Community Development Trusts: Brokering Property Rights on 'Communal' Land in the Richtersveld

Dissertation presented for the degree of Master of Science in Environmental and Geographical Science

by

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Declaration

This dissertation is submitted by me to the University of Cape Town for the award of a Masters degree. It is research work carried out by me under the supervision of Professor Maano Ramutsindela.

I know the meaning of plagiarism and declare that the work in this dissertation is my own in conception and execution. The contribution from the work or works of other people has been credited accordingly.

Signed by candidate

Kolosa Ntombini

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This dissertation is in honour of my parents, Lutukela and Neliswa Ntombini, whose life grounds and inspires me to do better. I would not have been able to produce this work without the people who have impacted my journey.

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Abstract

Property is a concept that gained traction by the ways in which it organises human relations and access and ownership resources. Research in legal geography has shown that property is mobilised to justify or resist dispossession. Colonial powers invoked problematic ideas of the property rights of indigenous people to justify land dispossession through trusts. The British empire was particularly well-versed in this, adopting a trusteeship model whereby indigenous land was held in trust. Placing indigenous land in trust enabled the empire to appropriate indigenous land without the moral hazard of violent land dispossession. The empire used trusts under the pretext that it sought to protect indigenous people and their land from increased competition for land triggered by settler influx. However, the trusteeship model fundamentally altered the property rights of indigenous people by redefining historical owners of the land as beneficiaries with no decision-making powers over property.

This study shows that the trusteeship model that was instrumental for land dispossession in South Africa re-emerged in the democratic era in the form of community development trusts. These trusts are not community-driven but are instead designed and created by the state to serve as an avenue for the state to exercise control over natural resources and to manage the relations between communities and the state. This study locates these dual roles within the broader political history of South Africa to demonstrate that the democratic state has maintained the symbiotic relationship between trusts and the state and that this enables the state to manage contestations over property.

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BBM	Bisset Boehmke McBlain Attorneys
CDT	Community Development Trust
CPA	Communal Property Association
DNA	Department of Native Affairs
DPE	Department of Public Enterprises
DRDLR	Department of Rural Development and Land Reform
ITB	Ingonyama Trust Board
LCC	Land Claims Court of South Africa
LMT	Lebowa Minerals Trust
NCOP	National Council of Provinces
NLA	Natives Land Trust
NP	National Party
NTLA	Natives Trust and Land Act
OFS	Orange Free State
PSJV	Pooling and Sharing Joint Venture
RCMC	Richtersveld Combined Management Committee
RMC	Richtersveld Mining Company
RGT	Richtersveld Gemeenskaps Trust
RIT	Richtersveld Investment Trust
TPCA	Trust Property Control Act
SADT	South African Development Trust
SANT	South African Native Trust
SCA	Supreme Court of Appeal of South Africa
VOC	Dutch East India Company

Chapter 1

Trusts in Context: Background of the Study

1.1 Introduction

This study seeks to understand how patterns of landholding in communal areas of South Africa have changed over time with an emphasis on the role played by trusts in this process. Broadly defined a trust is a "fiduciary relationship in which one party, the settlor or founder, gives another party, the trustee, the right to hold title to property or assets for the benefit of a third party, the beneficiary" (Manie, 2015: 44). Trusts have been a constant feature in communal areas since the earliest trusts recorded in 1844 in the Cape Colony (cf. Chapter 4). The notorious South African Native Trust (SANT) that held most communal land under white minority rule (cf. Chapter 5) to the proliferation of trusts in areas where there is mining development in the 2020s (cf. Chapter 6).

Since their establishment, trusts have been heavily contested because they turn community members from being land rights holders to beneficiaries. This action has serious implications for control over the land and revenue derived from the exploitation of that land. For example, the democratic government has acknowledged that in practice, trusts have constrained the flow of benefits to the envisioned beneficiaries in the mining sector (Department of Mineral Resources, 2018). Surprisingly the use of trusts as a tool to hold land and revenue for rural communities in South Africa has not stopped, if anything the democratic government continues to support the use of trusts despite the concerns that it has acknowledged. This raises interesting questions about the relationship between trusts and the state as well as the implications of this relationship for patterns of landholding.

The study uses the lens of property to explore this relationship. This lens is helpful because property organises and distributes rights, entitlements, and duties amongst people in relation to valuable resources (Blomley, 2016). Therefore, property reveals the nature of the different rights that individuals and communities have to a valued resource, in this case, land. Typically, rights of ownership and control go hand in hand, however, in a trust arrangement, this is not the case. A trust creates a complex legal arrangement that separates ownership and control rights and assigns them to the trust and trustees respectively. More importantly, the rights of the beneficiaries in this arrangement are limited. This is concerning given that control over

property is a good measurement of people's bargaining power (World Bank, 2017) and as a result their ability to negotiate good outcomes in development projects on their land.

At a conceptual level, using property as a lens to understand patterns of landholding in communal areas is important. In South Africa, much like other settler colonies, communal land tenure is still shrouded with uncertainty. There is a tendency to focus on access to land and the symbolic recognition of claims to land rather than the underlying question of land ownership (Lenggenhager & Ramutsindela, 2021). The emphasis on access and symbolism, most notably through the land reform programme, hides the reality that colonial land dispossession remains unresolved. Using property as an entry point offers a critical lens to reflect on the continuities of colonial land dispossession in the present.

1.2 Brokering property rights through trusts

Trusts emerged as part of colonial conquest in Africa. Colonialism centred around land dispossession with colonial powers invoking problematic ideas about the property rights of indigenous people to justify their actions. For example, the British colonial government argued that indigenous people had undefined rights to land (Bennett, 1996; Adams & Turner, 2005) meaning that their land was ownerless according to European standards. Using this justification, trusts were portrayed positively as tools to ensure that there was land set aside for indigenous people given the influx of settlers into the colonies and the consequent competition for land. However, placing land in trust not only masked the violence inherent in land appropriation but changed indigenous property rights fundamentally.

In South Africa, this was done through the South African Native Trust (SANT), later renamed the South African Development Trust (SADT) which held African land in communal areas. Through the SADT African land was controlled by the Governor-General, the Prime Minister, who was the supreme trustee with African traditional authorities as sub-trustees reporting to him (cf. Chapter 2). All rights of control over the land which included the right to sell, lease or alienate the land were assigned to the supreme trustee with a provision that he must use his power for the benefit of African people (Bennett & Powell, 2000). However, no provision outlined what rights the beneficiaries had in the system, especially when the supreme trustee did not administer the land in ways that benefited them. Before the introduction of trusts, traditional authorities were accountable to their people through customary law. But after the

introduction of trusts accountability mechanisms were diverted away from the people since traditional authorities were now accountable to the Governor-General as the supreme trustee (Ng'ong'ola, 1992; Delius et al., 1997). As a result of this change, African people become passive participants in land relations with no rights of control or avenues to bargain for accountability over those who exerted control over their land. It is these adverse implications on African land tenure that prompted resistance to trusts that culminated in the SADT being dismantled as the country began negotiations to end apartheid (cf. Chapter 6).

Interestingly the use of trusts re-emerged in the democratic era. The trusts found in democratic South Africa have been termed community development trusts (CDTs or community trusts) which suggests that they come from the community rather than the state (Zungu, 2016; Matebesi, 2020) and that they have been formed to facilitate development (Nelwamondo, 2016; Zungu, 2016). Many CDTs are described as success stories with an emphasis on how they have been able to grow their asset base and run development programmes (Nelwamondo, 2016), yet a closer look at the lived realities of the people in the areas with CDTs suggests the opposite. Not only is it difficult to see the tangible signs of development but community dissatisfaction is widespread (Bennie, 2018; Corruption Watch, 2018; Matebesi, 2020).

The widespread dissatisfaction reported in these communities has prompted an increase in research looking at the cause of the challenges experienced by community trusts. However, such research lacks the much-needed theoretical grounding. Much of the research is in the form of research reports (Harvey, 2017; Snyman, 2017; Corruption Watch, 2018; World Bank, 2017) and media articles (Mahapa, 2019; Ryan, 2019; Matikinca, 2020) which attribute the poor development outcomes to maladministration, corruption, and leadership disputes. While such research is useful in unpacking the challenges faced by community trusts, it does not address the deeper question of property rights which is at the heart of community trusts, their functions, and outcomes. Matebesi (2020) argues that at the centre of the conflict and challenges experienced by community trusts are unresolved concerns about land rights. While Matebesi (2020)'s articulation is not new and is echoed by practitioners in the field, there is a lack of scholarly work that grapples with the relationship between trusts and property rights meaningfully. This is quite surprising as it is recognised that trusts have been a major source of conflict in mining communities in South Africa (Matebesi, 2020; Matikinca, 2020). As such the study seeks to make a theoretically grounded analysis of the role of unresolved questions

of property rights in the success of trusts and to contribute to the understanding of trusts in South Africa.

It is important to clarify that community development trusts can exist in different sectors including mining, retail, tourism, agriculture, land reform, and renewable energy (Nelwamondo, 2016). However, this study limits itself to CDTs that have been established following successful land restitution claims that resulted in negotiations, and in some cases, partnerships with the government to facilitate conservation and mining ventures. This is because these CDTs emerge within the context of the national land reform programme through which the democratic state aims to address the legacy of unjust patterns of landholding. The national land reform programme is anchored on three principles, land redistribution, land restitution and tenure reform (Republic of South Africa, 2017). Hence, the 2017 National Land Reform Framework Bill describes the mandate of land reform as building a "unitary non-racial system of land rights for all South Africans that moves away from weak forms of rights" (National Land Reform Bill, 2017:7). This means that all aspects of the land reform programme, including the settlement of land restitution claims, must feed into this mandate. Consequently, CDTs that emerge from successful land restitution claims should be analysed through the lens of how they influence property rights on communal land.

The study makes two arguments, the first being that the impact of trusts on property relations has not fundamentally changed. Trusts weaken ownership and control over land by introducing legal ambiguities and complexities into property relations. To advance this argument, the study analyses CDTs in parallel to the trusts established under the colonial and apartheid regimes. This approach is beneficial because it locates trusts within the broader political history of the country and by doing so allows for a comparative approach to the evolution of the symbiotic relationship between trusts and the state which is revealed by property.

The second and related argument is that trusts must be seen as part of the state's apparatus used to exert control over people and space. For the colonial government, trusts were central in defining colonial geography which was grounded on segregation principles. Trusts enabled the colonial state to limit African land purchases while the state consolidated its approach over how to govern the newly acquired territory. The apartheid state, as shall be shown, would later perfect this geography of segregation through the creation of Bantustans and Coloured Reserves using the colonial framework. Moreover, the democratic state would be invested in

keeping this geography intact despite the dawn of democracy. Interestingly, the democratic state has also found ways to co-opt this geography for its benefit, particularly in communal areas where there are valuable resources.

As such, this study aims to explore the role of trusts in shaping property relations on communal land in South Africa.

To achieve this aim, the study has three objectives:

a. To trace the origins of trusts in organising property relations
b. To analyse the workings of trusts in the creation of the Bantustans and the Coloured Reserves
c. To understand the role of trusts in democratic South Africa using the Richtersveld as a case study

1.3 Richtersveld: a case study of trusts through time

Given the long history of the use of trusts in African land tenure, it was important to choose a case study where trusts have been present in all three governing regimes of the South African state, namely colonialism, apartheid, and democracy.[1] The Richtersveld community was chosen for this reason. Trusts in the Richtersveld can be traced to 1844 when a mission station was established by the Rhenish Missionary Church (Strassberger, 1969). It is the mission station that drew the pastoralists to the area leading to the establishment of the first Richtersveld town, Kuboes (South African History Online, 2019a). With time other towns were established and in 2021 the Richtersveld consists of four towns Lekkersing, Sanddrift, Eksteenfontein and Kuboes in the vicinity of the Richtersveld National Park and (Figure 1.1).

[1] While these three governing regimes are separated in the study for analytical purposes, there is an appreciation that they are not necessarily distinct. Indeed, scholars (Moon, 2017; Ramutsindela, 2017) argue that the separation between colonialism and apartheid is often superficial as both are underpinned by segregations principles, while others (Moon, 2017; Matebesi, 2020) problematize the notion of the "democratic" state preferring to use the term, "post-apartheid" state to reflect the continuities of apartheid in the present. In the study, both democratic state and post-apartheid state are used interchangeably.

Figure 1.1: Location of the Richtersveld towns

(Source: https://www.richtersveld-conservancy.org/where.php)

The history of these towns is tied to the development of trusts in the country. For example, when the Cape Colony government passed the Mission Station and Communal Reserves Act of 1909 (Mission Stations Act), the Kuboes mission station land, alongside other mission stations, was transferred to the Minister of Lands who held it in trust for the inhabitants. The Mission Stations Act played a significant role in the establishment of the Coloured Reserves which the Richtersveld is a part of. In parallel to the Mission Stations Act, twenty-seven years later the Native Trust and Land Act of 1936 formed the South African Native Trust which was central in the creation of the Bantustans.

Trusts have continued in the Richtersveld through conservation and mining ventures. The full discussion of these trusts is in Chapters 6. For the moment it is worth noting that following negotiations to form the Richtersveld National Park as a contractual park in 1991, the state symbolically recognised the Richtersveld community as owners of the land on which the park sits. Accordingly, the Richtersveld Gemeenskap Trust was established to hold land rentals received from the South African National Parks (SANParks). Later in 2003, the Richtersveld community won a land restitution claim that involved a narrow piece of land along the Orange River where there is diamond mining. The community negotiated with the state and Alexkor, the state-owned enterprise in charge of the mining. These negotiations resulted in a Deed of Settlement which was made into a Court Order in 2007. As part of the Deed of Settlement, the community and Alexkor formed a Pooling and Sharing Joint Venture to continue the mining operations and various trusts were formed to hold the compensation and assets received as part of the Deed of Settlement (cf. Chapter 6).

Thus, the Richtersveld case study allows for an exploration of trusts in their historical and contemporary contexts. Additionally, the choice of the Richtersveld places the analysis of a Coloured Reserve within the ambit of the broader political economy of trusts in South Africa. Unlike the former Bantustans which have been extensively studied, the former Coloured Reserves remain on the fringes of agrarian studies. This is understandable, in part, because the former Bantustans account for a larger percentage of communal land in South Africa. However, it means that the understanding of communal areas is not holistic. By choosing the Richtersveld as a case study, the study also aims to bring the literature on the former Coloured Reserves into conversation with that of the Bantustans to improve understandings of communal areas in South Africa.

1.4 Structure of the dissertation

Following this introductory background, Chapter 2 provides the theoretical grounding of the study by exploring the intersection between trusts, property relations and the state. Understanding this intersection is important because it is the state that organises and regulates property relations; meaning without the state there would be no property rights (Underkuffler, 2013). Therefore, to understand property of which the trusts influence, one must grapple with the role of the state more deeply. Understanding the role of the state is also useful in tracing the origins of trusts before their introduction in the colonial context. While trusts are regarded

as a feature of English law some sources suggest otherwise. These sources are engaged to provide a holistic understanding of trusts as an institution. The chapter also reflects on the choice of property as a lens to understand African land tenure. Some African scholars (Okoth-Ogendo, 1989; Mafeje, 2003; Ngugi, 2004) warn against the use of property arguing that property is fundamentally a European concept that misses the nuances of African land tenure. The chapter engages this argument to offer an alternative view that shows the value of property in understanding African land tenure. It does this by drawing from Hoebel (1966) and Hann (1988) to highlight the marginal Eurocentric baggage that conceptions of property might carry.

Chapter 3 presents the methodology that was used to answer the research questions. A qualitative approach was chosen to provide a detailed analysis of the study's objectives. The qualitative approach was used because it enables the researcher to collect broad narrative data so that the findings are informed by deep insights gained from a variety of data sources (Creswell, 2015; Sutherland et al., 2018). In line with the qualitative approach, the study used mixed methods including archival material, observations, and interviews with key respondents to unpack the role of trusts on property relations. Additionally, the challenges experienced in conducting the research are discussed to reflect on the study's limitations.

The study then presents the three finding Chapters 4 to 6, which coincide with the three objectives of the study.

Chapter 4 starts with a global glance of trusts by looking at trusts in various British colonies to answer the first objective of the study reported here. While the period traced in this chapter is vast, it identifies threads in the evolution of trusts from as early as the sixteenth century as background to the development of trusts in South Africa between 1844 and 1936. This genealogy of trusts is useful for understanding the establishment of trusts in 1844 in the Cape Colony and the subsequent Natives Trust and Land Act that was passed in 1936. The Natives Trust and Land Act consolidated the earlier trusts, paving the way for the establishment of the Bantustans and Coloured Reserves which are the focus of Chapter 5.

In Chapter 5, the study focuses solely on South Africa. However, there is a recognition that South Africa itself is a fragmented territory which is illustrated by the somewhat parallel development of trusts in the Bantustans and Coloured Reserves, respectively. In answering the second objective of the study, the chapter focuses on the period between 1936 and 1990. While

apartheid rule is formally recognised as having started in 1948 and ending in the early 1990s, the chapter shows that ideas of spatial segregation preceded and continued after the official end of apartheid with trusts playing a major role in this process.

Chapter 6 locates trusts in democratic South Africa between 1994 and 2021. It first draws from the transition period between 1990 and 1994 to foreground the presence of trusts in democratic South Africa. Thereafter the chapter draws from the case study of the Richtersveld to analyse the role of trusts in a democracy. It analyses the trusts that have been established to hold both the land rentals revenue received from SANParks as well as the assets received from the land restitution claim that the Richtersveld community won. These trusts are used as empirical evidence to show how trusts continue to weaken the rights of ownership and control of people living on communal land.

Chapter 7 offers the concluding arguments of the study by weaving together the insights from the various chapters. The chapter highlights three main insights from the study. First is that the emergence of post-apartheid trusts is an extension of the trusteeship model that emerged under British rule and was refined by the apartheid state. Second is that trusts entrench colonial geography by enabling the state to retain control over strategic resources despite political changes. Third is that property is a useful analytical tool to understand land relations because it reveals the symbiotic relationship between the state and trusts. Through the lens of property, it is evident that trusts serve as an invisible arm of the state.

Chapter 2

Connecting the dots: Trusts, property rights, and the state

2.1 Introduction

This chapter offers the theoretical framing of the study. It does so by showing the connections between the three concepts: trusts, property rights and the state, which form the theoretical base of the study. In the first section, the chapter unpacks ideas of property and state formation more generally to provide a broad conceptual overview. It then locates ideas of property in the organisation of space which allows for an interrogation of the patterns of landholding. Importantly, by tracing how ideas of property are rationalized in society the chapter shows that property and institutional authority, in the form of state-making, feed into each other. As such the chapter illustrates that the study of property is, in part, also a study of the processes of state-making. This foregrounding is important to interrogate the impacts of trusts. Thus, in the second section, the chapter analyses the relationship between trusts and the state. It argues that trusts have been critical in entrenching state power over land and thereby shaping relations with people living on communal land.

In the sections below, the respective entanglements between property and state; trusts and state are discussed. It is necessary to clarify what is meant by the state. In South Africa, the state is made up of three arms, the Executive, the Legislature, and the Judiciary (Parliamentary Monitoring Group [PMG], n.d). The Executive is made up of the President, Deputy President, Cabinet Ministers, Premiers, Members of the Executive Councils, government department officials and civil servants. The Executive is responsible for running the country, making, and implementing policies (PMG, n.d). In the study, the Executive is interchangeably referred to as the government. Then there is the Legislature, which is made up of the elected representatives who are in charge of making laws and overseeing the functions of the Executive (PMG, n.d). The Legislature is interchangeably referred to as Parliament in the study. Lastly is the Judicial arm of the state which refers to the authority vested in the courts, for example, the Land Claims Court. The courts are independent and accountable to the Constitution (PMG, n.d). As such reference to the "state" in the study indicates the combined effect of all three of these arms. Where it is necessary to be specific, the different notations of the government, Parliament and the courts/judiciary are used.

2.2 "All roads lead to property": exploring the embeddedness of property in social relations

Property rights form the basis of everyday life as they govern relationships between people and resources (MacPherson, 1978; Hann, 1998). Property legitimises and normalises claims to resources, which shapes power relations, orders society, and contains dissent (Blomley, 2016). While it is easy to observe the effects of property, defining property is complex because ideas of property are neither absolute nor unyielding, rather they reflect social norms and values which are constantly evolving (Blomley, 2013). However, there are certain material representations of property that seem to resonate with humans more widely. For example, when a physical boundary such as a fence is created between two plots of land, there is an understanding that the fence becomes the tangible representation of the set of values understood as property. Therefore, the fence becomes the material representation of [property], as in Jean-Jacques Rousseau's claim that,

> The first man who, having fenced off a plot of land thought of saying, *this is mine*, and found people simple enough to believe him, was the real founder of civil society… for this idea of property, depending as it does on many prior ideas which could only arise successively, did not take shape all at once in the human mind (Rousseau, 1754 cited in Elden, 2013:1-2).

While Rousseau takes his starting point from agricultural societies by referring to the division of land, work by scholars on early societies shows that the idea of *partage* – the division between things as mine or yours – has its origins much earlier and thus must be seen as an inherent quality in humanity (Hann, 1998). For example, archaeological studies on palaeolithic societies suggest that people held valuable items and/or items for adornment in one way or another as personal property (Hann, 1998). Equally, ethnographic work on hunter-gather societies has shown that ideas of property can exist while being limited by the society to avoid the adverse effects of property (Woodburn, 1998).

Early work by scholars on hunter-gather societies tended to over-emphasise the sharing of meat, which is an important aspect of these societies, as evidence that ideas of property did not exist in these societies (Dowling, 1968; Lee, 1979; Lee, 1988). More recent work on hunter-gathers has disproved these claims (Barnard & Woodburn, 1988). Woodburn (1998) has shown

that at the point when the animal is killed the hunter takes ownership of the kill. Importantly, there are systems in place to determine who is the killer of the animal in cases where there is an ambiguity which further highlights that ideas of ownership are present (Woodburn, 1998). The sharing of the meat, which is demanded by the value system, is a political exercise that is used to avoid the dependencies created by defining things needed for survival as property (Woodburn, 1998). As such Woodburn (1998) contends that it is best to describe hunter-gatherer societies as being disengaged from ideas of property, not unaware. Referring to the Hadza from Tanzania whose principles he argues can be applied to several African hunter-gatherer societies, he maintains that "The Hadza are keenly aware of the property rights that they reject, of the ever-present danger that individuals or groups may succeed in usurping such rights" (Woodburn, 1998:61). This work on hunter-gatherer societies is valuable because it shows that understandings of property need not be experienced by the society for them to exist. For the Hadza, it is the understanding of the dangers of ideas of property that motivates their political outlook, thus showing that property is embedded both as an experience to be cherished or normalised as in capitalist societies or as something to be avoided as in some hunter-gatherer societies.

2.2.1 Modelling property

Scholars have tried to group different conceptions of property into models. The most common of these is the ownership model which sees property as a set of consolidated and permanent rights that are vested in a single owner that can be identified (Singer, 2000a). This approach is also commonly referred to as the "Bundle of Rights" model (Sprankling, 2012). Three categories of rights make up this metaphorical bundle: (a) the right to exclude (b) the right to transfer and (c) the right to use and/or own (Sprankling, 2012). The ownership model privileges the owner in that the owner's right to exercise absolute control over the property must be respected by others including the governing power (Singer, 1996). Importantly the governing power may only intervene or mitigate the owner's rights if they harm others (Blomley, 2013). The ownership model has been extensively critiqued for its absolute approach to property which does not account for the ways in which society restricts people's power over things (Underkuffler, 1990; Jacobs, 1998; Alexander et al, 2008; Rosser, 2013). Yet at the same time, scholars concede to Singer (2000a)'s contention that the idea that ownership gives one absolute power is deeply seated in societal thinking. Therefore, the ownership model continues to be a

powerful determining force in both the understanding and enactment of contemporary property relations (Singer, 2000b).

As an attempt to develop a model of property more closely aligned with reality, there was a move from the rights to relationships model in the early twentieth century (Sprankling, 2012). The emphasis of the relationships model was that property does not just give the holder unlimited rights, but it also gives the holder corresponding duties (Hohfeld, 1913). This model was seen as useful in explaining the balance between individual and collective rights that property law tries to manage. Accordingly, under the relationships model property is described as a "complex web of legally-enforceable relationships between people" (Sprankling, 2012:7). Wesley Hohfeld is viewed as one of the leading figures in the development of a framework that classified the types of entitlements or relationships that can exist within this model. His framework consisted of four distinct types of entitlements and their corresponding counterparts which were: right and duty; privilege and no right; power and liability and lastly, immunity and disability (Hohfield, 1913). Sprankling (2012) notes that while Hohfeld's system gained some popularity in the early to mid-twentieth century, it has minimal influence today. It must be noted though that Hohfeld's insight of seeing property as consisting of relationships amongst people continues to hold great importance.

Any property model will undoubtedly fall short of explaining the vast mosaic of ideas behind property because as Blomley (2013:25) notes, claims to property are "continuously remade, and re-enacted, and as such, open to surprise and complexity, yet also capable of fixity and sedimentation". Therefore, instead of trying to develop better models or critiques to current models, Blomley (2013) challenges us to draw from performativity theory which views claims to property as performance. This view of property is useful because it allows us to see different models such as the ownership model, not just outside of reality but as contributing to the making of reality. This is because naming has power, meaning that in saying something, we "do" something (Austin, 1965). Of course, not all utterances have the same performative power because each performance is contingent on other performances. Put differently Blomley (2013:25) argues that performances are "citational" in that they reference previous experiences that humanity collectively remembers. As such the act of fencing an area, registering a title deed, mapping or surveying land must all be viewed as citational performances of *partage*.

Given this nestled nature between societal value systems, claims and performance that together constitute property, how does property retain its power to organise the world when it is not a fully coherent set of ideas. Sikor & Lund (2009:8) argue that it is through the "contract" that exists between property, state, and legitimacy.

2.2.2 Delegated sovereignty: property as state-making

Sikor & Lund (2009) argue that at its core, property is about people's struggle to have their claims to resources sanctioned by a politico-social institution for example a polity or state. Therefore, property is not inherently set in stone but is a continuous consensus of a performance of order that must be regulated by an institution with authority, and this is where the state and property intersect. As the politico-social institution does the work of recognising and legitimises people's claim to resources as property, it is further empowered with the authority to do so which in turn gives legitimacy to both the institution and property rights (Sikor & Lund, 2009).

However, for the politico-social institution to do this effectively, it must have a grasp of the social values and norms giving expression to them in law which becomes the property law that is used to legitimise claims to resources (Blomley, 2003; Sikor & Lund, 2009). Of course, the most powerful of these politico-social institutions is the modern state, which is why property rights can be summarised as state-sanctioned and enforced entitlements between people (Underkuffler, 2013). Therefore, this feedback loop between property and the state is linked together by the idea of legitimacy (see Figure 2.1). Put differently, Blomley (2014) makes the point that property rights unlike other rights have no meaning outside of the state. For example, whether or not the state was present the right of speech would exist, but property rights would not. Given that property rights are also an inherent part of citizenship one can argue that the state derives much of its power from being at the helm of legitimizing property rights.

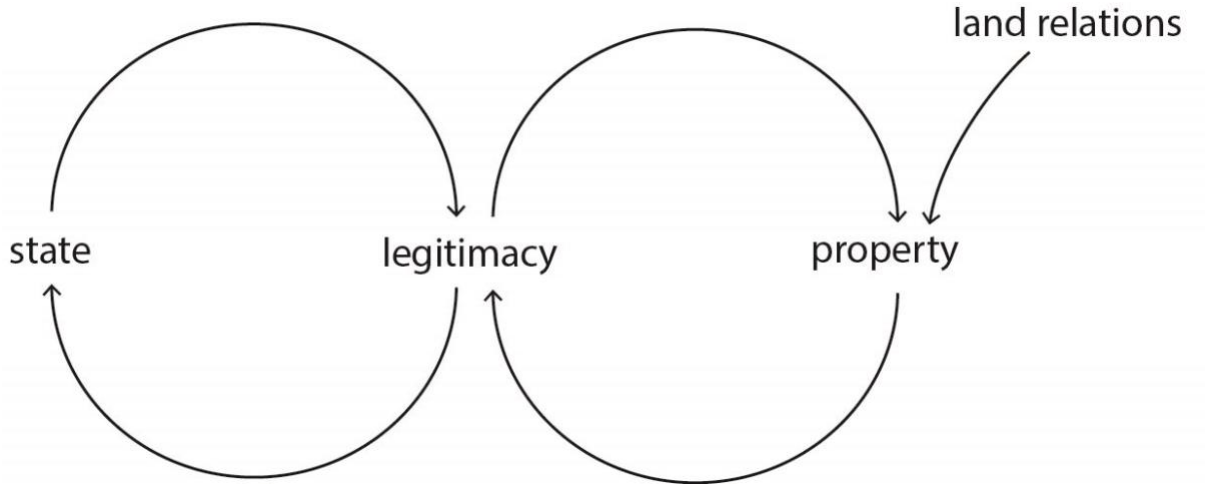


Figure 2.1: Property and state-making as a social contract
(Source: Author & Sandra Zaroufis)

Property rights can exist in a range of contexts, but for the purpose of this study, property rights are confined to how they organise space. Within this context, the relationship between property and the state is more pronounced. This is because while ideas of the state have changed over time, a salient understanding is to see the state as a flexible entity that centres around three aspects: territory, population, and authority (Moisio & Belina, 2017). Hence Max Weber's definition of the state as a "human community that successfully monopolises the legitimate use of physical force within a given territory" (cited in Moisio & Belina, 2017:1). Blomley (2003) has further elaborated on the idea of property and violence arguing that the idea of violence gives reason for the presence of property law. Liberal ideas of law are premised on drawing boundaries between order, the space in which law regulates ways of being, and an imagined disorder, the space outside of the law or beyond state sovereignty (Agamben, 1998). Importantly, this imagined other space need not necessarily exist, but its ideological possibility justifies the presence of the law and deflects from the inherent violence of the law. While violence is an inherent part of how the state derives its power, Rose (1994) has argued that the state cannot sustain multiple manifestations of violence and that violence is a sign that state power is faltering. Hence, she argues that states must derive means of legitimising themselves without the actual manifestation of violence. Property law helps the state contain violence by being a persuasive legitimiser of the organisations of space (Rose, 1994). Property thus becomes a central part of building narratives that cement the language and ways of seeing the world and ultimately property in land naturalises the possession and occupation of land (Bhandar, 2018).

2.2.3 Property, territory, and the state

Blomley (2016) further argues that there is a gap in how we think of property in relation to territory. Legal scholars tend not to pay attention to the territorial dimensions of property because they argue that property is about relationships between people. While geographers tend to consider territory in the context of the nation-state often neglecting the question of property. Territory as a concept is useful in understanding how space is organised (Elden, 2013; Blomley, 2016). While there is no universal definition of territory and while there are various approaches to the concept in geography (Castree et al., 2013), a key insight is to view territory as a process, an ongoing accomplishment that is constantly being affirmed and can be dissolved under certain circumstances (Elden, 2013). For example, scholars have shown the importance of administrative processes such as cartography in the making and re-affirming of territories (Castree et al., 2013).

To understand territory as a process is to understand that there is a space, some may refer to it as a terrain, that when organised in a particular way is transformed into a territory (Elden, 2013). And so, territory then not only refers to space but the process by which that space is organised for a particular end. Importantly, this organisation is ongoing which means that there are contestations that contribute to the making, unmaking, and remaking of that space (Castree et al., 2013; Elden, 2013). The organisation of space is important as the central question of this study is how do trusts broker property relations and the relationship between the state and people living on communal land. The relationship between the state and people living on communal land is not only negotiated on a particular space, communal land, but this relationship defines how this space is organised. As such scholars such as Elden (2013) stretch this processual approach to territory, arguing that not only does territory have a political-economic dimension in relation to land as well as a political-strategic dimension as it relates to terrain, but it is also comprised of techniques used to measure, control and manage a terrain. This becomes interesting when the different entities attempting to organise the space are themselves undergoing processes of change. This has been the case with modern states which have been undergoing transformative changes (Moisio & Belina, 2017).

The South African state is a perfect example of such an entity. Scholars of the state have long debated the role of the state in an increasingly capitalist world. Some argue that the state is being “hollowed out” as a result of the growing marketization of the world while others argue that the state is transforming in response to increased marketization (Moisio & Belina, 2017).

In response to this debate, materialist research on state transformation ensued from the 1990s. Scholars pursuing such research argue that it is more accurate to view that state as undergoing a qualitative change rather than being hollowed out. Building on this claim, they argue that state power is exercised differently as compared to, for example, the traditional Keynesian welfare state. In the contemporary world, different manifestations of the state exist, which scholars understand through terms such as competition states, workfare states, the rescaling of the states, and the neoliberalisation of the states (Moisio & Belina, 2017). This means that the state is constantly morphing and finding alternative ways to exert its power, often through the market process itself.

Therefore, when one explores the techniques that the state uses to organise space, these techniques will be affected by the context. In the case of South Africa, there have been three versions of the state, the colonial, apartheid, and democratic state, that have had to adapt to the market while at the same time managing how they relate to people living on communal land and this has affected how communal land as a space continues to be organised. Arguably the colonial and apartheid state, while representing two versions of the state, had similar interests regarding the organisation of communal land as a space. Central to these interests was a need to retain control over the communal land for two main reasons. First, by controlling land both the colonial and apartheid state retained control over the people living on communal land and this was important in the need to generate a continuous supply of cheap labour from these areas (Moon, 2017). Second, it ensured that control over land was differentiated according to race. Property relations on communal land were radically different from the property relations in urban areas and this was linked to a racist conception that communal tenure is the 'natural' way that African people relate to land (Ramutsindela, 2012). Through the system of trusts, the government was able to deny African people living on communal land rights to individualised tenure. Trusts, therefore, served as a tool or technique to conceal the influence of the colonial and apartheid state in organising communal land in particular ways so as to racialize property relations. When the democratic state came into power it offered an opportunity for the re-imagination of how communal as a space could be organised post-apartheid. The emergence of community development trusts in these areas allows for an analysis of the progress, if any, that has been made in re-imagining the organisation of communal land as space and re-imagining the property relations that underly its organisation.

2.2.4 Complexities of using property as a lens to explore communal land tenure

As mentioned previously, the idea of property is itself contested (Hann, 1998; Singer, 2000b; Underkuffler, 2003; Blomley, 2016). For scholars of land relations in Africa, the use of property in the African context is even more contested. A key concern in these debates is the belief that property in its ideology carries the ethnocentric baggage of the West (Hann, 1998). Scholars thus argue that to use property as a lens in discussions on communal land tenure in Africa results in misconceptions that miss the realities on the ground (Okoth-Ogendo, 1989; Ng'ong'ola, 1992; Ngugi, 2004). When property is discussed ideas of ownership are invoked. In Western understandings, you ask the question of who owns a plot of land to understand to whom the property rights are vested. The person or entity that possess all of the rights in this metaphorical bundle is then seen as the owner of the property and therein lies the problem. In many African societies, it is not one entity that holds these rights. A family might have rights of use to land at a certain point in time, for example during ploughing season. Thereafter the community might then have rights over the land for grazing. Therefore, you have a system of overlapping rights where one grouping might assert a particular right at a given time (Okoth-Ogendo, 2008).

Thus, scholars of land relations do not ask who owns the land, but rather who makes the decisions regarding a portion of land at a specific time. The question of decision-making power is seen as offering a better lens to understand African claims to land. It allows scholars to explore the entanglements in how claims to land are negotiated and makes visible the social relations onto which claims to land are nestled. A practical example to understand this is how the language of property has the potential to ignore how the claims of women are accounted for in African societies (Claassens & Ngubane, 2010; Nghitevelekwa, 2016). Using the language of who owns the land led to scholars incorrectly observing that in the majority of African societies women did not have claims to land. Had these scholars approached it from the lens of decision-making power, they would have observed that women often play an important role in deciding-making regarding the use of land and therefore have strong claims to land in their societies (Claassens & Ngubane, 2010). An approach to property that implies that an individual or group must possess the entirety of the bundle of rights fails to account for how claims to land in African societies are conceptualised.

The concerns raised by these scholars are valuable, however, there is a danger that they can make literature on African land systems nostalgic and thus unable to engage with contemporary

challenges. Indeed, even scholars in the Global North acknowledge that the ownership model inadequately explains the realities of property on the ground (Singer, 2000a; Alexander et al., 2008; Blomley, 2013) However, on reflecting on the challenges of developing a progressive model of property, scholars admit that while being a grossly inaccurate representation of property, the ownership model has shaped property's reality (Singer, 2000a; Alexander et al., 2008; Blomley, 2013). This means it is almost impossible to escape the ownership model's perverseness in society. I argue that this is especially so in a capitalist society. Put differently Singer (2000a: 83) reminds us that, "[d]emostrating that ownership can be deconstructed does not deprive it of force as an organising category". Indeed, ideas of ownership have a tenacity that permeates nearly all societies therefore it would be misguided not to use the lens of property as it has become entrenched in and has produced unequal power relations which this study tries to understand.

