

Land Rights and Urban Tenure: Ownership and the Eradication of Poverty in South Africa

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ABSTRACT

This paper analyses De Soto's argument that the formalisation of property leads to economic development and accepts it on the premise that such formalisation is not a panacea but a possible weapon in the armoury against poverty in South Africa.

A prerequisite to formalisation is land acquisition. However, the skewed land ownership statistic in South Africa necessitates a slow and cumbersome restitution process often impeded by excessive compensatory claims by land owners and exacerbated by the interpretation of section 25 of the Constitution by our Constitutional Court. An analysis of recent Constitutional Court decisions indicates that the court is developing a jurisprudence that takes into account the extreme nature and extent of past land dispossessions and the inequalities in wealth and land distribution. This approach could facilitate the expropriation and restitution of land as a deprivation, (in terms of section 25) which is found not to be arbitrary, is not an expropriation and in consequence would not require compensation. Formalisation can then follow.

The paper argues further that formalisation in the strict De Sotan sense of western exclusivity of ownership is not suited to the South African situation. The 'bundle of sticks' approach to ownership on the other hand, allows formalisation to occur whilst taking cognisance of local realities. Thus, formalisation of tribal trust land could mean common ownership where the 'sticks' of exclusivity and alienation are excluded from the 'bundle' while other 'sticks', *inter alia* income, security, and right to manage are retained. In the urban context, it is mooted that formalisation could include all the 'sticks' (incidents of ownership) but may need to exclude the right to alienate (for a period) to combat the problem of reverse titling.

The Richtersveld formalisation model is examined as a case study since it includes both the rural and urban contexts in one formalisation model. It is within this case study that a further 'stick' in the 'bundle' is identified, *viz.* capacity building and training, as it is seen to be essential that the affected community understands the formalisation model applied.

This paper concludes that formalisation as postulated by De Soto could serve as a catalyst for poverty eradication if it takes proper account of South African realities, and on the understanding that formalisation should reflect 'sticks' in the 'bundle' which maximise a community's ownership whilst mitigating anticipated problems.

CHAPTER 1

Introduction and Overview

Poverty and property ownership in South Africa are arguably two of the significant challenges in our nascent democracy. In the years that followed the systematic dispossession of black South Africans through trickery, force of arms and legislation such as the Natives Land Act 27 of 1913, forced removals culminated in the ultimate weapon of mass dispossession – the ideology of apartheid. The question posed by this dissertation is therefore ‘Can the acquisition of property rights assist in the eradication of poverty, and if so, how should land rights be formalised?’

At the height of apartheid in the early 1980s, almost two-thirds of black South Africans living in urban areas lived below the minimum living level (‘MLL’) and 81 per cent of blacks in ‘the reserves’ lived in dire poverty.¹ The striking feature of poverty in South Africa was, and still is the huge gap between land property owners and the landless. During the apartheid era 20 per cent of the population owned 75 per cent of the wealth.² Notwithstanding a rise in the black middle-class in South Africa post 1994, these statistics remain as much a reality today as they were then. If anything, this gap is presently widening, as indicated by Cousins,³ and if allowed to continue, South Africa faces a real threat to its hard-won democracy.

The solution is not necessarily singular in nature. As a stop gap measure, the South African government appears to be addressing the problem of poverty through social grants. The net effect of this is that 16.7 million people will be recipients of social grants by 2015 and the R 105 billion rand spent on these grants

¹ F Wilson and M Ramphela *Uprooting poverty: the South African challenge* (1989) at 17.

² Ibid at 18. Noteworthy is a study by Stellenbosch University, cited in Wilson and Ramphela, using the Gini coefficient to measure inequality, found that the inequality gap in South Africa was the largest of fifty seven countries for which data could be obtained.

³ B Cousins *Embeddedness v titling: African land tenure systems and policy failure* International Conference on Property Law, Stellenbosch (5 April 2005).

in 2012 to 2013 is set to escalate to R 122 billion by 2014 to 2015.⁴ In addition, economic growth of under three per cent per annum cannot possibly sustain a social grant system of this magnitude. Other more innovative means have to be found to address the problems of the poor. Land and rights to land and property are important factors in addressing poverty. However, as important as land might be in the project it should not be viewed as the panacea for eradicating poverty. A multi-faceted approach is required.

Chapter 2; a theoretical framing, begins in Part 1 with an introduction to Hernando de Soto's view that property ownership invariably equates with economic development is an important view and needs to be explored in any policy or strategy to combat poverty. De Soto contrasts the developed world (which he equates with the western world) with that of the developing world, and views the difference between the two as being that the former has formalised its land titling and registration process whereas the latter has not.⁵ There is merit in this argument. Those who have access to formalised land have access to security of tenure, and in rural areas, access to crops whereas in urban areas property provides access to economic activities such as spaza shops and other entrepreneurial micro enterprises.

In tough times property ownership provides a buffer as loans can be obtained against such property. An important point made by de Soto is that one should differentiate between money and property. He argues that money facilitates transactions but in itself does not produce additional resources.⁶ He quotes Smith⁷ as stating that 'the gold and silver circulating in any country is similar to a highway which circles and carries to market all the grass and corn of the country, but produces itself not a single pile of either'. What is important in de Soto's theory is the fact that property ownership makes people think differently

⁴ Sowetan '16.7 million people will be on government grants by 2015' (22 Feb 2012) quoting from the 2013 *Parliamentary Budget*.

⁵ H de Soto, *The Mystery of capital – why capital triumphs in the west and fails everywhere else*, (2000) at 51.

⁶ *Ibid* at 32 and 33.

⁷ H de Soto and F Cheneval *Realizing property rights* (2006) where Smith is quoted at 43.

about the value of the asset. The economic development produced by property ownership is therefore the result of a change in mind-set by the owner.⁸

Even in accepting the basis of de Soto's theory one needs to be mindful of the realities of the land issue in South Africa. If economic empowerment and the consequent eradication of poverty have to be achieved through, *inter alia*, formalisation of title, then a new approach needs to be devised in order to access property. In a recent report to Parliament by the Surveyor-General, it was indicated that eighty per cent of property in South Africa is in private ownership whilst a mere fourteen per cent is owned by the state.⁹ This indicates the magnitude of the problem.

It is suggested in Chapter Two that formalisation in the de Sotoan sense need not be restricted to exclusive individualised property holding only. Existing systems of common holding need to be adapted to produce similar benefits as envisaged by de Soto. This in effect requires careful attention to the 'sticks' contained in any given 'bundle'.¹⁰ Of further importance is that care should be taken not to engage in a 'one-size-fits-all' approach. Budlender and Latsky¹¹ warn that far-reaching legislative intervention would be necessary to address the land issue, but that existing rights and 'deeply valued rights' should not be destroyed in this process. All models of ownership must be adapted to the society in which they exist and be reflective of the inherent customary practices. Meinzen-Dick¹² for example, argues that in some areas people may have overlapping rights in respect of the same land, which may include the rights to graze animals or cultivate on land not owned by them but owned by others or the state. In other circumstances extended family

⁸ Supra n 5 at 45.

⁹ The Pretoria News 'Eighty per cent of property in South Africa owned by private persons and foreigners' (6 September 2013) at 1.

¹⁰ AM Honoré *Ownership in Oxford Essays in Jurisprudence* (ed) in AG Guest (1961). Oxford: Oxford University Press at 107. The concept of 'bundle of rights' is not foreign to Roman Dutch law. Tony Honoré, a Roman Dutch lawyer refers to "nine incidents of ownership" (which include possession, use and dispossession) which are comparable to what modern theorists call a 'bundle of rights'.

¹¹ G Budlender and J Latsky *Unravelling rights to land in rural race zones. A harvest of discontent: the land question in South Africa* (1991) at 130.

¹² DESA Working Paper Number 91 'R Meinzen-Dick Property rights for poverty reduction?' (December 2009) at 4.

members may have a say in the alienation of the land. Any model which professes to be adapted to the society which it serves must be reflective of these realities.

Formalisation projects in three African countries illustrate 'lessons learnt' from application of de Soto's theory and map the way forward for similar projects in South Africa. It is highlighted that title reversal is one of the most important factors which needs to be identified and proactively planned for. Title reversal occurs due to a number of factors when the formalisation process fails, and the benefits of formalisation are not realised. Where the title owner dies, and the title is not transferred to the heir due to, for example, the costs of the transfer or the inability of the heir to access the deeds office, the formalisation fails as the heir cannot access the benefits identified by de Soto. There are many other reasons for this 'failure' as discussed in the Chapter. These may range from succession precepts within that society to excessive transaction costs. Similar factors have been observed in urban formalisation projects. As any formalisation project will require huge government financial input, solutions need to be found to combat this and some suggestions are made in Chapter Six.

In Chapter Two, Part II, some perspectives of private land ownership are discussed and in Part III, the origins of ownership from a Roman Dutch point of view are analysed through the works of Grotius and Locke. The rectification of property rights through restitution or any other process ultimately requires a full understanding of property theory, therefore in Chapter Two it is traced how common property evolved into individualised property, and some basis is laid for exclusivity theory in our common law. Exclusivity, however, cannot be said to be the only determining factor of ownership under our common law. If exclusivity was the determining factor of ownership, then concepts such as 'usufructs', 'huur gaat voor koop' and servitudes would not have been possible. Thus Part IV proceeds to consider more modern theories such as the 'bundle of sticks' theory which may be appropriate in the South African situation. This modern theory has its roots in Hohfeld's theory Circa 1917.¹³

¹³ Hohfeld *Infra* n 131

In Chapter Three the SA experience of land rights and impediments to formalisation are discussed. Interventions to increase access to property through the court system, and the restitution process, are slow, cumbersome and lacking in political will to increase access to property in the time required by the poor. As access to property through the redistribution of state property will hardly make a dent in the demand, private property will have to be accessed more efficiently in future, and judicial activism will have to increase. Also in Chapter Three it is argued that an interpretation of Clause 25 of the Constitution has not been helpful in accelerating the process to acquire property through expropriation. The requirement of compensation, at market value, has all but nullified the restitution process. It is argued that within the South African situation, the systematic and intentional dispossession of land since 1652 should be a basis for more transformational and bold jurisprudence by our Constitutional Court. The judgement by Mogoeng C.J.¹⁴ appears to initiate a process where the possibility exist for courts to take into account the nature and extent of this dispossession. It is argued that the present restrictive interpretation of Clause 25 of the Constitution could, to some extent, be remedied by more innovative approaches to restitution. In the South African situation there has been an over-emphasis on the exclusivity aspect of property ownership.

Chapter Four sets out a South African case study located in the Richtersveld, where a model of restitution and formalisation was tested in both an urban and rural context. It is argued that the intricacy of the model has to be recognised as a major reason for its failure. The Richtersveld matter further flags the danger of designing models without sufficient consultation with the affected community and without the necessary capacity building in that community. I argue that economic value can only be achieved if the 'sticks' in the 'bundle of rights' are expanded to include the right to support and capacity building. Failure to do so, could lead to title reversal as discussed earlier herein.

Chapter 5 holds that the lessons learned in the Richtersveld case are valuable when applied to urban settings as well.

¹⁴ *Agri South Africa and Minister for Minerals and Energy and Afriforum* 2013 (4) SA 1(CC).

Chapter Six concludes with some recommendations in line with de Soto's argument that political will is required to develop the law of property in order for it to be more reflective of the good of society. One has to be mindful of the fact that 'the goal of property reform is to award property rights for millions of assets to millions of people in a short time. This means that at least half the job is about communication'.¹⁵ None of the suggestions in Chapter Six could be of any value in the absence of a political will. It is further argued that even in the presence of political will, the concept of personhood, and the loss of such personhood through dispossession, would require a commitment by white South Africans to acknowledge the wrongs of the past and be prepared to meet their black counterparts somewhere in the middle. It is in everyone's interest that poverty and the poverty gap be addressed urgently.

I now proceed with a review of the literature salient to a theoretical framing of property rights and its formalisation.

¹⁵ De Soto *supra* n 7 at 205.

CHAPTER 2

Formalisation of Property Rights – a Theoretical Framework

PART I De Soto's Theory

De Soto argues that property ownership and the formalisation of title mitigates poverty. This view is not universally accepted, and de Soto has his fair share of detractors.¹⁶ In the South African context however, there exists an urgent need to find innovative and more sustainable means of addressing poverty.

It is difficult to test de Soto's theory against his referenced sources as his work is notorious for its paucity in this regard.¹⁷ Empirical observation however lends credence to the argument that ownership in whatever form and economic value, are counterparts. This is in some instances apparent in urban areas where homes are improved once titling occurs. A further extension of this concept can be gleaned where existing property rights are extended. Karol Boudreaux¹⁸ argues that in the 1960's the South African Government granted Namibian white farmers the right to manage wild life on their properties. This allowed opportunities for tourism and the engagement by the farmers in other projects and trade with others. Many farmers diversified from traditional farming to game reserves for example.

The question posed in this thesis has thus given rise to much debate, but is particularly pertinent to the South African situation as South Africa has one of the world's highest levels of inequality with an ever increasing gap between the rich and the poor.¹⁹ South Africa has tried to address poverty through significant injections of capital into the social grant system, which is unsustainable.²⁰

¹⁶ See D Banik *Rights and legal empowerment in eradicating poverty* in E Robbins *Formalisation of land and housing tenure to empower the poor: simple nostrum or complex challenge?* (2008) and the sources cited at 175 ch 9.

¹⁷ De Soto supra n 7.

¹⁸ K Boudreaux 'Paths to property: creating property rights in Africa' (February 2007) presented at a conference at the Mont Pelerin Regional Meeting, Nairobi Kenya <http://www.montpelerin.org/montpelerin/members/.../KarolBoudreaux.pdf>.

¹⁹ Cousins supra n 3.

²⁰ Jacob Zuma 'Social grant not sustainable' Business Day BDLive (6 August 2012), available at <http://www.bdlive.co.za/articles/2011/11/24/social-grant-system-not->

In 1994 approximately 82 million hectares of commercial farmland, that is, 86 per cent of the total agricultural land or 68 per cent of the total surface area, was owned by approximately 60 000 white farmers while 13 million black people were pushed into the former black homelands.²¹ This vast disparity in land ownership patterns can largely be equated with the poverty profile of South Africa, where in 2001, 57 per cent lived below the poverty line. This has remained unchanged, other than the fact that the extent of poverty has grown.²² An interesting observation by Lahiff is that the proportion of the total poor that live in rural areas is declining, from 62 per cent in 1996 to 56 per cent in 2001.²³ This suggests rapid urbanisation with its concomitant challenges.

De Soto in his seminal work 'The Mystery of Capital'²⁴ takes the view that Western countries have grown and developed simply because of the fact that property owners have access to formal property rights.²⁵ He argues that more than 90 per cent of people in developing countries do not have formal property rights, but rather hold their land under various types of informal regimes. This is what he refers to as dead and living capital.²⁶ As in the case of 'dead capital', the holders cannot use their assets to leverage developing use.²⁷ De Soto argues further that formalisation has the following advantages:

[sustainable-says-zuma;jsessionid=E2366E7A6C0527524A8073EC88BAC1E2.present2.bdfm.](#)

²¹ Programme for land and Agrarian Studies, School of Government, University of the Western Cape E Lahiff 'Redistributive land reform and poverty reduction in South Africa', a working paper for the research project on livelihoods after land reform' 2007 at 3.

²² Ibid at 5. Lahiff states that the poverty gap has grown faster than the economy indicating that poor households have not shared in the benefits of economic growth. In 1996 the total poverty gap (the required annual income transfer to bring all households out of poverty) was equivalent to 6.7 per cent of GDP. By 2001 it had risen to 8.3 per cent.

²³ Ibid at 5.

²⁴ H de Soto *The mystery of capital - why capital triumphs in the west and fails everywhere else* (2000).

²⁵ Ibid at 51.

²⁶ Ibid at 6, 16, 32 and 33.

²⁷ TA Benjaminsen, S Holder, C Lund and E Sjaastad *The emerging formalisation agenda and some empirical evidence from Africa, paper presented at the*

- People tend to appreciate the potential of the asset once it is formalised;
- Integrating various information;
- Increasing peoples accountability;
- Making the asset work for itself as collateral for example;
- Establishing a people network;
- Protecting transactions and making criminal intrusion difficult.²⁸

De Soto's views are not without its critics. Some have argued that one of the key problems with de Soto's view is that he regards formalisation as the saviour of the poor.²⁹ Du Plessis and Leckie argue that property rights should be seen as one of the rights in a spectrum of rights addressing the challenge.³⁰ Benjaminsen opines that if de Soto's supporters 'have gone somewhat overboard in embracing formalisation as the latest magic bullet, de Soto has done little in his writings and talks to discourage them'.³¹

Robbins summarises the criticism against the de Soto position by stating that there appears to be very little evidence that security is achieved or that the holder has improved access to credit. Nor, he argues, is there evidence of increased jobs or better quality of jobs. He argues that in certain instances in Africa, titling created more homelessness.³²

Though there is merit in de Soto's argument, formalisation cannot be the sole thrust of poverty eradication strategies. Formalisation in itself does not necessarily mean the protection of every 'stick' in the 'bundle', but security can be achieved by protecting some of the 'sticks' and not others. In my view, a more flexible approach should be adopted with the model of formalisation, adapted to

symposium, 'At the Frontier of Land Issues: Social Embeddedness of Rights and Public Policy' (Montpellier 2006).

²⁸ Ibid at 49 to 62.

²⁹ E Robbins supra n 16 at 177. See also Ben Cousins *Will formalizing property rights reduce poverty in South Africa?* Questioning the mythologies of Hernando de Soto 'Institute for Poverty, Land and Agrarian Studies' Policy Brief No. 18 (October 2005) at 2.

³⁰ J du Plessis and S Leckie *Property rights and the need for more inclusive concepts, laws, policies and practices* op cit de Soto supra n 7 at 195.

³¹ Benjaminsen supra n 27 at 4.

³² Robbins supra n 16 at 177.

the requirements to suit a particular community. So be it that in some instances communal land would be protected through formalisation without the obvious corresponding individualisation. Likewise, in the urban environment, formalisation could occur by granting title, but restricting alienation. I am not convinced that de Soto completely rejects this view. Benjaminsen opines that de Soto has suggested a wide variety of formalisation, which could include title deeds, licences, permits, contracts and similar instruments. What is required here according to Benjaminsen, is that a central authority should provide official sanction and protection.³³ From this it is apparent that de Soto is not suggesting a 'one size fits all' approach.

De Soto's emphasis on titling as a sole source of prosperity is based upon his belief that 'capitalism stands alone as the only feasible way to rationally organise a modern economy'.³⁴ He is however not completely unaware of the suspicion with which non-western countries view capitalism.³⁵ He views the West as inextricably linked to the developing world, and what he refers to, surprisingly as the 'communist world',³⁶ and the prosperity of the West is linked to the prosperity of the rest of the world. It is within this context that he postulates his theory. He does not doubt that capitalism is a prerequisite for the theory and to this end then holds that value generated through the titling of property will bring the rest of the world in line with the prosperity of the West. He argues that this cannot be blamed on cultural differences between the West and developing nations as the third world 'is teeming with entrepreneurs'.³⁷ In consequence, he argues that the only reason for the difference in prosperity between the West and the rest, must be the manner in which the West generates value from property – turning 'dead capital' into 'live

³³ Benjaminsen supra n 27 at 4.

