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THE SYSTEM OF 99-YEAR LEASEHOLD IN SOUTH AFRICA

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RESEARCH REPORT PRESENTED FOR THE APPROVAL OF THE SENATE IN FULFILMENT OF PART OF THE REQUIREMENTS FOR THE DEGREE OF MASTER OF LAWS BY COURSEWORK, OF WHICH THE OTHER PART CONSISTS OF THE COMPLETION OF A PROGRAMME OF COURSES.

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CHAPTER 1

INTRODUCTION

1.1 THE SCOPE OF THIS WORK

The concept of 99-year leasehold rights is of particular interest not only because it reflects an unusual combination of characteristics which appear *prima facie* to be contradictory rather than complementary, but also because the system of 99-year leasehold, as it originated in the Blacks (Urban Areas) Consolidation Act 25 of 1945 (as amended in 1978) and in its present form as contained in the Black Communities Development Act 4 of 1984, although still under development, already evidences symptoms of early obsolescence. This obsolescence, however, is, as I shall demonstrate below, postponed by very real hurdles, such as the absence of effective survey in many existing black townships, and this may actually be one instance where political development has, for the time being, outstripped the practical realities.

This work is not intended to be a comprehensive analysis of all the practical and legal issues presented by the system of 99-year leasehold. I have tried to examine the nature of this new institution and at the same time to highlight particular aspects of this system which have, throughout its short but interesting life, proven to be problematic. In view of the dearth of commentary on the system of 99-year leasehold and my personal involvement in it, many of my observations and conclusions are based on practical experience rather than theoretical debate.

Short as its anticipated lifespan may appear to be, the system of 99-year leasehold may well, in years to come, be looked back upon as no more than the catalyst in the development of property rights for blacks in South Africa. Nevertheless, it marks a period in the development of property rights for blacks in South Africa which may, if only for historical purposes, prove to be worthy of recording.

1.2 HISTORICAL BACKGROUND

The concept of leasehold tenure in South Africa is not new. In the Cape Colony land was originally granted on either quitrent or freehold tenure. Quitrent tenure did not, however, prove to be popular and although Sir John Cradock did give the holder of such a quitrent tenure power of alienation [1], this form of tenure became the cause of much dissatisfaction amongst the farmers and was a contributory cause of many farmers deciding to trek. By the 1840's provision had been made for the conversion of such quitrent tenures to freehold title against payment of a conversion price. The nature of land held under such title after 1862 became known as *"redeemed quitrent"*. In 1934 legislation [2] was passed which abolished the payment of quitrent in rural areas, with certain exceptions and this was extended in 1937 [3] to apply to urban areas as well. The Pre-Union Statute Law Revision Act 44 of 1968 repealed the 1813 Proclamation.

With the discovery of gold in the Transvaal a form of leasehold tenure was introduced in respect of stands or lots in certain townships in the Mining District of Johannesburg [4]. This form of tenure also proved unsatisfactory as upon expiry of the leasehold right, the holder stood to lose his leasehold title and all right to the stand or lot, including any improvements effected thereto. Many leaseholders were not able to acquire the ownership of their leasehold lots at a reasonable price before such expiration, and consequently leaseholders were discouraged from improving their leasehold lots and this hampered the development of the townships in question.

1. Proclamation of 6 August 1813 by Sir John Cradock, providing for perpetual quitrent.
2. Abolition of Quitrent Act 54 of 1934
3. Abolition of Quitrent (Towns and Villages) Act 33 of 1937
4. See s93 of the Gold Law of 1898 of the South African Republic (Law 15 of 1898).

In consequence, 1952 saw the enactment of the Conversion of Leasehold to Freehold Act [5], which was intended to enable leaseholders to acquire freehold title to those stands or lots previously held under leasehold tenure. A similar form of tenure had also been introduced in respect of certain lots in the diamond fields and in 1961 legislation [6] was also introduced with a view to providing such leaseholders with certainty of title and to provide for a means of conversion to freehold title.

1.3 THE BLACKS (URBAN AREAS) CONSOLIDATION ACT

Mounting political pressures resulting from the rapid population growth amongst blacks, increased unemployment in built-up areas caused partly by large-scale urbanisation, and the need to recognise in some measure the permanence of an urban black population, saw a change in official attitudes to urban blacks during 1978. These pressures were given expression in the enactment of the Blacks (then Bantu) (Urban Areas) Amendment Act 97 of 1978 which extended the scope of the Blacks (Urban Areas) Consolidation Act to make provision for a system of 99-year leasehold tenure in respect of sites in black villages and locations. In terms of the amending legislation the holder of a right of leasehold was given the right to effect improvements on the site in respect of which the right of leasehold had been granted. Most important was the provision for the appointment of a Registrar and the establishment of a registration office to maintain an effective system of registration in respect of surveyed sites and to record all transactions and dealings relating to surveyed sites in respect of which rights of leasehold had been registered [7].

Rights of leasehold were granted by Administration Boards (subsequently superceded by Development Boards) in surveyed sites situated on land owned by such Boards to qualified persons [8]. The right of leasehold included the right to occupy, encumber and dispose of such right, provided it was to a qualified person. Where the right was bequeathed to

5. Act 61 of 1952
6. Kimberley Leasehold Conversion to Freehold Act 40 of 1961
7. S6B of Act 25 of 1945
8. S6A

or devolved upon any person who was not a qualified person, such person could only receive the net proceeds of any sale of the right of leasehold [9].

Restrictions were imposed in respect of the purpose for which the site could be used and the right of leasehold terminated upon the expiry of a period of ninety-nine years after the date of the initial registration of the right. This system of leasehold was fraught with practical difficulties with the result that participation by blacks was reluctant and slow. Difficulties included the following -

1.3.1 Leasehold was only open to qualified persons. Strict statutory requirements [10] restricted the numbers of persons qualifying for leasehold.

1.3.2 A right of leasehold could only be granted in respect of a surveyed site. General plans had only been approved in respect of a limited number of townships and the fact that the development of many townships was not based on recognised townplanning principles, coupled with the fact that boundaries of sites were often obscure, lead to problems in the preparation and approval of further general plans. This severely limited the number of sites available for leasehold purposes.

1.3.3 Accurate survey was essential if the holder of a registered right of leasehold was to enjoy security of title in respect of his tenure. The security of title enjoyed by the registered owners of land situated in freehold areas was based to a large degree on cadastral survey. Every parcel of land held under separate title had to be clearly identifiable before such title could be given any real meaning. The late I. A Course [11] defined a cadastral survey

9. S6A(5)

10. The definition of "qualified" person in relation to a right of leasehold meant a black referred to in s10(a) or (b) who was not a black referred to in s12(1) and included any descendant of a black who was a black referred to in s10(1)(a) or (b), and also included an association and any black who was not a qualified person but fell within a category of blacks recognised by the Minister by notice in the Gazette as qualified persons for the purposes of s6A and 6B and the regulations relating thereto, or who had in any particular case been expressly recognised by the Minister as a qualified person for such purposes, as well as any person recognised by the Minister, subject to such conditions as the Minister might impose, as a qualified person for the said purposes. Provided that any conditions imposed could also provide that a person should be recognised as a qualified person for a particular purpose or for a specified period or until the occurrence of a particular event only.

11. I. A Course : Cadastral Surveys with particular reference to the granting of 99-year leasehold - Planning & Building Developments 43: 65-74 MR-AP 1980.

as a survey of all the immovable property in a region or territory showing the position, dimensions, extent, and unique name of each separately registrable entity. It was essential that boundaries and beacons be clearly defined if such a survey was to prove effective and reliable.

It proved to be extremely difficult to include black townships in the existing cadastral system. Course, who assisted in the drafting of the 1978 leasehold regulations, found in many of the officials with whom he had to deal, a tremendous lack of understanding of security of title and its importance, as well as how it was to be achieved [12].

The final cost of leasehold to the individual was to be kept to a minimum if the new leasehold system was to have any chance of working. If each applicant for leasehold were required to pay for the survey of the relevant site, the financial burden would become too high. The problem assumed frightening proportions. According to Course it was estimated that the number of separately registrable entities required for blacks at that time was approximately equivalent to the number already registered for whites. This would require the eventual doubling of existing facilities.

For political reasons it was not regarded as necessary, in early times, to have black townships properly surveyed, and as Course points out [13], in cases where this was done, the plans were not examined, checked for mathematical consistency and filed methodically to form part of a future cadastre.

In some cases the system was so haphazard that no record whatsoever was kept of the surveyor's fieldwork. Cost would have been a major factor at such time as well, and, as many of the houses on such site were leased on a thirty year basis, no need was seen for accuracy. This showed short-sightedness on the part of the authorities at that time. Clearly it was not

12. Op cit 11
13. Op cit 11 at 73

foreseen or contemplated that blacks would ever enjoy some form of long-term or permanent title to land in urban areas.

