Contesting Control over the Namaqualand Landscape through Property

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Introduction

This chapter explores how different actors contested control over the Namaqualand portion of the !Garib area.[1] For an extended period, this area was encountered materially through the pastoral way of life of diverse local groups. Farming by trekboers brought some changes, but it is the exploitation of large mineral deposits – namely copper and later diamonds by settlers – that had the greatest effect on this area. While archaeological evidence shows that local African groups mined iron and copper for adornment, the scale of this mining was limited. Therefore, it was through the emergence of formal large-scale mining ventures that this area, which was previously seen as both geographically and economically peripheral, had the potential of being a lucrative site of wealth accumulation. As a result, for the colonial and later apartheid state[2], securing control over this area became more important. This chapter explores how this was done by looking at three moments in the timeline of this area: namely, the copper boom in the 1850s, the discovery of diamonds in the 1920s, and the Richtersveld land restitution claim between 1998 and 2003. The copper boom and the discovery of diamonds are used as lenses to explore how the state used its hegemony over property to assert and instrumentalise control over land, while the land restitution claim offers a lens to explore how local African residents contested this control in the contemporary moment.

1 I use the Khoekoegowab spelling of the !Garib / Orange River intentionally, to bring into view other narratives of this landscape that are embedded in its naming (see Lenggenhager and Ramutsindela, 2021: p. 4).

2 For analytical purposes I separate these governing regimes of the state but there is an appreciation that they were not necessarily distinct. Indeed scholars (See Moon 2017, McCusker, Moseley and Ramutsindela 2016 and Ramutsindela 2017) argue that this separation was often superficial, as both these governing regimes were underpinned by segregationist principles.

Contesting control over land through property

Property rights form the basis of everyday life by governing relationships between people and resources – in this case, land.[3] Because of their ubiquitous nature, the racial underpinnings of property rights are often understudied.[4] Critical scholars are increasingly addressing this, by drawing attention to how ideas of property were crucial in naturalising land dispossession during colonialism and remain integral in the continuation of racial property relations post-independence.[5] This chapter locates itself within the ambit of this critical scholarship on racialised property relations. In the case of the Richtersveld, mining played a central role in racialising property relations. This is because mining raised the issue of who may enter into lease agreements with mining companies and derive benefits in the form of rent or royalty payments. This question hinged on who exercises ownership rights over the land. It is the answering of this question that shaped the nature of property relations in this area and had an influence on how ideas of property became racialised. As such, this chapter argues that property was and remains a powerful tool for contesting and instrumentalising control over land. This is because property rationalises land dispossession through the law.[6] To advance this argument, the chapter traces the emergence of contestations over the control of land and minerals in not only the Richtersveld, but the broader Namaqualand area. Rather than being chronological, the chapter zooms in on specific moments in time when important legislative and policy changes occurred.

For the benefit of this discussion, the notion of ownership must be contextualised within broader ideas of property. Scholars have tried to come up with different models that best explain how property rights are expressed as ideas and are manifested in practice. The most popular of these is the ownership or 'Bundle of Rights' model which sees ownership of property as made of up three categories of rights, namely: the right to exclude, the right to transfer (i.e., alienate), and the right to possess and use.[7] Under this model the right of ownership represents an all-inclusive right that has subsets of other rights within it.[8]

Setting the scene

On 14 October 2003, the Constitutional Court of South Africa delivered the landmark Richtersveld judgment. In this judgment, the court ruled that the Richtersveld community held ownership rights under customary law over a narrow piece of land stretching

3 MacPherson 1978; Hann 1998; Ramutsindela and Sinthumule 2017.

4 Bhandar 2018

5 Ramutsindela 2012: p. 753; Ngcukaitobi 2021: p. xi.

6 Blomley 2003: p. 133

7 Sprankling 2012: pp. 4–6

8 The ownership model has been extensively critiqued for its failure to account for the ways that states restrict people's power over the things, see Underkuffler 1990; Jacobs 1998; Alexander et al. 2008; Rosser 2013. At the same time, scholars concede that the ownership model remains a powerful determining force in both how property is understood and enacted.

