REPORTABLE

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NO. 488/2001

In the matter between:

THE RICHTERSVELD COMMUNITY AND OTHERS **Appellants**

and

ALEXKOR LIMITED **First Respondent**
THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA **Second Respondent**

Before: **VIVIER ADP, HARMS, SCOTT, FARLAM & MTHIYANE JJA**
Heard: **17 & 18 FEBRUARY 2003**
Delivered: **24 MARCH 2003**

Restitution of Land Rights Act 22 of 1994. Richtersveld community entitled to restitution of customary law interest in land.

JUDGMENT

VIVIER ADP

VIVIER ADP

[1] This is an appeal, with the leave of this Court, against the dismissal by the Land Claims Court ('the LCC') of the appellants' claim for restitution of a right in land in terms of s 2(1) of the Restitution of Land Rights Act 22 of 1994 ('the Act'). The judgment of the LCC has been reported as *Richtersveld Community and Others v Alexkor Ltd and Another* 2001 (3) SA 1293 (LCC) and its judgment refusing leave to appeal as *Richtersveld Community and Others v Alexkor Ltd and Another* [2001] 4 All SA 563 (LCC). References to its judgment will be to the main judgment.

[2] The appellants are communities consisting of the inhabitants of four villages in the Richtersveld, which is the name given to a vast territory of some half a million hectares situated in the north-western corner of the Northern Cape Province with a total population of only about 3500 people. During the middle of the 19th century the Reverend Hein of the Rhenish Mission Society, who worked among the Richtersveld people at the time, gave the territory its name after a German missionary, Dr Richter, who had visited the area in the early part of that century. The four villages are Kuboes and Sanddrift in the north and Lekkersing and Eksteenfontein in the south. The claim is for the restitution of a narrow strip of land comprising seven farms stretching for more than 120 km along the west coast of the Richtersveld from the mouth of the Gariep River (formerly the Orange River) in the north to just below Port Nolloth in the south ('the subject land'),[1] but excluding the area occupied by Port Nolloth. It is about 85 000 ha in extent. In the mid 1920's alluvial diamonds were discovered near Alexander Bay after which alluvial diggings were established on the subject land. During 1994 the Government, the second respondent, granted the subject land, including all mineral rights, in terms of a deed of grant ('grondbrief'), to Alexkor Ltd, the first respondent, in which the State was the sole shareholder.[2] Immediately to

[1] The full description of the properties is to be found in the LCC judgment at para 1 fn 1.

[2] The Alexander Bay Development Corporation Act 46 of 1989 established a corporation with that name and all the assets, liabilities and obligations of the State in the State Alluvial Diggings, which the Minister of Economic Affairs and Technology with the concurrence of the Minister of Finance may have determined, passed to the Corporation. The Alexkor Limited Act 116 of 1992 provided for the incorporation of the

the east of the subject land are some farm properties (which were referred to as the corridor farms) and further east adjoining them is the Richtersveld Reserve, an area of some 300 000 hectares, in which the four villages are situated. The Richtersveld Reserve was established by a certificate of reservation issued on 5 February 1930 in terms of s 6 of the Crown Lands Disposal Act 15 of 1887 (Cape). [3]

[3] The first appellant claims that it constitutes the Richtersveld community as a whole. The second to fifth appellants constitute the respective communities who inhabit the four villages of Kuboes, Sanddrift, Lekkersing and Eksteenfontein. As an alternative to the community claims a large number of persons brought individual restitution claims. They have not appealed. This appeal accordingly only concerns the community claims to restitution.

[4] In order to qualify for restitution of a right in land a claimant must meet the requirements of s 2 of the Act. By agreement between the parties only the requirements of s 2(1) were decided by the Court *a quo*. Other issues arising from the Act, such as whether the appellants have received some or other consideration for any dispossession, and the form of restitution were to stand over for later adjudication, depending upon the outcome on the s 2(1) issues.[4] The relevant portion of that sub-section provides

'A person shall be entitled to restitution of a right in land if —

(a) ....

(b) ....

Alexander Bay Development Corporation as a public company under the name Alexkor Ltd and for matters connected therewith. This aspect is dealt with in more detail later.

[3] The Reserve 'for the use of Hottentots and Bastards who are residing therein and of other coloured people as the Governor-General may decide'.

[4] LCC judgment par 14-16.

(c) ....

(d) it is a community or part of a community dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices, and

(e) the claim for such restitution is lodged not later than 31 December 1998.'

In terms of s 2(1) a community claimant accordingly has to establish:

(a) that it is a community or part of a community as defined in the Act;

(b) that the community possessed 'a right in land' as defined in the Act;

(c) that they were dispossessed of such right in the subject land after 19 June 1913;

(d) that the dispossession occurred 'as a result of past racially discriminatory laws or practices';

(e) that the claim was lodged not later than 31 December 1998.

It was always common cause that the claims were lodged before 31 December 1998 but the other four requirements were in issue before the LCC.

ARE THE APPELLANTS COMMUNITIES AS DEFINED BY THE ACT?

[5] The Act defines a 'community' as a group of persons whose rights in land are derived from shared rules determining access to land held in common by such group (s 1 sv 'community'). It was no longer an issue in this Court that the first appellant constitutes a community for purposes of the Act and the findings of the LCC (at para 66 to 75 of the judgment) were accepted as correct. Although the other appellants, as 'part of a community' constituting the first appellant, are similarly entitled to bring restitution claims, the first appellant's success or failure disposes of the other four appellants' rights and it is not necessary to have further regard to their claims. I will consequently limit my discussion to the case of the first appellant and will refer to it as 'the appellant'. It was also not disputed that the appellant community has maintained its identity as a people and the essential attributes and characteristics of their forebears and the society and culture of earlier times.

[6] That leaves for consideration the other three requirements, namely (b), (c) and (d).

SUMMARY OF THE FINDINGS OF THE LCC

[7] The LCC found that the appellant's forebears held a right in the subject land based on 'beneficial occupation for a continuous period of not less than 10 years' before the dispossessions relied upon, which allegedly took place after 1913 (at para 65). The LCC, however, held that any rights the appellant's forebears might have held in the subject land were extinguished when the

entire Richtersveld was annexed by the British Crown on 23 December 1847 to become part of the Cape Colony (at para 37-43) and that the land became Crown land upon annexation. The LCC further held that insofar as the appellant was later dispossessed of any rights in the subject land, such dispossession was not the result of 'past racially discriminatory laws or practices' and consequently not of a kind that can found a claim for restitution under s 2(1) of the Act (at para 76-96).

SUMMARY OF THIS JUDGMENT

[8] As will become clear in the course of this judgment the material findings of the LCC cannot be supported, even though its exposition of the underlying facts is generally beyond reproach. In our view the undisputed facts of this case show that the Richtersveld community, living in the margin of history on the edge of the country, was largely ignored by successive governments although these governments always recognised that the community had some kind of exclusive entitlement to the land. In the result they were left in undisturbed possession of the land which was never taken from them for settling colonists. This makes this case unique.

This Court's principal findings are the following:

1. The Richtersveld community was in exclusive possession of the whole of the Richtersveld, including the subject land, prior to annexation by the British Crown in 1847.

2. The Richtersveld community's rights to the land (including precious stones and minerals) were akin to those held under common law ownership. These rights constituted a 'customary law interest' and consequently a 'right in land' as defined in the Act.
3. These rights survived the annexation and the LCC erred in finding that the community had lost its rights because it was insufficiently civilised to be recognised.
4. When diamonds were discovered on the subject land during the 1920's the State ignored the Richtersveld community's rights and, acting on the premise that the land was Crown land, dispossessed the Richtersveld community of its rights in the land in a series of steps amounting to 'practices' as defined in the Act and culminating in the grant of full ownership of the land to Alexkor.
5. These practices were racially discriminatory because they were based upon the false, albeit unexpressed premise that, because of the Richtersveld

community's race and lack of civilization, they had lost all rights in the land upon annexation.
The result of these findings is that the Richtersveld community is entitled to restitution of the subject land and that the appeal has to succeed.

RIGHT IN LAND

[9] A 'right in land' is defined in the Act as

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

It will be seen that any right in land, whether under common law, statute or customary law, is included in the definition. Rights in land are not limited to those that are registered and rights that are not capable of registration are also included. The words 'may include' in the definition, which are followed by certain specified interests, extend the definition but do not necessarily limit it to those specified interests. From the nature of the specified interests one must conclude that personal rights and interests, which are not real rights or even rights in law at all, also qualify as 'rights in land'. The definition includes 'a customary law interest'. An interest in land held under a system of indigenous law is thus expressly recognised as a 'right in land', whether or not it was recognised by the civil law as a legal right.

THE RIGHT IN LAND CLAIMED

[10] The appellant contended that the community, in addition to the right to

beneficial occupation for 10 years found by the LCC, possessed one or other of the following rights in the subject land at the cut-off date of 19 June 1913: (a) ownership, (b) the right to exclusive beneficial occupation and use or (c) the right to use the subject land for certain specified purposes, namely habitation, cultural and religious practices, grazing, cultivation, hunting, fishing, 'water-trekking' and the harvesting and exploitation of natural resources.