With the introduction of the 99-year leasehold system it was vital that building societies and other money-lending institutions gave their support to the system by financing the acquisition of leasehold rights upon security of mortgage bonds. If this co-operation was to be obtained it was essential that security of title be achieved to enable the mortgagors of leasehold rights to provide mortgagees with a real and acceptable form of security. For this reason also the question of accurate survey was of prime importance.

1.3.4 For the system of leasehold to succeed, affordability was a vital issue. Implementing a system of life-long leasehold tenure affording registered title necessarily involved various professions and authorities. It was unavoidable that professional fees and other expenses would have to be paid. Leasehold rights in respect of land would not be given away and a purchase price had to be determined for a right of leasehold relating to each site, some of which had already been improved. Apart from land surveyors it was inevitable in practice that the legal profession should be involved, if only to prepare and register mortgage bonds on behalf of money-lending clients.

In an endeavour to promote the success of the new system of leasehold and to minimise costs, the attorneys' profession willingly agreed to a tariff for leasehold matters pitched at a level lower than that set for other conveyancing matters, and leasehold transactions were exempted [14] from the provisions of the Stamp Duties Act 77 of 1968.

Acquisitions of rights of leasehold were not, however, exempted from the provisions of the Transfer Duty Act 40 of 1949. This may again have indicated short-sightedness on the part of the authorities at that time: they took the view that in terms of the

14. S63 (9) of Act 25 of 1945

Transfer Duty Act acquisitions of improved property were exempt from the payment of transfer duty where the consideration or fair value, for the purposes of such Act, did not exceed an amount of R30 000, and that this would in practice mean that little or no transfer duty would be payable in respect of leasehold transactions. It was only logical, however, that the actual cost of building and the market forces of supply and demand would force selling prices and building costs up.

In practice the officials responsible for the registration of leasehold transactions at the Department of Co-operation and Development as it was then known, did not call for a transfer duty receipt to be lodged where a registered right of leasehold was being transferred. This may have been a matter of policy but it is submitted that such transactions did in terms of *s*2 of the Transfer Duty Act, attract transfer duty. In terms of this section a transfer duty was imposed for the benefit of the Consolidated Revenue Fund on the value of any property acquired by any person by way of a transaction or in any other manner, and also in certain other prescribed circumstances.

Section 1 of the Transfer Duty Act defines *"property"* as land and any fixtures thereon, including *"any real right in land...."*. It is submitted that there is little room for arguing that a registered right of leasehold does not constitute a real right in land. It is undeniably a right in land, the due registration of which makes such right avail against the world. The fact that such registration is not in accordance with the Deeds Registries Act 47 of 1937 does not alter this. In terms of *s*6B of the Blacks (Urban Areas) Consolidation Act, provision was made for the establishment at the office of each Chief Commissioner, of a registration office at which the registrar concerned was to -

1.3.4.1 establish and maintain an effective system of registration relating to all the surveyed sites situated within his jurisdiction and keep a register of such sites; and

1.3.4.2 record every transaction, dealing or occurrence relating to a surveyed site.

Section 6A(4)(c) of the Act specifically went on to state that a certificate of right of leasehold which was duly registered served as proof to the registered holder thereof of the registration of the right of leasehold in question, of the right to occupy the site in question, subject to the conditions relating thereto, and also as proof of the vesting in the registered holder thereof of all the rights conferred on the holder in terms of the Act.

In addition to the financial considerations discussed above, certain infrastructure costs relating to the provision of essential services to sites also had to be paid and if, in addition, a realistic market price was to be paid for a right of leasehold, based on the value of the site concerned, it was clear that the financial costs would become too high for individuals to bear. Consequently formulae had to be determined whereby rights of leasehold could be made available at affordable prices.

The problem of cost did not end here. Where applicants wished to build on unimproved sites using building society finance they would be charged the normal building society rates of interest and would be required to qualify for such loan according to their earnings. On existing wage structures this would impose great limitations on the building of new houses. Slums could not be allowed to develop and it became vital to involve the private business sector in the financing of the construction and acquisition of homes for employees. Furthermore, building societies required that in order for any site, which was subject to leasehold, to be regarded as an acceptable form of security, all existing or proposed improvements thereto would have to conform to certain minimum specifications imposed by the building societies. Many existing dwellings erected on sites did not qualify in terms of such specifications and were consequently effectively excluded from the leasehold system.

1.3.5 If institutions and employers were to be persuaded to participate in the financing of leasehold rights it was essential that they should be afforded normal creditors' rights in the security afforded by a mortgage bond.

The Building Societies Act [15], as it was then called, was amended [16] so as to include in the definition of *"urban immovable property"*, any right of leasehold registered in terms of s6A(4) of the Blacks (Urban Areas) Consolidation Act, provided such right of leasehold had a remaining period of not less than twenty years to run. This was a necessary step to enable building societies to consider applications for loans upon security of registered rights of leasehold.

As a right of leasehold terminated *ipso facto* upon the expiry of a period of ninety-nine years after the date of registration thereof, a further limitation was placed upon money-lending institutions which were approached to finance the acquisition of a right of leasehold during the final years left remaining before the termination of the right. If the redemption period for the loan were reduced so as to coincide with the leasehold period remaining the monthly instalments would often be beyond the means of the applicant.

Insofar as a mortgagee was concerned, the most important right was to have the mortgaged right of leasehold sold in execution in satisfaction of a judgment debt, in the case of default by a mortgagor. The Act [17] provided that where a right of leasehold was offered for sale at a sale in execution or at a sale in consequence of the insolvency or liquidation of the holder of the right of leasehold, the right could be purchased only by a qualified person, but where the proceeds of the sale were not sufficient to recover the judgment debt and costs or such debt, the mortgagee was entitled to purchase the right for an amount equal to the amount of the judgment debt and costs or the debt, as the case may be and the amount of the said preferent claims,

15. Act 29 of 1965
16. Financial Institutions Amendment Act 80 of 1978 (S22(d)) and Financial Institutions Amendment Act 99 of 1980 (S50(c)). Since further amended by the Mutual Building Societies Amendment Act 81 of 1986 and complemented by the Building Societies Act 82 of 1986.
17. Act 25 of 1945 S6A(6)(a)

and during the prescribed period [18] such mortgagee who purchased a right of leasehold was entitled either to dispose of or to let the site relating thereto, to a qualified person. However, where no qualified person purchased the right of leasehold for an amount equal to the amount of the judgment debt and costs, or the debt, as the case may be, and the amount of the said preferent claims, in circumstances where there were two or more mortgagees, any of such mortgagees was entitled to purchase the right of leasehold at the highest price offered above the amount of the judgment debt and the costs or the debt, as the case may be, and the amount of the said preferent claims.

The difficulties presented by s6A (6)(a) and regulation 39 were -

1.3.5.1 At a sale the right of leasehold could only be purchased by a qualified person. This limited the market and placed a higher risk on mortgagees. Furthermore, prospective purchasers anxious to bid at a sale in execution were in practice often unaware of the legal requirements for the acquisition of a right of leasehold and the auctioneer was obliged to spell out these requirements before putting a right of leasehold under the hammer. This notwithstanding, bids were often made by persons either not qualifying for the right of leasehold or not able to arrange the required finance to enable them to comply with the conditions of sale.

1.3.5.2 Where no bid was made sufficient to cover the judgment debt and costs, a mortgagee was entitled to buy the right in but only for an amount equal to the amount of such judgment debt and costs. In such circumstances, therefore, a mortgagee was obliged to buy in the right of leasehold in full satisfaction of the judgment. Where the judgment debt and costs exceeded the market value of the right of leasehold at such time a mortgagee could

18. See regulation 39 Government Notice No R2471 dated 15 December 1978. This right could only be exercised during a period of up to twelve months, calculated from the date of purchase.

often be forced into a loss situation, without any recourse against a mortgagor for any shortfall which resulted.

1.3.5.3 Uncertainty prevailed where a mortgagee purchased a right of leasehold at a sale in execution. It was not clear from the wording of s6A(7) whether a right of leasehold could in such circumstances be transferred into the name of the mortgagee or whether such mortgagee was required first to make application to the Minister to be declared a qualified person for the purpose of acquiring such right of leasehold.

1.3.5.4 It was not at all clear what the position of a mortgagee would be in circumstances where it purchased a right of leasehold at a sale in execution but failed or was unable to dispose thereof to a qualified person within the prescribed period of twelve months. Section 6A(6)(c) entitled but did not oblige the Board concerned to purchase such right of leasehold upon conditions agreed with the mortgagee and after the expiry of the period to sell the right of leasehold to a qualified person. It was conceivable that the relevant Board could upon expiry of the prescribed period elect not to purchase the right of leasehold, thereby leaving a mortgagee in a position where it was no longer entitled to dispose of the right under any circumstances, and, in consequence, not be in a position to realise its security and recover all or even part of its claim.