for 120 km alongside the !Garib River (subject land), where diamonds have been exploited by the state since their discovery in the 1920s. More importantly, the court confirmed that these ownership rights included rights to the minerals and precious stones found on this land, thus entitling the community to be compensated for the minerals extracted since the 1920s. Following the judgment, the Richtersveld community entered negotiations with the state and Alexkor Limited – the state-owned enterprise in charge of diamond mining. The negotiations would culminate in the three parties signing a Deed of Settlement agreement four years later.[9]

Scholars and politicians alike agree that the court ruling was an astounding victory for the community. Not only did the apex court of the South African judicial system confirm that customary rights are in fact ownership rights, thereby challenging 200 years of mineral law premised on racialised property rights, but the judges also unpacked the contradictions between state legislation and the actions of colonial and apartheid government officials. Thus, through this judgement the Richtersveld community successfully challenged the state's historical control over this land. As mentioned previously, the chapter is not chronological and for the most part the evidence of the court proceedings is used as a starting point. This is because the case progressed through three layers of the court: the High Court, the Supreme Court of Appeals, and the Constitutional Court, thus providing a set of undisputed facts from which to draw analyses. For the arguments from the court proceedings to make sense, it is useful to summarise the Richtersveld and broader Namaqualand context in terms of mining.

The Copper Boom: contesting control through mineral leases

While there is a long history of mineral exploration in Namaqualand, it was only in the later part of the 19th century that large-scale mining took place.[10] The high transport costs, due to the isolated nature of the area, made mining ventures unprofitable.[11] A breakthrough happened when a narrow-gauge rail line from O'kiep to Port Nolloth was constructed in 1871. Following its construction, copper exports grew significantly.[12] With the growing copper mining industry in the area, there were increased conflicts between local people and the mining companies.[13] I focus on how these conflicts intensified post-1847 for two reasons. First, the region was now under state control, following annexation by the British Cape Colony in 1847; secondly, this period also coincided with the

9 As part of the Deed of Settlement agreement, the Richtersveld community received 190 million ZAR in extraordinary compensation for the diamonds extracted since 1920, various marine and agricultural assets, and a 49% share in the Pooling and Sharing Joint Venture. This joint entity, consisting of Alexkor Limited and the newly established Richtersveld Mining Company, would conduct the mining post land restitution. While this was an enormous victory at the time (in 2007), a closer analysis of this agreement casts doubt – see Ntombini and Ramutsindela (forthcoming).

10 Mutemeri and Peterson 2002: p. 291; Ashton 2018: pp. 150–153.

11 Bregman 2010: p. 30

12 Smalberger 1969

13 Bregman 2010; Ashton 2018.

copper mining boom. The copper boom brought about the question of property through the issue of mining leases. Since mining companies did not know which land would have the greatest amount and quality of copper deposits, they tried to secure leases for large areas of land.[14] For the local people, it meant even more encroachment on their land, which was already under threat from the increased numbers of settlers in the area. The Cape Colony government, as the state, had the responsibility of mediating the concerns of the mining companies and the local African residents, its subjects. At the same time, the state was in the process of defining what its view was on the property rights of the people in the territories it had annexed.

This was particularly so in the context of the north-western frontier which, for the most part, had been undisrupted by the extension of the Cape Colony border. The cosmopolitan nature of the local population profoundly influenced the social, political, and economic character of the region.[15] In some cases, owing to their European ancestry, some individuals amassed significant wealth enabling them to access land.[16] In other cases, local African chiefs secured land grants under the quitrent system – thus enabling them to continue to assert some control over their land.[17] It is not within the scope of this chapter to discuss the intricacies of these arrangements on the ground, however, scholars point out that this period was marked by fluidity and complex power relations regarding land ownership.[18] For the moment, I focus on the legal implications of the annexation. It appears that the Cape Colony government, at this stage, was inclined to protect the land rights of local African residents. This is evident from Section 3 of Ordinance 50 of 1828, which was still in place post-1847:

> And whereas doubts have arisen as to the competency of Hottentots and other free Persons of colour to purchase or possess land in this Colony: Be it therefore enacted and declared, That all Grants, Purchases, and Transfers of Land or other Property whatsoever, heretofore made to, or by any Hottentot or other free Person of colour, are and shall be, and the same are hereby declared to be of full force and effect, and that it is, and shall and may be lawful for any Hottentot or other free Person of colour, born, or having obtained Deeds of Burghership in this Colony, to obtain and possess by Grant, Purchase, or other lawful means, any Land and Property therein – any Law, custom, or usage to the contrary notwithstanding.

