

Socio-historical research and land tenure in South
Africa: A case study of land tenure rights on the
Northern Cape farm of Melkkraal.

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COMPULSORY DECLARATION

This work has not been previously submitted in whole, or in part, for the award of any degree. It is my own work. Each significant contribution to, and quotation in, this dissertation from the work, or works, of other people has been attributed, and has been cited and referenced.

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Dedication

This dissertation is dedicated to the people of Melkkraal. You have shown me that the journey of discovery is not to seek new landscapes but to look through new eyes. I thank you for your generosity and hospitality. This dissertation is also dedicated to Tia Callaghan.

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Abstract

The aim of the research was to clarify and explain the land tenure relations of a farming community called Melkkraal situated in the Northern Cape such that development assistance could be rendered to them by the Department of Land Affairs (DLA).

The Melkkraal farm has been owned by various members of the Kotze family since 1834 and through the process of testate and intestate succession has passed from one generation to the next. At present the farm is owned by seven members of the Kotze family in a co-ownership. However, it is also a home to twenty-six households of which three have a legal title to the land as co-owners. The remaining households have occupied the land through a haphazard process of acquiring oral permission from some of the co-owners and non-owning residents, some for as long as sixty five years. This has led to a tenure conundrum because the way in which the Melkkraal farm is registered means that neither the twenty six families who use the land, nor the seven co-owners can access the DLA assistance or effectively assert authority to make development decisions. As a result, the community requested the Surplus Peoples Project and the Environmental Monitoring Group (EMG) to advise them on the steps they would need to gain access to the DLA assistance and to better manage the land. During January 2004, SPP and EMG undertook to investigate and report on the nature and content of the rights of the members of the community in relation to the rights of the co-owners so that the community could be

assisted to formulate a strategy for the achievement of their developmental objectives. In February 2004, SPP conducted an extensive research study on how the community members hold, use and transact rights in land.

While participatory action research was the overall research paradigm, the particular research technique used for the Melkkraal case study was participatory rural appraisal (PRA). PRA is an action research tool or technique that involves community members defining and working to solve local concerns. As a result of the use of PRA the following research phases were drafted:

The first phase of the research entailed the collection and analysis of archival data to develop an understanding of the co-ownership and its co-owners and to develop a genealogy of the co-ownership. The second phase entailed conducting field work at Melkkraal in terms of interviewing the heads of each household as well as an interview with the land management committee. Phase three entailed a follow up visit to Melkkraal, a presentation of a progress report, a participatory mapping session and a focus group workshop on the various land uses at Melkkraal. The final phase of the research included another follow up visit to Melkkraal, the completion of the research analysis and the development of a final report that was presented to the community. The final presentation entailed a workshop explaining the land rights of the various households and a discussion of the way forward.

The research findings revealed that very little difference exists between the non-owning residents and the co-owners in terms of how land is used

and transacted. This was attributed to the evolution of the social land ethic such that one can speak of the Melkkraal farm as a common property regime. Therefore, in practice there is no difference between a non-owning resident and a co-owner.

The findings also revealed that just cause can be shown to apply for a declaratory order to invoke the Interim Protection of Informal Rights Act 31 of 1996. A successful application will mean that the existing informal rights in land of the non-owning residents will be elevated to the status of real rights in property.

Introduction

“The more man interfered with the natural balance produced and governed by the universe, the further away the harmony retreated into the distance.”¹

The sentiment above is what I wish to apply to land tenure in South Africa. The argument that I put forward in this dissertation is that the imposition of the Western Civil Code through the manipulation of the legal system of Roman-Dutch law led to a disruption of the harmony upon which traditional communal ownership principles were based. In other words, when the paradigms of the Western Civil Code and Communal Ownership meet, the result is the disruption of harmony.

This dissertation also advocates that communal land tenure should not be treated as either a one size fits all legal issue or as an abstract theoretical construct. Rather, communal land tenure should be recognized and acknowledged as a system of land use-rights *sui generis*. This dissertation paves the way towards communal land tenure reform through understanding the social and legal principles of an indigenous land ethic. This, however, requires a shift away from accepting the 'absoluteness' of ownership in Roman-Dutch law and the ownership paradigm, to an acceptance of a paradigm of use-rights in property. The use-rights in property paradigm is illustrated through the study of the Melkkraal community in the Northern Cape.

¹ Hoff, B. (2003). *The Tao of Pooh and the Te of Piglet*. (pp. 16). Methuen Young Books.

Introduction to the Melkkraal Community

Melkkraal is currently registered as Portion 2 of the farm Quipsberg, Farm No. 805, in extent 1373.0208 hectares. It is situated in the administrative district of Calvinia and located approximately 30 km south of Niewoudville in the Hantam Karoo, Northern Cape Province. During 2001, the Melkkraal community approached the Department of Land Affairs (DLA) for development assistance. They were informed that this assistance could not be rendered unconditionally due to the fact that on the one hand, their land is registered in undivided shares among seven co-owners², while on the other, twenty six families have also occupied the land for periods of up to 65 years. This has resulted in what can be coined a tenure conundrum. Given the way in which the land is registered, neither the twenty six families who use the land nor the seven co-owners can access state assistance or effectively assert authority to make development decisions.

The above shows the disharmony between what has become a *de facto* communal ownership at Melkkraal and the Western Civil Code of Roman-Dutch law. A restoration of legal and occupational harmony would require recognition of both paradigms of property law. A resolution of the contradiction between private property rights and the land use-rights of communal tenure will require a new rural land system, that is, a legal model of property law that takes into account the purpose of tenure in rural communities.

² See Appendix II and III.

Purpose of and Background to the Research

Understanding the land use-rights of communal tenure and how these are reconciled with private property rights is the broad objective of this dissertation. This quest for understanding is based on the land rights clarification research conducted at Melkkraal during my tenure as a researcher for the Surplus Peoples Project (SPP) in 2004. The research was initiated because of the Melkkraal community's urgent need to legally resolve the tenure conundrum and qualify for the DLA's developmental assistance. Consequently, the aim was to establish the nature and content of the rights and interests of households living at Melkkraal.

The Tenure Conundrum

The fact that the land is registered in a co-ownership makes the administration of the land a very cumbersome process. It is an archaic and rigid provision which has been taken from Roman law and applied to the South African system of Roman-Dutch law. It is a form of ownership that denotes that two or more persons share ownership in undivided shares. The law of co-ownership requires that any decision related to the land requires the unanimous consent of all the co-owners. This means that a co-owner cannot lease or allocate the land or a portion of the land for residential or agricultural purposes without the consent of the other co-owners. Although the community members required oral permission, such permission was not granted by unanimous consent of the co-owners as stipulated in Roman-Dutch law.³ To further compound matters, some of the co-ownership shares

vest in deceased estates which means it will be very difficult for surviving co-owners to access state subsidies, to use land for security, to lease or to regulate the current occupation and use of the land. To realize these benefits, executors would have to be appointed to administer deceased estates, and the assets, including the shares, would have to be allocated and then formally transferred in the Deeds Registry office to the heirs of the deceased persons – a process that can take years. In respect of the current households at Melkkraal, current legislation, most notably the Interim Protection of Informal Land Rights Act 31 of 1996, provides tenure protection for the community but does not provide them with the power to make future development decisions in respect of the land. In other words, they would still need the unanimous approval of the co-ownership.

As a result of the tenure conundrum, the community requested SPP and the Environmental Monitoring Group (EMG) to advise them on the steps they would need to gain access to the DLA assistance and to better manage the land. During January 2004, SPP and EMG undertook to investigate and report on the nature and content of the rights of the members of the community in relation to the rights of the co-owners so that the community could be assisted to formulate a strategy for the achievement of their developmental objectives. The development objectives of the community were mainly, commercial agricultural and infrastructural assistance, in particular, access to rooibos product markets, housing, sanitation and electrification. In the course of February 2004, SPP conducted an extensive

³ Authority for this position can be found in Pretorius v Botha 1961 4 SA 722 (T); Milner v Abdoola 1955 2 SA 187 (D).

research study on how the community members hold, use and transact rights in land. This was achieved through face-to-face interviews with the head of each household, four workshops with the community and archival research on the history of the farm and its co-owners. Similarly, EMG undertook to strengthen the land management system and to improve the productive use of the land. Once the field research was complete, SPP approached the Legal Resources Centre to assist and to advise on the possible legal remedies for the troubled land tenure arrangement at Melkkraal.

The tenure conundrum raises two important questions, namely:

- Does the law protect the twenty six farming Melkkraal families and, if so, what are the consequences of such protection for the rights of the co-owners?
- If the co-owners jointly agree that they would wish to sell the farm, or agree that they would like to lease it or that they would want to expel the community, can they do so?

The dissertation will explain that:

- The twenty six families are in an impossible position due to the fact that the Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA) merely affords them protection, but does not provide them with the power to make development decisions in respect of the land.
- The current co-ownership is in an impossible position due to the manner in which the land has been registered and the fact that the twenty six families have, as a community, the protection of IPILRA.

The dissertation will also discuss the possibility of shifting away from the ownership paradigm of private property to communal ownership based on land use-rights that should be registered in a similar way that title deeds are registered in the Deeds Registries Act 47 of 1937. The importance of this lies in the creation of legal certainty and the security of tenure that the state is obligated to fulfil in terms of S 25 (5) and S 25 (6) of the Constitution of the Republic of South Africa Act 108 of 1996 (Constitution).

Research Methodology

While participatory action research was the overall research paradigm, the particular research technique used for the Melkkraal case study was participatory rural appraisal (PRA). PRA is an action research tool or technique that involves community members defining and working to solve local concerns. As a result of the use of PRA the following research phases were drafted:

The first phase of the research entailed the collection and analysis of archival data to develop an understanding of the co-ownership and its co-owners and to develop a genealogy of the co-ownership. The second phase entailed conducting field work at Melkkraal in terms of interviewing the heads of each household as well as an interview with the land management committee. Phase three entailed a follow up visit to Melkkraal, a presentation of a progress report, a participatory mapping session and a focus group workshop on the various land uses at Melkkraal. The final phase of the research included another follow up visit to Melkkraal, the completion of the research analysis and the development of a final report

that was presented to the community. The final presentation entailed a workshop explaining the land rights of the various households and a discussion of the way forward.

Themes of Land Reform Discourse from the 1980's to the Present

The 'land question' is undoubtedly embedded in discourses around rights and, given South Africa's political history, it is also embedded in discourses around economic, social and political justice. Therefore, the arguments about the land reform program have often revolved around issues of equity, poverty reduction, economic development and political stability. The aim of the land reform, according to the White Paper of 1997, is to bring all people occupying land under a unitary legally validated system of landholding.

The purpose of this section is not to provide an exhaustive discussion around the various scholarly contributions on the 'land question' in South Africa but rather to provide an overview of the general subject terrain of these contributions. Furthermore, this overview attempts to further the discourse of tenure conundrums as experienced by the Melkkraal community.

The contributions on the 'land question' can be divided into four themes:

1. Debate within the legal fraternity during the mid 1980's that started with questions around the traditional concept of ownership.
2. Scholarship within the economic and social sciences in the 1990's that focused particularly on the relationship between redistribution and economic development.

3. Debate surrounding the constitutional developments of the property clause and understanding, analyzing and monitoring the land reform provisions during the first five years of South Africa's democracy.
4. Critical debate of the land reform path in South Africa after the first five years of democracy.

Debate within the legal fraternity began in 1984 when Cowen⁴ delivered a lecture on new patterns of land ownership. According to Van der Walt,⁵ this lecture represented a paradigm shift away from the established traditional theory of landownership to what Cowen called the 'transformation' of ownership. Cowen argued that the traditional concept of ownership was no longer acceptable as it was being extended and transformed. It was being transformed by a tendency to restrict land ownership in the interests of society but was also being extended by new forms of land ownership and land use created by sectional title, property time-sharing and airspace.⁶

Cowen's paper led to a sudden interest in land ownership within the legal fraternity and this resulted in an entire volume of the *Acta Juridica* being devoted to the question of land ownership in 1985.⁷ Notable contributions in this volume included Birks⁸ analysis on the Roman law concept of dominium and absolute ownership as well as Visser's analysis of

⁴ Cowen, D.V. (1984). *New patterns of landownership. The transformation of the concept of land ownership as plena in re potestas*. Cowen, D.V: Johannesburg.

⁵ Van der Walt, A.J. (ed.). (1991). *Land reform and the future of land ownership in South Africa*. Juta and Co, Ltd: Cape Town.

⁶ Van der Walt, A.J. (ed.). (1991). *Land reform and the future of land ownership in South Africa*. Juta and Co, Ltd: Cape Town.

⁷ The volume was then collated into a book called *Land ownership: Changing concepts* in 1985.

⁸ See Birks, P. (1985). The Roman law concept of dominium and the idea of absolute ownership. In *Land ownership: Changing concepts*. Juta & Co, Ltd: Cape Town.

the absoluteness of ownership within Roman-Dutch law.⁹ Both articles cogently demonstrated that the common law concept of ownership was not absolute or unlimited. Other significant contributions in this volume include Davenport's¹⁰ reflection on the history of land tenure in South Africa; Schoombie's¹¹ analysis of how the definition of immovable property was subverted under the Group Areas legislation; and Van der Post's historical account of the development and functioning of systems of registration.¹²

Within the social and economic sciences, especially between the early and mid 1990's the focus amongst many scholars was to understand the relationship between redistribution and economic development. The intention, it seems, was to create a development path in agriculture, which was stymied by apartheid, and it had been argued that redistributive land reform could create an environment for growth in agricultural production that would in turn support broader economic growth. It was further argued that this in turn would have a positive impact on poverty reduction. One of the better known proponents of this approach is perhaps Lipton's article on creating rural livelihoods for South Africa which postulated that encouraging small holder farming would be the best development path for South Africa.¹³ This was followed by a 2-volume work edited by De Klerk,

⁹ See Visser, D.P. (1985). The 'absoluteness' of ownership: The South African common law perspective. In *Land ownership: Changing concepts*. Juta & Co, Ltd: Cape Town.

¹⁰ See Davenport, T.R.H. (1985). Some reflections on the history of land tenure in South Africa, seen in the light of attempts by the state to impose political and economic control. In *Land ownership: Changing concepts*. Juta & Co, Ltd: Cape Town.

¹¹ See Schoombie J.T. (1985). Group Areas legislation – The political control and ownership of land. In *Land ownership: Changing concepts*. Juta & Co, Ltd: Cape Town.

¹² See Van der Post, D.J. (1985). Land law and registration in some of the black rural areas of Southern Africa. In *Land ownership: Changing concepts*. Juta & Co, Ltd: Cape Town.

¹³ See Lipton, M. & Lipton, M. (1993). 'Creating rural livelihoods: Some lessons for South Africa from experience elsewhere'. In *World Development*, vol. 21, Issue 9.

and Michael and Merle Lipton on rural livelihoods in South Africa.¹⁴ The subsequent work by John Mellor in 1999 bolstered the argument with empirical evidence from studies in countries like India and Malaysia.¹⁵ These studies have shown that growth in agriculture can make a significantly larger contribution to overall economic growth than growth in other sectors. Other notable contributions include Wilson and Ramphele¹⁶; van Zyl et al¹⁷; De Klerk¹⁸ and Bernstein.¹⁹

Once the Constitution was adopted in 1996 the debate on the 'land question' shifted towards understanding, analyzing and monitoring the realization of the land rights provisions enshrined in section 25 of the Constitution. This came from both the economic and social sciences as well as within the legal fraternity. From the legal context there were many contributions that dealt with deconstructing property rights in the new constitutional order in South Africa, how the jurisprudence of section 25 should be interpreted and an analysis of the enabling legislation to the

¹⁴ See Lipton, M.; De Klerk, M. and Lipton, M. (eds.). (1996). *Land, labour and rural livelihoods in rural South Africa*, vol.1 & 2: Western Cape (Durban: Indicator Press).

¹⁵ See Mellor, J.W. (1999). *Pro-poor growth: the relation between agricultural growth and poverty reduction*. Unpublished document.

¹⁶ See Wilson, F. & Ramphele, M. (1989). *Uprooting poverty: The South African challenge*. David Phillip: Cape Town.

¹⁷ See Van Zyl, J.; Kirsten, J. & Binswanger, H.P. (1986). *Agricultural land reform in South Africa: Policies, markets and mechanisms*. Oxford University Press: Cape Town.

¹⁸ De Klerk, M. (ed.). (1991). *A Harvest of discontent: The land question in South Africa*. IDASA: Cape Town.

¹⁹ See Bernstein, H. (1997). Social change in the South African countryside? Land and production, poverty and power. In *Land reform and agrarian change in Southern Africa*, An occasional paper series. Cape Town: Programme for Land and Agrarian Studies, School of Government, University of the Western Cape/Braamfontein, National Land Committee.

property clause.²⁰ Similarly, the economic and social sciences slowly shifted gear to understanding the broad scope of the land reform program and what it meant in the context of agricultural growth, poverty reduction and the communities that were to benefit from it. Furthermore, as the land reform program matured the focus shifted again to the process of implementation and an analysis of the opportunities and constraints in the context of implementation.²¹

As a result of empirical evidence coming to the fore of the slow pace of the land reform program and the difficulties that many communities were experiencing, particularly after being beneficiaries of land restitution or land redistribution, it became clear that the social relations and patterns of land ownership were not going to be a dramatic rupture from the past. This in turn resulted in the emergence of social movements on the one hand with the objective of fighting for the speedy implementation of the land restitution process as well other problems experienced with the land reform program.²² On the other, the growing impatience by many communities shifted the analysis of the 'land question' to a bolder critique of the land reform path of South Africa. Such critique underscored the market led

²⁰ See for example Van der Walt, A.J. (1998). 'Double property guarantees: a structural and comparative analysis'. In *SAJHR*, 1998, volume 14. ; Van Der Walt, A.J. (1995). 'Towards a theory of rights in property: Exploratory observations on the paradigm of post apartheid property law'. In *SAPR/PL*, vol. 10; Pope, A. (2002). 'Evictions and the protection of property rights: A case study of *Ellis v Viljoen*'. In *South African Law Journal*, vol. 119; Van der Merwe, C. G. (2002). 'Numerus clausus and the development of new rights in South Africa'. In *South African Law Journal*, vol. 119; Carey Miller, D.L. (1999). 'A new property?' In *South African Law Journal*, vol. 116.

²¹ See for example Cousins, B. (ed.). (1999). *At the crossroads: Land and agrarian reform in South Africa into the 21st century*. Cape Town: Programme for Land and Agrarian Studies, School of Government, University of the Western Cape/Braamfontein, National Land Committee.

²² Some of these social movements include the Land Rights Coalition that was launched in 1999 and the Landless People Movement that was established in 2001.

paradigm of the government's land policy and argued that it is consistent with the government's overall macro-economic strategy.²³

The above categories have been separated for ease of reference and also because, individually, they focused on specific aspects of the 'land question'. Synergistically, they created a healthy discourse but the lacuna is that the majority of the scholarship has been somewhat aloof with little applicability on how one should conduct research in the area of land reform. A further limitation is that very little has been written and researched on land tenure reform. Understandably, many have concentrated their efforts on the components of land restitution and land redistribution and therefore the slow pace of these components, their weaknesses and the disjuncture between the government policy and the path that these components should take have been debated extensively.

However laudable this may be, many have neglected the lived experience of the many rural communities and their views of the form that land tenure should take in their respective communities and how to attain legal certainty in respect of land-use rights. It is in part the quest of this dissertation to bring together the strengths of the social sciences and the legal fraternity and present a dissertation that contributes to the community of social research without sidelining the importance of understanding the legal dimensions of land reform.

²³ See for example Thoka, V. & Lesufi, I. (2001). *Social movements in the context of globalisation: Experiences and lessons for South Africa*. National Land Committee; Greenburg, S. (2002). *Land reform and transition in South Africa*. Paper presented to the Ford Foundation Environment & Development Affinity Group; Walker, C. (2003). *The limits to land reform: Reviewing the 'land question'*. Paper presented at African Studies/History seminar; Hall, R. (2004). 'A political economy of land reform in South Africa'. In *Review of African Political Economy*, No. 100; Cousins, B. (2005). *African reform and the 'two economies': Transforming South Africa's countryside*. Programme for Land and Agrarian Studies (PLAAS). School of Government, University of the Western Cape.

Chapter Overview

Chapter One: The Constitutional Basis of Land Reform

Agriculture accompanied by the possession/dispossession of land has played a leading role in the economic development of South Africa. Bernstein posits that in contemporary South Africa land and production and poverty and power are key co-ordinates of the agrarian question and hence agrarian reform.²⁴ He further avers that each tends to be associated with a particular problematic, that is:

- a) Land with justice.
- b) Production with efficiency.
- c) Poverty with welfare.
- d) Power with democracy.

It is submitted in this dissertation that the co-ordinates used by Bernstein are useful not only within the parameters of its intended use, but also, in furthering the understanding of the constitutional basis of the South African land reform agenda.²⁵ Therefore, these co-ordinates are not only helpful in laying the conceptual groundwork for understanding the development of the agrarian economy but are also useful in understanding the *raison d'être* of S 25 (property clause) of the Constitution. Given the past land (re)distribution during apartheid, this chapter sets the dual and arguably conflicting task of land reform and maintaining equality, fairness

²⁴ Bernstein, H. (1997). Social change in the South African countryside? Land and production, poverty and power. Occasional Paper No. 4. In *Land reform and agrarian change in Southern Africa*. Cape Town: PLAAS.

²⁵ The analysis and discussion in the appendix will show the fundamental role that these co-ordinates played in the three historical epochs of the agrarian economy in South Africa. Undoubtedly, the use was subversive to resolve the twin problematics of the native and labour question as well as how to resolve the poor white problem.

and justice. It is axiomatic that land distribution with justice would have been one of the priority areas of the African National Congress during the constitutional negotiations. This was not only as a symbolic imperative to redress past land dispossession but also to resolve the effect of widespread rural poverty (the poverty with welfare problem). Simultaneously, there was cause for concern that the land reform agenda should not translate into re-appropriation. Therefore, S 25 of the Constitution does not only obligate the state to effect land redistribution, land tenure reform and land restitution but also protects property in respect of S 25 (1) (the power with democracy problem).

This chapter also presents the land reform program in terms of its three components of land redistribution, land tenure reform and land restitution. As the *raison d'être* of the research was to clarify the tenure conundrum of Melkkraal, this dissertation is limited to the matter of land tenure reform. However, for the sake of developing an overall view of the land reform program related issues must be discussed in brief. Therefore, what follows in this chapter are the main features of the land reform program with particular emphasis on land tenure reform and the legislation that gives effect to the right of land tenure security.

Chapter Two: A Critical, Theoretical and Conceptual Framework

In this dissertation emphasis will be placed on land tenure reform as the key component within South Africa's land reform policy. As a result, much of the discussion and analysis will be concentrated on the rights that have been recognised, their nature, scope and content and how it all fits within

the overall property paradigm of Roman-Dutch Law. However, it is absurd to discuss land tenure reform in isolation from agrarian reform in South Africa as the iniquities of the past have created an agricultural political economy in which the power differentials are so skewed that the pursuit of justice necessitates a drastic reconstitution. The two concepts are quite distinct and, as Cousins correctly avers, should be clearly distinguished.²⁶

Whereas land reform is more focused on rights in land, that is, the nature, content and scope of land rights and more broadly the distribution of land in society, the central focus of agrarian reform is the political economy of land, that is, the class character of the relations of production and how these connect to the wider class structure in society.²⁷ While it is submitted that any research in the terrain of land reform must distinguish between these two concepts, it is equally important to have an understanding of the nexus between the two.

This, in broad terms, was the implicit theoretical and conceptual construct of the role players within the Surplus Peoples Project, and the Legal Resources Centre as well as the researcher. Therefore, even though the intended purpose of the research was primarily to clarify the rights in land of the residents of Melkkraal, the project itself was informed by the commitment of those involved to assist, empower and improve the capabilities of the community. At a broader level there was also an

²⁶ Cousins, B. (2005). *Agrarian reform and the 'two economies': Transforming South Africa's countryside*. Draft Paper. Programme for Land and Agrarian Studies. School of Government. University of the Western Cape.

²⁷ Cousins, B. (2005). *Agrarian reform and the 'two economies': Transforming South Africa's countryside*. Draft Paper. Programme for Land and Agrarian Studies. School of Government. University of the Western Cape.

acknowledgment of the limitations of the current land reform programme in South Africa and therefore the need to match private property rights with communal tenure.

The purpose of this chapter is to document, discuss and critically analyze the research conducted at Melkkraal in respect of SPP's terms of reference.

In brief, the terms of reference were to clarify:

- Who the current co-owners were in terms of the title deeds.
- Who the current residents were.
- The current tenure relations.
- The structures and relationship that existed between them.
- The legal rights of the residents and the co-owners in terms of the various applicable laws.

Chapter Three: The Melkkraal Farmers

This chapter documents the livelihood of each household at Melkkraal and concludes with a synthesis of the content and nature of the rights of each category of rights holder.

Chapter Four: The Common Property Regime

The analysis of the findings in chapter three showed that very little difference exists between the non-owning residents and the co-owners in terms of how land is used and transacted. This was attributed to the evolution of the social land ethic such that one can speak of the Melkkraal farm as a common property regime.

The term 'common property regime' (CPR) is used to refer to the legal regime in which a resource is utilized as common property. This is different

from open access situations where there is no social control over the use of resources making the 'tragedy' of overuse more likely. The quintessential difference between the two is that under CPR, the primary legitimacy of community based property rights is drawn from the community. Therefore, common property regimes are structured arrangements in which group membership is known, outsiders are excluded, rules are developed and enforced, incentives exist for co-owners to the institutional arrangements, and sanctions work to ensure compliance.²⁸ Common property regimes, as in the case of Melkkraal, is a complex arrangement in which different tenure systems and rights to resources co-exist with the broader communal management system. This chapter will deconstruct the common property regime that exists at Melkkraal. This is unpacked in terms of the eligibility of land users, the land management system and the different land practices that occur. The chapter will conclude with a discussion on the applicability of Interim Protection of Informal Rights Act 31 of 1996 for the Melkkraal community.

Chapter Five: Conclusion

The objective of this concluding chapter is to restate the research question in the light of the actual research findings and to reflect on how the research was conducted so as to provide guidelines for political and social researchers involved in land and tenure issues. Social research in land tenure is especially challenging because it requires the technical understanding of key principles and rules of law in property in particular, constitutional

²⁸ Makhanya, E.M. (2002). *The sustainability of rural systems under the Communal Property Association Act in South Africa*. Paper presented at the 10th Annual Conference of the IGU Commission for the Sustainability of Rural Systems, 2002.

issues, the interpretation of legislation and statutes and most likely a triangulation of research methods. Above all, it requires a very good understanding of the community such that recommendations can be made that will empower and develop the community. Effectively, the social researcher involved in land tenure exploration will be required to develop a legal knowledge, be a political scientist, a sociologist and a social historian. This is a challenging task not only in terms of what is required but also in terms of how to merge these disciplines into a single research outcome that is historical enough to trace the evolution of land reform, legal enough to identify the legal principles involved when trying to make sense of the rights in land, political enough to unravel the intricacies of public policy and sociological enough to reveal the nexus between land and agrarian reform.

Overview of Appendices

For ease of reference, I have included an overview of racial land legislation in South Africa in the appendix. It is designed to show the trajectory of land reform in South Africa that takes one back to the history of dispossession and, in particular, the manner in which the Apartheid regime manipulated the system of Roman-Dutch law to serve the interests of Afrikaner Nationalism. This is what Van der Walt coined as *volkspele* jurisprudence, which is a synergy between the exclusionary codes of apartheid ideology and Roman-Dutch law.²⁹ In respect of apartheid land law, the synergy resulted in contradictory features. Firstly, land and land rights became one of the

²⁹ Van der Walt, A.J. (2001). 'Dancing with codes – Protecting, developing and deconstructing property rights in a constitutional state'. In *South African Law Journal*. (pp. 258 – 311).

primary instruments for social change and social engineering through statutory changes in law. This entailed the manipulation of existing land rights as well as the creation of new land rights to suit the requirements of racial segregation. In the second instance, the exclusionary vision of property in Roman-Dutch law was maximized and usurped as the legal space through which the exclusionary practice and ideology of apartheid land law could be legitimated. In other words, the ideology of racial segregation and the notion of racial purity coalesced with the ownership paradigm of Roman-Dutch property law.