1.3.6 The registration system did not work easily and efficiently in practice. Every effort had been made to simplify procedures and reduce the involvement of the legal profession to a minimum. The aim of the authorities was commendable : it had been

intended to make procedures quick and simple and keep costs as low as possible. The various deeds registries constituted in terms of the Deeds Registries Act were already having difficulties in obtaining trained staff to act as examiners and were proving unable to cope effectively with the volume of transactions lodged during property booms. For this and other reasons it was felt that the function of registering leasehold transactions should not be merged with the deeds registries' functions as would have been the logical development. Furthermore, by separating this function from the deeds registries' functions it was hoped that the involvement of conveyancers would be curtailed.

This approach was implemented and *s*6B of the Blacks (Urban Areas) Consolidation Act and the regulations initially promulgated thereunder [19] created the legislative mechanism required. Section 6A(9) provided further that no provision of the Deeds Registries Act would apply with reference to any document executed or any transaction executed or any act relative to leasehold matters. This section effectively excluded any legal requirement which necessitated the employment of a conveyancer.

It was essential that an effective system of registration be introduced but in fact the system introduced failed dismally. It became clear that the system of registration for leasehold matters was in nearly all respects inferior to that constituted in terms of the Deeds Registries Act. The problems experienced by deeds registries in employing trained and experienced examiners did not disappear as a result of a so-called simplified procedure.

Lengthy delays were experienced as a result of examiners not being fully conversant with the legal requirements for registration and not being adequately trained in the day to day management of a registration office. Matters lodged together in a batch for simultaneous registration were often unlinked and

19 Government Notice No R2471 dated 15 December 1978.

registered or rejected separately. Matters were supposedly registered but thereafter rejected. Rejections often occurred without clear and valid reasons. Financial institutions registering mortgage bonds often paid out loans on the mistaken advice that such bonds had been registered only to find that as a result of administrative problems registration had in fact not taken place and that they had at that point in time no security.

It was against this background that financial institutions and conveyancers, to the extent that they were involved, and also the business community and blacks generally began to feel disenchanted with the system of 99-year leasehold. Political pressures mounted to give blacks greater rights and to ensure that a system was not created for blacks which could in any sense be regarded as inferior to that applicable to the remainder of the population. The shortcomings in the existing system had for some time been recognised by the authorities and in the face of these pressures the Black Communities Development Act was passed which made provision in Chapter VI for a second generation system of 99-year leasehold.

1.4 THE NEW LEGISLATION

Dealing with the practical problems arising from the system of 99-year leasehold contained in the Blacks (Urban Areas) Consolidation Act required considerable planning and involved *inter alia* the amendment of the Deeds Registries Act so as to provide for future leasehold transactions to be registered in the relevant deeds registry having jurisdiction in respect of the site concerned. Once the enabling legislation was passed the various registrars had to take steps to enlarge land registers to accommodate leasehold transactions. New regulations were required which had, as far as possible, to introduce uniform procedures for both leasehold and other matters. It was not possible for leasehold transactions to be brought within the ambit of the Deeds Registries Act without special regulations. Too many fundamental differences existed -

1.4.1 The concept and nature of leasehold tenure had to be catered for as opposed to ownership;

1.4.2 Matrimonial regimes pertaining to parties to leasehold transactions often differed from those hitherto experienced by deeds registries;

1.4.3 Additional considerations relating to status and contractual capacity had to be taken into account;

1.4.4 The means of identification and description of parties to deeds differed and the concept of *"qualified"* persons had to be catered for;

1.4.5 Provision had to be made for the transfer of existing deeds and records from the registration offices originally established for leasehold matters to the relevant deeds registries.

As a result of these and other considerations *ss*52 to 54, and *s*56 of the Black Communities Development Act [20] were only brought into operation on 1st November 1985 [21]. This notwithstanding that the legislation had been passed early the previous year.

In terms of the same government notice *s*69(1) of the said Act, insofar as it related to the repeal of *ss*6A, 6B, 6C and 6D of the Blacks (Urban Areas) Consolidation Act and the Blacks Resettlement Act 19 of 1954 was brought into operation on the same date.

New regulations governing the granting of rights of leasehold were also published on the same day [22]. The Deeds Registries Amendment Act 62 of 1984 amended the Deeds Registries Act insofar as leasehold transactions were concerned to enable the Regulations Board established in terms of *s*9 of the Deeds Registries Act to regulate, subject to the provisions of the Black Communities Development Act and the regulations promulgated under that Act, the form of applications, deeds and registers which would be used in connection with the registration of

20. Act 4 of 1984
21. Government Notice No R196 dated 1 November 1985.
22. Government Notice No R2481 dated 1 November 1985.

rights of leasehold, and any other real rights in respect of land held under such rights of leasehold [23].

Further provision was made for rights of leasehold to be transferred in the prescribed manner by means of a deed of transfer executed or attested by the registrar, and subject to any conditions governing the grant of the right of leasehold [24]. Under the previous system transfer had been passed by endorsement.

Finally *s*102 of the Deeds Registries Act was amended [25] by the insertion of a definition for a right of leasehold as a right of leasehold as defined in *s*1 of the Black Communities Development Act but excluding a right in respect of a sectional leasehold unit referred to in that definition. Although *s*55 of the Black Communities Development Act had made provision for the provisions of the Sectional Titles Act 66 of 1971 to apply to rights of leasehold, this section has not, at the time of writing, been brought into operation.

Once the consequential amendments required to the Deeds Registries Act had been passed the way was open for *s*3 of the Black Communities Development Act to provide, as it did, that a right of leasehold would, subject to the provisions of *ss*56 and 57 of the Act, be registered in accordance with the provisions of the Deeds Registries Act.

23. S3
24. S5
25. S9

CHAPTER 2

LEASEHOLD RIGHTS

2.1 THE CONCEPT OF LEASEHOLD

A right of leasehold as envisaged in the Black Communities Development Act does not fit easily into any recognised juridical classification of legal concepts. This is often the case with concepts created by statute as opposed to concepts derived from or based on common law. There is no jurisprudential requirement that new concepts should be capable of assimilation within existing classifications; the social, economic, and legal needs of any developing society must necessarily provide the spur for any legal system to adapt to keep pace with the development of such society. It is generally the social or economic need that precedes the introduction of new legal concepts, and taxes the initiative and innovative spirit of jurists and other persons who are called upon to create new legal frameworks to meet the changing needs of society.

It would be rare indeed, if not unknown, for any new legal concept to be introduced into a society which does not tax the courts with difficulties previously unknown although possibly considered in a different context. It is therefore important to examine analytically the concept of leasehold and the nature of rights thereunder, not only from a jurisprudential point of view, but also for practical reasons, as any new concept may embrace a multiplicity of facets and features akin to, or even derived from, a wide variety of existing concepts. For this reason comparisons of this nature are not necessarily odious but often provide invaluable assistance in the interpretation and application of a new juridical concept to facilitate its harmonious assimilation into society and its legal system.

2.2 DEFINITIONS

In the Black Communities Development Act certain words and phrases are given particular meanings and it is essential to understand their particular meanings before attempting to comprehend and analyse the juridical nature of the concepts inherent in the system of leasehold.

The following definitions which are contained in *s*1 of the Black Communities Development Act are of particular importance -

2.2.1 A *"Black"* or *"Black person"* means a person who is a black as contemplated in the Population Registration Act 30 of 1950, and for the purpose of the exercise of the powers, the performance of functions of, and the carrying out of duties by a Development Board in terms of any law, includes a person who is a black in terms of any such law; and for the purposes of *s*41 [26], of the Black Communities Development Act, includes the Small Business Development Corporation Limited, contemplated in the Small Business Development Act 112 of 1981.

2.2.2 *"Competent person"* [27] in relation to the acquisition of land means -

2.2.2.1 a black, including a black who is a citizen of a state, the territory of which formerly formed part of the Republic;

2.2.2.2 a black who is lawfully resident in the Republic;

2.2.2.3 a township developer;

2.2.2.4 an association;

2.2.2.5 an employer, for the purposes only of acquiring land or premises in a township for disposal to or occupation by blacks in his employ;

26. S41 provides for the acquisition by a competent person of land or premises in a development area.
27. As substituted by the Black Communities Development Amendment Act 74 of 1986

2.2.2.6 a person belonging to a category of persons approved by the Minister by notice in the Gazette, subject to the conditions which the Minister may determine in such notice; or

2.2.2.7 a person or body approved as such by the Minister, subject to such conditions as the Minister may in his discretion determine.