The Ordinance was significant for two reasons. First, it showed that there was no intention of extinguishing the surface land rights of the people in Namaqualand following annexation; and second, there was equality between local African residents and British subjects concerning the purchase and possession of land in the Cape Colony.[19] As such, in the

14 Bregman 2010: p. 64

15 Penn 2005: p.164; Sharp and West, 1984: p.4.

16 Legassick 2016; Lenggenhager and Ramutsindela 2021: p. 4

17 See Sharp and West 1984: p. 5

18 See Sharp and West 1984; Penn 1995; Legassick 2010: Legassick 2016.

19 South African mining law routinely reserved mineral rights for the Crown/state (see Mostert, 2012). For example, the Mission Stations and Communal Reserves Act No. 29 of 1909, part II, section 25, explicitly prohibited local African people from exercising rights to the minerals and precious stones. Be that as it may, when mining occurred the surface land rights holders

period between 1856 and 1910, there is evidence of various groups[20] entering into mineral lease agreements with mining companies – with the assistance of missionaries.[21] While groups granted mineral leases to mining companies, they did not have secure rights over the lands in question. At the time, the practice was for the Cape Colony government to grant Tickets of Occupation to local African groups, which defined the land which the group beneficially occupied and to a certain extent endorsed their claim to the land.[22] With the help of the missionaries stationed at various regions in Namaqualand, local African groups enquired about their rights over the land and the possibilities of being granted Tickets of Occupation. However, the Cape Colony government remained reluctant to do so for specific mission stations.[23] Nevertheless, the Cape Colony government, through Colonial Secretary John Montagu, assured these mission stations that the Crown did not intend to disturb their occupancy of the area.[24] But the lack of written documentation from the government confirming their land rights meant that their rights could be rendered invalid at any moment.

This happened as mining prospecting ventures showed increased promise. The colonial state progressively began to override agreements between mining companies and the local African groups. The colonial government's decision to override lease agreements is well discussed by scholars studying this region for its implications for land dispossession, but I argue that it also reveals important insights about the evolution of conceptions of property in the region.[25] To illustrate this, it is useful to analyse each party's actions. The confirmation from the government that their occupation of the land would be protected was reason enough for the local African residents to believe that their land rights – which they interpreted as ownership rights – were secured and protected by the Cape Colony government. As such, leasing the land was an assertion of their ownership rights. From the government's perspective, this was not the case. While the government

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were entitled to be compensated for the loss of surface rights to make way for mining, and this is where recognition of ownership was important.

20 Some of these groups were made up of individual persons who acquired wealth owing to their ancestry and banded together, often referred to as 'commandos', see Penn 2005. Others were groups made up of a 'tribe', under the leadership of a Captain and *Raad* (executive council) that lived on or in the vicinity of a mission station, see Richtersveld and Others v Alexkor Limited and Another 2001. Scholars note the difficulty of labelling groupings in the Namaqualand context, because labelling and/or identification was often time and context-specific. See Lenggenhager and Ramutsindela 2021.

21 Alexkor Ltd and Another v Richtersveld Community and Others 2003

22 For example, Bregman 2010: p. 48 commenting on the Ticket of Occupation granted in 1843 to the Kommagas community, which is part of Namaqualand, writes: 'A Ticket of Occupation was drawn up which meant that this land was theirs indefinitely. However, it did not mean that they *owned* the land but merely had the right to be on it. It would remain the property of the government which would hold the land in trust for the community. For people at Komaggas this must have been a wonderful moment – for the first time they had some form of assurance that their lands would be safeguarded against further imposition…. The major issue would arise in the later years was of ownership versus occupation'.