Perhaps then, there is a need to approach property in a manner that acknowledges its power to distort what was there in African societies but also its power to explain power relations in the contemporary moment. As such the key considerations made in analysing the literature available on property was the need to reconcile that trusts were introduced into African societies with complex claims to land that were nestled in social relations and that trusts distorted these relations over time. In this regard, Hann (1998)'s argument was most persuasive. Hann (1998) proposes that the definition of property needs to be stretched so that property can be approached in ways that enable different cultural contexts to be explored while being able to make commentaries at a theoretical level. In this way, the perceived ethnocentric baggage of the West in ideas of property can be mitigated. To build his case, Hann (1998) revisits one of E. Adamson Hoebel definitions of property, "Property, in other words, is not a thing, but a network of social relations that govern the conduct of people with respect to the use and disposition of things" (Hoebel, 1966:424). Hoebel of course has made other propositions on how to understand property but this earlier and arguably most simple definition can offer a good basis in how property as an ideology will be approached in this study.

First, Hoebel refers to a "network of social relations" and this language is instructive. Instead of viewing property as a "bundle of rights" that an individual must possess the entirety of the bundle to be seen as having a property right, the language of a network of social relations could capture the understanding that African claims to land were often based on overlapping claims. To grasp these overlapping claims one would need to pay attention to the social relations that

these claims are negotiated through. Therefore, social relations are the essential condition on which property rights are premised. Second, the word "network" also implies that one link is not powerful or superior to another and this is important if we are to avoid making the same mistakes as colonial authorities who perceived African claims to land as inferior to their understanding. As we return to Blomley (2016)'s starting definition of property in land as the "who or what entity has a right to some use or benefit of land", it is approached with Hoebel (1966)'s understanding. We approached the question of what entity has a right to some use or benefit not with a preconceived idea of what this right of use or benefit might entail but open to understanding the social relations that this right of use or benefit is negotiated.

A central contradiction or question that this study tries to grapple with is how the racial ordering of property rights has continued in democratic South Africa with the democratic state playing a role in its continuation. We expect that the democratic state to play a role in undoing this racial ordering that has continued to underpin property rights in South Africa, but the South African state has been involved in the continuation of trusts being used to hold communal land in South Africa bringing to question to its commitment to the de-racialisation of property. There are important nuances to be considered in trying to understand the democratic state's behaviour. While there is widespread literature that notes that the approach of viewing communal land tenure as an entirely collective system with no individual rights is problematic (Okoth-Ogendo, 1989; Ngugi, 2004; Clark & Luwaya, 2017), it remains challenging to move towards an approach that accounts for overlaps between more individualised and communal rights in these areas.

Firstly, government capacity is limited which seems to motivate the use of the collective in dealing with people in communal areas. For example, Communal Property Associations (CPA) which hold land restored following successful land restitution claims and are the main entities that speak on behalf of these communities. It is said that it is these CPAs that choose the community development trust arrangements and thus the blame is then placed on the CPAs for the dysfunction that is observed (Zungu, 2016). Secondly, from the state's perspective, there is a need to give communities autonomy to move away from the approach by the apartheid state of exerting control unfairly on these communities. Yet at the same time, the democratic state is invested in the outcomes of land reform in communities. This is because the perceived success or failure of land reform has geopolitical bearing for the country. This means that while the state might be invested in giving communities autonomy it has to have ways of monitoring

what is happening in communal areas. Arguably this is the context where we see the state finding ways to continue to exert control in communal areas through trusts which are the focus of the discussion below.

2.3 Trusts as an institution to hold property

To understand the implications of trusts on property it is useful to have an overview of how the institution emerged in law. It is commonly accepted that trusts are a creation of English law that has found expression in many legal systems across the world (Bruwer, 2018). Today trusts are well known as a useful tool for wealthy individuals in succession and tax planning, protecting assets from loss through state expropriation, divorce or other legal proceedings and lastly enabling families to ring-fence assets for differently-abled family members (Bruwer, 2018). This is interesting given the history of the institution. While in the present trusts are more commonly used by powerful members of society, historically they emerged as an attempt by individuals, not part of the aristocracy, to have greater control over the future of their property either during their absence or after their death (Manie, 2015). In the sixteen century when trusts first emerged in Europe the English Statute of Wills ensured that the state, at this time made by the King and members of the aristocracy, inherited a great deal of the property of people in the lower classes – this was in line with the feudal system of the time (Hare, 1998). Through trusts people, not part of the aristocracy had an opportunity to have more agency over the use of their property post-death (Hare, 1998).

2.3.1 History of the institution

There are several debates about how trusts as an institution to hold property came to be embedded in English law (Manie, 2015; Bruwer, 2018). Manie (2015), argues that regardless of the uncertainty about the origins of the use of trusts, each of the possible predecessors of the English trust was developed in response to social and practical problems that were prevalent at the time. As a result, the context of the time was important in shaping the development of the institution to what it is today (Manie, 2015). Some of the commonly proposed theories of the origins of trusts include the Roman *fideicommissum,* the Germanic *Treuhand* and the Islamic *waqf* theory (Manie, 2015; Du Toit et al., 2019).

The Roman *fideicommissum* was introduced into Roman law to avoid the rigidity of the law that prohibited certain individuals for example non-Romans from being beneficiaries of a will.

Through the *fideicommissum*, the testator was able to entrust a third party a property that would then be transferred to the person who was the desired beneficiary (Manie, 2015). By extrapolation, the argument is that the testator is the settlor in the English trust, with the third party who is entrusted with the property being the trustee in the English trust.

The second theory is the Germanic *Treuhand* which allowed for a third party, the *Salman*, to assist in the transfer of a property (Du Toit et al., 2019). The transfer between the owner of the asset and *Salman* had to happen while both parties are alive. Upon the death of the original owner of the asset, *Salman*, transferred the property to the designated beneficiary (Manie, 2015). As such the transfer to the *Salman* was an intermediate process in that the *Salman* was there to complete the transfer of a property in an instance where the transfer to the beneficiary could not happen immediately, for example in cases where an heir still had to be born or appointed.

Lastly is the Islamic *waqf* theory which is described as an unincorporated charitable trust. It is created by a declaration by the owner specifying that the income of a designated property is to be permanently used for a specific purpose (Manie, 2015). Manie (2015) argues that by looking at the historical periods the Islamic *waqf* is more likely to have been the predecessor of the use of trusts present today. Islamic *waqfs* would have been introduced into England following the return of the Crusaders who would have observed the working of *waqfs* in the Middle East. *Waqfs* would have been attractive to the Crusaders as the principle of the *waqf* could be used as means to avoid feudal dues. At the time, the Mortmain Statutes passed in the late fourteenth century prohibited the gifting of land to church organisations without royal consent (Manie, 2015). Some of the similarities between the *waqf* and the current use of trusts include that the property held in trust is reserved by the founder and its use is earmarked for the benefit of specific individuals or charitable purposes. The property becomes inalienable which means it cannot be subject to sale, transfer, or separation (Manie, 2015) and this ensures its protection. Both can exist in perpetuity and the continuity is guaranteed through the successive appointment of trustees (Manie, 2015). In line with the perpetual nature of the *waqf*, successive beneficiaries can be created. Structurally, they are the same with identical parties that existed in both, the settlor/*waqif*, the trustee/*mutawalli* and then the beneficiaries both in the present and the future (Manie, 2015).

It appears that the success of the introduction of the *waqf* principles in the use of trusts in England was short-lived. Hare (1998) gives an account of the emergence of Charitable Trusts in England showing that for some time trusts existed under common law and were largely unregulated until the seventeenth century when Parliament enacted the Statute of Charitable Trusts. Parliament argued that this statute was an attempt to prevent the misuse of funds to the detriment of the beneficiaries that was believed to be occurring due to the unregulated nature of these trusts. To protect and enforce charities, the Statute of Charitable Trusts empowered courts to appoint commissioners to examine donations to charity (Hare, 1998). While noting this, Hare (1998) goes further to argue that another motivating factor for the introduction of the Statute of Charitable Trusts was the need to protect the aristocracy from being deprived of property that would otherwise fall on them when an individual passed on. Before the statute was passed individuals were able to pass their property to charities with no regulation from Parliament (Hare, 1998).

If one overlays the accounts of Manie (2015) and Hare (1998), it appears that for an extended period, individuals had limited control over what happened to their property after their death due to the limitations of Mortmain Statutes that required individuals to obtain permission from the King to bequeath their property to third parties. This limitation would have made the principles of the Islamic *waqf* attractive to circumvent this limitation. Parliament might have allowed the use of *waqfs* principles in trusts for some time which is in line with Hare (1998)'s observation that for a long-time, trusts existed unregulated under common law. Perhaps with the increased use of trusts by individuals, Parliament later found them unfavourable as they were seen to be depriving the aristocracy of property that it otherwise would be entitled to post the death of individuals. Importantly at this point, Parliament was made up of the King and the aristocracy meaning there was a vested interest within Parliament to control private estates. Of course, that abuses were occurring to the detriment of the said beneficiaries might have been true, however, what is important for this study is what the oversight did to property relations. The Statute of Charitable Trust empowered the courts, which are the judicial arm of the state, to regulate these trusts. In enacting the Statute of Charitable Trusts, the state was firmly entrenching itself as an actor in the management of private property. This action would influence the management of property by creating a complex structure under which property is controlled and blurring the boundaries of control.

2.3.2 Unpacking the early British state and its relationship with Trusts

One could argue that the state's desire to have control over trusts is embedded in its very nature. To claim this legitimacy over a territory the state must have control over key aspects of that territory, one aspect being land. To do this the state relies on the law and property, which are interdependent (Blomley, 2003). While the state holds a monopoly over the acceptable use of violence through its role as the regulator of law, property law serves as a constraint to this monopoly (Blomley, 2003). Indeed, property rights in land give people the right to claim other rights such as the right to occupy, use, exclude and alienate a piece of land which even the state must respect (Blomley, 2016). How then does the state find ways to ensure that it retains its monopoly when there are pockets of land within its territory where it cannot claim full monopoly over the use of authority? The state's remedy must be the law. For the English state in the 17th century, this was done through the Statute of Charitable Trusts which ensured that whilst individuals could use trusts as a tool to retain their freedom of how their property was to be used post their death, the state had some power over this action as the regulating authority over trusts (Hare, 1998). As such in the earliest formation trusts were used by both the state and people to broker property relations for their ends.

2.3.3 Trusts and Trusteeship

Moreover, the English state also used the idea of trusts to gain control over land in other territories, in Africa and around the world. As part of its colonial endeavour, the English state needed a moral justification for usurping African people's claims to their land and holding land in trust served as a tool to do so. Importantly trusts in the colonies were packaged as trusteeship, which entails a hierarchic relationship of guidance that is meant to serve the supposedly less capable party (Bain, 2003). In the context of land, trusteeship involved European powers holding indigenous land in trust until indigenous groups reached a stage of 'civilisation' deemed appropriate to European powers. Allsobrook & Boisen (2017: 265) explain that, "The basic motivation for trusteeship is the expropriation of land from indigenous inhabitants, for the exploitation of resources. Yet the moral, political, and epistemic authority of trusteeship is based on the promise of self-determination for such inhabitants".

As such, the colonial project relied on the assumption that indigenous people did not have sovereignty which meant that they could not own land (Bennett, 1996). Thus, colonialists opted to portray African people as inferior and thus unable to exercise sovereignty over territory

hence the 'need' for supervision. This invocation of a moral obligation was important as it enabled colonial powers to project a different narrative of what was happening. Instead of the colonial project being viewed as land dispossession it could be portrayed as a project of civilisation of an inferior people (Ramutsindela, 2012). The establishment of trusts would facilitate this by enabling the colonial state to portray itself as a benevolent figure towards African people who would become beneficiaries in these established trusts (Bennet & Powell, 2000). This can be seen from the language that was used in the acts and treaties that facilitated the establishment of these trusts in several British colonies (Ng'ong'ola, 1992; Hare, 1998).

In South Africa, the colonial government established the South African Native Trust (SANT) through the Native Trust and Land Act, No. 18 of 1936. According to the colonial state, the trust's objective was the "settlement, support, benefit, and material and moral welfare of the natives of the Union". This trust will be discussed in greater detail in the coming chapters, however, what is important for the analysis at this moment is the narrative that was projected by the colonial state through this objective. The colonial state gave the impression that it cared for the welfare of African people. Absent from this narrative was the implications for property relations that this trust would have for African people. Trusts introduced a complex structure under which property was controlled which not only blurred but eroded existing claims to land. Under this schema of trusts, land that belonged to African people under their customary law became Crown land, held in trust by an officer of colonial state as the supreme trustee (Bennet & Powell, 2000). The traditional authorities of the respective African societies became sub-trustees accountable to the Crown through the colonial officer as the supreme trustee (Bennet & Powell, 2000).

While Schapera (1943) argues that traditional leaders being seen as trustees might seem consistent with the understanding of African societies at the time, there is a difference in Schapera's use of the term and its use and implications under the trust schema (Ng'ong'ola, 1992). Schapera (1943) uses the term of the trustee when referring to chiefs to avoid the use of the "absolute owner" which he cautions against. Schapera (1943) argues that while the chief was the leading figure in Tswana tribal life, being at the centre of land administration and commonly referred to as the owner of the land, his power was not absolute. For example, the chief could not alienate tribal land to outsiders without the approval of his people, nor did he have limitless power to take back land that members of the tribe were not occupying or using properly. Building on Schapera's examples of the constraints to the chief's power, Ng'ong'ola

(1992:142) suggested that it was "more accurate to understand the chief as a trustee holding land for this tribe". Therefore, Schapera's use of the term trustee when referring to traditional leaders in African societies is to emphasise that their power was not unlimited and that their tribesmen also had claims to land that could not be undermined by the chief.

This is not the same implication that the word carried in the trust schema. Under the trust schema, traditional leaders were sub-trustees, and this denoted a particular relationship of accountability. Instead of being accountable to their tribes as under their customary law, traditional leaders were accountable to the supreme trustee who was the officer of the colonial state. Ng'ong'ola (1992: 147) puts it well, making the following analysis when engaging Schapera's use of the word trustee to its use in the colonial context, "To apply this to the position of the chief might suggest that he was not at all accountable to his community for the discharge of his functions as a land administrator". As such, the introduction of trusts affected existing methods of accountability that kept land administration systems in African societies intact. Methods of accountability are embedded in power relations while at the same time reproducing particular power relations. Before the intervention of the trusts, chiefs were accountable to their communities. Communities could dispose of chiefs, in line with their custom, and this meant that there was a way to control the chief's power and consequently power over land in ways that were empowering for the community (Comaroff, 1974). With the introduction of a supreme trustee as the ultimate custodian of all communal land, it meant that power was wrestled out of communities. The colonial and later the apartheid state would possess the power over land administration with no way of communities being able to negotiate their power in this new system.

Apart from altering existing methods of accountability, trusts also introduced a particular conception of property and ownership to understand claims to land. While African people did not use the explicit language of property and ownership to explain their claims to the land and how these claims were relational, a language of land rights was present (Okoth-Ogendo, 1989; Ng'ong'ola, 1992; Okoth-Ogendo, 2008). However, with the introduction of trusts, those claims were altered and subsumed into the trust structure. African people become beneficiaries of trusts which was different from the land rights or entitlements they had according to their respective customary systems of law.

This change was significant in two ways. First, a beneficiary has little decision-making power and as such is a passive participant in property relations whereas a land right holder is an active participant with some autonomy. Second, the language of ownership and property failed to grasp and account for how African people understood their claims to land and so their land tenure regimes were transformed to fit European understandings (Ramutsindela & Sinthumule, 2017). In many cases what was captured under the trust schema was a weaker conception of the claim to land under customary law.

A common misconception that occurred was to conflate customary claims to land as equivalent to usufructuary and occupational rights (Ng'ong'ola, 1992). In African societies, ownership was not absolute because there were mechanisms that constrained the rights of individuals, families and even chiefs. This was not the case in the European context where property pivoted on the idea of absolute ownership. When observing this difference colonial authorities then conceived of African claims to land as mere rights of use, in relation to agricultural land, and rights to occupy, in relation to residential land (Ng'ong'ola, 1992). This meant that rights or claims to land that were more substantive were rendered temporary because they did not fit into European understandings of rights that were embedded in ideas of absolute ownership of property.

2.4 Conclusion

This chapter presented an overview of the conceptions and discussions around the three central themes of the study. By drawing from the British experience, where trusts first emerged in common law, the chapter has tried to illustrate the entanglements between trusts and state. More importantly, the chapter has shown that property provides the best analytical tool to understand how this entanglement influences patterns of landholding. In the latter sections, the chapter moved to the colonial African experience to locate trusts in African land tenure. This was done by giving a legal overview of the governance of trusts, outlining the provisions in historical legislation. This was also supplemented by commentary by scholars who have investigated the implications of trusts on African land tenure. One key insight that emerged was problematising the ideological underpinnings of trusts which were trusteeship. To investigate and grapple with the entanglements between trusts, property rights and the state a qualitative methodology was needed. In the next chapter, I discuss the methodology and techniques that I employed to collect and analyse trusts through the lens of property.

Chapter 3

Methodology

3.1 Introduction

While the methodology chapter is placed at the beginning of the study, in reality, questions of methodology are a continuous thread throughout this study. As Wellington et al (2005) argue, the selection of methodologies is a deeply reflective and philosophical endeavour and as result is constantly being refined. This holds for this body of work for two reasons. Firstly, this study is in the field of social science where human agency, social relations and ethics interact producing knowledge in particular ways (Wellington et al., 2005). Secondly, the nature of the questions being asked; the study aims to explore the role of trusts in shaping property relations. Property not only organises space but shapes power relations between people and the state. Humans make sense of these power relations in interesting ways, resisting, and reproducing power relations in specific ways. It is this feedback process that is at the core of this study and so considerations of social relations, particularly power relations, were both in the research process and the subject matter. What follows in this chapter is a reflective account of the decisions made in approaching the research questions. It is also an honest account of the lessons learnt, mistakes made and limitations of the study. Mistakes and limitations are important to acknowledge and account for so that the knowledge produced is of integrity. The chapter begins with a summary of the research approach and design. In the second section, the evolution of the research questions is discussed, and a detailed account of the data collection and analysis process is given. Due to the added complications of the COVID-19 pandemic, the face-to-face fieldwork process is discussed separately before presenting the limitations of the study and ethical considerations in the last section.

3.2 Research approach

A qualitative approach was used to explore the complex role of trusts in communal areas of South Africa. Adopting this approach was motivated by three factors. Firstly, its ideological orientation is rooted in interpretive research which argues that reality is multi-layered and complex (Neauman, 2000; Myers, 2009). Such an approach was useful given the nature of the subject matter. As shown in Chapter 2, trusts in South Africa reflect the entanglement between politics and law which is embedded in geography. At a political level, trusts reflect the ideology of trusteeship which the colonial governments employed in dealing with African land tenure.

But at a legal level trusts as an institution to hold property, in this case land, has implications for how space is organised and the everyday process of state-making (Sikor & Lund, 2009). These processes feed into each other to influence how the geography of communal areas unfolds. Therefore, the research was based on interrogating and interpreting events and actions by different stakeholders. To do this it was important to choose an approach that opened the data collection process to include a range of data. This made the qualitative approach most suitable as it enabled me to collect broad narrative data to gain deep insights into the subject matter (Sutherland et al., 2018)

Secondly, through the qualitative approach data collection and analysis can be done concurrently and iteratively (Creswell, 2015) which enabled me to refine the research process as the knowledge unfolded. This is important when dealing with broad narrative data as it might be necessary to adjust research questions to capture the subject matter better (Creswell, 2015).

Thirdly, a qualitative approach allowed for a more naturalistic inquiry by allowing the phenomenon to be investigated within its natural setting (Babbie & Mouton, 2001). This is important since social phenomena are located within a particular socio-historical context meaning that observations, analyses, and interpretations must be rooted within the understanding of this socio-historical context (Denzin & Lincoln, 2003; Myers, 2009).

3.3 Research design

In line with the attempt to have a naturalistic inquiry, an unstructured research methodology was adopted. This means that data collection did not follow a set sequence. As information from different sources become available, it was collected and analysed. Document analysis and a case study were the chosen research methods. Document analysis is the process of reviewing and evaluating both printed and electronic material related to the research phenomenon (Bowen, 2009). This approach was chosen for its ability to provide a contextual overview (Bowen, 2009) because documents provide background information and historical insight. This helped me to understand the roots of specific issues through time. In addition, the documents reviewed also prompted me to ask questions and to make observations when conducting interviews (Bowen, 2009). The documents sourced were grouped into archival material which provided a historical account and then trust deeds, government reports and minutes from meetings which provided a contemporary account. To complement data found in the document

analysis a case study was chosen to provide empirical evidence around which to triangulate the data. The selection of the case entailed choosing a locality that had been influenced by trusts in all three periods of the South African state. This was important so that the findings of the case study could be elevated at a theoretical level to make commentaries about the relationship between trusts and the state and its implications for patterns of landholding. Semi-structured interviews and direct observations were the main tools used to collect the case study data.

While document analysis is often used as a complementary method to triangulate data, for this study it was seen as a suitable main method of analysis. This was because of the nature of the questions being investigated as well as the context of the case study under investigation. Firstly, two of the three objectives of the study dealt with historical questions meaning that documents were the only available data source. Secondly, the third objective of the case study dealt with contemporary questions, and this is where the case study was useful, but document analysis continued to provide a greater portion of the data sourced. This is because much of the data centred around legal questions and as such it was best to obtain verified sources such as court documents and trust deeds to obtain accurate information.

In Chapter 1 the choice of the Richtersveld as the case study was detailed. As a method, the case study provided a set of advantages. It allowed multiple lenses to be applied to understanding the phenomenon under study. While document analysis remained a key feature, the case allowed me to explore the use of other methods such as interviews and observations. Semi-structured interviews were used because of their ability to give structure to the interview while giving space for participants to bring to light information they might not have thought of. There was a list of questions prepared for all participants as well as specific questions prepared for high profile informants such as the senior government officials and the community's former lawyer.

3.4 Evolution of the research questions

My interest in trusts was piqued by observations made in July 2018 while conducting research for my Honours mini-dissertation in the Richtersveld. The Honours mini dissertation explored how the state approaches and mediates the dialectical relationship between land claims and conservation in the Richtersveld. One piece of information that came up frequently during the interviews was the presence of trusts formed to hold the land rentals from SANParks and assets

received from the land claim settlement. Interviews with community representatives revealed that the trusts were facing a range of challenges. The trust account that holds the land rentals from SANParks was said to be "frozen" because it had not complied with the Financial Intelligence Centre Act (Community representative 1, Interview, 20 July 2018). However, this explanation did not make sense as non-compliance with FICA does not cause an account to be frozen (Nyatyowa, 2018). The trusts that held assets received from the land claim settlement were no better as there were allegations of maladministration which were causing divisions in the community. While the various trusts faced considerable challenges, the government, through SANParks and Alexkor presented a positive picture of the trusts to the public as evidence of benefit sharing. This raised the question of whether the trusts were a noble benefit-sharing mechanism gone wrong or if they served as a tool to co-opt community agency.

After handing in the Honours thesis, I was interested in gaining a better understanding of these trusts. Given that trusts are a complex legal arrangement and since I had no background in law, I decided that an internship in a research centre with a focus on the law would be the best way to gain applied knowledge. As such, I did a four-week internship with the Land & Accountability Research Centre (LARC) from November to December 2018. LARC is based in the Department of Public Law faculty at the University of Cape Town and specialises in land, mining, and governance issues from the lens of the law. Following the internship, LARC employed me as a research assistant for the mining team between February to December 2019. The mining team had secured funding for a Community Trust Project whose objective is to reform community trusts in the platinum mining industry and thus encourage better benefit sharing to the communities affected by mining. This deployment to the mining team would cement my interests in trust and challenge me to think deeply about their role in the geography of communal areas in South Africa.

Involvement in the Community Trust Project exposed me to the existence of trusts in the platinum mining industry. South Africa's mining law enables mining companies to adopt various benefit-sharing mechanisms. One of these mechanisms is the community trust model, which is used to hold, amongst others, mining royalties and shares in the mining company on behalf of the communities affected (Matebesi, 2020). Through these trusts, mining companies obtain a social licence to operate in these communities and thus these trusts play a crucial role in brokering relations in these communities. While government and mining companies presented the trusts as tools to promote sustainability and increased equity between mining

companies and communities, the work of the Community Trust Project exposed the lack of tangible outcomes on the ground.

Contrasting the trusts in the platinum industry and those in the Richtersveld, two things were striking. Firstly, the location of these trusts. The Richtersveld is a former Coloured Reserve and the trusts in the platinum mining industry are in the former Bantustans. Secondly, through these trusts control over strategic resources on communal land could be bargained by powerful actors such as mining companies and the state. This made me wonder if there was a relationship between the present-day community trusts and the trusteeship model that was used historically to hold African land through the South African Development Trust. This motivated the framing of the objectives of the study which aim to trace trusts from British colonialism, then apartheid through to democracy to grapple with the impacts of trusts on shaping the geography of communal areas in South Africa.

3.5 Data collection

The fieldwork for this study was split into two. The first part entailed working through archival materials and key documents. This was done throughout 2019 and 2020 as documents became available. The second part was conducting interviews which were done in November and December 2020. These included remote interviews through Zoom, phone calls as well as face-to-face interviews. The latter was done in November 2020 when I visited each of the four towns that make up the Richtersveld. I also visited Port Nolloth which is the administrative centre of the Richtersveld and Alexander Bay which is where the Alexkor offices are located.

3.5.1 Archival material

The archival materials used came from a range of sources obtained throughout 2019 and 2020. In 2020, obtaining material became more challenging as South Africa's COVID-19 national lockdown began in March 2020, which heavily constrained access to archives given that libraries remained closed. As such it became important to source materials that could provide comprehensive and verified primary and secondary data. Broadly there were three clusters of sources that I obtained.

First, from the UCT Library's Government Publications Collection, I sourced land and mining legislation and transcripts of Parliamentary debates. Since my focus was on trusts, I confined

my analysis of the legislation to laws that related to or affected trusts in communal areas. As such the Natives Trust and Land Act No. 18 of 1936 and all its amendments was a central source. Laws on their own are unable to give information around the political context and the motivation for decisions made which is why the 1936 transcript of the Parliamentary debates was extremely useful. The debates provided in-depth views of key stakeholders which gave insight into the factors that drove the passing of the Act.

Second, from the UCT Library's Special Collections I accessed material on the Richtersveld. Special Collections has a comprehensive repository on the Richtersveld which was donated by the Legal Resources Centre, which represented the Richtersveld community in its land claim. The repository includes court documents, maps, emails between the attorneys of the three parties involved (the state, Alexkor and the Richtersveld) and academic papers that the court accepted as evidence. Using this repository as a base was useful because the information had been verified by the courts and as shall be indicated later (cf. Chapter 6), the land claim went up to the Constitutional Court, so there was an added verification in that the evidence was tested at three levels, the Land Claims Court, the Supreme Court of Appeal, and the Constitutional Court.

Third, was a mix of primary and secondary data which included dissertations, court cases, laws proclamations and books to provide an overview of the colonial period. A key source used was *An African Survey: A Study of Problems Arising in Africa South of the Sahara,* which was conducted between 1934-8 to understand the actions of different colonial powers on the African continent. The survey provided a detailed account of the views and approaches of the different colonial powers to landholding on the continent. Moreover, it was written and produced by Lord Hailey, who was a British colonial officer having served in India and Africa for many years before being commissioned to conduct the survey, and whose knowledge of British colonial administration was considered unmatched (Cowen, 1956). The survey thus provided insights into the view of the British colonial state and detailed references to laws and proclamations that were checked to verify the information. I was aware that a survey such as this which was written by a colonial officer will be biased and in analysing the data this was a constant consideration. In addition, secondary information in the form of books and journals by prominent historians and religious studies scholars were consulted to provide further context to the survey. The work of religious studies scholars was important given that trusts in South Africa were initially established on mission land (cf. Chapter 4). Therefore I needed to

understand the socio-political context in which these trusts were established not only through the lens of historians but also scholars of religious studies, who paid closer attention to the motivations of the missionaries in the establishment of trusts.

3.5.2 Trust deeds, government reports and minutes from portfolio committee meetings

To follow the development of trusts in democratic South Africa I first looked at the Ingonyama Trust which entailed reviewing the Act that established the trust, annual reports by the Trust Board and the recent judgement that was handed down on 11 June 2021 as it dealt which the issue of land ownership on trust land. Second, I studied the Richtersveld Trusts which entailed analysing trusts' deeds, agreements, annual reports, government reports and minutes from portfolio committee meetings. Government reports and minutes of portfolio committee meetings were sourced from the Parliamentary Monitoring Group. Annual reports included those of Alexkor which were sourced from the company website as well as annual reports by the Department of Rural Development and Land Reform which detailed the government's progress in effecting the Deed of Settlement agreement (cf. Chapter 6). Trust deeds were sourced directly from the offices of the Master of the High Court which was challenging as some offices did not respond to requests for these documents, these challenges are detailed in section 3.8. Lastly, I also received documents that included minutes from meetings with various government departments and drafts of trusts' deeds and company structures from the community's former lawyer who was integral in the land claim process. While some of these documents were unsigned as they were in the draft format, they were deemed authentic as they were sourced directly from the community's lawyer.

3.5.3 Interviews

The intention was to conduct interviews with four broad categories of people namely: government officials from the different departments that are involved in the trusts, the current and former trustees, individuals serving in the joint management boards of the park and the Pooling and Sharing Joint Venture (PSJV) and lastly ordinary community members from the four towns in the Richtersveld. These interviews were planned for April 2020, however, following the nationwide lockdown these plans were halted until November 2020 when the University allowed some fieldwork to be conducted under new regulations. This added complexities to the processes. At this stage, the country was in Alert Level 3 which the University adhered to and added its conditions on re-granting ethics approval to conduct face-to-face interviews. As part of these conditionalities, researchers had to carefully consider their

participants' risk profiles. This was particularly so for my study as a large bulk of my participants would have been individuals over the age of 50 who could have comorbidities that further increase their risk profile. At the same time, online methods of engagement were difficult for community members due to the socio-economic profile of the community and the location – there is limited network connection in the Richtersveld

To address these challenges, I limited the number of participants from the community to key participants. These included current and former members of the Community Property Association Committee (CPA) which is the community's highest decision-making authority, community members who served in any of the trusts and subsidiary companies, community representatives in the Richtersveld Combined Management Committee (RCMC) and well-respected community activists. In this regard, I benefited from the relationships previously formed when I conducted research in 2018 in the same area, which meant that I had a sense of some of the key role players from the observations made in 2018. As such in many cases, I conducted follow-up interviews with key community representatives and community activists. Given that this was a new topic, I gave them a copy of the Honours dissertation and verified the information to be used for the Master's dissertation before proceeding with the questions prepared for the Master's dissertation. To address a concern that the study might lack a comprehensive community voice, I conducted Google searches of community protests, which allowed me to listen to interviews where ordinary community members expressed their grievances. An example for this is an extract available here[2], where a community member from Sanddrift speaks about grievances regarding community members not being allowed to mine their land. This and other extracts were enlightening in understanding the lived experiences of ordinary community members.

Conducting interviews was also complicated by the dynamics that existed within the community. There have been major conflicts that have led to court procedures. In addition, there have been several investigations that have been conducted which have revealed that some members serving in leadership capacities had vested interests in the decisions taken. For example, the Richtersveld Status Report complied in February 2017 by the Department of Rural Development and Land Reform (DRDLR) indicated that one of the contributing factors

[2] https://www.youtube.com/watch?v=n82kVgEOm64&list=PLaMjtNZr6ZqW1kKUhs-7QwesaZa6m_wDY&index=7

to the conflicts in the community was that some former and current CPA Committee members were alleged to have interests in the operations of the Pooling and Sharing Joint Venture (PSJV) as well as the Richtersveld Mining Company (RMC), and the Richtersveld Rehabilitation Company. This has impacted the relationship between the CPA Committee, the Richtersveld Trusts and Companies, and Alexkor. Some of these allegations were still being investigated when I conducted my research with some allegations being investigated as part of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State (Zondo Commission). As a result, there was some reluctance from participants to speak about their involvement in the various governing structures which made it difficult to get direct answers to certain questions.

Moreover, people in the Richtersveld are closely related. This became clear to me as I became familiar with the area, and this came out in the interviews as participants were less open to speaking about the involvements of their kin members in the various leadership structures. As such, I overlayed different accounts from community members from the different factions as well as accounts of official government investigations to have multiple accounts of the events that occurred. This was a challenging process as there often were discrepancies in the different accounts because the state and the community had vested interests in portraying a particular narrative of what had occurred.

I was grateful that between 8 and 11 January 2021, the Zondo Commission heard evidence related to Alexkor, the diamond mining company. The testimonies heard in the sessions included extracts of affidavits of an independent investigator and a whistle-blower who had approached the Commission about the alleged corruption and capture of Alexkor. The independent investigator was part of the team that conducted a forensic investigation of irregularities about Alexkor and the PSJV which was commissioned by the Department of Public Enterprises which oversees Alexkor while the whistle-blower was a diamond contractor. These testimonies, which were recorded live on each day, were invaluable as they provided a comprehensive narration of key events which were able to clarify several discrepancies that I had up until then not been able to resolve. The testimonies constituted verified sources because the witnesses were under oath and the statements benefited from the cross-examination of the chairperson of the Commission. In particular, the testimony by the independent investigator was insightful as it referenced the forensic report which is not publicly available but also spoke at length about the evasiveness of some Alexkor officials in providing the necessary

information. I highlight the latter as it speaks to challenges that I also experienced in obtaining information in this highly politicised environment. While being a student had its benefits in that people were less defensive than they might be to investigators, the study had the effect of making Alexkor officials apprehensive in general.

From the government side, multiple attempts were made to interview officials from the Northern Cape Department of Agriculture, Environmental Affairs, Rural Development and Land Reform, which were unsuccessful due to non-response. I was however able to conduct three interviews with key individuals. Firstly, Mr Alexander (Alec) Erwin served, the former Minister of Public Enterprises between 2004 and 2008 which coincided with the period when the Deed of Settlement between the community, the state and Alexkor was signed. This interview provided a Cabinet-level viewpoint of the actions of the state at this crucial period when the land claim was settled and the various trusts established. Secondly, the current Richtersveld National Park Manager, whose interview shed light on the state of the trust established to hold land rentals revenue from SANParks. Lastly, the current Municipal Manager of the Richtersveld Local Municipality, whose interview gave context to the workings of stakeholder relations that helped me to understand the Deed of Settlement better. From the mine's side, there was an attempt to interview the current CEO of Alexkor. At the time of writing, my request to interview the CEO was still being considered by the Alexkor Board of Directors.

Figure 3.1: Interviewing the Manager: Richtersveld National Park
(Source: Robin George, 2020)

Figure 3.2: Preparing to interview the Municipal Manager: Richtersveld Municipality (Source: Robin George, 2020)

3.5.4 Observations

Apart from technological constraints, face-to-face interactions were preferred because of their ability to allow a researcher to also make observations by being in the case study environment. Observation is one of the most universal and accessible techniques of obtaining information (Bryman, 2006; Cowie, 2009; Noel et al., 2017). It is useful because it helps to contextualise participants' answers, point to information that needs to be probed further and can be used in conjunction with other forms of data to triangulate information (Joslin & Müller, 2016; Hessen et al., 2019). This was highlighted by my visit to the Alexkor offices in Alexander Bay on 19 November 2020. The premises seemed abandoned as all the entrances were closed. After walking around, I noticed a slightly open window and started trying to catch the attention of the employees at this office. I was able to speak to a gentleman and a lady. Both were quite

hesitant to speak to me when I explained my research, in particular the lady who had been working for Alexkor for longer than the gentleman. To appease them, my fieldwork partner and I showed them our student cards repeatedly assuring them that were just students.

Figure 3.3: Alexkor offices in Alexander Bay
(Source: Author, 2020)

When I mentioned the Richtersveld CPA, the lady was quick to point out that the offices of the CPA are on the other side of town, and that I should hear from them what the issues are. She exchanged a worried glance to the gentleman before returning to her work. I took the opportunity of her being away from the gentleman to probe further. The gentleman seemed more willing to help but pointed out that he had only recently joined the office and therefore did not have enough context to answer my questions, but he gave me the CEO's email saying that the CEO would be the best person to answer my questions. This contrasting behaviour of the lady and the gentlemen alluded to a sense of apprehension within the Alexkor office, particularly that it was the more experienced employee who seemed to exude this apprehensive

behaviour more. As part of my fieldwork notes, I made personal reflections after each experience or interview, particularly those where I noticed behaviour that was out of the ordinary. I returned to this reflection entry following an email exchange between myself and the CEO of Alexkor.

I emailed the CEO requesting an interview and he seemed willing to engage with me. After asking me to send verification of being a student my request to interview him was sent by the Alexkor Company secretary to the Board of Directors for consideration. I was initially informed that my request was not considered by the Board because I did not attach a short presentation which I then sent. Following that, I was then informed that the Board was not in a place to consider my request because of "security concerns" given the various investigations being conducted into Alexkor. It must be said that while the Company secretary assured me that I would be notified via email as soon as the Board had made a decision, it was only after following up telephonically that I received a response. As shall be seen in Chapter 6, there have been various allegations about Alexkor's unsavoury involvement in factional conflicts within the Richtersveld leadership.