The list of appendices also includes:

- Genealogy of the Kotze co ownership.
- History of the transfer of property at Melkkraal since 1953.
- A community profile.

Chapter One: The Constitutional Basis for Land Reform

Introduction

Property rights are protected in terms of S 25 of the Constitution of Republic of South Africa, Act 108 of 1996 (Constitution). However, it was not axiomatic that they would be included and it was rather a product of political compromise between the National Party and the African National Congress at the multi-party negotiating forum.³⁰ Those who spoke against the inclusion of the protection of property rights feared that it could entrench control of, and insulate, existing property holdings thereby preserving the apartheid legacy. As a result, representatives of the democratic movement argued that land reform and land restitution are central to the transformation of the country and unless the Constitution directed such reform, nothing would happen. In contrast, the conservative school of thought feared that if property were not protected in the Constitution there would be an unregulated expropriation of property. In brief, the property clause in S 28 of the interim Constitution and later, S 25 in the final Constitution represents a compromise between the above schools of thought. Carrey Miller and Pope opine that the purpose of the property clause is to ensure a just and equitable balance between the interest of private property holders and the public interest in the control and regulation of the use of property.³¹ The purpose of this chapter is to expound

³⁰ Badenhorst, P.J. (2004). Property and the Bill of Rights. In *Bill of Rights Compendium*. Service Issue 15: Butterworths Publishers (Pty) Ltd: Durban.

³¹ Carrey Miller D.L. & Pope, A. (2000). *Land title in South Africa*. (pp. 284). Juta and Co, Ltd: Cape Town.

on the scope, meaning and content of the property clause in the Constitution, in particular, as it relates to land reform. Thereafter, I will present the land reform program in terms of its three components of land redistribution, land restitution and land tenure reform. The chapter will conclude with a section on the chief enabling legislation of the land tenure reform program.

1. The Property Clause

Scope of Property

S 25 (1) speaks directly to the scope of the property clause. This is especially so because of the debate as to whether property, for the purposes of constitutional protection, be construed restrictively or generously. It is implicit in S 25 (1) that it provides a negative guarantee as *'no one is deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property'*. Consequently, two interpretative views have emerged, that is, some see it as a general right to property whereas others see it as qualified right. Those who see it in terms of the latter argue that the said section, as enshrined in S 25 (2) and S 25 (3) guarantees two distinct rights, namely:³²

- The right not to be deprived of property except in terms of law of general application that does not permit the arbitrary deprivation of property.
- The right not to be expropriated except in terms of law of general application, for a public purpose or in the public interest, and on

³² See Van der Walt, A.J. (2004). 'An overview of developments of constitutional property law since the introduction of the property clause in 1993'. In *SAPR/PL*, vol.19.

payment of compensation, the amount of which and the time and manner of payment of which, if not agreed, is just and equitable.

However, the debate appears to be somewhat of a red herring. For example, it is more than conceivable that a court would interpret 'no one' to mean a holder or owner of property which would therefore mean that an unlawful possessor or holder of property would not be entitled to such constitutional protection.³³ Perhaps, its significance lies on the onus of proof and whether and how the limitation analysis should apply to section 25. However, a restricted or generous interpretation does have a bearing on how property is defined.

The Constitutional Definition of Property

Property is defined very restrictively in terms of property law, that is, rights in corporeal things and to a certain extent incorporeal interests and rights.³⁴ The constitutional definition is much broader than this as S 25 (4) (b) expressly provides that property is not limited to land and S 25 (6) provides for the protection of rights that is less than ownership. Carey Miller and Pope therefore opine that the object of the rights protected by section 25 need not be corporeal things but would include incorporeal things as well as 'new property' such as interests against the state and rights in respect of intellectual property.³⁵ Such a broad interpretation must be exercised with caution because it has been argued that property must have vested in the

³³ Such unlawful holders or possessors of property will find protection however in statutory legislation such as The Prevention of Illegal Eviction from Unlawful Occupation of Land Act 19 of 1998.

³⁴ Van der Walt, A.J. & Pienaar, G.J. (1999). *Introduction to the Law of Property*, (3rd edition). (pp. 12). Juta and Co, Ltd: Cape Town.

³⁵ Carrey Miller, D.L. & Pope, A. (2000). *Land title in South Africa*. (pp. 296). Juta and Co, Ltd: Cape Town.

person and not merely a right contingent on an uncertain event.³⁶ In this regard, customary property rights represent an interesting example. Customary law rights are different to civil law rights because the acquisition, use and disposal of these rights are embedded in the holder's status in a specific community.³⁷ Bennet argues that customary law rights can be divided into two elements, namely, the entitlement of a member of an ethnic group to claim an allotment of land and the individual's right to claim from land already allotted. It is argued that is within the framework of the latter that it falls within the ambit of property, by reason of the exclusion of others.³⁸

However, the Constitutional Court has held that it is impossible to define property comprehensively for the purposes of S 25. It therefore restricted itself to the statement that ownership of corporeal movables and land is at the heart of the constitutional property concept.³⁹ Despite this judgement, it is widely regarded that a fairly generous interpretation of property is appropriate when interpreting S 25. It is hence likely that as South Africa's constitutional jurisprudence develops a more precise yet more encompassing interpretation will follow.

Deprivation and Expropriation

Sections 25 (1) and 25 (2), as stated earlier, provide for, and describe, the circumstances for the deprivation and expropriation of property. The

³⁶ Ibid.

³⁷ Bennet, T.W. quoted in Van der Walt, A.J. (1995). 'A theory of rights in property'. In *SAPR/PL*, vol. 10.

³⁸ Bennet, T.W. quoted in Carey Miller, D.L. and Pope, A. (2000). *Land title in South Africa*. (pp. 299). Juta & Co, Ltd: Cape Town.

³⁹ First National Bank of S.A. Ltd t/a Wesbank v Commissioner, South African Revenue Service 2001 7 BCLR (CC).

distinction between what is deprivation and what is expropriation is an important one as every ‘expropriation’ involves a deprivation of property, but the converse is not true. In *Beckenstrater v Sand River Irrigation Board* it was held that in order for property to be expropriated, there must be an element of compulsory acquisition by the state followed by a transfer of rights in that property to another.⁴⁰ Similarly, in *Harksen v Lane*, it was held that *‘the word “expropriate” is generally used in our law to describe the process whereby a public authority takes property for a public purpose and usually against payment of compensation.’* The court further held that [expropriation] *‘involves acquisition of rights in property by a public authority for a public purpose’*.⁴¹ In contrast, deprivation of property concerns the regulation of property and its use which is not subject to the payment of compensation. The phrase ‘law of general application’ as included in S 25 (1) – although as yet not interpreted in full detail by the Constitutional Court – can be argued to mean general publicly accessible rules which affect the rights of individuals.⁴² This would include common law, statutory law and customary law.

S 25 (1) further provides that no law may permit arbitrary deprivation and this was interpreted to mean, in the recent FNB judgement, if the general law does not provide sufficient reason for the particular deprivation in question or is procedurally unfair.⁴³ Therefore, a person may only be

⁴⁰ *Beckenstrater v Sand River Irrigation* 1964 (4) SA 510 (T).

⁴¹ *Harksen v Lane NO and others* 1998 (1) SA 300 (CC).

⁴² Badenhorst, P.J. (2004). *Property and the Bill of Rights*. (pp. 3FB – 32) In *Bill of Rights Compendium*, Service Issue 15: Butterworths Publishers (Pty) Ltd: Durban.

⁴³ *First National Bank of SA Ltd v Commissioner, South African Revenue Service* 2001 7 BCLR (CC).

deprived of property by means of a non-arbitrary law and the state may only expropriate if it is in the public interest or if it is for a public purpose – S 25 (2) (a). Furthermore, this is subject to the payment of compensation – S 25 (2) (b). In respect of the public interest, S 25 (4) (a) specifically provides that the public interest includes land reform and reforms designed to bring about equitable access to South Africa's natural resources. This is the subject of the next section.

2. Constitutional Land Reform

There were two main purposes behind the land reform provisions as included in S 25 (4) – S 25 (9) of the Constitution. Firstly, it was to ensure that land reform was insulated from constitutional attack.⁴⁴ The second purpose was to provide a constitutional framework for land reform both in terms of structuring the program and mandating the enactment of certain statutes.⁴⁵

Land Redistribution

The objective of the land redistribution program is to provide the poor with access to land for residential and productive purposes in order to improve their income and quality of life. Specifically, attention is focused on the poor, labour tenants, farm workers, women and emergent farmers through providing government assistance in the form of monetary grants to purchase land. As a result of the grants being small, recipients are expected to pool their grant money to purchase land jointly. Currently, the individual grant is set between a minimum of R20, 000 and a maximum of R100, 000.

⁴⁴ See S 25 (4) (a) and S 25 (8) of the Constitution.

⁴⁵ See S 25 (5), 6 & 7 of the Constitution.

One of the key pieces of legislation in respect of land redistribution is the Development Facilitation Act 67 of 1995 (DFA). It is a comprehensive document and read together with the White Paper of 1997, its purpose is to introduce measures to fast track land development.⁴⁶ The DFA has three main features one of which empowers provinces to use applicable land development laws. The other two features are the creation of uniform norms and standards in relation to land development and the existence of national legislation in parallel with provincial laws. In essence the DFA allows for the devolution of power as provinces are empowered and indeed mandated to develop legislation that is commensurate with the needs of the province.

S 62 in chapter seven of the DFA is particularly interesting as it creates a new land right called 'initial ownership'. This type of land right is created and registered before the land is fully developed. In other words, it expedites the delivery of residential land by reducing the development and holding costs. In respect of the nature of the right, the holder possesses the right to use the land, encumber it by mortgage or personal servitude and sell the initial ownership. Full ownership is acquired as soon as the development process reaches a stage where the land is fully registrable.⁴⁷ However, in terms of S 62 (4) (c), the holder of the right in initial ownership does not have the right to 'otherwise encumber or deal with initial ownership'.

The DFA is described as a progressive and innovative piece of legislation. However, Van der Walt avers that it does not promote or create alternative

⁴⁶ In Carrey Miller D.L. & Pope, A. (2000). *Land title in South Africa*. (pp. 412). Juta and Co, Ltd: Cape Town.

⁴⁷ Van der Walt, A.J. (1999). 'Property rights and hierarchies of power: A critical evaluation of land reform policy in South Africa'. (pp. 8). In Du Plessis, L.M. (ed.) *Koers*. Potchefstroom University.

land rights as it is still aimed at the acquisition of, and promotes, the common law ownership of land.⁴⁸

Pace and Achievements of the Land Redistribution

The character of the land reform program has changed over time with a shift away from the emphasis of large groups wanting to settle on rural land to land reform that is 'agriculturally sustainable and economically viable'. This is evidenced by the Land Reform Policy Framework in 2000, which outlined the Land Redistribution for Agricultural Development (LRAD) as a major component of the land redistribution program. LRAD is a shift in strategy that is developmental in approach as it emphasizes the delivery of land for productive and income-generating purposes. This is different from earlier approaches that were focused almost exclusively on the delivery of land for settlement. In her 2003 budget vote the Minister of the DLA claimed 'enormous' progress had been made 'under our flagship Land Redistribution for Agricultural Development' program. She further stated that in the past financial year, the DLA transferred, through LRAD, 214 farms, yielding 185,609 hectares to 6,769 beneficiaries, including labour tenants. In the 2003/2004 financial year, the DLA planned to work on the transfer of 438 farms of 130,810 hectares to 6,179 beneficiaries, among them 133 labour tenants.

The fact that the budget for the land sector increased to R1, 9 billion over the 2003/04 and 2004/05 financial years is an indication of the determination to speed up land reform. However, research has indicated

⁴⁸ Ibid.

that this is still inadequate to meet redistribution commitments as DLA offices are committing funds to redistribution that exceed their budgets. An example of this is the Western Cape land reform office. In 2002 and 2003 it accumulated LRAD commitments worth R102 million but only R48 million was budgeted from current budgets. Similarly, the Eastern Cape provincial land office had already committed itself to an expenditure of R45, 7 million before the end of 2002 against an available budget of R44 million for the year.⁴⁹ Besides the budgetary constraints, the lacuna seems to lie in service delivery at the district level. It is not in dispute that distribution should be at this level. Rather, distribution appears to be viewed as an adjunct to existing provincial structures which are already overburdened. Approximately 80 - 90% of the Eastern Cape provincial budget is spent on services such as education, health and welfare and approximately 5% is spent on economic infrastructural activities that include water, transport, energy and land. In other words, capital expenditure in the provinces does not seem to reflect the need for land reform.

Land Restitution

The land restitution program deals with people who lost rights in land under apartheid. It is therefore a limited process that is designed to restore land or to provide compensation to those persons who were dispossessed of land without proper compensation by racially discriminatory practices after 1913. S 25 (7) of the Constitution provides the framework for restitution law and provides that:

⁴⁹ PLAAS press release, September 2003.

'a person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to the restitution of that property or to equitable redress'.

The Restitution of Land Rights Act 22 of 1994 was promulgated to provide the legal mechanism for the resolution of land claims by the state. Certain provisions of the Act have since been amended by the Land Restitution and Reform Laws Amendment Act 63 of 1997.

The long title of the Restitution of Land Rights Act states that the purpose of the Act is *'to provide for the restitution of rights in land in respect of which persons or communities were dispossessed rights under or for the purpose of furthering the objects of any racially based discriminatory law.'*⁵⁰ The long title further provides for the establishment of two bodies to deal with the restitution of land rights, namely, the Commission on the Restitution of Land Rights and a Land Claims Court.

S 1 (xi) of the Act defines a right in land as:

'any right in land whether registered or unregistered, and may include the interest of a labour tenant, a sharecropper, a customary law interest, the interests of a beneficiary under a trust arrangement and the beneficial occupation for a continuous period of not less than 10 years prior to the dispossession in question'.

Judging from the above definition, the scope of what is a right in land is significant in that it appears that the intention of the legislature was to

⁵⁰ Restitution of Land Rights Act 22 of 1994.

break away from the domination of the ownership-oriented hierarchy of land rights. In the first instance, the inclusion of labour tenants and sharecroppers represents such a departure as neither of these relationships would have created a *subtraction from dominium*⁵¹ and thus a real right in land. Secondly, the definition includes a customary law interest which is different from civil law rights in the acquisition, use and disposal of rights in land. Thirdly, S 1 (xi) provides for '*interests of a beneficiary under a trust arrangement*' the reference of which is the form of landholding under the Native Trust and Land Act 18 of 1936. Finally, the definition provides for '*beneficial occupation for a continuous period of not less than ten years*' with the emphasis placed on the beneficial aspects of landholding as opposed to questions of title.⁵²

The Pace and Achievement of Restitution

Research by PLAAS⁵³ revealed that the achievement of the restitution program has been the settlement of a large number of claims at an increased rate since 1999. Of the 63,455 claims lodged by the deadline in 1998, 36,488 were settled by March 2003. However, a large number of these claims were urban claims that were settled via financial compensation, primarily in the Western Cape and Gauteng. This in turn implies that the majority of the large and complex rural claims remain unresolved. In fact, of the 36,488 claims, PLAAS was only able to identify 184 rural claims settled

⁵¹ The *subtraction from dominium* test was formulated in Ex parte Geldenhuys 1926 (O). The use of the test helps to distinguish real rights from creditor's rights. In terms of the test one should look at the obligation created by the right and if the obligation rests upon the land itself it creates a subtraction from the ownership and therefore the right is a real right. However, if the obligation rests upon a specific individual in his/her personal capacity the right is a creditor's right.

⁵² Carrey Miller D.L. & Pope, A. (2000). *Land title in South Africa*. (pp. 324). Juta and Co, Ltd: Cape Town.

⁵³ PLAAS press release, September 2003.

with land allocation. In terms of the government restitution program, the total number of claims settled by April 2003 was 36,488. This involved 22,760 households over the 2002/2003 financial year, 25% of which were female-headed.

It was therefore highly unlikely that all restitution claims would be finalised by the end of 2005 as envisaged by President Thabo Mbeki. This was foreseen in the DLA briefing to the Portfolio Committee in 2003 which highlighted the following restitution challenges:

- Exorbitant land prices & uncooperative farmers.
- Poverty and financial compensation.
- Agricultural development.
- Housing development.
- Integrated development planning and rural livelihoods.

The Department of Land Affairs has since announced a shift in focus towards settling rural claims. This is because land redistribution to provide land for the landless in rural areas has been very slow, and falls far below the government's target of transferring 30% of agricultural land by 2015. At the current rate, it is unlikely to reach 5% by that date. At the time of writing this dissertation, the DLA has redistributed less than 2% of all commercial agricultural land in South Africa.

Land Tenure Reform

'Tenure' can be understood as the terms and conditions under which land is held, used and transacted.⁵⁴ However, the historical distinction between

⁵⁴ Carrey Miller D.L. & Pope, A. (2000). *Land title in South Africa*. Juta and Co, Ltd: Cape Town.

black and white tenure rights as a result of colonial and apartheid law meant the denial of rights to black people and the affirmation of the interests of whites.⁵⁵ Therefore, pre-1994 property law rendered the terms and conditions subject to which communities, such as Melkkraal, use and hold portions of land, invisible and consequently, afforded it no statutory protection. Section 25 (6) of the Constitution, however, is designed to cause a fundamental break with the past dual system. It provides that:

‘a person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress’.

S 25 (6) therefore mandates the state to transform insecure tenure into legally protected and non-discriminatory tenure. Attaining security of tenure requires land tenure reform and therefore it is important to distinguish between these concepts.

In less legal terminology, land tenure consists of social relations and institutions governing access to, and ownership of, land and natural resources.⁵⁶ It can also be defined in terms of a ‘bundle of rights’, that is, specific rights to do certain things with land or property. Land tenure rights may include:

- Rights to occupy a homestead, to use land for annual or perennial crops, to make permanent improvements, to bury the dead, and to make access for gathering fuel, wild fruit, etc.

⁵⁵ See Appendix I.

⁵⁶ Maxwell, D. & Wiebe, K. (1998). *Land tenure and food security: A review of concepts, evidence and methods*. Research Paper, 129, Land Tenure Centre.

- Rights to transact, give, mortgage, lease, rent and bequeath areas of exclusive use.
- Rights to exclude others from the above listed rights.

Smith and Piennar have further deconstructed security of tenure as the quality of rights of the tenure holder in relation to the outside world.⁵⁷ It refers to both the objective and subjective experience of the land rights holder and the attitude of others with regard to his or her tenure rights. This deconstruction is the crux of the matter and it is one that is embedded in the law of property. The lawful holdership of a right in land is a limited real right and hence entitlements stem from such a right in land. Depending on the nature of the right, such as freehold ownership, servitudes or usufructs the entitlements are:

- The right to occupy.
- The right to use.
- The right to bequeath to one's heirs.
- The right to transact.
- The right to mortgage the land.
- The right to exclude others.
- The right to benefits accruing from the land.

Smith and Pienaar⁵⁸ further posit that the security of a tenure form (permits, leases, servitudes etc.) can be measured in terms of:

⁵⁷ Smith, H. & Pienaar, K. (2001). *Forms of Tenure for Community Ownership*. (pp. 6). Unpublished paper.

⁵⁸ Smith, H. & Pienaar, K. (2001). *Forms of Tenure for Community Ownership*. (pp. 5). Unpublished paper.

- Protection of the rights holder against interference by others, eviction and attachment.
- ‘Transactability’ and transferability and to promote investment for credit by banks.
- Certainty and durability.
- Respect for the status of the rights holder as an individual and the institutional form of the tenure holder if it is a group or community.

In contrast, land tenure reform refers to a planned change in the terms and conditions of the legal basis of landholding. An example of land tenure reform would be a conversion of informal tenancy into formal property rights. The White Paper of 1997 cogently illustrated the complexity of land tenure reform by highlighting that:

‘Land tenure reform is the most complex area of land reform. It aims to bring all people occupying land under a unitary, legally validated system of landholding. It will devise secure forms of land tenure, help to resolve tenure disputes and provide alternatives for people who are displaced in the process.’

Implicit in the statement is the development of a new system of land holding, land rights and forms of ownership. Within the White Paper of 1997 are six guiding principles for land tenure reform:

1. Tenure reform must move towards ...the transformation of all ‘permit based’ and subservient forms of land rights into legally enforceable rights to land.

2. Tenure reform must build a unitary non-racial system of land rights for all South Africans.
3. Tenure reform must allow people to choose the tenure system which is appropriate to their circumstances.
4. All tenure systems must be consistent with the Constitution's commitment to basic human rights and equality.
5. In order to deliver security of tenure a rights based approach has been adopted.
6. New tenure systems and laws should be brought in line with reality as it exists on the ground and in practice.

However, comprehensive tenure reform legislation was going to take some time to develop,⁵⁹ and as a result, the first piece of procedural protective legislation that was promulgated after 1994 was the Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA). The other chief pieces of legislation that have been promulgated in respect of land tenure reform are the Extension of Security of Tenure Act 62 of 1997, the Prevention of Illegal Eviction from Unlawful Occupation of Land Act 19 of 1998 and the more recent Communal Land Rights Act 11 of 2004 (CLRA). These, with the exception of CLRA, will be discussed in the next section.⁶⁰ As the ambit of the CLRA goes beyond the immediate inquiry of the Melkkraal farming community, it will not be discussed in this dissertation.

⁵⁹ Right holders must, as of right, be able to have their rights declared and confirmed (by a court of law or by way of an administrative procedure). This should be the core object and function of a new unitary communal tenure law. A non-discriminatory content of rights should address transferability, benefit and enforceability.

⁶⁰ As IPILRA is the protective legislation that the Melkkraal community can invoke, its discussion will conclude this chapter.

3. Land Tenure Reform Legislation

The Extension of Security of Tenure Act 62 of 1997 (ESTA)

The Extension of Security of Tenure Act 62 of 1997 was passed to protect 'occupiers' who live on rural or peri-urban land which belongs to another person and who on the 4 February 1997 or thereafter had consent or another right in law to do so.⁶¹ One of the intentions of the Act is to provide security of tenure to farm workers who are not afforded protection in terms of the Land Reform Act 3 of 1996 as they do not qualify as labour tenants. An analysis of ESTA reveals that it provides security of tenure through securing those rights enjoyed by occupiers and protects them against arbitrary evictions.

To a large extent it is a procedural document. Firstly, S 3 of ESTA accords occupiers a secure legal right to continue to live on and use the land they occupy. This is supplemented by S 6 of the Act which sets out the rights and duties of occupiers. To this extent occupiers have the right to reside on and use land where they have consent of the landowner or the person in charge. They also have the right of access to services agreed upon, such as water, electricity and sanitation and may not be denied access to educational or health services. Secondly, in the interests of fairness, S 6 also places duties on occupiers and in this way the Act helps to regulate the relationship between owners and occupiers. Accordingly, S 6 (3) provides that an occupier may not unlawfully damage the property of the owner or cause harm to other occupiers. The occupier may further not help other

⁶¹ See S 1 (1) of Extension of Security of Tenure Act 62 of 1997.

persons to set up new dwellings without the authority of the landowner. Thirdly, Chapter IV of ESTA places specific requirements for the termination for the right of residence and it is clear that the intention of the legislature is to provide clear procedural guidelines so as to prevent disputes and, in the absence of prevention, to standardise procedures such that it is substantively fair. Chapter V of ESTA also makes provision for dispute resolution procedures before a dispute reaches court. In respect of S 9 (1) an occupier may only be evicted in terms of an order of court issued under the Act and such an eviction is subject to the procedures and conditions laid out in S 9 (2). In respect of protection against evictions S 8 (4) of ESTA provides strong protection to an occupier who has resided on the land for ten years or longer and has reached the age of sixty years or is an employee or former employee of the owner and can no longer render service due to disability. These occupiers are considered long-term occupiers and have the right to continue to live on the land for the rest of their lives.

There is however a developmental aspect to ESTA. S 4 of the Act creates opportunities for occupiers to strengthen their rights in land. This includes the opportunity to become landowners. In this respect, occupiers are able to apply for a settlement grant from the DLA with which they can pursue land individually or collectively. These grants have been set at R16, 000 per household.

The Prevention of Illegal Eviction from Unlawful Occupation of Land Act 19 of 1998 (PIE)

The Prevention of Illegal Eviction from Unlawful Occupation of Land Act 19 of 1998 (PIE) regulates both procedurally and substantively the eviction of what is defined in the Act as '*unlawful occupiers*'. PIE became law on 5 June 1998 and it repealed the Prevention of Illegal Squatting Act 52 of 1951 (PISA). The purpose of PISA was to prevent and control illegal squatting on public and private land by criminalising squatting. PIE to a certain extent inverts PISA as squatting is no longer a criminal offence in terms of the Act. PIE must therefore be seen and read in the context of the post apartheid land tenure reform measures. It was introduced as part of the government's land reform program to afford protection to squatters who had no legal right to the land on which they squat. Hence, one of its main purposes is to provide fair procedures for the eviction of unlawful occupants.

A purview of the long title and preamble indicates that PIE protects unlawful occupiers and it provides that unlawful occupiers may only be evicted in accordance with the provisions of the Act.⁶² S 1 defines an unlawful occupier as a person who occupies land without the tacit or expressed consent of the person or owner in charge. This meaning is somewhat ambiguous as the word occupier can be defined in two ways:

1. To hold possession of/reside in or stay.
2. To take possession of by settling on it or by conquest.

⁶² See S 4 of PIE.

Nonetheless, squatters may now only be evicted through a court order granted in terms of the Act. S 4 of the Act requires that an owner who plans to evict unlawful occupiers must notify them of his intention in writing at least fourteen days in advance. Notice must also be given to the municipality in whose jurisdiction the land is situated. After the fourteen-day period has expired the owner can approach the High court or Magistrate's court for an eviction order. The court is not obligated to grant the order but has discretion in this regard. The Act also makes provision for the procedure for urgent evictions and provides for evictions at the instance of state organs.⁶³

Interim Protection of Informal Rights Act 31 of 1996 (IPILRA)

IPILRA commenced on 26 June 1996. IPILRA's main purpose is:

'To provide for the temporary protection of certain rights to and interests in land which are not otherwise adequately protected by law'.

It therefore seeks to protect the rights of land users who were previously not afforded any protection because of the way in which ownership in the property paradigm operated. However, IPILRA does nothing more. The key issue as explained by Van der Walt⁶⁴ is that under apartheid land law, a rigid distinction existed between ownership as a superior right in a strict hierarchical relation to related lesser personal rights. IPILRA therefore causes a break by providing in S 2 (1) that:

⁶³ See S 5 and S 6 of PIE.

⁶⁴ Van der Walt, A.J. (1998). 'Property rights and hierarchies of power: A critical evaluation of land reform policy in South Africa'. In Du Plessis, L.M. (ed.). 'Koers', Potchefstroom University.

'Subject to the provisions of subsection (4), and the provisions of the Expropriation Act, (Act 63 of 1975), or any other law which provides for the expropriation of land or rights in land, no person may be deprived of any informal right to land without his or her consent'.

This represents a paradigmatic break from the 'absoluteness' of ownership as it means that the informal right in land is elevated to the status of a real right in property and, as a consequence, is enforceable against the whole world. This means that any purchaser of that land or any third party that has an interest in that land is bound by the existence of that informal right in land.

The Act excludes two categories of protection: S 1 (e) excludes *'any right or interest of a tenant, labour tenant, sharecropper or employee if such right or interest is purely of a contractual nature'*. Similarly, S 1 (f) excludes *'any right or interest based purely on temporary permission granted by the owner or lawful occupier of the land in question, on the basis that such permission may at any time be withdrawn by such an owner or lawful occupier'*.

Section 1 (a-d) distinguishes between four categories of informal rights to land that are protected. The first category is concerned with traditional black tenure and tenure in the areas set aside for the occupation by black persons under the different systems during the apartheid regime. This refers to the former bantustans and Self-governing Territories. The second category as defined in S 1 (b) of the Act refers to *'the right in land of a beneficiary in terms of a trust arrangement in terms of which the trustee is*

a body or functionary or appointed by or under an Act of Parliament or holder of a public office'. The third category is less specific as it deals with 'beneficial occupation for a continuous period of five years prior to 31 December 1997'. The fourth and final category of informal rights that is protected under the Act in S 1 (d) refers to those informal rights in land that were covered in Schedules 1 & 2 of the Upgrading of Land Tenure Rights Act (Act 112 of 1991). Most of these rights were rights derived from the system of permission to occupy.