23 Smalberger 1969: p. 64

24 Ibid.

25 See Smalberger 1969; Bregman 2010: p. 68; Ashton 2018: p. 154.

was willing to recognise that local African people had use and occupation rights, it was not willing to recognise their ownership rights. This is because recognition of ownership rights would have had implications for mining. It would mean that it that local African people were well within their right to enter into lease agreements with mining companies. The government was able to present its interpretation because no Ticket of Occupation to the land had been granted, thus no written and legally binding document outlined what rights to the land were recognised and what rights were not.[26]

The presence of valuable resources in colonies has long been acknowledged as playing a critical role in the evolution and sedimentation of racialised ideas of property.[27] This is particularly so in the context of settler exploration of the rich mineral deposits in South Africa, which played a major role in the country's economic development.[28] While the Cape Colony government initially seemed inclined to respect the land rights of local African groups, as soon as the wealth accumulation potential of the region changed, so did the government's position change. Through the Tickets of Occupation, the state successfully contested control over strategic portions of land in this region. While the copper boom lasted briefly, this successful contestation of the mineral rights would prove useful in entrenching control over the area once diamonds were discovered in the 1920s.

The Richtersveld struggle for a Ticket of Occupation

To further highlight the role of Tickets of Occupations as tools in instrumentalising the state's control over this landscape, it is worth turning to the Richtersveld as a case study. The Richtersveld offers an important site to explore how the presence of diamonds entrenched state control over minerals. This is because while the Cape Colony government granted Tickets of Occupations to the surrounding mission stations between 1843 and 1925, it remained reluctant to do so for the Richtersveld.[29] I argue that the mineral potential in the form of diamonds played a role in the state's reluctance.

The Richtersveld area is made up of four major settlements, namely: Eksteenfontein, Lekkersing, Kuboes and Sanddrift located in the north-western part of the Northern Cape Province in South Africa (Figure 1). Located south of the !Garib River, the Richtersveld forms part of what was previously referred to as Little Namaqualand.[30] Today the Richtersveld community is diverse; with people of varying ancestry.[31] However, a core part of the population is regarded as descendants of the Hobesen tribe, who were under the leadership of Captain Kupido Witbooi. Organisationally, the Hobesen consisted of several clans, each governed by a chief, who came together under the authority of a Captain and a *Raad (Executive Council)* consisting of members from the constituent clans. From the beginning of the 19th century, Witbooi claimed most of Little

26 Richtersveld and Others v Alexkor Limited and Another 2001

27 Bhandar 2018

28 Ashton 2018: p. 152

29 Smith 1996: p .3

30 Boonzaier 1996: p. 308; Richtersveld Community and Others v Alexkor Limited and Another 2001: pp. 12–13.

31 Sharp and West 1984: p. 8

Namaqualand as his territory to govern. Given that the land was vast, Witbooi divided the territory into three sections and appointed two assistant Captains to assist him. The eastern section was governed by Witbooi, while the central section was governed by Abraham Vigiland and the western section was governed by Paul (*Bierkaptien)* Links. It is this western section that was later named the Richtersveld, and today the residents refer to themselves as Richtersvelders.[32] The colonial history of the Richtersveld can be traced to 1844, when the Rhenish Missionary Society established a mission station – subordinate to the Steinkopf as the principal mission station.[33] The mission station drew more people into the area, seeking refuge from settlers further south. This led to the formation of the first Richtersveld settlement, Kuboes, and over time the three remaining settlements were established.[34]

Fig. 1: The location of the Richtersveld towns. (Source: https://www.google.com /maps). The settlement of Lekkersing is indicated as 'Richtersveld' on this map.

32 Richtersveld Community and Others v Alexkor Limited and Another 2003: p. 17; Community member, Kuboes, 20 July 2018, interview done by Kolosa Ntombini.