Green & Thorogood (2018) emphasise the importance of observations in the initial stages of research as observations help to identify problems allowing for problems to be mitigated in the early stages of the research. In an interview with a former member of the first CPA committee, I asked a direct question about their involvement as a trustee in the Mining and Rehabilitation Trust which was established to facilitate the rehabilitation of the landscape post-mining. The community member evaded this question insisting that according to the Deed of Settlement rehabilitation of the landscape was Alexkor's responsibility. Interestingly, I had a copy of the trust deed that indicated that he was both the representative of the Richtersveld Mining Company as the founder of the trust and was the second trustee of the trust in his personal capacity. I read out the objective of this trust to probe and noticed that he was uncomfortable. The interview did not continue much further from this point as there was a clear change of energy in the room and he was no longer forthcoming with information. This observation was made in the early stages of the interviews and thus informed my approach in subsequent interviews. I had already opted not to record interviews because of my experience in 2018 of observing that participants speak more openly when they are assured that conversations are not recorded. This added observation of a change in energy when a direct question relating to the participant's actions also alerted me about the parameters to be adopted in asking direct or

follow-up questions. When I noticed inconsistencies between a participant's statements and what was in a document such as a trust deed, I was tentative in probing or opted not to probe depending on the defensiveness I perceived from the participant. I would note the inconsistency in my notebook to be returned to by looking at the official document in question.

In addition, this direct observation of the participant being uncomfortable when asked about their involvement in this trust seemed to correlate and affirm the interpretation of the DRDLR of the situation. In multiple status reports complied by the DRDLR, the issue of factional fights within the community came up frequently with the DRDLR summarising its view that some members of the first CPA committee had business interests in Alexkor which influenced and, in some cases, compromised the decisions taken by this first CPA committee.

3.6 Data Analysis

In line with the qualitative approach, data analysis happened continuously as information became available. Using the theoretical framework (cf. Chapter 2) as a base, information was analysed according to themes that fed into the three objectives of the study (cf. Chapter 1). I employed content analysis and a mixture of deductive and inductive approaches in that the broad themes informed the analysis, but I also allowed the data to lead my analysis, reflecting continuously on what was emerging from the data. This was important as it is not possible to understand the impact of trusts on communal areas of South Africa without studying the state. However, studying the state presents some difficulty because the state is neither monolithic nor exclusively an object or institution as scholars argue that it is better to view it as a process (Moisio & Belina, 2017). This is even more complicated in the case of South Africa where there have been multiple versions of the state which shaped the permutations that each successive state has taken.

Going into the research I had broadly classified the state to have had three versions, the colonial, apartheid, and democratic state. However, as I began working through the archival materials, I realised that there was a need for greater nuance in analysing the period that I initially referred to as the colonial period of the state. The period before the formation of the Union of South Africa in 1910 was fraught with contestation (McCusker et al., 2016). Different groupings within the white bloc wrestled for control over the territory which we now refer to as South Africa. As different factions gained some control, however temporary it was, over

sections of the territory, they organised the space in particular ways. While I wanted to understand the role of trusts in brokering the relationship between the state and people living on communal land, it soon became clear that to grapple with the implications of these trusts, it would be important to unpack the political context at the time.

For example, initially, the colonial state relied on the missionaries to be de factor officials but later the state fell out of favour with the missionaries leading to the inclusion of sections in the Mission Stations and Reserves Act that effectively took away power from the missionaries concerning land. Without this context, the analysis of the legislative changes that occurred would be missing depth. Therefore, a political ecology approach to understanding the archive was necessary to make sense of the legislative changes holistically. A storyline narrative was used to map the political and legislative developments that occurred in the four provinces that later formed South Africa. The changes were summarised in the table that then allowed me to see the connections (see Appendix A) which informed my analysis. The same method was applied to understanding the changes post-1910.

Adopting a political ecology approach also proved useful in politicising not only the archive but also the scholarly work written about these historical periods. Historians emphasise the importance of reading archival material within its time so as to not impose contemporary ideological positions onto the past which, they argue, would compromise the analyses made. While this is true, in reading some scholarly work by historians and those in religious studies it became glaringly clear that there was a tendency to be generous in the analysis of the actions by the missionaries. Therefore, one needed to read critically and widely to be able to present a balanced and nuanced view of the missionaries that acknowledged them as both political actors with agency and citizens of a colonial state that imposed duties on them that did not necessarily align with their religious value systems.

In reflecting on common mistakes in conservation research Sutherland et al (2018), observe that scientists from one part of a discipline often use techniques from another discipline incorrectly. This is because the scientists do not take the time to reflect on these techniques and the relevant literature associated with these techniques. While Sutherland et al (2018) are referring to methodological techniques their observations can be applied to multi-disciplinary work as a whole. There is a need to reflect deeply when one approaches literature, findings and data from other disciplines. This proved crucial as this study engaged with matters of the law

extensively. In addition, the study was engaging in trust law which has been understudied in South Africa. While there were some scholars (de Waal, 1998; du, Toit, 2007; Manie, 2015) that have traced the developments of trust law, a key observation they make is that trust law remains developed through the courts because of the minimalist nature of the Trust Property Control Act which governs trusts in South Africa. Engaging with enough case law to understand these developments as they occurred over time was not possible because of the duration and scope of a Master's dissertation and so it became important to find a trusted source that would become my reference. Without a trusted source, there was a danger that I might engage with ideas that have been extensively disputed without knowing. To avoid such a mistake Sutherland et al (2018:8) recommend working in "truly multidisciplinary teams with experts appropriate for the techniques being used" as this ensures that the researcher can funnel the relevant literature, techniques and findings from other disciplines.

In this regard, I was fortunate to have been able to engage with three lawyers who work with trust law, and they were able to recommend the book, *Honoré's South African Law of Trusts*, which is used by practising lawyers as a handbook on trust law. The book was recommended for three reasons, firstly Honoré is well respected as being the leading scholar who synthesised South African trust law, secondly one of the editors of the book is a well-respected Judge of the Constitutional Court of South Africa and thirdly, the book referenced as a required reading by the Head Office of the Master of the High Court when sending out new guiding principles to be used by all its offices with regards to trusts. These were important attributes as it meant that I could be assured that I was engaging with the most updated and rigorously debated work on South African trust law. I accessed the latest edition of the book as the editors had revised this edition using the latest developments that had occurred because of recent judgements that dealt with trusts.

Additionally, throughout the duration of the study, I engaged with various lawyers. Two of these lawyers were from a law firm that works closely with the research centre where I was based in 2019. Thus, I was able to have multiple conversations with them during 2019 to flesh out questions I had regarding the three major Acts used in the study, the Natives Trust and Land Act, the Trust Property Control Act, and the Ingonyama Trust Act. Additionally, I engaged with the community's former lawyer who agreed to a second interview that took the form of a conversation to discuss some theoretical questions I had regarding the Trust Property Control Act. These conversations were valuable as the lawyers not only had theoretical

background but practical experience from working with trusts. I also benefited from conversations with an academic and lawyer who not only taught constitutional law at the University of Cape Town but also practices as a constitutional lawyer in the SADC region. These conversations provided much-needed insights into the principles underlying the various Acts and further aided my understanding of the judicial arm of the state.

Lastly, data from interviews were transcribed before being analysed. Transcription of the interviews began during fieldwork when the data were still fresh in my mind. As mentioned previously, I chose to not record interviews with community members which meant that I took detailed notes during the interview. I benefited from having a fieldwork assistant who helped with this to improve the accuracy of the notes taken. For the interviews with the government officials, a summary of the key points of the interview was sent after the interview and the government officials confirmed the summary as an accurate reflection of what they expressed in the interview. The interviews with the community lawyer took place online and these were recorded and transcribed using a transcription software called Otter ai. The advantage of this software was that it allows you to check the transcript with the audio to make the changes accordingly before the final transcript is downloaded into the chosen format, for example, MS Word or pdf.

3.7 A note on terminology

Analysing archival material presents a problem of terminology. This is because colonial and apartheid officials as well as missionaries used terms such as ‘native’ that were derogatory to people of colour. To repeat these words can be seen as perpetuating their traumatic baggage while leaving them out means diluting the voice of the state through its officials at the time. I have decided to use these terms in the study to capture the views of the state and the missionaries accurately. Particularly because the use of the word ‘native’ came to represent different people over time which influenced how space was organised in the Cape Colony. To show that these terms are used in the interest of accuracy and do not reflect my views these terms are italicised throughout the study when referring to persons. However, in cases where the word ‘native’ is part of the name of the Act, this is not done. In addition, when classifying groups, the state took on particular stances. For example, African and Black were often used interchangeably. People of San, Khoi and Nama ancestry were not included in this label of African. However, in this study African shall mean both Black and Coloured people and Black

shall mean people of Bantu ancestry. Using the term Coloured also presents a set of challenges as people in the Richtersveld, and other groups, assert that Coloured is a term imposed on people of San, Khoi and mixed ancestry by the apartheid government. Therefore, the term is used cautiously and only to denote the apartheid government's classification of groups.

3.8 Limitations of the study

Accessing information was the greatest limitation of the study. The first hurdle was accessing trust deeds that are held in the Office of the Master of the High Court. The Offices of the Master of High Court have a reputation of being dysfunctional and as a result, the lawyers handling the lodgement of the trust deeds will often have an office they prefer to deal with. As such the different Richtersveld trust deeds were lodged in the Kimberly, Pretoria, and Cape Town offices respectively. Due to the lockdown, it was not possible to visit the offices physically and thus email and telephone communication was used. Responses from these offices were delayed and inconsistent. The Kimberly Master's office was efficient over email and telephone while the Pretoria and Cape Town offices were not. It took weeks of inquiring through phone calls and emails before I was put in touch with the relevant offices to request a trust deed from the Pretoria office.

Perhaps what is more concerning have been the actions of the Cape Town office which seem to demonstrate that the officials are unfamiliar with the constitutional provisions that allow the public to access documents. When I lodged a request to access trust deeds from their office, I was informed by the helpdesk operator that I could only access the trust deeds if I obtained written permission from the trustees (Telephonic conversation, 13 November 2020). This was after the helpdesk operator spoke to her senior, the assistant Master. This experience was in stark contrast to the approach adopted by the Kimberly and Pretoria office that upon checking that the requested documents were for research purposes granted me access to the documents with some redactions as per Section 34(1) of the Promotion of Access to Information Act No. 2 of 2002. On 12 January 2021, I contacted the Cape Town office again inquiring about this difference in action across the offices and spoke to the assistant Master, who advised me to email the Master directly explaining this. It is concerning that the assistant Master seems unclear on a way forward opting to direct me to the Master. This would mean that the Master must deal with a large volume of inquiries. This is strange given that there is a law, the

Promotion of Access to Information, that indicates that members of the public including beneficiaries of these trusts, may access public documents.

It must be noted that there are fifteen Master's offices in the country and as such my experience accounts for only a fifth of the offices. At the same time, it is important to remember that the Cape Town and Pretoria offices are one of the biggest offices with the Pretoria office being where the Head office of the Master is based. At best one could argue that the other offices are as efficient as the Kimberly office or at worst, the experience at the Cape Town and Pretoria office is an indication that from the top-down there are serious capacity and competency issues in the Master's office. If the latter is true, it means that beneficiaries are left insecure regarding their rights against the trustees with little hope for a remedy.

The second hurdle was that even when some offices finally provided me with the trust deeds, the names of the trustees were not updated to confirm their current status, making it difficult to trace the relevant persons to be interviewed. I hoped that travelling to the Richtersveld would offer an opportunity to find out who were the current trustees in the various trusts. As mentioned previously, contact with community members was limited to key participants but informal conversations were done with community members while walking around in each town. From these informal conversations, it became clear that many community members no longer attended general meetings because they had lost confidence in the various community structures. As such the conversations with community members provided limited information and in particular community members largely did not know who currently served as community trustees in the various trusts. While this was a considerable limitation it also provided insight into the perceptions of ordinary community members about the community trust model.

Lastly, the location and terrain of the Richtersveld added complexity to the fieldwork. The Richtersveld is 700km from my residence in a remote part of the Northern Cape, where a 4x4 vehicle is needed for travel. This made field visit costs quite expensive which limited the number of visits/trips one can make to the site. The terrain also presented its challenges. As mentioned previously, the Richtersveld is made up of four towns. The roads between the four towns are gravel, which means that a distance that would normally take one and a half hours took three hours and sometimes longer depending on the condition of the road. As a result, one

town was visited per day as driving took up most of the day and the drives back to the accommodation had to be done before sunset to navigate the roads safely.

3.9 Ethical considerations

Research produced can only be deemed credible when data is obtained ethically and objectively. To ensure that this was the case for this study, ethical approval was obtained from the Faculty of Science Ethics Committee before the research commenced. The guidelines outlined in the application as well as those from the ethics committee were followed throughout the research process.

An important aspect of obtaining information ethically is obtaining prior and informed consent of research participants (Yin, 2018). Consent was sought and provided orally. This was done at the start of every interview, where I explained the research project and the nature of the participation sought to each participant. This was done in Afrikaans or English depending on the preference of the participant to ensure that the participant fully understood what the research entailed. As mentioned previously interviews were largely not recorded and in cases where they were, such as the interview with the community's former lawyer, permission to do so was sought before the recording commenced. Furthermore, the names of research participants who were interviewed were anonymised except for the current and former government officials who were made aware that they were being interviewed in their official capacity. As such the designation of the participant was used, for example, "CPA member" to provide the reader with the context of the participant's status. I also indicated to the participants that the research findings in the form of a dissertation would be shared through the University of Cape Town's open-access platform and that the dissertation would be shared with the community.

Lastly, to ensure that the research was objective, I continually reflected on my positionality. As Sultana (2007) argues, being reflective of one's positionality entails grappling with how one's relationship with the study matter is influenced by the broader institutional, social, and political realities. This helps to put the information gathered into perspective thus improving the quality of research outcomes.

3.10 Conclusion

The study made use of a qualitative research methodology to interrogate the role of trusts in communal areas of South Africa through time. Using archival material, the research provided a rich historical account of the emergence of trusts in the African contexts and how the model was perfected during apartheid in South Africa. The study used documents, observations, and interviews to understand trusts in their contemporary contexts in South Africa. In line with the qualitative approach, data collection and analyses were a continuous and reflective processes. The findings from the study are presented in Chapters 4, 5 and 6. A wide range of sources was used to contextualise events and to assist me in interpreting the reasons behind decisions taken. What has emerged is a rich account that contributes to understanding communal areas of South Africa and the interaction between trusts, property, and the state. In the next chapter, the first objective, which is tracing the origins of trusteeship is discussed.

Chapter 4

Origins of Trusteeship

"There is no matter in which colonial policy expresses itself so conspicuously as in the use which administrations make of their powers in regard to land, and certainly there is no question which influenced more critically the attitude of Africans towards the governing power"

Lord Hailey, G.C.S.I., G.C.I.E.[3]

4.1 Introduction

Land has always mattered, both for colonial regimes and for the colonies themselves. Policies concerning land were the fulcrum of control and cause of resistance in the colonies. Elden (2013:9) puts it succinctly arguing that "land is both the site and stake of struggle" which is an articulation of the significance of land in human existence. In analysing British colonial land policy, one often encounters the phrase "held in trust" which indicates that a trusteeship relationship existed between the Crown and indigenous peoples in the colonies. This relationship was significant in influencing the relationship between African people, their land, and the state (Bennett & Powell, 2000; Capps, 2012) with residues of this relationship still present in former British colonies today (Marumo, 2014). This chapter forms the first basis in unpacking the role of trusts in shaping not only property relations but also the relationship between African people and the state. This chapter does so by tracing the origins of trusts more broadly looking at various British colonies and then zooming in on South Africa, which is the focus of this study. At a conceptual level, the chapter shows that trusts were a tool that the colonial state used to construct a colonial architecture for the control of land and indigenous people and their relations to property, especially land.

As shown in Chapter 2, trusts as an institution to hold property, have a long history. There is a difference in how the institution developed in Britain and how it was transposed onto the British colonies. Bennett & Powell (2000), point to a key difference being that in Britain trusts were private law institutions, while in the colonies, trusts were public law institutions. This is an

[3] Baron Hailey, *An African Survey. A Study of Problems arising in Africa South of the Sahara.* (Great Britain: Oxford University Press, 1945), 712. Lord Hailey makes this remark in his capacity as the director of the African Survey which was conducted to understand the actions of different colonial powers on the African continent.

important distinction because it begins to account for the different actors that played a role in the institution in each context. In the British context, individuals were the key role players with the state, at the time made up of a monarchy, attempting to have some control over these trusts. As such, the role of the state was minimal. In the colonies, it was the opposite. The state's involvement was significant and, in several cases, for example in South Africa, Kenya and Canada, the state became the main role player in the institution (Atieno-Odhiambo, 1972; Bennet & Powell, 2000). The intention here is not to dwell on this difference as the aim of this chapter is not to contrast the trusts in the colonies to the trusts in Britain but to go further and grapple with the nature of trusts in the colonies.

O'Regan (1998) points out that trusts are a common feature in commonwealth countries which shows Britain's bias to using trusts as an institution to hold land for indigenous people. Trusts in the colonies varied depending on the context, as will be shown later, but a common feature was their effect on indigenous people's claim to their property – in this case, land. Indigenous people went from being land rights holders according to their customary law to being beneficiaries of trusts (Cross, 1992). While an explicit definition of a trust was given in Chapter 2 to frame the study, it is important to place this definition in its historical context. The definition largely represents a contemporary understanding of trusts. Rahman (2006) points out that the law of trusts has been in constant evolution with certain aspects being defined recently in England where trust law is seen to originate (Bennet & Powell, 2000). In earlier periods, which are the focus of much of this chapter, the institution was still in its infancy. Therefore, a broader and less rigid definition must be applied when tracing the origins of trusts in the British colonies.

For example, in Canada the arrangement was initially not referred to as a trust, but the schema was the same as that of a trust. The Crown would reserve certain lands for the exclusive occupation by Indians. According to the Proclamation of 1768, the tenure of Indians on this land was "personal and usufructuary right dependent on the goodwill of the sovereign" (Hailey, 1945:714). Another example is New Zealand, where Britain signed the Treaty of Waitangi on 6 February 1840 with Māori *rangatira* (chiefs). The treaty guaranteed the tribes exclusive and undisturbed possession of the land that was still in their occupation on the condition that the Crown had the exclusive right of pre-emption (Hailey, 1945). While some emphasise the positives of the Treaty in that it protected New Zealand from French annexation, the Treaty weakened chiefly authority over the land. Moreover, it later served as leverage for Britain to

assert control over the area culminating in Britain proclaiming sovereignty over the country on 21 May 1840 (New Zealand History, 2017). Therefore, the analysis of archival material for this chapter traced arrangements that involved the Crown having some kind of overseeing role over land that originally belonged to indigenous people.

4.2 The spread of trusts to British colonies

As discussed in Chapter 2, the seventeenth century became a key period in the development of trusts as an institution to hold property in Britain. At the same time, Britain was expanding its territory through conquest. Following Britain's experience in India, an ideology that indigenous peoples in the colonies must be ruled for their benefit was emerging in the late eighteenth century (Atieno-Odhiambo, 1972). This ideology would be actualised by transposing the institution of trusteeship onto the colonies (Du Toit, 2007; Manie, 2015). In Africa, trusts were found in East, Central and Southern Africa. In West Africa, trusts did not gain much traction because only a small portion of land was appropriated by settlers or declared Crown land. Therefore, much of the indigenous people's land administration systems were left undisturbed (Bennett & Powell, 2000).

In colonies where there was a larger settler population, the practise of holding land in trust grew impacting the organisation of land relations in those regions. Indigenous claims to land were subsumed into the trust structure. The colonial governments argued that by placing indigenous people's land in trust the government could monitor the appropriation of land by new settlers and ensure that a certain portion of land remained reserved for the exclusive use and occupation by the indigenous population (Hare, 1998). Bennet & Powell (2000: 601), offer a different view arguing that trusts were an English private law institution that was now being applied to public landholdings as a compromise between "land-hungry colonialists and the conscience of the colonial authorities". While colonial authorities were unwilling to allow indigenous people to continue exercising title over their land (Bennett & Powell, 2000), there was a need to justify European occupation over the African continent (Ramutsindela, 2012). Trusts offered an avenue to do both. Under this institution of trusteeship, the land on which indigenous people lived was placed under the control of a board of trustees. All interests in the land, such as the rights to sell, lease or alienate the land, was vested in the board of trustees with the provision that their power must be exercised for the support, advancement, and wellbeing of indigenous peoples (Bennet & Powell, 2000).

Within Southern Africa, there were countries such as South Africa, Botswana, and Zimbabwe where British colonial rule entrenched itself more strongly, while others were largely left undisturbed. Lesotho and Swaziland were such countries. Interestingly, the control of land in these two British protectorates bared the imprint of a trusteeship, particularly Lesotho.

Lesotho was annexed by the Cape Colony in 1871 but later placed under the direct control of the Crown in 1884, remaining a protectorate until its independence in 1966 (Government of Lesotho, 2018). Britain argued that its motivation to declare Lesotho, then called Basutoland, a protectorate was to prevent the Orange Free State from making any more attacks on native lands which has already been lost through previous treaties (Hailey, 1938). This motivation implied a trusteeship arrangement in that the Cape Colony Government, which represented the British, saw itself responsible for protecting the land for the benefit of the Basotho people, much like a trustee is seen as responsible for protecting the founder's asset for the benefit of the beneficiaries. At this point, the relationship between the Cape Colony and Lesotho seemed beneficial as it protected the Basotho people from land dispossession by the Afrikaners, although of course, some Basotho activists challenge this reading of history arguing that the British later colluded with the Afrikaner in stealthily usurping Basotho territory at the frontier (Motloheloa, 1962). I do not wish to dwell on these contestations of historical events as the aim in this historical period is to look at the land relations at the policy level. When one looks at the policy level, there are interesting changes that occurred following the declaration of Lesotho as a protectorate. The trusteeship relationship that existed between the Cape Colony and Lesotho had implications for how the land was controlled in Lesotho.

While the Lesotho Paramount continued to exercise authority under customary law, his authority over the land administration was subject to Proclamation 65 of 1922. As per this Proclamation, any decision made by the Paramount was invalid unless approved by the British Government (Hailey, 1945). One could argue that what this effectively meant was that the Lesotho Paramount was a lower-level trustee of the land with his power subject to the higher-level trustee being the Cape Colony Government that held the land on behalf of the British Government. It must be noted that there was a significant time lag between the declaration of Lesotho as a protectorate in 1884 and the passage of Proclamation 65 in 1922 meaning there were also various political processes and shifts that occurred in the period in between. However, the point to be made is that the declaration of Lesotho as a protectorate facilitated a

trusteeship relation between the British government and the Lesotho paramountcy giving rise to ambiguities about Lesotho's sovereignty and thus control over its land. These ambiguities could later be exploited by the British which is clear from the Proclamation 65 in 1922 which diminished the Paramount's power over the land.

The idea of declaring territories as protectorates also found expression further north. Eleven years after Lesotho was declared a protectorate Kenya experienced the same fate in 1895. While the circumstances surrounding the declaration of these two protectorates were starkly different, the effect of the protectorate declarations on land relations had some similarities that are worth analysing. In Kenya, the declaration of the protectorate came after a decade of the Imperial British East Africa Company's influence over the territory (Atieno-Odhiambo, 1972). Initially, the British Government did not want to be directly involved in East Africa and therefore chose to support the Company's private initiative rather than establish itself as a colonial authority directly. By supporting the Company's initiative Britain could retain British influence in East Africa while incurring minimal cost (Atieno-Odhiambo, 1972). Later, when Britain was ready to entrench itself more directly the influence established by the Company would be indispensable. This happened gradually with the passage of various land regulations and Orders which gave validity to treaties that the Company signed with chiefs who were often unaware of the consequences of these treaties (Atieno-Odhiambo, 1972).

As such, Atieno-Odhiambo (1972) argues that the declaration of the protectorate was merely a formalisation of British control over Kenya as the Imperial British East Africa Company represented British interest. Through the East Africa (Lands) Order in Council of 1901, much of Kenyan land was declared Crown land to be administered by the Commissioner and Consul-General and "such other trustees as might be appointed, to be held in trust for Her Majesty" (cited in Atieno-Odhiambo, 1972:97). This Order combined with the 1902 Crown Lands Ordinance and the 1915 Crown Lands Ordinance, firmly entrenched a trusteeship model in Kenya. Through these Orders, indigenous people's claims to land were reduced to rights of occupation, giving rights of control and alienation to the British Government. The effect of these orders was clarified in a court judgement which argued that indigenous people were tenants on the land they occupied at the will of the Crown (Wainaina vs. Murito (1922) cited Karanja, 1991 & Kameri-Mbote, 2006). Perhaps to appease itself, the British Government laboured on proving why this arrangement was beneficial for the indigenous people by portraying this arrangement as morally motivated. This is clear from this sentiment articulated

in a White Paper by the Colonial Office in 1923 announcing its obligations to the Kenyan people,

> But in the administration of Kenya His Majesty's Government regard themselves as exercising a trust on behalf of the African population, and they are unable to delegate or share this trust, the object of which may be described as the advancement of native races. There can be no room for doubt that it is the mission of Great Britain to work continuously for the training and education of the African towards a higher intellectual, moral and economic level than that which they had reached when the Crown assumed responsibility of the administration of this territory (cited in Atieno-Odhiambo, 1972:105).

The sentiment expressed by the British Government in Kenya is similar if not identical with that of the Cape Colony Government concerning Lesotho. Both governments saw themselves as responsible for the indigenous people in both territories. Implied in these sentiments was a belief that the existing customary authorities were incapable of governing themselves and by extension governing their land. As such, any role those customary authorities had over their land ought to be overseen by a British Government. Some scholars argue that trust arrangements were simply nominal, and that indigenous people continued to exercise their claims to land as they had done before the establishment of trusts (Delius et al., 1997). This was the case in instances where the land on which those indigenous people lived was not in demand. In cases where the land in question was in demand, the ambiguities entrenched by the trusteeship model had adverse ramifications later as the demand for land grew. As more settlers were invited into Kenya, the demand for land increased meaning that indigenous communities became victims of dispossession in favour of settlers. These dispossessions were justified politically and legally using the provisions in the various Orders passed (Atieno-Odhiambo, 1972).

Declaring territories as protectorates must be viewed within the development and refinement of the trusteeship model. This is because at an ideological level both frameworks achieve the same thing, namely to create ambiguities around authority. These ambiguities were used later by the Crown to assert control, meaning that the ambiguities were an impasse until the Crown determined whether it was valuable to pursue exerting direct control. In the case of Kenya, the presence of fertile land was a strong motivator while Lesotho did not offer much value for the

Crown. Additionally, both arrangements have a strong moral motivation that made resistance by indigenous groups more challenging. Since the dispossession took place legally, through the passing of Ordinances that gradually disempowered customary authorities, the terrain of resistance was shifted from the ground to the courts which placed the Crown at an upper hand. This is because indigenous groups had to find recourse within the law, where there was none. This is clearly shown by the Wainaina vs Murito (1922) ruling that rendered the indigenous people tenants on their ancestral land. The extent of the difficulties experienced by indigenous groups in legally resisting the trusteeship model is best illustrated using South Africa as an example, which we now turn to.

4.3 The South African permeation of trusts

There is a particular way the trusteeship model developed in South African for several reasons. South Africa was not a British colony from the onset as the territory was initially colonised by the Dutch East India Company (VOC[4]) in 1652 (McCusker et al., 2016). While the VOC's reign was brief, its influence was important because it meant that there were two white blocs in the South African colony, those of Dutch descent and those of British descent. In other colonies, the British were the only colonial power intervening which meant that the trusteeship model that emerged had a clear British character. Furthermore, the indigenous population in South Africa was complex. The land was initially occupied by the San and the Khoekhoe and over time Bantu speaking groups migrated into the area (Berger, 2009). By the late eighteenth century, Bantu speaking groups made up most of the population (Berger, 2009; Laband, 2020). Much of the trusteeship model was directed at regulating land relations for Bantu-speaking people. But the institution also had implications for people of San and Khoekhoe descent, but these are often not given enough attention due to their smaller numbers compared to Bantu-speaking groups. These complexities add to the nuance of how the trusteeship model developed in South Africa. Some of the key questions that will guide the analysis will be first, to understand the nature of the trusteeship model in South Africa. Secondly, what were the political dynamics that shaped the nature of trusteeship in the South with particular attention to the role of resistance? Thirdly, what were the implications of trusteeship on how the land was re-organised? Lastly, how does this history help us to understand the former Coloured Reserves better?

[4] The abbreviation comes from the company's Dutch name, *Vereenigde Landsche Ge-Oktroyeerde Oostindische Compagnie*.

It is important to account for the focus on South Africa. Mamdani (1996) cautions against South African exceptionalism which he argues is prevalent in South African studies. He argues that "South Africa has been an African country with specific differences" (Mamdani, 1996:27). In pointing out the reasons why the institution of trusts developed in a particular manner in South Africa, the aim of this study is not to over-emphasise the South African experience. From the onset, there is a recognition that trusts, as an institution to hold land, existed within the broader framework of direct and indirect rule that was used to govern Africa. However, what makes studying trusts important is to be able to unpack the continued racial character of property rights post-independence in Africa. It appears that racialised tenure continues to re-create itself through community development trusts in South Africa post-1994 and thus it becomes necessary to have an understanding of the history of this institution in the South African context.

In South Africa, the system of trusteeship can be traced to 1844 at mission stations in the Cape Colony (Strassberger, 1969; Bennet, 1996). However, it was only in 1864 when the Natal Native Trust was created that a more comprehensive system was developed (Bennet & Powell, 2000). While the system was being refined further in the Cape Colony and Natal which were British colonies, a parallel system of trusteeship was developing in the Transvaal, an Afrikaner republic. There were some important differences in the trusteeship system as it unfolded in the British colonies in comparison to the Afrikaner republics.[5] In the British colonies, trusteeship was formalised relatively quickly and was soon taken over by the colonial authorities from the missionaries. Whereas, in Transvaal, the system operated informally, with less intervention from the colonial authorities. Bergh & Feinberg (2004), argue that it was only after British occupation that the system gained formal recognition in the Transvaal again affirming the British's preference of using trusts to organise land relations in the colonies. Furthermore, Bergh & Feinberg (2004) make the analysis that the trusteeship system in South Africa was part of a bigger phenomenon which they describe as the interchange between race and land in European colonies which allowed white settlers to seize large tracts of land belonging to indigenous peoples. While this is the case, it appears that in its formative stage, when the practice of trusteeship was still administered by the missionaries it did not necessarily carry

[5] Orange Free State (OFS) was the second Afrikaner republic. There was no need for a comprehensive trusteeship system as only two reserves were established in the OFS (Bennett, 1996).

this objective. To unpack this further, a brief history of the missionaries in the Cape Colony and Natal is useful.

The role of missionaries in South Africa is laden with complexity. Initially, it appears that the missionaries served as mediators and conduits between indigenous people and colonial authorities (Kiernan, 2002). This was particularly important as under both the VOC and later under the British empire, indigenous people's land rights were either explicitly ignored or treated tenuously by colonial authorities. This was particularly the case for the Khoekhoe (Bennett, 1996). At the time, the prevailing understanding from colonisers was that for indigenous rights to be recognised and enforced post colonisation, the indigenous people concerned had to have a recognisable legal system. This was a precondition for recognising indigenous populations as sovereign nations. As per the thinking at the time, if there was no sovereign government, then that territory was deemed *terra nullius* which is to say that that the indigenous population concerned was deemed to have no legal system or therefore no land rights (Bennett, 1996). Of course, the merits of this recognition as a sovereign nation were in line with European socio-political understandings of governance which were imbued with viewpoints that failed to understand the organisational structures in Africa.

It appears that the Khoekhoe people were not recognised as a sovereign nation by the colonisers of the Cape Colony, in particular the British. While this was largely the case Bennett (1996) also points out some discrepancies during this period with regards to the status of the Khoekhoe. Sometimes the VOC bought land from the Khoekhoe which implied that the VOC recognised the Khoekhoe were a sovereign nation and in other cases the company simply appropriated land. However, for the most part, or at least after the British occupation of the Cape Colony, Khoekhoe people found their claims to land ignored and therefore had to find other ways to assert or negotiate their claims to land. This is where the missionaries played a role. Missionaries were Europeans and thus if they asked or acquired land from the colonial government their claim to the land was recognised. As a result, some missionaries acquired land on behalf of the Khoekhoe (Sharp & West, 1984).

Between the missionaries and the Khoekhoe, there was a recognition that the land was originally Khoekhoe land, but the colonial government did not recognise it as such. In these instances, the practice of holding land in trust for indigenous people was a tool that the Khoekhoe could use to retain access to their land. However, this practice meant that there was

a power dynamic between the missionaries and the Khoekhoe communities on the land and there are instances where the missionaries exploited this relationship as a recruitment strategy (Ashton, 2018). Therefore, trusteeship as a practice in its early days altered how space was organised. The first change was that with the onset of colonial authority indigenous people, in this case, the Khoekhoe found their claims to land annulled. In response to this, the Khoekhoe had to find ways to renegotiate their claim to the land. Their claims to their land were then nestled in their relationship with the missionaries as trustees over their land which meant that their claims to the land were still effectively annulled, but they could negotiate new terms through the missionary trustees. This added complexity in the organisation of space that was not there previously. First, the organisation of space would be a product of the rights accorded to the missionaries by the colonial government and then second, through the negotiations between the Khoekhoe communities and the missionary trustees. Importantly in both these processes, ordinary community members were not involved unlike under their customary law where they could participate in the organisation of space more directly.

A permeation of this relationship existed in Natal but with an important distinction. In Natal, the colonial government recognised the Zulu polity as a sovereign nation which meant that their claims to land were not ignored (Guy, 2013). Instead, the colonial government had to seize control of land through warfare. With each territory won through warfare, the Natal government would have to grapple with how to organise the space for the indigenous people who were now to be its subjects. But the Natal colonial government was still in its formative stages in developing a system of governance for the newly acquired territory. Constrained by limited administrative capacity the Natal government had to find a way to ensure it maintained some control over the territory without being involved directly. To do this, the Natal government leveraged the third actor in the organisation of space which was the various missionary societies that had settled in the area and had begun to form trustee-beneficiary relationships with the individuals and/or groups that were breaking away from the Zulu polity (Kiernan, 2002).

For the Natal government, it was useful to allow the relationship between the missionary trustees and the African beneficiaries to continue because it ensured that the land remained within some kind of European control while the question of land ownership remained unresolved. While the Natal colony governed itself, it remained subservient to the Cape colony government (Kiernan, 2002) which meant that it was also in the process of re-organising land

relations for Africans. As with any other colony, there were questions of whether indigenous people should be allowed to own land and what form this ownership would take. Trusts provided a useful placeholder that ensured colonial control over the land. Later when the Natal colonial government secured its hegemony over the territory it would be able to answer these questions. This we see happen in the latter part of the nineteenth century following the defeat of the Zulu nation.

There are some preliminary observations to be made about the spread of trusts to South Africa. Firstly, the nineteenth century was the formative stage of a kind of governing colonial authority in what we now know as South Africa. At this time, the four provinces were not consolidated as both the British and Afrikaner white blocs contested having some kind of hegemony over the area (McCusker et al., 2016). These contestations would become even more pronounced after the formation of the Union of South Africa in 1910 as each bloc wrestled for power over the Union. Secondly, the establishment of the Union would present yet another problem: the need for an overarching land policy across the four provinces (McCusker et al., 2016). This was not an easy process as underpinning the land policy suggestions from the two white blocs were different ideological positions on how Africans should relate to the land. Thirdly, trusts offered some answers in dealing with this need for an overarching land policy.

4.3.1 Trusts: an arm of direct or indirect rule?

Given the context that there were two dominant white blocs in South Africa, the British and the Afrikaner, it is natural to pose the question of whether the trusts established reflected a British or Afrikaner outlook. This is a useful question in one sense in attempting to understand the nature of trusts. But this question can be limiting in that it reduces trusts to their expression in the South African context. To fully grapple with trusts, they must be located within the framework of how, as Mamdani (1996) argues, Europe governed Africa. Governing Africa was not only about governing the people, but it was also about organising the space on which the people lived in particular ways to meet the objectives of the colonial administration that in turn facilitated colonial geography. Specifically, colonial geography centred around reorganising space to fulfil the requirements of the colony. In settler colonies, this was particularly interesting in that the objective would be to transform the colony for the use of settlers rather than just simply extracting resources from the colony.

Therefore, I argue, that trusts must be understood politically, as instrumental to state rule, i.e., they facilitated the governance of the people. Geographically, they were deployed as a mechanism for the spatial expression of colonial geography. At the time that trusts were established colonial powers were grappling with the native question which Mamdani (1996:16) summarises as, "how can a tiny and foreign minority rule over an indigenous majority. To answer this question, there were two broad answers: direct and indirect rule". Therefore, in trying to understand the nature of trusts in South Africa, the first consideration is on the form of rule, between direct and indirect, that trusts serviced. The second consideration is to locate that form of rule within the contestations of the two white blocs in South Africa.