Definition and Analysis of Beneficial Occupation

Beneficial Occupation is defined in S 1 (1) of the Act as: *'occupation of land by a person, as if he or she is the owner, without force, openly and without permission of the registered owner'.*

The term beneficial occupation was not given a more precise definition in the Act and one has to infer that it was the intention of the legislature to give it a general scope. However, one must have regard for the context of the statute itself as well as its scope and purpose. Carey Miller and Pope suggest that the definition of beneficial occupation applies to occupation in terms of the common law criteria of property holding rather than any particular form of title.⁶⁵ This is qualified in respect of some of the principal requirements for the acquisition of ownership by prescription, that is, occupation as being the owner without force (*nec vi*); openly (*nec clam*) and without the owner's consent (*nec precario*). Perhaps, the best deconstruction

⁶⁵ Carey Miller D.L. & Pope, A. (2000). *Land title in South Africa*. (pp. 464). Juta and Co, Ltd. Cape Town.

of the definition is from the Kranspoort Community Judgement.⁶⁶ Even though the matter pertained to the Restitution of Land Rights Act, it is nonetheless useful for present purposes. Dodson, J on page 32 at paragraph 54 made use of two legal dictionaries to generate a definition of occupation.⁶⁷ In Claasens Dictionary of Legal Words the term occupation is defined as '*being in possession or the state of being occupied*'.⁶⁸ In Mozeley and Whitely's Law Dictionary occupation is defined as '*the use, tenure or possession of land*'.⁶⁹ These definitions are thus congruent with possession in relation to rights in land. However, Dodson further stated that the definition of rights in land must include the concept of possession distinct from any underlying rights which may entitle the holder to such rights of possession. Therefore, occupation must be taken to mean possession as distinct from any recognised underlying right.

If occupation is taken to mean possession then it too needs clarification. Possession in property law consists of two fundamental elements, that is, the subjective component (*animus*) and the objective component (*corpus*). In the strict interpretation of property law the former refers to the intention with which the thing is being held or controlled. However, given that the definition in the Act is attached to 'beneficial' it would therefore be construed that possession would require that the subjective intention to occupy would be beneficial for a long period, that is, five years or more. The subjective component is crucial for the understanding of the land rights

⁶⁶ Kranspoort Community concerning the farm Kranspoort 48 LS, LCC 26/98.

⁶⁷ Kranspoort Community concerning the farm Kranspoort 48 LS, LCC 26/98.

⁶⁸ Ibid.

⁶⁹ Ibid.

clarification process of Melkkraal. A purview of any legal text on property would show that the mental element of intention is distinguished as the intention to hold as owner (*animus domini*) and the intention to hold for one's own benefit (*animus sibi habendi*). *Animus domini* is the controller's attitude that the property belongs to him or her. The intention to hold for one's own benefit reflects the attitude that the property belongs to someone else, that the holder is aware of that and recognises the owner's right but the controller holds the property for his or her own benefit. The discussion in chapter three will show that even though it can be argued that the Melkkraal residents fall into the category of beneficial occupants, the de facto practice is to treat those residents as having an intention to hold as owner.

The objective element of possession refers to the actual physical control exercised over the property. In terms of the Act such control needed to be continuous for a period of five years and it needed to be beneficial. Dodson further cited the case of *Ex Parte van Der Venter* 1950 (2) SA 90 (N) that gave a meaning to the term 'beneficial occupation' as '*occupation which would produce a benefit*'. However, in paragraph 58 the learned judge did make the point that the '*meaning of the term will have to be developed on a case by case basis as different factual circumstances come before the court for consideration*'.

It is my submission that it was the intention of the legislature to provide for such a general scope for the term 'beneficial occupation', such that the courts can evaluate each case on its merits.

Besides the exclusions already mentioned, the Act is also subject to the provisions of the Expropriation Act 63 of 1975 and further excludes land held on a communal basis. In terms of the latter, it is envisaged that holdership rights on a communal basis are protected in respect of the Communal Property Associations Act 28 of 1996. Furthermore, the way in which IPILRA envisages the protection of rights is that the holders cannot be deprived of these rights other than in accordance with the Ss 2 (1) and 2 (4) of the Act. Section 2 (1) pertains to the Expropriation Act 63 of 1975 and S 2 (4) refers to the custom and usage of the community based on:

'the principle that a decision to dispose of any such right may only be taken by the majority of holders of such rights presented or represented at a meeting convened for the purpose of considering such disposal and of which they have been given sufficient notice, and in which they had reasonable opportunity to participate'.

Although this is laudable given the plethora of insecure land rights in South Africa, the problem with IPILRA as opined by Claasens⁷⁰ is that the measures are protective rather than proactive. Therefore, IPILRA preserves the status quo as opposed to defining positive rights. She further stated that as a result, there are still incessant demands by communities and individuals in communal systems to secure stronger individual rights in land. At the same time, tribal leaders are demanding that the state transfer the land to the tribal authorities. This being said, significant protection can be inferred from S (3) of the Act. This section provides that subject to the

⁷⁰ Claasens, A. (1999). Land rights and local decision-making processes: Proposals for tenure reform. (pp. 129). In Cousins, B. (ed.). *At the Crossroads: Land and agrarian reform in South Africa into the 21st century*. PLAAS (UWC), NLC.

provision of S (2), any sale or other disposition of any land shall be subject to any existing informal right to that land. This is very significant as it implies a *subtraction from dominium*. In other words, it means that the informal right in land is a burden on that land and is tied and runs with it. The result therefore is that the informal right in land is elevated to the status of a real right in property and, as a consequence, is enforceable against anybody. This means that any purchaser of that land or any third party that has an interest in that land is bound by the existence of that informal right in land.

Conclusion

Section 25 (1) of the Constitution provides for the acknowledgement of different rights in property. The discussion in this chapter showed that the property clause not only recognizes and protects ownership but also other rights in immovable property. Therefore, the property clause and its enabling legislation represent a break from the common law ownership paradigm. In respect of land tenure, the purpose of legislation such as IPILRA is to transform the law in order to improve the security of tenure and the value of previously disregarded and unprotected land rights. This is quite significant for communities such as Melkkraal as it attempts to eradicate the distinction between ownership and registrable real rights and other forms of land tenure that are traditionally considered weak and insecure. Land tenure legislation is however more procedural than proactive and this calls for a greater analysis in respect of the benefits of the registration of fragmented land use-rights. However, the current

significance of land tenure legislation resides in raising weak and insecure land rights above the threshold of minimum recognition and protection. The fact that such protection occurs outside the common law ownership paradigm opens the space for the Melkkraal community and other such communities to develop a land tenure arrangement that is specific to the needs of the community. The more recent CLRA has further opened that space, but, its applicability to the Melkkraal community is limited. The CLRA specifically provides for legal security of tenure by transferring communal land to communities. In the context of Melkkraal, where the de facto practice reflects a common property regime but, de jure, is a private co-ownership, the application of the CLRA as provided in S 2 of the Act is not immediately visible. Perhaps, this is the reason why the promulgation of the CLRA has only repealed S 5 (2) of IPILRA. Therefore, communities such as the Melkkraal farming community would therefore still require the more immediate and interim protection of their tenure rights through IPILRA. This will allow for a proper land rights enquiry to be conducted and, if it is established that the community operates on the basis of shared rules, a communal property association may be established as contemplated in the Communal Property Associations Act 28 of 1996.

Chapter Two: A Critical Theoretical & Conceptual Framework

‘A key precondition for land reform to be feasible and effective in improving beneficiaries’ livelihoods is that such programs fit into a broader policy aimed at reducing poverty and establishing a favourable environment for the development of productive smallholder agriculture by beneficiaries.’⁷¹

Introduction

The above policy proposition by the World Bank represents a good point of departure as it reflects not only the inseparable link between land and agrarian reform but also the importance of agrarian reform for the achievement and success of land reform in South Africa. In this dissertation emphasis will be placed on land tenure reform as the key component within South Africa’s land reform policy. As a result, much of the discussion and analysis will be concentrated on the rights that have been recognised, their nature, scope and content and how it all fits within the overall property paradigm of Roman-Dutch Law. However, it is absurd to discuss land tenure reform in isolation from agrarian reform in South Africa as the iniquities of the past have created an agricultural political economy in which the power differentials are so skewed that the pursuit of justice necessitates a drastic reconstitution. The two concepts are quite distinct and, as Cousins correctly avers, should be clearly distinguished.⁷²

⁷¹ World Bank. (2003). *Land policies for growth and poverty reduction*. (pp. 154). Washington and Oxford: World Bank and Oxford University Press.

⁷² Cousins, B. (2005). *Agrarian reform and the ‘two economies’*: *Transforming South Africa’s countryside*. Draft Paper. Programme for Land and Agrarian Studies. School of Government. University of the Western Cape.

Whereas land reform is more focused on rights in land, that is, the nature, content and scope of land rights and more broadly the distribution of land in society, the central focus of agrarian reform is the political economy of land, that is, the class character of the relations of production and how these connect to the wider class structure in society.⁷³ While it is submitted that any research in the terrain of land reform must distinguish between these two concepts, it is equally important to have an understanding of the nexus between the two.

This, in broad terms, was the implicit theoretical and conceptual construct of the role players within the Surplus Peoples Project, and the Legal Resources Centre as well as the researcher. Therefore, even though the intended purpose of the research was primarily to clarify the rights in land of the residents of Melkkraal, the project itself was informed by the commitment of those involved to assist, empower and improve the capabilities of the community. At a broader level there was also an acknowledgment of the limitations of the current land reform programme in South Africa and therefore the need to match private property rights with communal tenure.

The aim of the research was to clarify and explain the land tenure relations of the community of Melkkraal such that development assistance could be rendered. Implicit in the research aim was how one reconciles private property rights with communal land tenure in the community.

⁷³ Cousins, B. (2005). *Agrarian reform and the 'two economies': Transforming South Africa's countryside*. Draft Paper. Programme for Land and Agrarian Studies. School of Government. University of the Western Cape.

The design of the research instrument was guided by the terms of reference provided to the researcher by the Surplus Peoples Project. The terms of reference were as follows:

Clarifying who the registered owners were in terms of the title deeds:

- Who the registered owners were.
- Who claimed to be the owner/s and on what basis.
- Whether they were still alive.
- Where they were located on the land or elsewhere.
- What their relationship to the land was.
- What rights they said they gave to the people who were living on and using the land.

Developing a data base of the residents:

- What relationship they had to the owners.
- How long they were living there.
- What they were actually doing on the land.
- Who gave them permission to be on the land?
- What were the terms of their residence?

Clarifying the current tenure relations:

- Who granted rights of land use?
- Who managed the land in terms of overgrazing, maintenance of the land and infrastructure?
- What owners said about the management of the land?
- What the non-owners said about the management of the land and the allocation of the rights.

- How long these systems had been in operation.

Ascertaining what structures and relationship existed between them:

- Which community organisation/s existed?
- Who the leaders of these organisations were.
- Gender sensitivity within the leadership.
- Which service providers operated in the community?

Clarifying what the legal rights of the residents and the owners were in terms of the various applicable laws:

- An analysis of the rights and powers of the residents and owners and the various groupings within them.
- Make recommendations on the rights and power configurations in terms of the analysis of the legislation.

1. Research Methodology

There are various definitions of research methodology explicated by various researchers. Babbie and Mouton, for example, define research methodology as the methods, techniques and procedures that are employed in the process of implementing the research design and research plan as well as the underlying principles and assumptions that underlie their use.⁷⁴ Other scholars on the other hand perceive methodology as the research method used in a particular enquiry which falls under two categories, namely, experimental and non-experimental research and quantitative and qualitative research. This view however, is an oversimplification because it effectively views research methodology as the same as the research process.

⁷⁴ Babbie, E. & Mouton, J. (2001). *The practice of social research*. (pp. 647). Oxford University Press.

In contrast, Babbie & Mouton's definition of research methodology does not only encompass the research design and research plan but the theoretical paradigms or meta-theories that inform them. Therefore, their definition creates the important link between the methodological paradigm and the meta-theory. The link between the research paradigm and the meta-theory can be tabulated as follows:

Figure 1: Relationship between the methodological paradigm and meta-theory⁷⁵

Paradigm	Meta-theory
Quantitative Research	Positivism
Qualitative Research	Phenomenology
Participatory Action Research	Critical Theory

For ease of reference the figure has been presented as a rather rigid classification of research perspectives but without a doubt this type of classification is problematic. Paradigms are not closed systems of thought hermetically sealed off from one another and more often than not there is an overlap. Furthermore, the way in which one conducts research is inevitably affected by the social context in which it takes place and therefore the data sought controls the selection of the methodology whether it is quantitative, qualitative or participatory action research.

Nonetheless, the critical tradition is the paradigm of choice for this study because of the belief that the objective of social research should be to

⁷⁵ Figure 1 is an adaptation of Babbie & Mouton's representation. In Babbie, E. & Mouton, J. (2001). *The practice of social research*. (pp. 48). Oxford University Press.

generate critical theory aimed at the emancipation of oppressed groups through enlightenment. Critical theory rejects the economic reductionism of the traditional Marxian view but does concede the powerful role of the superstructure. As an example, in contrast to Marx, Jurgen Habermas views the human race in three ways:⁷⁶

- As beings that need to produce materials to survive – purposive rational action.
- As beings that need to communicate with others using a commonly understood language within communities – communicative action.
- As beings that need to act rationally, to be self reflective and self-determining – emancipatory interest.

On the basis of the above, Habermas distinguishes between three types of sciences: the empirical-analytic, historical-hermeneutic and the critical sciences. These sciences reflect the positivist, phenomenological and critical perspectives in social research respectively. The critical sciences are important here as it goes beyond the production of nomological knowledge. Rather, its aim is to provide knowledge which engages the prevailing social structures. Therefore, from an epistemological view critical social science should be aimed at the emancipation of humans and this is precisely the ultimate aim of this research case study.

Participatory Action Research

Participatory action research, it needs to be argued, has a concern for both research as well as a political commitment to social justice and forms of

⁷⁶ Babbie, E. & Mouton, J. (2001). *The practice of social research*. (pp. 34). Oxford University Press.

democratic participation and is cited as the research methodology for the critical sciences. Babbie & Mouton describe it as ... *'a commonly used approach to "grassroots development" interventions and ... it has emerged as part of the search to render development assistance more responsive to the needs and opinions of local people'*.⁷⁷ There are five principles of participatory action research:

- Role of the researcher as a change agent.
- The importance afforded to the role of 'participation'.
- Democratic nature of the research relationship.
- How local knowledge is incorporated into this kind of research.
- The fact that knowledge is generated for purposes of action.
- Empowerment.
- Respect for participants interest and culture.

Participation is crucial to this type of research and participation in this context means that the community is integrated into the research by actively participating in the purpose of the research, planning the initial design of the research, implementation and monitoring of the project, the sharing of knowledge to participants and generating solutions to the problem.

While participatory action research was the overall research paradigm, the particular research technique used for the Melkkraal case study was participatory rural appraisal.

⁷⁷ Babbie, E. & Mouton, J. (2001). *The practice of social research*. (pp. 314). Oxford University Press.

Participatory Rural Appraisal

Participatory rural appraisal (PRA) is an action research tool or technique that involves community members defining and working to solve local concerns. It is an umbrella term given to a growing number of participatory approaches and methods that emphasize local knowledge and enable local people to make their own appraisal, analysis and plans.⁷⁸

PRA is described as ‘an action-reflection research practice that focuses on objects and diagrams to resolve community priorities, emphasizing working in the field, recognizing the complexity of local systems, and incorporating a sequential methodology that both highlights differences and aids in understanding differences and commonalities through group work.’⁷⁹ It has also been defined by the World Bank as ‘a family of participatory approaches and methods which emphasize local knowledge and enable local people to do their own appraisal, analysis and planning. PRA uses group animation exercises to facilitate information, sharing, analysis and action among stakeholders.’⁸⁰

History of PRA

The origins of PRA and its predecessor, rapid rural appraisal, arose in the 1970’s and 1980’s in response to the dissatisfaction with the limited results of questionnaire surveys and the social biases of ‘rural development’

⁷⁸ See Pratt, G. (2001). *Practitioners’ critical reflections on PRA and participation in Nepal*. Institute of Development Studies: Pathways to participation. Pretty, J.N. and Vodouchê, S.D. (1997). Using rapid participatory rural appraisal. In Swanson, B.E. et al. (eds.). (1997). *Improving agricultural extension: A reference manual*. Food & Agriculture Organization of the United Nations: Rome.

⁷⁹ “PRA in the US of A: Participatory Rural Appraisal: An application, analysis and evaluation.” Retrieved 09 March 2006 from the World Wide Web:<http://www.caup.umich.edu/acadpgrm/urp/utesymposium/publication/Mcdade.pdf>.

⁸⁰ World Bank. (1995). *The participation sourcebook*. Washington DC: World Bank.

tourism.⁸¹ However, it particularly emerged in the early 1990's as a hybrid methodological practice derived from sources including activist participatory research with its use of dialogue and participatory research to enhance people's awareness and confidence; agro-ecosystem analysis that contributed techniques such as diagramming and mapping; field research on farming systems that emphasized farmer's capabilities of conducting their own analysis; and the developments of rapid rural appraisal.⁸²

The techniques of activist participatory research used in PRA include collective research through meetings and sociodramas, critical recovery history, valuing and applying "folk culture" and the production and diffusion of new knowledge through written, oral and visual forms.⁸³ Agro-ecosystem analysis contributed transects such as systematic walks and observation; informal mapping such as sketch maps; diagramming such as seasonal calendars; and innovation assessment such as scoring and ranking different actions.⁸⁴ According to Chambers,⁸⁵ the representation of applied anthropology in PRA is the extension and application of social anthropological insights, approaches and methods. They are listed as follows:⁸⁶

- The idea of field learning as flexible art rather than rigid science.

⁸¹ Brown, D., Howes, M., Hussein, K., Longley, C. & Swindell, K. (2002). Participatory methodologies and participatory practices: Assessing PRA use in the Gambia. *Agricultural Research and Extension Network Paper* No. 124. London: ODI.

⁸² Laderchi, C. R. (2001). Participatory methods in the analysis of poverty: a critical review. Working Paper Number 62. *QEH Working Paper Series*. January 2001.

⁸³ Chambers, R. (1994). 'The origins and practice of participatory rural appraisal'. In *World Development*, vol. 22, No. 7.

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Ibid.

- The value of field residence, unhurried participant-observation, and conversations.
- The importance of attitudes, behaviour and rapport.
- The emic-etic distinction.
- The validity of indigenous knowledge.

Field research on farming systems contributed to PRA in terms of the understanding of:

- The complexity, diversity and risk-proneness of many farming systems.
- The knowledge, professionalism and rationality of small and poor farmers.
- The experimental mindset and behaviour of small and poor farmers.
- The ability of small and poor farmers to conduct their own analyses.

Rapid rural appraisal began as a better way to attain external learning and through its development the following core principles emerged:

- Reversal of learning which means moving away from the mere transmission of knowledge to learning from local people.
- Rapid and progressive learning that emphasizes flexibility and adaptation.
- Offsetting biases.
- Optimizing trade-offs between quality, relevance, accuracy and timelines.

- Triangulation.
- Seeking the expression and analysis of complexity and diversity.

Core Principles of PRA

1. Participation

Participation is regarded as a key component because the community's input into PRA activities is essential to its value as a research and planning method and as a means for diffusing the participatory approach to development. However, with PRA participation goes beyond the role as an end in itself and is seen as an important tool towards policy objectives such as empowerment and good governance.

In other words, participation is viewed not as a passive incentive process but an interactive process where the group/community takes control over local decisions and has a stake in maintaining structures and practices. Pretty and Vodouchê also argue that the participatory methods used can be put into four classes: group and team dynamics; sampling; interviewing and dialogue; and visualization and diagramming.⁸⁷

2. Teamwork

This is important in ensuring group dynamics but also to the extent that the validity of PRA data relies on informal interaction and brainstorming among those involved.

⁸⁷ Pretty, J.N. and Vodouchê, S.D. (1997). Using rapid or participatory rural appraisal. In Swanson, B.E. et al. (eds.). (1997). *Improving agricultural extension: A reference manual*. Food & Agriculture Organization of the United Nations: Rome.

3. Flexibility

Flexibility is necessary because each development context will be different and therefore the combination of techniques will be determined by the topic, location, time, available resources and the skill and size of the PRA team.

4. Optimal Ignorance

For purposes of efficiency PRA work tends to gather just enough information to make the necessary recommendations and decisions.

5. Triangulation

To ensure the validity and reliability of information, the rule of thumb is that at least three sources must be consulted or three techniques must be used to investigate the same topic.

Methods and Strategies of PRA

There are a variety of techniques that are used in the practice of PRA and these can be classified into visualized analysis, interviewing and sampling and group and team dynamic methods.⁸⁸ Visualized analysis would include participatory mapping and modelling; seasonal calendars and time lines; and trend and change analysis. Techniques in respect of interviewing and sampling would include transect walks and direct observation, wealth rankings and semi-structured interviews. In group and team dynamics focus group discussions, shared presentations, staying with the community and work sharing are common techniques. Below is an elaboration of the techniques that were employed during the research at Melkkraal.

- Participatory mapping.

⁸⁸ Laderchi, C. R. (2001). Participatory methods in the analysis of poverty: A critical review. Working Paper Number 62. *QEH Working Paper Series*. January 2001.

- Focus group discussions.
- Semi-structured interviewing.
- Shared presentations.
- Transect walks and direct observation.

Participatory mapping

A key method in PRA is mapping and modelling. This involves constructing, on the ground or on paper, maps or models using materials such as sticks, stones, grass, wood, tree leaves, paint, colored chalks, pens and paper.⁸⁹ Mapping is a powerful exercise because it provides a sense of ownership, is inclusive, creates insight and is an empowerment tool.

Focus group discussions

The importance of focus group discussions is to help share information and learn from others and it can lead to a new awareness about the causes of various community concerns and the appropriate ways to address them.

Semi-structured interviewing

This is the preferred method of interviewing because it is guided interviewing and listening in which only some of the questions and topics are predetermined.⁹⁰ Further questions arise during the interview and even though the form of the interview is informal and conversational it is carefully controlled and structured.

⁸⁹ Pretty, J.N. and Vodouché, S.D. (1997). Using rapid or participatory rural appraisal. In Swanson, B.E. et al. (eds.). (1997). *Improving agricultural extension: A reference manual*. Food & Agriculture Organization of the United Nations: Rome.

⁹⁰ Pretty, J.N. and Vodouché, S.D. (1997). Using rapid or participatory rural appraisal. In Swanson, B.E. et al. (eds.). (1997). *Improving agricultural extension: A reference manual*. Food & Agriculture Organization of the United Nations: Rome.

Shared presentations

The rationale for shared presentations is that key findings should always be presented to the community and outsiders.⁹¹ They are also an important opportunity for cross-checking and feedback and are crucial for establishing the validity of the findings.

Transect walks and direct observation

This technique entails systematic walks with key informants in the community, listening, asking, looking and seeking problems and solutions.⁹² The findings can then be mapped on a transect diagram. The advantage of this technique is that one may discover and understand local practices and develop a deeper understanding of the community.

Proponents hold that the core principles of PRA and its strategies of visual rather than verbal techniques, group-based activities and ‘reversals of learning’ where the community becomes the experts and the ‘experts’ the facilitators, stimulates the process of political change and empowerment.

Shortcomings of Participatory Rural Appraisal

Although PRA has been the preferred method for participatory development by many NGO's⁹³ it is not without its shortcomings. In this section I will discuss and respond to three key shortcomings through the lens of how the research was conducted at Melkkraal.

Firstly, PRA has been criticized methodologically for its lack of any ‘objective’ standards of assessment and quality control. Related to this is the

⁹¹ Ibid.

⁹² Ibid.

⁹³ For example, Brown et al found that by 1994 the methods of participatory rural appraisal were in use in at least 40 different countries.

concern for its preference for the visual over the verbal and the simplification that this implies.⁹⁴

I think these criticisms are well founded but the success of PRA will depend on the overlapping of the techniques used and therefore the practice of triangulation is imperative to achieve the reliability and validity of data. In the Melkkraal case study the combination of direct observation, participatory mapping, focus group discussions, semi-structured interviewing, and informal conversations with the members of the community as well as archival research contributed to the collection of reliable and valid data.

The second criticism of PRA concerns the disjuncture between the theory of participation and empowerment and its practice. Many have argued that the motive for participation has shifted to instrumental reasons for increased project implementation efficiency.⁹⁵ In their assessment of PRA in Gambia, Brown et al found very little evidence of community empowerment.⁹⁶ They attributed this to the mechanistic manner in which it was employed, the bias of participation favouring the literate and the lack of transference of skills such that it did not contribute to the development of independent projects by the community. Similarly, Bell argues that participatory ideals are often constrained by institutional contexts. He

⁹⁴ Brown, D., Howes, M., Hussein, K., Longley, C. & Swindell, K. (2002). Participatory methodologies and participatory practices: Assessing PRA use in the Gambia. *Agricultural Research and Extension Network Paper* No. 124. London: ODI.

⁹⁵ See Cornwall, A. (2002). 'Participation in development: Tracks and traces'. In *Currents* No. 28. August 2002. Swedish University of Agricultural Sciences. ; Pratt, G. (2002). 'What is wrong with PRA? Three narratives from Nepal'. In *Currents* No. 28. August 2002. Swedish University of Agricultural Sciences.

⁹⁶ Brown, D., Howes, M., Hussein, K., Longley, C. & Swindell, K. (2002). Participatory methodologies and participatory practices: Assessing PRA use in the Gambia. *Agricultural Research and Extension Network Paper* No. 124. London: ODI.

therefore argues that predefined activities, quantifiable cost and benefits and financial limitations mean that efficiency comes before empowerment.⁹⁷ As a result, he argues that 'the project selects and presents what local people say in terms of these requirements, rather than documenting what local people say and want outside of this predetermined agenda.'⁹⁸

The Melkkraal case study was thus inevitably constrained, but the use of PRA techniques opened the space for empowerment to occur. Empowerment is a long term process and in the case of Melkkraal the process started at least three years prior to the commencement of my research and is still continuing today. This is testimony to the commitment of everyone who was involved. As a result of this commitment, efficiency never came before empowerment. On the contrary, through the process of empowerment the community of Melkkraal has become part of a rooibos cooperative and their rooibos tea is imported to Europe, a committee was established and trained in eco-tourism, a land management committee was established and the entire research process contributed to those developments by allowing the community to express the form of land tenure system that best suited their needs.

Thirdly, numerous critics have questioned the idealization or myth of the use of the community as if it is a homogenous unified population.⁹⁹ Bell

⁹⁷ Bell, S. (2004). Does 'participatory development' encourage processes of empowerment? *Centre for Developing Areas Research* No. 41.

⁹⁸ Bell, S. (2004). Does 'participatory development' encourage processes of empowerment? *Centre for Developing Areas Research* No. 41.

⁹⁹ See Bell, S. (2004). Does 'participatory development' encourage processes of empowerment? *Centre for Developing Areas Research* No. 41; Brown, D., Howes, M., Hussein, K., Longley, C. & Swindell, K. (2002). Participatory methodologies and participatory practices: Assessing PRA use in the Gambia. *Agricultural Research and Extension Network Paper* No. 124. London: ODI; Cornwall, A. (2002). 'Participation in development: Tracks and traces'. In *Currents* No. 28. August 2002.

argues that the lack of attention to internal power divisions combined with PRA's general aim for local consensus mean that local knowledge often reflects local power and therefore has the effect of marginalizing the poorest of the poor. It is therefore argued that it is crucial to recognise the true diversity of communities and the power dynamics that exist within them. Without such recognition, participation and empowerment will not reach the level where sustainable development in communities can be achieved.