33 Richtersveld and Others v Alexkor Ltd and Another 2003: p. 18

34 South African History Online, https://www.sahistory.org.za/place/kuboes-northern-cape, (accessed 18 April 2021).

Between 1898 and 1930 there were multiple attempts by the *Raad*[35] to have their legal rights over the land secured through a Ticket of Occupation, but with limited success. Interestingly, the views of the government officials involved differed. In 1898, a Mr Moffat from the Native Affairs Office in Cape Town conceded, in a letter to the Superintendent of the Native Affairs, that while there was no Ticket of Occupation, the Richtersvelders could probably prove their claim to share in the land under the condition of continuous occupation since 1847.[36] In cases where local African communities had no Ticket of Occupation, continuous occupation of land over a long period was used to prove a claim to the land – meaning that colonial government could not ignore the Richtersvelders' claim.[37] In 1890, the Second Assistant Surveyor-General, Mr Melvill indicated that the amount of land that the Richtersvelders wanted to claim was too large – arguing that the government would not allow the community to occupy a land so vast.[38] Due to their semi-nomadic lifestyle, the land the Richtersvelders claimed was approximately 600,000 hectares.[39] Melvill also presented a report on the lands occupied by local African residents and missionary societies in Namaqualand, where he suggested that the land earmarked for the Richtersvelders be reduced to approximately 300,000 hectares.[40]

The Richtersvelders objected to Melvill's proposal, and he promised to take up this objection with the government. Melvill failed to do because on 3 August 1909, Reverend Kling wrote to the Colonial Minister of Agriculture referring to this matter and indicated that the community had not received any communication from the colonial government in the 19 years that had passed.[41] On 27 August 1909, Mr A.H. Cornish-Bowden responded to Kling's letter and reiterated the colonial government's position of having no intention of depriving the community of their land. He went on to say:

> … and in order to allay any anxiety which you and your people may entertain, I may state that it is proposed at the forthcoming session of Parliament to seek sanction to the formal reservation, by means of a Ticket of Occupation, of the area indicated by the figure bordered blue on the plan attached to Mr Melvill's Report of 1890, though of course there is no compulsion on the Government to reserve the whole of the area so defined…[42]

35 As missionary influence grew in the area, there was a change in the governance. Consequently, by 1909 a missionary official, Reverend H Kling, was now the chairman of the *Raads* of the Steinkopf, Richtersveld and Kalkfontein communities, see Richtersveld and Others v Alexkor Limited and Another 2003: pp. 69–70.

36 Richtersveld Community and Others v Alexkor Limited and Another 2003: p. 69

37 See Van Breda and Others v Jacobs and Others 1921 AD 30 which explains the requirements of English and Roman-Dutch Law – the two legal systems in place at the time in the Cape Colony – to prove a right under customary law, which entitles communities to exclusive occupation and use over land in the same way as a right of ownership under common law.

38 Richtersveld Community and Others v Alexkor Limited and Another 2001: p. 19

39 Ibid.: p. 19; Hendricks 2004.

40 Richtersveld Community and Others v Alexkor Limited and Another 2001: pp. 13–14

41 Richtersveld Community and Others v Alexkor Limited and Another 2003: pp. 69–70

42 Ibid.: pp. 71–72

It appears that Cornish-Bowden's assurance that the matter would be dealt in the coming session of Parliament did not come to fruition. It was only 21 years later, in February 1930, that the government issued a Certificate of Reservation[43] for the Richtersveld Reserve, as per section 6 of the Crown Lands Disposal Act No. 15 of 1887.[44] From the record of this select communication between the various government departments and the Richtersvelders, three things are striking. First, legally there was no reason not to grant the Richtersveld people a Ticket of Occupation. Second, the government was delaying giving the Richtersvelders a definitive answer. This is particularly so in the period between 1909 and 1930, in which – as I will show below – important shifts happened that altered the government's position. Third, when the Ticket of Occupation was eventually granted, it was for 300,000 hectares as per Melvill's recommendation, meaning that the Richtersvelders only had half of the land they originally occupied. I argue that the discovery of diamonds played a key role in these changes.