Scholars who theorise on direct and indirect rule make an important point that while the two forms of rule are often spoken about in a dichotomous fashion they are best understood as systems of rule along a continuum that reflects the degree of central control (Gerring et al., 2011). In the analysis of the history of colonial rule, some general remarks are often made about each colonial power's style of rule. For example, Britain is often thought to have employed the use of indirect rule in its colonies while France is seen to have used direct rule more (Gerring et al., 2011). With this view of these forms of rule as a continuum, such generalisations become less useful. Particularly in the British context, where there is a difference in the style of the rule used in the nineteenth and twentieth century respectively. Mamdani (1999:157) succinctly argues this by referring to Native administration in South Africa which trusts were a part of, "There was no single British colonial legacy. Native administration in the 'segregation' period was more in line with the legacy of nineteenth-century British 'direct rule' than with twentieth-century British 'indirect rule". If one considers this argument, it becomes important to bear in mind the following factors concerning trusts in South Africa.

First, there was a British white bloc that shifted its view of how to govern Africa between the nineteenth and twentieth century. Second, there was an Afrikaner white bloc that initially encountered the indigenous population during the VOC period where it sought to impose a master-servant relationship with African people. For the Afrikaner there could be no ambiguity in racial relations as expressed in the South African Republic (Transvaal) constitution, "*geene gelijkstelling van gekleurden met blanke ingezetenen… noch in Kerk noch in Staat* [no equality between people of colour and white inhabitants in either church or state]" (cited in Odendaal, 2012:21-22). While the Afrikaner white bloc continued to lose much power over its Republics

following successive British occupations and its eventual defeat after the Anglo-Boer War, it remained a significant threat to Britain's attempt to have hegemonic control over the territory and its organisation. Third, while the two white blocs were united in their need to control the African population, they represented differing capital interests. The Afrikaner bloc largely, but not exclusively, represented agricultural interests and therefore needed ways to ensure that African labour was available to work on the farms while the British white bloc increasingly came to represent mining capital interests which attracted African labour to the urban areas in search of jobs in the mines (South African Parliament, 1936; Moon, 2017).

Agriculture was progressively struggling to sustain a supply of labour because their wages were lower than those offered in the mining sector (Moon, 2017). If African people continued to have access to sufficient land, then they could continue to farm for subsistence and thus not need to offer their labour to the increasingly less attractive agricultural sector (Kepe & Ntsebeza, 2011). Therefore, for the Afrikaner white bloc, a key aspect of answering the *native* question would be to impose heavier restrictions on how much land would be reserved for African people to ensure that there was enough incentive for African people to offer their labour cheaply to the agricultural sector. Trusts were seen as an important tool to achieve this. Through trusts, the segregation and later apartheid government would be able to put a cap on the amount of land that the African population would be able to use or live on and this would drive labour interests (Moon, 2017). This became more important in the years following massive industrialisation where there was competition for labour. However, trusts did not start then, trusts as mentioned previously have a long history going back to 1844 in the Cape Colony. To understand trusts in the nineteenth century there is a greater need to pay attention to the circumstance that the colonial authority found itself in.

In the nineteenth century, the colonial power in South Africa was still in its infancy in terms of establishing its rule. There had been many encounters between indigenous groups with different colonial groups, from the Dutch to the English (McCusker et al., 2016) but it is only after British occupation that one can see a system of rule being imposed more formally (Guy, 2013). While the VOC governed the Cape Colony for a brief period, their interaction with indigenous groups was not that of a clear imposition of rule (Sharp & West, 1984). In some

cases, the Dutch were able to exercise a slave-master relationship with the Khoisan[6] groups; in other cases, the VOC bought land from the Khoisan which Bennett (1996) argues implied recognition of their sovereignty and some level of equality. This changes after the British occupation because the British were clearer in their imposition of rule coming as a colonial power rather than a company seeking to exercise exclusive control over the territory.

To understand how the British style of rule evolved the different hypotheses of rule which Gerring *et al.* (2011) summarise well must be considered. Three are useful for this discussion: access, power and the agenda-centred hypothesis to rule. The access hypothesis argues that the administration of rule is influenced by the extent of accessibility of the colony, which is in turn influenced by geography, disease, and transport barriers. Greater accessibility to the colony is seen to lead to a more direct style of rule and vice versa. In the case of South Africa, access was navigated through the ports which explains why the trust system began in the Cape Colony as it was from the Cape port that access to the territory was first established. As the British colony expanded to Natal access was severely constrained and the missionary trustees become increasingly important as they had already established access to the territory.

A power hypothesis argues that the form of rule employed depends on the extent to which it is military possible and necessary to do so. Thus, two sets of factors influence the style of rule under the power hypothesis. On the side of the colonial authority, it is the combined technological, military, bureaucratic, demographic, and economic capabilities to rule. The greater this combined coercive strength, the more direct the style of rule. But this is also influenced by the second factor which is the propensity to revolt by the colonised group. When more revolt is experienced, it necessitates a change in the form of rule preferred. Meaning that while the colonisers might have preferred a more direct form of rule they could be forced to adopt a more indirect form of rule to mitigate the resistance experienced and vice versa. Lastly is the agenda-centred hypothesis which argues that when the colonial authority's agenda is more transformative it is likely to impose a direct system of rule. This is because to succeed in thoroughly transforming the colony's economy, society and government, the colonial authority must have a better grasp of the levers of power in the colony (Gerring *et al*., 2011). This again

[6] In this section the term Khoisan is used to refer to both Khoekhoe and San groups. There is much scholarly literature (Sharp & West, 1984; Biwa, 2006; Penn, 2005; Laband, 2020) that shows that there was often misclassification of the two groups by the colonial authorities which is why this term is used to encompass both groups.

is best illustrated in the development of trusts in Natal. While the colonial government was constrained in its ability to control the territory, it had great ambitions for the Natal colony, particularly when it realised the agricultural potential of the land.

Now let us consider these hypotheses as they played out in the relationship between the state and the African people through the missionaries. In tracing the relationship between the state and the missionaries in Natal, Kiernan (2002:9) makes the following observation about the trusteeship, "The Trust conferred the role of 'caretaker of property and residents' on the missionaries for an undefined period. Beyond that, the question of ownership of the land was not clearly determined. Whether the grant had transferred ownership to the occupants or envisaged such a transfer and the lapse of the trust at some future time, or whether it was an acknowledgement of original ownership on the part of the residents collectively was never fully resolved. The trust was shrouded in ambiguity". From 1862, the Natal government began issuing the Deeds of Trust to the missionaries. The Natal colonial government was still in its infancy as it was simultaneously trying to build up a capacity to govern the areas which needed both military and administrative prowess. At the same time, it was trying to hold its ground against the strong Zulu kingdom in the north which it had only recently wrestled control over the territory from the migrating Boers (Kiernan, 2002; Guy, 2013). Both processes were resource and time-intensive as settlers needed to migrate to the area and be deployed to carry out these functions. As such, the Natal colonial government did not have enough resources to control the land directly.

The occurrences clearly show how access, power and agenda played out in the development of trusteeship in the nineteenth century. While the Natal colonial government did not have enough power to govern directly until much later, it had a transformative agenda for the Natal territory. Not only did the British want to 'civilise' the African population but increasingly there was a desire to make the territory a distinctive British settler colony, which meant that the colony had to reflect British principles particularly with regards to ruling the indigenous population. Therefore, the Natal colonial government had to find alternative ways of achieving its transformative agenda with limited resources and trusts served as an ideal tool to do this. By entrusting the land to the missionaries, the Natal colonial government bought itself time to establish its hegemony over the territory, a necessary precondition to exercising authority over the territory. As such trusts served as an administrative impasse ensuring that while the issue of indigenous people's property rights remained unresolved, control over the land remained in

European hands. As Kiernan (2002), argues the missionaries were effectively recruited as unofficial government officers within this system. Later when the Natal colonial government had successfully established its hegemony over the area and was ready to resolve the issue of indigenous people's property rights, it began to strategically push the missionaries out as trustees, replacing them with its officials. At that point, when colonial officials took over as trustees, the trusts would then serve as a more direct form of rule. The point to be made here is that trusteeship as an institution to hold indigenous land was fully embedded in the continuum of direct and indirect rule. As such the function of the trusts would morph as the continuum of rule shifted from indirect to direct in the nineteenth century.

4.3.2 Political landscape surrounding the creations of trusts

It is important to say explicitly that when direct rule is preferred by the colonising unit and it is practically possible, there would be no need for trusts. This is because the colonising group would have clear objectives of how it intends to re-organise space and would have the means to enact these objectives. Trusts are useful in cases where it is not possible, for whatever reasons, to enact the objectives that the colonising unit desires. In the British colonies, Cape Colony and Natal, a central impetus of creating trusts was the unanswered question of African people's property rights. Britain was ambivalent about allowing the indigenous population to own land in freehold. On the one hand under indirect rule of the chiefs, African land in the reserves could be held communally under the trusteeship of chiefs who reported to the government through native commissioners. On the other hand, there were Africans who had assimilated to English principles, as was the intention of the 'civilising' mission, and therefore demanded their right to be allowed to own property as any other English subject. This meant that Britain was caught in a hard position because, on the one hand, it encouraged Africans to follow British principles in the hope of attaining British citizenship and on the other hand Britain was uncomfortable with letting Africans hold land in freehold. To circumvent dealing with this predicament, the trusts also enabled the Crown to retain ownership of the land while on the ground African people were given use rights that appeared to be freehold titles. This can be seen in the phrasing of the Acts and grants instituting these trusts. There was discretion given to the board of trustees to allow individuals to demarcate their plots similarly to plots being demarcated for freehold title.

In Natal, a further motivation to set up trusts was the need to further destabilise the Zulu kingdom in the north. The north and the south were separated by the Thukela river with the north still under the control of the Zulu kingdom. Again, the role of the missionaries becomes important for understanding the developments that occurred. In 1845, the British had managed to wrestle control over Natal from the migrating Boers to establish Natal as a Crown colony subordinate to the Cape colony (Bennet, 1996; Kiernan, 2002). But the British had plans to control the whole area, not just Natal, which at the time was the area south of the Thukela River until Pondo kingdom as illustrated in Figure 4.1 below. Wrestling control over the Zulu kingdom needed to happen using multiple ways and one of which was to destabilise the people paying allegiance to the Zulu kingdom. By setting up native locations, which later became trust land, the British were creating an alternative space for Zulu subjects who were either disgruntled or wanted to live separately because they had become Christians and thus no longer paid allegiance to the Zulu kingdom. This progressively weakened the Zulu kingdom by reducing the people under its control. This meant that the Zulu kingdom was more vulnerable to defeat, and this happened in 1884 when it was annexed by the Natal government (Kiernan, 2002). Following the annexation, Britain was able to extend this system of trusteeship further north co-opting the traditional authorities into this system to serve as lower-level trustees accountable to colonial officials (Guy, 2013)

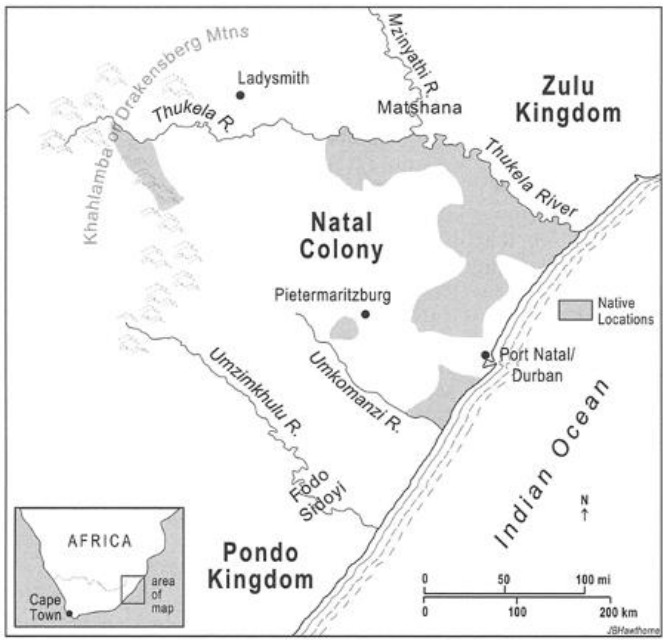


Figure 4.1: Map of Colonial Natal, 1847-1858

(Source: McClendon, 2006:263)

4.3.3 Land relations re-organised through trusts

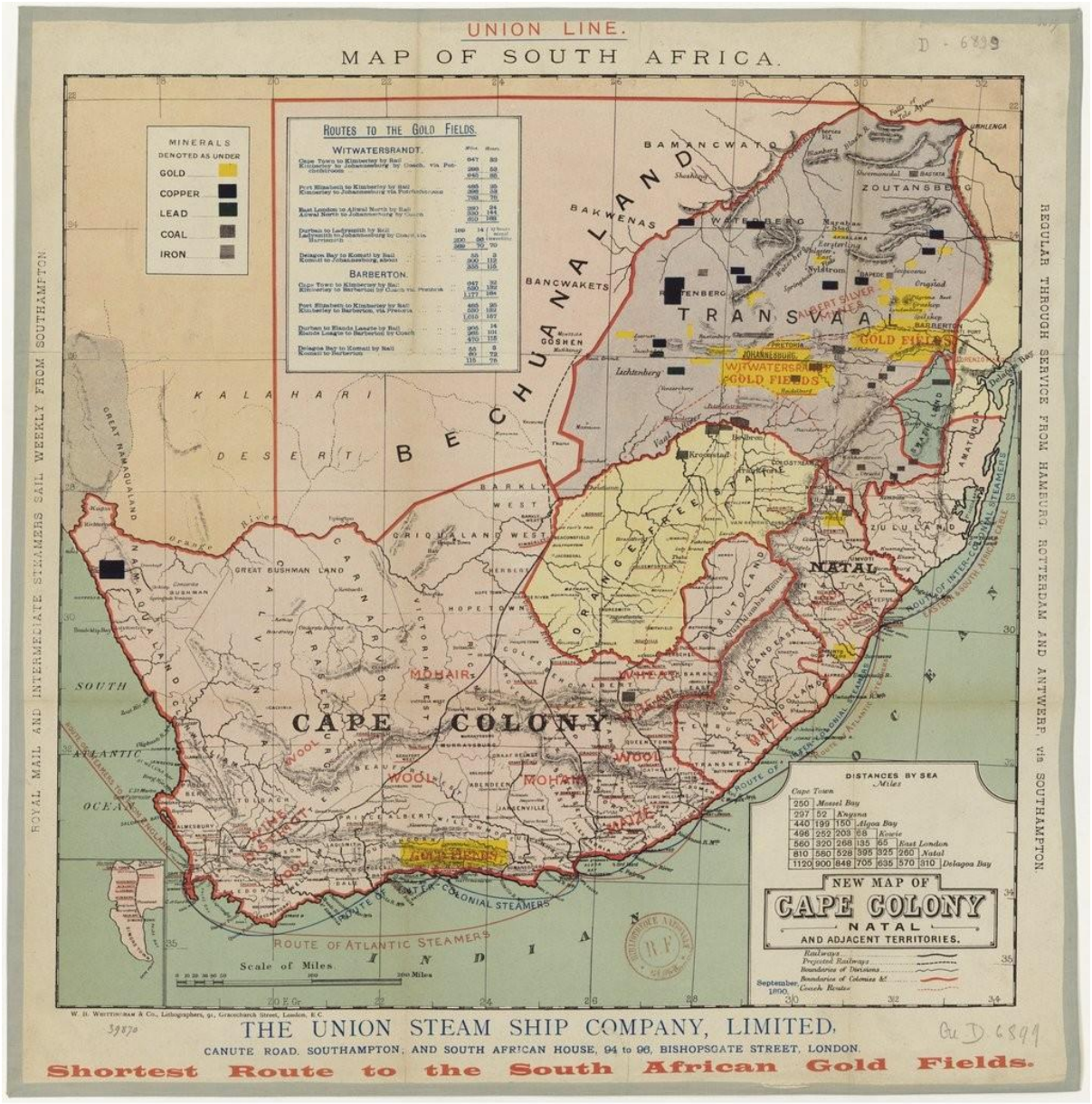
The recruitment of missionaries as de facto government officials had implications on the relationship between the African population and the missionaries. While Britain had a transformative agenda for the Natal colony, there was already some transformation of the society happening because of the influence of the various missionary societies present (Kiernan, 2002). The missionaries were invested in securing bounded areas in the pursuit of recruiting the African population to the church. Land served as an important conduit to do this. In the north, the Zulu kingdom exercised authority and so space was organised around allegiance to the Zulu kingdom. However, some African people either did not pay allegiance to the Zulu kingdom because their kingdoms had been destabilised during the Mfecane years or no longer wanted to be under the governance of the Zulu kingdom for various reasons (Guy, 2013). For these individuals, an alternative to the Zulu kingdom as an authority figure and as a means of accessing land would have been an incentive to relocate into the missionary reserves. The missionaries benefited from this in that those people who relocated to the land would be influenced by the missionary views, while for these people being on missionary land meant that their access to land did not have to hinge on their allegiance to the Zulu kingdom. While Kiernan (2002)'s analysis of the missionaries in Natal is perhaps too generous, a point to be made is that the missionaries seemed to not have fully understood the Natal government's vision to use the trusts as a tool to re-organise land relations in Natal. As such, the missionaries, at best, were unaware accomplices to the colonial government's agenda, or at worst, an interest group that was unable to outcompete the colonial government to the main re-organiser of the Natal as a space.

While is clear to see that trusts emerged as a British institution, they also found expression in the Transvaal, an Afrikaner Republic. At an official level, the Afrikaner Republic government had a clear line in its view about prohibiting African people from purchasing land. Thus, trusts emerged informally from missionaries who assisted African people in purchasing land. Tracing trusteeship in the Transvaal, Bergh & Feinberg (2004) show that the institution, while informal, was widespread and enabled Africans to exercise considerable decision-making power about their land, particularly in the context of mining leases. As we shall see in Chapter 5, this power privileged traditional leaders whom the apartheid government co-opted into managing the wider African population.

4.3.4 Implications of trusteeship on the former Coloured Reserves

While it is easier to see the progression and formalisation of trusteeship as an institution to hold indigenous land from 1864 in Natal culminating into the consolidation of all trusts in 1936, a parallel and somewhat haphazard process was happening in the former Coloured Reserves. While the first record of trusteeship was in the Cape Colony in 1844, the state intervened minimally until 1909 when the Mission Stations and Coloured Reserves Act (Mission Stations Act) was passed. The Act's objective was, "To provide for the better management and control of certain Missions Stations and certain Lands reserved for the occupation of certain Tribes or Communities, and for the granting of titles to the Inhabitants of such Stations and Reserves". The Act defined a mission station as, "any land held by a missionary society or religious body as a grant in trust for the natives or coloured persons in occupation of such land".

It is useful to place the Mission Stations Act in its historical perspective. The Act was passed in 1909 before the formation of the Union of South Africa meaning that its jurisdiction was the Cape Colony which by now encompassed an expansive area as indicated in Figure 4.2 below. While there was a considerably diverse indigenous population, the Cape Colony government was beginning to distinguish and group the population into two broad categories of *native* and Coloured. Evidence of this is how the Act defines the inhabitants of the Mission Stations and Coloured Reserves as "natives or coloured persons". This wording seems to suggest that from 1909 onwards the Cape Colony government had developed a clearer ideology of not considering Coloured people as *natives* meaning that *native* would become a category reserved only for Bantu-speaking groups. Mellet (2020), places this categorisation in what he argues was "De-Africanisation" which paved the way for the construction of *native* and Coloured identities between 1904 and 1950. We shall return to the period from 1936 to 1950 in Chapter 5, but for the moment we dwell on the period between 1904 and 1936. Post the Anglo-Boer, Mellet (2020) argues that the British and the Afrikaners were faced with the fact that, unlike in the Americas and Australasia, there was a surviving and numerically stronger indigenous population that had a good track record of resistance. As mentioned previously, the propensity to revolt by the colonised group is a strong determinant in shaping the kind of rule adopted. This meant that the British and Afrikaner needed to be united in an adoption of a strategy that would fragment this resistance and this is where the well-sharpened strategy of "divide, conquer, control and reconfigure" through identity would become most important (Mellet, 2020:271).



Source gallica.bnf.fr / Bibliothèque nationale de France

Figure 4.2: Union Line: New Map of Cape Colony, Natal, and Adjacent Territories

Source: The Union Steam Ship Company (London), 1890. Print.

Available: https://gallica.bnf.fr/ark:/12148/btv1b84458044/f1.item

Mellet (2020) argues that the first step was to reconfigure and re-identify over 50 indigenous groups into the category of *native*, while the remaining Africans who had over 195 African-Asian origins were categorised as Coloured. The official justification that the Cape Colony government relied on was that Coloured people did not speak Bantu languages but rather spoke English or Afrikaans with some traces of San and Khoekhoe languages or an African-Asian-Arabic creole mixed with English and Afrikaans (Mellet, 2020). It does appear though that for

some time this categorisation was not rigid as the legislators use “or” instead of “and” when separating these two groups (Mission Stations Act, 1909). This was further complicated in the northern frontier of the Cape Colony where the distinctions between trekboers and Khoisan groups were often blurred by either Khoisan people attaining “Boer” status through wealth, often livestock, or by trekboers being naturalised into Khoisan groups following either loss of wealth, spending years farming on historically Khoisan land or voluntary association and marriage (Sharp & West, 1984).

The Mission Stations Act was divided into two parts, one dealing with mission stations and the other with communal reserves. The Act defined a mission station as “any land held by a missionary society or religious body as a grant in trust for the natives or coloured persons in occupation of such land” while a communal reserve was “any Crown land in the Division of Namaqualand reserved or set apart otherwise than by formal grant for the occupation of native and other communities”. Because the mission stations had been land granted to the missionaries, the Act mandated the Governor to first seek the consent of the previous trustees and consult the affected people before applying the provisions of the Act to any mission station (section 3). Regarding the communal reserves, the Governor was mandated to consult the affected persons directly (section 20) which would make sense as there was not an intermediate body because the communal reserves were seen as unalienated Crown land. While the modes of consultation employed differed, there was a recognition that indigenous groups must be consulted about the management of their land.

Furthermore, the Act provided for the registration of individual rights in both mission stations and communal reserves (section 4, subsection 6) as well as the election of a Board of Management (section 5). This Board was to consist of nine people of which six were to be elected from the list of registered occupiers (section 5, subsection 1). The remaining three members were appointed by the Governor with recommendations from the Society (i.e., the mission society) and the Resident Magistrate of the District (section 5, subsection 6). While the chairperson of this Board was to come from the three members appointed by the Governor having both a casting and deliberating vote (section 5, subsection 1), it was significant that the registered occupiers were given a considerable decision-making power about their land through their ability to elect six representatives within the Board. Moreover, the Governor would only intervene in the governance of the land in cases where it had been sufficiently shown that the Board of Management had failed to carry out its duties. The Governor would, after giving three

weeks' notice in the Gazette and any paper that circulates the district appoint an administrator to carry out the Board's duties (section 7).

In a sense, through the Mission Stations Act, indigenous people had more security as their rights and decision-making power through elected representatives was formalised in law compared to the informal trusteeship arrangement that depended on the goodwill of the missionaries in the case of mission stations or other officials who acted as trustees for the Crown lands. However indigenous people were still under a trust arrangement because the ownership of the land did not rest with them. As per section 9, subsection 1, "No land allotted under the provisions of sub-section (6) of section four of this Act or allocated or granted under the provisions of section eight hereof shall be alienated, transferred, ceded, leased, mortgaged or rendered liable to execution for debt without the previous consent of the Governor; nor shall any such land be capable of sub-division or of being held in joint occupation or ownership". This means that the individual rights registered were that of use and occupation only as all other rights were vested in the Governor.

On the one hand, this was an improvement in the initial condition where indigenous people's rights were ignored completely and where they depended on the goodwill of missionaries. On the other hand, this Act diminished the rights of indigenous people who in the period before 1909 had managed to secure agreements that allowed them to exercise full ownership of their land. For example, under the Dutch administration, various Nama chiefs and people of mixed-race descent were given titles under a quitrent system (Smalberger, 1969; Sharp, 1977) meaning that they not only had rights of occupation and use but also rights of alienation and exclusion. For these groups, the Mission Stations Act left them with fewer rights than they enjoyed before its passing. Hence Sharp & West (1984) argue that the Mission Stations Act had the effect of systemising racial stereotyping and classification in what was a relatively cosmopolitan landscape. It meant that the agency to acquire land through the quitrent system was taken away from indigenous people.

At a governance level, the mission stations remained unaffected by the changes brought by the Mission Stations Act. In part, this is because of the geographical locality, the resistance, and resources. The mission stations were in remote areas which made the process of deploying colonial officials slow thus in most cases, the missionaries remained in charge (Smalberger, 1969). Moreover, these areas were sites of minimal resistance to colonial power at the time.

Penn (2005) has documented how the combined impact of the commandos and the arrival of missionaries in the eighteenth century fragmented communities and thwarted resistance at the northern frontier. As such by the early twentieth century when the Mission Stations Act was passed the culture of 'guerrilla' resistance by the Khoisan groups had long been replaced by compliance and leaning into the missionaries for assistance. As such while the colonial government had clarified its absolute control over the land through the Mission Stations Act, there was little or no incentive to assert control. This would change when diamonds were discovered in the area in the 1920s (Bregman, 2010). Lastly, the difference in resources also mediated the government's action. In the mission stations closest to the Cape of Good Hope, the interest in commercial farming was the primary motivator of government action. There was a need to secure labour for the farms which motivated local people being squeezed into smaller parcels of land to force them into labour (McCusker et al., 2016).

Further north this was harder because farming was not widespread as it was overtaken over by mining during the copper mining boom in the 1850s (Smalberger, 1969). As such mining interests played the larger motivating factor in the transformation of mission stations. Smith (1996) argues that it is best to understand the government's action in the nnorth during this period as a balancing act which is why there were discrepancies in how policies were applied to each mission station area. The state was dealing with three interest groups, namely missionaries, farmers (trekboers) and mining companies as well as balancing its own need to secure the landscape. For example, communication between government officials reveals that even the officials were unclear about the Cape Colony government's position on the ownership of the Richtersveld. In a communication to the Magistrate at Springbok on 18 April 1920, the Secretary of Lands said the following:

> … in regard to Richtersveld the Government's attitude has been as uncertain one so far, in as much as that, although it has undoubtedly been taken for granted that both the Bastards and the Hottentots possess certain surface rights of user and residence, a claim, that they should be recognised as actual owners of the soil, had never been admitted, . . . while you should do nothing which would be tantamount to a recognition of any claim on the part of the Bastards and Hottentots to ownership of the Richtersveld, no steps can be taken to interfere when white farmers are charged grazing fees by the Bastards or Hottentots; these people undoubtedly have certain grazing rights in the Richtersveld and, if outsiders desire to participate in the use of the grazing, the payment of a remuneration

> therefor seems reasonable, though the practice should not receive your official sanction (cited in Richtersveld Community and Others v Alexkor Limited and Another, 2001:20).

By and large, the government was willing to allow relations between the white farmers and the Khoisan people to continue as per normal. It was only after the discovery of diamonds that the government's attitude changed. Through diamond mining, this landscape which was previously seen as peripheral both geographically and economically had the potential of being a lucrative and strategic site of wealth accumulation. As a result, the government began asserting the provisions of the Mission Stations Act, which prohibited "native" or Coloured persons from having any legal claim to mineral rights and precious stones in land reserved for them. Smalberger (1969) and Ashton (2018) detail how the colonial government began to override leases that missionaries had entered into with mining companies on behalf of the local communities. Important to remember is that part of the shock of the missionaries during this time was that they had previously entered into agreements on behalf of the communities with farmers and mining companies that needed land to be used for grazing livestock used by their officials (Smalberger, 1969) and so the shift in government's position caught them off-guard. Bregman (2010) explains this shift quite well by arguing that following the discovery of the diamonds, the colonial government began to rethink the economic viability of the area.

This somewhat haphazard enforcement of the Mission Stations Act by the colonial government is further evidence of the trusteeship model being embedded in the continuum of direct and indirect rule. While the colonial government had not decided what value that the Namaqualand region would bring for the colonial project, the government could lean on the various missionaries to keep the land under European control and manage the day-to-day governance. However, as soon as the region's economic prospects changed through the discovery of diamonds, the state could again leverage the provisions of the trusteeship system to assert its control over the resources in the region.

4.4 Conclusion

This chapter has attempted to provide a broad overview of trusts by analysing how trusteeship as a system to hold indigenous property emerged as a British policy position in the colonies. Using South Africa as an example the chapter delved into the complexities of this system and how it shaped the relationship between Africans and the colonial state concerning land. Not

only did trusteeship progressively dimmish African people's claims to their land, but it also re-organised territory coding it with legal ambiguities. It is important here to note the differentiated contexts that mediated the extent of the ambiguities in the arrangements. Interestingly, one year before the establishment of the Union of South Africa, the Cape Colony government passed the Mission Stations and Communal Reserves which gave Coloured people and *natives* in the Cape Colony considerable decision-making power through elected Boards of Management. This is somewhat unlike the model applied in Natal where the Natal government simply replaced missionary trustees with colonial officials with no change in the decision-making power.

It is not possible to escape the racial underpinnings that seem to have motivated the preferential treatment given to people on the missions stations and communal reserves. In Natal, there was only a *native* population which seems to have motivated a harsher line about limiting the decision-making power of the indigenous population. It is also worth noting that the Cape Colony government had a more liberal stance on property relations as compared to Natal and indeed the Transvaal and Orange Free State. It was in the Cape Colony where for an extended period Bantu-speaking people could own land in freehold and thus were able to vote. At the same time, while the Cape Colony government was willing to give preferential treatment to people on mission stations and Coloured Reserves, it was only limited to surface rights. When it came to the control over valuable resources, in this case, diamonds, the Cape Colony government was unwilling to give these groups control. As we shall see in Chapter 5, by 1936, these discrepancies in the treatment of African people were replaced with a ubiquitous and harsher policy.

Chapter 5

The creation of the Bantustans and Coloured Reserves through trusteeship

"The object of this Act is to provide lines of demarcation between natives and non-natives in so far as ownership of land is concerned"[7]

5.1 Introduction

The Bantustans and Coloured Reserves are arguably one of the most conspicuous outcomes of apartheid. However, the idea to create them preceded the apartheid regime. Using the Native Trust and Land Act as a starting point this chapter explores how trusteeship was integral to the creation of the Bantustans and Coloured Reserves. The first section of the chapter provides the context of the foundation legislation by tracing its progression from the Bill to an Act of Parliament. In the second section, the chapter shows how the apartheid state used trusts to control land and people as an anchor of the ideology of apartheid. The chapter draws attention to the fact that even when certain Bantustans obtained independence or self-government from the Union of South Africa, ownership of their land was still held in trust by the Ministry of Native Affairs. This continued use of trusts despite the apartheid state's portrayal of the Bantustan system as providing independence for African people indicates that trusts continued to serve a purpose for the apartheid government. Drawing from experiences where minerals were found in the Bantustans and Coloured reserves, the chapter shows that trusts allowed the apartheid state to retain control over strategic resources. By way of chronology, the chapter locates the discussion between 1936 to the late 1970s.

5.2 Native Trust and Land Act: strengthening tenuous white politics

Much like Chapter 4 where the political landscape surrounding trusts was discussed it is necessary to give a brief context of the political dynamics from 1936 onwards. Discussing the trajectory of the making of the land policy before 1948 McCusker et al. (2016) make an important intervention using Gramsci's notion of hegemony. They argue that white politics in South Africa were turbulent with ever-shifting alliances that were centred around class and ethnocultural interests between the English and Afrikaners. As such the dominance of one faction over another was largely tenuous or at best minimal. I underscore the labelling of white

[7] Editor of the South African Agricultural Journal, July-Dec 1913.

politics in this era as tenuous because the white bloc did not have a unified vision for land policy. As mentioned in Chapter 4, the formation of the Union was a difficult task of achieving unity between white population groups; leading to a negotiated outcome in the form of the Union. Under these conditions, deciding on the land policy was highly contentious because the land policy brought together economic and socio-cultural factors. Some of the economic factors included the need to secure a constant supply of cheap labour for both the mining and agricultural sectors (Legassick, 1974), concerns that purchases of land by African people would interfere with mineral exploration and would result in competition for political power (South African Parliament,1936; Wickins, 1981) and the view that "squatting" was an economically unproductive arrangement because it made Africans less likely to enter the labour market (South African Parliament, 1936). At the socio-cultural level, there was an intersection of white fear and conservative thinking on the one hand and liberalism on the other hand.

As such the promulgation of the Native Bills as a path towards the Native Trust and Land Act must be seen as a coalescing of these factors. Not only did the Act consolidate all former trusts in the four provinces, but it also formalised trusteeship as the main institution through which African people's rights to land would be negotiated in communal areas. This would have implications for benefit-sharing when valuable resources were discovered on this land, as shall be shown later in this chapter, and expanded on in Chapter 6. The SANT, later SADT, continued to diminish African people's decision-making power and thus compromised their ability to participate in the exploitation of the valuable resources on their land.

5.2.1 Territorial segregation without Native Bills is ludicrous

One cannot discuss the Native Trust and Land Act (NTLA) without referring to the Natives Land Act (NLA) of 1913, which was its precursor and the Native Administration Act, No. 38 of 1927 which anchored the administrative aspects of the two land Acts. The underlying principle of both the NLA and NTLA was territorial segregation which had been at the crux of negotiations leading up to the establishment of the Union of South Africa (McCusker et al., 2016). However, there was a 23-year gap between the two Acts which is important to account for the critical shifts that were happening during this time that were instrumental in shaping the final version of the NTLA and thus the implications of the two Acts cumulatively in racializing property relations. While the NLA cemented discriminatory foundations in South African law it was, as Beinart & Delius (2014) argue, an interim measure. The NLA mandated the

establishment of a commission to inquire and report on the areas to be set aside for the occupation by Africans. This was the Beaumont Commission which released its report in March 1916 (South African History Online, 2019b). However, Parliament did not take the outcomes of the Commission to heart until 1936 when the Native Bills were tabled in Parliament again. A member of Parliament's remarks when the Native Trust and Land Bill was discussed on 4 May 1936 sheds light on some of the sentiments of members about the Bill,

> This Bill forms the core of our native policy. It is the second Bill in the trilogy of Bills which the Prime Minister is bringing forward and if the Bill is not passed the whole of our native policy will fall to pieces… To talk about territorial separation or segregation without translating this Bill into law is ludicrous, absolutely ludicrous… We are starting a new page in our native policy, and I am afraid that, in many quarters, it is not yet adequately recognised. We are turning our back entirely upon the laissez-faire policy of the past (South African Parliament, 1936: col.2897).

The last sentence of this remark is particularly interesting. The laissez-faire policy that was being referred to here are the inconsistencies on how African people held land across the Union as was clearly shown in Chapter 4. While the NLA represented the state's intention to organise space along racial lines the Act had up until now not achieved the desired effect imagined by the state. Using previously unexplored sources including reports by the Governor-General to Parliament; deeds and property transfer records between 1913 and 1936 as well as geo-referenced data sets of rural land holdings in the Transvaal, Feinberg & Horn (2009) showed that the NLA was unsuccessful in preventing African people from buying land. Using the exception clause in the NLA which allowed the Governor-General to approve purchases, as many as 3200 farms and lots were purchased by Africans between 1913 and 1936 (Feinberg & Horn, 2009).

While this was a considerable number of purchases, Feinberg & Horn (2009), admit that the process of using the exception clause to gain permission to purchase a farm or lot was difficult and prospective buyers had to conform to the rules and criteria set by the Native Affairs Department. Naturally, any land purchase is subject to rules and criteria, but the rules and criteria imposed by the Native Affairs Department were because of the prospective buyer's race meaning that they were a product of the underlying principle of racializing land ownership in South Africa. Moreover, an important criterion that had significant weighting on whether

the Native Affairs Department would allow the purchase was the location of the land. The land had to be in an area already recommended by the various commissions or regional committees appointed (Feinberg & Horn, 2009). This would ensure that these approved purchases fed into rather than detracted from the goal of territorial segregation which was the hallmark of apartheid geography.

It is not possible to ignore the paternalistic approach adopted by the Native Affairs Department adopted in the process of granting permission for land purchases. Prospective purchasers had to tolerate the scrutiny of the evaluation process carried about by the Native Affairs Department which sometimes included interviews, an inquiry into the assets and sometimes visits by officials to the property to be purchased (Feinberg & Horn, 2009). Historians analysing the outcomes of the purchase agreements make the argument that the Native Affairs Department officials often demanded changes in the agreements that were beneficial for the prospective African buyers (Bergh & Feinberg, 2004; Feinberg & Horn, 2009). This may have been the case; however, it does not change the fact that the agency of prospective African buyers was limited compared to their white counterparts who were not subject to this level of scrutiny when purchasing a property.

Moreover, the Native Affairs Department was given considerable power to determine the purchasing ability of Africans and we are left to hope that there were no cases where officials acted with impunity. This becomes a necessary entry point considering the contradictions of apartheid geography concerning African land ownership. At a legal and political dimension, African people were prohibited from purchasing land with an exception that would be at the discretion of the Native Affairs Department. In practice, the exceptions granted may have been considerable, but this does not take away from the tenuous nature of how these exceptions were guaranteed. There was no legal provision which would mean if there were prospective African buyers who were disgruntled about a rejected application for exception, they had no legal provision to negotiate from. Ambiguity was beginning to be an overarching feature of African property relations and was further entrenched by the passage of the NTLA.