[11] The appellant contended that the community had these rights on one of three alternative bases but for purposes of this judgment it is only necessary to mention two of them: First, it possessed these rights under its own indigenous law and when the Richtersveld was annexed, the common law of the Cape Colony was extended to it; under that law or international law the existing land rights of the inhabitants of the Richtersveld in terms of their own indigenous law were recognised and protected. They contended in the alternative that the rights that the Richtersveld inhabitants held in the subject land under their own indigenous law constituted 'customary law interests' and as such 'rights in' land for purposes of the Act even if these rights were not recognised and protected under the common law of the Cape Colony.

THE EVIDENCE

[12] At the trial a number of experts and lay witnesses testified on behalf of the appellant.[5] No evidence was led on behalf of the respondents. Evidence was given by three anthropologists and an archeologist for the appellant concerning the history of the appellant communities, the land they and their forebears occupied and their traditional laws, customs and practices forming part of their distinctive aboriginal culture. They were Mr E A Boonzaier, Prof A B Smith, Prof W P Carstens and Ms S M Berzborn. I should immediately point out that very little of the expert evidence was disputed at the trial, and that such evidence as was initially in contention was no longer questioned at the hearing of the appeal.

THE PERIOD PRIOR TO ANNEXATION

[13] In order to understand the basis of the appellant's claim and to decide the different issues it is necessary to deal with the history of the land and its people. In this regard it is convenient to deal with different stages of the history. The first question is whether the appellant possessed any rights in the subject land at the time of annexation. It does not appear that the LCC considered this aspect as such. Instead it considered another question, namely whether after annexation the land was *res nullius* and whether the appellant acquired ownership of the land by means of occupation (at para 37).

[14] At the time of annexation in December 1847 a group of people known

[5] See LCC judgment para 20.

as the Richtersveld people occupied the whole of the Richtersveld, including the subject land. The Richtersveld formed part of Little Namaqualand, as the area immediately south of the Gariep River in the northern part of the Cape Colony was called. The area north of the Gariep River was referred to as Great Namaqualand. The original inhabitants of Little Namaqualand had lived there since long before the Dutch colonisation of the Cape in the 17th century and archeological discoveries showed a pastoralist presence in the Richtersveld as early as 700 AD. Prof Smith testified that the core population of the Richtersveld had been there for over 1 000 years and had not changed.

[15] The Richtersveld people were a discrete ethnic group who identified themselves and were identified as the people of Captain Paul (Bierkaptein) Links. They consisted of a number of family clans, each headed by a chief. The clans together formed the tribe, which was headed by a captain, and a 'raad' (council) comprising the constituent clans. They considered the Richtersveld to be their land held by them in common.

[16] The Richtersveld people are a sub-group of the Nama people who in turn are generally considered by anthropologists to be a sub-group of the Khoi (also called Khoikhoi and, in former times, Hottentot) people. The Khoi are in turn seen as a sub-group within the larger category of Khoisan peoples, which include both Khoi and San (Bushmen).

[17] The Richtersveld people were formerly part of the Hobesen tribe under Captain Kupido Witbooi. At the beginning of the 19th century he claimed most of Little Namaqualand as his domain. In order to rule the vast land efficiently, Witbooi divided the territory into three sections. He ruled the eastern section and appointed two assistant captains for the other two sections, Abraham Vigiland for the central section that later became known as Steinkopf, and Paul (Bierkaptein) Links for the western section, subsequently named the Richtersveld. The eastern section under Kupido Witbooi had its head station at Pella and was later called Bushmanland. By the mid 19th century the Richtersveld people had assimilated some San and some Baster people but the group as a whole was predominantly of Khoi-Nama descent. The Basters were of mixed descent mainly from European fathers and San or Khoi mothers. The Richtersveld people had their main settlement at a mission station of the Rhenish Mission Society at Kuboes under the Reverend Hein, which was subordinate to the principal mission station at Steinkopf under the Reverend Brecher.

[18] Each of the said three Nama-Khoi tribes formed a discrete entity with its own social and political structure. The Richtersveld people shared the same

culture, including the same language, religion, social and political structures, customs and lifestyle derived from their Khoi-Nama forefathers. One of the components of the culture of the Richtersveld people was the customary rules relating to their entitlement to and use and occupation of this land. The primary rule was that the land belonged to the Richtersveld community as a whole and that all its people were entitled to the reasonable occupation and use of all land held in common by them and its resources. All members of the community had a sense of legitimate access to the land to the exclusion of all other people. Non-members had no such rights and had to obtain permission to use the land for which they sometimes had to pay. There are a number of telling examples: A non-member using communal grazing without permission would be fined 'a couple of head of cattle'; the Reverend Hein, who settled in the Richtersveld in 1844, recorded in his diary three years later a protest by the community that Captain Paul (Bierkaptein) Links had, without the consent of the 'raad', let ('verpacht') some of its best grazing land at the Gariep River Mouth; and the trader McDougal established himself at the mouth of the Gariep River in 1847 only after obtaining the permission of Captain Links on behalf of the community and agreeing to pay for the privilege. The captain and his 'raad' enforced the rules relating to the use of the communal land and gave permission to newcomers to join the community or to use the land. They furthermore mediated in the resolution of internal disputes and acted as a

court of law in the adjudication of criminal and civil matters. Schapera, *The Khoisan Peoples of South Africa*, 333 describes the 'raad' as the tribal executive. As I will show later the captain and his 'raad' acted and spoke on behalf of the Richtersveld people in dealing with the Colonial Government and others.

[19] The customary rules of the Richtersveld people were not limited to their social and political structures or their occupation and use of the land. They also included rules relating to criminal and civil law such as a prohibition of adultery, assault and theft, the recognition of private property rights in respect of all movable property, an obligation to pay compensation for damage to private property and rules of inheritance.

[20] The Richtersveld people had always been a herder group with a semi-nomadic lifestyle, necessitated by the arid, semi-desert environment and the very low and irregular rainfall in the region. The establishment of village settlements around secure water sources was, however, not uncommon. The LCC described the Richtersveld people's movement patterns as follows (para 58):

> 'It is clear that there was a seasonal cycle in the movement patterns. In the dry, hot summers when livestock required water every day or two, the herders tended to graze their cattle where water was available along the banks of the Gariep River and at other secure water sources. In the winter, when the livestock were less water-

dependent, the herders moved further afield to their winter pastures in the mountainous areas and in the sandveld so as to preserve the grazing close to their secure water sources for the summer.'

[21] With regard to the exclusivity of the Richtersveld people's use and occupation of the subject land at the time of annexation it must be accepted that some San people were present in the Richtersveld in pre-colonial times. The explorer Robert Jacob Gordon,[6] who travelled with William Paterson[7] up the Richtersveld coast in August 1779, described how they came across 'remains of the huts of wild Bushmen and whale bones and shells' and saw on the beach 'footprints of people and a seal skin freshly cut off' which one of his party said were the footprints of Bushmen who had come there to hunt.

[6] *Cape Travels 1777 to 1786* vol 2 (eds Raper and Boucher).
[7] *A Narrative of Four Journeys into the Country of the Hottentots and Caffraria*.

In addition some Baster immigrants arrived in the Richtersveld after 1830. By 1847 they had settled in the Richtersveld but they had done so with the permission of Captain Paul (Bierkaptein) Links. According to both Boonzaier and Carstens the Basters, like the San, were over time gradually absorbed into the Richtersveld community, partly through intermarriage but also by accepting the local norms and customs of the community, thereby losing their identity as a separate group. There was no evidence that at the time of annexation the Richtersveld was occupied by Basters other than those who did so with the permission of Captain Links and those who had been incorporated into the local community. The Trekboere, the descendants of European settlers, only started settling in the Richtersveld during the second half of the 19th century. They did so, however, with the permission of the Richtersveld 'raad' and subject to the payment of grazing fees. This was a practice consistently followed well into the 20th century.

[22] At the time of annexation the Richtersveld people had for a long time enjoyed exclusive beneficial occupation of the whole of the Richtersveld in the course of their semi-nomadic existence. Prof Carstens testified that by the mid 19th century the authority of Captain Paul (Bierkaptein) Links and his 'raad' over the whole of the Richtersveld was universally recognised both by the indigenous inhabitants and others. The evidence of Mr Boonzaier was to

the same effect. Ms Berzborn testified that in the 19th century the Richtersveld people regularly occupied and used the coastal region stretching from the Gariep River mouth in the north to Obiep in the south, which is inside the subject land. She identified a large number of places in the subject land that were given as the places of birth or baptism of members of the Richtersveld community in the register of the church at Kuboes.

RIGHT IN LAND (CUSTOMARY LAW INTEREST) AS AT ANNEXATION

[23] With regard to the Richtersveld people's occupation of the subject land two aspects need to be stressed. First, uninterrupted presence on the land need not amount to possession at common law for the purpose of an indigenous law right of occupation. Second, a nomadic lifestyle is not inconsistent with the exclusive and effective right of occupation of land by indigenous people. Cf McNeil, *Common Law Aboriginal Title* (1989) 202-204; *Mabo and Others v The State of Queensland* (No. 2) (1992) 175 CLR (HC of A) 188-189; *Delgamuukw and Others v British Columbia and Others* (1997) 153 DLR (4th) 193 (SCC) para 151 and Bennett and Powell, 'Aboriginal Title in South Africa Revisited' (1999) 15 *SAJHR* 449 at 465.