"Competent" for the purposes of leasehold is therefore given a restricted statutory meaning not to be confused with the generally accepted legal meaning of *"legally qualified"* or the meaning of the Dutch word *"bevoegd"* which both carry a different and far wider meaning. We are not dealing here with legal capacity but are concerned with a category of persons who may, in terms of the Act, acquire leasehold rights.

In its non-legal sense the word *"competent"* has certain undesirable connotations and for this reason is possibly an unfortunate choice of word. Its choice would appear to be the result of an effort to get away from the terminology used in the initial legislation relating to 99-year leasehold, namely the Blacks (Urban Areas) Consolidation Act, where the word *"qualified"* was used. Unfortunately this led to further confusion as certain forms prescribed to be used in terms of the regulations [28] governing the granting of leasehold rights until recently, still made use of the word *"qualified"* [29].

2.2.3 *"Leasehold site"* means a site, an erf or a lot situated in township and indicated on a diagram as contemplated in the Land Survey Act 9 of 1927, or a general plan. Again the inconsistent use of terminology is likely to cause confusion. It is submitted that the word *"site"* should be used throughout, particularly in deeds lodged for registration in the various deeds registries. This would distinguish leasehold transactions clearly from transactions relating to ownership and emphasize the

28. Government Notice No R2451 dated 1 November 1985.
29. See Annexure D to the regulations (now scrapped).

differing nature of the transactions. Unfortunately one finds confusing and haphazard reference to all the following words and phrases: *"site"*, *"leasehold site"*, *"premises"*, *"erf"* and *"lot"* [30].

2.2.4 *"Right of Leasehold"* means a right of leasehold contemplated in *s*52 of the Act, and includes a right in respect of a sectional leasehold unit as contemplated in *s*55 [31], and *"leasehold"* has a corresponding meaning.

2.3 THE NATURE OF LEASEHOLD RIGHTS

The word *"leasehold"* denotes *prima facie* that the rights conferred on the holder of a registered right of leasehold are in nature essentially akin to rights conferred on a lessee in terms of an agreement of lease. Agreement is an essential element of any lease and must relate to the subject matter of the lease, the period of the lease and also to the rental or other consideration which is to be paid or given. The rights and obligations of the lessor and the lessee will be regulated in accordance with terms and conditions mutually agreed upon. It is also clear that a lease by its very nature terminates upon the expiry of a specified or determinable time period, when the lessee will be under an obligation to restore the subject matter of the lease to the lessor.

A lease agreement may also confer on the lessee the right to fruits, but as Silberberg and Schoeman [32] point out, the grant to a lessee of a *jus abutendi* would be incompatible with the concept of lease. This right or the right to the capital as it is commonly known is essentially an incident of ownership and includes the right to alienate or destroy that which such right pertains to.

The nature of a right is characterised not so much by its name or title but by its legal content. If an attempt is to be made to classify the nature of leasehold rights it is essential to examine what content is given to these rights by the Black Communities Development Act.

30. Examples may be found in ss.52(1)(b) and 54(1) of the Act and in regulation 13
31. As at the date of writing s55 was not yet in operation.
32. Silberberg & Schoeman : The Law of Property. 2 ed (1983): 501.

2.3.1 It is quite clear from the Act generally and in particular from *s*52(1) that the holder of a registered right of leasehold will not in terms of the Act at any point automatically become the registered owner of the site to which the right of leasehold relates. Ownership of the site which is subject to leasehold rights will, in the normal course, remain vested in the leasehold grantor.

From a jurisprudential point of view it is also of interest to consider the nature of the rights, if any, which remain vested in the registered owner of a site in respect of which a right of leasehold has been registered. Although such registered owner is entitled to receive a nominal rental and the right of leasehold would in the normal course [33] terminate upon the expiry of the period of ninety-nin years this may well in practice prove to be an example of what is constituted by the so-called *"residuarity"* of ownership. This term is used to describe the residual right which may vest in an *"owner"* in circumstances where all or most of the so-called incidents of ownership have been vested in a person or persons other than the owner.

It will be seen from this discussion that many of the so-called incidents of ownership which are incompatible with or foreign to the nature of the common law rights associated with a lessee, are in fact vested in the holder of leasehold rights. This to a degree where bare ownership of the site to which the right of leasehold relates, as opposed to the right of leasehold as such, is reduced to a mere shell deprived of much of its legal content.

2.3.2 The holder of a registered right of leasehold has the right to erect any buildings or improvements on the site to which the right of leasehold relates, and also to alter or demolish any such buildings or improvements [34]

Although the limitation of the right to improve property, within the bounds of town-planning and other applicable by-laws and regulations, is today inherent in the concept of land ownership, it

33 Although a right of leasehold is granted for a period of 99 years as from the date of granting thereof, where such right is in terms of the Act, transferred to another competent person, such period will in terms of s52(1)(a) commence to run again de novo.

34. S53(5)(a).

is by no means uncommon for a lessee to be accorded similar rights in terms of a lease agreement. By agreement such lessee may or may not be entitled to compensation in respect of such improvements or it may be agreed that payment of the consideration which is to pass to the lessor is to take the form of improvements to be effected to the leased property by the lessee. In certain circumstances our law recognizes that a claim for improvements may lie in cases where a lessee effects improvements to the leased property without the agreement of the lessor.

Whether a holder of leasehold rights would be entitled in certain circumstances to claim compensation for improvements may prove to be an interesting question. This point has not been covered in the Act or in the regulations, probably for the reason that it is not envisaged that a right of leasehold would ever terminate through effluxion of time. However, the Act does provide that a registered right of leasehold may in fact terminate in certain specified circumstances. For example, a right of leasehold may be registered before the site has been surveyed by a land surveyor [35], and, if on subsequent survey it is found that the boundaries as identified at the time of such survey do not correspond substantially with the boundaries as identified at the time of registration of the right of leasehold, the holder of the right may cause the right to be cancelled [36]. In such circumstances the holder of the right of leasehold may well have a claim for damages against the Development Board, local authority or township developer concerned, based on the *actio legis Aquiliae*. However, should the holder base a claim for improvements on common law it will be vital to determine

35. S52(8) provides specifically that leasehold may, notwithstanding the provisions of ss(1) but subject to the provisions of ss(6) and (7), be granted in respect of premises situated in a development area although such premises have not been surveyed by a land surveyor, and such leasehold may be registered and hypothecated, provided

    (a) the premises concerned are shown on a diagram, aerial photograph or plan showing the relative situation of such premises and such diagram, photograph or plan is certified by an officer in the Department of Constitutional Development and Planning as relating to such premises;

    (b) the board, local authority or township developer, as the case may be, causes the premises concerned, so identified, to be surveyed by a land surveyor within a period of four years from such grant.

36. S52(8)(a).

whether the holder is in fact a lessee or whether he is a lawful possessor. The reason for this is that the common law did not, as a general rule, give a lawful possessor any claim for improvements. If, however, the holder of the right of leasehold is regarded as a lessee then a claim for compensation for improvements may well lie.

Apart from the above example, a right of leasehold may also be cancelled by agreement between the holder of the right and the relevant Development Board, local authority or township developer [37]. There would also appear to be no reason why the grantor of the right of leasehold could not cancel the right pursuant to a failure by the holder to pay the annual rental timeously or in the event of any other breach of the conditions of the grant of leasehold.

2.3.3 It follows as a matter of course that the registered holder of a right of leasehold will be entitled to use and occupy the leasehold site and any improvements erected or to be erected thereon. Prior to the repeal of s53(5)(b) of the Act [38], the right to occupy any building on the site was specifically vested in the holder of the right of leasehold by this section. The repeal of this section has not taken away such right from the holder of the right of leasehold. The *jus* [illegible] although recognised as an incident of ownership, is also totally compatible with a lease.

As has been seen [39] the right to acquire a right of leasehold is in the case of a black person linked to the question of competency. Where a competent black person who is the holder of a registered right of leasehold ceases for any reason to be a competent person for the purposes of the Act, he will not by virtue of such fact forfeit either the right to occupy the site or the right of leasehold [40].

37. S56(2).

38. By the Black Communities Development Amendment Act 74 of 1986.

39. See also 3.1 below for further discussion.

40. Prior to the repeal of s52(13) by Act 74 of 1986, this section specifically provided that where a competent person who was a black, ceased to be legally competent to reside in the town concerned or, in the case of an association or any other person who was not a black person ceasing to be a competent person, the right of leasehold would not thereby be forfeited.

2.3.4 The right of leasehold confers on its holder the right to encumber the leasehold by means of a mortgage [41]. It is, of course, the right of leasehold that will be hypothecated in such a case and not the site to which the right of leasehold relates.