In response to this criticism, it must be recognized that there is an underestimation in general by PRA practitioners of the length of time it takes to completely understand the different dynamics and tensions within a community. In the case of the Melkkraal community the research team got to know the community over a period of years. Therefore, the complexity of the community power relations was well known and to a large extent the research process was developed to make the community realize that their strength lay in their unity and not their division. This was an extraordinary process that unfolded and the best illustration of this was the words of the late Nicolaas Kotze IV at the final presentation of the findings of the research:

'Ons is almal dieselfde, daar is geen verskil tussen ons nie'. (We are all the same, there is no difference between us.)

2. The Research Process

As stated earlier, a core principle of PRA is the technique of triangulation and this was used during the research process. In particular, face-to-face

interviews, direct observation, participatory mapping, shared presentations and archival research were used. I shall discuss each of these in turn.

Research Phases

In respect of the terms of reference and the time frame of the research the following research phases were drafted:

The first phase of the research entailed the collection and analysis of archival data to develop an understanding of the co-ownership and its co-owners and to develop a genealogy of the co-ownership. This phase also entailed a legal analysis of appropriate legislation and a preliminary visit to Melkkraal. Once I felt sufficiently grounded in respect of what was required of me, the research instrument (interview schedule) was developed. The second phase entailed conducting field work at Melkkraal in terms of interviewing the heads of each household as well as an interview with the land management committee. Phase three was a consolidation of what was already achieved and entailed a follow up visit to Melkkraal and the drafting of a progress report that was presented to the community for comment. This phase also entailed a participatory mapping session and a focus group workshop on the various land uses at Melkkraal. The final phase of the research included another follow up visit to Melkkraal, the completion of the research analysis and the development of a final report that was presented to the community. The final presentation entailed a workshop explaining the land rights of the various households and a discussion of the way forward.

Archival Research

Given the legal nature of the research and the initial confusion as to who the rightful co-owners of the property were, it was decided that it would be useful to develop a genealogy of the co-owners and a historical account of the farm. This was presented to the community during one of the workshop sessions. The archival research was extremely important as it authenticated much of what participants revealed and resolved whatever doubts participants may have had about their history as well as being an empowerment tool allowing people to get in touch, and identify, with the historical legacy of the farm.

Selection of Respondents

Due to the imperative of understanding the nature and content of the rights of the twenty-six households a decision was taken to interview every head of the twenty-six households. A head of household was defined flexibly and it depended chiefly on who was mainly responsible for farming activities and practice on the ground. In married households, both the husband and the wife were presumed to have equal responsibility.

Face-to-Face Interviews

The rationale for face-to-face interviews arose out of the need to extract specific information from all the households in the community. The specific information sought was guided by the terms of reference. In specific terms demographic data, length of tenure, who provided permission, how permission was provided, relationship to current owners, what portions of land were used and for what purpose, number of stock, what rights in land

householders believe they possess and why and their views of development. Although questions were pre-arranged, each interview was administered in a semi-structured way to allow respondents to express themselves and to provide as much information as they could. In this respect, the interview schedule was used more as a guide to direct the participants. Interviews were conducted in the respective households and this had the obvious advantage of allowing participants to be as comfortable as possible. The fact that the participants were involved in the initiation of the research meant that they were aware of its purpose.

The manner in which interviews were conducted allowed views and opinions about the community's perceived land rights and practice on the ground, their views of the land management structure, the relationship between the owners and the non-owning residents and the rights, duties and obligations of these respective parties to emerge naturally. This allowed one to piece together the nature and content of the land use rights at Melkkraal such that appropriate solutions that fit the practice on the ground could be found.

Observation

Observation was also an important feature of the research process. This primarily took the form of photographing the participants, their homes, and the physical setting, and through general conversation with the various participants. The advantage of using the observation technique for this research study is that it allowed one to connect at a much more personal level with participants, become more familiar with the community and to

afford the researcher the opportunity to understand the finer nuances of the community and its history. In respect of photographs, permission was granted by all participants before a single photograph was taken. Perhaps the disadvantage of this technique is that one can become so engrossed in the personal lives of the residents to the point of almost losing objectivity. However, developing a deeper understanding of the community, especially in terms of the objectives of PRA, allows one to do justice to the objectives of the study. Furthermore, I doubt that the validity of the research was compromised. Firstly, a triangulation of research methods was used and that allows for a cross checking of information and secondly, I remained an outsider to the community which allowed me to report from a 'distance' despite being passionate about the community and their plight.

Workshops

Four workshops were held with the community. They included a presentation and discussion of the preliminary findings of the research, a participatory mapping session, a focus group workshop to clarify the various land uses at Melkkraal and a final presentation and discussion of the findings of the research and the way forward. The presentation of the preliminary findings of the research was very useful in terms of corroboration and allowing the research study to be as inclusive, democratic and empowering to the community as was possible. The participatory mapping and the focus group workshop also increased the validity and reliability of the research study. The specific content of the first two workshops was as follows:

Participatory Mapping Session

The objective of the participatory mapping session was to have a map created by the Melkkraal community that reflects the land rights and land use of all inhabitants including:

- All homesteads, heads of households and residents.
- Names of persons/people using each piece of arable land.
- Names and status of each person living in every house.
- Location of all land used communally or occasionally.

Clarification, Consolidation of various Land Uses

The objective was to clarify and consolidate the preliminary analysis of the research and the following were clarified during this workshop:

- Categories of rights holders at Melkkraal.
- Right, duties and obligations of rights holders.
- The households which fall into each category.
- The allocation of house plots, rooibos tea land and wheat land.

3. Ethical Issues

For the community, the research study was a personal matter as it directly affected them, and the findings of the research would provide much needed clarity on the tenure relations at Melkkraal and the rights in land that various households possess. It was further the intention that the land rights clarification would lead to the commencement of a legal process of land rights protection, registration and development assistance. The ethical issues are rather difficult to assess as I was commissioned to conduct the research three years after the process had already been initiated and it was

during that time when the community requested assistance from the Surplus Peoples Project. Therefore, it was axiomatic that permission and participation by the community would be rendered because it was the community itself that sought assistance. That being said however, there are some ethical dilemmas that one must take into consideration when conducting any form of research and there are two ethical considerations particularly pertinent to the current study. These are:

- The extent to which the research can be harmful to the community.
- Anonymity.

The extent to which the research can be harmful to the community

The Melkkraal community is a very poor community and many households engage in multiple livelihood strategies in order to subsist. Living off the land is one of the main livelihood strategies of the community and therefore the land is a crucial resource. The aim of the research was to clarify the land tenure relations of the community the results of which could impact on the selfsame community positively or negatively. In the event of the results being negative this could have meant the eviction of many households by the property owners, thereby increasing instead of ameliorating their plight. I as well as all the role players was therefore always mindful of the importance of the research and its implications for the community. In this respect there were many discussions about what should be done in the event some households were evicted and one of the main alternatives was to assist those households to apply for a land grant. The other alternative was to negotiate with the co-owners.

Fortunately, the four workshops held with the community around the findings of the research study resulted in a consensus on the way forward.

Anonymity

As a result of the research study being a commissioned study to determine exactly what rights in land members of the community held, the identification of the households and its members was crucial to the study. However, it must be said that initially the dissemination of the research findings was limited to the community and the various stakeholders and depending on the findings, would only be externalized once the legal process commenced. However, permission was granted by the community and the Surplus Peoples Project to use the names of the various participants for the purposes of this dissertation. I do feel that the use of names is important as it not only personalises the research but more importantly it immortalises the community through this dissertation - a symbol of their struggle and eventual empowerment.

Chapter Three: The Melkkraal Farmers

This chapter documents the livelihood of each household at Melkkraal and concludes with a synthesis of the content and nature of the rights of each category of rights holder. The head of each household represents the household. One of the heads of the households, Chrisjan Fortuin was unfortunately not available during the interview phase.

1. Livelihood of each Household

The narrative below reflects the status of the households at the time the interviews were conducted in 2004.

1. Dina Lot

Mrs. Dina Lot is a 62-year-old pensioner. Her house can be said to be the first one as you enter the Melkkraal farm, which is also adjacent to the guesthouse. She is a widow and has a housemate, Katriena Scheepers who has been living with her for the past four years. Dina Lot is a pensioner and receives R740 a month whilst Katriena is a 55-year-old unemployed woman. She asked Dina for permission to stay in her home. Katriena does not have any stock or crops of her own.

Permission to Occupy

Dina lives in a modest two-roomed house that she built herself sixteen years ago. Her association with Melkkraal is a long one having lived there before she decided to reside there permanently. According to Dina, she used to live at Melkkraal before, then got a job and used to regularly visit family at Melkkraal during her vacation over the years. When she decided to move

there permanently, she approached Klaas Kotze from Oorlogskloof for permission. Klaas Kotze is one of the joint owners and is also Dina Lot's cousin. Klaas Kotze subsequently gave her permission without any terms or conditions attached. Furthermore, the permission to reside there does not have a fixed date of termination and Dina feels that it will lapse when she dies. However, when probed, she felt that her house, stock and crops belonged to her. Therefore she feels that she is able to bequeath her property.

In respect of her house, she provided all the material and built it herself. In respect of her crops, she is the farmer and therefore assumes the duties and responsibilities thereof.

Land Use Rights

Dina has use rights and physical control over her house, her rooibos field that she acquired four years ago and her portion of the wheat field that she acquired when she received permission to reside at Melkkraal sixteen years ago. In respect of the latter, the grain is used for subsistence purposes whilst the rooibos tea is used commercially. In 2003 she received R200 from the sale of her tea. She also has a vegetable garden situated at her house, 6-8 chickens and two sheep that are all used for subsistence purposes.

2. Jan Syster (married Jacoba Helena Syster (Kotze))

Jan and Jacoba Syster are two pensioners who live on a relatively large portion of land at Melkkraal. Geographically, they are the third house in the

first cluster of houses at Melkkraal. Both Jan and Jacoba are pensioners. They have a combined income of R1 480.

Permission to Occupy

Jan and Jacoba Syster have been living at Melkkraal since 1960. They initially lived along the river at Melkkraal for a period of three years and then moved to where they reside now. The decision to live at Melkkraal was a result of Jacoba Syster being the daughter of Anna Johanna Kotze - one of the seven-fideicommissary heirs of the title deed T6930 of 1953. In total, Jan and Jacoba Syster have eight children with one having passed on. Of the seven children who are still alive, three reside in their own homes at Melkkraal, namely Koos, Jan and Klaas. In respect of permission to occupy, oral permission was sought from Anna Johanna Kotze with no terms or conditions attached.

Like Dina Lot, Jan and Jacoba Syster regard their place at Melkkraal as their own and consequently shall leave their property to their children.

Land Use Rights

The Systers use three portions of land, namely, the land on which they reside, a portion of the wheat field and a portion of land used for the growing of rooibos tea. They further own eight sheep and possess a vegetable garden on their house plot. The grain from the wheat field, the sheep and the produce from the vegetable garden are used for subsistence whilst the rooibos tea is used for commercial purposes. Although the Systers contend that permission to use a portion of the wheat field was granted in the 1980's, the likelihood is that they commenced wheat farming in the

1960's as the general practice is that access to the wheat field runs with the house plot. In respect of the use of the rooibos tea land, the Systers have had access to their portion of rooibos tea land for the past three - four years. The Systers were unsure how much they received from their sale of rooibos tea last year.

3. Frans Kotze (married to Marie Kotze (Tromp))

Frans Kotze was born at Melkkraal and for a long time he stayed with his mother, Anna Johanna Kotze. He has been staying in his current residence that he built himself since the 1970's. He is therefore the brother of Jacoba Syster.¹⁰⁰ Frans receives a disability pension although he does do seasonal work on occasion. His wife is a pensioner. Their combined monthly income from their pensions is R1 400.

Permission to Occupy

Although Frans was born at Melkkraal, oral permission to occupy was sought from his mother in the 1970's. He received the permission without any terms or conditions attached.

Land Use Rights

Frans Kotze and his family have a portion of the wheat field, a vegetable garden, ten chickens and three sheep used for subsistence purposes. He further has a portion of rooibos tea land used commercially. He received R1

¹⁰⁰ The children of Anna Johanna Kotze are Klaas Kotze (Oorlogskloof), Frans Kotze, Jacoba Helena Syster (Kotze).

600 from his produce last year. He also has two donkeys used as a means of transport to collect wood. The donkeys and his chickens are located at his residence whereas the sheep are located in the communal camp.

4. Petrus Jacobus Kotze (son of Jan and Jacoba Helena Syster and therefore grandson of Anna Johanna Kotze)

Petrus Jacobus Kotze and his wife Susanna (Kotze) live in a relatively modest three-roomed house situated to the left of the bottom of the hill at Melkkraal. He is also one of the few residents who owns a bakkie. He works as a painter in Clanwilliam whilst his wife stays home and tends to the house and farming chores when he is away. When he does not work his wife does odd jobs for the people at Melkkraal. They have three children of which the youngest, Quinton Kotze, aged ten, stays with them. It is difficult to gauge the exact income of Petrus because his work is not permanent. However, when he works he receives approximately R500 a week working for about six months of the year.

Permission to Occupy

Petrus was born at Melkkraal but he has been living in his current residence for approximately twenty years. Prior to that, he stayed with his parents. He received oral permission to occupy from his mother without any terms or conditions attached. He therefore believes he can stay at the property for as long as he lives and that he can pass his property on to his children. Petrus further informed me that the Melkkraal property is

supposed to be passed from one generation of Kotzes to the next.¹⁰¹ His source of information is from what his late grandmother told him.

Petrus also enlightened me on how he came to stay at his exact residence. To paraphrase the words of Petrus:

'Everybody looks for a place to stay where it will be comfortable. This veld was open and so I decided to build my house here.'

This seemed to be the process of choosing one's residence once permission to occupy is granted.

Land Use Rights

The Kotzes use five portions of land:

1. The land on which their house is situated.
2. A portion of the wheat field. Petrus received permission for access to the wheat field from his grandmother. The produce is used for subsistence purposes.
3. Two portions of rooibos tea land. Permission for access to land for the growing of rooibos tea was received in 1993 but it is not certain who gave the permission. Petrus received approximately R4 000 from the sale of his produce last year.
4. Petrus also possesses a vegetable garden on the land where the house is situated. The vegetable garden site exists but no vegetables are currently growing. There are also a quince, peach and fig trees.
5. Petrus owns forty sheep and 5/6 chickens that are used for subsistence purposes. The sheep are located in the communal camp.

¹⁰¹ As will be shown later, Martiens and Hugo Kotze provided similar information.

**5. Nicolaas Martiens Kotze (late son of Petrus Jacobus Kotze (13/05/13)
and Magrieta Steenkamp)**

Nicolaas, his wife and their grandson live in a quaint house quite deep in the land of Melkkraal. In relative terms they also appear to be one of the more affluent residents at Melkkraal. Both Nicolaas and his wife are seasonal workers whose joint income vacillates from R300 to R500 to R1 000 a month.

Permission to Occupy

Nicolaas Kotze was born at Melkkraal but has been living in his current residence since 1996. He however built the house in 1982 but left to work in Atlantis in 1983. For that twelve-year period his brother was living in his house. He did not ask for permission to occupy because he inherited the 1/6th share of the Melkkraal property from Petrus Jacobus Kotze in terms of the title deed T23327/80.¹⁰²

Land Use Rights

Nicolaas Kotze uses five pieces of land:

1. The land on which his house is situated.
2. A portion of the wheat field. The produce is used for subsistence.
3. Three portions of rooibos tea land. He started growing rooibos tea in 1996 and received R32 000 from his produce last year.
4. He has a vegetable garden and fig, peach and quince trees situated at the house. This is used for subsistence purposes.

¹⁰² This title deed further stated that Nicolaas Kotze had to pay his 11 brothers and sisters R50 each in compensation as well as granting them rights of usufruct. Of his siblings Petrus Jacobs Kotze, Hugo Kotze, Lena Kotze, Elizabeth Saas and Drieka Kotze reside at Melkkraal.

5. He also owns ten sheep that are used for subsistence purposes. The sheep graze with the other Melkkraal sheep in the communal camp.

6. Abraham Fortuin (married to Katriena Fortuin)

Abraham Fortuin was born at Melkkraal and lives with his wife and their two children in a house that he built in 1990. Prior to 1990 Abraham lived with his parents at Melkkraal. He is a seasonal worker whilst his wife is a housewife who will see to the daily farming chores when he is not available. The income is approximately R400 a month when he is working.

Permission to Occupy

When Abraham intended to build his house he approached whom he referred to as all the owners. Specifically, he approached Griet Kotze, Marie Syster, Helena Verooi and Klaas Kotze¹⁰³ for permission. Oral permission was subsequently granted without any terms or conditions attached or any length of tenure. It is for this reason that Abraham believes that he can reside at Melkkraal for as long as he lives. He further regards the place where he currently resides as his own. To quote him:

'I got permission from them, built my place and this land is now mine where I stay.'

To this end, Abraham believes he can leave his home and crops to his family if he should die. At the same token, Abraham acknowledges that he cannot do anything without the consent of the owners, but, that according to him, only applies outside the areas of his control. The areas over which he has

¹⁰³ It is not certain which Klaas Kotze he approached but one suspects it is the one who lives at Melkkraal.

control apply to his house, portion of the wheat field and the portion of the rooibos tea land.

Land Use Rights

Abraham possesses and makes use of four portions of land:

1. The land on which he resides.
2. A portion of the wheat field. He received permission for his portion of the wheat field in 1990. The produce is used for subsistence purposes.
3. Two portions of rooibos tea land. The rooibos tea is used for commercial purposes although Abraham has not sold any yet.
4. He also has five sheep and eight chickens used for subsistence purposes. The sheep are located in the communal camp.

7. Johanna Fortuin (Kotze)

Johanna Fortuin is a pensioner who lives in a small abode with her son Gert Fortuin. She has been living at Melkkraal for the past twenty-eight years. The income derived for the household is the pension of Johanna and the seasonal work of Gert Fortuin - it is uncertain to what this amounts.

Permission to Occupy

Permission to occupy was sought from Helena Johanna Koopman.¹⁰⁴ Oral permission was granted and in return Johanna Fortuin had to pay a monthly rent. There was no length of time given for the length of tenure and Johanna Fortuin presumes she is able to reside for as long as she lives. She

¹⁰⁴ Johanna Fortuin and Helena Johanna Koopman are second cousins as Helena's mother and Johanna's father were cousins.

is however uncertain whether she is able to leave her property on which resides and the house she built to her children.

Johanna Fortuin stopped paying rent in 1994 and Helena Johanna Koopman did not act against the non-payment of rent. It appears that one of the chief reasons for ceasing the payments was that Helena Johanna Koopman did not provide Johanna Fortuin with any invoices for the monthly rent she paid.

Land Use Rights

Unlike most of the other residents, Johanna does not have a portion of the wheat field or rooibos tea land. The only portion of land that she uses is the land on which her house is built. On this land she has two chickens and five chicks and a vegetable garden.

8. Andries Fortuin (father of Abraham Fortuin)

Andries Fortuin and his household are one of the bigger families at Melkkraal. He is a pensioner who lives with his wife, three children and five grandchildren.

Permission to Occupy

Andries has been living at Melkkraal for as long as he can remember, approximately 56 years, as his father, Jan Fortuin was a resident. He approached Helena Johanna Koopman for permission to occupy. The oral permission was granted subject to an initial monthly rent of R10. Andries stopped paying rent four years ago when the rent was pushed up to R12 a

month. As with the case of Johanna Fortuin, Helena Johanna Koopman took no action against the non-payment.

Besides the monthly rent there were no other terms or conditions attached. Andries believes that he can stay in his residence at Melkkraal for as long as he lives but he is not sure whether he is able to bequeath the house that he built to his family. There is no familial relationship between Andries Fortuin and Helena Johanna Koopman and the broader Kotze family.

Land Use Rights

Andries and his household do not make use of the wheat field nor do they possess their own portion of rooibos tea land. He does however have ten sheep, two horses, two donkeys and a vegetable garden.

9. Martiens Kotze (married to Maria Kotze)

Martiens is married to Maria Kotze who is the daughter of Petrus Jacobus Kotze (13/05/1913) and Magrieta Kotze (Steenkamp). They live with their three children in a relatively comfortable home situated quite deep inside the farm of Melkkraal. Martiens is a seasonal worker and his and his children's income depends on the length of time that they work in the year and what type of work they get.

Permission to Occupy

Martiens and his family have been living in their current residence since 1990. Prior to that, they lived in a place called Sandkraal. Permission to live at Melkkraal was sought from Maria's mother, Magrieta Kotze, which she in

turn readily provided. The permission to occupy was oral. Martiens Kotze further mentioned that at some point Helena Johanna Koopman wanted them to pay rent¹⁰⁵ but they refused on account that allegedly some children pay and others do not.

Martiens Kotze also stated that it was *'the will of Petrus Jacobus Kotze that his descendants should stay at Melkkraal and reap the fruits of the farm'*.¹⁰⁶ Therefore, with this in mind, Martiens and his family feel that the place in which they are currently staying and their land can be left to their descendants.

Land Use Rights

Martiens and his family make use and possess four portions of land at Melkkraal:

1. A portion on which their house is situated. Alongside the house is a vegetable garden where watermelon, pumpkin, potatoes and tomatoes are grown.
2. A portion of the wheat field that Martiens has been using since 1991. The produce is used for subsistence purposes.
3. A portion of land used for the growing of rooibos tea since 1991. It is used for commercial purposes. Last year he received R7 000 from the sale of the rooibos tea.
4. Martiens also has eight goats used for subsistence purposes. The goats are situated in the communal camp.

¹⁰⁵ The payment would presumably have been for Helena Johanna Koopman. It seems that at some point they did pay rent but later refused.

¹⁰⁶ This is congruent with the title deed T23327/80.

10. Hugo Kotze

Hugo Kotze is the child of Petrus Jacobus Kotze and Magrieta Kotze (Steenkamp). He is single and lives alone next door to his sister and brother in law Maria and Martiens Kotze. Hugo used to be a full time worker but he hurt his back and is awaiting his disability pension. The only other form of income that Hugo receives is from the sale of his rooibos tea.

Permission to Occupy

Hugo Kotze has been living at Melkkraal for twenty-six years. Initially he was staying with and looked after his mother. In 1990 he built the house in which he is currently staying. He asked his mother, Magrieta Kotze, for permission to occupy. He believes and treats the land that he is using as his own. He therefore believes that he is able to bequeath his house and land that he is using.

Land Use Rights

Hugo possesses and uses four portions of land at Melkkraal:

1. The land on which his house is situated. He has a vegetable garden alongside his house that he uses for subsistence purposes. Hugo currently grows watermelon, squash, potatoes, pumpkin, tomatoes and beetroot.
2. A portion of the wheat field used for subsistence purposes.
3. A portion of land used for the growing of rooibos tea used for commercial purposes. Hugo has had this portion of land since 1999 and earned R2500 last year from the sale of his rooibos tea.

4. Hugo also owns four sheep and nine chickens that are used for subsistence purposes.

11. Elizabeth Saas (Kotze)

Elizabeth is also one of the descendants of Petrus Jacobus Kotze and Magrieta Kotze. She lives with her husband, Dirk Saas, four children and two grandchildren. Elizabeth and her husband are seasonal workers together with their four children.

Permission to Occupy

Elizabeth and her family have been living at their current residence for twenty-four years after having received permission from her father, Petrus Jacobus Kotze. There were no terms or conditions attached to the permission to occupy and she further reiterated what her brother in law, Martiens Kotze, said about the last wishes of Petrus Jacobus Kotze. She therefore believes she is entitled to reside at Melkkraal for as long as she lives and is entitled to bequeath the land that she uses.

Land Use Rights

Elizabeth and her family use and possess three pieces of land at Melkkraal:

1. The portion of land on which her house is situated which has a vegetable garden. At the time of the interview nothing was planted.
2. Two portions of land for the growing of rooibos tea land which she started three years ago. She received R2000 last year from the sale of her rooibos tea.
3. A portion of land for the growing of wheat.

12. George Gous

George Gous is a single man who lives on his own in a small home adjacent to the property of Dina Lot. He has been living at Melkkraal for approximately six years. George receives a disability pension and whenever he can, he works as a seasonal worker. His disability pension amounts to R740.

Permission to Occupy

Six years ago George encountered housing problems in Niewoudville and then approached Klaas Kotze from Oorlogskloof (his mother's cousin) for permission to stay at Melkkraal. The permission he received from Klaas Kotze was oral and in return George Gous had to pay a monthly rent of R50 plus a portion of the wheat harvest. However, George at some point stopped paying rent and no action was taken against him.

He regards his place as his own and believes that he can bequeath it. Furthermore, there was no discussion on the length of tenure and George believes he can stay there for as long as he lives.

Land Use Rights

On a normal day George works around his little home, looks after his sheep and works in his vegetable garden. He has access to and possesses a piece of land where he resides and a portion of the wheat field. He received permission for the latter when he got permission to occupy. He grows tomatoes, quince, potatoes and figs on a patch of land alongside his house. They are all used for subsistence purposes.

13. Marie Syster

Marie Syster is the daughter of Nicolaas Kotze III (19 June 1940) and Katriena Kotze.¹⁰⁷ Her father died intestate and hence Marie and her sister will become part of the co-ownership. Marie Syster is married and lives with her husband, Andries Syster¹⁰⁸ and their three children. Marie's home is also home to her sister Lena Kotze, Helena Verooi and her mother's sister, Anna Willemse. The income of the household is the combination of Andries, Lena and Marie as seasonal workers and the two pensions of Helena Verooi and Anna Willemse.

Permission to Occupy

Marie and her family have been staying at Melkkraal since 1992. She approached Klaas Kotze from Oorlogskloof for permission.¹⁰⁹ Klaas is the cousin of Marie's father. They subsequently received permission to occupy without any terms or conditions attached.

Land Use Rights

Marie possesses and makes use of four portions of land:

1. The land on which Marie and her household resides. She also has a vegetable garden alongside the house but at the time of the interview nothing was planted.
2. A portion of the wheat field used for subsistence purposes.

¹⁰⁷ The siblings of Nicolaas Kotze are Martiens Kotze and Helena Verooi.

¹⁰⁸ He is the son of Jan Syster.

¹⁰⁹ Klaas is the son of Anna Johanna Kotze.

3. A small portion of land used for the growing of rooibos tea. She received permission three years ago. Marie sold the produce of rooibos tea for R125 last year.
4. She further owns three sheep and four chickens used for subsistence purposes. The sheep are located in the communal camp.

14. Ragel Kotze

Ragel Kotze is a single pensioner who lives alone in a small dwelling at Melkkraal. She is further the sister of Katriena Kotze. As a pensioner Ragel receives R740 a month.

Permission to Occupy

Ragel has been living at Melkkraal for the past ten years. She asked for permission to reside at Melkkraal after her mother passed away in Calvinia. In 1994, Ragel Kotze approached Helena Johanna Koopman, Klaas Kotze and Marie Syster for permission. Oral permission was then granted with no terms or conditions attached. As with most of the other residents, she believes that she is able to stay at Melkkraal for as long she wants and regards the house on which she stays as her own.

Land Use Rights

Ragel Kotze only makes use and possesses the home that she built herself. She does not do any farming either of rooibos or wheat and does not own any livestock. She does have a section of land on the property of her home for a vegetable garden.

15. Willem Beukes

Willem Beukes is a seventy-six old man who lives all by himself on the top of the hill at Melkkraal. Like Ragel Kotze, he does not get involved with any of the activities or politics at Melkkraal and rather prefers to live away from everyone and only spends time at the home of Marie Syster. Willem's sole income is his old age pension of R740 a month.

Permission to Occupy

Willem has been living at Melkkraal since the age of eleven years. His parents received permission from the then owners. As far as he can remember there were not any terms or conditions but his parents did pay 1/2 crown to stay at Melkkraal.¹¹⁰ Willem Beukes then worked for 'Oupa' Nicolaas Kotze.¹¹¹ As a result of having worked for 'Oupa' Nicolaas Kotze, he received a usufruct over the land. The usufruct however is unregistered, as was the initial permission to occupy.

Like many of the other residents, Willem Beukes further believes that he can bequeath his property.

Land Use Rights

Besides his home, Willem Beukes does not make use of, or possess any other property at Melkkraal and neither is he interested in using or possessing any other property.

¹¹⁰ It is not certain whether this was a once off payment or not.

¹¹¹ Although not clear, it is presumed that this is Nicolaas Kotze II.