[24] It follows that the fact that the Richtersveld people's use of the subject land may only have been seasonal, and may have been sparse and intermittent due to the exigencies of their survival, does not mean that they did not have the exclusive beneficial occupation of the land, especially since the

community had a strong sense of legitimate entitlement to the land (cf. *Hamlet of Baker Lake v Minister of Indian Affairs and Others* (1979) 107 DLR (3d) 513 at 544), which others respected. I have already referred in this regard to the evidence that the Richtersveld people regarded the subject land as their own and that strangers could only use and occupy the land with their permission. Even though the Richtersveld people may therefore not have occupied every bit of the subject land, and even if other indigenous people sometimes visited the territory, their exclusive beneficial occupation of the entire area was not affected. In this regard Lamer CJC said the following in *Delgamuukw v British Columbia*, *supra*, para 156:

'[T]he test required to establish exclusive occupation must take into account the context of the aboriginal society at the time of sovereignty. For example, it is important to note that exclusive occupation can be demonstrated even if other aboriginal groups were present, or frequented the claimed lands. Under those circumstances, exclusivity would be demonstrated by "the intention and capacity to retain exclusive control" (McNeil, *Common Law Aboriginal Title, supra*, at p. 204). Thus, an act of trespass, if isolated, would not undermine a general finding of exclusivity, if aboriginal groups intended to and attempted to enforce their exclusive occupation. Moreover, as Professor McNeil suggests, the presence of other aboriginal groups might actually reinforce a finding of exclusivity. For example, "[w]here others were allowed access upon request, the very fact that permission was asked for and given would be further evidence of the group's exclusive control" (at p. 204).'

[25] What rights did the Richtersveld people then hold in the subject land at the time of annexation? The LCC found, as indicated above, that the appellant held only a right to 'beneficial occupation for a continuous period of 10 years' during the 20th century. It further held that no 'customary law interest' in land

within the definition of 'right in land' in the Act had been proved. But the customary right it had in mind was something completely different from that under consideration here. It considered whether at the time of dispossession (post 1913) 'there existed a custom which had become applicable law, in terms of which the State was obliged to recognise rights of the first plaintiff over the subject land' (para 48).

[26] During argument in this Court it was conceded on behalf of both respondents that at the time of annexation the Richtersveld people had a customary law interest under their indigenous customary law entitling them to exclusive occupation and use of the subject land and that this interest was akin to the right of ownership held under common law.

[27] In my view counsel were driven to this concession by the uncontested facts of this case. Briefly stated, our law requires for proof of a custom that it must be certain, uniformly observed for a long period of time and reasonable. See Voet 1.3.27-35; *Van Breda and Others v Jacobs and Others* 1921 AD 330. In this case Solomon JA referred at 334 to the requirement of English law that the custom must be immemorial, as opposed to Roman-Dutch law, which merely requires that the custom must be an old one, and continued as follows:

'In practice, however, there is no substantial difference between the two systems. For in the English Courts "evidence showing continuous user as of right as far back as living testimony can go is regarded as raising the presumption that the custom existed at that remote date." Further "if proof of facts be given from which it can be inferred that user

corresponding to the alleged custom in fact existed at some time past, the existence of the custom from the remoter era will be inferred" (Halsbury, para 424, vol 10). According to Voet (1.3.29), it was necessary to prove a long lapse of time, which is variously expressed by the terms "ancient use", "old age", "long custom", "custom observed for many years", &c. And he observes that as the number of years is nowhere definitely stated, it must be left to the discretion of a prudent judge. In this view Merula (*Manier van Procederen*), vol. 1.1.1.5.1 and 4, agrees, and there, I think, we may be content to leave the question of age, as regards which there appears to be no substantial difference between the English and the Roman-Dutch law.'

[28] The undisputed evidence in this case shows that at the time of annexation the Richtersveld people had enjoyed undisturbed and exclusive occupation of the subject land for a long period of time. The right was rooted in the traditional laws and custom of the Richtersveld people. The right inhered in the people inhabiting the Richtersveld as their common property, passing from generation to generation. The right was certain and reasonable. The inhabitants and strangers alike were aware of the right and respected and observed it.

[29] I accordingly conclude that at the time of annexation the Richtersveld people had a 'customary law interest' in the subject land within the definition of 'right in land' in the Act. The substantive content of the interest was a right to exclusive beneficial occupation and use, akin to that held under common law ownership (cf P.J. Steytler *The Renaissance of Traditional Ownership of*

Land, Butterworths Property Law Digest (November 2000) 3 at 9-10). (I shall in due course return to the question whether it included the right to the mineral and other natural resources on the subject land.)

THE ANNEXATION

[30] The British Crown acquired the Richtersveld by Proclamation on 17 December 1847. The preamble reads as follows:

'Whereas, by reason as well of the causes as the result of the present hostilities, carried on in certain territories to the Eastward of this Colony, all Treaties and Conventions formerly subsisting between Her Majesty the Queen and the Chiefs of the Gaika, Congo, T'slambie and Tambookie Tribes of Kaffirs, and all others, have become, and now are, wholly abrogated and annulled; and, whereas, it is alike just the necessary, so to improve the results of the said hostilities, that the lives and properties of Her Majesty's Subjects resident in the Eastern Districts of this Settlement may, in future, be better secured, the recurrence of unprovoked and disastrous wars be prevented, and plunder and depredation in time of peace, be checked and controlled; and whereas one means of attaining these important objects will be to substitute for the present boundary between the Colony and the Kaffir tribes aforesaid, another and more eligible line; and whereas the Northern limits of the Colony, as the same purport to be settled by the Proclamation of then Government, bearing date the 21st February 1805, are ill defined and uncertain, and it is expedient to adopt in the direction a clearer and better boundary.'

[31] The Proclamation defined the new boundary of the Cape Colony and declared that all territory to the south or west of the new boundary –

'is hereby annexed to and incorporated with the Colony of the Cape of Good Hope as part and parcel thereof'.

It further declared that –

'any right or title to the exclusive occupation of any part of the said territory by any native chief or people, granted or conceded by any such treaties or conventions as aforesaid, has wholly ceased and determined, and shall not be revived'.

[32] In 1842 the Reverend Brecher of Steinkopf addressed a memorial to the Colonial Government in which he objected to the planned extension of the

boundary of the Cape Colony to the Gariep River. The Colonial Government replied on 14 September 1842 that it had –

'no intention of extending the boundaries of the colony or of interfering with the rights of those inhabiting the country beyond the boundary'.

[33] The intention not to extend the boundaries of the Cape Colony did not last long. Nevertheless, the annexation of the Richtersveld in 1847 was only proceeded with after a process of consultation between the Colonial Government and the recognised political leaders of Little Namaqualand, including Captain Paul (Bierkaptein) Links of the Richtersveld people, and after these leaders had consented to the incorporation of their territories into the Cape Colony. The Civil Commissioner for Clanwilliam, Mr Van Ryneveld, was sent to Little Namaqualand to consult with Captains Paul Links and Abraham Vigiland about the proposed incorporation of the Richtersveld and Steinkopf into the Cape Colony. It appears from a petition to the Colonial Government by the Reverend Brecher dated 12 June 1891 that, although these two leaders originally opposed the incorporation, they granted their consent after discussing the matter with the Reverend Brecher on condition that the Colonial Government protected 'ons en ons volk onzen van ouds af bewoon den grond'. In another letter he stated that the captains who ruled the land had said that –

'they were willing to become British subjects, only with this condition, that the Government must please protect them [in] their formerly occupied land against encroachment of people not belonging to them in order to lead a quiet and honest life'.

DID THE CUSTOMARY LAW INTEREST SURVIVE THE ANNEXATION?

[34] **THE TERMS OF THE PROCLAMATION:** Counsel for the first respondent submitted that it was clear from the wording of the second quotation above from the annexation proclamation that no existing rights in land were recognised by the British Crown. I do not agree. The words 'any right or title to the exclusive occupation' clearly refer to the treaties and conventions set out in the preamble and do not purport to terminate or assert

any other right over the annexed territory of the Richtersveld people.

[35] **THE FINDING OF THE LCC:** As I have pointed out, the LCC held that no indigenous land rights survived the annexation. It held (para 37-41) that the Colonial Government regarded the Richtersveld as *terra nullius* because the inhabitants were insufficiently civilised and 'simply assumed sovereignty of, and full ownership over, the entire Little Namaqualand (including the subject land)'. As I will show, the LCC erred in finding that the Richtersveld was *terra nullius* and that it was so regarded by the Colonial Government, or that the land became Crown land.

[36] **DOCTRINE OF ABORIGINAL OR NATIVE RIGHTS:** Before proceeding, it is necessary to refer briefly to the doctrine of aboriginal title relied upon by the appellant. It was submitted that our common law should be developed in the same way that the courts have done in some other countries with a colonial history. The courts in the United States, Canada, Australia[8] and New Zealand have developed their common law to protect rights to occupation and use of land by indigenous communities, labelled aboriginal or native rights, by recognising the rights of these communities to continue to occupy and use their communal lands as their forebears had done even when it was not underpinned by any rights at common law.

[37] Like the customary law interest that I have found was held by the Richtersveld community, aboriginal title is rooted in and is the 'creature of traditional laws and customs' (*Members of the Yorta Yorta Aboriginal*

[8] RH Bartlett *Native Title in Australia* (Butterworths).