This right of the holder should not be confused with the *jus abutendi* although it may appear that the holder has the right to alienate the site. What he in fact has is the right to alienate or mortgage the right of leasehold and this right is not incompatible with the nature of a lease. Rights under a lease of immovable property may be freely mortgaged and there is no reason why a lease agreement should not give the lessee the right to assign his rights thereunder to a third party.

2.3.5 The holder of the right will subject to the provisions of *s*52(6) [42], be entitled to dispose of the right of leasehold to any other competent person and this includes the right to sub-let the right of leasehold. This right gives the holder both a *jus fruendi* as well as a restricted *jus abutendi*. The *jus fruendi* exists in respect of both the site and the right of leasehold, but the *jus abutendi* relates effectively only to the right of leasehold as such. In reality the Act thereby vests in the holder of the right of leasehold what amounts to virtual ownership of any improvements which may be effected to the site concerned.

Where, however, a right of leasehold is bequeathed to or devolves upon any person, natural or juristic, who is not competent to acquire such right then the right of leasehold will be sold and the person who would otherwise have acquired the right of leasehold will instead receive the net proceeds from the sale thereof. [43]

41. S83(5)(c).
42. As will be seen, the Act now contemplates that a right of leasehold may in certain circumstances, be registered notwithstanding that the site concerned has not been surveyed by a land surveyor. S52(6) provides, however, that where the premises in respect of which leasehold has been granted, have not been surveyed by a surveyor, such leasehold may not be disposed of except by way of a sale in execution in the event of insolvency or succession.
43. S83(5)(d)

Conceptually this right is closely related to the right mentioned in 4.4. However, although the right to sub-let is a right accorded a lessee, this right in its present context entitles the holder of the right of leasehold to let the site. It is not intended to give the holder of the right the right to grant a sub-lease in respect of the right of leasehold. This section is badly worded and although as drafted the holder is in fact entitled to *"sub-let.....the leasehold"*, it is submitted that this could not have been the intention of the legislature.

H N Botha, writing in the Natal University Law Review [44], analyses the first generation legislation relating to 99-year leasehold in the light of Honoré's well known study of what Honoré termed the *"incidents"* of ownership. [45] Botha concludes that -

"Leasehold is thus a lesser right than full ownership (dominium plenum) but a fuller and more comprehensive right than a lease, and although it resembles emphyteusis, it differs in important respects and should properly be considered as a right sui generis that obtains in land for 99 years.".

The *jus emphyteuticarium* or *emphyteusis* as it was more commonly known, was a particular *jus in rem* recognised by the Romans as an institution of the civil law in the time of the Lower Empire [46]. This right gave the holder thereof the right, subject to the payment of an annual *pensio*, not only to the fruits derived from land and buildings but also the right of alienation. This right of free alienation was, however, subject to a right of pre-emption in favour of the grantor and in addition the *jus emphyteuticarium* also envisaged the eventual termination of the right by effluxion of time [47]. The holder of the right - the *emphyteuta* - could encumber the property and, upon his death, it could also be made the subject matter of a bequest. It seems, however, that the obligation to pay the annual *pensio* did not pass

44. Vol. 71 - 81 : The 99 year leasehold system of Land Tenure as introduced by Act 97 of 1978.
45. A M Honore : Oxford Essays in Jurisprudence (Ed A G Guest 1961) 107.
46. The Institutes of Justinian : Translation by T C Sandars : 1934 : 134.
47. W W Buckland : A Text book of Roman Law from Augustus to Justinian : 2 ed : 275.

to a third party to whom the subject matter of the *jus emphyteuticarium* was alienated, but remained with the original holder of the right. Thus it was clear that the *dominus* of land which was subject to a *jus emphyteuticarium* was in fact owner in name only.

Dutch law did not appear to recognise the *jus emphyteuticarium* although the principles of this institution did influence the development of what was known as *tijnsrecht* or *erfpacht* as it was also known [48]. According to Lee, this was also a grant of land for either a limited or an indefinite period subject to the payment of an annual rental. Here also in later times the holder acquired the right of free alienation by way of will or otherwise.

The system of 99-year leasehold provided for in the Black Communities Development Act differs in certain important respects from that established in terms of the Blacks (Urban Areas) Consolidation Act. One important enhancement of the system is, however, that the term of a 99-year leasehold will, under the new legislation, effectively be perpetual. This being for the reason that the circumstances under which a right of leasehold may terminate prior to the expiry of the 99-year period will seldom apply to an individual holder of a right of leasehold in practice; and this, coupled with the fact that the 99-year period commences to run *de novo* each time the right of leasehold is transferred, will in all but the most extreme cases, result in the absence of any real term existing. Another difference, and one of much greater importance, is the provision, in certain circumstances for a right of leasehold to be converted into ownership. This will be dealt with in greater detail in chapter 4.

The content of the right afforded the holder of a right of leasehold in the end result differs to no great degree from the present day content of the common law rights of a landowner; although from a jurisprudential point of view a leaseholder cannot be equated with an owner. By vesting in the leaseholder

48. R W Lee : An Introduction to Roman Dutch Law : 3 ed at 60.

rights not compatible with those of a lessee it becomes difficult to fit the rights of a leaseholder into an existing classification of rights. To classify such rights as *sui generis* may well be the natural course of action but difficulties are likely to arise in settling disputes and such a classification will not facilitate the settling of such disputes. The question of claims for improvements has been mentioned and rights to compensation arising out of expropriation would be obvious examples of potential areas of dispute.

What we are dealing with here is a right which embraces elements of ownership and also elements which are common to leases. Classifications should serve a purpose to justify their continued existence. Once a classification ceases to serve any purpose in practice its continued existence becomes pointless. For this reason the need to classify the nature of leasehold rights must still be justified; and it would be premature if not problematical to place such rights in a pigeonhole before the concept of leasehold has established itself in society and forged a place for itself within our legal framework.

CHAPTER 3

SELECTED PROBLEM AREAS

3.1 COMPETENCY AND CONTRACTUAL CAPACITY

Prior to the amendment of *s*52 of the Black Communities Development Act by the Black Communities Development Amendment Act 74 of 1986 [49], *s*52(2) defined the categories of persons who were competent for the purposes of acquiring rights of leasehold. The amending Act provided simply that rights of leasehold could be acquired by any competent person and provided in the definition section [50] of the Act that in relation to the acquisition of land [51], "*competent person*" means -

3.1.1 a black, including a black who is a citizen of a state, the territory of which formerly formed part of the Republic;

3.1.2 a black who is lawfully resident in the Republic;

3.1.3 a township developer;

3.1.4 an association;

3.1.5 an employer, for the purposes only of acquiring land or premises in a township for disposal to or occupation by blacks in his employ;

3.1.6 a person belonging to a category of persons approved by the Minister by notice in the Gazette, subject to the conditions which the Minister may determine in such notice; or

49. Act 74 of 1986 was brought into operation on 15 September 1986. See Gn No 158 dated 12 September 1986.
50. S1.
51. Land is defined as including any interest in land.

3.1.7 a person or body approved as such by the Minister, subject to such conditions as the Minister may in his discretion determine.

As has been seen, a right of leasehold under the Blacks (Urban Areas) Consolidation Act could be granted only to *"qualified"* persons [52], this qualification being linked *inter alia* to stringent residency and employment requirements.

Apart from illegal immigrants, the Black Communities Development Act has effectively brought all black persons within the definition of a competent person. Of equal importance is the inclusion of a township developer in this definition. To meet the ever-increasing housing needs of the black communities it was essential that private enterprise be involved and this would now facilitate this involvement.

As Olivier and van der Post point out [53], all competent black persons will not necessarily have contractual capacity; the question of competency being determined in accordance with the Act, and the contractual capacity of a black person being influenced and determined by both the South African common law and the customary law of blacks. In this regard reference should be had to *s*11(3) of the Black Administration Act 38 of 1927, which provides that the capacity of a black to enter into any transaction or to enforce or defend his rights in any court of law shall, subject to any statutory provision affecting any such capacity of a black, be determined as if he were a european : provided that -

(i) if the existence or extent of any right held or alleged to be held by a black or of any obligation resting or alleged to be resting upon a black depends upon or is governed by any black law (whether codified or uncodified) the capacity of the black concerned in relation to any matter affecting that right or obligation will be determined according to the black law in question;

(ii) a black woman (excluding a black woman who permanently resides in the province of Natal) who is a partner in a customary

52. See footnote 10 above.

53. Professor W H Olivier and Mr D J van der Post presented an address entitled "Land rights of blacks with special reference to Leasehold" in a series of seminars held around the Republic during early 1985 as part of the continuing legal education program of the Association of Law Societies.

union, and who is living with her husband, is deemed to be a minor and her husband shall be deemed to be her guardian.

The effect of (i) is that the contractual capacity of blacks in regard to rights of leasehold will be governed by common law. This is for the reason that the system of 99-year leasehold does not stem from black customary law but is an institution created by statute.