Discovery of diamonds: entrenching state control

Diamonds were first found in the Namaqualand region, around Kleinsee, in 1925; and then a few years later at the mouth of the !Garib River north of Port Nolloth, where a rich deposit was discovered.[45] Again, I focus on what the discovery of the diamonds did at a legal and political level rather than narrating what occurred on the ground.[46] In the period between 1918 and 1930, there was a distinct change in the tone of the communication between the different government officials. It is important to caveat my analysis of this period by acknowledging the political developments at the national level. In 1910, the Union of South Africa was established which amalgamated the former British Colonies and Afrikaner Republics. Thus, there was a change from a British colonial government to a segregation government which influenced shifts in land policy.[47]

From about 1920, officials in the Ministry of Land Affairs repeatedly inquired with the officials in the Department of Justice and state legal counsel about the legal status of the Richtersveld. In a letter to the Springbok Magistrate dated 18 April 1920, the Minister of Lands wrote the following:

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43 The terms, *Certificate of Reservation* and *Ticket of Occupation*, were used interchangeably in the court documents suggesting that they had the same legal implication.

44 Richtersveld and Others v Alexkor Limited and Another 2003: p. 4

45 Ashton 2018: p. 156

46 Following the discovery of diamonds in these key sites, the state established the State Alluvial Diggings (SAD) by proclamation in 1928 to conduct the mining. The SAD fenced off previously public areas, thus preventing the Richtersvelders from accessing what was their commonage. 61 years later, in 1989, the SAD was transformed into the Alexander Bay Development Corporation. Three years later, in 1992, it was incorporated into a public company, Alexkor Limited.

47 See Ntombini 2021: pp. 67–70; 72–73; 80–90; where I trace the development of land policy showing the shifts from more liberal politics, as espoused by the Cape Colony government, to the harsher Afrikaner position of limiting African people's land rights in the drafting of the Natives Land Act of 1913 and the Natives Trusts and Land Act of 1936. See also McCusker, Moseley and Ramutsindela 2016.

> …it is extremely difficult to furnish you with definite information as to the extent and limits of that part of the Richtersveld in regard to which the Government would be prepared to recognise the existence of definite claims to ownership or even residential or surface rights by the so-called Bastards attached to the Richtersveld mission and the Hottentots…under Headman Swartbooi Links…
> …in regard to Richtersveld the Government's attitude has been an uncertain one so far, inasmuch[sic] as that, although it has undoubtedly been taken for granted that both the Bastards and the Hottentots possess certain surface rights of user and residence, a claim, that they should be recognised as actual owners of the soil, had never been admitted, …while you should do nothing which would be tantamount to a recognition of any claim on the part of the Bastards and Hottentots to ownership of the Richtersveld, no steps can be taken to interfere when white farmers are charged grazing fees by the Bastards or Hottentots; these people undoubtedly have certain grazing rights in the Richtersveld and, if outsiders desire to participate in the use of the grazing, the payment of a remuneration therefor[sic] seems reasonable, though the practice should not receive your official sanction.[48]

Furthermore, in a report to Parliament in February 1921, the Controller and Auditor General to Parliament referred to a warning by the Secretary of Justice – which indicated that the segregation government could lose control over the Richtersveld by prescription, since it could not be disputed that the Richtersvelders had occupied the land for more than 80 years following annexation. The Controller noted that while this warning from the Department of Justice had prompted suggestions to make legislative changes to prevent this, those suggestions had not been implemented. The report concluded that, 'As rents are at present being collected from Europeans for grazing in the Richtersveld by one Paul Links, a coloured man, it is clearly indicated that rights of ownership are being exercised by the inhabitants.'[49] This extract seems to affirm the government's acceptance of the Richtersvelders' ownership rights. Yet on 6 March 1925, the Secretary of Lands wrote a letter to the Secretary of Justice seeking an opinion on: 'the extent of the rights which the coloured community can claim by virtue of their long possession [of the Richtersveld]'. The solicited opinion was received on 11 April 1925, which confirmed that the Richtersvelders – through their *Raad* – were exercising control over the land. Reference was made to various leases being granted to outsiders as proof of this.[50]

At all stages the government had enough evidence that showed that the Richtersvelders exercised ownership rights over their land. Therefore, the government needed to find another avenue to limit the Richtersvelders' rights. The stalling in granting the Ticket must be viewed in that light. South African mineral legalisation, while complex and with many exceptions, tends to reserve mineral wealth in favour of the state. However, when mining occurs, the holder of the surface land rights is entitled to be compensated for the loss of the surface rights to make way for mining.[51] This was the case for areas where

48 Richtersveld Community and Others v Alexkor Limited and Another 2001: p. 20
49 Richtersveld and Others v Alexkor Limited and Another 2003: p. 77
50 Ibid.: p. 73
51 Mostert 2012

a Ticket of Occupation was granted.[52] While the compensation that the communities would have received might have been minimal, it was still granted. By refusing to grant the Richtersveld community a Ticket of Occupation, the government ensured that the community legally exercised no surface rights. Consequently, they would not be entitled to be consulted to make way for mining nor to receive any compensation.