Community v Victoria [2002] HCA 58 para 103). The only requirement for the acquisition of aboriginal title is that the indigenous community must have had exclusive occupation of the land at the time when the Crown acquired sovereignty. See *Calder v Attorney-General of British Columbia* (1973) 34 DLR (3d) 145 (SCC) at 193-195.

[38] According to the doctrine of aboriginal title the antecedent rights and interests in land held by indigenous inhabitants survive the coloniser's acquisition of sovereignty and dominium. Bennett and Powell, 'The State as Trustee of Land' (2000) 16 *SAJHR* 601 at 615-616 state:

'Aboriginal title implies that, while a coloniser automatically acquired *dominium* over all land in new colonies, native rights persisted as burdens on the State's radical title.'

In their other article already cited, *Aboriginal Title in South Africa Revisited,* (at 461-462), these authors point out that the courts in other jurisdictions themselves concede that aboriginal title does not conform to the typical common-law concepts of property, and they freely admit that it is *sui generis*. The authors refer to the following distinguishing features between common-law property rights and aboriginal title. Aboriginal title originated in pre-colonial systems of indigenous law. It is enforceable in the ordinary courts, but is not protected from extinguishment by legislative act. Aboriginal title is not an individual proprietary right but rather a communal right vesting in an aboriginal people. Aboriginal title is inalienable to anyone except the Crown or state government.

[39] The aboriginal rights found by the courts in other jurisdictions vary in content. In *Delgamuukw v British Columbia*, *supra*, Lamer CJC described the different aboriginal rights as follows (para 138):

'At the one end, there are those aboriginal rights which are practices, customs and traditions that are integral to the distinctive aboriginal culture of the group claiming the right . . . . In the middle, there are activities which, out of necessity, take place on land and indeed, might be intimately related to a particular piece of land. Although an aboriginal group may not be able to demonstrate title to the land, it may nevertheless have a site-specific right to engage in a particular activity. . . . At the other end of the spectrum, there is aboriginal title itself . . . aboriginal title confers more than the right to engage in site-specific activities which are aspects of the practices, customs and traditions of distinctive aboriginal cultures. Site-specific rights can be made out even if title cannot. What aboriginal title confers is the right

to the land itself.'

Indigenous communities unable to establish aboriginal title may therefore still have acquired lesser aboriginal rights to certain specific land uses. See *R v Adams* (1996) 138 DLR (4th) 657 (SCC) para 27-29.

[40] The courts that have recognised aboriginal land rights have at the same time recognised that the Crown or State always had the power to extinguish aboriginal land rights. Termination requires appropriate legislative authority showing a clear and unequivocal intention to extinguish or at least an action making the land over to others (cf. LCC judgment at para 46).

[41] In *Mabo and Others v The State of Queensland* (No. 2) *supra*, Brennan J summarised the common law of Australia with reference to aboriginal title as follows (at 69):

'1. The Crown's acquisition of sovereignty over the several parts of Australia cannot be challenged in an Australian municipal court.

2. On acquisition of sovereignty over a particular part of Australia, the Crown acquired a radical title to the land in that part.

3. Native title to land survived the Crown's acquisition of sovereignty and radical title. The rights and privileges conferred by native title were unaffected by the Crown's acquisition of radical title but the acquisition of sovereignty exposed native title to extinguishment by a valid exercise of sovereign power inconsistent with the continued right to enjoy native title.

4. Where the Crown has validly alienated land by granting an interest that is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency. Thus native title has been extinguished by grants of estates of freehold or of leases but not necessarily by the grant of lesser interests (e.g., authorities to prospect for minerals).

5. Where the Crown has validly and effectively appropriated land to itself and the appropriation is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency. . . .'

See also McNeil, *op cit*, 193-211.

[42] As was pointed out by L.A. Hoq, 'Land Restitution and the Doctrine of Aboriginal Title : Richtersveld Community v Alexkor Ltd and Another' (2002) 18 *SAJHR* 421 at 435, an article commenting upon the judgment of the LCC, several commentators have addressed the hazards associated with recognising aboriginal title in South Africa. Some have expressed the view that the very reason for the 1913 cut-off date in the Act, and the fact that the date of dispossession was not extended back to the time of colonial annexation, was to eliminate claims based on aboriginal title. See, for example, J.T. Roux 'The Restitution of Land Rights Act' in Budlender, Latsky and Roux 'Juta's New Land Law' (1998) 3A-16. Other writers, such as Bennett and Powell in 'Aboriginal Title in South Africa Revisited', *op cit*, at 450-451 and Reilly 'The Australian Experience of Aboriginal Title: Lessons for South Africa' (2000) 16 *SAJHR* 512 at 528, have expressed the contrary view namely that aboriginal title can be a legitimate and workable part of South African law.

[43] All the aspects of the doctrine do not fit comfortably into our common law. For instance, the idea that the State or Crown possesses radical title to all land may have its origin in English feudal law and may be foreign to our law. In view of my conclusion that a customary law interest, for which the Act expressly provides, has been established in the present case, it is not necessary to pursue the matter any further and it becomes unnecessary to decide whether the doctrine forms part of our common law or whether our common law should be developed to recognise aboriginal rights. This conclusion also obviates any resolution of the question whether the LCC is entitled to 'develop' the common law, an issue dealt with at some length in its judgment (at para 49-53).

[44] **EFFECT OF ANNEXATION UPON EXISTING RIGHTS:** In colonial times acquisition of sovereignty over new territory could, according

to international law, be established by conquest or cession if the territory was inhabited, or by occupation, also called settlement, if it was not inhabited. *Halsbury's Laws of England* 4 ed reissue, vol 6, para 978, McNeil, *op cit*, 102. Occupation or settlement as a means of acquiring inhabited territories was based on the fiction that if a territory was inhabited by people regarded as insufficiently civilised it could be acquired by occupation or settlement as if it were uninhabited and therefore *terra nullius*. Dugard, *International Law - A South African Perspective*, 2 ed, at 119 points out that during the formative years of international law opinion was divided as to whether international law applied to indigenous peoples: the naturalists arguing that all peoples of the world enjoyed certain inalienable rights whereas the positivists denied such rights to indigenous peoples. He continues at 120:

> 'During the nineteenth century the positivist view prevailed, with the result that indigenous, non-European peoples in loosely organized societies were viewed as having no rights under international law. Consequently their territory was viewed as *terra nullius* – a designation that gave legal backing to the colonial expansion of that century. Modern international law, determined to erase this mark of imperialist paternalism from the historical record, has sought to minimize the nineteenth-century positivist position.'

[45] In 1975 the International Court of Justice was pertinently asked to determine whether the Western Sahara was *terra nullius* when it was colonised by Spain in 1884. The Court found (*Advisory Opinion on Western Sahara* 1975 ICJ Reports 12) that at the time of colonisation the Western

Sahara was inhabited by nomadic people 'organised in tribes and under chiefs to represent them' so that the territory was consequently not *terra nullius* capable of acquisition by occupation. The Court formulated its decision as follows (para 80):

> 'Whatever differences of opinion there may have been among jurists, the State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organisation were not regarded as *terra nullius*. It shows that in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through "occupation" of *terra nullius* by original title but through agreements concluded with local rulers. On occasion, it is true, the word "occupation" was used in a non-technical sense denoting simply acquisition of sovereignty; but that did not signify that the acquisition of sovereignty through such agreements with authorities of the country was regarded as an "occupation" of a "*terra nullius*" in the proper sense of these terms. On the contrary, such agreements with local rulers, whether or not considered as an actual "cession" of the territory, were regarded as derivative roots of title, and not original titles obtained by occupation of *terrae nullius*.'

[46] That the Richtersveld people had a social and political organisation at the time of annexation is clear from the evidence about their culture and traditional laws and customs to which I have already referred. The respondents, furthermore, in this Court expressly disavowed any suggestion that as a matter of fact the Richtersveld people were insufficiently civilised for purposes of the application of the rule. The Richtersveld could accordingly not have been regarded as *terra nullius*.

[47] The Colonial Government, moreover, did not regard the Richtersveld as *terra nullius* when that territory was annexed. Dugard, *op cit*, 121, after pointing out that even at the time of the Dutch East India Company at the Cape in the 17th century the Khoi indigenous inhabitants of the Cape already had a developed social organisation, states that:

> 'The African tribes to the east and north were accepted as political societies by the Dutch, the British, and the Boers, which all at some stage or another entered into treaties with tribal leaders. While the status of these treaties under international law was uncertain, they did at least make it clear that the African-occupied territories were not viewed as *terrae nullius.'*

[48] Indigenous rights in land were recognised at the Cape even in the time of the Dutch East India Company. Hahlo and Kahn, *The South African Legal System* (footnote 8 at 568) cite the purchase of the Cape district from the Khoi chief Schacher for £800, to be paid in goods, by the Raad van Politie. See also Bennett in Zimmermann and Visser (eds), *Southern Cross - Civil Law and Common Law in South Africa* (1996) 66.

[49] The British Crown acquired sovereignty over the Cape Colony in 1806 pursuant to hostilities between the Crown and the Dutch sovereign, which culminated in the Articles of Capitulation of 10 and 18 January 1806. This was formalised by the treaty between Great Britain and the Netherlands in terms of which the Cape Colony was formally ceded to the British Crown.