Under black customary law any property acquired by the head of a family or by any member of the family home was administered and controlled by the head of the family. This was however, subject to the right of any adult male, even where he resided at the family home, to acquire and own property. Where an adult male did so acquire property, it was under his exclusive control and no other person had any claim or interest therein. [54]

For all practical purposes therefore, in regard to the right to acquire, hold or hypothecate a right of leasehold, the capacity of an adult black man will be the same as that of an adult white man.

In regard to the capacity of black women, the position is totally different. It is not, however, necessary for the purposes of this system of 99-year leasehold, to examine the position of women under black customary law in any detail for, as will be seen, the legislature has intervened to resolve the problems which had hitherto existed in establishing the contractual capacity of black women for the purposes of acquiring, holding and hypothecating a right of leasehold [55]. In view of the difficulties previously facing third parties in dealing with black women, and in particular, from the point of view of building societies and other institutions granting loans upon the security of mortgage bonds hypothecating rights of leasehold, the building societies in general adopted a policy of not granting loans to black women except in special circumstances. This had created undue hardship for large numbers of unmarried black women who were thereby effectively precluded from acquiring rights of leasehold.

54. J C Bekker : Marriage, Money, Property and the Law 1983 at 23.

55. For further discussion on the contractual capacity of women under customary law, the reader is referred to the works cited under footnotes 53 and 54 above, and to the following works: A J Kerr : The Customary Law of Immovable Property and of Succession; J C Bekker and J J J Coertze : Seymour's Customary Law in Southern Africa, and W H Olivier and D J van der Post : Swartes se Regte op Grond met besondere verwysing na huurpag (Consulta series, Association of Law Societies).

In consequence. 1985 saw the passing of the Laws on Co-operation and Development Act 90 of 1985, which amended the Black Administration Act by the insertion therein of *s*11A. This section, for all practical purposes, resolved the difficulties hitherto experienced, by specifically providing that, notwithstanding any law affecting the status or contractual capacity of any person by virtue of black law and custom, the capacity of a black woman to perform any juristic act with regard to the acquisition by her of a right of leasehold or sectional leasehold under the Blacks (Urban Areas) Consolidation Act or the Black Communities Development Act, or the disposal of any such right or the borrowing of money on security of such right or the performance of any other juristic act in connection with such right or to enforce or defend her rights in connection with such right in any court of law, would be determined and any such rights acquired by her would vest in her and any obligation incurred by her would be enforceable by or against her as if she were not subject to black law and custom.

The effect of s11A is that the difficulties caused, *inter alia*, by customary unions in determining the contractual capacity of black women for the purposes of 99-year leasehold under the Black Communities Development Act, may now be disregarded. However, it still remains necessary when dealing with blacks in regard to rights of leasehold, to determine their matrimonial status, and in the case of women, to determine whether they are subject to any marital power. In regard to married black women the consequences which flow from civil marriages must be distinguished from the consequences which flow from customary unions; but as we have seen, customary law and as a result thereof, the consequences of a customary union will not, subject to the provisions of (ii) above, affect the capacity of a married black woman insofar as a right of leasehold is concerned [56].

However, as far as civil marriages are concerned, it must be remembered that in terms of *s*22(6) of the Black Administration Act a marriage between blacks, contracted after the 1st September 1927, does not produce the legal consequences of a marriage in community of property between the spouses; provided that in the case of a marriage contracted

56. For the practical effect on registration refer to regulation 16 of the Leasehold Regulations

otherwise than during the subsistence of a customary union between the husband and any woman other than the wife it is competent for the intended spouses at any time within one month prior to the date of the marriage to make a joint declaration before a magistrate, commissioner or marriage officer that it is their intention and desire that their marriage should be in community of property. A *"marriage"* as defined in the Black Administration Act excludes any customary union.

Although *s*22(6) does not prescribe that such a declaration shall be in writing, there does appear to be a prescribed form which is used in practice. Conveyancers endeavouring to satisfy themselves as to the correct matrimonial regime governing a marriage between blacks, have encountered certain practical difficulties in this regard, essentially because a variety of forms of marriage certificate are used in practice, many of which do not specify that the spouses have made a joint declaration as contemplated in *s*22(6) but merely record the marriage as being either in or out of community of property.

It should be noted that in a civil marriage between blacks which is out of community of property (ie where no declaration has been made in terms of *s*22(6)), the wife will still be subject to the marital power of the husband unless such marital power has been excluded by antenuptial contract. This will be the case, irrespective of when such marriage is entered into as *s*25(1) of the Matrimonial Property Act 88 of 1984 specifically provides that chapters 2 and 3 of such Act shall not apply to marriages between blacks in respect of which the matrimonial property system is governed by *s*22 of the Black Administration Act.

3.2 LAND SURVEY

A difficulty which had to be overcome and which caused a major impediment to the granting and registration of sufficient leasehold rights to meet the needs of the growing black urban population, was the lack of a cadastral survey incorporating the many black townships. Not only the cost of such survey but also the time which it would require, made it essential for some method to be devised whereby leasehold rights could be registered in areas where an approved general plan did not exist.

The Black Communities Development Act as first promulgated did not address this problem, but in 1986 amendments [57] were introduced which provided for the registration of leasehold rights in respect of premises which had not been surveyed by a land surveyor. Section 52(5) was amended to provide that leasehold could, notwithstanding the provisions of *ss* (1) but subject to the provisions of *ss* (6) and (7), be granted in respect of premises situated within a development area although such premises had not been surveyed by a land surveyor, and that such right of leasehold could be registered and hypothecated, provided -

3.2.1 the premises concerned were shown on a diagram, aerial photograph or plan showing the relative situation of such premises and such diagram, photograph or plan was certified by an officer in the Department of Constitutional Development and Planning as relating to such premises;

3.2.2 the board, local authority or township developer, as the case may be, caused the premises concerned, so identified, to be surveyed by a land surveyor within a period of four years from such grant.

Section 52(5) of the Act must be read with regulation 6 which requires that a site appearing on such a plan or aerial photograph be identified by way of a certificate by a land surveyor. The plan or photograph, as the case may be, must indicate the boundaries of the relevant site, the dimensions of such boundaries expressed to one decimal of a metre and the approximate area of the site in square metres. In addition, the number of the site and the numbers of all the adjoining sites shown thereon must be reflected and the plan or photograph has to bear a reference number allocated by an officer in the Department of Constitutional Development and Planning.

Although these new provisions endeavoured to overcome the problems presented by the lack of a proper cadastral survey, there were still both the cost and the time factors which hindered the registration of leasehold

57. The Black Communities Development Amendment Act 74 of 1986

rights in such areas. Furthermore, it did not appear that rights of leasehold registered in such circumstances would afford adequate security to prospective mortgagees. This was for the following reasons -

3.2.3 It was a requirement in cases where such an identification certificate had been issued and the right of leasehold registered in terms thereof, that the board, local authority or township, as the case may be, caused the premises so identified to be surveyed by a land surveyor within four years of the date of registration thereof [58]. Although it does not appear that the right of leasehold would automatically lapse if this were not done, it nevertheless created an unsatisfactory situation where disputes in relation to boundaries were likely to arise, particularly where an adjoining site was, in the course of time, surveyed. Encroachments could easily result and in the end result mortgagees would view the risk and value of the security afforded by a mortgage bond under such circumstances, with some circumspection. The fact that the holder of the right of leasehold could take steps to have the premises concerned surveyed at the cost of the board, local authority or township developer, in cases where such board, local authority or township developer failed to have the survey carried out within four years [59], would not necessarily overcome this difficulty. A mortgagee could in terms of a mortgage bond, acquire the right to take this step on behalf of the holder of the right of leasehold, but even if this right were exercised, a township developer might in the meantime have been placed under liquidation, in which event the cost would have to be recovered from the mortgagee. All in all a mortgage bond registered in such circumstances, could not be seen as an acceptable form of security, free from risk and complications.

3.2.4 The second difficulty facing prospective mortgagees was *s*52(6) which provided that if premises in respect of which leasehold had been granted, had not been surveyed by a surveyor, such leasehold could not be disposed of except by way of a sale in execution in the event of insolvency or succession.

58. s52(5)(b)
59. s52(7)

This meant that where a mortgagor defaulted on a mortgage bond, the mortgagee could not obtain a judgment and execute against the right of leasehold in the normal way, but would have to sequestrate the mortgagor before the right of leasehold could be sold. This could not, it is submitted, have been the intention of the legislature and it appears more likely that the section contains a drafting error and should have provided that such leasehold could not be disposed of except by way of a sale in execution *or* in the event of insolvency or succession. Draft legislation has been prepared to correct the position and should be passed this year.