³⁴ De Soto supra n 24 at 1. Capitalism in the de Sotean sense is fast losing favour as the implosion of the American and European economics in 2008 and 2013 begs a review of the present system. Increased regulation can very well temper the de Sotean enthusiasm for the system.

³⁵ De Soto supra n 24 at 2 to 5. He admits that in South America the enthusiasm for the markets is decreasing. He also refers to the fact that the Malaysian prime minister has criticised the cruelty of markets and 'weariness towards capitalism'.

³⁶ De Soto supra n 24 at 3. I use the word 'surprisingly' as de Soto is writing in 2003.

³⁷ De Soto supra n 24 at 4.

capital'. Capital is the foundation of progress and it is capital, he opines, that the third world fails to generate.

Egypt is used as an example of the poor accumulating its worth 45 times that of the total foreign investment received.³⁸ This wealth is however held in 'defective' forms, including land that is not recorded (titling). In contrast, in the West, every piece of land is documented.³⁹ This, to de Soto, is the Eureka moment. To him it all comes down to legally enforceable transactions on property rights.⁴⁰

Robbins in his critique of formalisation seems to limit the de Soto model to '... alleviation of urban poverty'.⁴¹ This is not what de Soto envisaged. He has made many references to both houses (urban) and 'parcels of land being tilled, sowed and harvested',⁴² (rural). The situation of the property is not a concern to him as he views the value to be added (capital) as a change in mind-set which is divorced from the property itself. This is effectively the Lockean view.⁴³ He opines that capital is brought to life through this mind-set change. This goes beyond looking at the asset but rather going beyond this and 'actively thinking' about the asset as it could potentially be.⁴⁴

I tend to agree with Robbins that de Soto takes property outside of its social context,⁴⁵ a result of his restrictive view of capitalism and the sanctity of free markets. The review of titling later herein illustrates that attempts in other African countries bears witness to the danger of disregarding social context, including property types and practices. There is however no evidence in de Soto's writing that he had total disregard for forms of tenure and social context. Some evidence

³⁸ De Soto supra n 5 at 5.

³⁹ De Soto supra n 24 at 6. De Soto is notorious for his paucity of references and footnotes, so it is difficult to gauge the veracity of his sources.

⁴⁰ De Soto supra n 24 at 5 and 6.

⁴¹ Robbins supra n 16 at 175.

⁴² De Soto n 24 at 39.

⁴³ Locke infra n 94 at 299 para 50.

⁴⁴ De Soto supra n 24 at 45. De Soto illustrates this with reference to a placid lake used for fishing and boating. Once a hydro-electrical plant is added, value (capital) is added. This requires a visualisation of this potential.

⁴⁵ Robbins supra n 16 at 180. This idea is not novel as Okoth-Ogendo stated '... the perception of what constitutes property at any point in a peoples history is invariably the product of the total milieu in which they live' See R Kingswill *Options for developmental land administration systems* (June 2005) at 2.

of his awareness of social context can be gleaned from his contention that in developing countries property is managed through ‘dozens’ of systems ‘some legal, some extra-legal’.⁴⁶ He explains that in these societies’ people’s ability to imagine what they can do with such property is limited to the immediate persons surrounding such owner (tribe).⁴⁷

In the West, with formalisation and recording, the collective imagination of a much wider group can be deployed.⁴⁸ In this one sees some form of appreciation of social context. The differences between Robbins and de Soto lies in the fact that the former sees the complexity of the multitude of practices related to the concept of property as an impediment to decreasing poverty through titling,⁴⁹ the latter does not.

De Soto refers to the 1849 Gold Rush in California that gave rise to many property regimes which took the government 100 years to formalise into one comprehensive recording system. This, he opines, ‘fuelled the United States’ explosive economic growth thereafter.’⁵⁰

Robbins raises further concerns regarding the conditionality of property and the nature of rights,⁵¹ an aspect extensively discussed in Part III herein. Suffice to say that the argument that such conditionality through, for example expropriation or police power decreases security of title may be true, but it is difficult to appreciate why this would impede formalisation. Deprivation and expropriation is universally applicable and thus embedded in all social contexts and property practices. What is important is that sufficient regulatory provisions are present to obviate the arbitrariness of such deprivation or expropriation, as envisaged by section 25 of the South African Constitution.

The decreased security through conditionality should lie in the regulating of ‘arbitrariness’ rather than the actual act of deprivation or expropriation.

⁴⁶ De Soto supra n 24 at 52.

⁴⁷ De Soto supra n 7 at 36.

⁴⁸ De Soto supra n 7 at 18. Further evidence that de Soto was aware of social complexities and practices can be inferred from his comprehensive work in Tanzania for the Tanzanian government.

⁴⁹ Robbins supra n 16 at 181.

⁵⁰ De Soto n 24 at 53.

⁵¹ Robbins supra n 16 at 181 and 182.

De Soto's theory has been applied in various African countries through formalisation of title. In Kenya for example, more than six million hectares had been formalised.⁵²

It was anticipated that this would develop two classes, namely economic farmers and the landless, who would serve as labour on the farms. As draconian as this may seem, the expectation was that it would have a direct influence upon poverty for both classes.

Ensminger cites⁵³ the following process of unravelling of the title system in Kenya. Certain districts like the Kayambu district had over 3000 titles registered in the name of deceased persons. In other districts only 2.4 per cent of successions (the transfer of land pursuant to the death of the original owner) were registered. 30 per cent of all land sales in East Kadianga was unregistered. The re-fragmentation of land also became common.⁵⁴

What in effect was happening in Kenya was that after an extensive formalisation project, in practice and through human behaviour, the *status quo ante* was being reverted to. A similar phenomenon was observed in Tanzania⁵⁵ as well as in Niger. The reasons for these failures are however different.

The reason for these formalisation failures was identified in Kenya as the exorbitant transaction costs involved.⁵⁶ This is not surprising, as it should have been anticipated that embarking upon a process of mass titling using a cumbersome and expensive British system, would inevitably lead to reverse titling.

It is abundantly clear that the exorbitant transaction costs were a disincentive and a material deterrent factor contributing towards reverse titling. It

⁵² J Ensminger *The frontiers of the new institutional economics* (1997) at 165 to 198. This was referred to as the Swynnerton Plan. This plan was directed at allowing land to become economically viable through leveraging and ease of transfer.

⁵³ FD Homan 'Succession to the registered land in the African areas of Kenya' (1967) vol 2, Part 1 at 237 *Journal of Local Administration Overseas* (London).

⁵⁴ J Ensminger *supra* n 52 at 180 to 185.

⁵⁵ De Soto was commissioned by the Government of Tanzania to advise on the formalisation of the second economy process, *supra* n 7 at 18. It is generally accepted that the term 'second economy' was coined by Thabo Mbeki. De Soto uses the words 'extra-legal economy', *supra* n 7 at 19, 26, 41, 48, 49, 50, 55. This extra-legal economy was worth \$29 billion – 10 times the foreign direct investment.

⁵⁶ J Ensminger *supra* n 52 at 181.

is therefore incumbent to ensure that the transaction costs and the effective control thereof, in the public interest, are closely and effectively managed. It should also be borne in mind that transaction costs are not only limited to the costs of actual transfer of title but could include travelling costs over vast distances (within the African context) to access far-flung registration centres.

Another reason for the failure of titling, or the individualised title program in the rural areas of Kenya is that the cost of titling could not be justified by the economic returns.⁵⁷ The South African experience indicates that if we do proceed to individualise title in the rural areas, it will likewise fail. Historical land ownership patterns confined approximately 86 per cent of Africans to the homeland areas which resulted in extensive over-farming and soil erosion. This severely hampers the ability of the farmer to practise an economically viable activity, making the transactional costs non-viable.

Another problem experienced by the Kenyan process was the rapid fragmentation of land through succession and insufficient legislation and capacity in place to regulate it.⁵⁸

A further issue identified in the Kenyan experience was mortgage foreclosure. The first tragic consequence of this type of foreclosure was that it seemed to be allowing one person to extinguish land rights which had its origins in customary ownership.⁵⁹ Kenyan law failed to take legislative cognisance of this. It is fundamental to de Soto's theory that one of the important advantages of mass titling is access to credit.⁶⁰ Allan Gilbert⁶¹ argues that banks are generally reluctant to lend to the poor. However, this does not mean that the poor want to lend. In South African research done by Tomlinson⁶², those who indicated that they did not want a mortgage loan out-numbered those who wanted a mortgage loan three to one.

⁵⁷ J Ensminger supra n 52 at 182.

⁵⁸ Benjaminsen supra n 27 at 186.

⁵⁹ Benjaminsen supra n 27 at 188.

⁶⁰ De Soto supra n 7 at 6.

⁶¹ Gilbert op cit n 55 at 1 to 19.

⁶² Tomlinson op cit n 55 at 1349.

In the South African context, we need to ensure that strong and effective synchronicity is established between the State and the private financial sector, to administer financial schemes and subsidies as part of the mass titling project. The transaction costs when titling the poor will also require special attention, to avoid the consequential reverse titling.⁶³

Certain lessons from this process can be applied to the formalisation of land. The reason being that just as in the case of land, businesses operating extra-legally do not have the benefits of formalisation, including access to credit. De Soto and his team travelled throughout Tanzania, comprehensively documenting the kinds of customs, rules, practices and social devices the Tanzanians used to organise their assets.⁶⁴

In Tanzania the major reason for the failure of mass titling was in de Soto's view, the failure to appreciate what already existed, and attempts to merely cancel that which existed, and bring in a mainstream legal order – the imposition of a foreign system.⁶⁵

This in itself showed that a system of formalisation cannot be imposed top-down, but has to take account of existing community practices. Many experiments failed because there was no appreciation for what existed, and there were merely attempts to cancel what existed, and bringing in the mainstream legal order – the imposition of a foreign system.

⁶³ Infra the Richtersveld discussion [Chap 5](#) below.

⁶⁴ De Soto supra n 7 at 26.

⁶⁵ De Soto supra n 7 at 26 op cit *The challenge of connecting informal and formal property systems: some reflections based on the case of Tanzania*. See also A Gilbert Liverpool University Press 'On the mystery of capital and the myths of Hernando de Soto: what difference does legal title make?' vol 24(1) International Development Planning Review at 1 to 19. (March 2002) and MR Tomlinson 'From rejection to resignation: beneficiaries' view on the South African Government's new housing subsidy system' (1999) Urban Studies at 1349.

A further lesson for South Africa in the light of the Tanzanian experience is that care should be taken not to impose a system on a community without having taken into account the existing practises and social relationships within that community. In South Africa, these practices could range from communal property to models where the Chief has sole authority over property.

The Niger experiment highlights the negative impact of an overly burdensome bureaucratic process, and transaction costs which are excessive in the circumstances, as it required payment on both provisional title as well as substantial title.⁶⁶ Once again there is a sense of *déjà vu* in so far as the Niger experience in 2001, compared with the Kenyan Swynnerton Plan in 1954.

The uncertainty in the Niger project related to both a misunderstanding of what rights needed to be secured through registration as well as a complete administrative failure, as no thought was given to state administrative and infrastructural support to register, record, protect and administer the system.⁶⁷

The expectations of the community were that of a French styled cadastre, which is comparable to the South African Deeds Registry System. The capacity to deliver a sophisticated system was however absent. Fewer than 50 title deeds were delivered in the first five years.⁶⁸ The system was accordingly discredited and the community lost interest in its value and purpose.

The failed result of the Niger experience had the unexpected consequence that rural Niger ended up not knowing which national, regional or local authority had the legitimate right to validate their property rights. Formalisation accordingly created confusion, as opposed to certainty and clarity.⁶⁹

A system which is not endogenous is destined to fail. I will later argue in relation to the South African project, that the Niger experience was unsuccessful because it failed to take into account the need to internalise the project, orientate the public to its application and value, and most importantly lacked the administrative ability and capacity to efficiently process, maintain and sustain the

⁶⁶ Benjaminsen supra n 27 at 6.

⁶⁷ Benjaminsen supra n 27 at 7.

⁶⁸ Benjaminsen supra n 27 at 8.

⁶⁹ Benjaminsen supra n 27 at 10.

system. Naturally and consequentially, the system imploded. The failed Niger experience illustrates the importance of the need to properly orientate the beneficiaries, demystify the process, ensure that the allocation of rights are recorded in a fair, equitable and transparent manner, and take proactive steps to eradicate opportunism, greed, nepotism and corruption from contaminating and destroying the credibility and integrity of the project. The case of the Richtersveld project will reflect this.⁷⁰

In Part II hereafter some perspectives and implications of private land ownership are juxtaposed with de Soto's theory.

⁷⁰ Infra [Chap 5](#) below.

PART II Perspectives of Private Land Ownership

In Part I above I analysed the value of de Soto's approach and concluded that formalisation of property rights could indeed be a tool to eradicating poverty. De Soto however does not address two facets important to the implementation of his theory. The first is the question of how property is acquired, particularly in the South African context. The second is whether the Western concept of exclusivity of property is the only type of ownership that could bring about the economic value that he postulates. In order to answer the latter, it is necessary to consider other property theories and to determine whether more innovative theories such as the 'bundle of rights' theory for instance, is not more appropriate within the South African context.

Theorists have long grappled with the concept of property rights. The view that property is a right to a thing, would normally fall outside of what lawyers would define property as. One could argue that there cannot be a relationship between a person and a thing, as only persons can be capable of possessing rights and obligations.⁷¹

The relationship between a person and other persons in respect of a thing is a complex relationship. This relationship would for example include the right of the person to use and to some extent abuse, sell, transfer, enjoy and exclude others.⁷² The person in respect of whom these rights are exercised would have concomitant duties as well as rights, which may include the duty not to intrude upon that person's property, and the right of that person to expect the other person not to use property in such a manner that it intrudes on another's property.⁷³ It is within this context that theorists place different emphasis on the various facets of this

⁷¹ J Waldron *The right to private property* (1990) at 27. Waldron however argues that private property is a complex relationship between the person, the thing and society at large. Consider the situation where X is the owner of a car – Waldron argues – and X's rights and obligations with regard to *inter alia* the use of that car.

⁷² Ibid at 28. See also Honoré's "incidents of ownership" as described by AJ Van der Walt, TSAR, Rights and reforms in property theory – a review of property theories and debates in recent literature: part iii, at 511.

⁷³ T Merrill and H Smith 'What happened to property in law and economics' Yale Law Journal vol 111, No. 2 (November 2001) at 359.

relationship. Some elevate the concept of exclusivity to the extent that it ignores other facets inherent in this relationship. Others see it as a 'bundle of rights' of which exclusivity is merely one of the 'sticks' of the 'bundle'. The 'bundle of sticks' approach is often referred to as the 'lawyer's interpretation'.⁷⁴

The definition of property is not simple or straight forward. Property has been defined as rights among people that concern things. In other words, property consists of a package of legally recognised rights held by one person in relationship to others, with respect to an object.⁷⁵

These definitions appear to be individually focused, based upon a western perspective and rights in relation thereto. At best, these definitions are silent on communal property rights, which have a particular prevalence in the South African context.

Edward Robbins opines that property consists of multifaceted elements which include not only rights, but elements of perceptions, values and practices.⁷⁶ This is an expansive view of a 'bundle of rights' which has commonly been seen as consisting of legal relationships, and raises its own problems. How, for example, does one achieve uniformity of perceptions? Perceptions, unlike values which can be brought into being through convention, are intrinsic to the individual psyche. If Robbins is correct in his view, then the lack of uniformity of perceptions could lead to dissent, fragmentation and internal conflict within that community.

The definition of property as rights that a person holds in a thing is traditionally described as a 'bundle of rights' which could include a right to: exclude; transfer; possess, and use.

⁷⁴ GS Alexander & EM Penalver *An introduction to property theory* (2012) at 3.

⁷⁵ JG Sprankling *Understanding property law* 3ed (2012) at 2.

⁷⁶ Robbins op cit n 16.

Contemporary property scholars have identified the right to exclude as the 'single essential feature of ownership that distinguishes it from other legal concepts'⁷⁷ According to Thomas Merrill:

'The rights to exclude others are more than just "one of the most essential" constituents of property – it is the *sine qua non*. Give someone the right to exclude others from a valued resource, that is, a resource that is scarce relative to the human demand for it, and you give them property. Deny someone the exclusion right and they do not have property.'⁷⁸

This view and approach is critiqued by Gregory, who identifies private property systems in which the right to exclude is absent. He refers by way of contrast, to the Swedish right to roam known as *allemansrätt*. This right is also generally embedded, in varying degrees, throughout Scandinavia. The owner has a right to determine the use of the land, and those exercising their right to roam must navigate their way around it.⁷⁹ This concept is particularly important within the South African context. Common property in our rural areas is a reality. If one adds in the authority of the Chief over such land, then one could anticipate reluctance on the part of the Chiefs to abandon completely their authority over such common land. The *allemansrätt* concept therefore could be a compromise in so far as the Chief's authority over certain sections of the commonage is preserved whilst the right of the subjects to roam is similarly preserved.

While these elements no doubt form part of the body of elements constituting the property right, a number of additional layers of rights contribute towards the full content, utilisation and enjoyment of this right. It is often the disregard for this fact that has led to the failed experiment in land restitution programs and the formalisation of land.

⁷⁷ TW Merrill as quoted in *An introduction to property theory* supra n 74 op cit 3. This type of absolutist approach to exclusivity is often said to have found its origin in the works of Blackstone. Roman Dutch writers such as Grotius (infra) brought "exclusivity" to the fore as a result of their concentration on 'personhood'.

⁷⁸ Ibid at 3 where TW Merrill is quoted and refers to Merrill and Smith *What happened to property?* TW Merrill *Property and the right to exclude, putting the pieces back together* – see supra n 74.

⁷⁹ Ibid at 4 Alexander also refers to the Scottish Land Reform Act 2003 where this Scottish custom of roaming or access was formally recognised in their statute.

On the other hand, it is often a slavish adherence to this positivistic and restrictive view and notion of exclusivity and the content of the 'bundle of rights' that led to the discrediting of, and resistance by communities to innovative land restitution and land formalisation models.⁸⁰

James Penner defines property as 'the area of law that is descriptively categorised by exclusion rights and normatively grounded in the interest we have in the use of things, an interest that in turn grounds largely in the value of individual autonomy',⁸¹ while Jeremy Waldron, defines the law of property as 'that area of law concerned with the function of allocating material resources'.⁸²

Both these perspectives are limited in scope as they do not properly take cognisance of the complexities of the relationships in property. Penner's definition places too strong an emphasis on exclusivity whilst providing no basis upon which this right to exclude others exists, whereas Waldron looks at the function of property law without attempting to give content to the right.

Part III takes a historical look at the origins of ownership from a Roman Dutch perspective, through the works of Grotius and Locke, and traces how common property evolved into individualised property.

⁸⁰ Formalisation is commonly used by writers but is not necessarily descriptive of what is intended to be achieved. By implication informal suggests notions of non-compliance, disorganised, chaotic and anarchistic, which is most certainly not the case.