The promulgation of the NLA had been a significant move in developing a *native* policy that espoused a more conservative view of not allowing African people to own land, however, the state remained split for an extended period about a way forward. The state recognised that it needed to release more land for *native* occupation as the NLA had only earmarked

approximately 7% of South Africa for *native* occupation (Platzky & Walker, 1985). The question of which land, in what portions and how that land was to be released, however, remained a vexing issue. In the same parliamentary session of 4 May 1936, another member made the following remark,

> I hope the Minister will not think because we criticise some of the provisions of the Bill, that we are opposing the Bill; this is not the case. The position with regard to this Bill is that the whites of South Africa are being asked to make great sacrifices by contributing a very large portion of their land for the settlement of natives in the future. It is a big sacrifice you are asking them to make, … Many of us are going to support the Bill, but we are anxious to see that the interests of the whites and of the country generally are not sacrificed… but we would have liked to know what the Government proposes to do with this land after the natives are placed on it to safeguard the future interests of all concerned (South African Parliament, 1936: col.2894).

This member's remarks about the white population being asked to give up tractions of its land are important to note because it points to the growing anxieties of the white population that, in part, motivated the final version of the Bill. Remembering that the Bill was being tabled six years after the Great Depression of 1930 which had seen both mining and agricultural sectors hit hard by declines in profits (Moon, 2017). As such there was an increasingly poor white population that wanted to see legislation passed that would secure its interests (South African Parliament, 1936). While scholars note that there there was no single causal factor motivating the passage of both the NLA (Wickins, 1981; Feinberg, 1993; McCusker et al., 2016) it was in part, this increasingly threatened white population that desired to see more restrictive legislation passed. Many of the speakers following on this intervention quoted above lamented overgrazing of fertile land in the reserves and on various portions of the land within the Natal trust as a motivation for carefully choosing the land to be released under this Bill and the need to enforce more controls over the management of this land, in particular, control over the amount of stock to be kept by African people (South African Parliament, 1936). Of course, arguments of overgrazing and deforestation happening in the reserves were motivated by the need to restrict wealth accumulation by Africans through agriculture and to force Africans into migrant labour (Kepe & Nstebeza, 2011). However, it is important to note how these concerns about the state of African reserves were constructed and the motivations for the remedies put forward. The members of Parliament carefully scrutinised the schedule of areas to be released

and/or bought by Government for the African settlement, carefully removing strategic and fertile areas in the final schedule of the released areas (South African Parliament, 1936; Platzky & Walker, 1985). But more importantly, for purpose of this study, there was a push for the state to exercise more oversight power over the current land in the reserves as well as over the land to be released through the NTLA.

5.2.2 The final version of the Native Trust and Land Act

The first mandate of the NTLA was the establishment of the South African Native Trust (SANT) which was to be governed for the "settlement, support, benefit, and material and moral welfare of the natives of the Union" (NTLA, 1936: section 2). From this point onward the SANT became the registered owner of all scheduled land in the reserves, with few exceptions, as well as all additional land to be released as provided for by the NTLA (Platzky & Walker, 1985). As trustee of the SANT, the Governor-General had the authority to allocate his powers and functions as trustee to the Minister of Native Affairs which is what happened in practice (Platzky & Walker, 1985). Chapter 2 of the Act also provided for the appointment of a board to advise the trustee about the acquisition, disposal and development of land and perform such other functions that the Governor-General prescribed (section 7, subsection 3). This board would be made up of an officer of the Native Affairs Department, who would serve as the chairman, and two other people with one possibly being an African. Importantly, both these individuals would be appointed by and hold office at the discretion of the trustee (section 7, subsection 2). It was only through appointment as members of these boards that African beneficiaries could attain representation within the trust structure. However, as outlined by the Act, this was an advisory board which meant that it had no power to hold the trustee accountable and as such the trustee had a great deal of power over land relations.

While the NTLA gave the trustee power to pass any necessary regulations to ensure the effective administration of the trust no section outlined what, if any, consequences if trustee failed to administer the trust in ways that ensured the material and moral welfare of the beneficiaries. The Act simply imposed a fiduciary duty on the state. A fiduciary duty, loosely defined, is an obligation to act in the best interests of another (Rahman, 2006). It can be applied to an array of relationships including the trustee-beneficiary, employer-employee, attorney-client, and physician-patient, to name a few. What this duty entails in each context will differ, but the overarching principle of acting in the best interests of another remains the same. As

such courts will often define this duty as an obligation of loyalty (Smith, 2002). While the concept seems straightforward at face value, legal scholars concede that fiduciary law remains an elusive concept in practice (Boxx, 2001; Smith, 2002; Rahman, 2006). It is not within the scope of this study to get into the legal debates around fiduciary law but what stands out in these debates is the use of the courts to flesh out what this fiduciary duty entails in practice (see Cameroon et al., 2018).

In her attempt to define the concept within South African law of trusts, Rahman (2006), traces various court judgements and therein lies the problem. The concept was not well defined in South African law, hence its continuous development within the courts (Rahman, 2006). At the time that Rahman (2006) writes there had been multiple judgements meaning that there was progress in the development of the concept within South African law. This, however, was not the case when trusts were first introduced. Therefore, there was no case law that African beneficiaries could draw upon to understand their rights under this institution. Moreover, because of the Native Administration Act No. 38 of 1927, regular courts were limited in intervening in African affairs (Platzky & Walker, 1985). The result was that the state as the trustee was simultaneously responsible for defining, executing, and regulating its fiduciary duty towards African beneficiaries. More importantly, Africans were not privy to this process which meant that where there were cases that the state failed to act in ways that were in line with a fiduciary duty, Africans could seek no legal recourse as there was none provided for in the law (Capps, 2010). Africans depended on the goodwill of the state in interpreting and executing its fiduciary powers (Capps, 2010) leaving them vulnerable to abuse. To illustrate this further, it is perhaps useful to tease out some of the key features of how Africans organised their space before the introduction of trusts.

While different groupings organised space differently whether using kinship relations, patrimonialism or chieftaincies, a commonality was that the accountability mechanisms of these arrangements centred around the group itself (Ng'ong'ola, 1992; Hann, 1998; Comaroff & Comaroff, 2009). That is to say that the parties involved in the organisation of the space were accountable to the same customary law which they could revert to in cases where there was a deviation from the expected behaviour about the organisation of space. Naturally, within each group, there were power dynamics as has been noted by scholars who show that women and unmarried men often have less say than married men under customary law (Moyo, 2004). Customary law was not stagnant, meaning that the group collectively participated in the

evolution of the customary law and by extension the principles of that law that related to the organisation of space. More importantly, there was no ambiguity as the mechanisms of accountability were embedded within custom that was understood collectively by the group (Comaroff, 1974). As such the customary law, while ever-changing, remained sacrosanct as the highest authority in determining how space was organised. There could be no individual who was above the custom meaning at that level, there was equality in how space was organised. This was not the case under the trust arrangement because no provisions detailed the rights of beneficiaries in this institution and the duties of the state, as trustee, towards beneficiaries.

The lack of duties outlined in the NTLA suggests that there was an implicit expectation that the Governor-General would act in the best interests of African beneficiaries. But the resistance to governments attempts to exert its oversight over African people's rights of use on SANT land shows that there were cases where there was a misalignment between the expectation of fiduciary duty and its experience of it on the ground. An example of this is the resistance to Betterment Planning it was introduced in the late 1930s (South African History Online, 2020a).

Betterment firstly entailed the government dividing SANT land into residential and agricultural plots (Platzky & Walker, 1985). Instead of living in scattered homesteads close to fields, African people were forcefully clustered into villages on poorer soils, for example, hill stops, while the rest of the land was divided into defined plots for growing crops, forestry and grazing respectively (Platzky & Walker, 1985). The exact number of rural people affected by this enforced villagisation is not known but is thought to be considerable with an estimated one million people being moved in Natal since 1950 (Platzky & Walker, 1985).

Secondly, Betterment was accompanied by stock limitations. The argument from the state's perspective was that there was overgrazing on the land and of course the government was not willing to release more land as a solution meaning that stock culling was the solution used to address overgrazing in the reserves. While Betterment Planning was resisted heavily by African people (Kepe & Ntsebeza, 2011), it occurred by and large precisely because the segregation state was empowered by the law to regulate how SANT land was to be used. Meaning that while the SANT appeared to give rights of use to Africans even those rights of use were not secured because the segregation state had ultimate authority to regulate these

rights of use by being able to not only force African people to move homesteads but also to cull livestock.

While all property rights are regulated in some shape or form, property rights holders have reasonable levels of autonomy and decision-making power within the land that forms part of their property. This is especially around rights of use (Blomley, 2013); as such the regulation of stock numbers of Africans highlights the weakness of the property rights of Africans on SANT land. Consequently, even the resistance measures used by Africans during this period were in line with this acceptance of vulnerability at the level of the law. African people resisted Betterment Planning militarily (Kepe & Ntsebeza, 2011). If African people under the SANT had recognised property rights, be it rights of use and occupation, their resistance should also have been through the law, but this was not the case. As such, the segregation state in dealing with this resistance could justify its actions because the state was within its right as the trustee to control how the land was to be used.

Lastly, compensation under Betterment Planning. For the people who lived on scheduled land (i.e., SANT land) compensation did not include the value of the loss of land. This was the case for the people who were removed from the Tsitsikamma reserves. The government's justification was that the land was held in trust meaning that residents were only entitled to compensation for the loss of the structures built on top of the land for example houses (Platzky & Walker, 1985). When people are removed the compensation received is meant to include the value for the loss of surface land rights (Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another, 2018) and so the ability of the apartheid government to move people without paying this category of compensation is evidence of the assertion that the NLTA made African people tenants on their own land (Clark & Luwaya, 2017).

5.3 Making the Bantustans

As part of perfecting the geographical expression of racial segregation, the apartheid state consolidated the African reserves as well as any scheduled and released land under the SANT into Bantustans (see Figure 5.1). According to the apartheid state, these were "self-governing Bantu national units" which were divided along ethnic lines to promote the self-development of each ethnic group. At an ideological level, Bantustans were significant for at least two reasons, first, they gave territorial expression to apartheid ideology (Ramutsindela, 2017),

second, their creation formed the key administrative mechanism used to justify the removal of African people from the South African political system (Evans, 1997; South African History Online, 2019c) while allowing the state to continue to supervise African land ownership.

Under the Promotion of Bantu Self-government Act, No. 46 of 1959 the apartheid state committed to starting the process of giving the respective territorial authorities control over the land in their areas. This would be done by assigning some of the rights and powers that were conferred to the Governor-General and/or Minister of Native Affairs as trustees of the SANT (section 7, subsection 4) to the respective Bantustan governments. However, this conferment of certain rights and powers did not divest the powers of the Governor-General or Minister who still had the power to withdraw any right or authority conferred to the respective Bantustan governments because he was still the trustee of all SANT land. Again, ambiguity continued to shape African property relations because the level of decision-making power of the territorial authorities was negotiable rather well defined.

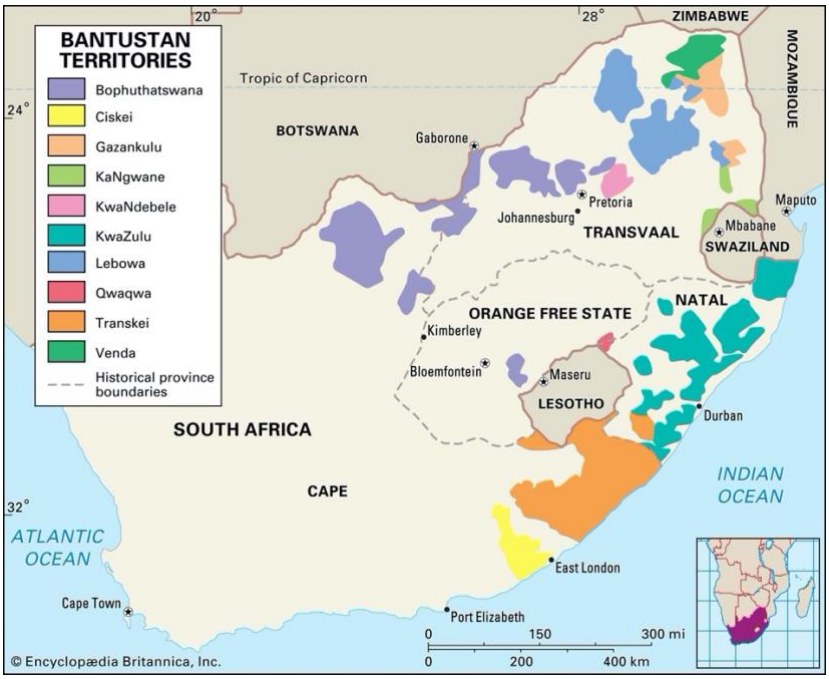


Figure 5.1: Map of Bantustan territories

(Source: https://www.britannica.com/topic/Bantustan)

When some Bantustans gained independence, there was the conferment of more powers to the independent governments, but this was still subject to the supervision of the apartheid state.

For example, the state still had powers to amend the boundaries of Bantustans by mere proclamation in the Government Gazette with the only restriction being that the apartheid state had to consult with the authorities of the relevant Bantustans (Platzky & Walker, 1985). This provision was extremely helpful for the central government in Pretoria because it became a carrot stick that was used to manage the resistance of outspoken Bantustan leaders. Importantly, when minerals were discovered, it revealed just how much power the apartheid state retained in the Bantustan system. Mineral speculation played an important feature in keeping the Bantustans under apartheid state control. The apartheid state had seen the power of mineral interests in swinging interests within white ranks and thus was aware of the need to secure power over prospective mining activities in the Bantustans. This is why the NTLA largely remained silent on the issue of minerals thus giving leverage to the apartheid government to decide at a later stage its position depending on the factors emerging when minerals were discovered in a locality. This was useful because the Bophuthathtswana and Lebowa Bantustans had the largest bulk of platinum resources in the country. From the 1960s when platinum prices rose, the industry became lucrative. Because of their history as former Transvaal reserves, there were three forms of mineral ownership that existed in these Bantustans (Capps, 2012).

First, state trust property which was land earmarked for African occupation as part of the NLA and NTLA. This land was transferred to the Bantustans governments to become state land of the respective Bantustan. As such the Bantustan governments were able to handle the negotiations of both surface leases and rent to be paid by mining companies (Capps, 2012). The revenues derived from these lease arrangements were paid into state-land trust funds to be used for acquiring more state land for the Bantustan or the economic development of the Bantustan (South African Institute of Race Relations, 1964). This use of the revenues was previously determined by the apartheid government as part of the NTLA (section 5, subsection f). Therefore people living on trust land had no say on whether or not mining would commence and forced removals were routinely used to make way for mining activities (Levin et al., 1997).

Second, tribal-state property which referred to land that had been acquired in a variety of ways and was registered in trust in the name of a state official in trust for "a chief and his tribe" (Capps, 2012:71). This form of mineral ownership was dominant in Bophuthatswana that gained traction in the late nineteenth century in the Transvaal due to the six *native* rule (Feinberg, 1993). In most cases, mineral rights were severed from the land rights under this

arrangement but in cases where these rights were not severed, the tribal authorities were entitled to negotiate with mining companies who wanted to exploit the minerals (Capps, 2012). While tribal authorities in this context should have had more agency than their counterparts on trust land, the apartheid state continued to exercise much power. Tribal authorities could negotiate directly with the mining companies, but the Minister of Native Affairs had the power to unilaterally amend these agreements (see also Chapter 4). When Bophuthatswana attained independence in 1977, the apartheid government transferred its power as trustee to Lucas Mangope as President of Bophuthatswana. This empowered Mangope to enter into unfavourable agreements with Impala Platinum (Capps, 2012; Corruption Watch, 2018). Despite legal challenges to these agreements by the Bafokeng Tribal Authority, which disputes Mangope's authority, these agreements remained intact throughout the apartheid years (Capps, 2012).

Third, the mineral trust property which was specific to the Lebowa Bantustan. In 1987 the Lebowa Minerals Trust Act No. 9 of 1987 was passed which created the Lebowa Minerals Trust (LMT). All mineral rights in Lebowa previously held by SADT were transferred to the LMT (Portfolio Committee on Mineral Resources and Energy, 2000). As such the LMT had the authority to grant mineral leases to mining companies and to receive all revenue from these leases. Delius (1996) has documented how the LMT was an instrument that the apartheid government used to capture the Bantustan elite in Lebowa.

The granting of some degree of autonomy to the Bantustan leaders in Bophuthatswana and Lebowa was part of the apartheid government's tactic of divide and rule. It gave impetus to Bantustan leaders to align themselves with the apartheid government in the hope of receiving and safeguarding privileges. To illustrate this, it is useful to give context on how these two Bantustans came to exercise some control over their minerals. Between 1972 and 1973, the apartheid government granted self-governing status to the Bantustans and further encouraged each Bantustan to take independence status which would supposedly give the Bantustan even more authority (South African History Online, 2019c). However, only four Bantustans, Transkei, Bophuthatswana, Venda, and Ciskei took this offer (Portfolio Committee on Mineral Resources and Energy, 2000) while the other Bantustans rejected it, most notably Lebowa and KwaZulu (Lynd, 2021). The resistance of the remaining Bantustans prompted the apartheid state to use various tactics to co-opt their leaders. I argue that this is the context that Mangope's autonomy over the minerals must be viewed. In addition, the resistance by KwaZulu and

Lebowa leaders against independence prompted the apartheid state to use the discretion in its powers under the SADT to create the LMT to silence the African elites in Lebowa, as Delius (1996) argues. At this point, the apartheid government had no available incentives to co-opt Kwa-Zulu elites. However, this changed in 1994 when the outgoing apartheid government created the Ingonyama Trust which will be discussed in Chapter 6.

While attention was drawn to the occurrences in Bophuthatswana and Lebowa there are a plethora of examples that can be used to show how the apartheid state continued to exert control over the Bantustans hiding under this trust arrangement but of importance are examples involving land with mineral rights. As discussed in Chapter 2, property rights are often tested when there is value to be derived from land. When the stakes are higher, the rights of each stakeholder and/group to the land in question will determine their bargaining power and thus their ability to benefit from the minerals derived from the land. Trusteeship was politically useful for the apartheid government. It enabled the apartheid government to diversify its approach for each Bantustan to co-opt traditional leaders, where necessary. For example, Mangope enjoyed favour with the apartheid government which empowered him to act unilaterally, and his regime was notable for using the military to quell resistance (South African History Online, 2019d). Centring the LMT trustees in Lebowa and Mangobe in Bophuthatswana also made the apartheid government invisible to the mounting resistance in these Bantustans because of mining (Mbeki, 1984).

5.4 Forgotten Islands: The Coloured Reserves post 1936

Land policy post-1936 tended to focus on consolidating the outcomes of the SADT. This is reflected in the fact that there were more than thirty Acts passed that had a bearing on the SADT. In contrast after the Mission Stations Act, only three Acts were passed concerning the governance of the Coloured Reserves. They were the Coloured Persons Settlement Areas Act, No. 3 of 1930 which was later repealed in 1961, the Coloured Persons Communal Reserves Act, No. 3 of 1961, and lastly Preservation of Coloured Areas Act, No. 31 of 1961. The two Acts passed in 1961 simply extended the application of the Mission Stations Act to rural areas inhabited by Coloured people.

The minimal legislation on the Coloured Reserve is reflective of a coalescence of factors. By the twentieth century, most of the Coloured population worked and lived in white-owned

commercial farms as labourers (McCusker et al., 2016). This is particularly so in the Western Cape. Additionally, the spatial distribution and history of the areas reinforced an island approach to implementing legislation. Unlike the Bantustans, the Coloured Reserves did not originate from historical areas that the communities occupied, but rather because of communities moving into the area following the establishment of a mission station (Penn, 2005; McCusker et al., 2016). As such, Tickets of Occupations granted with the assistance of the missionaries were, by and large, the main documents that determined the management of each area. Lastly, by the time the apartheid government came into power, the copper and diamond mineral booms of the 1850s and 1920s had dwindled. These mineral booms were the main motivator of government action with regards to the mission stations located in the northern frontier of the Cape Province (cf. Chapter 4). In the six Coloured Reserves located in the northern frontier, Kommagga, Concordia and the Richtersveld which all had diamond reserves had aspects of the Missions Stations Act asserted more directly when diamond mining commenced in the 1920s (Bregman, 2010). After this period there was little to no financial incentive to control these areas hence the apartheid government largely left them undisturbed.

5.5 Conclusion

The analysis of trusts between 1936 and the late 1970s has provided evidence of the indispensability of trusts in the apartheid toolbox. By tracing the political context surrounding the promulgation of the NTLA, the chapter showed how trusts were crucial in developing South Africa's overarching land policy which would be the cornerstone of apartheid geography. Through the NTLA which created the SANT, the government was able to put in place a framework that continued the direct and indirect rule approach of the colonial years. This is because, through the ambiguous provisions of the NTLA, the apartheid government was able to give various privileges to African elites to garner their support. This strategy was crucial as by the time the apartheid government wanted to establish the Bantustans, African resistance to segregation was increasingly cemented. Using the examples of Lebowa and Bophuthatswana the chapter put a spotlight on the power of mineral wealth bargained through trusts in assisting the apartheid government to achieve its key objective: territorial segregation. The apartheid government's victory in achieving territorial segregation was hard-won making it invested in securing its gains. In Chapter 6, I explore how this was done during the political transition to democracy and analyse its far-reaching effects in the democratic era.

Chapter 6

The Richtersveld: Exploring the role of trusts in democratic South Africa

6.1 Introduction

This last findings chapter discusses the continuities of trusteeship in democratic South Africa. It does so by analysing the establishment of trusts during the country's political transition, and the establishment of various trusts following the successful land restitution claim of the Richtersveld community. These trusts are used as empirical evidence to explore how property rights on communal land have been reconfigured under democracy. The dawn of democracy signalled much hope and expectations for people living on communal land. Through the national land reform programme, there was an opportunity to not only restore land that had been dispossessed under colonialism and apartheid; but to ensure that ordinary community members have secure property rights. What we see however is the proliferation of community development trusts throughout the country where land has been restored or where communities have entered into joint management agreements for conservation. It becomes important to analyse these trusts under the backburner of a new constitutional dispensation to determine what their impact has been on property rights. Are these trusts able to give community members secure property rights or are they remnants of their colonial predecessors? To answer these questions the first section gives an overview of trusts during the political transition in the country. The second section traces the practical implications of the trusts on the decision-making power of the community. By drawing attention to government action during the Richtersveld land restitution and in the post-settlement arrangement, the chapter reveals the symbiotic relationship between community trusts and the democratic state.

Given that much of this chapter is informed by analysis of trusts in the Richtersveld it is important to give a brief background of the Richtersveld community. As mentioned previously, this community occupies four towns, Kuboes, Lekkersing, Eksteenfontein, and Sanddrift (cf. Chapter 1). Richtersveld is part of Namaqualand in the Northern Cape province. The Richtersveld community is diverse, consisting of the Nama people, who inhabit both South Africa and Namibia, people of mixed ancestry and Black people who migrated into the area to work in the mines (Richtersveld Writers Circle, n.d.). While their Nama ancestry can be traced to both the San and Khoikhoi people on either side of the Orange River (Biwa, 2003), the

Richtersveld people consider themselves as a distinct indigenous people and refer to themselves as Richtersvelders (Richtersveld Community and Others v Alexkor Limited and Another, 2001). Today the four Richtersveld towns fall under the Richtersveld Local Municipality which falls under the Namakwa District Municipality. As per the 2011 Census, the population consists of approximately 11, 982 persons and has a 18.6% unemployment rate (Stats SA, n.d).

6.2 Trusts during the Transition

The evolution of trusts from colonialism to apartheid has shown that trusts were instrumental in managing contestations that were centred around property. As shown in Chapters 4 and 5, the contestation was about the question of African rights to property. We noted that the trusteeship model under colonialism and apartheid co-opted African institutions of traditional leadership and the principle of fiduciary duty from common-law to create an institution premised on ambiguity. The ambiguity subdued African resistance especially once the apartheid government answered the question of African property rights unfavourably. The use of ambiguity to subdue resistance is worth keeping in mind as we move to the analysis of two critical trusts that emerged between 1990 and 1994. This period is important because it shows that the community development trusts, which are at the centre of analysis in this chapter, did not emerge out of nowhere; rather they were rooted in the apartheid state's last attempts to preserve its interests that would be threatened by democratic reforms (McCusker et al., 2016). At a theoretical level, the analysis of the trusts during the transition to democracy follows arguments by scholars that transition periods offered an opportunity for outgoing colonial governments to keep neoliberal paths open (McCusker et al., 2016; Moon, 2017). This holds particularly true for South Africa, where the change in government was achieved through negotiation rather than a military takeover.

In his biography FW De Klerk highlights that for the apartheid government the timing of the historical announcement in 1990 to release Nelson Mandela and unban political movements was designed to achieve two things: first to normalise the political environment and second, to catch the ANC off-guard (De Klerk, 1999; Moon, 2017). De Klerk's remark is interesting because it shows that the apartheid government was well versed in using tactical manoeuvres to gain an upper hand. This context helps uncover the significance of the formation of the two trusts, namely the Richtersveld Gemeenskap Trust (RGT) and the Ingonyama Trust. Each trust

had particular significance. The RGT emerged from the first contractual agreement to establish a park on communal land. This model used in the Richtersveld would form the template of an approach to the land reform-conservation conundrum that the democratic government would later refine and perfect (McCusker et al., 2016). The Ingonyama Trust was established merely days before the first democratic elections, with the aim of placing a third of the land in Kwa-Zulu Natal under the control of the King as trustee (Boom, 2019). Given the sheer size of the land under the Ingonyama Trust and its symbolism of the Zulu people as the largest linguistic group in the country, it would set conditions that could either empower or disempower the incoming government in its land reform policy and its relationship with traditional leaders.

6.2.1 Development trumps property: implications of the Richtersveld Gemeenskaps Trust

In March 1989, SANParks, made final preparations to sign the contract that would establish the Richtersveld National Park [RNP] (Spies, 2018). As was the order of the day at the time, the local community had not been adequately consulted which led to opposition that culminated in the community obtaining an urgent interdict halting the process a day before the contract was to be signed (Community member 1, Interview, 20 July 2018). Following negotiations that lasted for 18 months, an amended contract was drafted and signed in July 1991 establishing the Park (Hendricks, 2004). Of interest in this study is the timing of its establishment during South Africa's State of Emergency and the key question of why was it important for the apartheid government to establish a national park before 1994?

SANParks' official narrative is that the idea to create the park started in the 1970s, but that the consolidation of these ideas was delayed by interdepartmental tension and bureaucracy and that it was only in the 1980s that the plans were further developed (Spies, 2018). McCusker et al. (2016) present a different view arguing outgoing governments in Africa tended to adopt pre-emptive measures meant to secure the future of protected areas. These pre-emptive measures, they argue, were not just about land, but were part of the wider politics of the African state. To avoid ambiguity, these wider politics can be summarised as the distrust shown by outgoing minority governments about the capability of incoming African-led governments and the fear of radical reforms that would threaten white interests (McCusker, 2016; Moon, 2017). It is important to note that while the focus here is on the apartheid government's actions, Ramutsindela (2007) has documented the role of powerful individuals within the conservation lobby in the establishment of the RNP. The conservation lobby largely represented white

interests and suspicions about the attitude an incoming African-led government would have towards conservation. On the one hand, there was the fear that protected areas would be threatened by radical land reform while on the other hand there was a feeling that the incoming government would be preoccupied with solving socio-economic issues rather than attending to the protection of nature (McCusker et al. 2016).

Rather than let things unfold the conservation lobby along with the apartheid government were able to take advantage of the set of factors during this period to develop a solution that would put to bed the issue of land reform. The first of these factors was the existence of mining in the area which the conservation lobby wanted to limit. Magome & Murombedzi (2003) remind us that in South Africa contractual parks were about extending protected areas to include land that could not be bought or where there were mining rights. South African mining legislation privileges mining over conservation (Centre for Environmental Rights, 2021) meaning that the conservation lobby needed to find alternative strategies to limit the expansion of mining. Second, at the time of political negotiations, the community did not have ownership rights over the land (McCusker et al., 2016). The land was in fact state land held in trust for the community with the community possessing usufruct rights over the land as it was being used for communal grazing (Boonzaier, 1996). Thus, the prospect of having their claim to the land recognised through the contractual agreement would be an attractive proposition to the Richtersveld community. This is because according to the agreement, community representatives from each town and a representative for stock farmers would be elected to form part of the joint management board that manages the park as stipulated in the co-management aspect of the agreement (Boonzaier, 1996). Additionally, the community would receive income in the form of land rentals into Richtersveld Gemeenskaps Trust (RGT) which would be used for community development as a form of benefit-sharing (Boonzaier, 1996; Henricks, 2004).

The contractual park and the RGT viewed together ensured that SANParks's initial plan of having the area demarcated for conservation remained unchanged while further legitimatising the RNP by involving the community symbolically. To give a short background, contractual agreements first emerged in Australia as part of attempts by the state to move away from exclusionary conservation practices that often marginalised indigenous people living on the land (Reid et al., 2004). The practice of establishing parks contractually in Australia followed the passage of the Aboriginal Land Rights (Northern Territory) Act of 1976, which granted title to aboriginal people in specific territories. It is tempting to view the RNP contractual

agreement as serving a similar function given that the Richtersveld people are also of aboriginal descent but there is an important distinction between the two. South Africa had not yet given legal recognition to the status of aboriginal title. In the initial definition of contractual parks, the apartheid government defined them as "any land that is either privately owned or state owned that is managed by an agreement reached between the owner (state or private) and the National Parks Board… and whose boundaries of which, its identification, ownership and status are established by contract" (Republic of South Africa, 1976). As such the Richtersveld contract legally fell under the category of state land. However, as Boonzaier (1996) notes the negotiations had the effect of changing the narrative because SANParks referred to the land as "owned" by the community.

Additionally, the payment of rent into the RGT further strengthened this view of the community "owning" the land. In the everyday understanding of property being able to exert rental payment for the use of land is thought to indicate the presence of a strong property right. This thinking is not wholly untrue as being able to lease one's property is one of the most common examples of exercising the right of use (Sprankling, 2012). However, a closer look at how the community's right to lease the land is exercised in practice places doubt on the strength of this right. Control over RGT, which receives and manages the rental income, is not with the community as all the RGT trustees are not from the community (Spies, 2018). Interestingly, the RNP management is at pains to emphasise this. In the 2018-2028 Park Management Plan, we are told that the trustees are "independent and respectable" people not from the community (Spies, 2018:14). The fact that the management of the rental income could not be placed in the hands of the community reveals two things. First, the RGT has residues of the colonial trusteeship model which is embedded in the assumption that local communities cannot manage their land and in this case the rental income from the use of their land. Second, there was little interest in fostering increased agency for the community; rather the negotiations and concessions by SANParks were about palliating the issue of property rights. This was done by symbolically recognising ownership without a change in legality and symbolically allowing the community to exercise the right to lease the land but without control over income from the leasing arrangement. Cousin (1997) argues that a right is not "real" if it is promised by law but denied in practice. Thus, the establishment of the RGT became a tool to underhandedly deprive the Richtersveld community of real rights while preserving the interests of the conservation lobby which the apartheid state supported.

6.2.2 Ingoyama Trust: creating gatekeepers, thwarting reforms

The Ingonyama Trust served to preserve interests and privileges that were created under apartheid. In her explosive article Lynd (2021) traces the role of the Ingonyama Trust in bringing the Inkatha Freedom Party (IFP) into the 1994 polls. Lynd makes several important arguments but one that is striking is her summary of one of the key objectives of the Trust which was to "shield KwaZulu from the transformative ambitions of the central government" (Lynd, 2021:4). The KwaZulu Bantustan never became an 'independent state' despite its large size (cf. Chapter 5). It is said that this was because Buthelezi as the Prime Minister of KwaZulu at the time considered taking independence as leading to Black South Africans becoming foreigners in their own country. Buthelezi's view was in line with the pre-exile ANC that saw the 'independent' states for what they were: factotums of the apartheid state (Evans, 1997; Lynd, 2021). However, during the transition to democracy, Buthelezi sought to protect KwaZulu from the ANC government-in-waiting. This reflected the political tension between the ANC and IFP which the apartheid state capitalised on (South African History Online, 2020b).

Lynd (2021) points out that the creation of the Bantustans in the early 1990s was about creating a social class that had something to lose if apartheid ended. The Kwa-Zulu Bantustan had always presented a two-pronged challenge for the apartheid government. As the largest Bantustan, turning KwaZulu into an 'independent' state would have perfected the homeland system. However, the apartheid government had up until 1994 been unable to give Buthelezi a good enough deal that would convince him to accept independence and he remained a source of inconvenience for the apartheid government as both critic and collaborator at will (Marks, 1986). Sithole (2004) argues that Buthelezi's refusal to take up independence can be traced to his disgruntlement in the early part of the 1970s when the apartheid government demarcated the land to be included in the Zulu Traditional Authority. Thus, the transition to democracy offered the last opportunity for the apartheid government to complete the homeland system. In an interview with Hilary Lynd (2021:8) André Fourie, a member of the National Party, said the following,

> We could have had those people as partners. And if we could have kept Buthelezi – the doyen of the homelands – if he would associate himself with a deal with the National Party to fight the election, some of [the rest of] them would still come.

Lynd (2021) gives context to Fourie's statement explaining some of the dynamics within the National Party (NP) at the time. Like any party, there were liberal and conservative factions within the NP with De Klerk, as president, representing the liberal faction that had decided to pay minimal attention in galvanizing the traditional leaders to be on the NP's side going into the 1994 elections. As such Lynd (2021) attributes the creation of the Ingonyama Trust to the attempts of the conservative faction within the NP, which upon seeing the De Klerk faction's failure to woe the traditional leaders made plans independently and only much later when the agreement was cemented approached De Klerk. While Lynd (2021)'s separation of the factions is useful for understanding the internal intricacies of the deal within the NP, her portrayal of De Klerk as minimally invested in the Ingonyama Trust lacks some important historical context.

Following the unbanning of political parties in the 1990s, the apartheid government hastily enacted various reforms. One was enacting the Abolition of Racially Based Land Measures Act No. 108 of 1991 which amongst others dismantled the SADT (section 11, subsection 1a) and importantly the apartheid state finally transferred the land in the SADT into respective self-governing territories (Proclamation R28 of 1992). The interim Constitution (Act No. 200 of 1993) reversed these changes but what is important here is unpacking the motivations of these last-minute reforms. Throughout the apartheid era, the state had kept the SADT in place despite the establishment of the self-government territories which showed its desire to retain control over the Bantustans. Why then dismantle the arrangement before the 1994 elections when the incoming government would have almost certainly dissolved the SADT? My argument is that this was an attempt to win over the Bantustan elite and thus undermine the ANC's land policy. While McCusker et al (2016) note that the ANC did not have a solidified land policy at the time, one position was clear, the ANC had indicated that it would dismantle the Bantustans and place all land under state control which the apartheid state was opposed to. As such, De Klerk, and the broader NP (liberal or conservative) saw value in the creation of the Ingonyama Trust for two reasons. First, as Lynd (2021) argues, bringing the IFP into the elections in the hope that it would provide a good threat to the ANC's voter base thus improving the NP's prospects. Second, if the ANC won, to undermine its land policy by setting up a precedent with traditional leaders that the ANC would have to maintain or risk havoc.

The apartheid state was aware of what the rhetorical and material implications of the Ingoyama Trust would do in sowing desires in the Bantustan elite. The Ingoyama Trust not only

recognised the Zulu King who had up until then been marginalised by the apartheid government, but it secured his power over the land by making him trustee to manage the land according to custom alongside the chiefs and headmen. This security given to the Zulu traditional leaders would always be the point of departure of other traditional leaders and would be an expectation that the ANC would have to manage. Given that if the ANC was indeed to have a more radical land policy it would need to centralise the governance of land, its aspirations were thwarted while in gestation. Thus, the Ingoyama Trust served to co-opt traditional authorities and former Bantustan leaders to serve as the gatekeepers of apartheid geography. Our interest here is on how this ignited debates and new contestations over communal land, especially following the change in policy on the trust land post-1994. This policy shift is briefly discussed below.

In April 2007, the Ingonyama Trust Board (ITB), decided that it would no longer issue Permission To Occupy (PTO) certificates and that all existing PTOs would be converted into lease agreements. The project was named the PTO Conversion Project and in accordance with the Conversion Project, occupants would have to pay rent to the Trust to remain entitled to live on the land (CASAC v Ingonyama Trust, 2021). The ITB communicated this decision to the National Assembly's Portfolio Committee on Agriculture and Land Affairs on 13 November 2007 when the ITB presented its 2006/2007 annual report citing that the conversion would provide better security of tenure as PTOs were 'weak in law' (CASAC v Ingonyama Trust, 2021). At this stage, community members and civil society organisations raised concerns about this policy change engaging both the ITB and government regarding their concerns but with no success. As such tensions began building up regarding the Conversion Project. However, it was only a decade later, in November 2017, when the tensions reached a boiling point. This is because the ITB issued various notices and media advertisements about the Conversion Project and invited residents, companies based on Trust land and other entities to convert their PTOs into these long lease agreements per the new policy. Moreover, the notices indicated that the applications must provide evidence of having adhered to all the terms and conditions of having a PTO, most notably the payment of levies. These notices sparked increased concerns from residents and the government alike. The Portfolio Committee asked the ITB for an explanation regarding the Project on multiple occasions and inquired whether the Department of Rural Development and Land Reform (DRDLR) had approved the Conversion Project. The ITB's explanation of these queries was not deemed satisfactory and the Portfolio Committee instructed the ITB and the Trust to put the Conversion Project on hold until DRDLR confirmed

that the Conversion project was legal, however, the ITB did not heed these instructions (CASAC v Ingonyama Trust, 2021).