16. Anna Lot

Anna Lot is a fifty-five year-old divorced woman who lives with her boyfriend, Abraham Steenkamp, at Melkkraal. Anna could not provide a precise figure as to their income but she and Abraham are both seasonal workers. Anna was born at Melkkraal and some time later she moved from Melkkraal with her husband. Approximately twenty years ago she returned to Melkkraal.¹¹² In respect of Abraham, he too was born and has always stayed at Melkkraal.

Permission to Occupy

When Anna Lot returned to Melkkraal she asked Helena Johanna Koopman, her cousin, for permission to occupy. It was oral permission accompanied by a monthly rental. Anna is however unsure what the monthly rental was as she ceased her monthly payments a long time ago. She is also unsure as to when she in fact did cease to pay her monthly rent.

As Abraham Steenkamp was born at Melkkraal, his permission to occupy runs with the initial permission of his parents.

Land Use Rights

Besides the land on which Anna Lot and Abraham Steenkamp reside they do not make use or possess any other portions of land at Melkkraal. They also do not appear to own any livestock.

¹¹² It is not certain if she returned with her husband and then got divorced or whether she got divorced after she returned to Melkkraal.

17. Griet Syster (Kotze) (married to Jan Syster)

Griet and Jan Syster live in a modest house at Melkkraal. Griet is a housewife and Jan is a seasonal worker. Jan is also the son of Jan Syster senior and was born at Melkkraal. Griet on the other hand came to Melkkraal as a child and grew up there.

The Systers have been living in their current residence for twelve years. It is not certain what the monthly income is as Jan's work is seasonal.

Permission to Occupy

Although Griet is one of the present co-owners at Melkkraal, she approached Helena Verooi and Helena Koopman for permission. The Systers received oral permission to occupy without any terms or conditions. According to the Systers, they can stay for as long as they live and regard their place and portions of land as their own.

Land Use Rights

The Systers make use of and possess four portions of land:

1. The land on which they reside. They also possess a vegetable garden where they grow beetroot and potatoes.
2. A portion of land used for the growing of rooibos. They received permission for the land two years ago from Helena Johanna Koopman.
3. A portion of land used for the growing of wheat.
4. In respect of livestock the Systers own three sheep and two chickens. The sheep are located in the communal camp.

18. Gert Witbooi

Gert Witbooi, his wife Siena and their child Anita are one of the families at Melkkraal that have no familial relation to the Kotzes. All three members of the family are seasonal workers. Gert and his family have been living at Melkkraal for eleven or twelve years.

Permission to Occupy

Niewoudville became too expensive a place for them to stay and as such they approached Klaas Kotze from Oorlogskloof and Helena Johanna Koopman for permission. Helena and Klaas granted oral permission. They did not ask for any rental and did not place a limit on the length of tenure.

Although Gert Witbooi regards the place where they stay as his own, he does however acknowledge that if the owners decree to evict him, he must leave. In that sense he does acknowledge his temporary status.

Land Use Rights

Other than the house in which the Witbooi's stay with a vegetable garden the Witbooi's do not make use or possess any other portion of land at Melkkraal. They also do not own any livestock.

19. Drieka Kotze

Drieka Kotze is a divorced woman who lives with her boyfriend, Johannes Vrye, and her three children at Melkkraal. Her eldest child, Karien, works in Atlantis and comes home during the vacation and her other two children, Elton (18), and Andriaas (16) are at school. Drieka Kotze is the sister of Piet and Nicolaas Kotze who live at Melkkraal. She works as a housekeeper in

Niewoudville and earns R220 per week. Jan is a seasonal worker, and when he works, he earns approximately R200 - R300 per week.

Permission to Occupy

Drieka has been living at Melkkraal since 1986. According to Drieka, she no longer wanted to stay at the farm where she worked and hence approached Helena Johanna Koopman for permission to stay at Melkkraal. Helena provided the oral permission at a rental of R4 a month. However, Drieka stopped paying the rent in 1992. According to her, Jakob Kotze, from Eerste River in Cape Town, advised her not to pay on the account that it is 'eiedomsgrond'.

Drieka regards her place and her rooibos tea land as her own and thinks that she is able to leave her property to her children.

Land Use Rights

Drieka Kotze and her family make use of and possess four portions of land:

1. The land on which they reside. On this land they also have a vegetable garden where squash, pumpkin, watermelon, onions, potatoes and cucumbers are grown. They also have orange, peach, apple and fig trees.
2. A portion of land for the growing of rooibos. They received permission in 2000 and sold their produce last year for R150.
3. A portion of the wheat land used for subsistence purposes.
4. In respect of livestock, they own three sheep and 13 chickens that are used for subsistence purposes. The sheep are located in the communal camp.

20. Petrus Jacobus Kotze

Petrus is another sibling of Drieka, Piet and Nicolaas Kotze. He is a married man and lives with his wife Sophie and their daughter, Donna, who is nineteen years old. He is a seasonal worker and his wife works as a housekeeper once a week. Their combined income is approximately R300 a week.

Permission to Occupy

Petrus was born at Melkkraal but left to find work at the age of nine and returned four years ago. On his return he asked his brother Nicolaas Kotze for permission and then chose a place to stay. The permission was oral with no terms or conditions attached. There was also no discussion as to how long Petrus was allowed to stay. According to Petrus, this will depend on who the right owners of Melkkraal are. Petrus further declared that even though he regards his place as his own, his family would move if he were to die, as his wife would not adapt to Melkkraal in his absence.

Land Use Rights

Petrus makes use of and possesses three portions of land:¹¹³

1. The land on which their home is built. He has a vegetable garden on his plot but nothing was planted.
2. Land for planting rooibos tea. Petrus received permission three years ago from his brother Nicolaas but has not planted anything yet.
3. A portion of wheat land. He did not ask for permission, as according to him anyone who can afford to plant wheat is entitled to plant.

¹¹³ It is not sure whether Petrus owns any livestock as the interview was cut short.

21. Nikolaas Kotze

Saana Kotze is married to Nikolaas Kotze. They have four children, Francois Kotze (18), Joseph (7) and Sandria (3). Nikolaas is further the son of Jan and Helena Syster. Saana Kotze is a housewife and Nikolaas is a seasonal worker. They live in a caravan at Melkkraal. It is difficult to get an accurate figure of the income but if Nikolaas does get work he earns approximately R250 per week.

Permission to Occupy

The Kotzes have been living in their current residence for eighteen years. Nikolaas was born at Melkkraal and Saana came to Melkkraal with Nikolaas eighteen years ago. Permission to occupy was received from his parents. The permission was oral with no terms or conditions attached. Nikolaas does regard his place as his own and therefore believes he can pass his property on to his family when he dies.

Land Use Rights

Nikolaas and his family make use of and possess three portions of land:

1. The land on which they reside. They have a vegetable garden on this land and grow pumpkin, sweet potatoes and mielies.
2. A portion of land for the growing of rooibos tea. According to the Kotzes, they received permission to grow rooibos tea approximately twenty years¹¹⁴ ago from his parents.
3. A portion of the wheat field.

¹¹⁴ Although this is the information that was given it is unlikely that they received permission twenty years ago.

22. Jan Kotze

Jan and Dina Kotze live at Melkkraal with their daughter and her three children. It is also the home to Ingrid (15) but she is not a member of the immediate family. Jan is a seasonal worker and Dina is a pensioner. Jan earns approximately R200 a week when he works and Dina receives R740 a month.

Permission to Occupy

Jan Kotze was born at Melkkraal but moved and then returned sixteen years ago. According to Jan, he asked Klaas Kotze from Oorlogskloof for permission because, according to him, Klaas Kotze is the sole owner. Nicolaas Kotze and Jan Kotze are also cousins. He also approached Helena Johanna Koopman and Jan Syster. They all provided permission with no terms or conditions attached.

Jan regards the place as his own and according to him the wishes of his mother, Anna Johanna Kotze, was that he could stay at Melkkraal for as long as he wants. He further believes that he can leave his property to his children when he dies.

Land Use Rights

The Kotzes make use of and possess:

1. Land on which they reside. However, they do not have a vegetable garden.
2. A portion of the wheat field.
3. They also own eight sheep that are located in the communal camp.

23. Roslain Syster

At the time of the first phase of interviews in February 2004, Roslain Syster and her two children, Denver (13) and Wesley Opperman (17) were living with her father Andries Syster. She has since moved on to her own piece of land at Melkkraal. Roslain is a seasonal worker who earns approximately R220 per week when she does work.

Permission to Occupy

In 1997 Roslain approached Helena Johanna Koopman for permission to occupy her own piece of land. Helena then provided the permission with no terms or conditions attached. However, shortly thereafter Roslain found work quite a distance away from Melkkraal and therefore was unable to stay at Melkkraal. On 19 March 2004, Roslain approached Nicolaas Kotze of Melkkraal and the Melkkraal Committee to confirm whether the permission still stood. The permission was confirmed and now Roslain occupies a former abandoned house at Melkkraal. Roslain does not pay any rent.

Land Use Rights

As Roslain has just moved into her own home the only use right that she has at this point is the land on which she lives.

24. Jakob Koopman¹¹⁵

Jakob is the fifty-four year old brother of Helena Johanna Koopman who is staying in the house of his sister. Jakob is a seasonal worker but it is not clear how much money he earns.

¹¹⁵ Unfortunately Jakob Koopman could not be interviewed. Marie Syster provided the available information.

Land Use Rights

Jakob makes use of four portions of land:

1. The portion of land on which he resides with a vegetable garden.
2. A portion of land for the planting and growing of rooibos tea.
3. A portion of the wheat field.
4. Jakob owns three sheep and also manages his sister's twenty-two sheep.

The sheep are located in the communal camp.

2. Synthesis of the Nature and Content of the Rights

Figure 2: Nature and Content of Rights for Non-owning Residents

	House	Rooibos	Wheat	Grazing
Permission	Received.	Received.	Received.	Received.
Content of right	Control. Use and Benefit. Vindication. Transactibility of the fruits. Alienation in respect of being able to transfer property to the next generation.			
Termination of right	Right will terminate only if there is a decision to permanently vacate Melkkraal.		Right is dependant on primary right of possessing a house plot. If house plot ceases so will other rights.	
Obligation	A payment of R60 a year for water and its maintenance.		Responsibility to demarcate area of use and to tend to one's own crop.	Responsibility to tend to one's own stock. To graze only in demarcated areas. Ensure stock remain in demarcated areas for grazing.

Figure 3: Nature and Content of Rights for Co-owners

	House	Rooibos	Wheat	Grazing
Permission	Not Applicable.	Not Applicable.	Not Applicable.	Not Applicable.
Content	Control. Use and Benefit. Vindication. Transactibility of the fruits. Alienation of share.			
Termination of right	Termination of right will only cease if share is alienated.			
Obligation	A payment of R60 a year for water & its maintenance. Expenses & losses in respect of maintenance of property.	Responsibility to demarcate area of use and to tend to one's own crop.		Responsibility to tend to one's own stock. To graze only in demarcated areas. Ensure stock remain in demarcated areas for grazing.

The findings of the individual interviews showed that there are two categories of rights holders at Melkkraal, namely, the non-owning residents and the co-owners. However, the findings have revealed that there is very little difference between them because the social land ethic that has evolved at Melkkraal provides both co-owners and non-owning residents with the

same rights, duties and obligations. The similarity and distinction are provided in the figures above.

Chapter Four: The Common Property Regime

The analysis of the findings in chapter three showed that very little difference exists between the non-owning residents and the co-owners in terms of how land is used and transacted. This was attributed to the evolution of the social land ethic such that one can speak of the Melkkraal farm as a common property regime.

The term 'common property regime' (CPR) is used to refer to the legal regime in which a resource is utilized as common property. This is different from open access situations where there is no social control over the use of resources making the 'tragedy' of overuse more likely. The quintessential difference between the two is that under CPR, the primary legitimacy of community based property rights is drawn from the community. Therefore, common property regimes are structured arrangements in which group membership is known, outsiders are excluded, rules are developed and enforced, incentives exist for co-owners to the institutional arrangements, and sanctions work to ensure compliance.¹¹⁶ Under open access, no one has rights of ownership and hence it cannot be construed as a common property regime. Common property has become an important strategy of ensuring that a group/community has long-term use of the land.

Common property regimes, as in the case of Melkkraal, is a complex arrangement in which different tenure systems and rights to resources co-exist with the broader communal management system. What follows below

¹¹⁶ Makhanya, E.M. (2002). *The sustainability of rural systems under the Communal Property Association Act in South Africa*. Paper presented at the 10th Annual Conference of the IGU Commission for the Sustainability of Rural Systems, 2002.

is the deconstruction of the common property regime that exists at Melkkraal. This is unpacked in terms of the eligibility of land users, the land management system and the different land practices that occur. This chapter will conclude with a discussion on the applicability of Interim Protection of Informal Rights Act 31 of 1996 for the Melkkraal community.

1. The Land Users

As indicated previously, due to the fact that Melkkraal is privately owned by a co-ownership of the Kotze family the key criterion for membership to the community was familial ties to the Kotze family. To a certain extent this is still the case, but because the community has evolved, the criterion has broadened to one based on familial ties to the existing community. With the exception of the households of Andries Fortuin, Abraham Fortuin, Roslain Syster, Willem Beukes and Gert Witbooi all the households are related to the Kotze family. However, Andries Fortuin has been a community member for as long as fifty-six years. Abraham Fortuin and Rosalain Syster were born at Melkkraal and have been staying there ever since, thirty and forty years respectively. Willem Beukes has been a community member for sixty-five years whilst Gert Witbooi has been a community member for twelve years.

2. The Land Management

The Melkkraal Committee is a land management committee that was formed in 2000 with the assistance of the Environmental Monitoring Group. The Melkkraal Committee is composed of eight members namely Abraham Fortuin (chair), Marie Syster (vice chair), David Saas (secretary), Griet

Syster, Klaas Kotze, Piet Kotze, Martiens Kotze and Elizabeth Saas. As the land management structure the committee is empowered to:

- Enforce the shared community rules as related to the various land uses.
- Ensure the maintenance of the farm through the collection of the maintenance fees from the community members and the overall running of the farm.
- Provide permission for the use of any land use.
- Resolve conflict as pertains to the dispute of any community rule.

As a result of the formation of the Melkkraal Committee, the community practice is undergoing a process of change and this has created an overlap between the traditional practice of the community elders and the functions of the committee. As such it displays a dual authority, which in turn adds to the confusion in the community.

3. Land Practice

There are five different types of land use at Melkkraal. These are as follows:

- Land used as residential sites.
- Land used for rooibos cultivation.
- Land used for wheat cultivation.
- Land used for grazing.
- Land used for vegetable gardens.¹¹⁷

Each of these land practices will be discussed in turn as well as an analysis of the content of the rights that stem from their usage. This section

¹¹⁷ At the time of conducting the research there was no information of this type of land use. It can however be presumed that its nature and content is similar to the rights that stem from land used for rooibos cultivation if the vegetable garden exists outside the residential site.

will conclude with a synthesised graphical representation of these land uses. As will be shown below eligibility, the content of the rights, the obligations and enforcement thereof are the same for the different land uses.

- **Land used as Residential Sites**

An allocation of a residential site is the principal right at Melkkraal as eligibility for all other land uses is dependant upon being a member of the community. As stated earlier, membership is based on familial ties to the existing community.¹¹⁸ Since the land management committee was only formed in 2000 all but one community member, Rosalain Syster, acquired permission for a residential site from the traditional practice of approaching one or two of the community elders. In the case of Rosalain Syster, the Melkkraal Committee as well as a community elder, Nicolaas Kotze IV, was approached. This is indicative of the overlap between the traditional practice of acquiring land use rights through the community elders and the new community practice since the formation of the Melkkraal Committee.

Under the new system the process of acquiring a residential site entails approaching the Melkkraal Committee who would then jointly decide with the community as a whole whether permission could be granted and where the best site would be. Once permission for a residential site is granted, the holder is responsible for the construction of the home and is obligated to enclose the perimeter of the allocated residential site. The same process was applied under the old system.

¹¹⁸ See appendix V for a detailed history of each resident and how they acquired a residential site at Melkkraal. Two of the twenty six households, namely, Chrisjan Fortuin and Martienus Arnoldus Kotze were unfortunately unavailable during the research.

Content of Residential Land Use Right

Duration

The community practice is that a residential land use right is a perpetual right and cannot under any circumstances be taken away, except when the holder of the right intentionally abandons the site. When this occurs, notice to abandon is given to what the community regards as the community elders. Such notice is now given to the Melkkraal Committee.

Transactability of the residential site

Holders can conceivably lease the allotment to outsiders or members of the community. However, the community practice is that in the event a holder wishes to lease, permission must first be granted from the Melkkraal Committee.

- **Land used for Rooibos Cultivation**

Eligibility for a rooibos allotment is dependant on the criterion of membership to the community. The practice of granting rooibos allotments is similar to the process of the allocation for residential sites. In other words, in some cases one or two of the 'community elders' were approached. The principal persons, in their personal capacity, responsible for such permission and allocation were Johanna Helena Koopman, the late Nicolaas Kotze IV and Klaas Kotze, all of whom are co-owners. Since 2000, the Melkkraal Committee with the consensus of the community decides all allocations of rooibos allotments. Appendix VI shows the current holders of a rooibos allotment.

Content of the Right of a Rooibos Allotment

Duration

The community practice is that once permission is granted for the rooibos allotments it cannot under any circumstances be taken away if one does not make use of it. It is uncertain what happens when the holder of the allotment dies.

Transactability of the allotment

Holders of the rooibos allotments have exclusive physical control and therefore they can conceivably lease the allotment to outsiders or members of the community. However, the community practice is that in the event a holder wishes to lease, permission must first be granted from the Melkkraal Committee.

- **Land used for Wheat Cultivation**

In a similar manner to the allotments for rooibos cultivation, the granting of allotments for wheat cultivation is dependant upon being a member of the community. However, unlike the rooibos allotments, members of the community do not have their own specific wheat allotments. Rather, the community practice is that any member who has seed and a plough to plant is eligible to cultivate the wheat field. The size of the allotment that a member of the community acquires is dependant upon the amount of seed that person possesses. Once a member of the community acquires an allotment, he/she has exclusive physical control over the allotment and, as with rooibos, has the obligation of enclosing and tending to the allotment.

At the end of the season all the allotments go back into the pool and the process starts anew the following season.

The process of acquiring an allotment for wheat cultivation prior to the formation of the Melkkraal Committee follows the same process reflected in acquiring other land uses, that is, through asking one or two of the 'community elders' for permission. Since 2000, the Melkkraal Committee has been mandated by the community to assume the responsibility for granting permission. Unlike with rooibos that is grown for commercial purposes, wheat is grown for subsistence.

Content of the Right of a Wheat Allotment

Duration

The duration of the right is seasonal.

Transactability of the allotment

It is unlikely that the holders of wheat allotments are able to lease the allotment to outsiders. Rather, it would be a community decision whether a portion of the wheat field should be leased to outsiders.

- **Land used for Grazing**

The focus group discussion held with the community on 28 March 2004 revealed that members of the community approached the 'community elders', the late Nicolaas Kotze IV, and Klaas Kotze from Oorlogskloof for permission to graze. Klaas Kotze as a co-owner provided permission in his personal capacity. The focus group discussions also revealed that the community practice prior to 2000 was that if members of the community wanted to add to their existing stock number, they would need to ask the

permission of the 'community elders'. Given that the Melkkraal Committee is the current land management committee, the responsibility rests with the said committee to provide permission and to monitor the amount of stock relative to the grazing capacity of the land.

Rights holders are obligated to make sure that their stock are safely kept in the designated grazing compounds at all times and each stock owner is responsible for tending to his/her own stock. The focus group discussion further revealed that the annual general maintenance fee of R60 that each household is obligated to pay in respect of general maintenance includes the maintenance of the grazing field.

Concerning the transactability and transferability of the grazing right, two positions emerged in the focus group discussion. The first position was that the grazing right is transferable to the immediate family. The second position was that the grazing right is neither transactable nor transferable, and in the event of a stockowner's passing, consensus must be reached between the survivors and the Melkkraal Committee. Appendix VII shows the current stockowners at Melkkraal and how much stock they own.

Content of Grazing Rights

Duration

Once a community member has a grazing right, such right cannot be taken away. It is uncertain what happens when that community member dies. There were two positions on the matter: Firstly, the grazing right is transferable to the immediate family. The second position was that the grazing right is neither transactable nor transferable and in the event of a

right holder's passing, consensus must be reached between the next of kin and the Melkkraal Committee over the said right.

Transactability of the right

A grazing right cannot be individually transacted to outsiders.

4. Summary of all Land Uses

Regulation and Enforcement of all Land Uses

The Melkkraal Committee, together with community consensus, is responsible for the allocation of all land uses. It ensures that the rights of the holders are not encroached upon. If one's right is encroached upon the community practice is that the matter gets taken to the Melkkraal Committee who, on behalf of the injured party, will investigate and reclaim the right for the injured party. In respect of grazing rights, it is mandated to monitor the amount of stock relative to the grazing capacity of the land.

Control and Obligation for all Land Uses

The holders have exclusive physical control of their land use and the community practice is that each holder is responsible for his/her land use in accordance with the community rules. For example, in the case of grazing rights, rights holders are obligated to make sure that their stock is safely kept in the designated grazing compounds at all times and each stock owner is responsible for tending to his/her own stock. All holders are obligated to pay an annual general maintenance fee of R60.¹¹⁹

Use and Benefit of all Land Uses

They further derive exclusive benefit from the fruits of their produce.

¹¹⁹ The annual general maintenance fee is applied to all community households irrespective of the number of land uses that a household possesses.

The figure below shows the eligibility, content of the right and the obligations and enforcement that flow from them.

Figure 4: Eligibility for land use rights

Eligibility	Content of right	Obligation	Allocating Authority	Regulation and Enforcement
<p>Must have familial ties to the existing community for a residential land use right.</p> <p>Must be member of the community for other land uses.</p>	<p>Control.</p> <p>Use & Benefit.</p> <p>Transactability of fruits.</p> <p>Vindication.</p>	<p>Everyone is responsible for his or her own land use in accordance with the rules of the community.</p> <p>Payment of the annual general maintenance fee.</p>	<p>'Community elders' prior to 2000.</p> <p>Melkkraal Committee after 2000.</p>	<p>'Community elders' prior to 2000.</p> <p>Melkkraal Committee after 2000.</p>

5. The Applicability of the Interim Protection of the Informal

Rights Act 31 of 1996 (IPILRA)

Section 2 (1) of IPILRA provides that 'no person may be deprived of any informal right to land without his or her consent'. Section 1 (a-d) distinguishes between four categories of informal rights to land that are

protected. However, it is the third category, namely, 'beneficial occupation' that is relevant for present purposes as it pertains directly to the circumstances of the Melkkraal community.

Legal Issue to be decided

The legal requirements for a successful claim for relief in terms of the Interim Protection of Informal Rights Act 31 of 1996 are contained in S 1 of the Act. Section 1 (i) and Section 1 (c) require that a claimant must prove beneficial occupation which means:

- occupation of land by a person
- as if he or she is the owner
- without force
- openly
- and without the permission of the registered owner
- for a continuous period of five years prior to 31 December 1997.

Existence and occupation by a community

Occupation of land by a person includes a community. In terms of S 1 (ii) of the Act a community means the following:

Any group or portion of a group of persons whose rights to land are derived from shared rules determining access to land held in common by such group.

The determination for the existence of a community relies on two concepts:

- I. A sufficiently cohesive group.
- II. Commonality.

Cohesion and Commonality

The current land users at Melkkraal have been living there for a considerable period of time. The longest length of tenure is 65 years and the shortest is that of Piet Kotze of four years, although he was born at Melkkraal. Of the twenty-three households the average length of tenure is 24.6 years with twenty of the households having residence longer than 10 years, 11 being resident longer than 20 years and 6 households having residence longer than 30 years. Of further interest is that 14 of the heads of households were born at Melkkraal, 8 are directly descendent of the Kotze fideicommissary heirs and nine are extended family. This means that 17 of the twenty-three households are related to the original Kotze family.

The length of tenure reveals that the majority of land users have been living alongside each other for longer than ten years but the commonality of being born at Melkkraal, being related to the Kotze family and sharing familial ties to the existing community reveals a level of cohesion that transcends the length of tenure.

Shared Rules

The Melkkraal community has developed a community practice and a system of tenure relations that has evolved over time and members have worked within this framework to create a system that is amenable to all. This system of tenure relations was solidified in 2000 through the formation of a land management committee known as the Melkkraal Committee. The evidence suggests that eligibility in respect of the various land uses is dependant upon being a member of the community. Once community

membership is established - through an allocation of a residential site - a community member has to approach the Melkkraal Committee in respect of permission for the other land uses. The committee will then take that matter to the community in order to reach a joint decision. The above discussion on the different land uses also shows that each land use has its own set of rules that is enforced by the Melkkraal Committee and to which each land user has to conform.

The evidence therefore suggests that the land users at Melkkraal currently have access to the land for residential and agricultural purposes in an orderly and regulated fashion. The research and the workshops that were held with the Melkkraal community cogently revealed that the practice on the ground is that no real distinction exists between the two co-owners that reside at Melkkraal and the rest of the land users. In fact, the status of the two co-owners is as members of the community because like any other community member they have to abide by the shared community rules as pertains to the various land uses and other community practices. As an example, in the case of Griet Syster permission for an allocation for a residential site was acquired from the then community elders. However, the best illustration of this is the words of the late Nicolaas Kotze IV:

'Ons is almal dieselfde. Daar is geen verskilling tussen ons nie'(We are the same. There is no difference between us.)

One can therefore infer that the land users at Melkkraal do not operate on a system of hierarchical rights that is traditionally associated with ownership but rather hold, use and transact rights in land on the basis of

shared community rules that provides all community members with equal access to various land uses.

Was occupation without permission of the registered owner?

Co-ownership is an archaic and rigid provision that has been taken from Roman law into the South African system of property law. It is a form of ownership that denotes that two or more people own a thing at the same time in undivided shares.¹²⁰ The law of co-ownership requires that firstly, as all co-owners are entitled in the share of the property, no owner has the power to alienate land and neither may one co-owner prevent any other from using the joint land reasonably and in proportion to his undivided share. Secondly, a co-owner cannot introduce an innovation or change in the nature of the occupation of the land without the consent of the other co-owners. In a co-ownership, a majority - whether in number or in value of their respective shares - cannot bind a dissenting minority with regard to the use that should be made of the land.¹²¹ A co-owner can also only make use of the joint property as constitutes normal and ordinary use thereof or as the co-owners intended by special agreement. Finally, as co-owners are bound in respect of the land, every co-owner has the right to alienate his share or part thereof freely and without reference to his co-owners.

The crux of the matter is that the law of co-ownership in South Africa provides that any juristic act with regard to the common property can be effected only with the co-operation of all the co-owners.¹²² Further, the

¹²⁰ Van der Walt, A.J. & Pienaar, G. (1999). *Introduction to the law of property*. (3rd edition). Juta and Co, Ltd: Cape Town.

¹²¹ See Pretorius v Botha 1961 4 SA 722 (T).

¹²² LAWSA vol. 27, pp. 348.

position in Roman-Dutch law that common property can be leased if the majority of co-owners so decide has not been accepted in South African law.¹²³ In *Pretorius v Botha* 1961 (4) TPD it was held that a decision of the majority in co-ownership does not bind the minority. Therefore, the consent of all the co-owners is required if the common property is alienated or burdened with a real right. Co-operation is also required where there are administrative decisions with regard to the common property. Therefore, no co-owner is entitled to change or improve the common property on his /her own and likewise the co-operation of all co-owners is required if the use of the common property or specific part of it is decided upon. Similarly, no co-owner is entitled to appropriate for his/her own use a specific part of the common property.

The evidence indicates that all community members were granted permission by either the elders in the community who were not co-owners or by one, two or three of the co-owners in the individual capacity but never from the co-ownership as a single registered owner. The practice of acquiring use and occupational rights has clearly demonstrated that the seven co-owners do not operate as a co-ownership.¹²⁴ Co-ownership requires owners to reach unanimous consensus over the nature of the occupation of the land but the practice of providing permission to the various community members contradicts the law of co-ownership. In not one circumstance at Melkkraal did the co-ownership ever get together and reach a consensus over the nature and occupation of the land. This can only mean that the

¹²³ LAWSA vol. 27, pp. 348.