⁸¹ Ibid at 5 see also JE Penner *Idea of property in law* (2000) at 71..

⁸² Op cit Waldron at 34 to 35 n 71.

PART III The Natural Lawyers' View of Property Rights
Grotius' on Property Theory

Grotius opined that property was granted to humankind in common by divine right.⁸³ From this concept of commons, Grotius emphasised the concept of use-rights.⁸⁴ The individual had the right to use an object, to satisfy needs, and then allow others the equal right to do so. The use of all things was a common right. Grotius explains this concept by referring to Cicero.⁸⁵ Cicero contends that when a person occupies a seat in a theatre, it is his for the duration of that period. He cannot take the seat with him, nor lay any future claim to it. The theatre is thus a common, but with specific use-rights. The question then arises as to how these use-rights are acquired? The short answer given by Grotius is that use-rights are acquired by occupation. It is important to observe that a use-right is exercised in common with others, but exclusivity is granted through *occupatio*.

As a proponent of natural law, Grotius views the concept of property through the prism of nature which is immutable and innate in all humans. He thus views the concept of property in positive law, as a result of an evolutionary process in natural law. In other words, positive law arises over time when it is not in conflict with natural law, but is established under the guidance of natural law.⁸⁶

This evolutionary process is described by Grotius as originating in a person's innate right to her body. Through this process of evolution, this right to your body (which includes your right to life, limb and liberty) evolved into a property right.⁸⁷

⁸³ H Grotius *De Jure Belli ac Pacis Libri Tres* at 186 (Francis W Kelsey translation) (1925) *The law of war and peace* Chap 2, s II at 4-5 Grotius life spanned the period 1583 to 1645. DJPC.

⁸⁴ G Pienaar *The inclusivity of communal law tenure: a redefinition of ownership in Canada and South Africa* at 2 (2010). Tribal Trust Land in rural SA is a reality that impacts upon contemporary constitutional development. As this type of land tenure is subject to the authority of the chief, there is often a power struggle between the jurisdictional authority of the Local Authority (Municipality) and that of the Chief.

⁸⁵ A Mossoff 'What is property, putting the pieces back together' (2003) Public Law and Legal Theory Working Paper Services, research Paper No. 01-09, available at <http://ssrn.com/abstract=438780>.

⁸⁶ *Ibid* n 83 at 227.

⁸⁷ K Olivecrona. *Appropriation in the state of nature: Locke on The origin of property* (April to June 1974) vol 35 (2) *Journal of the History of Ideas* at 213.

This original right to your body is referred to by Grotius as the *suum cuique tribuere*.⁸⁸ Fundamental to this concept of *suum* is the original liberty of man.⁸⁹ This brought about a degree of sovereignty that every person had over their own body and sphere. This perimeter around the person is what is understood to be the *suum*.⁹⁰ The person had to respect the *suum* of others, just as others had the reciprocal duty.⁹¹ An infringement of this *suum* would constitute an *injuria*.⁹² Karl Olivecrona⁹³ describes this *suum* as an invisible fence which marked off the one sphere from that of others. This is in fact, exclusivity.

Locke's Theory of Property

John Locke's 'Two Treatises of Government'⁹⁴ is the seminal work of property theory. The importance of this theory is that it builds upon the Grotian view in that it pays particular attention to charity in the concept of property. This allows an interpretation of the concept of property to make provision for property in instances of extreme want.⁹⁵ In essence this theory holds that once a person's labour is applied to property, such property is appropriated. One could assume that Locke traces this concept back to what Grotius refers to as the *suum*, and what Locke calls the property which 'Men have in their persons'.⁹⁶ This included things like a person's life, limbs and liberty, and predates positive law. Anthony Fressola emphasises Locke's regard for liberty and asks whether there's a general right to liberty? He argues that this clearly cannot be so as unbounded liberty would give each person the right to do whatever s/he pleases. He argues that the actions of

⁸⁸ Ibid at 212. This is based upon the natural law concept that God accords to everyone what belongs to him.

⁸⁹ Ibid at 213. Grotius viewed the original liberty to include life, limb, reputation and honour.

⁹⁰ Ibid at 212.

⁹¹ Ibid at 212. Grotius called this the *alieni abstinentia* – the duty not to take what belongs to others.

⁹² Ibid at 212.

⁹³ Ibid at 211 to 230.

⁹⁴ J Locke *Two treatises of Government* 2ed (1680 to 1690).

⁹⁵ Ibid at 115.

⁹⁶ Ibid n 83 at 1.2iii.

one person may limit the liberty of another.⁹⁷ This could be extended to positive objects. These are fundamental elements and cannot be unjustly interfered with. Nature itself protects the *suum*, and if the *suum* is protected, then so is nature.

Locke takes this concept one step further. He argues that everyone 'has property in his own person, thus nobody has a right to, but himself'.⁹⁸ He argues that with the 'labour of his body and the works of his hands we may say are properly his'.⁹⁹ It is instructive to note that Locke does not view the labour as the sole criteria, but also emphasises the value of benefit to the labour.¹⁰⁰

Important to Locke's work are the concepts of 'justice', 'charity', and 'extreme want'.¹⁰¹ It could thus be argued that, if justice gives an unassailable right to property acquired through honest industry, then the term charity could, in itself, be interpreted as just in circumstance of extreme want. To deny charity in the presence of extreme want, could in effect be a denial of justice and a justification for an individual's right to surplus. One could further extrapolate that as Locke views property as an extension of the *suum*, in effect extending the *suum* into the wider world that such extension is accompanied by an extension of natural law and thus can be argued to form a moral basis for land restitution.¹⁰²

⁹⁷ A Fressola 'Liberty and property: reflections on the right of appropriation in the state of nature' (October 1991) quarterly vol 18 4 *American philosophical* at 316.

⁹⁸ *Ibid* n 94 at 24 at para 27.

⁹⁹ *Ibid* n 94 at para 27.

¹⁰⁰ *Ibid* n 94 para 26, 27, 38 and 24. R Nozick (1974) at 174 to 175 criticises this view. Why should a person, he asks, who mixes his labour with property not lose his labour rather than gain (appropriate) property? A further criticism by PJ Proudhon *What is property* (1867) at 61. '*To tell a poor man that he has property because he has arms and legs ... is to play upon words, and to add insult to injury*'. See also Two Treatises ii at 33, as quoted in Buckle, at 153.

¹⁰¹ S Buckel *Natural law and the theory of property: Grotius to Hume* (1991) at 159. Locke's concept of 'charity' is comparable to Grotius' view of 'necessity'.

¹⁰² T Roux 'Land restitution and reconciliation in South Africa' Paper presented at University of Cambridge (3 to 4 November 2006) where the author is concerned with restitution and to which my argument is relevant.

Hegel's discussion on the relationship between poverty and private property is reflective of the view of charity expounded by Locke. Hegel argues that extreme need must be taken into account in instances where property rights are infringed.¹⁰³

In summary, Locke never intended to describe property theory in the 'post original state'. He must have realised the changes, even in his lifetime, with regard to a shift to a money economy and the increased role of government in property appropriation and retention. For Locke, property arose naturally through the instinct of self-preservation in all humans. This understanding of Locke's work is important as we venture into the works of modern property theorists, and the discourse between Grotian and Lockean concepts of exclusivity and the 'bundle of rights'. It is also apparent that many modern theorists distance themselves from the Lockean model whilst basing their revisionary theories upon those very Lockean precepts. Munzer goes as far as to postulate that 'this Chapter refers to Locke's view in passing but it takes no position on the overall interpretation of his theory of property'.¹⁰⁴

This Hegelian concept is further supported by Nozick who proposes that there are only two bases upon which a person may legitimately hold property, namely through just transfer or just appropriation of a property right.¹⁰⁵ Where either of these principles are transgressed, rectification by the State is permissible.¹⁰⁶

PART IV Modern Property Theories: The rights that have to be formalised

The Right to Exclude

¹⁰³ Ibid n 71 at 380. Waldron opines that Hegel's main concern is with life as a precondition of all rights and not necessarily the poor man's right to property.

¹⁰⁴ SR Munzer *A theory of property* (1990) at 257. This is particularly astonishing as the chapter is titled 'Labour and desert.'

¹⁰⁵ R Nozick *Anarchy, state and Utopia* (1975) at 151. Also see T Roux, Land Restitution and Reconciliation in South Africa, at 3.

¹⁰⁶ *Ibid* at 150.

The right to exclude others as an essential component of ownership has long been the centre of debate.¹⁰⁷ Around the time of Grotius's writing, it was a commonly held view that property was not a moral concept, but that nature had imposed property upon all men in common to use such things but had not imposed individual private property rights.¹⁰⁸ In nature, every person only had a right over her *suum*.¹⁰⁹ Everything else fell into the domain of common use. This view is also followed by the view of Locke who opined that all the fruits of the earth are also found in common estate.¹¹⁰ Whereas Grotius viewed the process from common property to private ownership as an evolutionary process linked to occupation and later a form of convention or agreement between the members of such society, Locke saw this evolution as some act of acquisition and the addition of labour as the foundation of private property.

It is however common to both Grotius and Locke that exclusivity is an integral part of property rights theory – albeit more central a concept for Grotius than in the case of Locke.¹¹¹ We should however note that Locke in his mixing labour concept saw exclusivity in a person's life and her labour. The right to exclude is viewed as underpinning the right to acquisition, use and disposal.¹¹² Locke argues that property is obtained through an exclusive moral claim to one's life and liberty which is then extended over material objects.¹¹³ The essence of the exclusionary approach is traced back to Blackstone who places particular emphasis upon

¹⁰⁷ In contrast, the integrated theorists see exclusivity as a corollary to use rights or, as some theorists opine, as possessory rights. See A Mossoff 'What is property? putting the pieces back together' at 413.

¹⁰⁸ F Suarez *de legibus ac deo legislatore* (On treatise on laws and god the lawgiver) *Selections from three works* at 278 (G.L. Williams et al. trans. 1944).

¹⁰⁹ *Ibid* n 93 .

¹¹⁰ Locke basis this statement upon scripture and what he calls 'natural reason'.

¹¹¹ Mossoff *supra* n 85 at 392. Mossoff argues that albeit Grotius – as a natural legal scholar – saw the centrality of 'exclusivity' in property theory, he recognised the integrated nature of use rights in the following passage: Men, who are the owners of property, should have the right to transfer ownership, either in whole or in part. For this right is present in the nature of property.

¹¹² Mossoff *supra* n 85 at 390.

¹¹³ Mossoff *supra* n 85 at 389.

exclusion.¹¹⁴ Katz places the exclusivity theorists into broad camps.¹¹⁵ The first camp she identifies as the rights-based approach and constructs this approach around the works of James Penner.¹¹⁶ His work emphasises the use of things which use is then protected by excluding all other persons from such use. In this approach, the boundary is established to protect such use and to establish the individual owner's sole right in deciding on how to use the resource.

Katz critiques the work of Thomas Merrill and Henry Smith. Both these camps do however give equal prominence to exclusivity with the notable difference that the latter views ownership as a 'gate-keeping function'.¹¹⁷ Both approaches place a duty upon the other not to cross that boundary.¹¹⁸ This allows for the space within which the owner can exercise ownership. Mossoff argues that the right to exclude is an important element of property but not necessarily a fundamental element. He argues that the rights of acquisition, use and disposal are essentially the foundation of property and that the right to exclude is merely ancillary to the aforesaid rights.¹¹⁹ He therefore views exclusion as a derivative right. In other words, the owner has all the other rights only because she has the right to exclude which is innate to the boundary and signalled to the world at large by the boundary.¹²⁰ Katz argues that in protecting exclusivity, all incidental or auxiliary rights (derivatives) are equally protected without the need to exercise an array of

¹¹⁴ L Katz *infra* n 115 where she cites Blackstone's commentaries in relation to his approach with regard to exclusion.

¹¹⁵ L Katz 'Exclusion and exclusivity in property law' vol 58 *University of Toronto Law Journal* 3 at 279 *et seq.*

¹¹⁶ JE Penner 'The Bundle of rights picture of property' (1996) 43 *UCLA Rev.* at 711.

¹¹⁷ Katz *supra* n 115 at 281.

¹¹⁸ D Hume *A treatise of human nature* 2ed (1960) at 484 to 516. Hume views this restriction by others not to cross the boundary as based upon 'convention' where people accept that it is in their interest not to disturb others if there is the same degree of reciprocity.

¹¹⁹ Mossoff n 85 at 392.

¹²⁰ This concept is also reflected in the works of the integrated theorists. It is often argued that the 'poster boy for exclusivity, Blackstone, supported exclusivity in the second of his 'Commentaries' whilst supporting use rights in the first volume. The passage 'the third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land' (1 Blackstone, *Commentaries* at 138) is often used as support for this contention.

fragmented rights. These reciprocal rights and duties are protected through the thing itself (*in rem*).¹²¹ These participants in the rights / duties regime need not interact with each other at all as the reciprocal rights and duties can be exercised without knowledge or reference to whom the owner is or what the property's use is.

Henry Smith views exclusion as an important but not a core value.¹²² Exclusion, he argues, only makes sense if it has evolved within the society to include rules of governance which circumscribes exclusion. This is particularly important in forms of property other than landed property. It would for example be impossible to apply exclusion to the ownership of a fluid resource like water.¹²³

Katz takes an interesting angle on the rules of exclusivity, and argues that the role that exclusivity plays is to bring the owners' agenda into line with the activities of others. This does not mean that the owner loses the right to exclusivity, but that the owner is allowed to set the agenda as to where and in what manner s/he would exercise that exclusivity.¹²⁴

The owner's agenda to exclude whilst being compelled to respect common rights is further incorporated in the American public trust doctrine. In terms of this doctrine, the wet sand portion of beaches are held in trust for the public. Alexander and Penalver illustrate this with reference to a private club which barred access of the public to a private beach area by erecting a gate. The court applied the public trust doctrine and concluded that owners of private property in terms of this doctrine do not have absolute exclusivity as in the Blackstonian concept. The owner's agenda extends to controlling access and possibly charging for facilities. It however does not extend to absolute exclusion.¹²⁵

¹²¹ Ibid n 115 at 283.

¹²² T Merrill and H Smith 'What happened to property in law and economics?' (November 2001) *Yale Law Journal* vol 111 2 at 357.

¹²³ T Merrill supra n 78 at 3.

¹²⁴ Katz supra n 115 at 298 to 299.

¹²⁵ Ibid n 74 at 134. See *Raleigh Avenue Beach Association v Atlantis Beach Club* 2005 879 A.2D 112 at 121 (New Jersey Supreme Court).

Van Der Walt¹²⁶ states that the 'property for personhood' idea and its influence on perceptions of property has led to the fact that common law open access property is often viewed with 'disdain', or at least with a measure of social, cultural or historical chauvinism. He argues that Hardin's theory referred to as 'The Tragedy of the Commons' postulates that common property will inevitably lead to negative results for the participants because of 'inherent egoism, materialism and rationalism which will result in overindulgence and abuse'.¹²⁷ Van der Walt however argues that in contemporary times there is a greater acceptance of common property, more particularly in land rights of indigenous peoples.¹²⁸ Munzer includes common property in his theory of public property, public trusts and stewardship.¹²⁹ In this resurgence of common property, van der Walt argues that property can no longer be viewed strictly in terms of exclusivity, but that many property interests have to be defined in the context of 'social or common wealth'. He categorises this interest 'as a right not to be excluded from common property rather than the right to exclude others from individual property'.¹³⁰ This concept of the right not to be excluded is no longer frowned upon, as intimated by van der Walt, as it has found expression in, amongst others, sectional title property regimes.

The 'Bundle of Rights' Theory

Hohfeld¹³¹ is generally acknowledged as the father of the 'bundle of rights' concept, even though there is no evidence that he has ever used the term. The concept is derived and extrapolated from Hohfeld's reference to elements, correlatives and opposites.

He tabulates three sets of terms that are applicable to rights, and Munzer sets it out as follows:¹³²

¹²⁶ AJ van der Walt 'Tydskrif vir Suid Afrikaanse Reg (TSAR)' (1995) vol 3 at 508.

¹²⁷ Ibid at 509.

¹²⁸ Ibid at 509.

¹²⁹ Munzer supra n 104 at 206 to 214.

¹³⁰ Van der Walt supra n 126 at 509.

¹³¹ WN Hohfeld, Fundamental legal conceptions as applied in Judicial reasoning, 26 Yale Law Journal, 710 (1917).

¹³² Munzer supra n 104 at 19.

Elements	Correlatives	Opposites
Claim-Right	Duty	No-Right
Privilege (Liberty)	No-Right	Duty
Power	Liability	Disability (No-Power)
Immunity	Disability	Liability

Munzer explains the fundamental legal conceptions as that of the eight conceptions listed above in the elements and correlatives columns.¹³³ This he explains as follows:

‘Very different from a claim-right or, as Hohfeld usually says, simply a right of claim is a privilege. A privilege is a legal liberty or freedom. It involves not a correlated duty but the absence of a right on someone else’s part to interfere. A claim-right is also quite different from a power. A person has a legal power when, by some act, he can alter his legal position or that of someone else. The correlative of a power is a liability.’

This Hohfeldian analysis in itself shifted the emphasis from the previously held view that property rights exist in a relationship between a person and a thing (the *in rem* concept) to what is now generally accepted as relations among persons in respect to things.¹³⁴

These relationships described by Hohfeld form the basis for what later theorists termed the ‘bundle of rights’.¹³⁵ This was especially so in the case of

¹³³ Munzer supra n 104 at 18. Also see Hohfeld supra n 131. Hohfeld postulated that ownership in property causes a vast array of rights, obligations, privileges and powers – not towards the property itself – but rather towards the person (in personam).

¹³⁴ Van der Walt supra n 126 at 506.

¹³⁵ These later theorists include T Grey *The disintegration of property* in JR Pen-nock and JW Chapman (eds) *Nomos XXII: Property* (New York: New York University Press, 1980) 69. See also T Merrill and H Smith ‘What happened to property in law and economics’ (2001) III Yale L.J. 257. In addition, Honoré’s “incidents of ownership” is in essence a Roman-Dutch view on the ‘bundle of rights’ theory. Jeremy Waldron *The right to private property* at 28 *et seq*, sets out a case study of

legal realists who latched onto this concept in order to show that the definition of property does not exist, but that it is merely an *ad hoc* collection of disparate rights and uses. Legal realists used this in order to justify state intervention in property as they could now argue that property is not a natural right.¹³⁶

Alexander observes that it is neither regarding property as ‘an endlessly complex ‘bundle’ of discrete rights between people with respect to things’ or ‘searching for one single essential ‘stick’ in the ‘bundle of rights’, that is definitive of the concept of property’.¹³⁷ He refers to Tony Honoré’s¹³⁸ conception of property rights as incidents of ownership.¹³⁹

Munzer explains that the idea of property involves the elements, correlatives and opposites as illustrated in the previous table, together with the incidents as perceived by Honoré. In effect Honoré’s incidents provided the ‘sticks’ for Hohfeld’s ‘bundle’.

‘Bundles’ and layers of rights are flexible in nature. They could and should be expanded, restricted or limited, taking into account the relevant circumstances prevailing from time to time, and evolving with the passage of time.