Article 6 of the Articles of Capitulation of Cape Town of 10 January 1806 provided that:

> 'All *bona fide* private property, whether belonging to the civil or military servants

of the Government, to the burghers and inhabitants . . . shall remain free and untouched.'

Article 8 of the same Articles of Capitulation provided that:

> 'The burghers and inhabitants shall preserve all their rights and privileges which they have enjoyed hitherto.'

Article 8 of the Articles of Capitulation of the Cape Colony of 18 January 1806 in turn provided that:

> 'The inhabitants of the Colony who are comprehended in this capitulation are to enjoy the same rights and privileges as have been granted to those in Cape Town, according to the capitulation of the 10th instant.'

In my view it is clear from the Articles of Capitulation that when the British Crown acquired sovereignty of the Cape Colony by conquest and cession in 1806 the indigenous land rights of the inhabitants were recognised and respected.

[50] Ordinance 50 of 1828 enacted by the Colonial Government is another indication that indigenous land rights were respected. Section 3 of that Ordinance provided as follows:

> '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 or Property therein - any Law, custom, or usage to the contrary notwithstanding.'

[51] The Ordinance ended with another equality provision in an Order-in-Council, ordering and declaring that –

> 'all Hottentots and other free Persons of colour lawfully residing within the said Colony are, and shall be in the most full and ample manner entitled to all and every the rights, privileges, and benefits of the Law, to which any other His Majesty's subjects, lawfully residing within the said Colony, are or can be entitled.'

DOCTRINE OF RECOGNITION

[52] As I have already indicated the Richtersveld, at the time of annexation, was inhabited by people who had a social and political organisation and who could not have been regarded as insufficiently civilised to possess land rights. All of this was common cause in this Court. The territory was accordingly not amenable to acquisition by occupation or settlement. In all the circumstances it is clear that the acquisition of the Richtersveld by the Proclamation was the equivalent of an acquisition by conquest or cession with the same consequences as the acquisition of the Cape Colony into which it was incorporated. It is also clear that it was so regarded by the Colonial Government. Halsbury, *op cit* states (para 980) that an annexation in the face of an organised society considered civilized was treated as a case of cession and not settlement even before or in the absence of cession by international

formalities. Even if the Richtersveld was not acquired by conquest, then it was in any event deemed to have been acquired by cession. For present purposes it is not necessary to decide whether it was the one or the other. What is important is that it was not acquired by occupation or settlement. In this regard it is significant that there was never any settlement by the Colonial Government in the Richtersveld.

[53] At one time protagonists of the so-called doctrine of recognition held the view that annexation of land by the British Crown resulted in the abolition of all pre-existing customary rights and interests in land except those rights, which the Crown chose, in the exercise of its sovereignty, to recognise. It was held that this was so whether the assumption of sovereignty was by way of conquest, cession or annexation, or the occupation of territory that was not at the time held under another sovereign. So, for example, it was stated by Lord Dunedin in *Vajesingji Joravarsingji v Secretary of State for India* (1924) LR 51 Ind App 357 at 360 that:

'[W]hen a territory is acquired by a sovereign state for the first time that is an act of State. It matters not how the acquisition has been brought about. It may be conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognised ruler. In all cases the result is the same. Any inhabitant of the territory can only make good in the municipal Courts established by the new sovereign such rights as that sovereign has, through his officers, recognised. Such rights as he had under the rule of predecessors avail him nothing.'

[54] The decision in *Vajesingji Joravarsingji* is not in accordance with the weight of authority and has been criticized as unworkable in practice and wrong in law and logic. See McNeil, *op cit* 175-179, Bennett and Powell, 'Aboriginal Title in South Africa Revisited' 449 at 478. McNeil, *op cit*, at 177 points out that the recognition doctrine would result in uncertainty and chaos since all title to land would be uncertain for an indefinite period after annexation. In the meantime the inhabitants would be presumed to be

trespassers and all property transactions, other than with the Crown, would be of doubtful validity. In the absence of an express declaration of the Crown's intentions, this uncertainty would last until it became obvious from the Crown's actions that its intention was to recognise, or not to recognise pre-existing rights.

[55] Against the recognition doctrine is a line of authority to the effect that there is a presumption that, 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. This has been referred to as the doctrine of continuity. Bennett and Powell *op cit* at 480 state that –

'the great majority of colonial decisions favoured the doctrine of continuity and today it is a settled feature of Anglo-American jurisprudence'.

The presumption was applied in *Amodu Tijani v The Secretary, Southern Nigeria* [1921] 2 AC 399. That case involved a claim for compensation by an African chief for lands taken by the Crown for public purposes under a local ordinance in Southern Nigeria, a colony acquired by the cession of Lagos in 1861. In issue was the amount of compensation to be paid, which depended on the nature of the appellant's interest in the lands and his relationship with the community that had occupied and used it. Dealing with the nature of the land tenure under local customary law and the effect of the cession, Viscount Haldane said at 407:

'No doubt there was a cession to the British Crown, along with the sovereignty, of the radical or ultimate title to the land, in the new colony, but this cession appears to have been made on the footing that the rights of property of the inhabitants were to be fully respected. This principle is a usual one under British policy and law when such occupations take place . . . . A mere change in sovereignty is not to be presumed as meant to disturb rights of private owners; and the general terms of a cession are *prima facie* to be construed accordingly.'

[56] As was pointed out by Brennan J in *Mabo and Others v The State of Queensland supra* at 56, Viscount Haldane did not confine the generality of the last sentence to acquisitions by cession but appeared to construe the terms of the cession in the light of the general principle by which private property

rights survive a change in sovereignty by whatever means.

[57] In *Sakariyawo Oshodi v Morianno Dakolo* [1930] AC 667 (PC) at 668, Viscount Dunedin, despite his earlier judgment in *Vajesingji Joravarsingji*, accepted that the decision in *Amodu Tijani* laid down that the cession of Lagos in 1861 'did not affect the character of the private native rights'.
[58] The approach adopted in *Amodu Tijani* was confirmed by the Privy Council in a Southern African context in *Sobhuza II v Miller and Others* [1926] AC 518 (PC) at 525 where the Court held that the title of an indigenous community to land, which the Court regarded as generally usufructuary in nature, survived as 'a mere qualification of a burden on the radical or final title of whoever is sovereign'.
[59] Similarly, in *Adeyinka Oyekan v Musendiku Adele* [1957] 2 All ER 785 (PC) at 788 e-i, which dealt with the cession of land to the British Crown in the former colony of Lagos, Lord Denning said the following:

> 'In inquiring, however, what rights are recognized, there is one guiding principle. It is this: The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected. Whilst, therefore the British Crown, as Sovereign, can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it; and the courts will declare the inhabitants entitled to compensation according to their interests, even though those interests are of a kind unknown to English law.'

[60] The rule that indigenous rights to private property in a conquered territory were recognised and protected after the acquisition of sovereignty was, however, not universally applied. Recognition was sometimes withheld from those communities regarded as backward or insufficiently civilized from a European perspective. In *In re Southern Rhodesia* [1919] AC 211 (PC) Lord Sumner at 233 considered whether the land rights of the Ndebele held under customary law –

> 'belonged to the category of the rights of private property, such that upon a conquest it is

presumed, in the absence of express confiscation or of subsequent expropriatory legislation, that the conqueror has respected them and foreborne to diminish or modify them'.

He held that they were not. He expressed the *ratio* for his conclusion as follows:

'Some tribes are so low in the scale of social organisation that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilised society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them.'

This decision of the Privy Council was not followed in the subsequent decisions of the Privy Council to which I have referred and was rejected in *Mabo* where Brennan J said (at 40) that it –

'depended on discriminatory denigration of indigenous inhabitants, their social organisation and customs' and that its basis was 'false in fact and unacceptable in our society.'

Brennan J concluded as follows at 57:

'The preferable rule, supported by the authorities cited, is that a mere change in sovereignty does not extinguish native title to land. (The term "native title" conveniently describes the interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants.) The preferable rule equates the indigenous inhabitants of a settled colony with the inhabitants of a conquered colony in respect of their rights and interests in land and recognizes in the indigenous inhabitants of a settled colony the rights and interests recognized by the Privy Council in *In re Southern Rhodesia* as surviving to the benefit of the residents of a conquered colony.'

[61] In view of the authorities I have referred to, the recognition doctrine as formulated by Lord Dunedin in *Vajesingji Joravarsingji* cannot be supported

and I agree with the view expressed by Brennan J in *Mabo* in the passage I have quoted. It follows that the existing customary law interest in the subject land held by the Richtersveld people survived the annexation.

[62] The LCC came to the contrary conclusion, holding that a change in thinking cannot turn the clock of history back: the change cannot destroy any land title obtained (presumably by the Crown) in accordance with rules of law applicable at the time and that the consequences of the colonial acquisition must be examined according to the conditions and rules in existence at the time (at para 42). The legal principle cannot be queried. But one has first to ask whether there was such a rule relating to *res nullius* as at 1847. Counsel could not give any reference to the rule in English law that predates the late 19th century. M. F. Lindley *The Acquisition and Government of Backward Territory in International Law* (1926) 18 points out that the publicists, who did not recognise the sovereignty of 'backward people', belong principally 'to a comparatively recent period' and the works he cites are all (as far as I can gather) from the late 19th century or later. No one has suggested that it ever formed part of Roman Dutch law. The International Court of Justice has found, and we have no reason to doubt that finding, that there was no such rule in international law. But even if there were such a rule, it remains a question of fact whether the rule could have been applicable to the circumstances of this case and, as I have attempted to show, it could not.