¹²⁴ See results of the individual interviews.

community, some of whom have been living there for as long as fifty years have been doing so openly, without force and without permission of the registered co-ownership. Permission of some of the co-owners is not sufficient in terms of the law of co-ownership. It is further the result of the nature in which permission was granted over a period longer than sixty years that a system of shared community rules has evolved into what it is today.

There is therefore clear and undeniable evidence that the Melkkraal community has been occupying the land as if it were the owner, without force, openly and without the permission of the registered owner for a continuous period of five years prior to 31 December 1997.

The Implication of the Applicability of IPILRA

The evidence suggests that the Melkkraal community is protected by the Interim Protection of Informal Rights Act 31 of 1996 (IPILRA) as beneficial occupiers in terms of S 1 (c) of the Act. However, because IPILRA serves as a holding measure it merely affords them protection and does not provide them with the power to make future development decisions in respect of the land. The co-ownership finds itself in a similar position. Firstly, the fact that the community has the protection of IPILRA means that any sale or other disposition of the Melkkraal land by the co-ownership shall be subject to any existing informal right to that land. Secondly, the manner in which the land has been registered as a co-ownership places the co-ownership in a very difficult position given that some shares vest in deceased estates. This means that even if the co-ownership wanted to do something to or about the

land executors would first need to be appointed in the deceased estates such that estates can be wound up and assets, including the shares, allocated and then transferred formally in the deeds registry office to the heirs of the deceased persons. Thereafter, the new co-owners and the existing co-owners would then have to unanimously agree on whether they should sell, lease, or allocate rights to occupants. Therefore, the current predicament of the co-ownership means that it, like the Melkkraal community, is unable to make future development decisions in respect of the land.

The reality of the situation at Melkkraal is that both the community and the co-ownership are in a catch-22 situation and the only viable way out of this land tenure conundrum are discussions and negotiations between the parties on the best way forward. Successful negotiations could mean access to state subsidies in the form of land reform grants the result of which would mean an improvement in livelihoods and security of tenure of the Melkkraal community.

It was therefore envisaged and proposed by the joint collaboration of the Surplus People's Project, Environmental Monitoring Group and the Legal Resources Centre that the following occur as matter of expediency:

- Discussions with the community regarding future solutions to this problem.
- Discussion and negotiations with the co-ownership on solving the key problem.
- Agreement on the way forward.

Chapter Five: Conclusion

Social research in land tenure is especially challenging because it requires the technical understanding of key principles and rules of law in property in particular, constitutional issues, the interpretation of legislation and statutes and most likely a triangulation of research methods. Above all, it requires a very good understanding of the community such that recommendations can be made that will empower and develop the community. Effectively, the social researcher involved in land tenure will be required to develop a legal knowledge, be a political scientist, a sociologist and a social historian. This is a challenging task not only in terms of what is required but how to merge these disciplines into a single research paper that is historical enough to understand the evolution of land reform, legal enough to understand the legal principles involved when trying to make sense of the rights in land, political enough to understand the intricacies of public policy and sociological enough to understand the nexus between land and agrarian reform.

The aim of the research was to clarify and explain the land tenure relations that existed at the Melkkraal community such that development assistance could be rendered. But, implicit in the research aim was the bigger question of how one reconciles private property rights with communal land tenure at Melkkraal.

This question arose for two reasons. In the first instance, resolving the land tenure relations at Melkkraal, to a large extent, revolves around the

reconciliation of private property rights and communal land tenure. Related to this, is the social land ethic that has evolved at Melkkraal over a period of generations. This is important in itself as it enriches one's understanding and provides guidance as to how such reconciliation can be achieved.

Clearly, the first reason emerged out of the research aim but the second reason involved the much bigger socio-legal question. This can be summarized as follows:

Can land tenure reform succeed when the system of land rights in property law has always privileged the institution of ownership?

I analyzed, in appendix I, how the apartheid ideology of separate development was able to manipulate the innocent legal code of Roman-Dutch property law. It was able to achieve this because Roman-Dutch property law traditionally defines land rights as exclusive spaces that allows for the free exercise of individual autonomy. This means that the system of property law in South Africa rests on the ownership paradigm where ownership is regarded as the pinnacle of a hierarchy of rights in Roman-Dutch property law. It is therefore the 'absolute' right upon which other rights are created and evaluated. Van der Walt avers that as result of this paradigm, many rights and interests will not be recognized or protected because they do not fit within the framework on which the civil-law notion of individual ownership rests.¹²⁵ To overcome this, Van der Walt proposed a system based on fragmented use-rights with each right being recognized and protected on its own merits and according to its own context. He further

¹²⁵ Van der Walt, A.J. (1999). 'Property rights and hierarchies of power: A critical evaluation of land reform policy in South Africa'. In Du Plessis, L.M. (ed.). *Koers*. Potchefstroom University.

believes that title will not be an important factor in this model because security will be created and ensured through legislation.¹²⁶ The distinction between the ownership model and use rights model is presented in the figure below:

Figure 5: Key features of the ownership and use-rights models¹²⁷

Ownership	Use-rights
Based on a hierarchy of rights	No hierarchy of rights
Title and use normally united	Title and use mostly separated
Security depends on title	Security by legislation
No title means no security	Statutory security threshold
Tends to resist regulation	Tends to absorb regulation
No natural ceiling ('absolute')	Natural ceiling of restrictions
Supports hierarchy of power	No inherent power relations

I certainly concur with Van der Walt that a use-rights model will be better suited for the achievement of the land reform objectives in South Africa as it has the potential of being an important cog in the distribution of wealth and power. Furthermore, the Melkkraal community has provided one with the practical example of how a use-rights paradigm could be realized on the ground. In this context, and in order to make a use-rights paradigm work, it is vitally important to understand and build on the tenure institutions that exist in communities. Such institutions and relations successfully exist due to a social land ethic. In Cross' analysis of the indigenous social land ethic, she argues '...that the indigenous land

¹²⁶ Van der Walt, A.J. (1999). 'Property rights and hierarchies of power: A critical evaluation of land reform policy in South Africa'. (pp. 6). In Du Plessis, L.M. (ed.). *Koers*. Potchefstroom University.

¹²⁷ Figure sourced from Van der Walt, A.J. (1999). 'Property rights and hierarchies of power: A critical evaluation of land reform policy in South Africa'. (pp. 6). In Du Plessis, L.M. (ed.). *Koers*. Potchefstroom University.

right is built on a set of principles that balance off providing land to the landless against upholding possession by landholding families and limiting the conditions of access and transfer.¹²⁸ Therefore, it is proposed that future research should concentrate on creating the synergy between socio-legal theory and practice on the ground. This seems an apt point of departure for attempting to reconcile private property rights with communal land tenure.

However, socio-legal theory needs to go beyond what Van der Walt has proposed and, in particular, whether security of tenure can actually be secured through legislation only. Pienaar avers that legislation alone will not be sufficient.¹²⁹ Rather, he believes that security of tenure will only be obtained through registration of title. He believes that the only way to make rights a reality for people and communities, like Melkkraal, is for those rights to become concretized and individualized by an applicable system of governance.¹³⁰ For this to happen, the South African Deeds Registry will need to be adapted so that all land tenure rights can be registered in an affordable way. Therefore, Pienaar's preference is for a fragmented use-rights system based on title as the central policy for land tenure in South Africa. This system is presented below in comparison to the system proposed by Van der Walt.

¹²⁸ Cross, C. (1992). 'An alternative legality: The property rights question in relation to South African land reform'. (pp. 315). In *South African Journal on Human Rights*. (1992). Vol. 8.

¹²⁹ Pienaar, G. (2001). 'The registration of fragmented use-rights as a development tool in rural areas'. *Constitution & Law IV, Seminar Report 6*.

¹³⁰ Pienaar, G. (2001). 'The registration of fragmented use-rights as a development tool in rural areas'. *Constitution & Law IV, Seminar Report 6*.

Figure 6: Comparison between Pienaar's use-right model and the use-rights model proposed by Van der Walt.

Pienaar's use-rights model	Van der Walt's use-rights model
No hierarchy of rights.	No hierarchy of rights.
Use and title united.	Title and use mostly separated.
Security by legislation and registration.	Security by legislation.
Statutory security threshold.	Statutory security threshold.
Tends to resist regulation.	Tends to absorb regulation.
Natural ceiling of restrictions by regulation.	Natural ceiling of restrictions.
No inherent power relations.	No inherent power relations.

Research into the best way to achieve a fragmented use-rights model, where use and title, can be registered is crucial for any further development of land tenure reform. This will allow the holder of the use-right the security of tenure in respect of:

- Protection against interference by others, eviction and attachment.
- 'Transactability' and transferability and to promote investment for credit by banks.
- Certainty and durability.

If the above aspects can be achieved through registration, it will go a long way to improving livelihoods, reducing poverty and establishing a favourable environment for the development of productive smallholder agriculture. These, after all, are some of the central objectives to land tenure reform in South Africa.

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**Appendix I: Historical overview of racial land legislation
in South Africa**

Historical Overview of Racial Land Legislation in South Africa

'Awaking on Friday morning, June 20, 1913, the South African Native found himself, not actually a slave, but a pariah in the land of his birth. The 4,500,000 black South Africans are domiciles as follows: One and three-quarter million in Locations and Reserves, over half a million within municipalities or urban areas, and nearly a million as squatters on farms owned by Europeans. The remainder is employed either on the public roads or railway lines or as servants for European farmers, qualifying, that is, by hard work and saving to start farming on their own account'.¹

Introduction

The purpose of this chapter is to identify the main features of landholding and land ownership in South Africa. It provides an overview of the dispossession of land of the indigenous people of South Africa and the simultaneous legal regulation of title to land of the white oligarchy.

Land has a crucial value in any society as it forms the basis of material and psychological security. As Bennet et al (1985) argue, *'the group that is in a position to manipulate land rights is able to entrench its political hegemony'*.² It is further common cause that a nexus existed between land dispossession and the historical development of agriculture in South Africa and a discussion of the one necessarily implies the other. This is so because land dispossession has historically played a central role in shaping the

¹ Plaatje, S. (1982). *Native life in South Africa*. Raven Press: Cape Town.

² Bennet, T.W., Dean W.H.B., Hutchison, D.B., Leeman, I. & van Zyl Smit, D. (ed.). (1985). Editorial Preface. In *Land ownership: Changing concepts*. Juta & Co, Ltd: Cape Town.

agrarian order and the political economy of South Africa as a whole. However, it is not within the parameters of this chapter to enter into the polemic of the development of capitalist agriculture. This will only occur if the need arises to show the connection between the legal regulation to the title of land, apartheid and the development of capitalist agriculture.

The Colonial Society

The colonial society that emerged after colonization in 1652 by the Dutch East India Company (VOC) was an imposition of its own system of ownership of land onto the colonized whose land ethic was an uncodified customary tradition of landholding. A cogent illustration of this is represented by the conversation between Jan van Riebeeck and Harry the Strandloper in April 1660.³ Van Riebeeck attempted to impress upon Harry the insufficient grazing land between for settlers and the Khoi and that any terms of negotiation should be determined by the colonizer.

Harry replied: *If the country is too small, who has the greater right, the true owner or the foreign invader.'*

Van Riebeeck responded: *'We have won this country in a just manner through a defensive war and it's our intention to keep it.'*

This illustrates that one must not assume that an unwritten form of landholding necessarily implies that there was no system of land tenure prior to the arrival of the colonizers. On the contrary, although the perception may have been by the arriving Dutch that the land was *terra nullius*, it could not have been further from the truth. Rather, the Khoi-

³ Eveleth, A & Mngxitama, A. (2003). The struggles of South Africa's landless. In *Development Update*. Interfund: September 2003.

Khoi did not view land as an object of individual ownership. When they met the Dutch for the first time they assumed they were granting them rights of access and not individual and exclusive rights to own land. Therefore, the origin of 'separate' land for blacks and the social engineering by means of manipulation of land tenure rights goes as far back as the 17th century with the arrival of the VOC settlers.

The Settlement at the Cape of Good Hope

The settlement at the Cape of Good Hope was established in 1652 by the VOC as a refreshment station for ships making the journey between Europe and Batavia. Despite its significance as a refreshment station, the VOC also saw a commercial interest in the Cape Colony. It was nevertheless an expensive exercise and it was for this reason that freehold grants (erfbriewen) were given to freeburghers. This entailed the grantee receiving the right to bring as much land as possible under the plough within three years, following which, the grantee had the right of disposal, that is, the right to sell, lease and/or alienate. However, the grantee and his/her successors in title were subject to the correlative obligations to grow produce for sale to the VOC and to provide military services.⁴ It is difficult to describe this form of tenure but given the correlative obligation, perhaps the best description is that erfbriewen is a servitude-laden form of Dutch freehold.⁵

⁴ Elphick, R. and Gillomee H. (ed.). (1986). *The shaping of South African society*. (pp. 179). Maskew Miller Longman (Pty) Ltd: Cape Town.

⁵ Davenport, T.R.H. (1985). Some reflections on the history of land tenure in South Africa, seen in the light of attempts by the state to impose political and economic control. In *Land ownership: Changing concepts*. Juta & Co, Ltd: Cape Town.

In an alternative description, Carey Miller & Pope see a correlation between this form of tenure and the social relations of production in feudalism.⁶

In 1714 land grants extended to beyond the extent of the Cape of Good Hope settlement. This expansion dispossessed many of the Khoi-Khoi. In contrast to the freehold tenure, land grants during 1714 amounted to a loan farm system (leeningsplaats). The loan farm system, in theory, encompassed an annual lease of farm land subject to a minimal rent being payable as well as a tenth of the crop harvest. In practice however, rent was seldom paid, the land was not surveyed and although the law at the time prohibited the sale and subdivision of land, this was often not the case.⁷ In real terms, leeningsplaats amounted to a legal form of squatting.

The informality of the tenure system during the early years of occupation proved problematic. The unintended consequence of the system was to encourage the population to spread out so widely that it made the countryside ungovernable. It must also be borne in mind that the VOC was primarily a commercial enterprise and the reason for encouraging the freeburghers to settle in the Cape colony was for the production of fresh produce. However, this backfired slightly as the cheapness of the loan farm discouraged capital investment and the development of productive agriculture. In addition, rents were often unpaid and any attempt by the VOC to recover such money led to a rebellion by the freeburghers. In 1732 the VOC tried to remedy this through the introduction of quitrent tenure

⁶ Carey Miller, D.L. & Pope, A. (2000). *Land title in South Africa*. (pp. 4). Juta and Co, Ltd: Cape Town.

⁷ Davenport, T.R.H. (1985). Some reflections on the history of land tenure in South Africa, seen in the light of attempts by the state to impose political and economic control. In *Land Ownership: changing concepts*. Juta & Co, Ltd: Cape Town.

(erfpacht). Quitrent tenure was based on a fifteen-year lease and the holder's name was registered in the office of the secretary to the governor.⁸ However, like the loan farm system, the land was not surveyed. Concomitantly, the loan farm system existed in parallel with quitrent tenure the result of which was that it was still easy to obtain land on loan. Hence, further changes were made in 1743 to convert the loan system to freehold tenure for the same annual fee that was levied on quitrent farms.

In 1795 the Cape colony came under the British Administrators who attempted to tighten the system of landholding. But, during the period up to 1840, the British adopted a rather contradictory position. Duly,⁹ as an example, was highly critical of the British Administration:

From 1795 to 1844 and beyond land policy was one of the most neglected services of the British government at the Cape. The creation of an effective administrative office to control and direct the alienation of land was seldom considered as an object in itself. At no time, from 1795 until 1844, could it be said that either the Cape or the Colonial office undertook a serious examination of how any land code could be properly implemented.

The resultant therefore was that the system of landholding that had already become standard practice under its predecessor remained in tact. This amounted to the colonial administration legalizing what it could not prevent.

⁸ Duly, L. (1968). In Hodson, T. (1997). *South African land tenure, past and present: A country report*. University of Maine.

⁹ Quoted in Carrey Miller D.L. & Pope, A. (2000). *Land title in South Africa*. (pp. 12). Juta and Co, Ltd: Cape Town.

When British authority was consolidated by the permanent annexation of the Cape Colony in 1806 it turned its attention to tightening the system of landholding, an attempt which was largely unsuccessful. In 1813 Governor Craddock proclaimed the conversion of loan places upon application into perpetual quitrent. This also became the form of tenure for new grants. Perpetual quitrent meant that on payment of an annual levy, the right holder received a title to the land that allowed the holder to freely possess, use and dispose of the property excluding mineral rights. But, in different ways and for different reasons, the 1813 proclamations failed. In the first instance, the compromise of establishing security of title in return for acceptance of British authority was wholly rejected by the frontier settlers. Secondly, the British administration lacked the capacity to survey the land and register titles. As a consequence, the colonial administration reverted to the loan farm form of tenure. The indigenous population of course was excluded from the 1813 proclamations and there was no real attempt to incorporate them into the land tenure system. In fact, the administration made an attempt to further restrict the rights of the indigenous population.

The Vagrancy and Contracts of Hire Proclamation No. 14 of 1809 had decreed that every Hottentot will have a fixed place of abode and if he wished to move, he had to obtain a 'certificate' (pass) from the Landdrost. Ordinance 50 of 1828¹⁰ however repealed Proclamation 14 of 1809 by acknowledging the rights of Hottentots to own land as well as extending

¹⁰ Extension of Hottentot Liberties, No. 50 of 1828. In Eybers, G.W. (ed.). 1918. *Select constitutional documents illustrating South African history 1795 – 1910*. George Routledge & Sons, Limited: New York.

their liberties to own land. But, as Carrey Muller¹¹ posits, Ordinance 50 amounted to no more than tokenism because by that stage it was very difficult for the indigenous population to enter into commercial production on an equal footing with the boers.

Location Acts and the Establishment of Reserves

As a brief interlude into the establishment of reserves the Great Trek between 1832 and 1837 terminated whatever hope the indigenous people had in respect of the access to, and control, over land. The establishment of the independent republics of Natalia, Orange Free State and the Transvaal (De Zuid Afrikaanshe Republiek) dispossessed many of the indigenous population of their land. This was an obvious result of the segregationist legislation and policies in these republics. For example, within the Republic of Natalia every male Voortrekker who had entered Natal before 1840 was given two farms and those who arrived later were given one. Consequently, when the Republic of Natalia was annexed by the British in August of 1843 the dispossession caused so much displacement that the establishment of reserves for 'Africans' was recommended. By 1847 the Commission for Locating Natives established seven reserves and in 1864 a further forty-two reserves were established and placed under the control of the Natal Native Trust. The land was classed as Crown Land which effectively did not provide any security of tenure for those in the reserves and further did not provide any security for African tribal interests. The ZAR (Transvaal) and Orange Free State followed the example of the Republic of Natalia with

¹¹ Carrey Miller, D.L. & Pope, A. (2000). *Land title in South Africa*. Juta and Co, Ltd: Cape Town.

perhaps the ZAR being bolder in its land segregationist policies.¹² For example, Article XIII of the Pretoria Convention of 1881 stated that:

'Natives will be allowed to acquire land, but the grant or transfer of such land will be registered in the name of the Native Location Commission.'

In respect of policies regulating Africans in the Cape, Davenport asserts that the government adopted a cautious policy of encouraging the individualization of tenure among Africans.¹³

Among the Cape Assembly's first 'legislated' measures were the Location Acts passed in 1869, 1879 and 1884. The Native Locations, Lands and Commonage Act 40 of 1879¹⁴ is particularly interesting as it provided occupation rights to 'natives' on a one-man, one-lot basis. What is even more interesting is that the power of forfeiture was not retained by the state, which made this a form of quitrent title. The preamble to this Act stated that *'it is desirable that portions of land in such locations shall be granted on person and individual tenure.'*¹⁵ Sections 1 and 2 of the Act clearly spelt out what this meant and how it was to be done. For example, S 1 stated that *'it shall be lawful for the Governor to divide a portion of such land into lots and to grant titles to such lots to separate individuals upon quitrent tenure upon such annual rent ...'* Section 2 of the Act provided for *'reserving a sufficient quantity of land'* for commonage and the common pasturage of

¹² S 9 of the Grondwet of the South Africa Republic of 1858 explicitly states that the 'people desire to permit no equality between the coloured people and the white inhabitants either in Church or State.

¹³ Davenport, T.R.H. (1985). Some reflections on the history of land tenure in South Africa, seen in the light of attempts by the state to impose political and economic control. (pp. 60). *In Land ownership Changing concepts*. Juta & Co, Ltd: Cape Town.

¹⁴ Natives Locations, Land and Commonage Act, No 40 of 1879. In *Cape of Good Hope Statutes 1652-1886 Vol. II L- Z*.

¹⁵ *Ibid.*

stock.¹⁶ However, despite the attempts to persuade 'natives' to accept quitrent title, communal occupation of land remained the norm in these registered reserves.

There were however pernicious reasons for the Location Acts especially around the time of the mineral discoveries. Suffice to say that white farmers in the Eastern Cape were experiencing a shortage of labour and were unable to compete with local black farmers, many of whom held freehold land in the area. As a result, white farmers had resorted to renting out portions of their farms to black farmers. Likewise, being a black sharecropper was a far more preferable mode of life than working directly for a white farmer. The reason was that in the production and sale of crops, black persons had considerable economic freedom at that time. Therefore, if one were to take the view that capitalist agriculture in South Africa emerged from a semi-feudal system with the white landholder extracting rent from the squatter peasantry in the form of cash, kind or labour, then one would appreciate the nexus between the dispossession of land and the development of capitalist agriculture. The crux of the matter is that as industry developed in the wake of the mining revolution in South Africa the need for labour grew at a much larger scale than before. Running parallel to the need for labour was the growing political push to convert the 'communistic principles' associated with black land tenure into a system of holding land under individual rights and by separate title deeds.¹⁷ As a result of mounting political pressure, mainly from the mine owners, the Cape government promulgated legislation

¹⁶ Ibid.

¹⁷ Carrey Miller, D.L. & Pope, A. (2000). *Land title in South Africa*. (pp. 16). Juta and Co, Ltd: Cape Town.

designed to force blacks off the land and into the colonies' emerging industries.

The Native Locations Act 33 was promulgated in 1892 and required farmers to register all blacks working on their lands and imposed severe limitations on the number of blacks permitted to stay on the land who were not actually earning a wage. This measure had a drastic effect on the black sharecropper. Two years later came the infamous Glen Grey Act 25 of 1894. Under the guise of the benevolent provision of individual land tenure rights for blacks in the Cape, it imposed a ten acre limit on the size of all holdings with no man permitted to own more than one holding. The Act further discouraged black representation in Parliament but allowed it in the rural districts. Such districts were divided into locations and the available land in the location divided into allotments of approximately four morgen each in terms of perpetual quitrent.¹⁸ The transfer of land was subject to government approval. For example, it could be forfeited in the case of behavior not approved of by the government, it could not be subdivided or sublet nor could it be bequeathed. The Glen Grey Act also provided for a labour tax. This meant that blacks who did not possess land and who did not work for at least three months of the year outside their district were liable to pay ten shillings per year.¹⁹

The Glen Grey Act had a devastating effect on the South African peasantry as it was their access to communal land that had enabled them to

¹⁸ Davenport, T.R.H. (1985). Some reflections on the history of land tenure in South Africa, seen in the light of attempts by the state to impose political and economic control. (pp. 60). In *Land Ownership: changing concepts*. Juta & Co, Ltd: Cape Town.

¹⁹ Tong, M. (2003). *Lest we forget: Restitution digest on administrative decisions*. (pp. 24). Pretoria: Government Printer.

practice subsistence farming and prosper. Although initially intended for the Glen Grey area, the Glen Grey Act became influential in other areas around the country. Its influence was such that it led to the development of what became known as customary land tenure.

The Glen Grey Act was rapidly followed by Act 30 of 1899. This Act permitted whites to employ any number of blacks but it required them to obtain a prohibitively expensive license before they could lease land to a black.²⁰ Act 32 of 1909 imposed even more limitations. The final result was that blacks were forced to become wage laborers for white farmers, move to bare subsistence farming in the reserves or seek work in industry.

The Beginning of Early Segregation Policy

In 1910 the Union of South Africa was formed and soon after its establishment The Native Land Act 27 of 1913 was promulgated. The Act outlined the practice of blacks being allowed to privately own land, lease land and practice sharecropping. In the words of Davenport the motive of the 1913 Land Act was to:

*'...impose a policy of territorial segregation with a very heavy hand. It aimed specifically to get rid of those features of African land ownership and share-cropping which white farmers found undesirable, and to enlarge reserves to ease congestion and facilitate the recruiting of labour for the mines.'*²¹

The Land Act 27 of 1913 had the effect of demarcating parts of South Africa as black territory and it prohibited the sale of any of the remaining

²⁰ This was in the region of 36 pounds per annum.

²¹ Carrey Miller, D.L. & Pope, A. (2000). (pp. 19). *Land title in South Africa*. Juta and Co, Ltd: Cape Town.

white areas to blacks. The areas demarcated for blacks consisted of approximately 7% of the land area of the Union. Section 1 (a) enforced the policy of segregation by providing that a native could not enter into any agreement with a person other than another native to acquire any interest over land outside the designated scheduled areas except with the approval of the Governor General. The Act also provided that '*no person other than a native shall purchase, hire or acquire any land in a scheduled native area under a penalty of a hundred pound fine or six months imprisonment.*' Effectively, Act 27 of 1913 prohibited blacks from acquiring land outside the scheduled areas other than land already in black hands. It also meant that unsurveyed state land, to which blacks had access and use of, could no longer be registered in their names.²²

The caveat of the Land Act of 1913 was that it was only applicable in Natal and Transvaal since ownership of land in the Orange Free State was forbidden to blacks under Ordinance 5 of 1876. In the Cape of Good Hope, S 35 (1) of the Constitution of the Union of South Africa Act of 1909 protected the political franchise of blacks. What this amounted to was that as a result of the policy of the British administration in respect of access to land, the Land Act of 1913 was not applicable to the Cape of Good Hope if it disenfranchised blacks from the right to vote. Hence, S (8) 2 of the Land Act of 1913 provided that its provisions would not operate to prevent any person

²² Pienaar, K. (2003). *An Overview of land laws in South Africa*. Unpublished Paper.

*'from acquiring or holding a qualification where under he is or becomes entitled to be registered as a voter at Parliament elections ...'*²³

The promulgation of the Black Administration Act 38 of 1927 partially solved this problem. S 5 of the Act was in effect the enabling legislation of S 147 of the South Africa Act of 1909. This empowered the Governor-General of South Africa as the designated supreme chief of all blacks and in later years these powers were extended to cover blacks in the Cape Province.

The Black Administration Act of 1927 effectively regulated the geographical mobility, living conditions and economic activity of blacks and enabled mass relocations in addition to small-scale evictions. Most notably, the Act regulated the administrative control of land, land tenure, land use and every conceivable activity that took place on land in black rural and urban areas.²⁴ Section 4 of the Act provided for the establishment of the South African Development Trust (SADT) which was empowered to acquire land that was identified as 'released areas' (in terms of the Act), scheduled areas (in terms of the Land Act of 1913) and crown land. In terms of the Act, the SADT became the registered owner of the land with the State President being the Trustee of this Trust. It further introduced 'trust tenure'. According to Davenport and Hunt, 'trust tenure' involved a reversal of the trend towards individualization and was a variant form of the traditional

²³ Tong, M. (2003). *Lest we forget: Restitution digest on administrative decisions*. (pp. 31). Pretoria: Government Printer.

²⁴ This means rural and urban areas as demarcated by the Land Act of 1913 and then later the Natives Trust and Land Act 18 of 1936.

communal system but with the control removed from the chief and placed in the SADT officials.²⁵

The Native Trust and Land Act of 1936 effectively ensured the total state control and administration over these land areas and ensured that private land ownership was impossible. Once the Native Representation Act of 1936 abolished the franchise for blacks in the Cape, the sum effect of the legislation was not only to bring about total separation of black land areas from white areas. It also, by virtue of the degradation of land tenure rights in black areas and total administrative control, exerted pressure on blacks to become wage laborers on the farms and in industry.