At the same time, disgruntled community members together with the Council for the Advancement of the South African Constitution and the Rural Women's Movement, wrote to the Minister, the Director-General, Deputy-General and the Trust, seeking a written commitment that the notices would be withdrawn on the basis that the PTO Conversion project would deprive families of their customary law right to participate in the decision-making process regarding the occupation and use of tribal land (Sihlali, 2019). They did not receive a favourable response and thus commenced with a legal challenge which they lodged on 6 November 2018 (CASAC v Ingonyama Trust, 2021).

The judgement, which was delivered on 11 June 2021, ruled that people who had entered into residential lease arrangements with the Ingonyama Trusts were entitled to have these leases cancelled and to be refunded for the money paid as rent to the Trust as per these lease agreements. In addition, the judge ruled that the Ingonyama Trust not only breached the Constitution and customary law, but it also breached the Ingonyama Trust Act which governs it. Lastly, the judgement made extremely critical findings against the Minister of Agriculture, Land Reform and Rural Development. It found that the Minister had failed to protect the rights of rural residents and the Minister was ordered to provide people living on Ingonyama Trust land with PTO certificates and to update the court every three months on the progress made in issuing these PTOs (CASAC v Ingonyama Trust, 2021).

The judgement has been hailed as a victory for people living on communal land (LARC, 2021; LRC and CASAC, 2021). Dr Claassens, who is the chief researcher at the Land and Accountability Research Centre, highlighted the damning finding against the Minister who, it has been proven, has the ultimate authority over the trust (Pikoli, 2021). This finding against the Minister is interesting to unpack for two reasons. I argue the fact that the Minister has ultimate authority should not have been a matter that needed to be clarified in the courts. The Ingonyama Trust Act has been amended twice since 1994. Initially, when it was promulgated in 1994, the King was the sole trustee with no board, meaning he exercised considerable control. However, after the democratic state came into power, the Ingonyama Trust Act was reviewed extensively to ensure that the Act met the requirements of both the Interim and Final Constitution of 1996 (Ingonyama Trust Board, 2019).

Through the amendments, the democratic state was able to ensure that it has overseeing power over Ingonyama Trust which guarantees the state's power over the land. While the King remains Trustee, the ITB was established according to the KwaZulu Ingonyama Trust Amendment Act 9 of 1997. The ITB oversees the administration of the trust. Importantly, the Minister's power over the Trust is clarified. While the chairperson of the ITB is the King (*Ingonyama)* or his nominee, the appointment of the eight remaining board members rests on the Minister in consultation with the Premier, the *Ingonyama* and the House of Traditional Leaders (Ingonyama Act, section 2A, subsection 3). And in fact, the King has always chosen to have a nominee serve as chairperson so that he is relieved of administration duties (Ingonyama Trust Board, 2019). With regards to the appointments of the remaining board members, the Act was specific in that the word "consultation" was chosen as opposed to "consent" which clearly indicates the Minister's authority in the appointment process. This means that eight of the nine members of the Board are directly chosen by the Minister. Additionally, the Minister is empowered to designate one of the board members to be the vice-chairperson of the Board. The provisions of the amendments are quite straightforward in ensuring that the democratic government has direct say in the matters of the Ingonyama Trust. Furthermore, the Ingonyama Trust is required to report on its activities annually to Parliament.

The democratic state used the amendments of the Ingonyama Trust Act to negotiate its power over the Ingonyama Trust. While it appeared that the Ingonyama Trust would become a remnant of the apartheid state during the political transition in the early 1990s, I would argue that the democratic state was able to change this by successful entrenching its power over the Trust. In reading the Act and seeing the various ways in which the establishment of the Ingonyama Trust Board has taken away much of the power of the King as sole trustee as well as the oversight power that the Minister is given and may enforce, I would argue that the Ingonyama Trust as it stands shows the invisible arm of the democratic state and this shall be clear as the consequences of the judgement are unpacked further.

The legal challenge against the Ingonyama Trust was lodged in 2018 with the judgment handed down nearly two years later. In the meantime, the residential leases continued to be due for the communities. In addition, while the judgement has mandated the Trust to pay back all the rentals paid, the chairperson of the Board, Jerome Ngwenya, has asked the court to set aside the ruling and if failing to do so, has asked to be granted leave to appeal at the Supreme Court

of Appeal. Ngwenya's actions are in direct defiance to the Minister's mandate which was that the judgement be accepted by the ITB. Importantly this is not the first time that Ngwenya has acted in defiance to the Minister. When the Board's term had expired, the Minister attempted to appoint a new Board which Ngwenya resisted and threatened legal action against the Minister's attempts to reform the board. In addition, following the recommendations of both the High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change and the Advisory Panel on Land Reform and Agriculture that the Ingonyama Trust be reformed drastically or disbanded Ngwenya also voiced fierce opposition and threatened legal action (Harper, 2019). In response to this, the current Minister, Thoko Didiza, has instead attempted to reform the Ingonyama Trust by appointing an interim board and financial managers from her department to oversee the finances of the Ingonyama Trust (Harper, 2019). This is in part because the audits of the Ingonyama Trust have never been clean (Pikoli, 2021).

The Minister's decision to opt to reform rather than exert her oversight power firmly indicates one of two things. First, a lack of political will. The Minister is empowered both by the Ingonyama Trust Act and the Constitution to act to protect the rights of the community. Second, it reveals that trustees wield much power and that at a structural level South African legislation has left too many gaps that trustees are aware of and can abuse. Ngwenya is a former judge on the Western Cape bench and is therefore aware of legal processes and loopholes. Regardless of whether his attempts to take legal action against the Minister would have succeeded in the courts, his ability to make considerable threats carried much sway. My intention here is to highlight what these processes mean for the residents on trust land. While these political processes happen at a national level, residents are still mandated to pay leases and their land tenure remains insecure. Civil society organisations celebrate the ruling which demands that the Minister report to the court every three months and that if the Minister fails to take action, she can be taken to court to be compelled to do so. However, given that the initial ruling of this case took almost two years to be concluded, it is safe to say that while these legal processes unfold nothing much has changed for the communities. If Ngwenya does indeed opt to take the matter to the SCA then it could be months or even years before the matter is resolved with finality. These more recent controversies surrounding the Ingonyama Trust have overshadowed a complex but informative picture that has emerged from the Richtersveld which we turn to.

6.3 Richtersveld trusts post 1994

Two trusts were also established following the Richtersveld community's successful land restitution in 2003. Before discussing the trusts, a brief context of the land claim is useful. On 14 October 2003, the Constitutional Court (ConCourt) handed down the Richtersveld judgment. This judgement came after a lengthily legal process stretching from December 1998, when the Richtersveld community lodged its land claim. In this claim, the Richtersveld community wanted relief under customary law over a narrow piece of land running parallel to the Atlantic Ocean (referred to as the 'subject land'), where diamond mining is being conducted by the Alexkor Limited. This mining company is wholly owned by the government. The Land Claims Court, where the claim was initially heard in 2000, dismissed the community's claim on the basis of two interrelated reasons. First, it argued that following the British annexation of Namaqualand in 1847 the subject land had become Crown land and therefore any rights that the community held were extinguished. Second, it argued that any rights that the community lost subsequent to 1847 were not as a result of past racially discriminatory laws; implying that the community's claim failed to meet the parameters of the Restitution of Land Rights Act (Richtersveld Community and Others v Alexkor Limited and Another, 2001).

This judgement was overturned by the Supreme Court of Appeal (SCA) on 24 March 2003. The SCA ruled that the LCC erred in its finding that the Richtersveld community's customary rights to the subject had not survived British annexation. It further asserted that the Richtersveld community's customary rights to the subject land, including rights to the minerals and precious stones were "akin" to rights under common law ownership (Richtersveld Community and Others v Alexkor Limited and Another, 2003). Alexkor and the Government appealed this judgement at the ConCourt. However, the ConCort upheld the SCA judgement and went a step further to state that the Richtersveld community's customary rights to land were in fact ownership rights not only over the land but minerals and precious stones underneath the land (Alexkor Ltd and Another v Richtersveld Community and Others, 2003).

As such the community was entitled to be compensated for the minerals and precious stones that had been extracted from its land since dispossession. To give effect to this, the matter was referred to the Land Claims Court (LCC) while at the same time the community was involved in negotiations with the Government of South Africa, represented by the Department of Public Enterprises (DPE) and Alexkor Limited. The two processes ran concurrently, however in the

end it was through the negotiation process that the three parties reached a resolution which was a Deed of Settlement agreement which was made a Court Order in 2007 (Former CPA member, Interview, 18 November 2020). The Deed of Settlement outlined the terms of the negotiated settlement between the three parties and the compensation that the community would receive for the minerals that had been extracted from its land since dispossession. Thus, as part of the Deed of Settlement agreement, two trusts were established as well as various companies to hold the assets restored to the community.

6.3.1 Using trusts to contain radical judgements

At a structural level the Deed of Settlement, which was anchored on the trust structure, simultaneously advantaged the government while disadvantaging the community which had been placed in a legally strong position following the historic victory at the ConCourt. The ConCourt judgement had done something radical, which was to rule that customary rights to land *are* ownership rights, not just *akin* to ownership rights as the Supreme Court of Appeal had ruled (Alexkor Ltd and Another v Richtersveld Community and Others, 2003). Furthermore, that these ownership rights included the minerals and precious stones found beneath the land. This overturned the 200 years' worth of South African Mineral Law that had been premised on racializing rights to minerals by considering customary rights as only usufruct rights to the land surface (Mostert, 2012). To show just how transformative this judgement was the democratic government, seeing that it could no longer contest control over the minerals through the court proceeding, chose another avenue. In the Recordal of the Deed of Settlement (2007: 5-6), the following was stated:

> Whereas the Government of the Republic of South Africa, in resumed proceedings: admitted that restoration of the claimed land should be restored… disputed that, with effect from 1 May 2004, restoration of the mineral rights in respect of the claimed land was possible in law and that the Land Claims Court had the power or jurisdiction to order restoration of any rights to prospect and/or mine as contemplated in the Mineral and Petroleum Resources Development Act, 2002 (Act 28, 2002)

After the ConCourt rules on land restitution matters, it refers the case back to the LCC which deals with the finer aspects of the restitution, for example, what form the restitution or compensation should take. By raising the implications of its newly promulgated law, the

Mineral and Petroleum Resources Development Act (MPRDA), the government was shifting the contestation back to fundamental questions which would need the matter to revert to the ConCourt. Whether the government would win the case if it reverted to the ConCourt, I argue, was irrelevant, but what this did was to splinter the community and its legal counsel, the Legal Resources Centre (LRC) by shifting the focus to time considerations. It had taken the community five years since the case was lodged in 1998 at the LCC to get to the ConCourt victory of 2003. To start the process again was understandably not attractive to a community facing immediate socio-economic needs. The former CPA committee chairperson explained that before signing the Deed of Settlement with Alexkor and the government, the CPA had a conversation with their legal counsel where the CPA wanted assurance that if they pursued the legal route, they would get a better deal than what the government had offered in the Deed of Settlement. Their legal counsel was not able to guarantee this hence their decision to accept the Deed of Settlement (Former CPA member, Interview, 18 November 2020).

I was unfortunately not able to interview the lawyer involved in this case due to non-response. However, at the official level, the LRC released a statement in 2007, explaining its decision to withdraw its involvement. The LRC indicated that because it saw the Deed of Settlement agreement as "ill-advised and prejudicial" it was best to not be involved as it did not want to represent the community while holding an opposing view concerning the Deed of Settlement (IOL, 2007). While it seems as though the LRC and the Richtersveld community parted amicably, a report released by a consultant who was present in various community meetings between September 2011 and March 2013, points otherwise. Referring to the Deed of Settlement, the report notes that, "The secretive and unexpected manner in which the signing took place led to the LRC resolving that it would not involve itself with the Richtersveld community for the next five years" (Fife, 2013:12).

The community's decision to sign the Deed of Settlement broke the long relationship and partnership with the LRC and so the community had to find a new legal team, Bisset Boehmke McBlain Attorneys (BBM), post the Settlement phase. I was fortunate to interview the lawyer who formed part of the BBM team twice and gain more information regarding this. The lawyer emphasised that by the time BBM came into the picture the Deed of Settlement was a "done deal" and so BBM was there to assist in making the Deed of Settlement into a Court Order and to implement it (Former community lawyer, Interview, 26 November 2020). This means that during the Deed of Settlement negotiations the community did not have their own legal

counsel. The former CPA chairperson indicated that during the Deed of Settlement negotiations the Department of Public Enterprises (DPE) provided legal counsel to assist in drafting the Deed of Settlement (Former CPA member, Interview, 18 November 2020). Even if the legal counsel provided by the DPE was objective, the fact that the community did not have its own legal counsel with whom it had established a good relationship and with whom it had shared the context of the land restitution case, made the community weak at the negotiations. As such by the time the community had legal counsel, there could be no changes made to the Deed of Settlement even if the legal counsel could see potential challenges or flaws in the agreement. Without taking away the agency of the community in deciding to accept the Deed of Settlement, the government's timing of raising the issue of a new law, the MPRDA, while dangling the Deed of Settlement is proof that the state was still invested in retaining control over the mineral wealth in the Richtersveld. The state was able to move the contestation outside the courts where the community had been successful to the negotiation table where the community was weaker. The trust structure that emerged is helpful for understanding these dynamics.

The trust structure was made up of two trusts, the Richtersveld Community Trust (RCT) which holds the land assets received and the Richtersveld Investment Trust (RIT), which holds the extraordinary compensation received by the community from the State (Deed of Settlement, 2007). In both trusts, the beneficiaries are the members of the Sida !hub Communal Property Association (CPA), which was formed when the community lodged its land claim. Understanding the RIT is perhaps simpler as its main objective is to hold the Investment Holdco shares, see Appendix C. It is the Investment Holdco that received the R190 million extraordinary compensation from the State (Deed of Settlement, 2007). With 100% of the Investment Holdco shares held by the RIT, the RIT is tasked with achieving long term capital growth for the beneficiaries and providing the RIT with an income that can be used for the social development of the Richtersveld community on an ongoing basis (First Deed of Variation, 2009). As per Section 12.2.2 of the Deed of Settlement, the trustees to be appointed to the RIT were required to have investment management experience or merchant banking expertise with one of the trustees being a nominee of the Minister of Finance. This trustee nominated by the Minister of Finance would assist the RIT in financial and investment decisions for a period at the discretion of the Minister of Finance. The RIT trustees oversee the appointing of directors to sit on the board of the Investment Holdco and one of these directors must be a nominee of the Minister of Finance (Deed of Settlement, 2007).

The establishment of the RCT is more complex as it has 100% shareholding in the Richtersveld Development Co (Pty) Ltd which in turn has 100% shareholding in each of the four Co (Pty) Ltd's as indicated in Appendix B. The four companies each held a category of the assets received as part of the Deed of Settlement which are summarised in Table 6.1 below.

Table 6.1: Companies established to receive assets from Alexkor

Company	Assets received
Richtersveld Agricultural Company	• All movable assets that were related to Alexkor's agricultural and maricultural business • R700,000 for project management costs
Richtersveld Property Holding Company	• Residential erven within the Alexander Bay township. Alexkor retained the right of occupation over the said residential erven for a period of 10 years (2007-2017) against the payment of R45 million as compensation to the company • Commercial, retail, and industrial properties within Alexander Bay township • R45 million for property development, this amount was received from the state and was to be managed by the Richtersveld Investment Holding Company (Richtersveld Status Report, 2017:3)
Richtersveld Mining Company	• Land mining right • Capitalisation funds from the R200 million contribution that Alexkor made to start off the PSJV

Richtersveld Environmental Rehabilitation Company	• Did not receive any assets but was set up to manage the rehabilitation of the land and sea-mining sites

Due to the complexity of the trust structure, the success of the trusts depended on the success of these companies (see Appendix B), which in turn depended on the seamless working together of four government departments, trustees as well as community leadership structures which was a daunting task.

Mr Alexander Erwin, the Minister of Public Enterprises at the time when the Deed of Settlement was agreed to, gives the background of the considerations by the Cabinet during the negotiations stating that it was important for the Deed of Settlement to be a success to not discredit the land reform process (Former Minister, Interview, 17 November 2020). Therefore, the future of the mining business was at the crux of the negotiations and as such much of the Deed of Settlement centred around the mining business. The Richtersveld community received the land mining right and Alexkor retained the sea mining right. However, to mine alluvial diamonds both the land and sea mining rights needed to be exploited together. As a result, a Pooling and Sharing Joint Venture (PSJV) was formed, with the Richtersveld Mining Company (RMC) bringing its land mining right and Alexkor bringing its sea mining right into the venture. In terms of shareholding, Alexkor holds 51% while the RMC holds the remaining 49% share in the PSJV (Deed of Settlement, 2007). This is evidence of the state's efforts to retain control over the land mining right using the PSJV as its vehicle.

This shareholding arrangement was and continues to be the source of disgruntlement in the community. When the first CPA committee returned to the community to announce this provision on 12 May 2007 at a community meeting, it is said that many community members left the meeting as to them this concession was a betrayal of the land claim (Former Ward Councillor, Interview, 17 November 2020; CPA member 1, Interview, 18 November 2020). This meeting has also been the subject of much debate. Some of these debates centre around the legitimacy of the mandate received by the CPA committee at this meeting.

Understandably, the shareholding weighting was the subject of much contention since it meant that the state, through Alexkor, effectively retained control of the most valuable asset post land

restitution. Mr Erwin explained the two motivating factors from Cabinet's perspective behind this arrangement. Firstly, the need to ensure community stability and secondly, to facilitate the capitalisation of the RMC. Mr Erwin stated that his experience in the trade union sector showed him the importance of community stability for any benefit-sharing programme to succeed. During the negotiation process, there were already concerns regarding the stability of the Richtersveld community as factions within the community were emerging (Former Minister, Interview, 17 November 2020). Thus, Cabinet thought it best to retain majority shareholding while the community stabilised. He further explained that Alexkor having majority shareholding was an intermediate plan. Cabinet planned to later cede its share, or a portion thereof to the RMC so that the RMC would have majority shareholding in the PSJV. This is because at the time of the land claim government had already decided that Alexkor was not a strategic asset and was in the process of unbundling it but did not do so considering the land claim negotiations (Former Minister, Interview, 17 November 2020).

Erwin's claim is partially supported by a report of the Public Enterprises Portfolio Committee following a study tour of Alexkor in November 2004 indicated the following, "The Alexkor management explained that the government's restructuring plans for Alexkor includes selling 51% to a strategic equity partner, giving the community 10% and retaining 39%. In view of the negotiations on the claims, this has been put on hold" (Parliamentary Monitoring Group [PMG], 2005). Government did have plans to exit as the main shareholder but at this stage, the envisioned equity partner was not the community. The government had at this stage paused the processes of looking for this equity partner pending the finalisation of the negotiations with the community (Portfolio Committee on Public Enterprises, 2005). As a result of the land claim, the government was then forced to have the community as its strategic equity partner. Surprisingly the Deed of Settlement did not outline the government's plan to later cede its shares to the community. The Deed of Settlement only indicated that the two parties, Alexkor and the RMC, had the first preference when the other considered selling its stake in the PSJV (Deed of Settlement, 2007). This meant that the community depended on the government fulfilling this verbal promise with nothing in writing, as far as I could establish. This questions the integrity of the government's commitment. In 2021, which is fourteen years later, the government has not followed through on this verbal promise. When questions about fulfilling the obligations promised during this time both Alexkor and the government indicate that they are concerned about the state of the various entities under the Sida !hub CPA making it difficult to fulfil their obligations. While these concerns are legitimate as many of the Richtersveld

entities are dysfunctional, one cannot help but wonder if the problems faced by the Richtersveld entities are a convenient excuse that enables the government to retain control over this valuable land and that the promise to cede the shares was simply dangled to the first CPA committee members during the negotiations to garner their buy-in to the Deed of Settlement agreement.

In terms of the capitalisation of the RMC, Erwin argued that by having majority shareholding in the PSVJ, Alexkor would carry the burden of maintaining the mine giving the RMC time to build its capacity to later take over the expense (Former Minister, Interview, 17 November 2020). This would be critical given that deep-sea mining, which is currently how alluvial diamonds are currently being extracted in the Richtersveld, is an expensive enterprise. Erwin's claim is supported by what was agreed to in the Settlement. Alexkor was mandated to put its land and marine mining assets as well as certain members of its personnel under the control of the PSJV (Deed of Settlement, 2007). For the community, this was a significant benefit because it meant that the mining operations did not have to stop while the RMC built up its capacity. The community had at this time seen the negative consequences on employment when a mine closed or when a new mining company took over from another and they wanted to avoid some of these challenges (Former CPA member, Interview, 18 November 2020). Alexkor was also mandated to contribute the necessary capital, up to a maximum value of R200 million, for the joint operations of the PSJV. This capital would be used to maintain the income stream from the sea operations and to subsidise the land operations during its development phase. Thereafter the RMC and Alexkor would contribute towards the expenses according to their respective participation interest in the PSJV (Deed of Settlement, 2007). This indicates some attempts by the Cabinet to assist in the building of the capacity of the RMC. Furthermore, the government committed R50 million to the Investment Holding Company for the recapitalisation of the agricultural and maricultural enterprises (Fife, 2013). This money was to flow from the Investment Holding Company to the Richtersveld Agricultural Company. From the Deed of Settlement, there was much hope to be expected for the improvement of the lives of the Richtersveld people. However, as shall become evident in the sections below, this did not happen. Instead, the community has been plagued with infighting and protracted legal battles that eat at the very money meant to facilitate economic development for the whole community. Importantly the state's role in these conflicts has been questionable.

6.3.2 Poor Millionaires: status of the Richtersveld Trusts

I first became aware of the challenges facing the RGT when I conducted fieldwork in 2018. While SANParks continues to pay land rentals, the community had not benefited from the funds due to the RGT being inactive. What was more concerning was that the community representatives were misinformed as to the reasons for this. At the time, the community representatives believed that the RGT was frozen due to non-compliance with the Financial Intelligence Centre Act (Community representative 1, Interview, 20 July 2018). I was able to obtain some clarity upon interviewing the RNP manager on 19 November 2020. He clarified that the RGT was currently not "active" because one of the trustees had passed away and those that are still alive were not "active". Furthermore, as the SANParks representatives on the RCMC, they were working with the community representatives to firstly, confirm the current trustees and secondly, to fulfil all the legal processes needed to appoint new trustees so that the RGT can be "reactivated". While this is underway, the land rentals revenue from SANParks had thus far been paid into an attorney's trust account as requested by the RCMC.

Strangely, the death of trustees has been the main cause of an administrative blockage in the functioning of the RGT. Section 7(1) of the Trust Property Control Act, No. 57 of 1988 (TPCA), which governs community trusts gives direction on the appointment of trustees. The first point of call is the trust deed which is meant to provide for occurrences such as the death of a trustee. If there is no provision, then the Master of the High Court may appoint a trustee after consultation with as many relevant parties as the Master sees fit. It is unclear what mechanisms the RCMC has thus far employed to resolve this issue but the fact that the RGT has remained "inactive" for the two years since I first heard of the issue is cause for great concern. One of the community representatives who sits on the RCMC expressed deep sadness about the poor state of the schools in the Richtersveld which the RCMC is unable to solve even though the RGT's objective is education development. The RCMC, he said, was left helpless because while the RCMC is aware that the funds from the land rentals revenue are available, without the trustees' permission the RCMC is unable to use the funds to improve the schools (Community representative 2, 16 November 2020). This situation demonstrates the pitfalls of a trust arrangement, which does not give power to communities.

Previously I have shown how the RGT's establishment not only legitimised the RNP without addressing the unresolved issue of land ownership but also shifted the focus from land ownership to benefit sharing. It is clear that even the promised benefit sharing has not come to

fruition. By entering the RNP contractual agreement, the Richtersveld community not only lost the opportunity to strengthen their property rights, but it is also stuck with a dysfunctional trust. This supports the argument made in this study, namely that trusts subdue resistance by introducing ambiguities and this is made visible by using property as a lens. While the community has not yet seen the tangible gains of its decision to lease the land to SANParks, the RNP remains functional and the democratic state is still able to enjoy the value it derives from having a national park within its territory. Moreover, the RGT shields the failure of the agreement. This is glaringly clear from the fact that in 2018 when SANParks published its 10-year Management Plan it was still able to present the image of the successful partnership with the community to the public while SANParks officials knew that the RGT was dysfunctional. The dysfunctionality of the RGT cannot be presented as an isolated incident rather than being rooted, as it should be, in the unresolved issue of land ownership. In this context, trusts benefit the interests of the state than the community. This is evidence of the symbiotic relationship between trusts and the state.

The RCT and RIT have not fared much better. While funds of more than R200 million have been distributed by the government into the various trust and company structures, each beneficiary has only received R4500 as direct benefit. In addition, there has been minimal indirect benefit in the form of infrastructure, employment or development programmes painting a bleak picture. Regardless of these challenges faced by the community trust and supporting structures, diamond mining has continued meaning that the state's stake in the profits from the PSJV has not been compromised. Unpacking the challenges faced by RCT and the RIT are more complex as the challenges involve the role of the state post the Deed of Settlement as well as in-fighting within the community's leadership structures. In the next section, government action is detailed from the period when the land restitution case was lodged in 1998 to the present.

6.4 Situating the state back in

As previously mentioned the Richtersveld land claim settlement was complex in that it involved four departments. Namely the Department of Public Enterprise which dealt with the business aspect, the Department of National Treasury which oversaw disbursing both the extraordinary compensation received from DRDLR as well as capitalisation funds committed to by the government as part of the Deed of Settlement agreement, the Master of the High Court

(which is housed in Department of Justice and Constitutional Development) which registers and oversees the trusts and lastly the Department of Rural Development and Land Reform which oversees land reform but also giving support to community structures such as CPAs. As such for the settlement process to run smoothly there was a need for coordinated efforts from all four departments. Yet from the onset of the land claim process, it was clear that there was a lack of coordination between these departments.

6.4.1 Government's blunders during the land claim process

When the community lodged the land claim in December 1998, the government, represented by the Minister of DPE, was cited as the second defendant (Richtersveld Community and Others v Alexkor Limited and Another, 2001). The Minister of DPE indicated that the government would abide by the decision of the court. Later, the Minister of Agriculture and Land Affairs applied to intervene in the proceedings on behalf of the government. This application was granted, and the Minister of Agriculture and Land Affairs then represented the government and choose to oppose the land claim alongside Alexkor (Richtersveld Community and Others v Alexkor Limited and Another, 2001). It is not clear why the Minister of Agriculture and Land Affairs opposed the claim as, during the case in the LCC, the Minister did not make any special pleas (Richtersveld Community and Others v Alexkor Limited and Another, 2001). The Minister of Agriculture and Land Affair's actions fragmented the government's approach – instead of the community perceiving the government as being supportive to their claim, it sowed a level of distrust that would permeate in years to come.

As previously mentioned, the LCC dismissed the Richtersveld land claim in 2001 but the judgement was overturned by the Supreme Court of Appeal (SCA) in 2003 which ruled in the community's favour. At this point again, the government behaved in a contradictory manner. Alexkor the diamond mining company opposed the claim at the LCC and was a respondent in the SCA judgement. Following the ruling of the SCA, Alexkor indicated that it would appeal the decision at the ConCourt and the government joined Alexkor in appealing. Not only was the government's decision to appeal puzzling but the way the government's appeal was handled revealed a lack of direction.

The government only applied for leave to appeal three weeks before the hearing of the appeal. According to the rules of the SCA, any party that wanted to appeal the judgement needed to do

by 30 April 2003 and the government failed to meet this deadline. In a letter dated 24 April 2003, the state attorneys notified the Richtersveld attorneys of Alexkor's decision to appeal and the government's decision to not actively participate in the proceedings opting to abide by the decision of the court. In the meantime, the government was attempting to reach a settlement agreement with the Richtersveld community and engaged in discussions between 8 April 2003 and 26 May 2003. These discussions were unsuccessful (Alexkor Ltd and Another, v Richtersveld Community and Others, 2003). The government then opted to appeal submitting its condonation and application on 13 August 2003. The government attributed its delay in applying timeously to the fact that several departments were involved in the case. An affidavit submitted on behalf of the government indicated that "no co-ordinated evaluation of the order of the SCA was undertaken before the Cabinet decision of 11 June 2003… [i]t was only at the meeting of 16 July 2003 that serious consideration was given to the possibility of seeking special leave to appeal on behalf of the Applicant" (Alexkor Ltd and Another v Richtersveld Community and Others, 2003:7). While the ConCourt granted the government condonation for its late application the judges remarked that "The delay in applying for special leave to appeal is unacceptable and has not been adequately explained" (Alexkor Ltd and Another v Richtersveld Community and Others, 2003:8).

The government's uncoordinated action, on the one hand, reveals the weakness of its bureaucratic processes that render it unable to formulate a response timeously. Yet, on the other hand, they potentially reveal a government that has mastered the art of deception. Throughout the dealings with the community, DPE and Alexkor are represented as two separate entities that seem to act independently yet this cannot be the case as Alexkor is wholly owned by the government with DPE as the shareholder representative (Department of Public Enterprises, 2021). Therefore, the decisions of Alexkor to oppose the land claim represent a decision of the government. Alexkor put in much effort to discredit the community's claim to the land particularly in its appeal at the ConCourt. By presenting this effort as an effort of Alexkor and not the government, it conceals the government's role in frustrating the community's attempt to have their land restored. If indeed the government was committed to abiding by the decision of the court, then it could have used its oversight function over the Alexkor to ensure that Alexkor did not pursue the appeal. In instances where it has been politically useful to do so,

the government has intervened in the decisions of its other state-owned enterprises[8]. One must be left to conclude then that the government did not intervene because through Alexkor's appeal the government had a backdoor in case its negotiations with the community did not go well. This backdoor came in handy for the government because due to its late appeal application, the government was not allowed to submit any pleas during the ConCourt proceedings and as such, it was Alexkor's appealing documents that the judges drew from (Alexkor Ltd and Another v Richtersveld Community and Others, 2003). Even though the appeal was unsuccessful, it drew to question the government's commitment to its land reform programme.

6.4.2 A failed second chance: analysing departmental oversight post-settlement

The Deed of Settlement agreement offered an opportunity for the government to right its past wrongs and show its commitment to land reform and the Richtersveld community. However, the government did capitalise on this opportunity. The community's lawyer from 2007-2012, gives context as he recalls some of the challenges faced by the community post-settlement, arguing that, "There was not really any input from government apart from Treasury on the Investment Trust and the Investment Holding Company, which had a representative who was his weight worth in gold". He further stated that "had it not [been] for Treasury, I think there was a risk that the money would have been irresponsibly spent, the Investment Holding Company monies would have been very, very irresponsibly spent. So for Treasury's involvement, one should certainly give government credit" (Interview, 26 November 2020).

The RIT has delivered the most outcome out of the three trusts in that it has at least paid out the R4500 to each beneficiary (Fife, 2013; Community member, Interview, 19 July 2020). The amount comes from the extraordinary compensation of R190 million received for the diamonds that were mined since dispossession. While the R4500 is not a large amount of money, it is the only direct benefit that each community member has received from their land. This demonstrates the important role of government post-settlement. Through Treasury, the government was able to play a critical oversight role that has resulted in the community having one tangible benefit from their property.

[8] A statement by the leader of the Black Management Forum indicated many black executives in the SOEs were considering resigning due to intolerable levels of political interference from government. Available: https://www.news24.com/fin24/Economy/government-meddling-sets-black-execs-up-to-fail-at-soe-slaughterhouses-bmf-20190604 [2020, February 5].

While Treasury's presence brought much-needed support, DPE did not provide a similar kind of support. By 2007, it seemed as though DPE and the community had managed to establish a good working relationship. Unfortunately, this changed in September 2008 when Mr Erwin resigned as Minister. He was one of the first Ministers to resign following Former President Mbeki's recall from the government by the ANC. The first CPA chairperson indicated that Mr Erwin's resignation had a grave effect on the community because it broke the momentum that the community had built with the DPE. Erwin's special advisor, Rafique Bagus (AmaBhungane & Scorpio, 2017) took over dealings with the community and Bagus showed a clear disregard for the agreements outlined in the Deed of Settlement (Interview, 18 November 2020). He also claimed that Bagus was less interested in power-sharing in the Alexkor RMC PSJV and asserted Alexkor's majority shareholding to direct decisions of the PSJV. This resulted in the deterioration in the relationship between Alexkor and the RMC, that is the community (Interview, 18 November 2020). This also points to the failure of the agreement to provide a safety net for the community. Since Alexkor had a majority shareholding in the PSJV, the community was dependent on the good relationship with Mr Erwin, which is not a sustainable arrangement because it left the community vulnerable to the political changes in government and in the ANC as the ruling party. Additionally, as mentioned previously Alexkor is not independent meaning that the DPE had the obligation and the power to intervene in Alexkor's decision. Reading minutes from both DPE and DRDLR portfolio committees one is left to wonder if the government purposefully portrays itself as powerless to avoid taking responsibility for Alexkor's actions.

On 27 February 2019, DPE tabled a report on its progress in implementing the Deed of Settlement to the National Council of Provinces (NCOP) Public Enterprises and Communication portfolio. At this meeting, one of the documents tabled for discussion was a status report compiled by the Office of the Chief Land Claims Commissioner which indicated, "… the first of a number of court cases and other public disputes ensued from 2009… In addition Alexkor has been involved in the affairs of the CPA and its structures in varying degree. As partners in the Pooling and Sharing Joint Venture (PSJV), there seemed to be no sharing and no understanding of roles and responsibilities" moreover the report indicated that "Alexkor has been supporting certain activities and certain CPA members in order to gain support for their activities" (NCOP, 2019). Government was aware of the mischievous activities that Alexkor was being accused of yet no punitive measures against Alexkor were

discussed. At this meeting, the Deputy Director of DPE defended the department saying the department found itself constrained because of the conflict happening within the community (NCOP, 2019).

The comment made above shifts the accountability for the problems to the community with no remark about DPE's lack of decisive action. A member of this Committee alluded to this pointing out the DPE has failed to act on the Committee's recommendations to review the Deed of Settlement following the Committee's visit to the Richtersveld in 2016 (NCOP, 2019). DPE's actions can be seen as incompetency but with more information emerging from the Zondo Commission, it seems the DPE's lack of action may have been politically motivated. A whistle-blower alleges that the capture of DPE began following the appointment of Malusi Gigaba as Minister of Public Enterprises in 2010 (Craythorne, 2020). Furthermore, Bagus and the former Alexkor CEO Mervyn Carstens have been implicated in allegations linking them to the Guptas (AmaBhungane & Scorpio, 2017). The Zondo Commission is still yet to finalise its findings but there appears to have been external political influence in the action of the department.

Another key entity is the Master of the High Court which oversees the functioning of the trusts by keeping an updated record of the trusts and their trustees and assisting when there are issues with a trust as per its discretionary powers (Trust Property Control Act, No. 57 of 1988). In my experience of trying to obtain trust deeds from three different Master's office, the hope of the Master's office using its discretionary powers seems doubtful. As was shown in Chapter 3, the process of lodging an inquiry with the Master's office becomes the first barrier to members of the public. Additionally, the Master does not keep updated information of the trustees which further entrenches a lack of accountability because it is not clear where community members would obtain the most updated information. Unpacking the lack of oversight by the Master of the High Court is interesting because on the one hand, the Master represents the judicial arm of the state, which should be independent, and in the South African context should be the most efficient part of the state. But on the other hand, when we look at the fact that the Master of the High Court is a dysfunctional office and is housed in the Department of Justice and Constitutional Development, and so its inefficiencies in how it is run represents the inefficient part of the executive arm of the state. The part played by the Master of High Court, in contributing to the dysfunctionality of the trusts (by not providing proper oversight), is illustrative of two flaws of the state.

First that this supposedly independent arm of the state, which is the judiciary, is not working well, in that it has not been able to put in place laws that fit the socio-economic context. As has been shown, to solve a problem that is about a trust takes a long legal process, which is not fitting for a community that does not have the socioeconomic means to sustain protracted legal processes. Laws are meant to be applicable to the context therefore the failure of the TPCA in not placing adequate safety nets such as putting obligatory powers on the Master of the High Court's office, are a failure for people living on communal land. Second, the failure of the Master of High Court as an arm of government indicates a lack of political will from the executive arm of the state that does not prioritise people living on communal land and perhaps uses so-called inefficiencies in its departments to disguise its attempts to retain control over strategic resources. The lack of proactive action oversight means that the Richtersveld community cannot get control over the trusts while the state, through Alexkor, continues to mine the diamonds.

Lastly, we come to the role of the DRDLR. In the early years, DRDLR was not involved actively in the activities of the community. In its 2006/7 annual report (at this stage it was still the Department of Land Affairs), it indicated that it was involved in discussions with DPE and Treasury to honour the Court Order. It seems DRDLR became more actively involved post-2012 when conflicts within the community escalated considerably. The department attempted various approaches to try and mediate including appointing an external service provider to run mediations, but these attempts were unsuccessful. A critical observation made by the department is that the conflicts centred around the first CPA committee of 2007-2012 not wanting to relinquish its power following the ‘election’ or ‘appointment’ of the second CPA committee.