THE SOVEREIGN AS OWNER OF ALL LAND NOT ALLOCATED

[63] The LCC held that in terms of the law in force in the Cape Colony at the time of the annexation all land not granted under some form of tenure belonged to the Crown (at para 43). In this regard it relied upon some authors and an *obiter* statement in *Cape Town Council v Colonial Government and Table Bay Harbour Board* (1896) 23 SC 62. This view, no doubt, is based upon English feudal law and to the extent that Roman-Dutch law had some remnants of feudal law, that law was never introduced into South Africa.

[64] In support of this finding the LCC held further (para 37 fn 54 and 55)

that the Colonial Government –

'made laws under which non-issued land (considered to be Crown land) could be disposed of. That included Crown land actually occupied by people, but who were considered to have insufficient civilisation to make them the owners of the land'.

It cited the Crown Lands Act 2 of 1860, replaced by Act 14 of 1878, in turn replaced by Act 15 of 1887.

[65] I agree with counsel for the appellant that these Acts manifested a contrary intention to that found by the LCC. They provided for the disposal of waste Crown land but expressly excluded certain categories of land, including land such as the Richtersveld, from their operation. So, for example, s 12 of Act 15 of 1887 provided, in terms similar to those of its precursors:

'Land claimed by any registered owner of adjacent land as part of his property by reason of any alleged defective title deed or supposed landmarks or beacons of the said adjacent land, land occupied *bona fide* and beneficially without title deed at the date of the extension of the colonial limits beyond it, land conditionally occupied or claimed under any general notice or regulation of the Government, or under any promise or order of a Government officer, duly authorised at the time to make such promise, or give such order, shall not be considered or treated as Crown land for the purpose of this Act, until the claim thereto, in each case, shall have been decided on by the Governor.'

The Richtersveld clearly fell in the category of 'land occupied *bona fide* and beneficially without title deed at the date of extension of the colonial limits beyond it'. These Acts accordingly manifested an intention to respect existing land rights and not to extinguish them. Act 15 of 1887 (Cape) was repealed by the State Land Disposal Act 48 of 1961, which does not include a provision

corresponding to s 12 of the Cape Act. The result of this was that protection given by that section to the land rights of persons such as the members of the appellant was extinguished.

[66] Respondents' counsel relied upon these Acts for another, though related, submission. They accepted as correct something that is really axiomatic, and that is that rights can only be extinguished by acts of state or legislation. Cf the *Mabo* rules quoted. Hard pressed to identify any such overt act since the title was not extinguished by any grant, they pinned their hope on these Acts, especially the quoted provision. At best for them it can be said that the Legislature assumed that all land not allocated by means of the grant of title deeds belonged to the Crown but the implied assumption cannot be elevated to a legislative act with that consequence.

THE PERIOD AFTER ANNEXATION UNTIL DISPOSSESSION

[67] The Richtersveld people continued to exercise and enjoy exclusive beneficial occupation of the whole of the Richtersveld until at least the mid 1920's. The LCC held that other people who may have lived on the subject land in the beginning of the 20th century shortly before the Richtersveld people were excluded and who were by then not absorbed by the appellant communities, were not sufficient in number or strength to affect the exclusivity of the occupation by the appellant communities. This finding was not contested on appeal.

[68] The Richtersveld people's claim to exclusive use and occupation of the whole of the Richtersveld was persisted in from annexation until their dispossession well into the 20th century. They made their claims expressly in correspondence with the Colonial authorities and also by conduct by requiring strangers to obtain their permission before settling or grazing their animals in the Richtersveld.

[69] The Colonial Government and its successor after Union in 1910 never disputed those claims (although they sometimes disputed the claim to ownership) and consistently admitted or at least accepted the Richtersveld people's exclusive right of occupation of the whole of the Richtersveld.

[70] Although the Richtersveld people shared their Khoi-Nama culture with the two other tribes the Colonial Government and its successor in their

dealings with the Richtersveld people consistently accepted that the Richtersveld people were a specific community with its own character and identity and dealt with them on that basis. They were always regarded by the Colonial Government as a distinct entity. For instance, in his report of 1854, the Surveyor-General, Mr Charles Bell, referred to *'Paul Linx and his people'* as a distinct group that occupied a particular territory and whose members could be identified and counted.

[71] That the Richtersveld people retained a continuous identity until the present day appears *inter alia* from the following passage in the judgment of the LCC dealing with the political structure of the Richtersveld people in the time after Captain Paul (Bierkaptein) Links (para 69):

> 'After the death of Captain Paul (Bierkaptein) Links, he was succeeded by his son, Captain Paul (Swartbooi) Links. After his death, the community changed the title of their chiefs to hoofkorporaal. The first hoofkorporaal was Gert (Jul) Links. A problem arose because he utilised grasgeld for his own needs. The community wanted him replaced by Paul (Tweekierie) Links, who was too young at the time. They elected Petrus Links to take over from Gert (Jul) Links, and when Paul (Tweekierie) Links was old enough he replaced Petrus Links as hoofkorporaal. Paul (Tweekierie) Links passed away in 1957. The governance of the Richtersveld people (who lived in the reserve) was then made over to a government-appointed superintendent, assisted by an advisory council (later a management council).'

In his report of 30 June 1890 the Assistant Surveyor-General, Mr Melvill, dealt with the Richtersveld people as a specific community with its head

station situated at Kuboes and an out-station at Kalkfontein, about 60 km south of Kuboes, where there was strong, permanent water. Mr W C Scully, the Civil Commissioner for Namaqualand, who visited the Richtersveld in the 1890's, described the missionary at Kuboes, the Reverend Hein, as the "dictator of the Richtersveld".

[72] Earlier, in a letter dated 1 December 1851, addressed to the Colonial Secretary, the Surveyor-General, Mr Charles Bell, had written that the annexation of the Richtersveld did not affect rights to private property and therefore did not affect the lease between the trader McDougal and Captain Links.

[73] On 4 May 1888 the Reverend Brecher of Steinkopf wrote to the Civil Commissioner at Springbok enquiring about the ownership of the Richtersveld, which he claimed was without question the people's own property. Brecher added that when he asked the Colonial Government to define the boundaries of the Richtersveld, Bell told him that –

> 'the people could use undisturbedly the whole veldt as long as there would be no application for land. And when this would be done, then it was fine enough to reserve the mission ground for the natives at Richtersveld . . .. I think that I once instructed the present Raad at Richtersveld that, when anyone may trespass on this ground and water which they absolutely hold to be their property, then they must give such person a warning to leave the place and in the event he may not listen to them, then they could on account of the place being their own property and on account of the Squatting Act, impound the trespassing

stock.'

[74] In his said report of 30 June 1890 Mr Melvill stated that the Richtersveld community had –

'just and well founded claims to be continued and secured in such occupation, the Government having, at different times, substantially acknowledged their claims'.

He added that the extent of the land claimed by the Richtersveld community was 'enormous, being, as very roughly estimated by me, from 680 000 to 700 000 morgen'. He pointed out that no boundaries had ever been defined and that –

'the country having been hitherto considered as not a very desirable one for Europeans to inhabit, the natives have been allowed to occupy it in their usual nomadic fashion, without limitation to any particular part'.

[75] On 19 February 1898 Mr J B Moffat of the Native Affairs Office in Cape Town, stated in a letter to the Superintendant of Native Affairs that –

'it must be admitted, I think, that the people cannot equitably be disturbed in their occupation of the land. There may be some newcomers who have no right to be there, but the bulk of the people can probably prove their claim to share in the land under the conditions of the tickets of occupation, or in the case of Richtersveld for which there is no ticket, continuous occupation since 1847, by themselves or their families'.

[76] On 3 August 1909 the Reverend H Kling, in his capacity as Chairman of the Steinkopf Raad and of the Richtersveld and Kalkfontein community, wrote to the Colonial Minister of Agriculture. After referring to Mr Melvill's proposal in 1890 to reduce the size of the Richtersveld he continued as follows:

'.... the people of Richtersveld then and there objected to Mr Melvill when he promised us faithfully to represent our objection to the government, we never heard any further regarding the matter, neither did we receive any notice from government regarding our objection. This was a matter of at least 19 years ago - we now claim the rights of the Richtersveld area as mentioned in annexure "C" of Mr Melvill for the following are in our favour - the rights of the period of occupation which has been as far back as 1830 when Captain Paul Links Snr was already in possession of Kuboes (Richtersveld) and surrounding ground and Jacob Fries at Kalkfontein.'

The Reverend Kling went on to state that by 1890 the Richtersveld people had occupied the land for a full 60 years and that Mr Melvill had admitted in his report to the Colonial Government that the territory legally belonged to the Richtersveld people. He concluded as follows:

'We have practically occupied this area for at least 80 years undisputed by anyone so fully intent to maintain our rights which by every point of law is ours. I therefore, as chairman of the Raad of Steinkopf, Kalkfontein, Richtersveld people, on their behalf humbly petition that you grant us the title of the area as claimed by us to stop any further encroachment on our ground by our government surveyor and thereby save any dispute which may arise as a result thereof.'