In thinking through the highly complex manner that the Richtersveld community lost control over land with mineral wealth, there is a tendency to focus on this period of the discovery of diamonds. This is because it was during this period where the state prevented access to land through the erection of fences and declaration of the State Alluvial Diggings. However, I argue that during this period, the state merely instrumentalised systems that had been placed much earlier, during the copper boom. The copper boom had given the state a glimpse of the mineral potential of the landscape, and while the boom was brief, it made the state aware of the need to limit African people's property rights for two main reasons: firstly, to ensure that the state exercised ultimate authority over land, in case other minerals were discovered; and secondly, to limit any compensation payable to them. This is clearly shown in the case of the Richtersveld, whereby the government knew that the community had – since time immemorial – exercised rights to the land, but had successfully managed the community's ability to fully exercise this control through the Ticket of Occupation issue. Through a protracted, highly unequal, and often dubious negotiation process, the state ensured that it was able to entrench its control over the land to facilitate mining.

Richtersveld land restitution claim: disputing historical property relations

The dawn of democracy, in 1994, offered an opportunity for the Richtersveld community to contest the dispossession of the past. This is because, through the land restitution arm of the South African national land reform programme, the community could have their land rights restored. Briefly, the land restitution arm is anchored on the Restitution of Land Rights Act No. 22 of 1994 (Restitution Act), which aims to restore land or provide alternative compensation to those who were disposed of their land, or rights to their land, because of racially discriminatory laws. The Act, amongst other things, set the parameters of what makes a land restitution claim valid. First, the dispossession of the right to land must have occurred after 19 June 1913 and must be because of racially discriminatory laws or practices; second, it must be presented by persons who were a community or part of a community at the time of dispossession or are the decedents of such persons; and lastly, the claim must be lodged no later than 31 December 1998.[53]

Hence the Richtersveld community lodged its land restitution claim in December 1998 at the Land Claims Court against Alexkor and the government. The community desired the court to grant the following order: first, to declare that the Richtersveld people hold public servitude over the subject land which entitles them to its exclusive beneficial occupation and use; and second, that the community was entitled to be compensated

52 Bregman 2010

53 Restitution of Land Rights Act, No. 22 of 1994, Chapter 1, section 2(1).

for the diamonds extracted on this land since 1920.[54] The outcome of the case was delivered on 22 March 2001. The judge dismissed the community's claim on the basis that the community had failed to show that their dispossession was because of racially discriminatory laws and practices. The judge argued that following the British annexation of Namaqualand in 1847 the subject land had become Crown land and therefore any rights that the community had, were extinguished upon annexation. As such, the judge argued that any rights that the community lost after 1847 were not a result of past racially discriminatory laws meaning that the community's claim failed to meet the parameters of the Restitution Act.[55] The community appealed this judgement at the Supreme Court of Appeal (Supreme Court). In the judgement delivered on 24 March 2003, the Supreme Court ruled that the Land Claims Court erred in its finding that the Richtersveld community's customary rights to the subject had not survived British annexation. The judgement focused on a large range of evidence to reach this conclusion but for the purpose of this chapter, I focus on two: the government's communication with the missionaries and the law of continuity. These pieces of evidence speak to how, through the land restitution claim, the Richtersveld community successfully contested historical and problematic assumptions about property rights under customary law.