The term of this second CPA committee has been fraught with contestations with some community members siding with the first CPA committee which has severely affected its ability to lead the community. Moreover, fighting within this second CPA committee has led to court proceedings that have further weakened its ability to lead. I have tried without success to verify how this second CPA committee came about. From the interview with the community’s lawyer between 2007-2012, he indicated that in one of the meetings with DPE in 2012, the first CPA committee was asked to hand over to a new CPA structure because its term had expired (Interview, 26 November 2020). It was not clear to me whether an election indeed

took place and if this election met the requirements to be deemed valid. From the DRDLR's CPA Annual Report of 2015/2016, in 2015 the CPA did not have verified annual financial statements and it had not conducted an AGM which are the two important markers of a functional CPA. Interestingly, DRDLR classified it as compliant CPA meaning that not much support was given to its leadership until matters reached a boiling point. I also found it interesting that it was DPE and not DRDLR that called on the first CPA committee to step down. Regulating CPAs is the duty of DRDLR. It is fair to argue that the lack of involvement by DRDLR in that transition period of 2012 had ramifications on the stability of the CPA structure which could never recover.

While this second CPA committee faced legitimacy challenges, Alexkor was due to pay R45 million rand in rent for leasing properties in Alexander Bay. This agreement was outlined in the Deed of Settlement which indicated that the lease was for 10 years between 2007 and 2017 (see Table 1). The community has not received this amount. Alexkor indicated that it was ready to make the payment but would only make the payment to the Richtersveld Property Holding Company as that is what the Deed of Settlement requires (CPA member 2, Interview, 20 November 2020). However, community members wanted payments made to them directly because they no longer trusted the functionality of the Property Holding Company (CPA member 2, Interview, 20 November 2020). Following a community meeting on 13 May 2017, the community resolved that this amount must be paid to the beneficiaries directly and the government was tasked with assisting the community to amend the Deed of Settlement to make this possible (Office of the Chief Land Claims Commissioner [CLCC], 2018). Legal counsel was sought by the DPE and DRDLR and the report from the counsel was that this would be a difficult task as the parties would have to show that the circumstances had changed since the Deed of Settlement was made into a court order thus warranting this change (CLCC, 2018). This advice from counsel was received on 15 September 2017 (CLCC, 2018). When I conducted fieldwork in November 2020 this issue had not yet been resolved. It is not clear what has caused the delay in this process being finalised.

In the NCOP Public Enterprises and Communication report referred to previously, progress on this issue was also discussed. Again, there was a failure to take responsibility, this time the blame was shifted to the courts as can be gleaned from the following remark , "It is proposed humbly that DPE furnish it with the application which has been lodged. Parliament needs to engage that process at another level to prevent delays in the court process. Parliament as a

component of the state will write a formal letter with authority to the authorities who are another component of state. *If the courts delay in taking decisions on matters of this nature, one can definitely say they are failing poor communities and justice exists only for the rich* (my emphasis)"(NCOP Public Enterprises, 2019). Parliament, in this case, the NCOP, with all the evidence that clearly show that for many years DPE and DRDLR had failed to act timeously to address these issues used the opportunity to shift the blame to the courts. While it is true that court processes often impede justice due to expensive and protracted legal proceedings, the government remained equipped through its powers to have assisted the Richtersveld structures before this point.

The DRDLR also reported that one of the biggest challenges of the Richtersveld Trusts is that there is no proper understanding of the reporting structure of the different structures. "The tensions are linked to disputes within and between the various entities which should be reporting to the CPA but are clearly not. The institutions, especially the Richtersveld Investment Trust refuse to acknowledge the over-arching authority of the CPA" (CLCC, 2018:6). The CPA is meant to be the ultimate decision-making authority because it represents the highest authority of the community. It is interesting that DRDLR can point this out because the RIT trustees' actions are embedded in the authority they are given through the trust arrangement. It is the failure of the Deed of Settlement to outline this overarching authority of the CPA over the RIT and RGT that has enabled this behaviour from the trustees. One might argue that it was the responsibility of the community to pre-empt these challenges and thus structure the trusts accordingly, but the government also had a role to play in this. From the Deed of Settlement, the government had the capacity and knowledge of how to structure the mining aspects in favour of the government and so the carelessness of the provisions of the trust can be viewed as intentional negligence from the government's side

6.4.3 Elevating the analysis of government action

The uncoordinated government action post-settlement is revealing of the role of trusts in democratic South Africa. Trusts continue to be a tool to manage contestations which is why the presence of the government is most visible in the early stages when the trusts are being established. This is because it is at this point that the contestation for resources is at its peak. Once the trust has been established to resolve the contestations the government recedes back. This is because the establishment of the trust ensures the hidden presence of the government.

Therefore, when trusts are observed in their current and dysfunctional state, there is a tendency to look at their challenges in a cause-and-effect relation. For example, to attribute their dysfunctionality to inefficient trustees when in fact their design has engineered their problems. Therefore, the context in which the trusts were designed highlights the nature of the contestations, how they were managed, and the consequent challenges.

6.5 Conclusion

This chapter has shown that trust arrangement weakens land reform beneficiaries' decision-making powers over their newly restored property rights. The case of the Richtersveld community makes three points clear. First, it demonstrates trusts work intimately with the state and also tend to further the interests of the state in communal areas where the ownership of resources such as land are contested. The protection of the interests of the state by trusts is made visible through decision-making processes as demonstrated by the Deed of Settlement. It is the Deed of Settlement that tied ordinary community members to a trust structure that completely removes them from the decision-making processes. The Deed of Settlement should not be seen in isolation as it is part of an approach to the settlement of land claims adopted by the democratic state. In this approach, ordinary community members are locked into a group relation towards their property that affords little or no room for individual decision-making. Second, in addition to the use of trusts, the state also directly contested the control of minerals by opposing the land claim lodged by the Richtersveld community, often citing the challenges of leadership and a lack of solidarity in the communities as the reasons for doing this. Third, this opposition by the state also reveals contradictions within the state as shown by the involvement of four state departments in the Richtersveld. These conditions complicate the functioning of trusts while creating confusion in the community regarding the role of the state in community development and redress. In the next chapter, I highlight insights from the various chapters.

Chapter 7

Can the Trusts be trusted?

7.1 Introduction

The aim of this study was to investigate the role of trusts in shaping property relations on communal land. This was done by firstly tracing the origins of trusts more broadly to understand the critical role they played in organising African property relations. Secondly, the role of trusts in the creation of Bantustans and Coloured Reserves was unpacked to illustrate that the existence of trusts was useful in giving geographical expression to the apartheid ideology. Drawing on the Richtersveld the study showed that the presence of trusts in democratic South Africa serves to sustain the status quo by shifting contestations away from the property rights to benefit sharing. The purpose of this chapter is to reflect on the findings of the study and to locate them in the broader conversations about property and state-making and the role of trusts therein. This is done by first summarising the main findings of the study before returning to the key conceptual debates on role of trusts as property brokers. The last part of the chapter reflects on the implications of the recent Ingonyama Trust judgement on the trusteeship model used in democratic South Africa.

7.2 The main findings of the study

This study showed that even though trusts in South Africa have emerged under different legal arrangements and political contexts, their impact on African property relations has remained the same. Trusts have sustained the ambiguities in African property relations, which served to mask rather than resolve the tensions related to the unresolved question of African land ownership. Property is a useful lens to understand this process because it shows the nature of different rights that exist. This study reveals that placing land and any other asset in trusts weakens rights. This is because in a trust arrangement the ownership of the asset is vested in the trust while the rights of control are exercised by the trustees. Such a structure takes away the decision-making power from people living on communal land, who are the beneficiaries. The presence of trusts in each version of the South African state also reveals that there is a symbiotic relationship between trusts and the state that is manifested through property. This symbiotic relationship not only entrenched colonial and apartheid geography but sustains this geography despite reforms brought by democracy.

7.2.1 Trusts, property, and geography

Much of the literature on trusts is fragmented. Political scholarship has focused on the ideology of trusteeship that underpinned trusts (Bain, 2003; Allsobrook & Boisen, 2016) while legal scholarship has focused on the legal implications of the trust arrangement on property relations (Rahman, 2006; du Toit, 2007; Manie, 2016; Cameron et al, 2018). While this literature is useful for understanding trusts at a conceptual level, it neglects the spatial dimension of trusts. Therefore, the study makes two contributions to the literature on trusts. First, it brings together the fragmented literature on trusts to show that trusts must be seen both as a political project premised on trusteeship and embedded in direct and indirect rule. Second, that trusts play an important role in determining the geography of property; meaning how property rights are distributed and land ownership defined for different groups of people in society. These two considerations were critical in thinking through apartheid as a geographical project. To give effect to the apartheid project, trusts were deployed in the creation of the Bantustans and Coloured Reserves.

One prevailing challenge of public trusts in South Africa has been that while there has been case law that has enriched the understanding of private trusts, none has dealt with public trusts. In particular, the question of what rights do beneficiaries have in a public trust arrangement has remained largely unanswered. Courts have been reluctant to grant beneficiaries legally enforceable rights against the trustees. The issue of beneficiary rights is an important one because it speaks directly to how people living on communal land negotiate their property rights. The main argument here is that trusts reveal how the state shapes property rights on communal land. If one goes back to the implication of the structure of trusts, which is that property is held or administered by a trustee(s) for the benefit of the identified beneficiaries (Cameron et al., 2018), it means that the beneficiaries do not have a direct right to the property itself. The next logical question is how beneficiaries negotiate their right to the property? It must be through their rights against the trustees.

This is where the fiduciary duty of the trustees becomes critical. As shown in Chapter 4, a fiduciary duty is meant to articulate the duty of care that trustees are meant to apply in the fulfilment of their role as trustees. Chapter 4 highlighted that fiduciary duty is a weak form of protection because not only it is an elusive term but the process of proving that a trustee has not executed their fiduciary duty is an arduous legal process. Given that one is dealing with people living on communal land who often do not have the socioeconomic means to pursue a

lengthy legal process they might likely remain with a trustee who is not fulfilling their fiduciary duty. As a result, their right to the property, which is contingent on their right against the trustee, remains ambiguous. When a right is ambiguous, it is open to abuse. This is what was observed during the apartheid period when the apartheid state leveraged these ambiguities in property relations to facilitate the creation of the Coloured Reserves (cf. Chapter 4) and the Bantustans (cf. Chapter 5).

To some extent, this issue of beneficiary rights is dealt with when it comes to private trusts. Cameron et al. (2018: 44-45) commented that, "the point correctly made is that a trust between living persons (inter vivos) is usually created by way of a contract that contains a stipulation in favour of the beneficiary, who on acceptance acquires an indefeasible right under the trust" and further, "it has been suggested that the contractual aetiology of an inter vivos trust means that the trustee, while owing a fiduciary duty to the beneficiaries, also owes a duty to the trustee to carry out the terms of the trust". There are two implications here. Firstly, that the primary, *indefeasible,* right that that the beneficiaries have is towards the trust itself. This does not take us far because the trust is simply an institution to hold property. To say someone has a right against an institution does not give a practical answer as to how that right is meant to be exercised or enjoyed. The second implication is that the trustee has a fiduciary duty towards the beneficiary who must in turn have a right against the trustee because how else would this fiduciary duty be realised? Yet in how Cameron et al. (2018) formulate their argument, the duty of the trustee towards the beneficiary is a secondary consideration because what is emphasised is that the trustee's fiduciary duty is towards the trust itself. As such one encounters the same problem of having a right or duty against an institution with no practical answer as to how this right or duty is to be given effect.

A property right is fully realised or enjoyed when there are clear ways in which it is given effect. To unpack this further, one must return to some of the tenants of property relations. Property is commonly understood as a bundle of rights including the right to exclude, to transfer, to possess and to use (Sprankling, 2012) but these rights, are exercised between people in relation to things which is why the relational aspect is critical to understanding property rights (Blomley, 2003). As such when one brings in the language of ownership which goes together with property, it is having any or all these bundles of rights that is meant to say something about who owns the property. Ownership of property is not absolute as many scholars would attest (Okoth-Ogendo, 2008) and in South Africa, ownership of property is

subject to the Constitution. What is clear though is that owning property affords individuals decision-making powers. For example, in a tenant-landlord relationship, the landlord is the owner of the property with rights of use, possession, exclusion and alienation to the property (Sprankling, 2012). The landlord, through a lease, surrenders the right to use the property to the tenant as well as the right to exclude because the tenant cannot be excluded from the property for the duration of the lease. However, at the end of the lease period, those rights return to the owner of the property. Most importantly, the landlord as owner of the property, can set the parameters under which the rights of use and exclusion are ceded to the tenant. There is something essential then about decision-making power that is a hallmark of property.

Tracing where the decision-making power lies in a trust arrangement reveals that trusts shape property relations. While in the statutory definition of a trust, the words "held" and "administrated" are both used to account for the fact that sometimes the trustee holds or administers the property, a judgement showed that the power of the trustee to insist on administrating the property against the beneficiary's wishes does not differ according to whether the beneficiary owns the property or not (Koch v Estate Koch 1946 CPD cited in Cameron et al., 2018:10). This is to say the beneficiary has no decision-making power unless it is explicitly provided for in the trust deed. It is clear then that there is no material difference between public trusts such as the SANT and later SADT and the inter vivos trusts such as the community development trusts when it comes to their effect on the decision-making power of beneficiaries. In both cases, beneficiaries are not guaranteed decision-making power. It is up to the trust instrument, be it the Act that established the trust or the trust deed to give the beneficiaries decision-making power. Since decision-making power is a hallmark of property, it could be concluded that, in reality, beneficiaries have no property rights in a trust arrangement or that their property rights are symbolic. This becomes interesting to unpack in light of the fact that many CDTs hold property that has been returned to communities following successful land restitution claims. Land restitution is meant to restore land ownership to those who have been dispossessed of their land due to discriminatory laws yet CDTs place those very communities back to a point where they lose the essence of their property rights, but this time through a trust arrangement.

7.2.2 State, trusts and the trusteeship model

It has been already shown that the organisation of land is central to how the state exercises control over its territory (cf. Chapter 2). Tracing trusts throughout their history has revealed that for each period of the South African state, the presence of trusts helped the state to solve an ideological challenge centred around property relations. During the colonial period, there was a need to keep land under European control while the colonial state developed an overarching land policy that would decide the nature of African property rights. As such, trusts in this period were packaged as part of the trusteeship ideology, i.e., the belief that Europeans had the responsibility of holding indigenous land in trust until indigenous people reached an appropriate stage of civilisation (Allsobrook & Boisen, 2016).

Packaging trusts in this manner bought the colonial state time to solidify its land policy. As shown in Chapter 4, the colonial period was marked by contestations and an uneven expression of land policies across the four provinces. This unevenness reflected not only the contestations between the British and Afrikaner white blocs (McCusker et al., 2016) but also an evolving vision of the purpose of the colony. Allsobrook & Boisen (2016) argue that with the discovery of minerals, which prompted the industrialisation of the colony, that moved the vision from a territorial to a commercial colony which made the issue of African property rights more contentious. The needs of a commercial colony centred around capital accumulation and limiting African property rights would be integral to achieving this objective (Bhandar, 2018). Therefore, trusts become part and parcel of meeting the needs of a commercial colony. In the early colonial period, missionaries served as trustees, who ensured that the appropriated land remained under European control but with minimal costs for the nascent colonial state. Once the colonial state began developing its capacity it pushed out the missionaries as trustees, replacing them with colonial officials.

For the apartheid state the colonial trusteeship model proved to be a liability for the rapidly industrialising state which needed cheap labour (Allsobrook & Boisen, 2016). Resistance by early African intellectuals was appealing to the emancipatory promise of the British colonial trusteeship (Lalu, 2013; Allsobrook & Boisen, 2016). The apartheid state had now solidified its position on African property relations through the 1913 Natives Land Act which prohibited African people from owning land in their own right. While the 1913 Natives Land Act represented the first instrument intended to provide the legal framework for segregation, it had the unintended consequence of solidifying African resistance. This added a challenge for the

apartheid state which needed to find ways to fragment resistance as it proceeded with passing the remaining Acts. This gave the impetus to re-package trusts to form part of the apartheid ideology of separate development. The 1936 Native Trust and Land Act, which established the SADT was presented as part of the government's commitment to giving African people agency through the self-governing territories.

Therefore, under apartheid trusts served to move contestations away from the unfulfilled promises of colonial trusteeship regarding property by creating alternative spaces where Africans could have some semblance of property rights. As shown in Chapter 5, ownership of the land in the Bantustans and Coloured Reserves still did not rest with the people living in these spaces meaning that the apartheid state still exercised ultimate authority. In addition, through the SADT the apartheid government was able to give geographical expression to the ideology of separate development. While the packaging of trusts differed between the colonial and apartheid state, the fundamental objective remained the same, i.e., ensuring that African property rights were limited. This affirms Bhandar's (2018) argument that modern property law evolved alongside and through colonial land appropriation.

7.2.3 Trusts in democratic South Africa

The much-anticipated judgement regarding the Ingonyama Trust which was delivered in June 2021 clarified the property rights of residents of land nominally owned by the Ingonyama Trust and the powers exercised by the Trust and the Trust Board (Pikoli, 2021). In Chapter 6, the political context surrounding the establishment of the Ingonyama Trust was discussed at length. In particular, the creation of the trust at the end of apartheid rule demonstrated that trusts were useful for the outgoing apartheid state to influence the direction of land reform in the democratic state. Following the deal being made public after the 1994 elections (Lynd, 2021), the existence of the Ingonyama Trust during the democratic era has generated much debate and controversies around its implications for the land ownership and rights of people on communal land (Bloom, 2019, Carnie, 2019; Pikoli, 2021). As such various civil society organisations and research centres have been involved in legal action culminating in litigation.

In the recent two-part webinar hosted by the Land and Accountability Research Centre to discuss on Ingonyama Trust judgment, Dr Claassens remarked that the judgement has gone further than the Richtersveld judgement at the Constitutional Court in 2003 which affirmed

that customary rights to land are not just *akin* to ownership they *are* ownership rights. What the Ingonyama judgement did was to go a step further and clarify what this looks like on an individual basis. The judges ruled that claims that people on communal land have to their residential plots are in fact strong property rights that can be passed on from one generation to the next (CASAC v Ingonyama Trust, 2021). This dismisses the myth that there are no individual rights within the layered complexity of overlapping rights that define customary rights to land. However, while the judgement is being scrutinised this is simply rhetoric. Moreover, and perhaps more concerning there is a risk that a range of political processes can happen between the judgement and implementation that could dilute the gains of this victory. Here it is useful to reflect on the insights that this study has gleaned from the outcomes after the landmark victory of the Richtersveld community in 2003. Of course, the contexts of the Ingoyama Trust and the Richtersveld Trusts are different however there are parallel implications that are worth noting.

The creation of different trusts in the Richtersveld showed the ability of trusts to morph to meet the evolving demands of the state. As we noted in Chapter 6 the creation of the RNP on communal land as a contractual park required the use of the RGT to ensure that the National Parks Board's vision to create the park was fulfilled whilst managing land contestations that could come from land reform. By 'recognising' the Richtersveld community's rights to the land there would be no need for land reform to happen on the RNP. Additionally, the RGT would shift the focus to be on the benefits of the park rather than the community questioning the strength of their property rights to the RNP. Interestingly, the configuration of how the community is represented reveals the weakness of the community's property rights. Strong property rights should result in the community having better bargaining power, but this is not the case in the Richtersveld. Control over the revenue from the leasing arrangement is in the hands of the trustees of the RGT who are not from the community. The community's representation in the day-to-day management is through the RCMC but as the interview with the community representative reveals, the RCMC has limited power. The RCMC members know the is money in the trust but without the trustee's permission, the funds cannot be used by the community.

The Richtersveld land claim also opened an avenue through which we can understand changing relations between community trusts and the state. The land claim was about the contestations over property, in this case, the property was the minerals on the subject land. Hence the

Richtersveld victory at the ConCourt was seen as a landmark judgement because it not only restored the land but also the minerals in land. From the perspective of the Cabinet, there was a need to neutralise the contestation as it would have far-reaching ramifications on the government's control over resources. It is useful to analyse the government's action in the negotiations in that light. Previous negotiations with the community had not yielded results because, at that stage, the government still had the opportunity to manage the contestations through the court proceedings. This changed following the ConCourt judgement because the judgement effectively gave the community an upper hand in terms of the contestations regarding the ownership of the property. This is also evident in the change in how the government presented its position on the Deed of Settlement. As the government could no longer oppose the land claim settlement endorsed by the ConCourt, it began to emphasise that the passage of the MPRDA in 2002 made it impossible for the government to fulfil the demands of the judgement. Hence, negotiations became necessary for the government and community to find an amicable solution. In effect, the renewed negotiations offered a new possibility to neutralise the contestation over property rights brought by the judgement through the complex trust structure.

What is significant about the trust structure is that it shifted the contestation from the ownership of the resources to benefit sharing. The fact that the Alexkor held majority shareholding in the PSJV was clearly the signal that the government had succeeded in managing the contestation regarding mineral ownership. However, the government needed to have a rationale that presents an alternative reading of the situation. The government then presented the PSJV as its commitment to assisting the community transition well into managing the mining venture, particularly emphasising that the PSJV would ensure that there was not a period where the mine had to be shut down while ownership transitioned from the Alexkor to the community (cf. Chapter 6). These remarks are important because they highlight what was considered as the priority for the people negotiating the Deed of Settlement. What ended up being the priorities for the negotiators was not the original priorities of the community. This is where it is useful to return to the initial relief sought by the community which was articulated in the court papers: the land and the minerals. This is also affirmed by the reaction of the community members when the CPA committee announced the shareholding: many community members walked out of the meeting (cf. Chapter 6). Their walking out, as articulated by a community member, was their reaction to what they considered as a betrayal of the land claim struggle. The experiences of the Richtersveld community indicate that while there is an expectation that

the democratic state should have a different approach to dealing with the property rights of people living on communal land this is not necessarily the case. Capital interests which drive the desire for states to entrench their control over resources are more powerful in defining state action.

7.3 Concluding remarks

Resolving issues around trusts is a long legal process because trusts, as an institution, are premised on ambiguities that privilege elite groups who are able to sustain long legal processes. Such an arrangement is misplaced for the realities of people living on communal land, who are largely marginalised socio-economically and thus are disadvantaged by such processes. An important insight to be gleaned from the challenges of the Richtersveld Trusts and the Ingoyama Trust experience is that while court victories can be significant and affirm the strength of the property rights of people living on communal land adopting trusts weaken these gains resulting in the community having little decision-making power over the management of their assets. The repetitive nature of the challenges of the Richtersveld community centred around the administrative backlogs of the trusts, from the death of trustees in the RGT to the lack of accountability of the RIT, raises a more fundamental question about the appropriateness of the trust model for communities on communal land. It is useful to remind ourselves of Cousin (1997)'s assertion that if rights are promised in law but due to political processes on the ground are denied then the validity or 'realness' of those rights must be questioned. Perhaps it is time to go back to the drawing board and adopt an institution that is less legally intensive as compared to trusts.

References

Adams, M & Turner, S. 2005. Legal dualism and land policy in Eastern and Southern Africa. UNDP-International Land Coalition Workshop. *Land Rights for African Development: From Knowledge to Action*. 31 October – 3 November 2005. Nairobi, pp.1-18.

Agamben, G. 1998. *Home sacer: Sovereign power and bare life.* Stanford, CA: Stanford University Press.

Alexander, G.S., Peñalver, E.M., Singer, J.W & Underkuffler, L.S. 2008. A statement of progressive property. *Cornell Law Review*, 94, pp.743-744.

Alexkor Ltd and Another v Richtersveld Community and Others (CCT19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003).

Allsobrook, C. & Boisen, C. Two Types of Trusteeship in South Africa: From Subjugation to Separate Development. *Politikon*, 44(2), pp. 265-285.

Ashley, P. & Boyd, B.W. 2006. Quantitative and qualitative approaches to research in environmental management. *Australasian Journal of Environmental Management*, 13(2), pp.70-78.

Ashton, G. 2018. Echoes Through Time: Dispossession and Reclamation of the Mineral Wealth of South Africa. In *In Good Company? Conversations Around Transparency and Accountability in South Africa's Extractive Sector*. 3rd ed. Cape Town: Open Society Foundation, pp.149-161.

Atieno-Odhiambo, E.S. 1972. The colonial government, the settlers and the "Trust" principle in Kenya 1939. *Transafrican Journal of History*, 2(2), pp.94-113.

Babbie, E. & Mouton, J. 2001. *The Practice of Social Research: South African Edition*. Cape Town: Oxford University Press Southern Africa.

Bain, W. 2003. *Between Anarchy and Society—Trusteeship and the Obligations of Power.* Oxford: Oxford University Press.

Barnard, A. & Woodburn, J. C. 1988. Property, Power and Ideology in Hunting and Gathering Societies: An Introduction. In *Hunters and Gatherers, vol. II: Property, Power and Ideology*. T. Ingold, D. Riches and J. Woodburn, Eds. Oxford Berg, pp.4-31.

Beinart, W. & Delius, P. 2014. The historical context and legacy of the Natives Land Act of 1913. *Journal of Southern African Studies*, 40(4), pp.667-688.

Bennie, A. 2018. When a community says 'No': Democracy, mining and alternative development options on the Wild Coast. In *In Good Company? Conversations Around Transparency and Accountability in South Africa's Extractive Sector*. 3rd ed. Cape Town: Open Society Foundation, pp.25-37.

Bennett, T.W. 1996. African Land – A History of Dispossession. In *Southern Cross: Civil and Common Law in South Africa*. R. Zimmermann & D Visser, Eds. Great Britain: Juta and Company Ltd, pp.65-94.

Bennett, T.W. & Powell, C.H. 2000. The state as trustee of land. *South African Journal on Human Rights*, 16(4), pp.601-622.

Berger, I. 2009. *South Africa in World History*. New York: Oxford University Press.

Bergh, J. & Feinberg, H.M. 2004. Trusteeship and Black Land Ownership in the Transvaal During the Nineteenth and Twentieth Centuries. *African Historical Review*, 36(1), pp.170-193.

Bhandar, B. 2018. *Colonial Lives of Property: Law, Land, and Racial Regimes of Ownership*. Durham: Duke University Press.

Biwa, M. 2006. *Toa Tama! Khams Ge': Remembering the War in Namakhoeland, 1903-1908.* M.A. Thesis. University of Cape Town.

Blomley, N. 2003. Law, property, and the geography of violence: The frontier, the survey, and the grid. *Annals of the association of American geographers*, 93(1), pp.121-141.

Blomley, N. 2013. Performing Property: Making the World. *Canadian Journal of Law and Jurisprudence*, 26(1), pp.23-48.

Blomley, N. 2014. The Space of Property [Video file]. Available: https://www.youtube.com/watch?v=qr1KQIuUTas&list=PLaMjtNZr6ZqW1kKUhs-7QwesaZa6m_wDY&index=14 [2019, November 19].

Blomley, N. 2016. The territory of property. *Progress in Human Geography*, 40(5), pp. 593-609.

Bloom, K. 2019. The great trial dodge: Ingonyama Trust and the price of a date deferred. *Daily Maverick*. 25 November. Available: https://www.dailymaverick.co.za/article/2019-11-25-the-great-trial-dodge-ingonyama-trust-and-the-price-of-a-date-deferred/ [2021, July 18].

Boonzaier, E. 1996. Local responses to conservation in the Richtersveld National Park, South Africa. *Biodiversity and Conservation*, 5, pp. 307-314.

Botha, C.G. 1928. *Public Archives of South Africa, 1652-1910*. Cape Town: Cape Times Limited.

Boxx, K.E. 2001. The Durable Power of Attorney's Place in the Family of Fiduciary Relationships. *Georgia Law Review*, 36(1), pp.1-62.

Bregman, J. 2010. *Land and Society in the Komaggas region of Namaqualand*. M.A. Thesis. University of Cape Town.

Bruwer, E. 2018. *Settlor control and trustee liability: an analysis of English and offshore trust law with indicators for the development of South African trust law*. PhD. Thesis. Stellenbosch University.

Bryman, A. 2006. Integrating quantitative and qualitative research: How is it done? *Qualitative Research*, 6(1), pp.3-37.

Cameron, E., De Waal, M.J. & Solomon, P. 2018. *Honoré's South African Law of Trusts*. 6th ed. Johannesburg: Juta and Company Ltd.

Capps, G. 2010. *Tribal-Landed Property: The Political Economy of the Bafokeng Chieftaincy, South Africa, 1837-1994*. PhD. Thesis. London School of Economics and Political Sciences.

Capps, G. 2012. Victim of its own success? The platinum mining industry and the apartheid mineral property system in South Africa's political transition. *Review of African Political Economy*, 39(131), pp. 36-84.

Carnie, T. 2019. Eleventh-hour delay in Inyonyama Trust court case involving King Goodwill Zwelithini. *Daily Maverick*. 20 November. Available: https://www.dailymaverick.co.za/article/2019-11-20-eleventh-hour-delay-in-ingonyama-trust-court-case-involving-king-goodwill-zwelithini/ [2021, July 18].

Castree, N., Kitchin, R. & Rogers, A. 2013. *A Dictionary of Human Geography*. Oxford: Oxford University Press.

Centre for Environmental Rights. 2021. *Somkhele Anthracite Mine*. Available: https://cer.org.za/programmes/mining/litigation/somkhele-anthracite-mine [2021, July 29].

Claassens, A. 2019.'Bantustan Bills' trample on the rights of rural people. *Daily Maverick*. 4 November. Available: https://www.dailymaverick.co.za/article/2019-11-04-bantustan-bills-trample-on-the-rights-of-rural-people/ [2019, November 22].

Claassens, A. & Ngubane, S. 2008. Women, land and power: the impact of the Communal Land Rights Act. In *Land, Power & Custom: Controversies generated by South Africa's Communal Land Rights Act*. A. Claassens & B. Cousins, Eds. Cape Town: UCT Press, pp.154-183.

Clark, M. & Luwaya, N. Land and Accountability Research Centre. June 2017. Communal Land Tenure 1994-2017: Commission Report for High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change. Parliament of the Republic of South Africa.

Comaroff, J. 1974. Chiefship in a South African Homeland: A Case Study of the Tshidi Chiefdom of Bophuthatswana. *Journal of Southern African Studies*, 1(1), pp.36-51.

Comaroff, JL. & Comaroff, J. 2009. *Ethnicity Inc: The Zulu Kingdom Awaits You*. Chicago: University of Chicago Press.

Corruption Watch. 2018. *Mining Royalties Research Report 2018*. Johannesburg: South Africa.

Cousins, B. 1997. How do rights become real? Formal and informal institutions in South Africa's land reform. *IDS Bulletin*, 28(4), pp.59-68.

Cousins, B., Cousins, T., Hornby, D., Kingwill, R., Royston, L. and Smit, W. 2005. Will formalising property rights reduce poverty in South Africa's 'second economy'?. Policy Brief, No. 18. Debating land reform, natural resources and poverty. PLAAS.

Cousins, B. 2010. The politics of communal tenure reform: A South African case study. In *The struggle over Land in Africa: Conflicts, Politics and Change*. W Anseeuw & C. Alden, Eds. Cape Town: HSRC Press, pp.55-70.

Cousins, B. 2021. What landmark Kwazulu-Natal court ruling means for land reform in South Africa. *The Conversation*. 22 June. Available: https://theconversation.com/what-landmark-kwazulu-natal-court-ruling-means-for-land-reform-in-south-africa-162969 [2021, July 3].

Cowen, G.L. 1956. An African Survey, Revised 1956: A Study of Problems Arising in Africa South of the Sahara by Lord Hailey. Review. *Political Science Quarterly*, 73 (4), pp.613-615.

Cowie, N. 2009. Observation. In *Qualitative research in applied linguistics*. J Heigham & R Croker, Eds. London: Palgrave Macmillan, pp.165-181.

Craythorne, G. 2021. Testimony: The Judicial Commission of Inquiry into Allegations of Sate Capture, Corruption and Fraud in the Public Sector including Organs of State. (Chairman: R.M.M. Zondo). 8 & 11 January. Available: https://www.statecapture.org.za/site/transcripts [2021, January 12].

Creswell, J. W. 2015. *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches*. London: Sage.

Creswell, J. W. & Clark, V. L. 2007. *Designing and Conducting Mixed Methods Researc*h. London: Sage.

Cross, C. 1992. An Alternate Legality: The Property Rights Question in Relation to South African Land Reform. *South African Journal on Human Rights*, 8(3), pp.305-331.

Deed of Settlement. 2007. Deed of Settlement between The Richtersveld Community and Alexkor Limited and The Government of the Republic of South Africa. Signed on 22 April 2007. Pretoria, South Africa.

De Klerk, F.W. 1999. *The Last Trek—a new beginning: the autobiography*. London: Pan MacMillan.

Delius, P. 1996. *A Lion Amongst the Cattle: Reconstruction and Resistance in the Northern Transvaal.* Oxford: James Curry.

Delius, P., Kingwill, R & Chaskalson, M. 1997. A Historical Investigation of Underlying Rights to Land Registered as State Owned. Law, Race and Gender Research Unit, pp.1-53.

Department of Mineral Resources. Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry, 2018 (Mining Charter, 2018). 27 September. Government Gazette, No. 41934.

De Waal, M.J. 1998. Die Wysiging Van 'n Inter Vivos Trust. *Journal of South African Law*, pp.326-334.

Dowling, J.H. 1968. Individual Ownership and the Sharing of Game in Hunting Societies. *American Anthropologist*, 70(3), pp.502-507.

Du Toit, F. 2007. *South African Trust Law: Principles and Practice*. Durban: LexisNexis.

Du Toit, F., Van der Linde, A. & Smith, B.S. 2019. *Fundamentals of South African Trust Law*. Durban: LexisNexis.

Elden, S. 2013. *The Birth of Territory*. Chicago: University of Chicago Press.

Evans, I. 1997. *Bureaucracy and Race: Native Administration in South Africa*. California: University of California Press.

Feinberg, H.F. 1993. The 1913 Natives Land Act in South Africa: Politics, Race, and Segregation in the Early 20th Century. *International Journal of African Historical Studies*, 26 (1), pp.65-109.

Feinberg, H.F. & Horn, A. 2009. South African Territorial Segregation: New Data on African Farm Purchases, 1913-1936. *Journal of African History*, 50, pp.41-60.

First Deed of Variation. 2009. First Deed of Variation in Respect of the Deed of Trust of The Richtersveld Investment Trust. Signed on 14 May 2009. Cape Town, South Africa.

Green, J. & Thorogood, N. 2018. *Qualitative Methods for Health Research*. 4th ed. SAGE.

Government of Lesotho. 2018. *About Lesotho*. Available: https://www.gov.ls/about-lesotho/ [2020, August 17].

Guy, J. 2013. *Theophilus Shepstone and the Forging of Natal: African Autonomy and Settler Colonialism in the Making of Traditional Authority*. Pietermaritzburg: University of KwaZulu-Natal Press.

Hailey, B. 1945. *An African Survey: A Study of Problems arising in Africa South of the Sahara*. 2nd ed. Great Britain: Oxford University Press.

Hann, C.M. 1998. Introduction. In *Property Relations: Renewing the Anthropological Tradition.* C.M. Hann, Ed. Cambridge: Cambridge University Press, pp.1-47.

Hare, M.C. 1998. Charitable Trusts as a Device for Indigenous People to Merge and Develop Customary Land. *Journal of Malaysian and Comparative Law*, 25, pp.309-324.

Harper, P. 2021. Ngwenya ITB appeal defines Didiza. *Mail & Guardian*. 9 July. Available: https://www-pressreader-com.ezproxy.uct.ac.za/south-africa/mail-guardian/20210709/page/9 [2021, July 18].

Harvey, R. 2017. Charting A Way for South African Mining to Benefit Communities. SAIIA Policy Insights No. 50. July. Available: https://media.africaportal.org/documents/saia_spi_50_harvey_20170808.pdf [2021, April 26].

Hendricks H.H. 2004. *Nomadic pastoralism and the conservation of biodiversity in the Richtersveld National Park, South Africa*. PhD. Thesis. University of Cape Town.

Hessen, R., Bright, L.K., & Zucker, A. 2019. Vindicating methodological triangulation. *Synthese*, 196(8), pp. 3067-3081.

Hoebel, E.A. 1966. *Anthropology: The Study of Man*. New York: McGraw-Hill.

Hohfeld, W.N. 1913. Some Fundamental Legal Conceptions as Applied Judicial Reasoning. *Yale Law Journal*, 23, pp.16-59.

Ingonyama Trust Board. 2019. *About.* Available: https://www.ingonyamatrust.org.za/about-itb/ [2019, September 14].

IOL. 2007. LRC bows out as Richtersveld attorneys. *IOL News*. 17 May. Available: https://www.iol.co.za/news/south-africa/lrc-bows-out-as-richtersveld-attorneys-353508 [2021, June 29].

Jacobs, H.M. 1998. Who Owns America: Conclusion. In *Who owns America?: Social conflict over property rights*. H.M. Jacobs, Ed. Wisconsin: University of Wisconsin Press, pp.245-252.