As a basic point of departure, no traditional formal right to property is absolute. In modern day Deeds Registry practices, most (but not all) of these limitations are recorded in the title deed in the form of conditions, servitudes and restrictions. Examples of these limitations are: mineral rights, common law personal servitudes (*usufruct, usus* and habitation), reversionary rights, fideicommissa, *fideicommissum residui*, lease agreements, conditions restricting alienation or disposal, land subject to the recording of a contract in terms of section

“Susan and her Porche” which in effect brings the “bundle of rights” theory into practice.

¹³⁶ Merrill and Smith supra n 122 at 365. T Grey in his work *The disintegration of property* (1980) in JR Pen-nock and JW Chapman (eds) in *NOMOS XXII: Property* at 69. This view was eagerly adopted in order to justify the non-existence of the concept of property.

¹³⁷ Ibid at 4.

¹³⁸ AM Honoré *Ownership in oxford essays in jurisprudence* First Series (1961) at 107 to 147.

¹³⁹ AM Honoré *Ownership in readings in the philosophy of Law* (1999) 557 at 563 to 574. Examples of this incidence of ownership are incidence such as the right to exclude, to use, to manage, to income, to security, amongst others.

20 of the Alienation of Land Act 68 of 1981, land bank charges and sectional mortgage bonds.¹⁴⁰ There are also common law¹⁴¹ and statutory restrictions not necessarily recorded or referred to in the title deed.¹⁴² This will be dealt with in a later Chapter.

Human Rights as a 'Stick' in the 'Bundle'

Conventional definitions of property rights do not appear to take sufficient cognisance of the human rights component of our understanding of property rights. According to du Plessis and Leckie, another 'stick' should be added to the 'bundle'; that of the Human Rights dimension.¹⁴³

Du Plessis and Leckie argue that a slavish adherence to exclusivity has excluded vast sectors of society from the fruits and benefits of the earth.

In this context provision was made for the Constitutional entrenchment of a human rights based approach incorporating the right to adequate housing and

¹⁴⁰ A West *The practitioner's guide to conveyancing and notarial* 3ed (2013) at 321 to 327.

¹⁴¹ *Huur Gaat Voor Koop* is a Roman-Dutch law maxim, protecting the lessee against eviction by subsequent purchases and also against successors of the lessor. See G Bradfield and K Lehman *Principles of the law of sale lease* 3ed (2013) at 179 to 184. See also JC de Wet 'Huur gaat voor koop' (1944) 8 THRHR 74.

¹⁴² Examples of statutes that may impact on title are the following: Restitution of Land Rights Act 22 of 1994, planning ordinances, municipal by-laws, and approved development frameworks of the municipalities indicating the extent to which land may be developed with support of the authorities, National Environment Management Act 107 of 1998, Transfer Duty Act 40 of 1949, Development Facilitation Act 67 of 1985, Land Reform (Labour Tenants) Act 3 of 1996, Interim Protection of Informal Land Rights Act 31 of 1996, Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, Communal Property Associations Act 28 of 1996, Housing Act 107 of 1997, Water Services Act 108 of 1997, South African National Roads Agency Limited and National Roads Act 7 of 1998, Rental Housing Act 50 of 1999, National Environmental Act 107 of 1998, National Environmental Management: Protected Areas Act 57 of 2003, Local Government: Municipal Property Rates Act 6 of 2004, Mineral and Petroleum Resources Development Act 28 of 2002.

¹⁴³ Most property rights seem to be recognition dependant in a way that basic human rights are not. R Cruft 'Are property rights ever basic human rights' (February 2010) *British Journal of Politics and International Relation* vol 12 1 at 142 to 154 in which it is argued that property rights are recognition dependant, whereas basic human rights do not need this dependence. It is difficult to hold a right to property if such right has no effect on other people.

property rights. Pursuant to the South African Constitutional imperatives, steps have been taken in an attempt to redress the consequences of disenfranchisement, by promulgating restitution legislation, amongst others, the Restitution of Land Rights Act 22 of 1994 (the 'Restitution Act').¹⁴⁴

This did not necessarily happen per chance, but by design. As previously noted, the European Convention on Human Rights makes no mention of the term 'property rights'¹⁴⁵ and Leckie argues that in the context of property, the concept of property rights has been wholly inadequate in achieving universal access and dignity. He therefore advocates a more inclusive concept of property rights which embraces housing, land and property ('HLP' rights).¹⁴⁶ This in effect broadens the concept of property rights and brings it into the realm of the 'bundle of rights' theory. Leckie argues that by viewing property in the context of HLP rights, it would be possible to address more efficiently, the rights of different types of rights holders.¹⁴⁷

Leckie argues that the 'bundle of rights' that will underpin the property rights interests of the rights holders listed above, would then include the right to adequate housing; the right to be protected against false evictions; the right not to be arbitrarily deprived of one's property; the right to privacy and respect of the

¹⁴⁴ Restitution of Land Rights Act 22 of 1994. The aims and objects of this Act are to provide for the restitution of the rights in land where individual or communities were dispossessed on the basis of racially discriminatory legislation. A commission on restitution of land rights and a Land Claims Court was also established in terms of this legislation.

¹⁴⁵ De Soto supra n 7 op cit J du Plessis and S Leckie at 195.

¹⁴⁶ De Soto supra n 7 op cit J du Plessis and S Leckie at 196.

¹⁴⁷ De Soto supra n 7 op cit J du Plessis and S Leckie at 196. The rights of those without housing, land or property (the landless and the homeless). The rights of those informally in possession of housing, land or property (slum dwellers or squatters); the rights of those in possession of housing, land, or property under customary or traditional law arrangements (indigenous people and rural dwellers); the rights of those with formal legal title to housing, land or property (private land owners); the rights of those who commonly face discrimination in equitably accessing housing, land or property (women and ethnic minorities); and the rights of all persons to be protected against arbitrary or illegal forced eviction or displacement of housing, land or property.

home; the right to freedom of movement, and the right to an adequate standard of living.¹⁴⁸

This is the 'bundle' of HLP rights which would then give content to a concept of property rights more especially in a country like South Africa where the developmental characteristic of property needs to be addressed.

As much as Grotius in his theory emphasises exclusivity as fundamental to ownership, there is no evidence that he rejects corollary rights out of hand. In his writings he has referred to the transfer of ownership 'whole or in part as being inherent in property'.¹⁴⁹ It could be argued that transfer of 'part ownership' is implied recognition of the 'bundle of rights' concept and therefore not foreign to his theory.

Van der Walt's argument¹⁵⁰ that land can serve a variety of needs 'and therefore it is possible to distribute rights to one piece of land among a number of people with different needs can be argued to be supported by Grotius. In the South African context van der Walt argues, the Eurocentric view of property rights and their emphasis on the 'social, economic, political and legal domination of ownership' must be abandoned and we should move in the direction where a broad range of property rights are of equal importance.¹⁵¹

The importance of the Lockean view is that Locke regards property rights as fundamental and therefore they have to be protected from government intrusion.¹⁵² The question arises as to the circumstances under which 'government intrusion' is acceptable.

In the next chapter I argue that the extent of dispossession suffered by black South Africans and justifies a more intrusive approach to property rights.

¹⁴⁸ De Soto supra n 7 op cit J du Plessis and S Leckie at 197.

¹⁴⁹ Mossoff supra n 119.

¹⁵⁰ Van der Walt supra n 126 at 520.

¹⁵¹ Van der Walt supra n 126 at 523.

¹⁵² Locke supra n 94 at para 27.

CHAPTER 3

Land Rights in South Africa – Historical Impediments to Formalisation

Nozick has argued, in the Lockean tradition, that property rights are fundamental and can only be interfered with to rectify historically unjust transfers.¹⁵³ The rectification of past injustices has to be based upon historical data and is applicable irrespective of the length of time that has elapsed or what has happened to the property right subsequently.¹⁵⁴ Consequently, in this chapter, I explore both the history of dispossession as well as the extent thereof. I argue that the draconian nature of the dispossession not only justifies rectification, but forms the basis for greater and more urgent intervention in property rights by our Constitutional Court.

In 2002 the Constitutional Court, in the First National Bank (FNB) decision¹⁵⁵, collapsed the six point constitutional property clause enquiry into one, and viewed expropriation as a sub-category of deprivation – all expropriations are deprivations. The FNB decision opened the door to a case by case determination, depending on the facts, enabling transformative jurisprudence¹⁵⁶. In 2013, the matter of *Agri South Africa and the Minister for Minerals and Energy and Afriforum*¹⁵⁷, the Constitutional Court took the interpretation of section 25 of the Constitution one step further, by following the First National bank decision, but for the first time, balanced private rights with the public interest, taking into account the nature and extent of the deprivation together with the prevailing social context.

¹⁵³ Nozick supra n 105 at 151, where he states the following: The complete principle of distributive justice would say simply that a distribution is just if everyone is entitled to the holdings they possess under the distribution. A distribution is just if it arises from another distribution by legitimate means. The legitimate means of moving from one distribution to another are specified by the principle of justice in transfer. See also Roux supra n 102 at 3.

¹⁵⁴ Ibid at 4.

¹⁵⁵ Supra n 212.

¹⁵⁶ The FNB decision was pursuant to a decision in *Harksen v Lane NO 1997 (1) SA 300 (CC)*. where the Court defined expropriation restrictively.

¹⁵⁷ Supra n 14.

It cannot be disputed that land rights in South Africa, in contrast with many other jurisdictions, is highly politicised.¹⁵⁸ There is a school of thought that argues that the essence of apartheid was not only directed at achieving dominance over people, but was a grand design to firstly achieve dominance over land and to then use this dominance to subjugate people. Derek van der Merwe opines that ‘...dominium over things facilitates imperium over persons.’¹⁵⁹

Van der Walt argues that this dominance of people through land was facilitated by the perception that ownership is absolute.¹⁶⁰ In South African law a real right is understood as capable of being enforced against all-comers, this as distinct from a personal right that can be directed only at specified persons or class of persons.¹⁶¹ This absolute view of property perfectly suited the apartheid architects as this view, taken together with the theory of exclusivity, suited the grand design.¹⁶²

A History of Dispossession

The history of South African titling as described below, was however merely a formalisation process that commenced when Jan van Riebeeck established a victualing station at the Cape. This brought the Dutch into direct conflict with the Khoi. Van der Merwe argues that albeit that the Khoi had informed the Dutch of their ownership in the land, the Dutch claimed land in the name of the Dutch East India Company and also claimed the right to dispose of such land. The Dutch justified their ‘right’ by claiming that the land was *res nullius*.¹⁶³ This ridiculous assertion is clearly based upon a view that some form of registration is required to

¹⁵⁸ Van der Walt supra n 126 para 4 op cit Sachs (Protecting Human Rights in a new South Africa (1990) at 105) and quotes him as follows: ‘*South African land has not always produced food, but has always been fertile ground for producing questions*’.

¹⁵⁹ D van der Merwe ‘Land tenure in South Africa: a brief history and some reform proposals’ (1988) TSAR at 663.

¹⁶⁰ AJ van der Walt *Informal housing and the environment: land rights, transition* (1991) ‘SA Public Law’ vol 6 1 and 2 at 202.

¹⁶¹ Ibid at 203.

¹⁶² There was a distinct lack of understanding the ‘bundle of rights’ theory in terms of which the concept ‘ownership’ would inevitably be more than its constituent parts.

¹⁶³ Van der Merwe supra n 159 at 666.

claim ownership to land. Folklore, custom, practices and specific oral claims of ownership, did not fit the Dutch view.¹⁶⁴

This land grab continued unabated as the trekboers ventured further inland in search of land. Van der Merwe states that in the 1770s, competition for grazing land in the Eastern Cape led to a series of bloody battles, commonly referred to as the frontier wars.¹⁶⁵ The land grab continued through quiet acquiescence of the Cape government through a policy of non-interference.¹⁶⁶

The British who succeeded the Dutch acted no better. The first governor Craig was more realistic in his dealings with the Boers by asserting that he had no right to allocate or occupy property belonging to others.¹⁶⁷ This should however be seen within the context of the British/Boer acrimony, with the indigenous people being but a footnote to a greater priority for both colonial powers, the British and Dutch. This inference could necessarily be supported by the fact that the second British Governor, Cradock¹⁶⁸ displayed far less sensitivity to the land question than his predecessor. Cradock abolished the concept of 'loan places', and replaced it with 'quitrent title'.¹⁶⁹

The 'loan place' concept was replaced by 'place tenure'. Both these concepts of ownership were however tainted by the same fundamental premise, that is, they were both based upon the same principle of acquisition which was, and

¹⁶⁴ Z Skweyiya 'Towards a solution to the land question in post-apartheid South Africa: problems and Models' (1990) SAJHR vol 6 at 195. Skweyiya puts it much stronger and argues that 'land robbery and dispossession became part and parcel of the colonisation process'. Infra n 235 where the Constitutional Court recognised customary law interest – Aboriginal Title.

¹⁶⁵ Van der Merwe supra n 159 at 666. Also see Boucher *The Cape under the Dutch East India Company* in Cameron and Spies 61.67.

¹⁶⁶ British land Policy at the Cape 1795 to 1844 (1968) 3.

¹⁶⁷ Van der Merwe supra n 159 at 668.

¹⁶⁸ Sir John Cradock became Governor in 1811.

¹⁶⁹ The concept of 'loan places' was established by the trekkers/occupiers who would, as they progressed north, occupy land and then send in an application to the Cape for registration of quitrent title knowing that there would be an administrative capacity failure. I am reluctant to use the word 'squatting' as in the South African context, 'squatting' in the present South African context, given the history of disempowerment, must have a different context.

still is, legally and morally incorrect.¹⁷⁰ They were both thus perspectives of illegal occupation of land. Van der Merwe calls it squatting.¹⁷¹ The net effect of Cradock's actions was, in effect, to legitimise squatting and formalise the land grab. This was made possible by the fact that the South African system of land registration was started in 1652 and based on the Dutch model.¹⁷² Although this was not a secure means of land tenure as the Cape took many years to register title, if at all, the white landowner through the system of 'request of tenure', allowed such owner to exercise the rights to possession and disposition as if registration had occurred and local officials recognised such rights.¹⁷³

In sharp contrast, Africans received land from 1835 in terms of the D'Urban Scheme but no security of tenure was included, as no registration occurred. The superintendent merely recorded the award.¹⁷⁴ This in effect influenced security of tenure, which is an important factor in property development. Adding value to land must be subject to the *spes* of realising that value at some later stage. This land is then in effect, limited to subsistence farming. This lack of security of tenure was further exacerbated by the ZAR Volksraad of 28 November 1853, who awarded property for exclusive use by Africans 'provided they behaved lawfully and obediently'.¹⁷⁵

Notwithstanding the above analysis, one cannot dispute the fact that Africans did in fact receive land, but at all times such land allocated was always part of a greater plan to dispossess. At first sight this may appear to be a contradiction in terms. I am however of the view that this contradiction is resolved with reference to a single statute, amongst many, which assists in supporting my

¹⁷⁰ Van der Merwe supra n 159 at 669.

¹⁷¹ Van der Merwe supra n 159 at 669.

¹⁷² Van der Post 'Land law and registration in some of the black rural areas of Southern Africa' (1985) *Acta Juridica* 213 at 216.

¹⁷³ Van der Merwe supra n 159 at 669.

¹⁷⁴ Van der Post supra n 172 at 217. Africans in the area around Grahamstown were treated differently by Lord Grey who granted quitrent title subject to restrictive conditions which included restrictions on alienation. This however failed as Africans could not afford the costs of survey and registration.

¹⁷⁵ Van der Merwe n 159 at 673.

premise.¹⁷⁶ The Glen Grey Act 25 of 1894,¹⁷⁷ has been hailed as ‘one of the best enactments bearing on native policy ever posed and as a compromise between Native and European systems¹⁷⁸ ‘and likewise as’ a masterpiece of political strategy’.¹⁷⁹ On the face of it, this statute provided quitrent title based upon surveyed land.¹⁸⁰ The conditions of title contained a non-alienation provision; alienation could only occur with the governor’s consent, and could not be subdivided, sublet or mortgaged.¹⁸¹ In addition, the title contained a ‘grab back’ clause as the state could reclaim the land under certain prescribed conditions, which included rebellion by the ‘owner’, conviction of certain offences and failure to occupy the land beneficially.¹⁸² Whilst this statute professed to empower, it in effect had the opposite effect. Van der Merwe argues that it firstly disqualified holders from voting, as the property qualification franchise to vote in terms of Cape Parliamentary Registration Act 14 of 1887, required freehold title whereas this statute deemed all land to be held in communal tenure.¹⁸³ The restriction of the plot size to four morgen severely impeded the ability of the holder to compete with white farmers. This more so, in the light of the title restriction that prohibited leverage in the form of hypothecation. In addition, this statute had the intended consequence of providing rapid urban industrialisation and mining with cheap labour. Although land was deemed by section 26 to be held communally, the title to the plots was individualised. In consequence, access to the land was limited to

¹⁷⁶ Van der Merwe n 159 at 680.

¹⁷⁷ Other similar statutes include the Native Locations Act 40 of 1879 British Kaffraria Land Regulations GN3 of 1885 which had similar intended consequences.

¹⁷⁸ Glen Grey Act 25 of 1894.

¹⁷⁹ Van der Post supra n 173 - Van der Post quotes a memoranda, the Secretary of Native Affairs AG 1906 497/50394.

¹⁸⁰ Van der Merwe n 159 at 675.

¹⁸¹ It is interesting to note that van der Post fails to fully appreciate the concept of quitrent title. This type of title, up to this statute, usually took the form of a long lease, conditional and subject to a rental payment. This was in contrast with *erfpagd* at the Cape Colony which was similar to title as we know it today. The quitrent title granted under this statute retained the essential characteristics of quitrent through its conditionality and the payment of 15 s per annum - supra n 172 at 213 et seq.

¹⁸² Van der Post supra n 172 at 218.

¹⁸³ Van der Post supra n 172 at 218.

the few and the vast majority of Africans had to seek their fortunes in the urban areas.¹⁸⁴

Van der Post inadvertently refers to another consequence of the Act as it brought about a 'partial acceptance of the tenure and registration system'.¹⁸⁵ This partial acceptance would, through formalisation, mean that vast tracts of land, previously subject to various forms of traditional ownership, were now subject to the Glen Grey Act 25 of 1894, and therefore subject to state control as a result of the conditions of title including the 'grab back' provisions.

The statute initially applied to the Glen Grey district in the Ciskei and Transkei,¹⁸⁶ but the disingenuous nature of the statute and its sinister motives did not go unnoticed, and were extended as a model to other areas of the country.¹⁸⁷

The above analysis of land acquisition is not intended to be exhaustive. I have intentionally not addressed acquisition through superior arms and war, or what van der Merwe calls 'the superior coercive capacity' of the white man.¹⁸⁸ I have likewise not analysed laws which were promulgated to explicitly bar Africans from land ownership.¹⁸⁹ The above analysis is merely intended to place into context historical land ownership patterns which I will later argue are important in the land expropriation debate. This context will however not be complete without reference to the Natives Land Act 27 of 1913.