3.2.5 Finally *s*52(8)(a) accorded the holder of a right of leasehold the right to cause such right to be cancelled in circumstances where, upon survey of the site, the boundaries were found not to be substantially the same as those indicated on the identification certificate in terms of which registration had been effected. There is no requirement that, in instances where the right of leasehold has been mortgaged, the consent of the mortgagee is in such circumstances, required before the right of leasehold may be cancelled, and the fact that the holder of the right of leasehold may, in such circumstances, have a claim for damages against the board, local authority or township developer, does not provide protection for the mortgagee. Section 52(8)(b) does however, provide that the board, local authority or township developer shall compensate a mortgagee in respect of any loss which such mortgagee may have suffered as a result of such cancellation; but this is also not satisfactory as the value of the mortgage bond as a form of real security becomes suspect and a mortgagee certainly could not be expected to finance the acquisition of rights of leasehold in such circumstances if such mortgagee could, without its concurrence, be placed in the position of a concurrent creditor and have to use its best endeavours to recover the debt owing to it from a township developer which might be long since departed or no longer exist. If such a situation did arise, in all likelihood the holders of rights of leasehold in respect of all the sites in the township would be in a similar position with a multiplicity of mortgagees seeking

compensation. In such a situation there is also room for arguing that the mortgagors would, in each case, first have to be excussed by the respective mortgagees in order to minimise any damages which such mortgagees might suffer, before any claim for compensation against a board, local authority or township developer could be entertained.

In the light of the above problems, it is not anticipated that institutions, least of all the building societies, will consider loans in respect of rights of leasehold relating to unsurveyed sites, in a favourable light. The legislation reflects a serious effort to overcome the difficulties presented by the lack of proper survey, but the importance of cadastral survey as one of the corner-stones of our system of land registration, highlights one of the inherent weaknesses in the system of 99-year leasehold which is now contained in the Black Communities Development Act.

There is no doubt that to tamper with this corner-stone of our land registration system, can lead to a subtraction from the very high degree of security of title which holders of registered real rights in South Africa enjoy. In my view the question of survey is paramount and if the authorities are not able to incorporate leasehold townships in the existing cadestral survey within a short space of time, some means must be devised whereby private enterprise is involved in this undertaking. This is particularly so in view of the fact that *s*57A. [60] now contemplates the conversion of rights of leasehold into ownership. This must indicate that land tenure by blacks in South Africa is passing through a transient stage and that the passage of time will see ownership for all members of the population and the total obsolescence of the system of 99-year leasehold.

3.3 SPECIFIC COMMON LAW PROBLEMS

As has been seen [61], *s*53(5)(a) of the Black Communities Development Act vests in the holder of a right of leasehold, subject to the provisions of the Black Local Authorities Act 102 of 1982, and any regulations or by-

60. See the discussion in chapter 4 dealing with the conversion of rights of leasehold into ownership.
61. See 2.3.2 above.

laws relating to the erection, alteration or demolition of buildings, the right to erect on the leasehold site in question any building or improvements, including the right to alter or d[illegible]ish any such buildings or improvements. It has also been seen [62] that the Act contemplates circumstances in which a right of leasehold may in fact be cancelled or even terminate *ipso facto* by the effluxion of time. Where a right of leasehold terminates either by effluxion of time, or is cancelled in any other manner, the ownership in any improvements of a permanent nature effected to the leasehold site by the holder of the right of leasehold will vest in the owner of the leasehold site by a form of accession known as *inaedificatio*. Inaedificatio [63] denotes the permanent attachment or annexation of buildings, pumps, walls or other structures to land and in accordance with the common law principle *superficies solo cedit*, buildings and other structures of a permanent nature erected on land, become the property of the owner of the land on which they have been built or erected.

In circumstances where improvements have in this manner, acceded to the land and the right of leasehold terminates either by effluxion of time or is cancelled in other circumstances contemplated in the Act, the question arises as to whether the holder of the right of leasehold will have any claim against the owner of the leasehold site arising out of such improvements, and if so, whether the holder of the right of leasehold would in such circumstances, be entitled to exercise any right of retention as security in respect of such claim. Although this question has not been decided by our courts, and an in-depth discussion of this question is beyond the scope of this work, it is submitted that the correct approach in such circumstances, would be to view the holder of the right of leasehold as a lessee vis-à-vis a leasehold grantor in cases where such leasehold grantor is also the owner of the leasehold site. A right of leasehold is granted subject to the provisions of the Black Communities Development Act and as the Act vests in the holder of the right of leasehold the right to erect buildings and improvements on the site, the leasehold grantor and owner of the land may in the writer's view, be deemed to have consented to the erection of such improvements. We are here concerned only with urban land [64] but on the basis of the judgment in De Beers Consolidated

62. See 2.3.2 above.
63. Silberberg & Schoeman op cit footnote 32 above at 215.
64. See definition of "leasehold site" in s1 of the Act.

Mines v London and S A Exploration Company [65], in which the Court extended the application of the Dutch placaaten of 1658 to urban tenements, the holder of a right of leasehold would have a claim for compensation in respect of improvements of a permanent nature effected to the leasehold site during the currency of the period of leasehold, after such right of leasehold comes to an end even if such improvements are found to have been made without the consent of the owner of the leasehold site. In such a case the improvements would remain on the leasehold site for the benefit of the leasehold grantor and owner of the leasehold site and the holder of the right of leasehold would have no right of retention in regard to the leasehold site pending payment of compensation. As such improvements will, it is submitted, be deemed to have been effected with the consent of the leasehold grantor and owner of the leasehold site, the claim for improvements will only extend to the value of materials used [66].

The approach following by the court in the De Beers case has, however, been criticized [67] and the position cannot be regarded as free from doubt.

Where of course the grantor of the right of leasehold is not also the owner of the leasehold site, the position may be different and in such circumstances it is arguable that the owner of the leasehold site cannot be deemed to have consented to the holder of the right of leasehold effecting improvements to the leasehold site. The counter to this argument is, however, that the owner of the leasehold site, although not the leasehold grantor, did in fact make the site available to the leasehold grantor for leasehold purposes and on such basis could still be deemed to have consented to the holder of the right of leasehold effecting improvements to the site on the basis of constructive knowledge of the rights vested in the holder of a right of leasehold by the Act being imputed to him [68]. The difficulty that may arise in such a case is that the holder of the right of leasehold may, quite arguably, be held to be in the position of a lawful possessor vis-à-vis the owner of the leasehold site in view of the fact that the leasehold grantor and the owner of the leasehold site are not the same person. If this were so, the entire position regarding

65. 1893 10 SC 359.
66. Kama's Estate v Kreusch 1910 EDL 53.
67. cf C G van der Merwe : Saker [illegible] 104 et seq.
68. In terms of s52(1) of the Black Communities Development Act, a board, local authority or township developer may grant rights of leasehold to competent persons in respect of land made available to it for such purpose in terms of s34(9) of the Act.

a claim for compensation in respect of improvements of a permanent nature effected to the leasehold site may alter completely.

It is unfortunately, beyond the scope of this work to consider these questions in greater detail, and the purpose of mentioning these questions here is merely to illustrate the difficulties which can and are likely to arise in regard to claims for compensation in respect of improvements effected to leasehold sites by the holders of rights of leasehold. Clearly the classification of the nature of the rights of the holder of a right of leasehold will in such cases, have a direct bearing on the question of rights of retention and claims for compensation, particularly in view of the fact that the grantor of a right of leasehold need not necessarily be the owner of the site concerned.

In view of the fact that the Act does not deal with claims of this nature it is submitted that the courts would seek to find some basis for allowing the holder of the right of leasehold a claim for compensation in respect of improvements effected to a leasehold site at least to the extent of the actual cost of materials used. To come to a contrary view would appear most inequitable and harsh, particularly if it is borne in mind that such improvements are effected pursuant to the right specifically vested in the holder of a right of leasehold, by statute [69], to do so.

3.4 PROBLEMS ARISING OUT OF STATUTE

In creating a new concept of land tenure the Black Communities Development Act has, as has been seen, resulted in peculiar situations arising which were not necessarily anticipated by the legislature; and some of them may in the course of time require judicial pronouncement to resolve them if amending legislation is not introduced. Apart from this aspect, the introduction of a new concept into an existing legal framework will invariably also require what may in some cases be considerable consequential amendments to related legislation which affects the practical application of such new concept. For the purposes of this work two statutes will be considered -

69. For further discussion on the general position regarding claims for compensation in respect of improvements and rights of retention, the reader is referred to van der Merwe : op cit footnote 67.

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3.4.1 The Pension Funds Act 24 of 1956

It has been shown that in order for the system of 99-year leasehold to succeed, it was essential not only for the building societies to finance the acquisition of rights of leasehold and the construction of dwellings on leasehold sites, but also for the private and business sectors to be involved in the same way by assisting their employees in terms of housing schemes and by the granting of loans. This was of considerable importance, particularly in view of the fact that the incomes of many blacks did not always qualify them, on the basis of their earnings, for building society loans which were offered at market related rates.