[77] In a letter dated 27 August 1909 the Surveyor-General, Mr A H Cornish-Bowden, replied to the letter of the Reverend Kling. Far from disputing any of the claims that the Richtersveld people had occupied the whole of the Richtersveld since before annexation, Cornish-Bowden assured the Reverend Kling that the Colonial Government

'has no intention of depriving the inhabitants of the Richtersveld of the rights they have

hitherto enjoyed as you seem to apprehend, 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. All rights to minerals and precious stones will be reserved to the Crown as in the case of Steinkopf'.

[78] On 6 March 1925 the Secretary for Lands addressed a letter to the Secretary for Justice requesting an opinion by the State law advisors on –

'the extent of the rights which the coloured community can claim by virtue of their long possession [of the Richtersveld]'.

In setting out the facts the Secretary for Lands said that –

'the aboriginees occupied all the land between the Buffels River and the Orange River prior to the extension of the boundary'.

The opinion, dated 11 April 1925, confirmed that the Richtersveld was regarded as including the land –

'situated on the south bank of the Orange River, north of Port Nolloth, the sea being its western boundary'.

It further confirmed that the –

'Richtersveld proper was occupied by a tribe of Hottentots owing tribal allegiance to an hereditary chief. The family name being Links. The occupation of the tribe goes back to at least the beginning of the 19th century . . . The original Hottentot blood is now largely mixed through intermarriage with Bastards. The inhabitants, however, claim continued existence as a distinct tribal entity. The affairs are managed by a Raad presided over by the Rhenish Missionary. Arable land, water and grazing are held in common. The life is chiefly nomadic. New burgers are incorporated into the tribe by the vote of a general meeting of the whole tribe. The revenue consists of grazing fees, the money being devoted chiefly to education.'

[79] In the opinion the State law advisors referred to the action which one Ryk Jasper Cloete, a member of the Richtersveld community, had instituted in the Cape Supreme Court during 1917 against the Colonial Government claiming ownership of the whole of the Richtersveld by prescription. In its

plea to this claim the Government had admitted 'the communal occupation' of the area by the Richtersveld people and that the –

'control of occupation of the Richtersveld was at all material times exercised by the Raad appointed by the Hottentots subject to the control and supervision of the Rhenish Missionary Society'.

This claim, also opposed by the community, was not proceeded with, apparently due to a lack of funds.

[80] From the aforegoing it is clear, in my view, that the Colonial Government and its successor at all material times from annexation until immediately prior to the alleged dispossession, recognised the Richtersveld people as a distinct community which had occupied the whole of the Richtersveld from prior to annexation and had continued to do so.

[81] I have earlier in this judgment referred to the practice of the Richtersveld people to grant grazing leases to white farmers in the Richtersveld. From extended correspondence between Colonial Government officials about this practice it appears clearly that the Government never challenged the right of the Richtersveld people to do so. In June 1909 Mr O C H Strong, the Resident Magistrate at Port Nolloth, wrote to the Assistant Treasurer of the Colonial Government and with reference to three grazing leases in the Richtersveld, stated the following:

'a wholesale system apparently has been going on without check of farmers being fleeced

by the mission people at the loss of the government and the exercise of rights of ownership of the land has been made by the mission presumably on behalf of the natives'.

At the request of the Assistant Treasurer of the Colonial Government Mr Strong subsequently compiled a 'return of grazing fees levied by the Rhenish Mission Community upon farmers residing in the district of Port Nolloth'. On 4 January 1910 the Surveyor-General said the following about this issue in a letter addressed to the Assistant Treasurer of the Colonial Government:

'... the land was set aside for the inhabitants of the Richtersveld, and I consider that in equity government is bound to acknowledge the right of these people to it. In my opinion it would not be advisable to make any claim to the grazing fees levied by them, as this would cause considerable dissatisfaction, which is not warranted.'

[82] Nothing apparently was done in the ensuing years about the grazing fees collected by the missionaries on behalf of the Richtersveld people. The matter was again raised in a letter dated 16 July 1919 from the Colonial Secretary for Lands to the Magistrate at Springbok. In the letter the former stated that it was extremely difficult to give 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' of the people under Captain Paul (Swartbooi) Links. The Colonial Secretary for Lands went on to say that –

'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 therefore seems reasonable, though the practice should not receive your official sanction.'

[83] The report of the Controller and Auditor General to Parliament in February 1921 referred to the warning in 1918 by the Secretary for Justice that the Government could lose the whole of the Richtersveld by prescription and that this concern had prompted a suggestion of legislative intervention that had not been implemented. The Auditor-General concluded as follows:

'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.'

[84] From the minutes of evidence taken before the Select Committee on Public Accounts in 1922 it appears that rent was at that stage still being collected from white farmers for grazing in the Richtersveld by Captain Paul (Swartbooi) Links.

MINERALS AND NATURAL RESOURCES

[85] I now return to consider whether the appellant's customary law right

encompasses a right to minerals and other natural resources. With regard to the Richtersveld people's use of mineral and natural resources Mr Boonzaier and Prof Carstens testified to the effect that long before annexation the Nama people in Little Namaqualand had mined and used copper for the purpose of adornment. According to Mr Boonzaier the Richtersveld people appreciated the value of minerals. This led them to grant mineral leases to outsiders. The people at Steinkopf did the same. In his evidence before the Parliamentary Select Committee in 1856 Mr G.W. Prince of Prince, Collison & Co, referred to several mining leases which had been concluded with the Reverend Brecher. It is not clear whether the latter acted on behalf of the people at Steinkopf or the Richtersveld people.

[86] Captain Paul (Bierkaptein) Links and his 'raad' on 11 August 1890 granted a mineral lease to a Mr Anderson and his associates. The lease described Links as

> 'Captain of the Bastards and Namaqua people owning and occupying the country from south of Bethany, Great Namaqualand to the Orange River and the country south of the said Orange River of which "Richtersveld" is the chief town or station.'

In 1910 the Reverend Kling on behalf of the Richtersveld community granted Henry Wrensch mineral prospecting rights to the Richtersveld. At around the same time a prospector called Giffen reported that the Richtersveld community had entered into mining arrangements with several mining companies.

[87] This evidence clearly establishes that the Richtersveld community believed that the right to minerals belonged to them and that they acted in a manner consistent with such a belief. They exploited the minerals without requesting permission from anyone to do so and, significantly, strangers respected their rights by obtaining their permission to prospect for minerals and concluding mining and mineral leases with them.

[88] Although there was no evidence of mining activities on the subject land itself or that mining leases were concluded in the period prior to annexation, this is not fatal to the appellant's case. At the time of annexation it was clearly part of the distinctive culture of the Richtersveld people to appropriate for themselves the right to minerals and natural resources on the land and it is clear that this custom had continued from earlier days. In *R v Van der Peet* (1996) 137 DLR (4th) 289 (SCC) Lamer CJC said (para 60), with reference to aboriginal rights, that the time period that the Court should consider in identifying whether the right claimed meets the standard of being integral to the aboriginal community claiming the right, is the period prior to contact between aboriginal and European societies. He went on to say (para 62) that this does not mean that:

'the aboriginal group claiming the right must accomplish the next to impossible task of producing conclusive evidence from pre-contact times about the practices, customs and traditions of their community. . . . The evidence relied upon by the applicant and the courts may relate to aboriginal practices, customs and traditions post-contact; it simply needs to be directed at demonstrating which aspects of the aboriginal community and society have their origins pre-contact. It is those practices, customs and traditions that can be rooted in the pre-contact societies of the aboriginal community in question that will constitute aboriginal rights.'

[89] Lindley, *op cit*, at 352, pointed out that mineral rights were frequently reserved to the Government 'and in lands owned by or reserved to the natives', but he added that –

'Where native lands are taken for mineral development, adequate compensation should be given to the owners, and should in general include other lands equally suitable in all

respects for their purposes.'

This did not happen in this case, as I shall show later.

DISPOSSESSION 'AS A RESULT OF PAST RACIALLY DISCRIMINATORY PRACTICES'

[90] The final issue for determination is whether the appellant was dispossessed of its rights in the subject land as a result of past racially discriminatory laws or practices. In the first place it is clear that the dispossession relied upon took place after 19 June 1913. In terms of s 2(1)(d) of the Act a community is entitled to restitution of its rights in land only if it was dispossessed of those rights 'as a result of past racially discriminatory laws or practices'. According to the definitions clause 'racially discriminatory laws' include laws made by any sphere of government and subordinate legislation and the term 'racially discriminatory practices' means racially discriminatory practices, acts or omissions, direct or indirect, by —

'(a) any department of state or administration in the national, provincial or local sphere of government;

(b) any other functionary or institution which exercised a public power or performed a public function in terms of any legislation.'

[91] The appellant contended that the Richtersveld community was dispossessed by a series of legislative and executive steps whereby, after the

discovery of diamonds in the mid 1920's, state alluvial diggings were established on the subject land, the public, including the Richtersveld people, were excluded from the subject land, mineral rights in the subject land were granted to Alexkor and full ownership of the subject land was ultimately transferred to Alexkor.

[92] The state alluvial diggings were established by Proclamation 58 of 8 March 1928, which declared a portion of the subject land in the vicinity of Alexander Bay to be a state alluvial digging in terms of s 26 of the Precious Stones Act 44 of 1927. The Proclamation described the land concerned as 'unalienated Crown land'. Proclamation 1 of 3 January 1929, Proclamation 250 of 17 July 1931 and Proclamation 158 of 7 June 1963 extended the state alluvial diggings until it ultimately covered the whole of the subject land. The last three Proclamations also described the subject land as 'unalienated Crown land'.