The Natives Land Act 27 of 1913 ('Natives Land Act')

It could be contended that apartheid based on racism was too crude a system to rise to the level of an ideology.¹⁹⁰ A look at the Natives Land Act however, displays the ingenuity of apartheid architects in constructing a huge social

¹⁸⁴ Glen Grey Act 25 of 1894 s 26.

¹⁸⁵ Van der Merwe *supra* n 159 at 676 *et seq.*

¹⁸⁶ Van der Post *supra* n 57 at 219.

¹⁸⁷ The provisions of the statute were extended to the Transkei in 1898, by Proclamation 227.

¹⁸⁸ Van der Merwe *supra* n 159 at 674.

¹⁸⁹ See Wetboek van den Oranjevrijstaat (1891) Ch 34 of 266 to 267.

¹⁹⁰ Oxford dictionary defines 'ideology' as: a system of ideas, especially one which forms the basis of economic or political theory and policy. Racism is too crude a concept to conform to the concept 'system of ideas' or rooted in an 'economic or political theory'.

experiment that can still be felt today. Zille¹⁹¹ calls the Act apartheid's 'original sin' as it reserved 87 per cent of the land exclusively for white ownership.¹⁹²

Africans could acquire land only in scheduled areas.¹⁹³ This was an act of disempowerment which caused major socio-economic hardships. In broad practical terms, it restricted African land ownership to the Homeland territories whilst creating a white urban environment. This statute formed the cornerstone of apartheid and attempted to 'raise' apartheid as a system, to the level of an ideology. A series of subsequent legislation followed the Natives Land Act and was designed to neatly dovetail with this statute to achieve the ultimate goal, namely a white South Africa. It is important that we trace this development so as to better understand the present land question.

Section 2 of the Act made provision for the establishment of a commission to investigate the further acquisition of Land.¹⁹⁴ Following the recommendations of this Commission the Native Trust and Land Act 18 of 1936 ('1936 Act') was promulgated and identified as 'released land' by the statute. The statute also established the South African Native Trust which is the predecessor of the Development Trust as it is today.¹⁹⁵ Africans could then lease or purchase land from the Trust. It is important to note that this 'released land' was restricted to land in the scheduled areas only.

The Lagden Commission Report in 1905 designed and implemented a policy that enabled the framework for the practical enforcement of the 'scheduled areas' (under the Natives Land Act) and the 'released areas' (under the 1936 Act). Van der Merwe opines that this 1905 policy was facilitated by the ultimate victory of whites over Africans in the frontier wars and illustrates how *imperium* over land was used to obtain *imperium* over people.¹⁹⁶

One cannot deal with the Natives Land Act in a legalistic and abstract way, divorced from the actual socio-economic consequences, human suffering and

¹⁹¹ H Zille *Tragic consequences of the 1913 Land Act* Moneyweb (23 January 2013).

¹⁹² Natives Land Act 27 of 1913 s 1(1) and 1(2).

¹⁹³ The Beaumont Commission was later established for this purpose.

¹⁹⁴ Van der Merwe *supra* n 159 at 679.

¹⁹⁵ Van der Post *supra* n 172 at 221 et seq.

¹⁹⁶ S Plaatje *Native life in South Africa* (2007).

mankind's capacity to inflict hardship upon fellow beings. The seminal work *Native Life in South Africa*¹⁹⁷ documents this tragedy. Solomon Plaatje, author and journalist, travelled through the Orange Free State and Transvaal by bicycle, documenting the human tragedy caused by the Natives Land Act. Plaatje explains that as they travelled, word of the new Act travelled ahead like wildfire amongst the Boers. Overnight African tenants and sharecroppers had to hand over their cattle to white farmers and become employees, his employees. Those who refused had to take their cattle and trek north from farm to farm seeking refuge. Refused the right to trek through farms, most had to stick to the roads. Cattle and children became emaciated and died. Parents had to bury their children surreptitiously on white farms at night.¹⁹⁸ Plaatje calls this Act the 'law of extermination',¹⁹⁹ for this is what the law in effect became. A case study by Plaatje would be pertinent to illustrate what he regarded as the root cause of extermination. He provides the following case study:

'One farmer met a wandering Native family in the town of Bloemhof a week before our visit. He was willing to employ the Native and many more homeless families as follows:

A monthly wage of 2 pounds 10s for each such family, the husband working in the fields, the wife in the house, with an additional 10s a month for each son, and 5s for each daughter, but on condition that the Natives' cattle were also handed over to work for him. It must be clearly understood, we are told that the Dutchman added, that occasionally the Native would have to leave his family at work on the farm, and go out with his wagon and his oxen to earn money whenever and wherever he was told to go, in order that the master may be enabled to pay the stipulated wage. The Natives were first inclined to laugh at the idea of working for a master with their families and goods and chattels, and then to have the additional pleasure of paying their own small wages, besides bringing money to pay the "baas" for employing them. ... Needless to say the natives did not see their way to agree with such a one-sided bargain. They moved up country, but only to find the next farmer offering the same terms, however, with a good many more disturbing details, and the next farmer, and the next, so that after this Native farmer had

¹⁹⁷ BM Mahlangeni 'Reflections on the impact of the Natives Land Act 1913 on local government in South Africa' Parliament Research Unit (20 May 2013).

¹⁹⁸ S Plaatje supra n 196 at 66.

¹⁹⁹ S Plaatje supra n 196 at 75.

wondered from farm to farm, occasionally getting into trouble for travelling with unknown stock, “across my ground without my permission” and at times escaping arrest for he knew not what, and further, being abused for the crimes of having a black skin and no master, he sold some of his stock along the way, beside losing many which died of cold and starvation; and after thus having lost much of his substance, he eventually worked his way back to Bloemhof with the remainder, sold them for anything they could fetch, and went to work for a digger²⁰⁰.

In the absence of alternatives, Plaatje advised that the evicted Africans travel with their cattle to Bechuanaland (now Botswana).²⁰¹ Few, if any, made it. In despair, he later advised that Africans accept the white farmers’ terms pending an appeal to the King of England.²⁰² The Act had achieved its purpose. It overnight dispossessed the African of his land, his cattle and his dignity by reducing him to the status of the white farmer’s servant.

The Act has just passed its 100th anniversary, yet its effects on many spheres of life are still currently experienced.²⁰³

The above history of deprivation and human suffering lays the basis for restitution in the Nozickan sense. This did not go unnoticed by the founders of our Constitution, as specific provision is made for restitution.²⁰⁴ What is important to explore at this stage is the question as to restitution on the one hand and the public interest on the other. It is important to this end, that the Constitutional Court develops a transformatory jurisprudential framework to prevent frustrating the restitution process. Restitution is also central to the success of de Soto’s theory so as to ensure that the economic value, aimed at mitigating poverty, can be achieved.

The Constitution and Reform

²⁰⁰ S Plaatje supra n 196 at 64 to 65.

²⁰¹ Ibid at 76.

²⁰² Another form of dispossession, which falls outside of the scope of this paper, was forced removals. Wilson & Ramphela *Uprooting Poverty* at 216 states that in the 23 years from 1960 to 1983 a total of 3.5 million people were forcibly removed and placed in areas they did not desire to go.

²⁰³ S Plaatje supra n 196 at 73.

²⁰⁴ South African Constitution Act 108 of 1996, s 25(7). Also see Land Restitution Act 22 of 1994.

The history of South African land rights as indicated above, is one of dispossession which has impacted upon present day Constitutional analysis. The extent of this dispossession and the crude racist basis upon which it was executed, has resulted in land rights in present day South Africa suffering from a credibility crisis. With the advent of negotiations leading to the 1994 democratic dispensation, there were great expectations that the new Constitution would redress the property injustices of the past. This expectation remained exactly that, an expectation.²⁰⁵ The fear that a property clause would entrench the then existing property relations, became a reality. Van der Walt in his trilogy on property theories,²⁰⁶ states that the inclusion of a property clause was a non-issue at the pre 1994 Constitutional negotiations, and that the only issue was its formulation.²⁰⁷ This eventuated in the adoption of section 28 of the interim Constitution,²⁰⁸ which later became Section 25 of the present Constitution.²⁰⁹ I will now proceed to analyse the extent to which the property clause attempts to achieve a delicate balance between existing property rights and the public interest. Section 25 of the Constitution contains the protection of property rights.²¹⁰ It is necessary to explore

²⁰⁵ It is not a given that constitutional protection for property rights be enshrined in a democratic state. Western democracies like Canada and the United Kingdom have no property clause. The world's biggest democracy, India, repealed its property clause post-independence in 1978.

²⁰⁶ Van der Walt *infra* n 309 'Rights and reforms in property theory – a review of property theories and debates in recent literature: part iii' (1995) TSAR at 520.

²⁰⁷ *Ibid* at 520.

²⁰⁸ This section came into operation on 27 April 1994.

²⁰⁹ The final Constitution 1996.

²¹⁰ Section 25 of the Constitution provides:

(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application—

(a) for a public purpose or in the public interest; and

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—

how our courts are achieving this balance between the protection of property rights in terms of this section and imperatives of restitution as required by subsection 7 of the same section.

The Constitutional court had an opportunity to reconsider its decision in the Harksen's²¹¹ case in the matter, *First National Bank v Commissioner SARS*.²¹²

The facts in this matter are that section 114 of the Customs and Excise Act 91 of 1964 were argued to be in contravention of section 25 of the Constitution. In terms of section 114, the Commissioner could attach property to secure the payment of import taxes. Included in the property so attached, were vehicles over which Wesbank had a lien of ownership, as were financed by them. It could thus be argued that the state was exercising its rights over property, not belonging to the judgement debtor, but belonging to an unrelated third party, namely Wesbank. The Cape High Court had the first opportunity to deal with this matter, and found that the affected parties (including Wesbank) were co-principal debtors and that section 114 of the Act was not unconstitutional, as it imposed a tax and did not amount to expropriation.²¹³ J Ackermann dismissed this argument on the basis that, what was of importance, was the Constitutionality of section 114 in view of section 25 of the Constitution - the property clause.

Ackermann viewed the fundamental issue as being an attempt to achieve the difficult balance between public interest and individual property rights.²¹⁴

Theunis Roux opines²¹⁵ that the FNB decision amounts to the court collapsing the six point Constitutional property clause enquiry into one, namely,

-
- (a) the current use of the property;
 - (b) the history of the acquisition and use of the property;
 - (c) the market value of the property;
 - (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
 - (e) the purpose of the expropriation.

²¹¹ *Infra* Harksen n 156.

²¹² *First National Bank of SA Limited t/a Wesbank v Commissioner South African Revenue Service* 2002 (4) SA 768 (CC).

²¹³ *Ibid* at 330A.

²¹⁴ *Ibid* at para 50.

arbitrary deprivation.²¹⁶ Whereas in Harksen, the court viewed expropriation and deprivation as separate categories with no overlap, the court in FNB adopted a completely different approach by viewing expropriation as a sub-category of deprivation. The court in fact is of the view that all expropriations are deprivations.²¹⁷ This means that it is irrelevant, when an applicant approaches the court to test the Constitutionality of an expropriation, whether the applicant seeks relief based upon deprivation or expropriation. The court will always first investigate whether a deprivation has occurred. This deprivation has to be arbitrary and the court sets out its test for arbitrary deprivation in paragraph 100 of the judgement.²¹⁸

²¹⁵ T Roux 'The arbitrary deprivation Vortex: constitutional property law after FNB' www.saifac.org.za/docs/res-papers/RPS%20NO.%2039.pdf accessed on 11 June 2012. He defines Vortex as a system, occupation, pursuit, viewed as swallowing up or engrossing those who approach it (Concise Oxford Dictionary 1982).

²¹⁶ AJ Van der Walt *An overview of developments in constitutional property law since the introduction of the property clause in 1993*. A paper read at the conference of the Bill of Rights after 7 years presented by the FW de Klerk Foundation 4 to 5 July 2003 at 60 van der Walt describes it as having 'telescoped' it into the arbitrary test.

²¹⁷ Van der Walt 'Striving for the better interpretation' SALJ (2004) vol 121 a critical reflection on the constitutional Court's Harksen and FNB decisions on the Property Clause at 854 to 867.

²¹⁸ Supra n 212 at para 100 at 810G to 811F. The test includes an enquiry into: (sufficient reasons) is to be determined by evaluating the relationship between means employed, namely the deprivation in question, and ends sought to be achieved, namely the purpose of the law in question. A complexity of relationships has to be considered. In evaluating the deprivation in question, regard must be had to the relationship between the purpose of the deprivation and the person whose property is affected. In addition regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property. Generally speaking when the property in question is ownership of land or a corporeal movable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation than in the case when the property is something different and the property right something less extensive. Generally speaking, when the deprivation question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially. Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a

This test in effect means that the closed or restrictive interpretation of section 25 by the Harksen court is replaced by an interpretation that will be different from case to case depending on the facts. A further important consequence of this decision is that if left open, the question is whether section 36 justification could be applicable to section 25.²¹⁹ The relevance of this decision is that it creates the possibility that land restitution under certain circumstances could be expedited through expropriation as the facts of each matter will determine whether such expropriation has been arbitrary or not (including the court taking into account the history of dispossession). This reflects the view of Karl Clare's notion of transformative Constitutionalism where he argues that 'a long term project of Constitutional enactment, interpretations, and enforcement committed ... to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.'²²⁰ The resultant increase in restitution will in effect accelerate the process of formalisation and it's concomitant de Sotan benefits.

In applying this analysis to the facts above, the court came to the conclusion that section 114 was invalid in so far as it allowed for the deprivation of property other than the customs debtor, that is, the deprivation of the property of an unrelated third party. The court therefore telescoped the inquiry into one salient question, namely whether sufficient reason existed for the deprivation involved.

more rational relationship between means and ends: in others this may only be established by proportionality evaluation closer to that required but as required by section 36(1) of the constitution. Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case: always bearing in mind that the inquiry is concerned with 'arbitrary' in relation to the deprivation of property under section 25.

²¹⁹ S 36 of the Constitution stipulates the following: 36. Limitation of Rights – (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including – (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.

Van der Walt argues that this is not applicable in South African law for various reasons, but mainly as the notion of the 'bundle of rights' is foreign to our Roman Dutch law, which views property rights (dominium) as indivisible. I do not necessarily agree with this view as there are common law doctrines which gives expression to the 'bundle of sticks' theory, that is, usufructs. It cannot be denied that the usufruct, depending on its extent, could potentially remove the right of use and enjoyment from the owner. Van der Walt also concedes that the Cape High Court has given a form of recognition to the 'bundle of rights' concept.²²¹ In this instance the court dealt with an expropriation claim for gravel from a private gravel pit that was expropriated for which compensation was claimed. The court had no hesitation in severing a single 'stick' from the 'bundle', namely the use of the owners land, and identifying this as a form of deprivation. It also cannot be ignored that the court in the FNB decision accepted that not all aspects of property need to be affected in order to ground a claim for deprivation including expropriation.²²² This aspect will inevitably be argued in future decisions.

The above judgement, albeit at first glance, appears to be restrictive in so far as the deprivation of a single 'stick' in the 'bundle', could foreseeably amount to deprivation. It in fact opens the door to transformative jurisprudence by recognising that 'sufficient reason' can negate the arbitrariness of deprivation. It is in this context in which the South African history of dispossession is relevant, as it can conceivably be argued that this history amounts to sufficient reason to validate a deprivation and prevent it from rising to the level of an expropriation, and consequentially, no compensation. This transformative constitutionalism will enhance the restitution process and lead to increased formalisation.

This formalisation project was taken forward by the Constitutional Court in *Agri South Africa v Minister for Minerals and Energy and Others*.²²³ In this matter the Constitutional Court further developed the concept of arbitrariness in an expropriation process and opened the door to an argument that prior dispossession of land could have a direct bearing upon whether a subsequent deprivation is

²²¹ *Du Toit v Minister of Transport* 2003 (1) SA 586 (C) at para 12.

²²² *Supra* n 212 FNB para 100 item f, 811 C to D.

²²³ *Supra* n 14 CCT 51/12 (2013) ZACC 9.

arbitrary or not. This in effect will facilitate land restitution and therefore formalisation. The dispute was based upon mineral rights which grants the holder limited real rights in land, enforceable against the world at large. These rights could be alienated by cession, mortgaged or be subject to a usufruct. More specifically, it included the right not to mine (in the form of old order rights). Sebenza Pty (Ltd) acquired a mine, incorporating the right to mine in the form of old order mineral rights. As a result of financial difficulties, Sebenza was unable to mine, and failed to convert the old order mining rights to new order mining rights in compliance with the newly promulgated Mining Petroleum Resources Development Act 28 of 2002 ('MPRDA'). The effect of the Act was to forfeit the right to mine (effectively the right not to mine) if they were not converted into new order mining rights within two years after the coming into operation of the MPRDA. Sebenza's right lapsed by operation of the MPRDA. Sebenza was also liquidated. AgriSA purchased Sebenza's claim for compensation from the liquidators. AgriSA instituted the claim for compensation against the state on the basis of an alleged expropriation, which claim was rejected.

The North Gauteng High Court²²⁴ found that Sebenza's mineral rights had been legislated out of existence and this was tantamount to deprivation. They further found that the rights had been acquired by the state and, thus the deprivation amounted to an expropriation. The Supreme Court of Appeal²²⁵ found that mineral rights has no practical value unless there is the right to mine and in consequence does not constitute property. If it does not amount to property, then the holder cannot be deprived or expropriated.

In the Constitutional Court, Mogoeng CJ characterised the issue as whether Sebenza's mineral rights, enjoyed during the subsistence of the Minerals Act 50 of 1991 (now repealed), were expropriated when the MPRDA took effect.²²⁶

Mogoeng acknowledges the position as set out in the FNB judgement, which viewed expropriation as a sub-set of deprivation. There is thus more required to establish an expropriation than a deprivation. He argued that the MPRDA as a law

²²⁴ *Agri South Africa v Minister of Minerals and Energy* 2012 (1) SA 171 (GNP).

²²⁵ *Minister for Minerals and Energy v Agri SA* 2012 (5) 1 (SCA).

²²⁶ *Supra* n 14 CCT decision at 26 at para 55.

of general application, had the effect of depriving Sebenza. What now has to be considered is whether the deprivation led to expropriation? Sebenza was deprived of the following rights:

- a. not to prospect or mine and to prevent anybody else from doing so;
- b. to preserve the option to prospect or mine later;
- c. to sell or lease the right to mine or prospect to any person of its choice.

Section 25 should be interpreted with due regard to 'the gross inequality in relation to wealth and land distribution in this country and by design the MPRDA is meant to broaden access to business opportunities in the mining industry for all, especially previously disadvantaged people'.²²⁷ Mogoeng takes a case by case approach to whether an expropriation has occurred, and argues that a fine balance needs to be struck between deprivation under the MPRDA on the one hand, and the need for job creation in growing the economy, on the other. In answering the crucial question whether the state acquired the ownership of the rights after the deprivation by the MPRDA, as required by section 25(2), Mogoeng finds this not to be the case. In this process the state acts merely as a facilitator or conduit.