In 1948, when the National Party came to power the policy towards blacks changed from one of crude exploitation to a ruthless, ideological crusade. The ultimate target was the total separation of races in the social, residential, cultural and political arenas. In the economic sphere, job reservation for whites and other measures designed to keep blacks in the lowest order of employees were introduced. Thus came about a plethora of statutes which created rigid divisions between the races:

- Population Registration Act 30 of 1950 required that all people in South Africa be individually classified in terms of race.
- The Group Areas Act 41 of 1951 provided for areas to be proclaimed as 'reserved' for particular racial groups. No other racial group was permitted to live, trade or own land in a reserved area. The Act also

²⁵ In Carrey Miller, D.L. & Pope, A. (2000). *Land title in South Africa*. (pp. 26). Juta and Co, Ltd: Cape Town.

provided for persons or communities of any other racial group present on the reserved land to be moved out.

- The Natives Re-Settlement Act 19 of 1954 was designed to remove 'black spots' from white urban areas. Blacks were removed from these areas and forcibly relocated.
- The Native Trust and Land Act 18 of 1936 was amended to the Development Trust and Land Act and together with the Black Administration Act controlled every aspect of farming, townships, trading, building, tribal authorities and land tenure in black areas.
- Influx control measures were applied under the Black Urban Areas Consolidation Act 25 of 1945. Its objective was to remove every single black person who could not prove absolute right and title to be there out of white urban areas.

The Marriage between Apartheid and Roman-Dutch Law

The above historical sketch has clearly shown how the principles of property as embedded in the common law were manipulated and indeed violated to serve the interests of racial segregation and Afrikaner Nationalism. As a result of the spatial separation between the races as well as the restriction on the availability of land ownership for black people, the question of the future of land ownership in South Africa has justifiably become an emotional and sensitive subject.²⁶ It therefore comes as no surprise that

²⁶ That the property clause in the write up to the draft and final constitutions was a real bone of contention and a major stumbling block during the negotiation process speaks largely to the emotion it generated from all stakeholders.

there were calls in the early years of democracy as well as recently²⁷ to abolish Roman-Dutch law. Such calls do not provide firstly for adequate solutions, but more importantly, because of the failure to go beyond the normative they lack proper contextual analysis of the relationship between apartheid and the common law. That a nexus existed there is no doubt as apartheid law consisted of a mixture of an 'innocent' legal code (Roman-Dutch law) and the ideological code of Afrikaner Nationalism. This combination created a skewed legal and political dimension. Therefore, apartheid was attached to Roman-Dutch law with the clear intention that it be a permanent fixture.²⁸ To put it differently, the apartheid era cannot be attributed to the inadequacies of the common law. Rather, apartheid was introduced by enabling legislation by virtue of the doctrine of parliamentary sovereignty the derivatives of which are to be found in English constitutional law.²⁹ Therefore, with parliamentary sovereignty protected by the constitution and with one of the golden rules of statutory interpretation under common law being that the legislature does not make mistakes, it became almost impossible for the judiciary to intervene on matters of equity and justice. Van der Walt³⁰ illustrated the violation of the law of property by highlighting the following:

²⁷ As an example, in a recent episode of 'Judge For Yourself' by Judge Dennis Davis one of the discussants held the view that the property clause in the constitution is completely westernised and should be abandoned in favour of traditional African morés.

²⁸ Van der Walt, A.J. (ed.). (1991). The future of common law landownership. In *Land reform and the future of land ownership in South Africa*. Juta and Co, Ltd: Cape Town.

²⁹ S 34 (3) of the Republic of South Africa Constitution Act 110 of 1983 provided: No court of law shall be competent to inquire into or pronounce upon the validity of an Act of Parliament.

³⁰ Van der Walt, A.J. (ed.). (1991). The future of common law landownership. In *Land reform and the future of land ownership in South Africa*. Juta and Co, Ltd: Cape Town.

- Apartheid legislation destroyed the common law spirit of justice and equality that permeated the Roman-Dutch law of property through the promulgation of legislation such as the various Land Acts, Group Areas Act and the Prevention of Illegal Squatting Act.
- The unequal distribution of agricultural and residential land as well as the distortion of tenurial and occupational patterns destroyed what could have developed into a natural system of land relations.
- The belief that Roman-Dutch private law is politically neutral has created a legitimacy crisis and the division between private and public law was artificially upheld to protect such political neutrality.
- The preoccupation with the notions of 'pure'³¹ Roman-Dutch law ensured the neglect of the development of customary law.

In summation, apartheid was successful as a legal system because of the translation of the ideology into legal practice. Given that the legal framework of Roman-Dutch law was already present as an instrument for law reform, all that was left for the judiciary to do was to interpret the various policies of racial segregation rationally and to seek legal reasons for the reform of Roman-Dutch property law. Van der Walt avers that the 'unholy marriage' between Roman-Dutch law and apartheid can be

³¹ Historically, the purist opposition to the 'contamination' of Roman-Dutch law was very closely linked to Afrikaner Nationalism. This initially started within the academic sphere but was really cemented during the 1950's under the then Chief Justice LC Steyn who replaced various English legal rules and principles and doctrines with Roman-Dutch law. In *Regal v African Superslate* 1963 1 SA 102 (A), as an example, it was held that the idea of the legal concept of nuisance was taken from English law was incorrect and rather it is to be found in Roman-Dutch neighbour law.

illustrated by two conflicting characteristics of land law: It was simultaneously 'dynamic movement oriented' and 'static position oriented'.³²

In the former, land and land rights were used as instruments for social change through the creation of legislation to accommodate the ideological goals of apartheid. This means that social engineering through state intervention provided the substance to the ideological meaning of apartheid law. Therefore, it created the legislative and legal space to manipulate existing land rights to shape the development of racial landholding. This was achieved through, inter alia, the segregation of land holding and the redefinition and downgrading of black land rights from ownership to insecure tenure.

In contrast, the 'static position oriented' or analytic mode of apartheid land law made use of the judiciary to uphold the hierarchies of apartheid through the suppression of rules and interpretations that did not fit in with the apartheid ideology and to find legal reasons to enforce the rules and interpretations that did fit.³³ A detailed analysis of these two characteristics will be the subject of the following subsection that looks at the Group Areas Act as a practical example.

The Exclusivist Vision of Roman-Dutch Property Law

Van der Walt³⁴ asserts that the instrument of the apartheid state encompassed creating new law through legislation in order to accommodate

³² Van der Walt, A.J. (2001). 'Dancing with codes - Protecting, developing and deconstructing property rights in a constitutional state'. (pp. 267). In *South African Law Journal*, vol. 118.

³³ Van der Walt, A.J. (2001). 'Dancing with codes - Protecting, developing and deconstructing property rights in a constitutional state'. (pp. 270). In *South African Law Journal*, vol. 118.

³⁴ Van der Walt, A.J. (2001). 'Dancing with codes - Protecting, developing and deconstructing property rights in a constitutional state'. In *South African Law Journal*, vol. 118.

the ideological goals of apartheid. The consequence of the new legislation was that the country could be divided into exclusively white and black areas and the statutory prohibition of one race group owning or using land designated for another race group. Van der Walt³⁵ further avers that in order to serve the interests of the grand plan of apartheid, land rights in black areas had to be redefined and downgraded into insecure tenure rights. Although such laws were created through legislation they nonetheless required interpretation within the legal framework of Roman-Dutch law. The design of the apartheid land legislation was to treat land and land rights as exclusivist in line with the exclusionary vision of racial purity. Such emphasis on exclusivity found an obvious bedfellow in Roman-Dutch property law because it traditionally defines land rights as exclusive spaces that allow for the free exercise of individual autonomy.³⁶ Given that both apartheid and Roman-Dutch property law are exclusionary all that remained was to entrench the role of the judiciary to synchronize the apartheid ideology and the dominant rights theory of Roman-Dutch property law. The result of the synchronization was the spatialization into homelands and the definition of exclusively white, black, indian and coloured residential areas where different property rights with different characteristics and features applied in each of those areas.³⁷ For example,

³⁵ Ibid.

³⁶ Ownership represents the perfect example because it is regarded as the pinnacle of a hierarchy of rights in Roman-Dutch property law. Property law in Roman-Dutch law involves a hierarchy of stronger and weaker rights and ownership is that 'absolute' right upon which other rights are created and evaluated.

³⁷ Van der Walt, A.J. (2001). 'Dances with codes - Protecting, developing and deconstructing property rights in a constitutional state'. In *South African Law Journal*, vol. 118.

the different characteristics of property in white and black areas can be presented as follows:

Figure1: Characteristics of property in white and black areas

White areas	Black areas
Paradigm right is ownership.	Paradigm right is use or use permit.
Paradigm is unitary and hierarchical.	Paradigm is fragmented.
Governed by private law.	Governed by public law.
Source of law: Roman-Dutch.	Source of law: statutes and customary law.
Absolute and complete real right that possesses permanency through registration.	Very limited and restricted right personal use rights based on tribal or statute grants regulated by statute.
Protection of right through legal remedy is very strong.	Protection of right through legal remedy is very weak.
Right can stand as good real security.	Right provides no basis for real security.
System is liberal and modern.	System is feudal.

The *raison d'être* of the Group Areas Act 41 of 1950 was the control of ownership of immovable property by the setting aside of areas for the exclusive ownership/occupation of members of a specific racial group.³⁸ It provided for areas to be proclaimed as 'reserved' for particular racial groups.

³⁸ Schoombee, T.J. (1985). Group Areas legislation – The political control and ownership of land. (pp. 77). In *Land ownership: Changing concepts*. Juta & Co, Ltd: Cape Town.

The Act further made provision for the removal of persons or communities of any other racial group present on the 'reserved' land. This was done by supplementary legislation, most notably, The Prevention of Illegal Squatting Act 57 of 1951.

The Group Areas Act provided for three groups, namely, white, native and coloured. The long title of the Act makes for useful reading and analysis and it provided that the purpose of the act was:

'To consolidate the law relating to the establishment of Group Areas, the control of the acquisition of immoveable property and the occupation of land and premises, and matters incidental thereto.'

Schoombie deconstructed the long title rather well by focusing on the correlation between the imposition of the controls in the Act and land and land use rights, that is:

- The acquisition (holding) of immoveable property.
- The occupation of land and premises.
- The use of land and premises.

These three concepts according to Schoombie constitute the *sine qua non* of the prohibitions to disqualified persons.³⁹ In the first instance, the Act made use of ordinary common law concepts but left these concepts undefined in order to facilitate the extension of the common law definition. In other instances however, statutory definitions were provided that were not exhaustive in scope but in fact extended, curtailed or distorted the

³⁹ Schoombie, T.J. (1985). Group Areas legislation – The political control and ownership of land. (pp. 91). In *Land ownership: Changing concepts*. Juta & Co, Ltd: Cape Town.

ordinary meaning of a concept provided under common law. A classical illustration is the definition of immovable property and the implications it had for the definition of ownership and, by extension, the scope of real and personal rights in respect of property. The ordinary meaning of this concept is simply 'a unit of land and everything permanently attached to it'. In the Act however, the definition of immovable property is as follows:

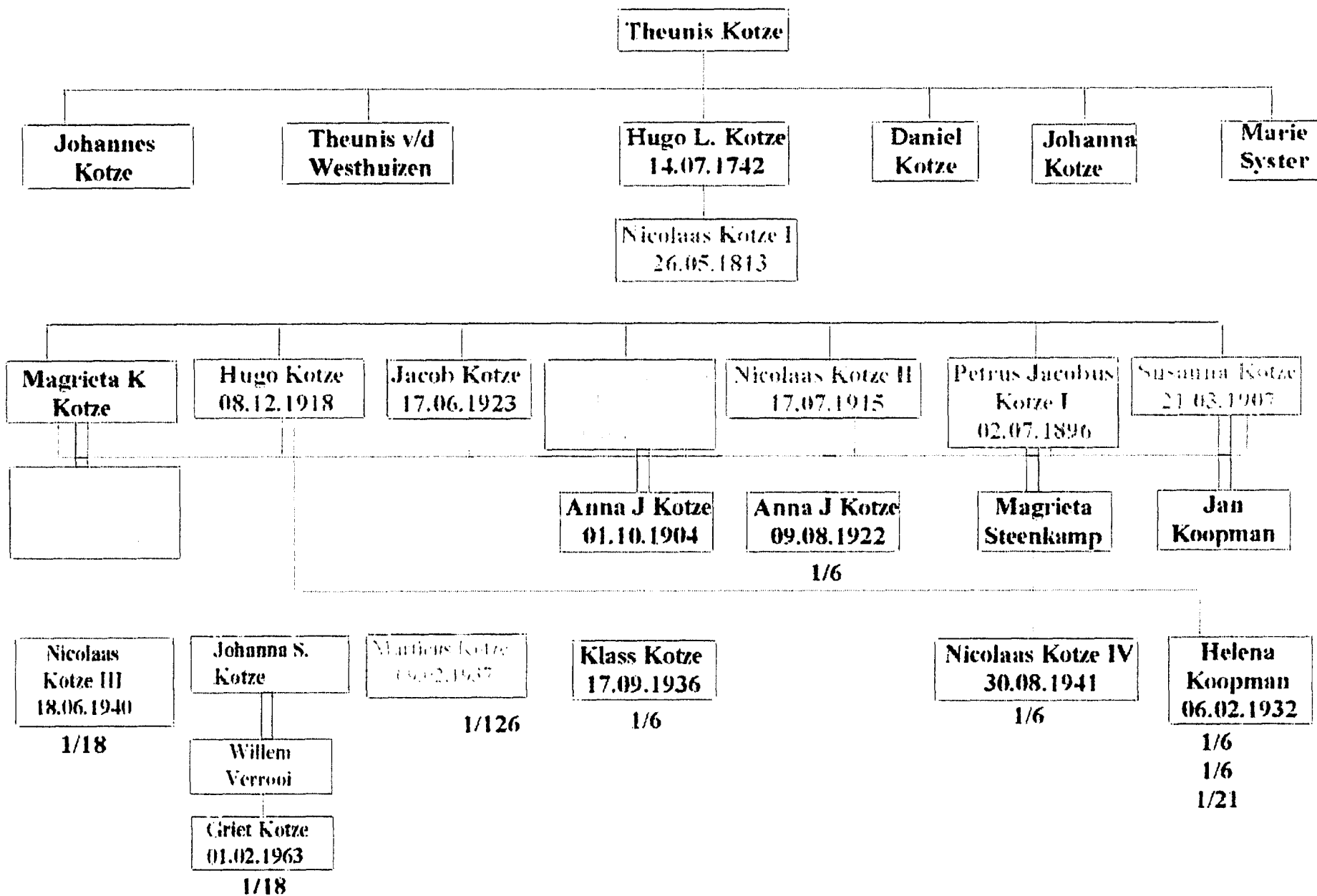
[Immovable property] *'includes any real right in immovable property and any right which would upon registration be such a real right and any immovable property referred to in paragraph (b) of the definition of "owner" and any lease or sublease of immovable property (other than that of a lease or sublease 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 dig or mine any mineral) or a lease or sublease of any such right or 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.'*⁴⁰

In conclusion, when contrasting the two definitions it is clear that there is not only an extension but a distortion of the very essence of Roman-Dutch property law. This example cogently shows how Roman-Dutch law was manipulated to serve the interests of the grand plan of the apartheid policy.

⁴⁰ Schoombee, T.J. (1985). Group Areas legislation – The political control and ownership of land. (pp. 91). In *Land ownership: Changing concepts*. Juta & Co, Ltd: Cape Town.

Appendix II: Genealogy of the Kotze co ownership.

The Kotze Family Tree

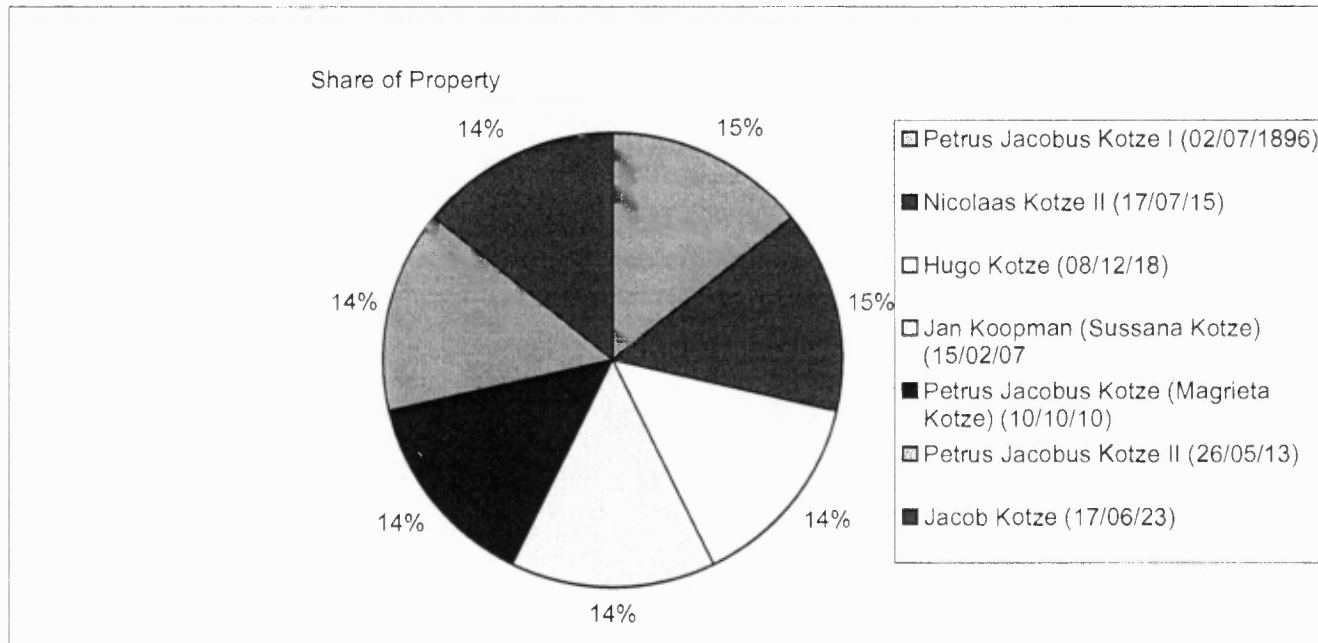


**Appendix III: History of the transfer of property at
Melkkraal since 1953**

Deed of Transfer T6930/1953

Name	Share of Property
Petrus Jacobus Kotze I (02/07/1896)	0.142857
Nicolaas Kotze II (17/07/15)	0.142857
Hugo Kotze (08/12/18)	0.142857
Jan Koopman (Sussana Kotze) (15/02/07)	0.142857
Petrus Jacobus Kotze (Magrieta Kotze) (10/10/10)	0.142857
Petrus Jacobus Kotze II (26/05/13)	0.142857
Jacob Kotze (17/06/23)	0.142857

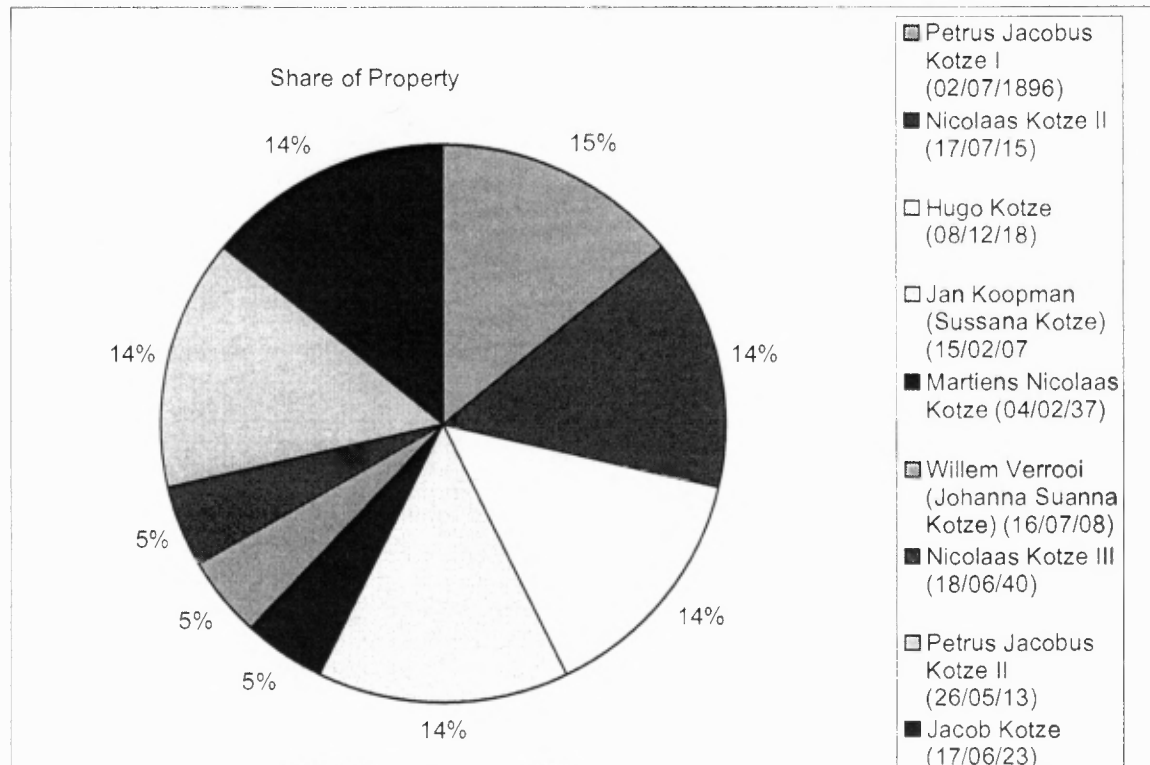
Portion 2 sub-divided amongst the seven children of Nicolaas Kotze (14/07/1842)



Deed of Transfer T4311/1965

Name	Share of Property
Petrus Jacobus Kotze I (02/07/1896)	0.142857
Nicolaas Kotze II (17/07/15)	0.142857
Hugo Kotze (08/12/18)	0.142857
Jan Koopman (Sussana Kotze) (15/02/07)	0.142857
Martiens Nicolaas Kotze (04/02/37)	0.047619
Willem Verrooi (Johanna Suanna Kotze) (16/07/08)	0.047619
Nicolaas Kotze III (18/06/40)	0.047619
Petrus Jacobus Kotze II (26/05/13)	0.142857
Jacob Kotze (17/06/23)	0.142857

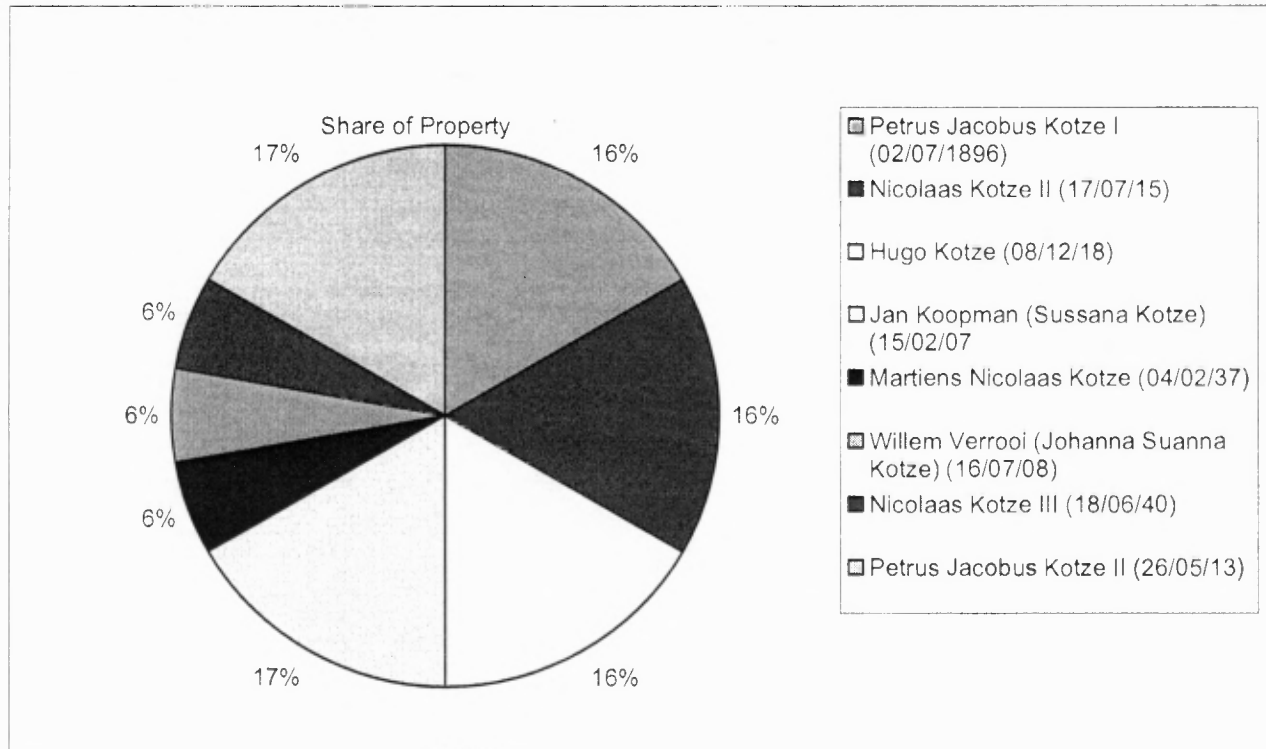
Magrieta Kotze's property was transferred to her husband, Petrus Johannes Kotze (10/10/10) and on his death was transferred to their three children, Nicolaas III (18/06/40), Martiens Kotze (04/02/37) and Willem Verrooi (16/07/08), the husband of daughter, Johanna Susanna Kotze.



Deed of Transfer T4312/1965

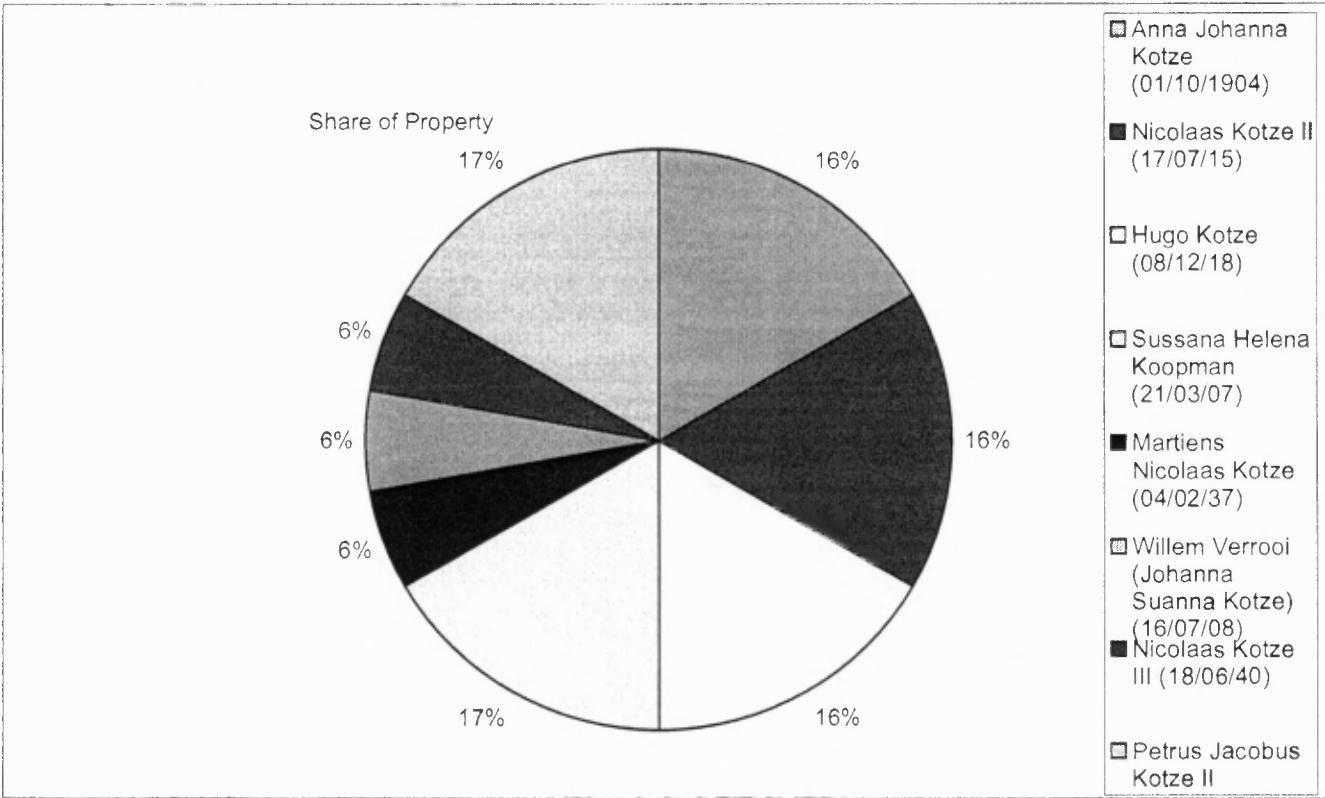
Name	Share of Property
Petrus Jacobus Kotze I (02/07/1896)	0.1666665
Nicolaas Kotze II (17/07/15)	0.1666665
Hugo Kotze (08/12/18)	0.1666665
Jan Koopman (Sussana Kotze) (15/02/07)	0.1666665
Martiens Nicolaas Kotze (04/02/37)	0.0555555
Willem Verrooi (Johanna Suanna Kotze) (16/07/08)	0.0555555
Nicolaas Kotze III (18/06/40)	0.0555555
Petrus Jacobus Kotze II (26/05/13)	0.1666665

On Jacob Kotze's passing, his property was sub-divided amongst his siblings, with the Petrus Kotze's portion sub-divided between his sons and son in-law. They each now have 1/126 & 1/21 of the total land.