First, the judges focused on the communication between Reverend Brecher and the Cape Colony government referred to previously. They showed that while in the initial announcement of annexation the government had indicated that all rights of the indigenous people would be annulled, this was later retracted. Following inquiries by Brecher, the Cape Colony government indicated that it did not intend to interfere with the rights of the people in Namaqualand and went on to consult the traditional leaders before finalising plans for the annexation. This, the judges argued, was the proof that the Richtersvelders' rights to land survived annexation.[56]Second, the judges reminded the court of the law of continuity, which is an accepted view of Anglo-American jurisprudence, in the following extract, '…in the case of both conquest and cession, a mere change in sovereignty does not extinguish the private property rights of the inhabitants of a conquered territory which continue in force unless confiscated by an act of state'.[57] This, and the fact that Ordinance 50 of 1828 (referred to previously, which recognised the local residents of Namaqualand as subjects of the Crown) was not repealed by the annexation in 1847, was further proof that the Richtersvelders' property rights survived annexation. The judges went on to detail the political organisation of the Richtersveld, illustrating that the community recognised the value of the minerals on its land by citing instances where the Richtersvelders exercised ownership rights in relation to minerals. A key example used was an instance in 1910, when the Richtersvelders – through Reverend Kling (subordinate to Reverend Brecher) – granted a mineral lease to a prospector, Henry Wrensch, which also showed that the community viewed its land right as inclusive of the mineral wealth underneath the soil. As such, the judge ruled

54 Richtersveld Community and Others v Alexkor Limited and Another 2001: p. 5

55 Ibid.: pp. 43–55

56 Richtersveld Community and Others v Alexkor Ltd and Another 2003

57 Richtersveld Community and Others v Alexkor Ltd and Another 2003: p. 53

that the community's customary rights to the subject land were 'akin' to rights under common law ownership.[58]

While ruling that the Richtersvelders right to land survived annexation was important, the issue of whether the dispossession happened after 1913 still needed to be answered – so that the Richtersvelders could be entitled to restitution. Regarding this, the judges traced the series of steps that the government undertook after the discovery of the diamonds in 1925. This included the erection of fences which blocked the communities access to the subject land, the establishment of the State Alluvial Diggings to conduct the mining, and so forth. Analysing the government's actions, the judges concluded that the Richtersvelders continued to exercise exclusive ownership of the subject land until the mid 1920s.[59] This date was significant because it placed the land claim within the time parameter set by the Restitution Act, which is that the dispossession must have happened after 19 June 1913.

Despite this success at the Supreme Court, Alexkor and the Government chose to appeal the judgement at the Constitutional Court. This appeal was unsuccessful, and in fact the Constitutional Court went a step further than the Supreme Court. It ruled that the Richtersveld community's customary rights to land were not just 'akin' to ownership rights, as the Supreme Court had ruled, but that they were in fact ownership rights not only over the land but minerals and precious stones underneath the land.[60] As such the community was entitled to be compensated for the minerals and precious stones that had been extracted from its land since dispossession.

This victory at the Constitutional Court was ground-breaking, not only for the people in the Richtersveld but also for the understanding of property rights on communal land in South Africa. For the people in the Richtersveld, it meant that Alexkor and the government had to negotiate with the community as 'equals' with recognised property rights with regards the future of the diamond mining.[61] At an ideological level the judgement was unusual and profound. In cases where communities have won a land restitution claim in an area where there is mining, only their surface rights are restored. This was the case in the famous Makuleke claim[62], one of the first land restitution claims to be settled and which formed a key precedent on how to resolve land claims in conservation and mining areas.[63] Underlying this approach is the problematic view that in communal areas, land rights are limited to surface use and occupation rights, and that they do not amount to ownership rights under common law. Through this victory the Richtersvelders successfully thwarted this assumption. While there are varying views on the outcome of these negotiations[64], the point to be made here is the power of the Richtersveld land restitution claim in re-contesting control over this important area.

58 Richtersveld Community and Others v Alexkor Ltd and Another 2003

59 Richtersveld Community and Others v Alexkor Ltd and Another 2003: p. 64

60 Alexkor Ltd and Another v Richtersveld Community and Others 2003

61 Former Community Leader, Alexander Bay, 18 November 2020, interview done by Kolosa Ntombini.

62 Makuleke Community Re: Pafuri area of Kruger National Park and Environs 1998.

63 Ramutsindela 2002: p. 15

64 See Ntombini and Ramutsindela (forthcoming).

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