The importance of this decision lies in the fact that albeit the court found that a deprivation had occurred, it did not find the deprivation to be arbitrary.²²⁸ For the first time, it would appear that the Constitutional Court, in balancing private rights with public interest took into account the present day realities in South Africa.²²⁹ It is not beyond comprehension that future litigation related to landed property could further develop these concepts. I am of the view that the 'bundle of sticks' theory would be of particular importance for restitution within the South African context. If deprivation of one or more of the 'sticks' by a law of general application was to occur, it is not beyond contemplation that a future court may find the deprivation not to be an expropriation, given the Constitutional Courts approach.

²²⁷ Supra n 14 CCT decision at 30 para 61.

²²⁸ Supra n 14 para 53 at 25.

²²⁹ Supra n 14 para 61 at 29 and 30. Mogoeng CJ argues that section 25 must be interpreted with due regard to the gross inequality in relation to wealth and land distribution in this country.

It is apparent from the above that the Constitutional Court is developing a Constitutional Transformatory Jurisprudential framework, which could facilitate the restitution framework in future and accelerate the benefits held forth by de Soto's theory.

The following chapter hones in on a specific South African example of property rights acquired in a transformative context through a case study of land restitution to the dispossessed community of the Richtersveld.

CHAPTER 4

Formalisation: The Case of the Richtersveld Land Restitution

In the previous chapter I explored the potential role of the Constitutional Court in facilitating access to land through restitution to the poor. In this chapter I explore a model of formalisation in a case where restitution has already occurred hereby applying de Soto's theory to a South African scenario. In this case study I illustrate how formalisation models can accommodate more than one property rights theory. The 'bundle of rights' theory is illustrated in this study in the form of common property, whilst exclusivity is central in other aspects. This accords with Gregory's view of the *allemanrätt*, where the 'bundle of sticks' is assembled to reflect the requirements of a specific formalisation project. I argue that true economic value in the de Soto sense can only be achieved if one of the 'sticks' in the 'bundle of rights' transferred to a community includes the right to support and capacity building. As will be apparent from this study, the omission of this 'stick' has serious consequences for the viability of formalisation and could in itself lead to title reversal.

In this South African case study, I was appointed as the Receiver of the Richtersveld Communal Property Association ('CPA'), by the Northern Cape High Court²³⁰ on 28 February 2011.

The Richtersveld claim was initially formulated as a land claim in terms of section 2(1)²³¹ of the Restitution Act. The Land Claims Court rejected this claim as it did not have the jurisdiction to decide whether the 1847 annexation was a dispossession as contemplated by the statute.²³² The Supreme Court of Appeal ('SCA') reversed this decision, holding that the Richtersveld community had a customary law interest (aboriginal title) in the land which was not extinguished by

²³⁰ *The Richtersveld Sida !Hub Gemeenskaplike Eiendomsvereniging and 11 Others and Johannes A Rossouw v Edwin Clifford Farmer and 7 Others and Richtersveld Communal Property Association and 11 Others, unreported Case No. 1822/10 (NC).*

²³¹ This section requires that the claimant must be a person or a community who had been dispossessed of a 'right in land, and this dispossession must have taken place after 19 June 1913 in furtherance of a racially discriminatory law or practice'.

²³² H Mostert & P Fitzpatrick 'Living in the margins of history on the edge of the country – legal foundation and the Richtersveld Communities' title to land' (2004) (Part 1) TSAR 2 at 308.

the 1847 annexation. This included the minerals and precious stones.²³³ In its argument, the SCA linked the original annexation to the systematic expulsion of the people from the land as mining activities spread, a process that the court found went beyond 1913, placing the Richtersveld squarely within the framework of the Restitution Act.²³⁴

The Constitutional Court upheld the SCA decision²³⁵. In so doing, the Court found that the Richtersveld community had a right to ownership in the land under indigenous law.²³⁶ This ownership in the land included minerals and precious stone. The court found that there was nothing in the proclamation that annexed the land in favour of the British, which could lead to the conclusion that the rights of the Richtersveld community were extinguished thereby. It therefore followed that, as at 19 June 1913, the Richtersveld community was still the owner of the land, minerals and precious stone. Post 1913, the court found that the Precious Stones Act 73 of 1964²³⁷ and its proclamations, which dispossessed the Indigenous Law Ownership of the Richtersveld community and excluded the community from both the land and its rights to exploit its mineral wealth, was in fact a discriminatory dispossession for the purposes of section 2(1) of the Restitution Act.²³⁸

²³³ Ibid at 312.

²³⁴ Ibid at 312.

²³⁵ *Alexkor Ltd v Richtersveld Community (2003) (12) BCLR 1301 (CC)*.

²³⁶ Ibid at para 62.

²³⁷ Precious Stones Act 73 of 1964.

²³⁸ Ibid at para 92.

The Richtersveld Restitution Process – a Formalisation Model

The Richtersveld is in the semi-arid region of South Africa, and mainly occupied by the Nama people, who are descendants from the Khoi Khoi. Diamonds were discovered in 1925, which had a direct impact upon the lives of the local people. As the Government of the day awarded licences to mine the diamonds, the local indigenous community were shifted into restricted and designated pockets of land.²³⁹ It all came to a head when in 1957 a fence was constructed around the mining land, permanently barring the indigenous people from access.²⁴⁰ This culminated in complete exclusion over the period 1989 to 1994 when the land upon which mining activities were being exercised, was transferred to Alexkor, a state owned entity.²⁴¹

This was the culmination of a long process of dispossession, which in effect started in 1909 when the Communal Reserves Act 29 of 1909 was legislated and in effect gave the state administrative control over the area.²⁴²

In 1996 the new democratic government promulgated the Communal Property Associations Act 28 of 1996 (the CPA Act'), to enable the community to form juristic persons, known as Communal Property Associations. These associations were empowered to hold and manage property on behalf of the community. This enabled communal titling.

In addition, in 1998 the Transformation of Certain Rural Areas Act 94 of 1998 ('TRANCRAA') was promulgated. Its stated purpose is to transfer land in 23 rural areas to residents or accountable local institutions. These two statutes form the basis of the model upon which the Richtersveld structure was developed.

It is significant to note that the community was afforded an opportunity to elect whether the land should be held by the Municipality, by the individual

²³⁹ See *Richtersveld Community v Alexkor Limited and Another (2001) (3) SA 1293 LCC at 28 to 29.*

²⁴⁰ S Patterson 'Casenote: The foundations of aboriginal title in South Africa? The Richtersveld Community v Alexkor Limited Decisions' (2004) 5 (30) *Indigenous Law Bulletin* 17.

²⁴¹ *Ibid* at 2.

²⁴² P Wisborg and R Rohde '*Contested land tenure reform in South Africa: The Namaqualand experience*' (2004) School of Government University of the Western Cape.

privatisation of commons or by the CPA, in a referendum conducted during December 2002 to January 2003. In the Richtersveld, 94 per cent of the voters chose Communal Property Associations, with 0 per cent support for privatisation.²⁴³

On 22 April 2007 a deed of Settlement was concluded between the Richtersveld Sida !Hub Communal Property Association²⁴⁴, Alexkor and the Government of the Republic of South Africa²⁴⁵ (the 'Parties'), in terms of which the parties agreed to a settlement which was made an order of Court on 09 October 2007 (the 'Order')²⁴⁶.

In terms of the Order, the CPA was required to establish an agreed corporate structure (as amended in the Order)²⁴⁷, the entities of which had to comply with section 35(3) of the Restitution Act, read in conjunction with the CPA

²⁴³ Ibid at 8.

²⁴⁴ The CPA is a duly authorised statutory body, established in terms of the Communal Property Association Act 28 of 1996, specifically for purposes of receiving the property awarded by the Land Claims Court, pursuant to a restitution court order instituted under the Restitution of Land Rights Act 22 of 1994, discussed more fully below. Supra s 2.

²⁴⁵ This settlement was concluded pursuant to the Land Claims Court under Case Number: LCC 151/1998 finding that the Richtersveld Community constituted a Community or a part of a community dispossessed of a right in land after 19 June 1913 based on past racially discriminatory laws or practices, as defined and required in s 2(1) of the Restitution of Land Act 22 of 1994. See also *Richtersveld Community and Others v Alexkor Ltd and Another* LCC 151/98 2001 (3) SA 1293.

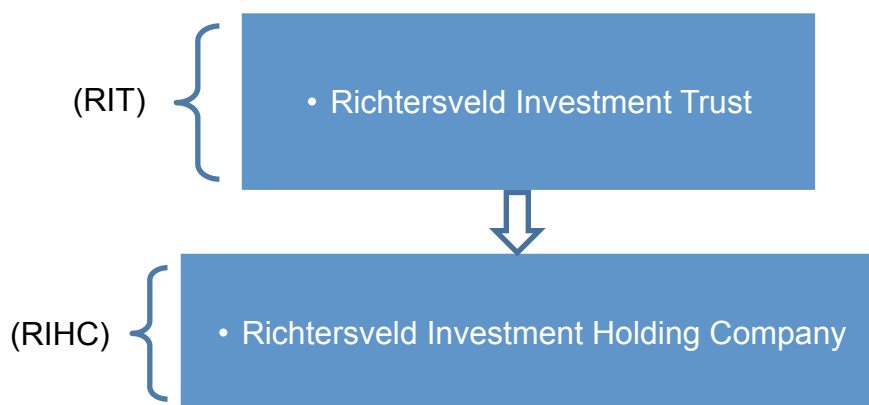
²⁴⁶ This Deed of Settlement was made an order of the Land Claims Court of South Africa (Held at Cape Town) on 09 October 2007 in Case No. LCC 151/1998 (the 'Order'). The parties to the Agreement were the Richtersveld Community as Plaintiff; Alexkor Limited as first Defendant, and the Government of the Republic of South Africa, as second Defendant.

²⁴⁷ In terms of the Order, the corporate structure to be established, consisted of the following entities: Devco (Pty) Ltd – to be known as Richtersveld Self-Development Company (Pty) Ltd (Devco); Investment Holding Company (Pty) Ltd (Investment Holding Co) – to be known as the Richtersveld Investment Holding Company (Pty) Ltd; Richtersveld Community Trust IT315/2007; Richtersveld Investment Trust IT314/2007; Agricultural Holding Company (Pty) Ltd (Agricultural Company) - to be known as Richtersveld Agricultural Holding Company (Pty) Ltd; Property Holding Company (Pty) Ltd (Property Holding Co) - to be known as Richtersveld Property Holding Company (Pty) Ltd; Richtersveld Mining Company (Pty) Ltd. (RMC) - to be known as Richtersveld Mining Company (Pty) Ltd; and Richtersveld Sida !Hub Communal Property Association (CPA); (Supra 4 to 8 of the Order, read in conjunction with annexure 'A' of the Deed of Settlement).

Act.²⁴⁸ Consequently, the CPA²⁴⁹ and the Property Holding Company²⁵⁰ received land respectively; the Richtersveld Mining Company received the converted new order mining right,²⁵¹ monetary compensation was paid to the Richtersveld Property Company (R45 million) and the Investment Holding Company (R190 million plus R50 million)²⁵², and agricultural and mariculture assets transferred to the Richtersveld Agricultural company (including its subsidiaries). Alexkor was also ordered to develop the town of Alexander Bay, including exclusive and individual title.

The following diagrams illustrate the corporate structure, owned and controlled by the CPA:

Diagram 1:



²⁴⁸ The Communal Property Associations Act prescribes the manner in which the CPA acquire, holds and manages property on behalf of communities - the ownership, management and control of communal property.

²⁴⁹ The Communal Property Association received the township of Alexander Bay; the designated harbour; the HMS Marine Plant; the designated airport land, together with a further seventeen portions of land, including several farms. Supra n 246 Annexure 'B' of the Order.

²⁵⁰ Several erven including sports and recreational facilities, business, filling stations, crèches and places of assembly, a hall, fire station and houses were transferred in terms of annexure 'G' of the Order. Alexkor shall transfer certain of the identified properties subject to Alexkor having the right of occupation to those properties for a period of ten years, against payment of the sum of R45 million to the Property Holding Company on the date of transfer. Supra n 246 clause 5.7 at 11 to 12 of the Order.

²⁵¹ Supra n 246 para 5.12 at 13.

²⁵² Supra n 246 para 5.13 at 13.

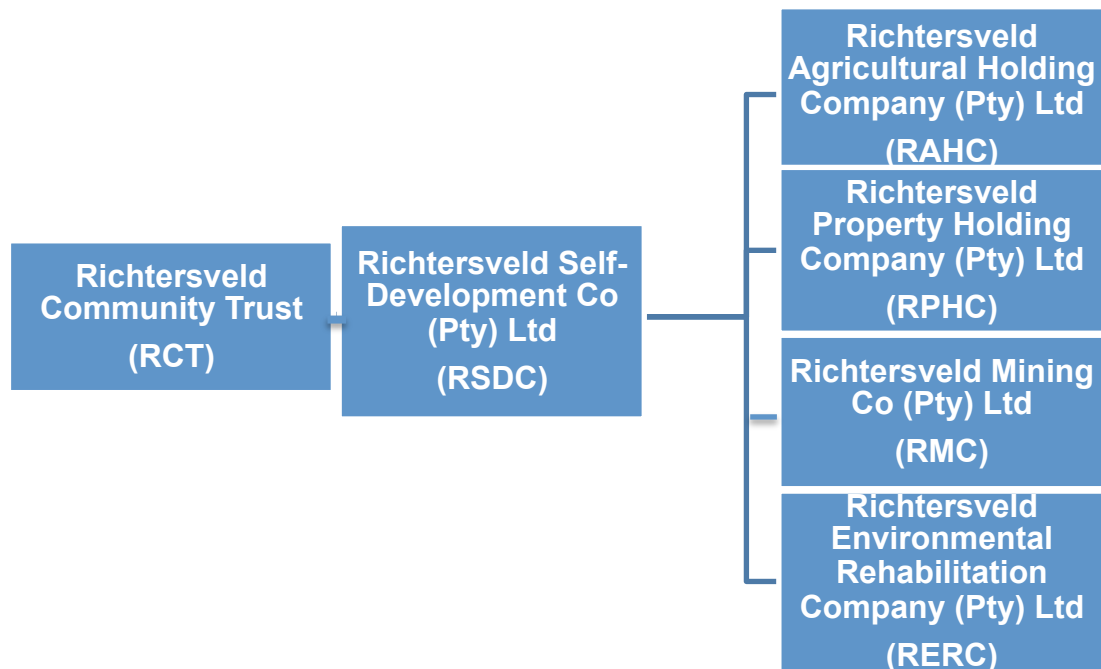
The RIT owns 100 per cent of the shares in the RIHC. There are a total of nine trustees appointed to administer the RIT. A total of four community trustees are appointed, one from each of the four beneficiary Towns, Kubus, Eksteenfontein, Sandrift and Lekkersing. One Trustee is nominated by the Minister of Finance, one by the Minister of Agriculture and Land Affairs, and three independent trustees nominated by the CPA committee. The chairperson is elected from one of the independent trustees.

The RIT's income is distributed in terms of the CPA's distribution policy – educational programs; entrepreneurship and social development for the CPA members.

The RIHC received payments of R50 million for the recapitalisation of the agricultural and Maricultural properties, together with developments for the benefit of the CPA members; R190 million to be invested in terms of the investment policy, to be grown and provide an income for the RIT, and R45 million in respect of a ten year rental / occupation right payment, for Alexkor occupying and using the designated properties acquired by the CPA in terms of the court order.²⁵³

There are eight directors serving on the board of the RIHC, consisting of four directors from the beneficiary community that is one from each of the aforesaid four towns, three independent directors who are nominated by the trustees of the RIT, and one director nominated by the Minister of Finance.

²⁵³ E Mohoebi 'Department of Rural Development and Land Reform Statement' (19 March 2012), available at <http://www.info.gov.za/speech/DynamicAction?pageid=461&tid=61055> accessed on 2 September 2013.

Diagram 2:

The RCT owns 100 per cent of the shares in the RSDC, and is obliged to distribute its income to the CPA members.

The amount of the distribution and benefits received and enjoyed by the members are directly related to the success and profitability of RSDC's subsidiaries - RAHC; RPHC; RMC and RERC, in which RSDC owns 100 per cent of the shares. There are seven trustees appointed, four community trustees appointed from and representing each of the aforesaid four towns, and three independent trustees nominated by the CPA committee.

The RSDC has a board consisting of 11 directors, four directors from the community, nominating and representing each of the four towns, four directors nominated by each of the RSDC's four subsidiaries and three independent directors nominated by the trustees of the RCT.

Each of the four subsidiaries (RAHC, RPHC, RMC and RERC) have boards consisting of six directors, four are nominated and represent each of the four towns, and two independent directors are nominated by the holding company, RSDC.

More than 50 directors (excluding the CPA committee) are required to serve on the respective boards of the aforesaid structures.²⁵⁴

The CPA Act²⁵⁵ enables communities to establish associations called communal property associations, for purposes of acquiring, holding and managing property on the basis as agreed on by members of a community in terms of a written Constitution. The CPA Act is specifically applicable to an order granted by the Land Claims Court, in instances where a community is entitled to restitution under the Restitution Act²⁵⁶, and where the order is conditional upon the establishment of a CPA.²⁵⁷ The Richtersveld Communal Property Association (the 'RCPA') was duly established in terms of section 8 of the CPA Act.

The RCPA is therefore a juristic person, with capacity to acquire rights and obligations in its own name in accordance with its Constitution²⁵⁸. The RCPA was therefore established in compliance with and as required by section 2 of the RCPA Act, for purposes of exercising communal ownership and control over the communal property rights, as ordered by the Land Claims Court. Committee members serving on the RCPA owe a fiduciary duty to the members of the association²⁵⁹ (the Richtersveld beneficiary community). Communal ownership and titling is authorised and enabled by the RCPA Act.²⁶⁰ The RCPA is precluded from disposing, encumbering or concluding any prescribed transaction in respect of the whole or any part of the RCPA's immovable property (or any real right in respect thereof), without the consent of the majority of members present at a general meeting of members.²⁶¹

²⁵⁴ Ibid at para 11.

²⁵⁵ Communal Property Associations Act 28 of 1996.

²⁵⁶ Restitution of Land Right Act 22 of 1994.

²⁵⁷ Ibid s 2.

²⁵⁸ Ibid s 6. The Constitution of the CPA was adopted and approved, pursuant to it complying with the prescripts of s 8(2)(d) read in conjunction with the Schedule to the CPA Act.

²⁵⁹ Ibid s 7.

²⁶⁰ Ibid the Preamble to the Act.

²⁶¹ Ibid s 12(1).

The Land Court specifically noted in the Court Order,²⁶² that it was satisfied that the corporate structure entities (read with their respective trust deeds; Constitutions and memoranda and articles of association [now memoranda of incorporation]), complies with section 35(3) of the Restitution Act, read in conjunction with the CPA Act.

The RCPA was ordered to prepare a register of RCPA members in accordance with the RCPA Constitution, within six months as from 9 October 2007, being the date of the order. This register constitutes the record of RCPA members and beneficiaries of the assets. This register is required to be audited, tabled, considered and approved at the general meetings of the RCPA, provide copies of the approved register to the trustees of the Richtersveld Investment Trust and Richtersveld Community Trust, prior to distributions being made to beneficiaries²⁶³.