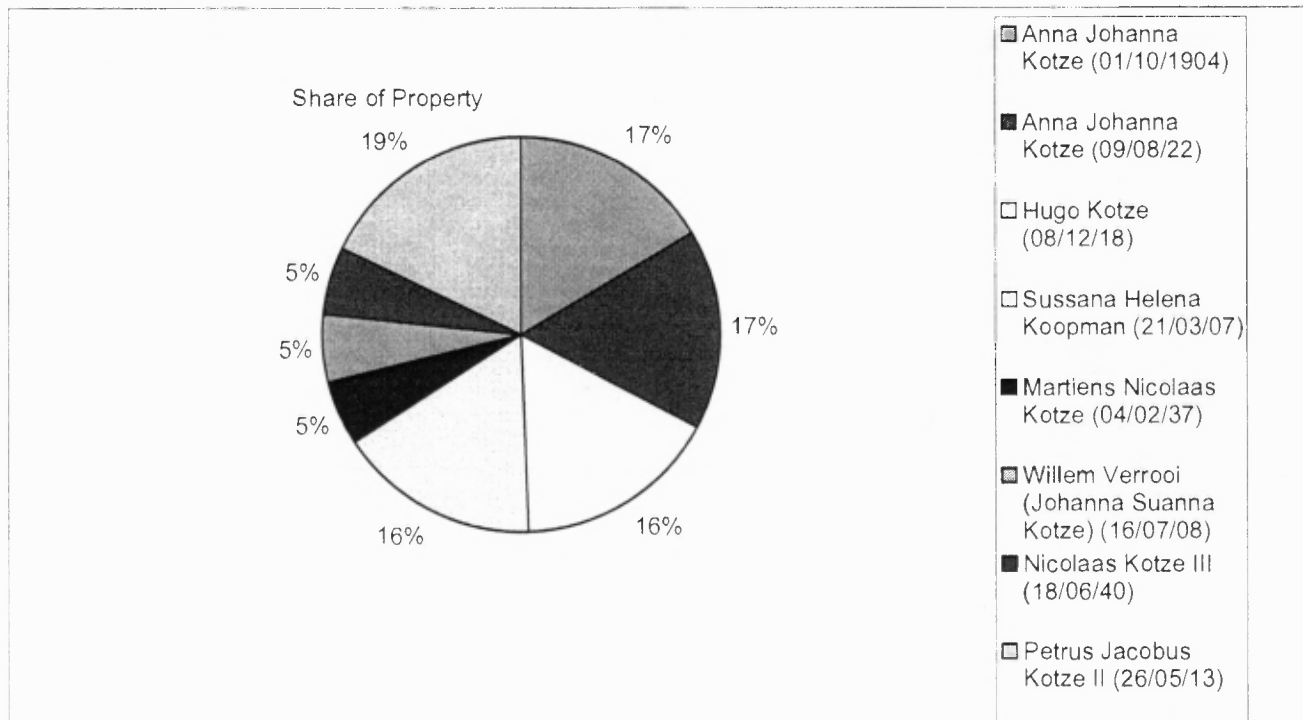
Deed of Transfer 23679/1972	
Name	Share of Property
Anna Johanna Kotze (01/10/1904)	0.1666665
Nicolaas Kotze II (17/07/15)	0.1666665
Hugo Kotze (08/12/18)	0.1666665
Sussana Helena Koopman (21/03/07)	0.1666665
Martiens Nicolaas Kotze (04/02/37)	0.0555555
Willem Verrooi (Johanna Suanna Kotze) (16/07/08)	0.0555555
Nicolaas Kotze III (18/06/40)	0.0555555
Petrus Jacobus Kotze II (26/05/13)	0.1666665

On his death, the share of Jan Koopman is transferred to his wife, Susanna Koopman.



Deed of Transfer 12975/1976	
Name	Share of Property
Anna Johanna Kotze (01/10/1904)	0.1666665
Anna Johanna Kotze (09/08/22)	0.1666665
Hugo Kotze (08/12/18)	0.1666665
Sussana Helena Koopman (21/03/07)	0.1666665
Martiens Nicolaas Kotze (04/02/37)	0.0555555
Willem Verrooi (Johanna Suanna Kotze) (16/07/08)	0.0555555
Nicolaas Kotze III (18/06/40)	0.0555555
Petrus Jacobus Kotze II (26/05/13)	0.180453996

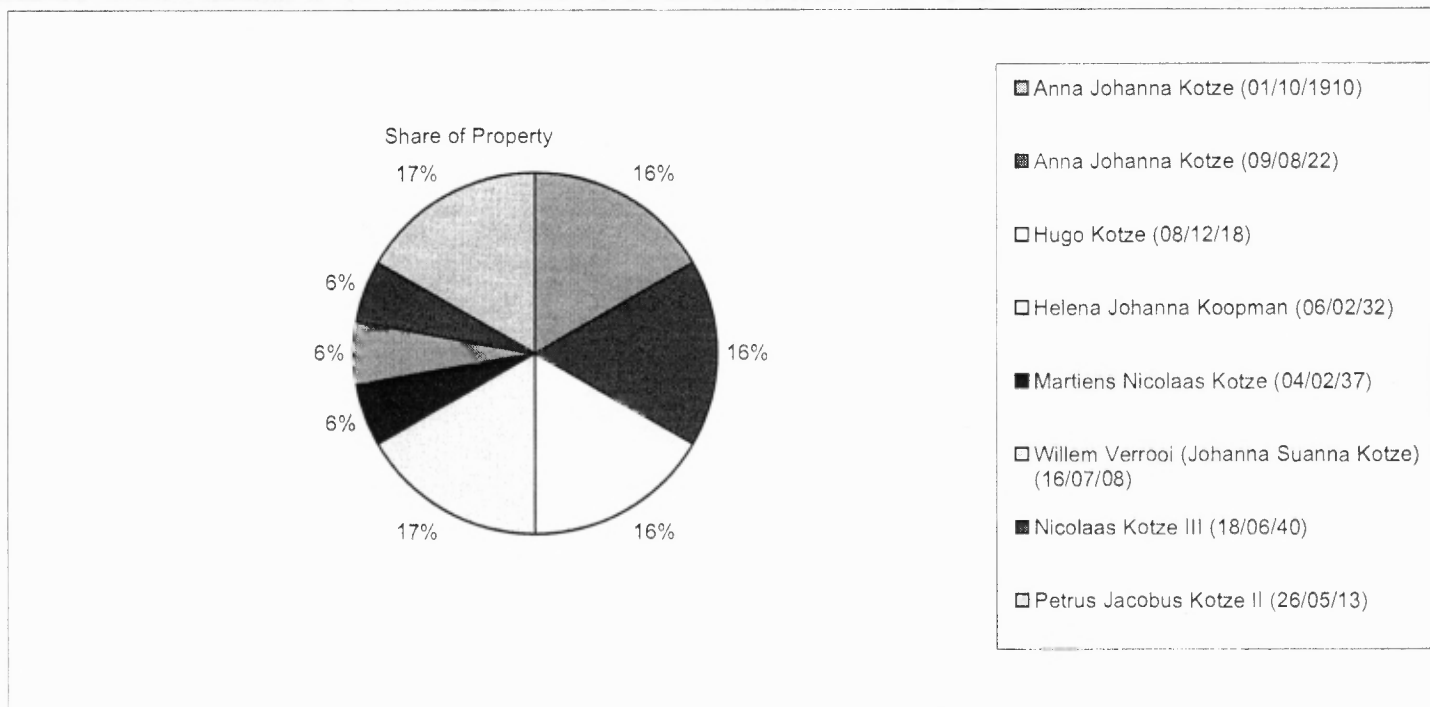
On his death, the share of Nicolaas Kotze II is transferred to his widow, Anna Johanna Kotze.



Deed of Transfer 13492/1977

Name	Share of Property
Anna Johanna Kotze (01/10/1910)	0.1666665
Anna Johanna Kotze (09/08/22)	0.1666665
Hugo Kotze (08/12/18)	0.1666665
Helena Johanna Koopman (06/02/32)	0.1666665
Martiens Nicolaas Kotze (04/02/37)	0.0555555
Willem Verrooi (Johanna Suanna Kotze) (16/07/08)	0.0555555
Nicolaas Kotze III (18/06/40)	0.0555555
Petrus Jacobus Kotze II (26/05/13)	0.1666665

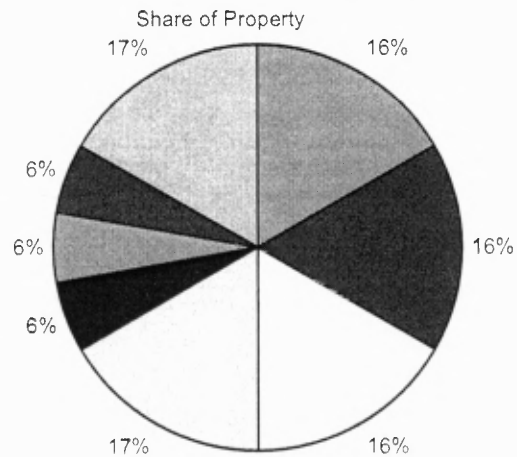
On her death, the share Susanna Koopman was transferred to her daughter, Helena Johanna Koopman.



Deed of Transfer T23327/1980

Name	Share of Property
Anna Johanna Kotze(01/10/1904)	0.1666665
Anna Johanna Kotze (09/08/22)	0.1666665
Hugo Kotze (08/12/18)	0.1666665
Helena Johanna Koopman (06/02/32)	0.1666665
Martiens Nicolaas Kotze (04/02/37)	0.0555555
Willem Verrooi (Johanna Suanna Kotze) (16/07/08)	0.0555555
Nicolaas Kotze III (18/06/40)	0.0555555
Nicolaas Kotze IV (30/08/41)	0.1666665

The 1/6th share of Petrus Jacobus Kotze is bequeathed to his son, Nicolaas Kotze III.

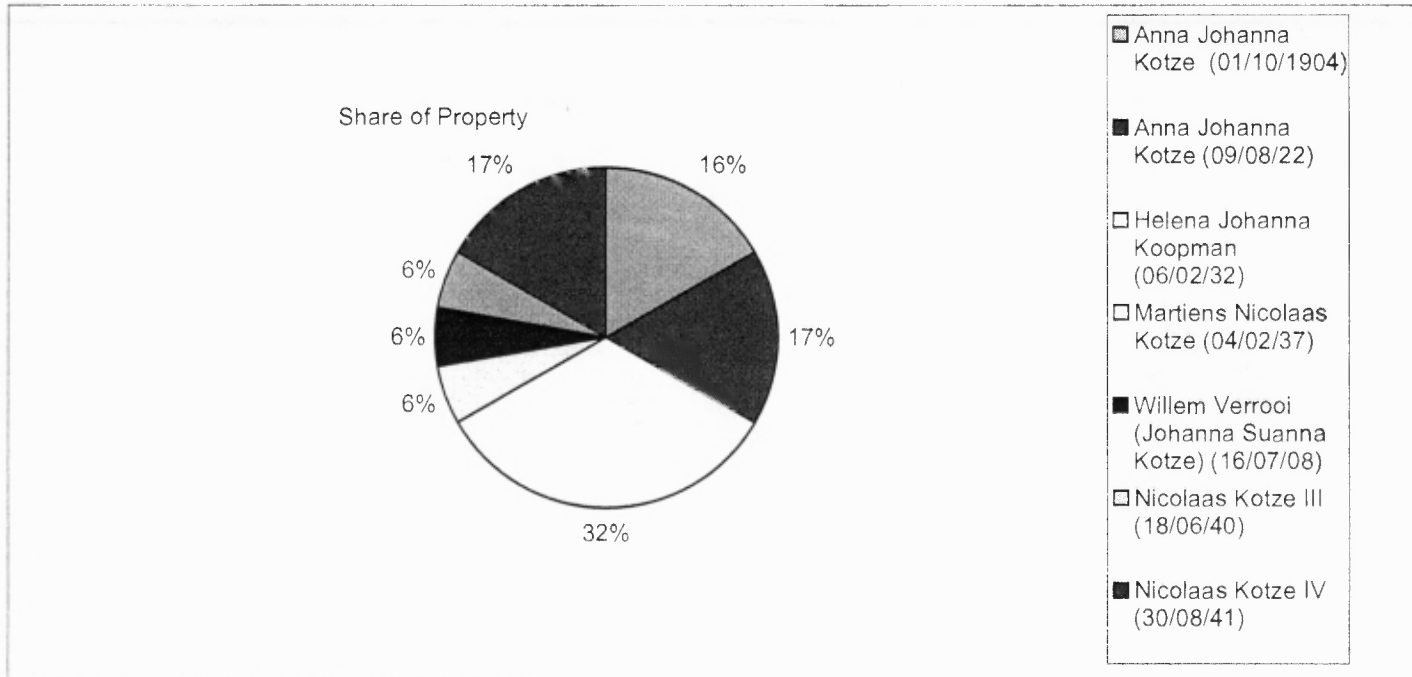


- Anna Johanna Kotze(01/10/1904)
- Anna Johanna Kotze (09/08/22)
- Hugo Kotze (08/12/18)
- Helena Johanna Koopman (06/02/32)
- Martiens Nicolaas Kotze (04/02/37)
- Willem Verrooi (Johanna Suanna Kotze) (16/07/08)
- Nicolaas Kotze III (18/06/40)
- Nicolaas Kotze IV (30/08/41)

Deed of Transfer T31822/1986

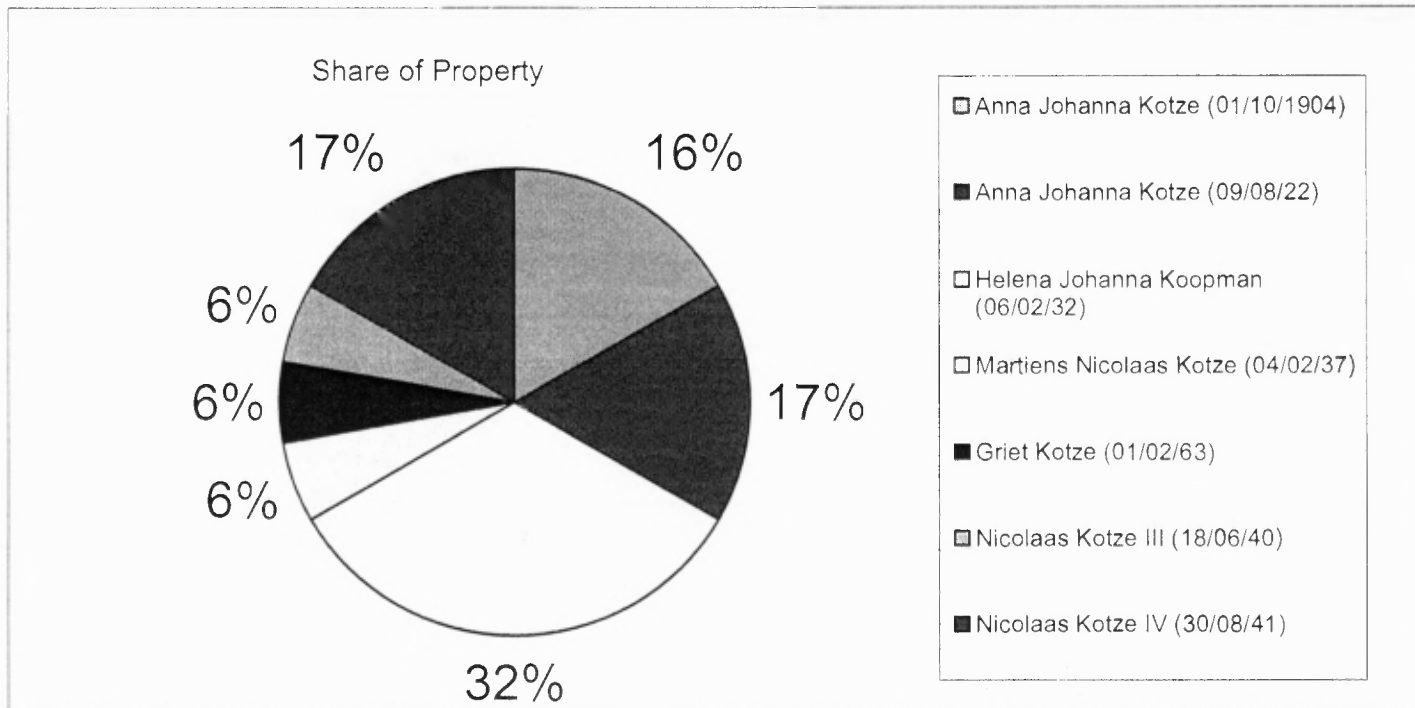
Name	Share of Property
Anna Johanna Kotze (01/10/1904)	0.1666665
Anna Johanna Kotze (09/08/22)	0.1666665
Helena Johanna Koopman (06/02/32)	0.333333
Martiens Nicolaas Kotze (04/02/37)	0.0555555
Willem Verrooi (Johanna Suanna Kotze) (16/07/08)	0.0555555
Nicolaas Kotze III (18/06/40)	0.0555555
Nicolaas Kotze IV (30/08/41)	0.1666665

The 1/6th share of Hugo Kotze is transferred to his niece Helena Johanna Koopman.



Deed of Transfer T51701/1986	
Name	Share of Property
Anna Johanna Kotze (01/10/1904)	0.1666665
Anna Johanna Kotze (09/08/22)	0.1666665
Helena Johanna Koopman (06/02/32)	0.333333
Martiens Nicolaas Kotze (04/02/37)	0.0555555
Griet Kotze (01/02/63)	0.0555555
Nicolaas Kotze III (18/06/40)	0.0555555
Nicolaas Kotze IV (30/08/41)	0.1666665

The 1/18th share of Willem Verrooi is transferred to Griet Kotze.

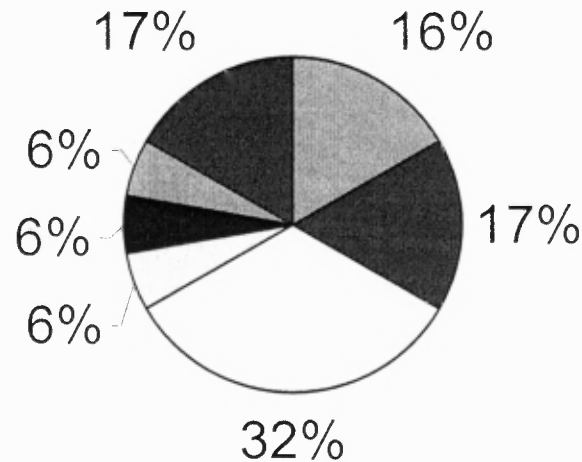


Deed of Transfer T28143/1988

Name	Share of Property
Klaas Kotze (17/09/1936)	0.1666665
Anna Joanna Kotze (09/08/22)	0.1666665
Helena Johanna Koopman (06/02/32)	0.3333333
Martiens Nicolaas Kotze (04/02/37)	0.0555555
Griet Kotze (01/02/63)	0.0555555
Nicolaas Kotze III (18/06/40)	0.0555555
Nicolaas Kotze IV (30/08/41)	0.1666665

The 1/6th share of Anna Johanna Kotze is transferred to her son, Klaas Kotze.

Share of Property

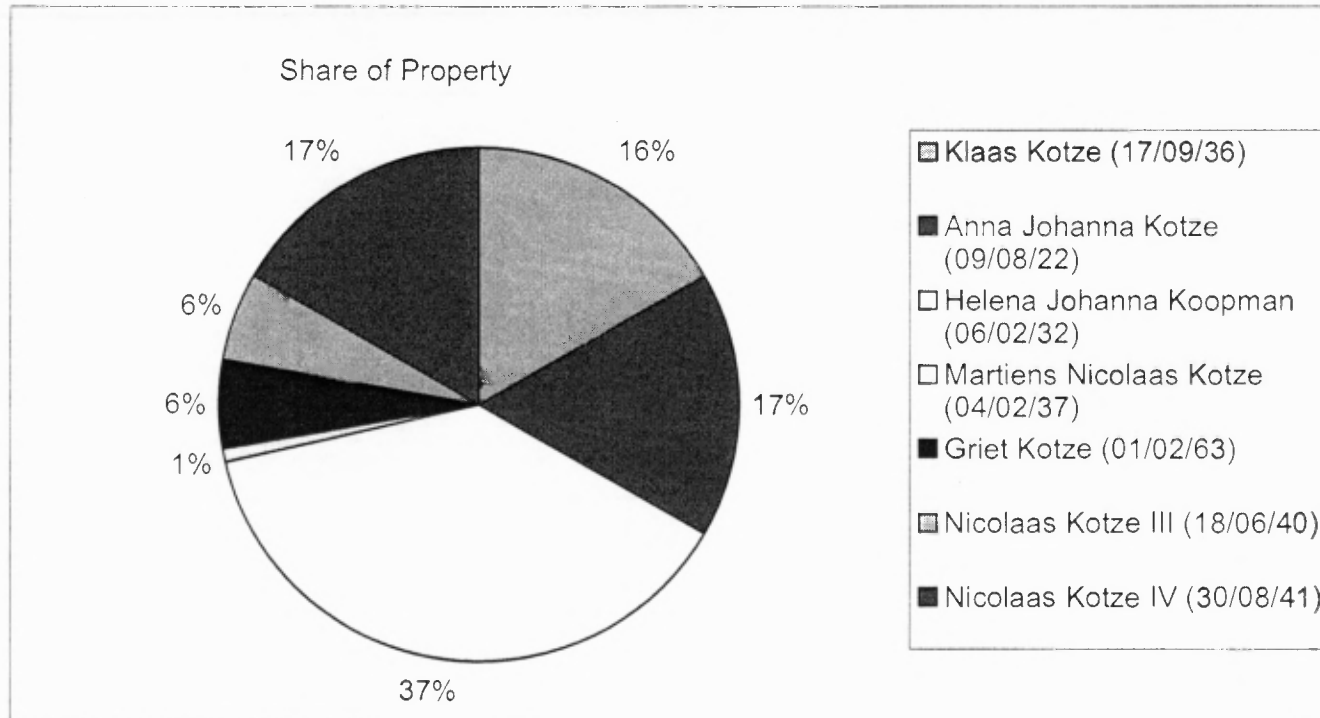


- Klaas Kotze (17/09/1936)
- Anna Joanna Kotze (09/08/22)
- Helena Johanna Koopman (06/02/32)
- Martiens Nicolaas Kotze (04/02/37)
- Griet Kotze (01/02/63)
- Nicolaas Kotze III (18/06/40)
- Nicolaas Kotze IV (30/08/41)

Deed of Transfer T22451/1990

Name	Share of Property
Klaas Kotze (17/09/36)	0.16666
Anna Johanna Kotze (09/08/22)	0.16666
Helena Johanna Koopman (06/02/32)	0.3809523
Martiens Nicolaas Kotze (04/02/37)	0.0079365
Griet Kotze (01/02/63)	0.0555555
Nicolaas Kotze III (18/06/40)	0.0555555
Nicolaas Kotze IV (30/08/41)	0.1666665

Martiens Nicolaas Kotze sells 1/21 of his share to Helena Johanna Koopman.



Appendix IV: A community profile

House	Names	Occupation
1	Dina Lot	Pensioner
	Katrina Scheepers	Unemployed
2	Jan Syster	Pensioner
	Jacoba Helena Syster	Pensioner
3	Frans Kotze	Seasonal Worker
	Marie Kotze	Pensioner
	Lena Kotze	Seasonal Worker
	Hugo Kotze	Apprentice
4	Petrus Jacobus Kotze	Painter
	Susanna Kotze	Housewife
	Quiton Kotze	Scholar
5	Elizabeth Kotze	Seasonal Worker
	Brendon Van Wyk	Scholar
6	Abraham Fortuin	Seasonal Worker
	Katriena Fortuin	Housewife
	Nico Fortuin	Scholar
	Aljacum Fortuin	Minor
7	Johanna Fortuin	Pensioner
	Gert Fortuin	Seasonal Worker
8	Andries Fortuin	Pensioner
	Lyah Fortuin	Pensioner
	Alida Fortuin	Seasonal Worker
	Lyah Fortuin	Seasonal Worker
	Andries Kousie	Seasonal Worker
	Geraldine Fortuin	Scholar
	Jacques Opperman	Scholar
9	Marthinus Kotze	Seasonal Worker
	Maria Kotze	Housewife
	Hugo Kotze	Seasonal Worker
	Meagan Kotze	Scholar
	Nolene Kotze	Seasonal Worker
10	Hugo Kotze	Disability Pension
11	Dirk Sass	Seasonal Worker
	Elisabeth Sass	Seasonal Worker
	David Sass	Seasonal Worker
	Maria Kotze	Seasonal Worker
	Magrieta Kotze	Seasonal Worker
	Abraham Sass	Seasonal Worker
	Beverly Sass	Scholar
	Jolemine Sass	Minor
	12	George Gouws
13	Marie Syster	Seasonal Worker
	Andries Syster	Seasonal Worker
	Mercia Syster	Seasonal Worker
	Nicolaas Syster	Minor
	Shantell Syster	Minor

House	Names	Occupation
	Lena Kotze	Seasonal Worker
	Helena Verrooi	Pensioner
	Anna Williamse	Pensioner
14	Ragel Kotze	Pensioner
15	Williem Beukes	Pensioner
16	Anna Lot	Seasonal Worker
	Abraham Steenkamp	Seasonal Worker
17	Jan Syster	Seasonal Worker
	Griet Syster	Housewife
18	Gert Witbooi	Seasonal Worker
	Siena Witbooi	Seasonal Worker
	Anita Witbooi	Seasonal Worker
19	Drieka Kotze	Domestic Worker
	Johannes Fraaier	Seasonal Worker
	Andrias Kotze	Scholar
	Elton Kotze	Scholar
	Karin Kotze	Works off farm
20	Petrus J Kotze (Piet)	Seasonal Worker
	Sophie Kotze	Domestic Worker
	Donna Kotze	Scholar
21	Nicolaas Kotze	Seasonal Worker
	Sanna Kotze	Housewife
	Francois Kotze	Scholar
	Joseph Kotze	Scholar
	Sandria Kotze	Minor
	Jan Kotze	Scholar
22	Jan Kotze	Seasonal Worker
	Dina Kotze	Pensioner
	Alida Kotze	Seasonal Worker
	Jenna-Lee Kotze	Minor
	Kelly-Anne Kotze	Minor
	Carminita Kotze	Minor
	Ingrid Kotze	Scholar
23	Rosaline Syster	Seasonal Worker
	Denver Syster	Scholar
	Wesley Opperman	Scholar
24	Jakob Koopman	Seasonal Worker
25	Chrisjan Fortuin	Sharecropper
	Adoline Fortuin	Housewife
	Christopher Fortuin	Scholar
	Edgar Fortuin	Scholar
	Morne Fortuin	Minor
26	Martiens A Kotze	Seasonal Worker