Joslin, R. & Müller, R. 2016. Identifying interesting project phenomena using philosophical and methodological triangulation. *International Journal of Project Management*, 34(6), pp.1043-1056.

Kameri-Mbote, P. 2006. Righting wrongs: confronting land dispossession in post-colonial contexts. Keynote Speech. *Conference on Land, Memory, Reconstruction and Justice Perspectives on Land Restitution on Land Restitution in South Africa*. 13-15 September 2006. Cape Town: Houw Hoek Inn, pp. 1-9.

Karanja, P. W. 1991. Women's Land Ownership Rights in Kenya. *Third World Legal Studies*, 10(6), pp.109-135.

Kepe, T. & Ntsebeza, L. 2011. Introduction. In *Rural resistance in South Africa: The Mpondo Revolts after Fifty Years.* T Kepe & L. Ntsebeza, Eds. Boston: Brill, pp.1-18.

Kiernan, J. 2002. Politics, Land and Religion in Colonial Natal: The Dilemmas of Missionary Trust. *Journal for the Study of Religion*, pp.7-19.

Laband, J. 2020. *The Land Wars: The Dispossession of the Khoisan and AmaXhosa in the Cape Colony*. Cape Town: Penguin Random House South Africa.

Lalu, P. 2013. Nelson Mandela Is Very Much with Us! *Economic and Political Weekly*, pp.24-26.

Land and Accountability Research Centre. 1 February 2021. Ongoing struggles to hold the Ingonyama Trust to account. Available: https://www.customcontested.co.za/ongoing-struggles-to-hold-the-ingonyama-trust-to-account/ [2021, July 18].

Land and Accountability Research Centre. 11 June 2021. Ingonyama Trust judgement an enormous win for rural residents in KZN. Press Statement. Available:

https://www.customcontested.co.za/ingonyama-trust-judgment-an-enormous-win-for-rural-residents-in-kzn/ [2021, July 18].

Lee. R. 1979. *The !Kung San: Men, Women and Work in a Foraging Society*. Cambridge: Cambridge University Press.

Lee, R. 1988. Reflections on Primitive Communism. In *Hunters and Gatherers, Vol 1: History Evolution and Social Change.* T. Ingold, D. Riches & J. Woodburn, Eds. Oxford: Berg, pp. 252-268.

Legal Resources Centre (LRC) and Council for the Advancement of the South African Constitution (CASAC). 11 June 2021. LRC and CASAC welcome landmark ruling declaring Ingonyama Trust's actions unlawful and in violation of the Constitution. Press Statement. Available: https://lrc.org.za/11-june-2021-lrc-and-casac-welcome-landmark-ruling-declaring-actions-of-the-ingonyama-trust-unlawful-and-in-violation-of-the-constitution/ [2021, July 18].

Legassick, M. 1974. Legislation, Ideology and Economy in Post-1948 South Africa. *Journal of Southern African Studies*, 1(1), pp.5–35.

Lenggenhager, L. & Ramutsindela, M., 2021. Property killed a peace park dream: The entanglement of property, politics and conservation along the Gariep. *Land Use Policy*, 105, pp.1-9.

Levin, R., Solomon, I. & Weiner, D. 1997. Forced removals and land claims. In *No More Tears: Struggles for Land in Mpumalanga, South Africa*. R. Levin and D. Weiner, Eds. Trenton, NJ: Africa World Press, pp.96–116.

Lynd, H. 2019. Secret details of the land deal that brought the IFP into the 94 poll. *Mail & Guardian*. 7 August. Available: https://mg.co.za/article/2019-08-07-secret-details-of-the-land-deal-that-brought-the-ifp-into-the-94-poll/ [2020, June 28].

Lynd, H. 2021. The Peace Deal: The Formation of the Ingonyama Trust and the IFP Decision to Join South Africa's 1994 Elections. *South African Historical Journal*, pp.1-44.

MacPherson. CB. 1978. Introduction. In *Property: Mainstream and Critical Positions.* MacPherson, C.B. Ed. Toronto: University of Toronto Press, pp. 1-13.

Mafeje, A. 2003. *The Agrarian Question, Access to Land, and Peasant Responses in Sub-Saharan Africa*. Geneva: United Nations Research Institute for Social Development, pp.1-43.

Magome, H. & Murombedzi, J. 2003. Sharing South African national parks: Community land and conservation in a democratic South Africa. In *Decolonizing Nature: Strategies for Conservation in a Post-colonial Era*, W. M. Adams & M. Mulligan, Eds. London: Earthscan Publications Ltd, pp.108-134.

Mahapa, R. 2019. Mining rights ride roughshod over property rights. *Daily Maverick*. 15 February. Available: https://www.dailymaverick.co.za/opinionista/2019-02-15-mining-rights-ride-roughshod-over-property-rights/ [2021, April 26].

Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another (CCT265/17) [2018] ZACC 41; 2019 (1) BCLR 53 (CC); 2019 (2) SA 1 (CC) (25 October 2018).

Mamdani, M. 1996. *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*. Princeton: Princeton University Press.

Mamdani, M. 1999. The Distinctive Face of Apartheid. *The Journal of African History*, 40(1), pp.157-159.

Manie, L. 2015. *The South African Law of Trusts with a View to Legislative Reform*. PhD. Thesis. University of the Western Cape.

Marks, S. 1986. *The Ambiguities of Dependence in South Africa: Class, Nationalism, and the State in Twentieth-Century Natal*. Johannesburg: Ravan Press.

Marumo, L.M. 2014. *State custodianship of the nation's mineral and petroleum resources and the South African Development Trust Act 18 of 1963: A critical comparison*. Magister Legum. North-West University.

Matebesi, S. 2020. *Social Licensing and Mining in South Africa*. Abingdon: Routledge.

Matikinca, A. 2020. Communities staved of mining royalties amid lack of transparency. *Business Day*. 12 July. Available: https://www.businesslive.co.za/bd/national/2020-07-12-communities-starved-of-mining-royalties-amid-lack-of-transparency/ [2021, April 27].

Mbeki, G. 1984. *South Africa, the Peasants' Revolt*. London: International Defence Aid Fund.

McClendon, T. 2006. You Are What You Eat up: Deposing Chiefs in Early Colonial Natal, 1847-58. *The Journal of African History*, 47(2), pp.259-279.

McCusker, B., Moseley, W.G. & Ramutsindela, M. 2016. *Land Reform in South Africa: An Uneven Transformation*. Maryland: Rowman & Littlefield.

McGregor, L. 2014. Can South African State-owned Companies Succeed? University of Stellenbosch: Hans Seidel Foundation. Available: https://portal.regenesys.net/course/discussions/editors/kcfinder/upload/files/McGregor%2C%20L.%202015.%20Can%20State%20Owned%20Companies%20succeed.%20USB..pdf [2020, November 28].

Mellet, P. T. 2020. *The Lie of 1652: A Decolonised History of Land*. Cape Town: Tafelberg.

Moisio, S. & Belina, B. 2017. State, the. In *The International Encyclopaedia of Geography*. D. Richardson, N. Castree, M.F. Goodchild, A Kobayashi, W Liu, & R.A. Marston, Eds. New Jersey: John Wiley & Sons, Ltd, pp.1-11.

Moon, S. 2017. *The Political Economy of State-making in post-Apartheid South Africa*. Trenton, New Jersey: African World Press.

Mostert, H. 2012. *Mineral Law: Principles & Policies in Perspective*. Cape Town: Juta and Company Ltd.

Moyo, S. 2004. *African Land Questions, the State and Agrarian transition: Contradictions of Neoliberal Land Reforms*. Harare: African Institute for Agrarian Studies.

Motloheloa, J. 1962. Lesotho's Road to Independence by Secretary, Communist Party of Lesotho Mr John Motloheloa. Lesotho, 5 May 1962. Available: https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv02424/04lv02730/05lv03005/06lv03006/07lv03012/08lv03015.htm [2020, August 20].

Muller, H. 1963. Separate Development in South Africa. *African Affairs*, 62(246), pp.53-65.

Muthien, Y. 1994. *State and Resistance in South Africa, 1939-1965*. Aldershot: Averbury.

Myers, M.D. 2009. *Qualitative Research in Business Management*. 1st ed. London: Sage.

National Council of Provinces (NCOP) Public Enterprises and Communication. Richtersveld Community & Alexkor Deed of Settlement: progress report on 27 February 2019. Cape Town: Parliament of South Africa. Available: https://pmg.org.za/committee-meeting/27996/ [2021, January 21].

National Land Reform Framework Bill. 2017. Available: https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_reports_for_triple_challenges_of_poverty_unemployment_and_inequality/Illustrative_National_Land_Reform_Framework_Bill_of_2017_with_Land_Rights_Protector.pdf [2019, September 20].

Nelwamondo, T. 2016. History of Success and Challenges of SA: Community Trust. SAWEA/SAPVIA Roundtables. 23 May 2016. IDC Sandton. Available: https://sawea.org.za/wp-content/uploads/2016/05/Community-Trust-in-South-Africa-SAWEA-SAPVIA-23-MAY-2016.pdf [2021, April 27].

Neuman, W.L. 2000. *Social Research Methods: Qualitative and Quantitative Approaches*. 4th ed. Boston, Massachusetts: Allyn and Bacon.

New Zealand History. The Treaty in brief. Available: https://nzhistory.govt.nz/politics/treaty/the-treaty-in-brief [2020, July 15].

Nghitevelekwa, R. 2016. Land relations and property rights in central-north Namibia's communal areas. In *The Politics of Nature and Science in Southern Africa*. M. Ramutsindela, G. Miescher, & M. Boehi, Eds. Basel: Basler Afrika Bibliographien, pp.208–230.

Ng'ong'ola, C. 1992. Land Problems in Some Peri-Urban Villages in Botswana and Problems of Conception, Description and Transformation of "Tribal" Land Tenure. *Journal of African Law*, 36(2), pp.140-167.

Ngugi, J.M. 2004. Re-examining the Role of Private Property in Market Democracies: Problematic Ideological Issues Raised by Land Registration. *Michigan Journal of International Law*, 25, pp.467-527.

Noel, A.B., Abdaoui, A., Elfouly, T., Ahmed, M.H., Badawy, A. & Shehata, M.S. 2017. Structural Health Monitoring Using Wireless Sensor Networks: A Comprehensive Survey. *IEEE Communications Surveys & Tutorials*, 19(3), pp.1403-1423.

Nyatyowa, L. 2018. *What is FICA, And Why Do You Need To Know About It*. Available: https://www.oxbridgeacademy.edu.za/blog/fica-need-know/ [2018, October 1].

Odendaal, A. 2012. *The Founders: The Origins of the ANC and the Struggle for Democracy in South Africa*. Johannesburg: Jacana Media.

Office of the Chief Land Claims Commissioner. 2018. Status Report Richtersveld. Commission of Restitution of Land Rights: Department of Rural Development and Land Reform, Republic of South Africa. 21 February. Available: https://pmg.org.za/committee-meeting/27996/ [2021, January 26].

Okoth-Ogendo, H.W.O. 1989. Some Issues of Theory in the Study of Tenure Relations in African Agriculture. *Africa*, 59(1), pp.6-17.

Okoth-Ogendo, H.W.O. 1991. *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya*. Nairobi: ACTS Press.

Okoth-Ogendo, H.W.O. 2008. The Nature of Land Rights Under Indigenous Law in Africa. In *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act*. A. Claassens & B. Cousins, Eds. Cape Town: UCT Press, pp.95-108.

O'Meera, D. 1996. *Forty Lost Years: The Apartheid State and the Politics of the National Party, 1948-1994*. Cambridge: Cambridge University Press.

O'Regan, K. 1988. A Fiduciary Duty on the State: The implications of 'holding land in trust for the use and benefit of black persons'. Labour Law Unit, pp.1-9.

Parliamentary Monitoring Group. n.d. The Structure of Government. Available: https://pmg.org.za/page/structure-of-government [2021, July 30].

Penn, N. 2005. *The Forgotten Frontier: Colonist and Khoisan on the Cape's Northern Frontier in the 18th Century*. Cape Town: Juta and Company Ltd.

Pikoli, Z. 2021. Land rights have become a resource that is given to the elites, say rural land activists. *Daily Maverick*. 7 July. Available: https://www.dailymaverick.co.za/article/2021-07-07-land-rights-have-become-a-resource-that-is-given-to-the-elites-say-rural-land-activists/?utm_campaign=snd-autopilot [2021, July 18].

Platzky & Walker. 1985. *The Surplus People: Forced Removals in South Africa*. Johannesburg: Ravan Press.

Portfolio Committee on Mineral Resources and Energy. 2000. Abolition of Lebowa Minerals Trust Bill: discussion. 26 September 2005. Cape Town: Parliament of South Africa. Available: https://pmg.org.za/committee-meeting/119/ [2021, July 25].

Portfolio Committee on Public Enterprises. 2005. Report of the Portfolio Committee on Public Enterprises on the Study Tour of Alexkor, a state-owned diamond mining company in Alexander Bay, Northern Cape, dated 16 March 2005. Cape Town: Parliament of South Africa. Available: https://static.pmg.org.za/docs/2005/050316pcpubentreport.htm
[2021, January 20].

Rahman, L. 2006. *Defining the concept of "Fiduciary Duty" in the South Africa law of trusts*. Magister Legum. Thesis. University of Western Cape.

Ramutsindela, M. 2003. Land reform in South Africa's national parks: a catalysis for the human-nature nexus. *Land Use Policy*, 20(1), pp.41-49.

Ramutsindela, M. 2007. Resilient geographies: land, boundaries and the consolidation of the former bantustans in post-1994 South Africa. *The Geographical Journal*, 173(1), pp.43-55.

Ramutsindela, M. 2012. Property rights, land tenure and the racial discourses. *GeoJournal*, 77, pp.753-763.

Ramutsindela, M. 2017. Apartheid. In *The International Encyclopaedia of Geography*. D. Richardson, N. Castree, M.F. Goodchild, A Kobayashi, W Liu, & R.A. Marston, Eds. New Jersey: John Wiley & Sons, Ltd pp. 1-4.

Ramutsindela, M. & Sinthumule, I. 2017. Property and difference in nature conservation. *Geographical Review*, 107(3), pp.415-432.

Ray, A.J. 2016. *Aboriginal Rights Claims and the Making and Remaking of History*. McGills-Montreal & Kingston: Queen's University Press.

Reid, H. 2001. Contractual National Parks and the Makuleke Community. *Human Ecology*, 29(2), pp.135-155.

Reid, H., Fig, D., Magome, H. & Leader-Williams, N. 2004. Co-management of Contractual National Parks in South Africa: Lessons from Australia. *Conservation & Society*, 2(2), pp.377-409.

Republic of South Africa. 1976. Statutes of the Republic of South Africa: National Parks. National Parks Act No. 57 of 1976.

Republic of South Africa. 2017. Report of the High-Level Panel on the Assessment of Key Legislation and Acceleration of Fundamental Change. November. Available: https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf [2020, July 18].

Republic of South Africa. May 2019. Final Report of the Presidential Advisory Panel on Land Reform and Agriculture. Available: https://www.gov.za/sites/default/files/gcis_document/201907/panelreportlandreform_0.pdf [2021, July 18].

Richtersveld Community and Others v Alexkor Limited and Another. 2001 (LCC151/98) [2001] ZALCC 10 (22 March 2001).

Richtersveld Community and Others v Alexkor Ltd and Another (488/2001) [2003] ZASCA 14; [2003] 2 All SA 27 (SCA) (24 March 2003).

Richtersveld Writers Circle. N.d. *Richtersveld, Our Land.* Kuboes: Richtersveld Writers Circle.

Rose, C.M. 1994. *Property as persuasion: Essays, on the History, Theory, and Rhetoric of Ownership*. Boulder, CO: Westview Press.

Rosser, E. 2013. The ambition and transformative potential of progressive property. *California Law Review*, 101 (1), pp.107-171.

Ryan, C. 2019. Billion in mining royalties intended for the poor squandered, stone or diverted. *GroundUp.* 1 July. Available: https://www.groundup.org.za/article/billions-mining-royalties-intended-poor-squandered-stolen-or-diverted/ [2021, April 2021].

SANParks. 2018. *Richtersveld National Park: Park Management Plan for the period 2018–2028*. South African National Parks.
Available: https://www.sanparks.org/conservation/park_man/approved_plans.php [2020, October 15].

Schapera, I. 1943. *Native Land Tenure in the Bechuanaland Protectorate*. Lovedale, South Africa: The Lovedale Press.

Sharp, J. S. & West, M. 1984. Controls and Constraints: Land, Labour and Mobility in Namaqualand. *Conference on Second Carn*egie *Inquiry into Poverty and Development in Southern Africa*. 13-19 April 1984. Cape Town: University of Cape Town. Conference Paper No.71, pp. 1-22.

Sihlali, N. 2019. Justice delayed for residents on trust land. *Daily Maverick*. 19 November. Available: https://mg.co.za/article/2019-11-29-00-justice-delayed-for-residents-on-trust-land/?cv=1 [2021, January 11].

Sihlali, N. 2020. Time for Ingonyama Trust Board to explain how it manages its land. *Daily Maverick*. 8 December. Available: https://www.dailymaverick.co.za/opinionista/2020-12-08-time-for-the-ingonyama-trust-board-to-explain-how-it-manages-its-land/ [2021, January 11].

Singer, J. 1996. No right to Exclude: Public and Private Accommodations and Private Property. *Northwestern University Law Review*, Vol. 90(4), pp.1283-1357.

Singer, J. 2000a. *Entitlement: The Paradox of Property*. New Haven, CT: Yale University Press.

Singer, J. 2000b. Property and Social Relations: From Title to Entitlement. In *Property and Values: Alternatives to Public and Private Ownership.* C Geisler & G. Daneker, Eds. Washington, DC: Island Press, pp.3-20.

Sithole, J. 2004. Neither Communists nor Saboteurs: KwaZulu Bantustan Politics. In *The Road to Democracy in South Africa: Vol. 2, 1970–1980*. South African Democracy Education Trust Pretoria: UNISA Press.

Smalberger, J.M. 1969. *Aspects of the History of Copper Mining in Namaqualand*. M.A. Thesis. University of Cape Town.

Smith, D.G. 2002. The critical resource theory of fiduciary duty. *Vanderbilt Law Review*, 55, pp.1399-1497.

Snyman, L. 2017. Roles and Responsibilities in the Mineral Social Benefit System: Genuine Confusion or Passing the Buck? In *In Good Company? Conversations Around Transparency and Accountability in South Africa's Extractive Sector*. 2nd Ed. Open Society Foundation, pp.53-63.

South African History Online. 2019a. *Kuboes*, Northern Cape. Available: https://www.sahistory.org.za/place/kuboes-northern-cape [2021, April 18].

South African History Online. 2019b. *William Henry Beaumont*. Available: https://www.sahistory.org.za/people/william-henry-beaumont [2021, July 25].

South African History Online. 2019c. *The Homelands*. Available: https://www.sahistory.org.za/article/homelands [2019, December 19].

South African History Online. 2019d. *Lucas Manyane Mangope*. Available: https://www.sahistory.org.za/people/lucas-manyane-mangope

South African History Online. 2020a. *Babanango, Kwa-Zulu Natal*. Available: https://www.sahistory.org.za/place/babanango-kwa-zulu-natal [2021, February 23].

South African History Online. 2020b. *Inkatha Freedom Party (IFP)*. Available: https://www.sahistory.org.za/article/inkatha-freedom-party-ifp [2021, June 28].

South African Institute of Race Relations. 1964. *A Survey of Race Relations in South Africa for the Year 1964*. Johannesburg: South African Institute of Race Relations.

South African Parliament. 1936. Debates of the House of Assembly (Hansard), fourth session, seventh Parliament. Vol. 27 (4 May-17 June). Cape Town: Parliament.

Sprankling, J.G. 2012. *Understanding Property Law*. Durban: LexisNexis.

Strassberger, E. 1969. *The Rhenish Mission Society in South Africa 1830-1950*. Cape Town: C. Struik

Sutherland, W.J., Dicks, L.V., Everard, M. & Geneletti, D. 2018. Qualitative methods for ecologists and conservation scientists. *Methods in Ecology and Evolution*, 9(1), pp.7-9.

Torres, A. 2021. Testimony: The Judicial Commission of Inquiry into Allegations of Sate Capture, Corruption and Fraud in the Public Sector including Organs of State. (Chairman: R.M.M. Zondo). 8 January. Available: https://www.statecapture.org.za/site/transcripts [2021, January 12].

Underkuffler, L.S. 1990. On property: an essay. *The Yale Law Journal*, 100(1), pp.127-148.

Underkuffler, L. S. 2003. *The Idea of Property: Its Meaning and Power*. Oxford: Oxford University Press.

Underkuffler, L.S. 2013. Property and change: The constitutional conundrum. *Texas Law Review*. 91, pp.2015-2037.

Weimer, D.L. 1997. The political economy of property rights. In *The Political Economy of Property Rights: Institutional Change and Credibility in the Reform of Centrally Planned Economies*. Cambridge: Cambridge University Press, pp.1-14.

Wellington, J., Bathmaker, A., Hunt, C., McCulloch, G. & Sikes, P. 2005. Doing Research: Reflection on Methods, Methodology and Ethics. Succeeding with your Doctorate, pp.96-111.

Wickins, P. 1981. The Natives Land Act of 1913: A Cautionary Essay of Simple Explanations of Complex Change. *The South African Journal of Economics*. 49 (2), pp.105-129.

Windel, A. 2009. British Colonial Education in Africa: Policy and Practice in the Era of Trusteeship. *History Compass*. 7(1), pp.1-21.

Woodburn, J. 1998. 'Sharing is not a form of exchange': an analysis of property-sharing in immediate-return hunter-gatherer societies. In *Property Relations: Renewing the Anthropological Tradition*. C.M Hann, Ed. Cambridge: Cambridge University Press, pp.48-63.

World Bank. 2017. Digging Beneath the Surface: An Exploration of the Net benefits of Mining in Southern Africa. Available: https://openknowledge.worldbank.org/bitstream/handle/10986/32107/Digging-Beneath-the-Surface-An-Exploration-of-the-Net-Benefits-of-Mining-in-Southern-Africa.pdf?sequence=1&isAllowed=y [2021, April 27].

Zungu, W.S. 2016. *Exploring the Role of Community Trusts in Development within the Mkhwanazi Traditional Authority*. M.A. Thesis. University of KwaZulu-Natal.

Appendices

Appendix A

Trusts in the four provinces (prior to 1910)

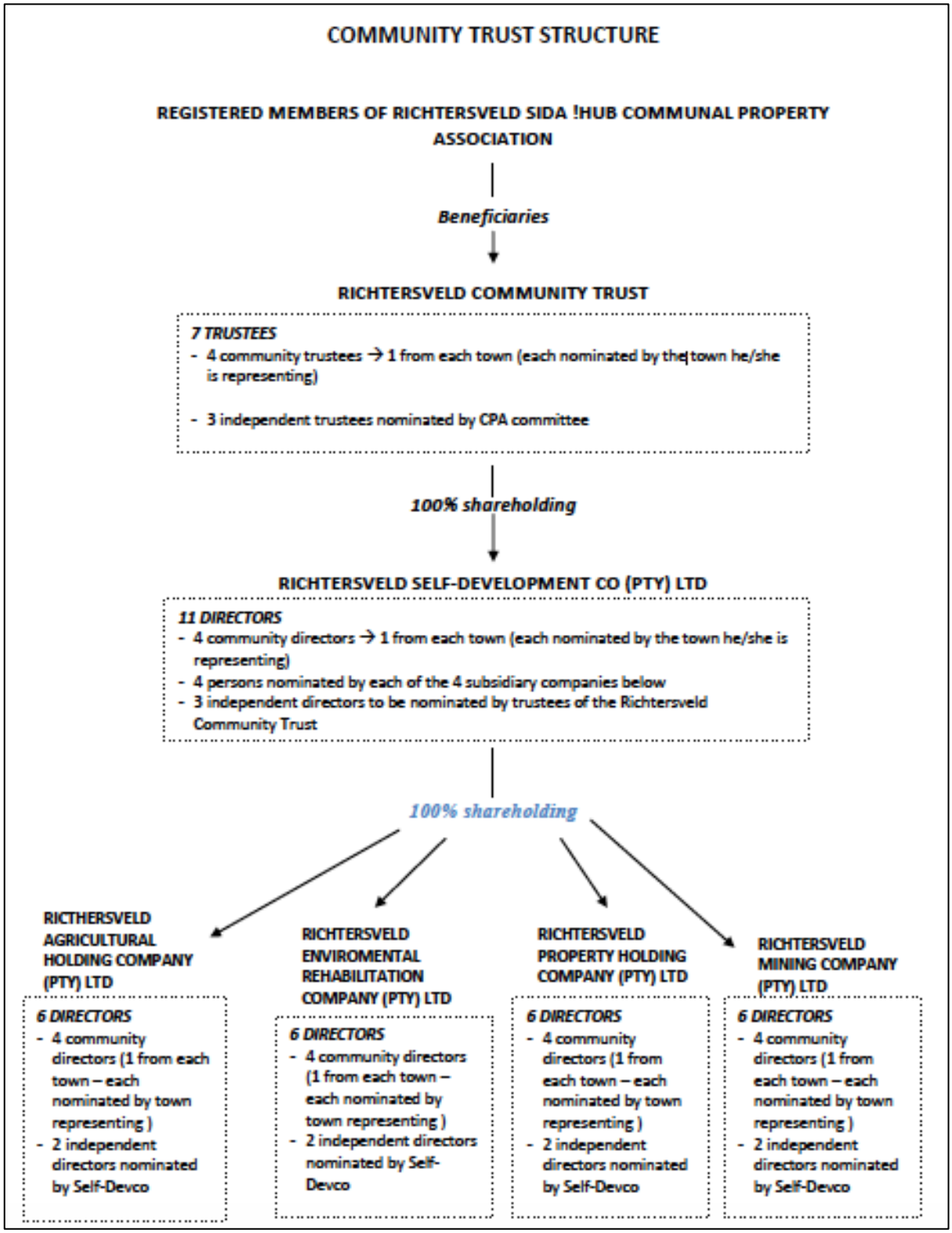
Cape	Natal	Transvaal	Orange Free State
1795-1803 First British occupation of the Cape. In 1795, VOC loses its control over the Cape and the company is dissolved in 1798 (McCusker, Moseley & Ramutsindela, 2016:43) 1799-1802 Third War of Dispossession between the Khoisan and the colonial authorities (McCusker, Moseley & Ramutsindela, 2016:42) What happens between 1803-1806? Do the British lose control of the Cape and to whom? 1806 British occupy the Cape once more (Bennett, 1996:67; McCusker et al; 2016: 44) 1814 Netherlands formally cedes its rights to the territory (Bennett, 1996:67) 1828 'equal rights' ordinance was passed which gave persons of colour the same rights to acquire and dispose of land as the settlers (Bennett, 1996:68) 1847 After the War of the Axe, the policy of negotiating treaties with African rules is abandoned in favours of annexation (Bennett, 1996:70) 1854 First trusts established in Mission Stations (Bennet & Powell, 2000:602) 1883 Cape Commission on Native Laws and Customs (Bennett, 1996:74-75)	1845 Britain establishes Natal as a Crown Colony subordinate to the Cape. This is two years after the British wrestled control of the Natal from the migrating Boers (Kiernan, 2002:8); Bennet (1996:75) says it was 1843 that Natalia was annexed by Britain. 1846-1847 1856 Natal is given a separate colonial government as a result of an influx of British settlers. But the colony's existence is precarious because of the strong Zulu kingdom in the north. It only entrenches its power in 1884 after the fall of the Zulu kingdom (Kiernan, 2002:8). According to Bennett (1996:75), Zululand was annexed in 1887. 1862 Natal government starts issuing Deeds of Grant to the missionary societies. During this period, a major problem for the government is how to settle African people who had returned to their ancestral land following dislocations by Zulu conquest. But these grants are clouded with ambiguity (Kiernan, 2000:8-9) 27 June 1864 Trusts established in Natal and they are more comprehensive (Bennett & Powell, 2000) 1868 Missionaries suspended the sale of freehold land because of experiences where the selling would give African people freedom to either go back to their own beliefs or sell the land to non-Christians who would amongst other things practise polygamy which seemed to be a big problem for the missionaries (Kiernan, 2000:13)	NB "Unlike Natal and the Cape, the Transvaal Government paid little attention to the governance of the African population or to their land requirements" (Bennett, 1996: 80) 1853 *Volksraad* resolution is seen as the first evidence of some kind of land policy for Africans. It states that Africans can be granted land on condition of their 'good behaviour' (Bennett, 1996:80) 1855 Another resolution is passed declaring that non-*burghers* were forbidden from owning land 1881 Pretoria Convention stipulates that Africans have the rights to acquire land and obliges the government to appoint a standing Locations Commission to delimit reserves where Africans would be able to acquire land (Bennett, 1996:80) In lines with the Commission's recommendations, reserves were created in Rustenburg, Lichtenburg, Marico and Sekhukuneland districts. It is not clear whether or not the trusteeship principle applied to these reserves but there was no provision in the Pretoria Convention But the Convention make provisions for the land that African people bought. According to art. 13 of the Convention, and land bought by Africans was to be transferred to the locations Commission in trust 1899-1902 Anglo-Boer war (McCusker, Moseley & Ramutsindela, 2016:41) Prior to the war, is the Transvaal referred to as the South African Republic (SAR)?	1848 Britain annexes Free State (Bennett, 1996:77) 1854 Britain withdraws and under the Bloemfontein Convention recognises Free State as an independent nation (Bennett, 1996:77) 1884 The land of the is annexed into Free State following a succession dispute. It seems as though initially there were 2 reserves for people of colour which were left undisturbed (Bennett, 1996:77-78)

Trusts after 1910

	Segregation (1910-1947)	Apartheid (1948- early 1990s)	Issues relating to Coloured people
Notes: Sir Theophilus Shepstone was the director of the Native policy in Natal for about 30 years. Refer to Marumo (2014:15), where he speaks about the commission that Shepstone was a part of which was arguing that the African John Xavier Merriman was the last Prime Minister of the Cape Colony before the Union 1903 Lord Milner convenes a Commission which is chaired by Sir Godfrey Lagden (the Commission is later named after him) to report on 'native' affairs in the four colonies that would become part of the Union (Bennett, 1996:81). My observation: Lagden Commission is more interested in tenure while the Beaumont Commission is interested in the amount of land to be provided. 1903-1905 Lagden Commission conducts its work 1905 Shepstone's Commission releases a second report where it outlines patterns of land holding. Commission raises a key problem: the need to regulate the actual purchase of land by Natives (Marumo, 2014:16). 1909 Act of Union promulgated (McCusker et al., 2016:50)	1910 Union 1913 J.B.M. Hertzog quits the Botha government early in the year and this adds to the factors prompting the Botha government to start drafting the land act (McCusker et al, 2016:49) June Natives Land Act is passed Bennett (1996:81) cites that the Act was originally intended to be an interim measure to stop the acquisition of land by Africans outside scheduled areas McCusker, Moseley & Ramutsindela (2016:49) complicate the analysis, giving a fuller picture of the political context of the time. The Act originated from concerns of the Transvaal and Orange Free State where the Afrikaner wanted to continue in some kind of master-servant relationship with African people. But more importantly the conflict between Botha and Hertzog was a key factor as in threatened the budding unity of the Union. They refer to Feinberg who argues that the act was passed as an attempt to placate Hertzog. Later in the year Botha commissions that Native Lands Commission appointing William Beaumont as its chair, the commission is later named after him. In accordance to the Natives Land Act, the Commission is to determine which lands are to be demarcated for African people (Bennett, 1996). 1916 Natives Land Commission (Beaumont Commission) submits its report. Certain interest	1940s Betterment scheme is implemented (Kepe & Ntsebeza, 2011:6) 1950 Verwoerd becomes the Minister of Native Affairs 1951 Bantu Authorities Act Hands over the governance the reserves to traditional leaders and also put them in charge of administration of betterment planning (Bennett, 1996:88) but importantly, the SADT still continues to exist which ties into one of the comments from Prof Maano that when placing the trusts into perspective it will be important to show that they played a role both under segregation and during apartheid. While administration was being given to the Bantustan governing structures, ultimate control was still vested in the Native Affairs Department. 1959 Verwoerd becomes Prime Minster of South Africa (Marumo, 2014:13) Promotion of Black Self-Government Act 46 is passed. The objective of the Act is to establish self-governing African units and to advance the 1913 and 1936 land policy (Marumo, 2014:13) 1961 The powers given to traditional leaders by the Black Administration Act of 1927 and the Promotion of Black Self-Government Act of 1959 are re-assigned to the President of South Africa. It is only then when the Homelands attained self-governance or independence in the case of Transkei, Bophutatswana, Venda & Ciskei, that is power is re-assigned back to them (Marumo, 2014)	1976 Theron Commission releases the Report on of the Commission of Inquiry into Matters Relating to the Coloured Population Group. Bennett (1996:90) argues that the establishment of the Commission was influence by the situation of the late 1970s where Government was being forced to think about major political reform. One of the Government's solution was to co-opt Coloured and Indian people into the Government.

Summary of archival analysis of Trusts pre-1910 and post-1910
(Source: Author, 2020)

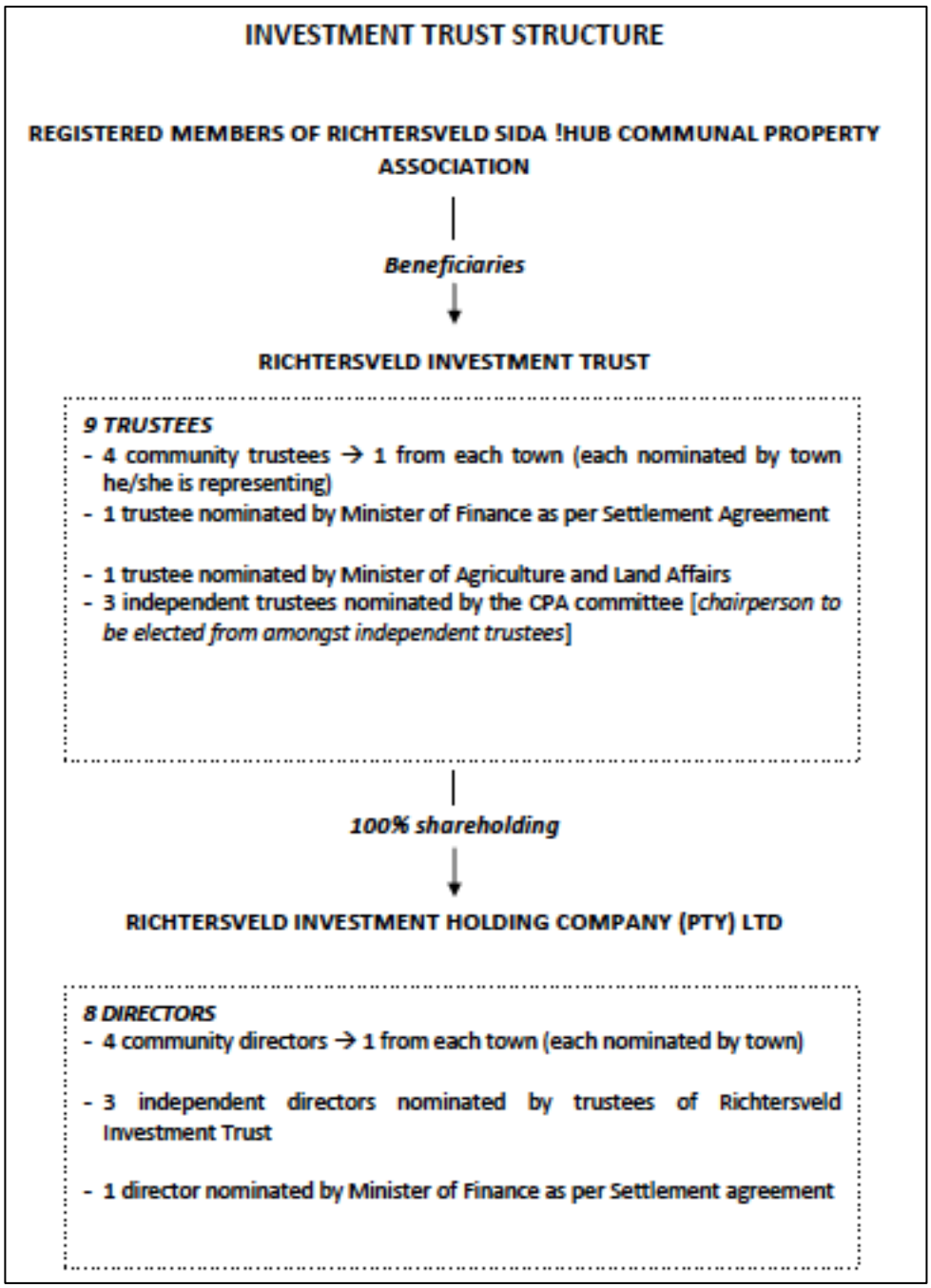
Appendix B



Richtersveld Community Trust Structure

(Source: Bisset Boemke Attorneys cited in Fife, 2013:9)

Appendix C



Richtersveld Investment Trust Structure

(Source: Bisset Boemke Attorneys cited in Fife, 2013:10)