[93] The appellant contended that the premise that the subject land was unalienated Crown land meant that the protection and benefits afforded to the owner of land on which a state alluvial digging was established, were not afforded to the Richtersveld community. These included the protection and benefits afforded to the rights of surface owners under s 29 of the Precious Stones Act 1927; the entitlement of owners and surface owners under s 19(1)(a) to select 400 claims free of charge; the owners' share of licence moneys

under s 22 and the protection of the owners' homesteads and water rights under s 23.

[94] It was contended that the dispossession process was further implemented by s 2 of the Alexander Bay Development Corporation Act 46 of 1989, which established a corporate body and provided for the transfer to it of –

'all assets, liabilities, rights and obligations of the state in the State Alluvial Diggings which the Minister of Economic Affairs with the concurrence of the Minister of Finance may determine'.

In 1991 the Corporation was granted a variety of mineral rights in respect of the subject land in terms of the Precious Stones Act 73 of 1964.

[95] Sections 2 and 3 of the Alexkor Limited Act 116 of 1992 provided for the change of the Corporation into a company and for the name to be changed to Alexkor. The incorporation of the Corporation as a company had no effect on its rights and obligations acquired or incurred prior to such incorporation. In due course the subject land was granted to and registered in the name of Alexkor in 1994. On 20 April 1995 the title deeds of the subject land were endorsed to the effect that a certificate of mineral rights in respect of the whole of the subject land had been issued in favour of Alexkor. It was contended that the appellant was thus finally dispossessed of all its rights in the subject land and the minerals upon it.

[96] The appellant contended that the dispossession was effected by their eviction from the subject land and its appropriation by the State and Alexkor. It was contended that the dispossession was the result of racial discrimination in that the State failed to recognise and protect their rights in the subject land in the same way that the land rights of the other inhabitants of the Cape were

consistently recognised and protected. It was contended that the very essence of the discrimination against the Richtersveld community was the State's fundamental premise that they had no land rights in the subject land at all.

[97] The LCC held that insofar as the appellant was dispossessed of any rights in the subject land, such dispossession was not of a kind that could found a claim for restitution. Following its earlier judgment in *Minister of Land Affairs v Slamdien* 1999 (1) BCLR 413 (LCC), the LCC held (para 93):

'A dispossession which did not occur under a law or practice designed to bring about spatial apartheid, or broadly speaking, which was not intended for implementing the division of South Africa into separate compartments for different racial groups, would not qualify as a dispossession for the purposes of the Act.'

In other words, the LCC held that the laws and practices alleged by the appellant to have resulted in their dispossession were not aimed at furthering 'spatial apartheid' and that without this link the appellant's claim did not fall within the ambit of the Act. In my view the LCC erred in this restrictive interpretation of the Act.

[98] In *Slamdien* the former landowner's land was expropriated for the building of a racially exclusive school. In claiming restitution, the argument was that this amounted to a racially discriminatory practice in terms of the Act. In its judgment the Court stated that the underlying purpose of the Act was to address dispossessions of land rights resulting from a particular class of racially discriminatory laws and practices, namely those that sought specifically to achieve 'spatial apartheid'. The Court then continued as follows (para 26):

'These would then be those laws and practices which discriminated against persons on the basis of race *in the exercise of rights in land* in order to bring about that racial zoning' (my emphasis).

The Court in *Slamdien* held that the discriminatory component of the decision to establish a school on the respondents' property was not directed at the exercise of rights in land, either directly or indirectly. It held that the

discrimination was directed instead at the prospective pupils of the school who would have to be educated separately from other race groups. For this reason it was held that the racially discriminatory practice complained of fell outside the ambit of the Act.

[99] The real *ratio* of the judgment in *Slamdien* was therefore not the absence of 'spatial apartheid' measures but that the Act limited restitution remedies to people who had been discriminated against in the exercise of their land rights (L.A. Hoq, *op cit* at 442).

[100] There is, contrary to the finding of the LCC (at para 83-92), no justification in the interim Constitution of the Republic of South Africa Act 200 of 1993, the Constitution of the Republic of South Africa Act 108 of 1996 or the Act itself for confining the right to restitution under the Act to dispossessions under laws or practices designed to bring about 'spatial apartheid'. Counsel for the second respondent correctly conceded in this Court that this restriction was not justified.

[101] The Act was in the first place designed to give effect to ss 8(3)(b) and 121 to 123 of the interim Constitution. Section 121(2)(b) read with s 8(2) provided for restitution pursuant to any dispossession of rights in land if such dispossession was effected under or for the purpose of furthering the object of a law which would have been inconsistent with the prohibition of racial discrimination contained in s 8(2), had that section been in operation at the time of such dispossession. Section 2 of the Act, as originally enacted, created the statutory right to restitution by cross-reference to s 121(2) of the interim Constitution. It provided for restitution if the dispossession 'was effected under or for the purpose of furthering the object of a law which

would have been inconsistent with the prohibition of racial discrimination contained in s 8(2)'. I can find no indication in any of these provisions for limiting the right to restitution to laws 'designed to bring about spatial apartheid'.

[102] Section 25(7) of the Constitution widened the right to restitution for any dispossession 'as a result of past racially discriminatory laws or practices'. This widening was in turn extended to the Act by the corresponding amendment of s 2(1) brought about by s 3 of Act 63 of 1997. Again, if the right to restitution under the Act has to be limited to dispossessions designed to bring about 'spatial apartheid' it would, in my view, not give full effect to the provisions of either s 25(7) of the Constitution or the Act.

[103] In dismissing the appellant's contention that the State's failure to recognise and protect their rights in the subject land constituted a racially discriminatory law or practice, the LCC said that the denial of such rights was not shown to have been influenced by, or based upon any racial discrimination. It said that there was no evidence to show that the Government officials who failed to recognise and protect the appellant's rights did so either for racist reasons or because they deliberately failed to recognise the appellant's rights (at paras 108 and 114). The LCC repeatedly emphasised that the State and its officials acted in the belief that the appellant held no rights in the subject land (e g at para 106).

[104] It seems clear, therefore, that the LCC required a motive, an intent, a racist reason or a conscious failure to recognise the appellant's rights. In so

doing it ignored the effect of the laws and practices on the appellant's rights and failed to consider the indirect racial discrimination relied upon by the appellant.

[105] The fact that the Act expressly includes indirect racial discrimination in the definition of racially discriminatory practices is significant. This is in accordance with s 9(3) of the Constitution and with the principles established in the Constitutional Court's equality jurisprudence. See *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) para 43 where the Constitutional Court held that in the case of indirect discrimination proof of motive or intention to discriminate on the part of the State is not required.

[106] The LCC held, as I have already indicated, that upon annexation the Richtersveld became Crown land because the Colonial Government considered the inhabitants to be insufficiently civilised and the land therefore *terra nullius*. As I have found, the LCC erred in two respects in this regard: the inhabitants were not insufficiently civilised and the Colonial Government for this reason did not regard the land as *terra nullius*.

[107] Ignoring the fact that the Richtersveld was not *terra nullius*, State policy since the 1920's has consistently been to regard the Richtersveld as Crown land and, while acknowledging their occupation and use of the land since before annexation, it has refused to recognise that the Richtersveld inhabitants have any rights in the land. For example, according to the minutes of the meeting of the Parliamentary Select Committee on Public Accounts on 3 April 1922 the Government's attitude was stated to be that the Richtersveld became Crown land upon annexation and, while the inhabitants' 'precarious occupation' was acknowledged, it was not accepted that they held any rights in the land.

[108] Precisely the same State policy is evident in the whole process set out above whereby the said Proclamations under the Precious Stones Act, 1927 were promulgated and the legislative and executive steps taken which culminated in the eviction of the appellant and the eventual transfer of full ownership to Alexkor. (I have referred to the fact that the Proclamations described the subject land as unalienated Crown land.)

[109] Underlying the State policy was the obvious, albeit unexpressed, premise that the Richtersveld became Crown land upon annexation because its people were insufficiently civilised. It can safely be accepted that an essential part of this premise was the race of the Richtersveld people. No alternative springs to mind or was suggested. The racial discrimination, therefore, is clear.

[110] The effect of the State policy was that the Richtersveld people were treated as if they had no rights in the subject land. Their dispossession resulted from a racially discriminatory practice in that it was based upon and proceeded from the premise that due to their lack of civilisation, to which their race was inextricably linked, the Richtersveld people had no rights in the subject land.

[111] In result the appeal succeeds with costs including the costs of two counsel. The orders of the LCC are set aside and replaced with an order in the following terms:

'(a) It is declared that, subject to the issues that stand over for later determination, the first plaintiff is entitled in terms of s 2(1) of the Restitution of Land Rights Act 22 of 1994 to restitution of the right to exclusive beneficial occupation and use, akin to that held under common law ownership, of

the subject land (including its minerals and precious stones);

(b) The defendants are ordered jointly and severally to pay the plaintiffs' costs including the costs of three counsel.'

VIVIER ADP

HARMS JA)
SCOTT JA)
FARLAM JA) CONCUR
MTHIYANE JA)