This case illustrates a unique form of communal titling, as the titling is in effect held through statutory corporatisation. This was unprecedented at the time within the South African context, and most certainly within the broader African context. The model also provides for individual titling. Alexkor was ordered to transfer a number of residential properties to the Property Holding Company, after the establishment of the formal township of Alexander Bay, and once the properties have become transferable in terms of the Deeds Registries Act 47 of 1937.²⁶⁴

Alexkor, the state, the provincial government of the Northern Cape were all ordered to transfer designated land, amongst others, to the RCPA and its entities, for and on behalf of the community.

It was specifically ordered that the transfer of the land together with all the relevant servitudes, all the conveyancing work required for the establishment of a township (in terms of the Order), including the opening of the township register, and the consolidation of specific land identified in the Order on which the township of Alexander Bay was to be established, the subdivision of the designated land for the harbour, the border post and airport were ordered to be done by the state

²⁶² Supra n 246 at 8 to 9 at para 2.13.

²⁶³ Supra n 246 at 26 at para 13.

²⁶⁴ Supra n 246 at 11 to 12 at para 5.7.

attorney at the cost of the state.²⁶⁵ The effect of this order was to shift the transactional costs from the beneficiary community to the state, and by so doing, improve the viability and enhance the formalisation of the project. Excessive transaction costs were one of the shortcomings in the Kenyan experiment which led to reverse titling.

The parties agreed and were consequently ordered to establish a formal township called Alexander Bay, at the cost of the state through Alexkor, by subdividing designated land, and consolidating it into a new cadastral unit for this purpose.²⁶⁶

Alexkor was also ordered to transfer several properties to various social institutions and government authorities and bodies, to normalise social and governmental structures within the township of Alexander Bay.²⁶⁷

The Community acquired 49 per cent of the mining rights owned by Alexkor, and the relevant parties were ordered to establish a joint venture to operate the mining activities,²⁶⁸ and all diamonds mined from the land and recovered from offshore operations were to be jointly owned by the community through the Mining Company and Alexkor in the joint venture.²⁶⁹ In addition Alexkor had to capitalise the mining operations to a maximum of R200 million, to be paid to the joint operations of the joint venture.²⁷⁰

²⁶⁵ Supra n 246 at 15 of the Order at para 6.4.

²⁶⁶ Supra n 246 at 16 at para 7.1. Alexkor is a State Owned Mining Company.

²⁶⁷ Supra n 246 at 7.5 at para at 17 to 18 of the Order. For example, the public streets and public places to be transferred to the Richtersveld Local Municipality – all land required for Municipal purposes; land required for schools to be transferred to the Northern Cape Department of Education; property upon which churches are situated will be transferred to the relevant church institutions, and property upon which building or houses are situated being utilised by Government departments, to be transferred to the relevant government departments. Op cit para 7.5.1 to 7.5.5.

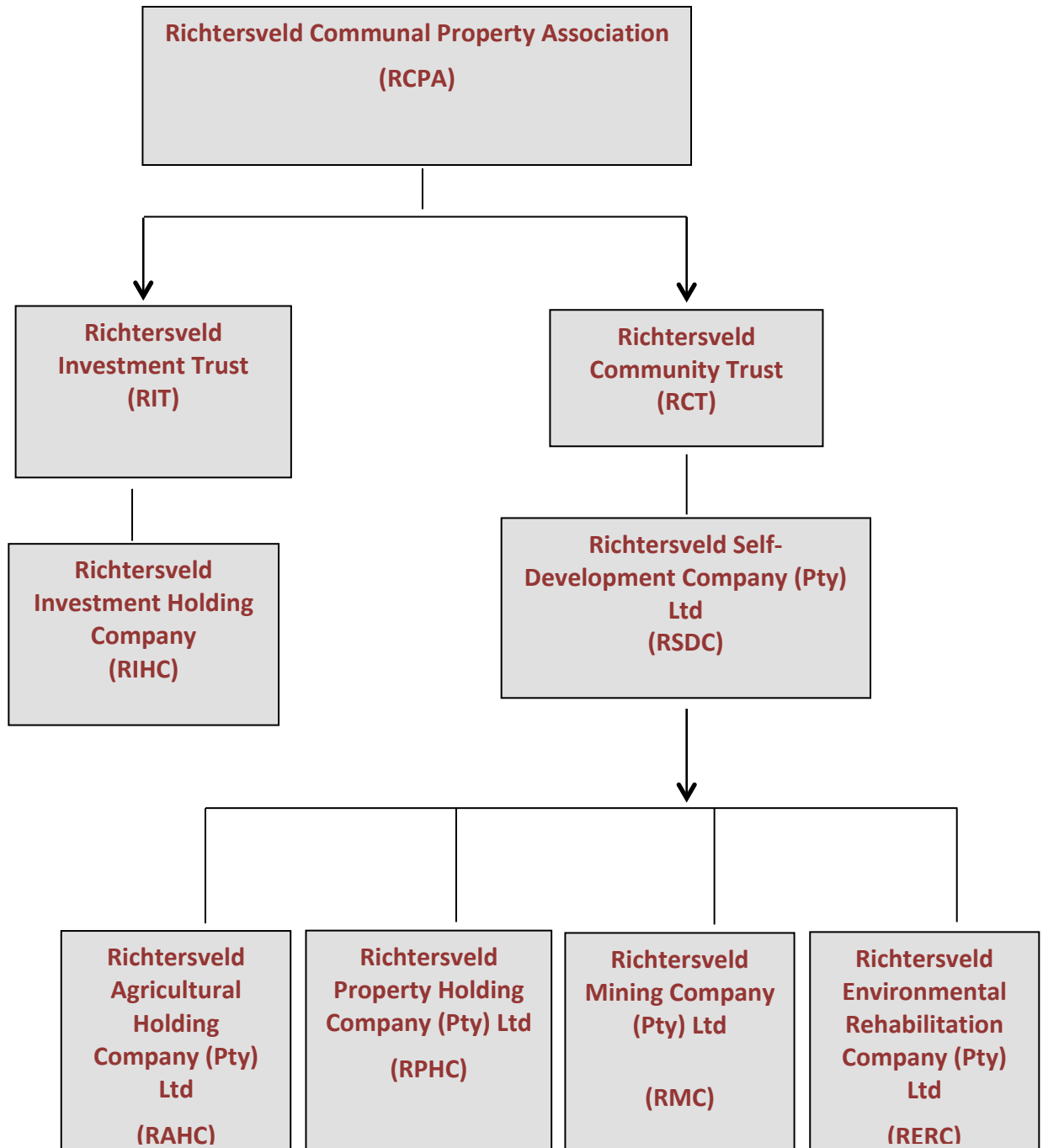
²⁶⁸ Alexkor owned mining rights in terms of mining authorisation ML33/93, granted by the Minister of Minerals and Energy in terms of s 9 of the Minerals Act 50 of 1991. Alexkor held the common law rights to precious stones under Certificate of Mineral Rights K365/95 which, at the time, had to be converted from old order rights to a mining right in terms of the MPRDA. Supra n 246 at 26 and 27 of the Order at para 8.2.

²⁶⁹ Supra n 246 at para 8.3.6 of the Order.

²⁷⁰ Supra n 246 at para 8.3.14 of the Order.

The Challenges Experienced in the Model

The Diagram below depicts the holistic organogram applicable to the RCPA.



The model imploded for a variety of reasons, and this included inefficiencies in the management of the RCPA membership list; management and governance challenges; the lack of pro-active consistent communication, consultation and on-

going engagement in a transparent and empowering manner with the RCPA membership; non-viable and unsustainable agricultural endeavours and mining endeavours with the mining activities being barely profitable, and the agricultural activities *de facto* insolvent. The reasons for this can be identified as the following:

- The beneficiaries were expected to operate in a complex structural and regulatory framework.
- It is common cause that the Beneficiary community is one plagued by literacy and poverty challenges.
- The corporate structure consists of complex structures as described in the diagram above.
- Each structure requires the exercise of fiduciary duties; business and commercial acumen, a thorough understanding of its regulatory environment applicable to the relevant sector of operation; governance imperatives, the Companies Act 71 of 2008 (as amended), the Trust Property Control Act 57 of 1988 as amended, and many more.
- The optimal value of the commercial activities are only realised through the exercise of prudent, efficient and well informed decisions being made, based on expert advice, as may be required. The community representatives serving in the relevant structures needed to be supported, trained and empowered to act prudently, efficiently and with business acumen in these leadership capacities.²⁷¹
- The beneficiaries (the Communal Rights Holders) have huge expectations with regard to receiving benefits flowing from the significant multi-million rands worth of assets owned and controlled by the RCPA. The management of these expectations and demystification of the structures and decision making processes are key in realising the success of the model. The structure and entities must function and operate efficiently and profitably to unlock and achieve the optimal realisation of the value of the assets.

²⁷¹ Wisborg and Rohde supra n 242 at 21. They argue that any improvement in tenure rights will always be vulnerable if such improvement is isolated from training, finance and integrated development initiatives.

- An on-going process of empowerment, educational support and capacity building was found to be lacking in this instance.
- In the absence of the above essential aspect, the program was bound to fail.
- The complexities of the structure were clearly determined by the value of the property and the need to ring-fence and de-risk the assets as a whole, taking into account the tax efficiencies required. The structure is therefore complex but necessary in the circumstances.
- In addition to the complexity of the corporate structure, the legislative regulatory framework is equally complex and requires on-going and consistent evaluation, interpretation, compliance and application.
- As was the experience in the Niger project, it failed to take into account the need to internalise the project, orientate the public (the Richtersveld beneficiary community in this instance) to its application and value, and lacked the administrative ability and capacity to efficiently manage the system.²⁷²
- Central to the operations of this beneficiary system, is the maintenance of a beneficiary register. The register records two categories of beneficiaries categorised as 'A' and 'B' list beneficiaries. The 'A' list consists of the initial beneficiaries, as required in the Land Claims Court Order.²⁷³
- The integrity of this material process remained one of the key factors for the successful functioning of the RCPA. World class register maintenance processors, practices and technical sophistication must be procured for this purpose. This procurement could be easily achieved at no cost to the community.²⁷⁴

²⁷² Benjaminsen supra n 27 at 7.

²⁷³ Supra n 246 at 26 to 27 at para 13.

²⁷⁴ The cost of this technical world-class sophistication can be procured by the CPA lobbying the Minister of Trade and Industry to consider this aspect when negotiating and approving 'equity equivalent' programs with multi-nationals investing in South Africa, in compliance with the Codes of Good Practice (Code 600, Statement 600 together with Code 700, Statement 700) approved in terms of the

- The beneficiary list had to be maintained efficiently, transparently and in an accountable way so as to ensure that the integrity of the process is not only sustained, but enhanced.²⁷⁵
- The need to communicate consistently and in a consultative and empowering way remains essential, consistently demystifying the complex structures. This should have been seen as part of the transformation costs (or transaction costs), to ensure that the transformation and empowerment through, amongst others, property rights generally and titling specifically, enjoyed a measure of restitution with transformative success.

What is common to all of the above reasons is what is referred to earlier as one of the most important ‘sticks’ in the ownership ‘bundle’, namely empowerment through training, support and capacity building. In the absence of this, the community was left adrift and the realisation of economic value becomes improbable.

Pursuant to the appointment of the writer, as Receiver of the RCPA in 2011,²⁷⁶ the Department of Rural Development and Land Reform (the ‘Department’) appointed a mediator who is supporting and assisting the RCPA. The Department has also increased its resources committed to the RCPA through its Recapitalisation and Development Program, ‘to ensure that they enjoy the fruits of the Land Reform program’.²⁷⁷ The Department recognises that the RCPA restitution process has achieved an unprecedented financial, property and mining rights portfolio for the affected Richtersveld community, and the need to manage and develop the

Broad Based Black Economic Empowerment Act 53 of 2003. National and Multi-national companies could also be approached for assistance and support through their Social Investment Responsibility projects and initiatives. The CPA may want to consider establishing an entity for Public Benefit Organisation (‘PBO’) status, and registering it as such. This will be a further incentive for companies to contribute towards the funding of the technical requirements identified, and other desperately needed and required initiatives of the CPA.

²⁷⁵ Wisborg and Rohde supra n 242 at 21.

²⁷⁶ The period of appointment as Receiver was from 25 February 2011 to 30 June 2011.

²⁷⁷ E Mohoebi supra n 253 at para 1.

leadership of the RCPA; the Trusts and companies.²⁷⁸ The business acumen, management skill and visionary leadership requirements are enormous. In addition, and equally important, is the requirement for the RCPA to have the ability and skill to mediate disputes and manage the portfolio in a transparent, accountable and consultative manner to achieve empowerment, demystification and participation by the RCPA members.

It is however important that the best professionals with the requisite skills are appointed to ensure that the initiative succeeds and empowerment through training is achieved.

Robbins opines that relationships are directly affected by any change in property holding.²⁷⁹ It could be argued that the Richtersveld model was indeed a model that caused a change in property holding as a dispossessed people were empowered through restitution, but in a different form of property holding. The factors that have to be taken into account, Robbins argues, includes whether the model disturbs existing traditional systems, whether individualised title to formerly common land infringes existing use right, whether it infringes entrenched gender based property relations, and similar factors.²⁸⁰ Viewing the consequent implosion of the Richtersveld model, I would agree that this model appears to display practically all the *sequelae* listed by Robbins, to wit:

How will social relations be effected by a shift in a form of property holding? Will it create conflict between groups, will it reduce the capacity for a social group to cooperate even economically, and will it favour some individuals over others, are just some of the questions for which we should have answers. There is considerable evidence that shifting from customary and kinship based forms of ownership to one based on market models, can have significant effects not only on property distribution but on social relationships and such practices as generosity and even claims to kinship.²⁸¹

The consequences of formalisation were missed by the architects of the Richtersveld model. Returning to de Soto, there is a marked difference between the house as an object, and the title to that house. If one concentrates on the house

²⁷⁸ E Mohoebi supra n 253 at para 4.

²⁷⁹ Robbins n 76 at 186.

²⁸⁰ Robbins supra n 76 at 187.

²⁸¹ Robbins supra n 76 at 186.

itself, one never quite moves past materiality. If one concentrates on the title however, one 'enter[s] the conceptual universe' and in this universe is where capital lives. By concentrating on the title, one begins to see the economic potential. It is this, he argues, that forms the basis of the theory that it is title that turns dead capital into live capital.²⁸² In the Richtersveld model, it was important that the community understood the complexities involved in the concept of 'title' as applied in this model, so that they could conceptualise this economic potential.

Karol Boudreaux opines that this view by de Soto caused renewed titling efforts in Africa, including in South Africa²⁸³, as the following chapter dealing with titling in the urban context illustrates.

²⁸² De Soto supra n 24 at 50.

²⁸³ Boudreaux supra n 18.

CHAPTER 5

The Formalisation of Individual Title in the Urban Context

Titling is one step closer to the achievement of a measure of equality and economic empowerment.

The urban context can be viewed as a separate but not necessarily a less challenging environment to apply titling as a means of addressing poverty. The urban environment can generally be divided into three distinct sectors. The first being the formally 'coloured'²⁸⁴ townships where houses were owned by the local authority and rented to the occupants without any security of tenure as there was a marked absence of lease agreements and tenants could be evicted at the whim of the local authority. Empirical observation illustrates that the mass titling of these properties post 1994 was generally a success as many of these properties have been improved and there is no evidence of reverse titling. The property improvements observed are indications that titling has opened the door to accessing credit in the form of mortgage. In these areas however, mass housing in the form of flats (apartment buildings) tell a different story. Blocks of flats, having been titled, have fallen into disrepair, levy payments have all but ceased and trustee bodies have imploded. The reason for this is obvious, and can be equated with the implosion of the Richtersveld and Niger models.

The lessons learnt from the Richtersveld case study are also relevant and applicable to the urban context. Formalisation must take cognisance of the need for on-going training, support and capacity building is paramount, and should be included as one of the most important 'sticks' in the 'bundle of rights'. Similarly, the need to build social cohesion, skills, mechanisms and capacity to formulate and develop problem solving methodologies within the context of the rule of law; unlock and access resources; guide and support beneficiaries in becoming participants in the real economy with the ability to responsibly leverage or even commercialise the property asset.

Sectional Title for example, is a sophisticated and complex model of formalisation, regulated by a legally complex statute.²⁸⁵ In addition, the concept of

²⁸⁴ I use this racial classification solely for the purpose of illustrating an apartheid reality.

²⁸⁵ Sectional Title Act 95 of 1986.

sectional title was completely foreign to the inhabitants of these townships. Whereas sectional title formalisation models in the more advantaged areas are supported by private property management companies, those in the townships were left to fend for themselves without a support system or education. In the rush to title, a crucial element, namely consultation was ignored. Bruce²⁸⁶ argues that excellent models for consultation exists, the most documented being the Tanzanian model. This process is crucial in obtaining public acceptance and education of the intended reform.

A second reason for the failure of formalisation which one can identify with reference to Bledsoe²⁸⁷ is that there was a complete lack of monitoring and evaluation of the titling project. This monitoring, he argues, must include how these new rights are used and more especially, their impact on the lives of the poor.²⁸⁸ This was patently lacking in the formalisation of the 'coloured' townships.

The second section into which the urban environment can be divided is the black²⁸⁹ townships. I have dealt with this separately as the apartheid regime legislated differing occupation rights for the black townships from that of 'coloured'²⁹⁰ townships. The black townships received 'ownership' in the form of 99 year leasehold rights. At first glance this may appear to provide greater security to the Black occupant than that afforded to the 'coloured' occupant. But this was all 'smoke and mirrors' as these leases were never registered. Boudreaux²⁹¹ argues that in 1986 the then government attempted to convert leasehold into freehold but this process experienced various problems and never took off. The first transfers of title were only effected after the 1994 election of the democratic government.

²⁸⁶ J Bruce *et al* 'Land and Business Formalization for Legal Empowerment of the poor: strategic overview paper' ARD INC for USAID at 26.

²⁸⁷ D Bledsoe *et al* *Using land titling on registration to alleviate poverty* (2006).

²⁸⁸ Bruce *supra* n 286 at 27.

²⁸⁹ I also use the term 'black' guardedly as the apartheid state viewed the concept 'black' as a development from 'native' to 'bantú' to 'plural' to 'black' as progressive.

²⁹⁰ The use of this apartheid terminology is purely for categorisation purposes, but does not imply acceptance of such designations.

²⁹¹ K Boudreaux 'The effects of property titling in Langa township, South Africa' (May 2006) Mercatus Policy Series, Policy Comment No. 4.

Langa is the oldest²⁹² township in Cape Town and is situated on the Cape Flats, southeast of Cape Town. Boudreaux opines that with the change in legal rights through titling came a visible improvement in the titled properties.²⁹³ Owners extended their properties, installed new windows and upgraded interiors. This in turn had a knock on effect on the township economy, both through increased employment of local trade's persons and a boom in the hardware sector.²⁹⁴ This consequence of titling is not unique to Langa and has been observed in many other jurisdictions. Bruce *et al* quotes a study by Deininger and Chamorrow (2004) which found a link between the registration of title and increase land values.²⁹⁵ There are however many other studies who do not find this link. Bruce thus suggests that you cannot assume economic improvement and that intensive initial research must be done prior to the implementation of formalisation.²⁹⁶ He argues that formalisation in urban and peri-urban areas are more likely to succeed as the land is more valuable and markets already exists.²⁹⁷ This is not necessarily the case in the rural areas.

Boudreaux makes the interesting observation that few Langa homeowners use their title deeds as collateral for loans. There are many reasons for this, including the high unemployment rate²⁹⁸ which disqualifies many owners from obtaining a bank loan. Even in circumstances where the owner would ordinarily qualify for a loan, she would invariably have the extended family living on the property, and a loan repayment default would place the whole extended family at risk.²⁹⁹ The Deininger study quoted by Bruce made similar findings as well as the study by Feder and Nishio (1996).³⁰⁰ The latter study also refers to the advantage of urban land and markets.

²⁹² Langa was established immediately after the First World War.

²⁹³ Boudreaux *supra* n 18.

²⁹⁴ Boudreaux *supra* n 291 at 27.

²⁹⁵ Bruce *supra* n 286 at 28.

²⁹⁶ Bruce *supra* n 286 at 29.

²⁹⁷ Bruce *supra* n 286 at 29.

²⁹⁸ Official statistics places this at 25 per cent, but is more than likely considerably higher.

²⁹⁹ Boudreaux *supra* n 291 at 28.

³⁰⁰ Bruce *supra* n 286 at 28.

Boudreaux further observes that a strong property market has developed in Langa, but that the sales are often informal and concluded on the basis of an affidavit.³⁰¹ This is the problem of reverse titling identified earlier in this Chapter with reference to Kenya. A similar phenomenon has been observed in other jurisdictions such as Uganda and Cambodia where owners have failed to register transfer transactions through both sales and successions.³⁰² This is a disquieting factor as it nullifies the substantial state resources employed to implement the formalisation model, causing Bruce to suggest that there should be a move away from 'mass or systematic' titling and towards a system where titling is effected only in circumstances when an individual actually applied.³⁰³

Boudreaux lays the reason for reverse titling solely at the door of transferring attorneys (conveyancers),³⁰⁴ where high attorney fees lead to informal transfers occurring. This is another example of reverse titling, as the transaction costs in the form of attorney's fees, results in owners selling their properties without effecting the necessary registration of the transaction in the Deeds Office. In addition, transfer can only be effected once outstanding municipal charges are cleared. This exacerbates the problem. This problem is however not unique to Langa. Bruce refers to the situation in the Honduras where 86 per cent of property was held extra-legally. The Honduran government legislated to rationalise the chaotic property system and implement a system of titling, through establishing a new entity called 'Property Institute'. This institute was to handle all property transactions. This model found favour with a broad spectrum of civil society and was passed unanimously by the National Congress. The only objections to this system came from lawyers as the model greatly limited the role of notaries (their equivalent of our conveyancers).³⁰⁵

³⁰¹ Bruce supra n 286 at 28.

³⁰² Bruce supra n 286 at 31.

³⁰³ Bruce supra n 286 at 31.

³⁰⁴ Boudreaux supra n 291 at 29.

³⁰⁵ Bruce supra n 286 at 22 to 23.

Careful thought will have to be given to the causes of reverse titling. Creating a parallel cadastre³⁰⁶ system is in my view not the solution. Any parallel system would be viewed as 'inferior' and not granting the same indefeasibility of title³⁰⁷ as that afforded by the mainstream registration system. Reduced security of tenure would invariably defeat the purpose of the exercise. Government support for an agency or institute to transact on behalf of the owner would however go a long way to reducing the transaction costs.

Notwithstanding the problems associated with formalisation, Boudreaux opines that the Langa experiment has turned dead capital, in the de Sotán sense, into live capital, since the value of the asset has increased. He opines:

By giving residents additional 'sticks' in the 'bundle' of property rights, the government has created incentives for owners to invest in, maintain and improve property. The South African government's policy of transferring title from the public sector to private individuals has been an important step on the road towards formalisation and improved economic development, but this policy has carried South Africa only part of the way. Titling is not a panacea and cannot by itself; miraculously whisk the poor from the world of informality into the commercial world.³⁰⁸

The reverse titling phenomenon observed in Langa presents a real threat to empowerment. To reduce or eliminate transaction costs which is mainly the cause of reverse titling (and succession), state supported institutions need to take responsibility for property transfer transactions in clearly identified areas possibly by employing existing institutions (eg the Legal Aid Board, University Law Clinics) and the established legal profession to undertake this task.

In Chapter 6 which follows, I conclude by reflecting upon restitution practices gleaned from implementation on the ground and the consequent formalisation models.

³⁰⁶ This is an official register of ownership, extent and value of real property in a given area – Random House Kernerman Webster's College Dictionary, 2010.

³⁰⁷ Indefeasibility of title as a concept means that once property is registered in a cadastre system, no third party can have a stronger claim to such property than the registered owner.

³⁰⁸ Boudreaux supra n 291 at 30.

CHAPTER 6

Conclusion

The premise that land ownership in South Africa suffers a ‘huge legitimacy crisis’ cannot be disputed³⁰⁹ *albeit* that van der Walt lays this crisis squarely at the door of ‘grand apartheid’ and the culmination of a process that started in 1652.³¹⁰ The concerted efforts to date to dispossess black South Africans of their land, requires the South African land issue to be dealt with in innovative ways. A failure to do so will undoubtedly lead to the implosion of our young democracy.³¹¹

Present government policy has relied heavily upon the restitution process in order to meet this challenge. This restitution process had to finely balance the Constitutional protection of property³¹² with correcting past injustices. The Restitution of Land Rights Act, 22 of 1994, in Section 1 attempts to define ‘rights in land’ as widely as possible as to include as many as possible who suffered dispossession due to unjust laws and processes. To this end, it includes not only land owners, but also tenants, sharecroppers, beneficial occupiers, and the like, the focus being to transcend the narrow sense of legal restoration and to broaden the concept to include social restoration as well – the so-called principle of ‘restorative justice’. Theunis Roux argues that Nozick’s theory of ‘historical entitlement’ was imported into South African restitution theory.³¹³ Persons, Nozick opines, can legitimately own property in two ways only: firstly through just appropriation, or secondly through just transfer.³¹⁴ If any one of these two principles are breached, it entitles the state to intervene and restitute rights.

Careful thought has to be given to the formalisation models to be employed once restitution becomes a reality. The ‘sticks’ that are included in any

³⁰⁹ Van der Walt *supra* n 206 at 493 at 514.

³¹⁰ *Supra* at [Chap 3](#).

³¹¹ South Africa could very well end up like Zimbabwe where the slow pace of land reform compelled the government to embark on a ‘land grab’ project – causing great hardships to the white inhabitants, and the country as a whole.

³¹² S 25 of the Constitution. The Restitution of Land Rights Act 22 of 1994 gives effect to s 25(7) of the Constitution.

³¹³ Roux *supra* n 102 at 8. See also Nozick *supra* n 104 at 231.

³¹⁴ Roux *supra* n 102 at 3. See also Nozick *supra* n 104 at 150.

formalisation model will have to be determined by the needs of a particular community. At times these needs may require exclusivity, whilst in other instances, common ownership should form the basis of formalisation. What is important is that formalisation must lead to benefits which may be economic in nature - for example access to capital - and in other aspects can extend to pride in ownership and thus the enhancement of the human experience.

The restitution process does not go far enough, and this is the case for a variety of reasons. Firstly, Robbins³¹⁵ has argued that property cannot be divorced from its inherent social relationships which give it both its social and economic value.³¹⁶ In the original act of dispossession, the dispossession was not merely limited to the physical property, but included the destruction of these relationships. This cannot be restituted. The destruction of economic value for the period of dispossession (which in South Africa can be up to 100 years in terms of the Restitution Act), cannot be compensated for.

Another factor not properly accounted for in the restitution framework, is the concept of 'personhood'.³¹⁷ This concept has been fully discussed in Chapter 3 and finds expression in both Lockean and Grotean philosophies. It is argued that it is only through property ownership that a person could achieve full self-development. The concept of 'personhood' or 'enhanced human experience' is not a 'stick' in the 'bundle of rights', but is a consequence of formalisation, for example Scott Leckie's concept of 'human flourishing'³¹⁸ as a consequence of the right to decent housing, which is a 'stick' in the 'bundle'. The unjust act of dispossession thus directly impacts upon the personhood of the affected party. This also cannot be compensated for through restitution and will survive any restitution process. The only manner in which to address this legacy is through restorative justice aimed at repairing relationships. Roux suggests a model where the owner and claimant get together face to face to negotiate terms of rectification. This, he suggests,

³¹⁵ See [Chap 4](#) above.

³¹⁶ Robbins *supra* n 39 at 186.

³¹⁷ Roux *supra* n 102 at 5. Roux quotes the work of Radin in support of his view, and this concept can be traced back to Hegel's Philosophy of rights, as well as the Grotean view of the *sum cique tribuere*.

³¹⁸ (Cross reference)

should be done notwithstanding the fact that the owner has no link to the original unjust dispossession. This process, he opines, will 'restore each to a position of social equality'.³¹⁹ The present restitution framework keeps owners and claimants at arm's length. This increases the possibility of suspicions, opens new hurts, and causes the process to be viewed as allowing the beneficiaries of the unjust dispossession to once again benefit. This perception of double dipping is not helped by recent reports such as that the owners of Bela Bela Game Reserve, which is subject to a claim, have been offered R1 billion in compensation. This is unlikely to have occurred if the two parties had met in a process and balanced the original unjust act and all its consequences, with the market value of the property. Both parties would then have walked away restored.

The greatest impediment to the success of the restitution process has been the property protection clause contained in section 25 of the Constitution,³²⁰ the deprivation and expropriation provisions of which were discussed in Chapter 3 of this paper. The compensation provision³²¹ was a direct result of the negotiated settlement that gave rise to the new order. Van der Walt argues that the purpose of the expropriation, in this instance restitution, should not be the sole determinant of whether compensation should be paid.³²² I am not convinced that this argument is necessarily correct. The extent of the dispossession suffered as described in Chapter 3 must surely influence remedial actions taken in a democratic society. Land and its potential to alleviate poverty, is central to the survival of the

³¹⁹ Roux supra n 102 at 8.

³²⁰ Harksen supra n 156. The restrictive interpretation of section 25 severely impacted upon restitution. In addition, the necessity for a property clause, given the South African history, is questionable. Jurisdictions such as Canada, United Kingdom, and India do not have property clauses. Also supra n 205.

³²¹ S 25(3) of the Constitution. This should be read together with the Restitution of Land Rights Act 22 of 1994, which provides for market value as compensation unless it can be shown that the present owner paid less than market value. The latter situation is often impossible to establish in the absence of records. It also follows that the current owner is protected even where he has paid market value for property from a seller who obtained the property through force of arms!

³²² Van der Walt *Constitutional Property Law* 2ed (2005) at 271. The purpose of the expropriation is one of the factors to be considered in determining the amount of compensation in terms of s 25(3) (a) to (e).

democratic state. Our judicial interpretations should be alive to this reality.³²³ It is in this context that section 25(8) of the Constitution is instructive and demands judicial interpretation.³²⁴

In the absence of transformative constitutionalism, formalisation would not be realised. One cannot separate expropriation from its inherent counterpart, namely compensation. Market value compensation in itself is a significant impediment to formalisation - the Bella Bella restitution project required compensation exceeding one billion rand.³²⁵

What further bedevils the concept of property in South Africa, and consequently restorative processes, is the view that exclusivity is fundamental to a formalisation model. Put differently, that formalisation should allow the owner to exclude all others. The South African common law did not have a concept of 'ownership', but relied upon the term 'dominium'. Grotius viewed dominium from the perspective of common property, that through societal contract, through which each party sacrifices part of his '*suum*', - such property becomes individualised.³²⁶ This concept of 'personhood' as we have found in Grotius and described by Locke as 'property which "men" have in their persons', has been latched onto by many modern writers in different ways. Munzer, using the Hohfeldian methodology opined that the 'central truth is that property involves relationships among persons and with respect to things'³²⁷ whilst Radin took the concept further into 'personhood'. Because of the emphasis in the ownership relationship being on the 'person', this personification of property resulted in the greater protection of the

³²³ The FNB and Harksen cases dealt with property rights, but not in the context of land restitution.

³²⁴ No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

³²⁵ The formalisation model employed is an interesting one as it retains the present owners as managers to operate the thriving game lodge whilst the beneficiaries are employed in the project and share in the profit. Their ownership therefore includes most 'sticks' in the 'bundle' but specifically excludes use rights.

³²⁶ Supra [Chap 3](#).

³²⁷ Van der Walt supra n 126 at 506.

person's (individual's) legal and moral rights.³²⁸ This, van der Walt argues,³²⁹ is the foundation for defining property rights solely in terms of exclusion. An unfortunate consequence of the rise in 'exclusivity', was a perception that – as the 'progress' from commonage to individual holding was an evolutionary one – common property is an 'uncivilised' and archaic phenomenon that will, with 'civilisation', eventually revert to private holding.³³⁰ Nothing could be further from the truth, and in my view, the reason for this is that neither Grotius nor Locke were promoting the total abolition of commonage in favour of individual title. They were merely describing the phenomenon of individual title and there is no evidence in their writings that they regarded individualisation as an inevitable consequence, replacing all commonage. There is a place for both systems in a formalisation model, and they can exist side by side as is shown by the *allemanrätt*, *inter alia*, in Sweden.³³¹

The concept of 'personhood' is difficult to apply in a situation where a person owns multiple properties. This is because one equates the personalisation of property through *suum* and all its later manifestations as reflective of the modern day phenomena that one person could hold property in all the major cities of the world. In a situation where formalisation must address poverty through economic value and personhood such as in South Africa, it is submitted that multiple property holdings would not be an issue. The benefit of formalisation such as human flourishing (personhood) is often reflected in the improvement of property by the owner once it has been formalised.

A person certainly cannot have the same personalised relationship with multiple properties (some of which may not even be known about), as de Groot or Lockean counterpart. Property rights in the South African context thus have to take account, not only of the right to exclude others, but also the right of others to be included. I argue that this is more especially so given our history of dispossession. Our theory of property cannot be frozen in time, but must reflect

³²⁸ Munzer *supra* n 132 at 19.

³²⁹ Van der Walt *supra* n 126 at 508.

³³⁰ Van der Walt *supra* n 126 at 508.

³³¹ *Supra* [Chap 3](#). I make this reference as Sweden is a 'developed' country as opposed to a 'developing' country, Katz *supra* n 124 at 298 to 299.

present day realities. To this end, 'exclusivity' should be viewed as but one 'stick' in a 'bundle of rights', with no greater hierarchical claim than any other 'stick' in that 'bundle' in the formalisation process.

In South Africa land is generally registered as tribal land, trust land and privately owned land.³³² Unlocking the value of the first two types of land in the de Sotán sense, are not without its own challenges, the greatest challenge being the authority of the chief and the control that he exercises over such land. Future land policy will have to acknowledge this reality. The challenge is however not insurmountable, as under 'grand apartheid' some tribal and trust land was transferred, under separate registry, to individuals and groups of individuals in common.³³³ Formalisation models can take account of this where the realities allow. The granting of quitrent title, either individual or in common, should be an important requirement in any formalisation model in order to unlock the economic value of land in the de Sotán sense and bring about increased security of title.

This increased security of title is of particular importance to South Africa as much of the rural population are transient, moving to cities and then straddling rural and city living. Such persons have no intention of permanency in the cities and direct their resources to the security enjoyed in the rural and peri-urban areas.³³⁴ It should however not be forgotten that the challenge relating to rural land goes well beyond tribal and trust land. As 87 per cent of black people were compressed into these types of land, over cultivation and grazing has severely impacted upon the economic viability of such land. In many instances the value to be unlocked would lie in the element of 'human flourishing' referred to by Leckie and du Plessis.³³⁵ I agree with their contention that security of tenure can take many forms, but that the ultimate aim is for all to live in peace and dignity, with the prospect of the de Sotán proverbial gold at the end of the rainbow.

³³² Van der Post supra n 172 at 225.

³³³ Van der Post supra n 172 at 222. Van der Post explains that under Proclamation R188 of 1969 residential and arable allotments were transferred after consultation with tribal and community authorities.

³³⁴ Robbins supra n 39 at 189. The likely negative effect of this would be that the lack of security in the urban areas will increase the informal housing areas.

³³⁵ Du Plessis and Leckie supra n 30 at 203.

If the challenge does not lie in tribal and trust land, I venture to suggest that it lies in the restitution of white owned rural and peri-urban farm land. I have described the two-pronged process of the apartheid government to turn black farmers, sharecroppers, and tenants into labour tenants in Chapter 3. This has inevitably led to a great number of land claims that call out for a reviewed land restitution statute, and a judicial system that truly practices transformational jurisprudence. In pursuit of this ideal, it is possible to have a multiplicity of formalisation models all operating in the same country. Whether one calls it common usage, customary rights, title, or tribal use, is of no consequence. What is important is the framework within which these rights operate. This framework should provide a form of state recognition of these rights, a system of documentation and registration of these rights, and state supported programs to grant access to finance and markets. Any formalisation model must reflect these realities by documenting these rights in a formalisation model as key to unlocking de Sota benefits. This in itself, is a movement away from the exclusivity of property in the Roman-Dutch law sense to a 'bundle of rights' culture where the number of 'sticks' included in the 'bundle', is determined by the model of formalisation. In this vein it is not beyond contemplation that in a single claim, a formalisation model could be devised where the white owner together with the claimants acquire differing types of rights to the same property.³³⁶ The consequences of this could be that such a formalisation model could be viewed as a deprivation in terms of section 25 and not an expropriation which requires compensation. This would accelerate the restitution process and consequently formalisation.

Formalisation in the urban township environment also requires similar innovation. This type of restitution is usually based upon individual title and is thus in line with the discussion on exclusivity. An example of this can be found in the recent decision by the Cape Town Municipality to hand over 40 title deeds to business owners who use their homes as businesses in the Langa Township. The

³³⁶ See [Chap 5](#) dealing with the Richtersveld, where this aspect is comprehensively dealt with.

Mayor explained: 'Having title to property is a fundamental requirement of a free market system as it allows an owner to derive an income and access capital'.³³⁷

In the final analysis, this paper has argued that the 'bundle of rights' theory, as a component of a formalisation model, has to be extended to include the critical human rights element as an additional 'stick' in the 'bundle'. In addition, as was evident from the Richtersveld case, formalisation of title could have negative unintended consequences culminating in reverse titling, if capacity building in the community is not included as a material component of the formalisation model itself. The formalisation model as applied in the Richtersveld included a combination of many of the aspects discussed in this paper. The 'bundle of sticks' concept was applied insofar as property rights in some instances included exclusivity, whilst in others, use rights were excluded. For example, the formalisation model recognised exclusivity with regard to individual domestic housing on the one hand, whilst excluding use rights in respect of the other property such as mining and farming. The formalisation model that was applied in the Richtersveld had all the prospects of success but failed because an important element was overlooked, namely the community's capacity to understand the complexities of the model. It is therefore important that any formalisation model must be grounded in the community itself and be relevant to that community.

³³⁷ The New Age – De Lille hands out title deeds – Pg. 8 (26 February 2014)

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