Employers, on the other hand, were in a position to assist employees in a variety of ways, for example -

3.4.1.1 by negotiating housing scheme agreements with building societies whereby selected employees would on the basis of certain suretyship and other obligations undertaken by the employer, be granted higher loans than normally granted in such circumstances thereby reducing the cash portion of the purchase price which the employee would otherwise be required to contribute;

3.4.1.2 by advancing all or part of the balance of the purchase price to the employee upon security of a second mortgage bond, in circumstances where a building society may have granted a loan upon security of a first mortgage bond to be registered;

3.4.1.3 by advancing all or part of the purchase price to an employee upon security of a first mortgage bond in circumstances where no building society was involved;

3.4.1.4 by advancing all or part of the purchase price to an employee in circumstances where no part of such loan was to be secured by the registration of a mortgage bond or where only part of such loan was to be secured in this manner; and

3.4.1.5 by making financial arrangements which involved a combination of any two or more of the above schemes.

It could not be expected that employers would grant loans to black employees indescriminately without in each case considering the business risk involved and the value of whatever security could be provided by the employees concerned to ensure that moneys advanced in this manner would be repaid, particularly in circumstances where the employee concerned died or for any reason left the services of the employer.

In view of the financial constraints placed on many black employees, the only affordable method which could often be adopted was for employers themselves to grant loans to the employees concerned and to do so at a subsidized ra e of interest. As affordability often provided the greatest constraint, methods were also sought whereby even the cost of the registration of a mortgage bond could be avoided or reduced.

An obvious source of potential security in such cases was the cash contributions of an employee, standing to the credit of such employee in a pension fund. In the case of employees with many years of service the amount of such contributions could be substantial and with certain limitations the amount so held in a pension fund, would constitute an ideal form of security, provided employers could appropriate all or part of such amount in settlement of what was remaining owing to them in circumstances where the employee died or left their employ. This is where certain difficulties arise in regard to the applicable provisions of the Pension Funds Act.

In terms of *s*37D(b)(i)(aa) of the said Act -

"...a registered Fund may deduct any amount due by a member to his employer on the date of his retirement or on which he ceases to be a member of the fund in respect of a loan granted by the employer to the member for any purposes referred to in section 19(5)(a); ... to an amount not exceeding the amount which in terms of the Income Tax Act [70]*, may be taken by a member or beneficiary as a lump sum benefit payable in respect of the member or a beneficiary in terms of the rules of the fund, and pay such amount to the employer concerned."*

To ascertain the purposes for which the loan was granted reference must be had to *s*19(5)(a) which lists the different purposes, namely -

(i) to *"redeem a loan granted to a member by a person other than the fund against security of immovable property which belongs to the member or his or her spouse and on which a dwelling has been or will be erected which is occupied or, as the case may be, will be occupied by the member or a dependant of the member"* (my underlining); or

(ii) to *"purchase a dwelling, or to purchase land, and erect a dwelling on the land, for occupation by the member or a dependant of the member,"* (my underlining); or

(iii) to *"make additions or alterations to or to maintain or repair a dwelling which belongs to the member or his or her spouse and which is occupied or will be occupied by the member or a dependant of the member".* (my underlining).

Section 19(5)(d) of the Pension Funds Act specifically defines *"immovable property"* as including-

70. Act 58 of 1962

"a surveyed site in respect of which a right of leasehold is registered in terms of Section 6A of the Blacks (Urban Areas) Consolidation Act, 1945 (Act No.25 of 1945)". [71]

When one looks at *s*19(5)(a) the following words and phrases appear: *"immovable property"*, *"a dwelling"* and *"land"*. In relation to a right of leasehold, a black does not acquire ownership of the leasehold site concerned but becomes the registered holder of a right of leasehold in respect of such leasehold site. The definition contained in *s*19(5)(d) is intended to include a registered right of leasehold in *"immovable property"*. Strictly speaking therefore, the definition is incorrect in that it defines *"immovable property"* as including *"a surveyed site..."*. It would be more correct for the definition to read as follows:-

> *"(d) For the purposes of this Section "immovable property" includes a Right of Leasehold in respect of a site which has been or is to be registered in terms of Section 52 of the Black Communities Development Act 4 of 1984."*

The wording of this definition does not in itself cause a major problem. However, when this definition is applied to *s*19(5)(a) a major problem does arise as a result of the use of the words *"dwelling"* and *"land"* which appear in *ss*(ii) and (iii) of *s*19(5)(a). This is for the reason that it is not possible under South African law (apart from a scheme registered in terms of the Sectional Titles Act 66 of 1971) to own a dwelling separately from the land on which such dwelling has been permanently erected. In consequence, *s*19(5)(a)(ii) can only be interpreted as meaning for the purposes of purchasing land and the reference to *"dwelling"* in *s*19(5)(a)(iii) as meaning a *"dwelling erected on land..."*. By specifically defining *"immovable property"* as including a registered right of leasehold in respect of a surveyed site, one cannot interpret *"land"* where it appears in *s*19(5)(a)(ii) as including such a right of leasehold.

71. S56(5)(a) of the Black Communities Development Act provides that all certificates of leasehold and mortgage bonds registered in terms of the Blacks (Urban Areas) Consolidation Act in respect of leasehold sites shall be deemed to have been registered in terms of the first mentioned Act.

In consequence of the aforegoing, it can be argued that a housing loan granted to a black employee in respect of a right of leasehold will not fall within the purposes specified in *ss*19(5)(a)(ii) and 19(5)(a)(iii). This is for the reason that the use of the words *"dwelling"* and *"land"* in *ss*(a)(ii) and (a)(iii) of *s*19(5)(a) do not include a right of leasehold. It is suggested that the phrase *"immovable property"* be used throughout *s*19(5)(a) to achieve consistency. This would involve amending *ss*(ii) and (iii) to read as follows:-

"*(ii) To purchase land or to purchase land and erect a dwelling on it for occupation by a member or a dependant of the member; or*

(iii) To make additions or alterations to or to maintain or repair a dwelling erected on immovable property which belongs to the member or his or her spouse and which is occupied or will be occupied by the member or a dependant of the member."

As a result of the inconsistency in the terminology detailed above, one is left with the following incongruous result: if any employer grants a loan to an employee *against security of immovable property* for the purposes specified in *s*19(5)(a)(i) then the employer will also be entitled to rely on the additional security of the lump sum benefit which would be due to a member by the pension fund on the date of such member's retirement or the date on which he ceases to be a member of the pension fund. The added requirement in *s*19(5)(a)(i) that the loan must be "against security of immovable property" means that a mortgage bond must have been registered to secure such loan and this requirement leads to the situation that in such a case the employer will in fact have the security of both a mortgage bond and a portion of the employee's pension fund contributions. However, in cases where a mortgage bond is not registered to secure the repayment of the loan, such loan will not qualify in terms of s19(5)(a)(i) of the Pension Funds Act for that

reason, and because *"dwelling"* and *"land"* do not include a right of leasehold, the loan will also not fall within the purposes specified in *s*19(5)(a)(ii).

In other words, if an employer wishes to grant a housing loan to a black employee for the purpose of acquiring a right of leasehold, then the employer will not be able to rely on the additional security of part of the pension fund contributions unless such employer also registers a mortgage bond over the right of leasehold to secure the repayment of the loan. This is clearly undesirable and drastically restricts the application of *s*37D of the Pension Funds Act, with the result that employers may have no security for housing loans granted in certain of these circumstances.

3.4.2 The Expropriation Act 63 of 1975

As far as the Expropriation Act is concerned, the question to be dealt with is the following : where land or a portion of land which is subject to a right of leasehold is expropriated under the provisions of the Expropriation Act, how is compensation to be determined, and secondly, who will be entitled to receive such compensation?

Section 2 of the Expropriation Act empowers the Minister of Community Development to expropriate, subject to an obligation to pay compensation, any property for public purposes or to take the right to use temporarily any property for public purposes. The Act defines *"property"* as including both movable and immovable property, and *"immovable property"* in turn includes a real right in or over immovable property.

Although the question posed in regard to both the determination of compensation which may be payable, and the ascertaining of the person to whom such compensation will be payable, may appear problematic in the context of land which is subject to a right of leasehold, it is submitted that the answers to both questions lie in an understanding of the nature of the rights of both the owner of the leasehold site and those of the holder of the right of leasehold.

As has been demonstrated [72], once a right of leasehold has been registered in respect of a leasehold site, the right of ownership in the leasehold site as such, which remains vested in the owner of such site, amounts to no more than an empty shell [73], deprived of nearly all the beneficial incidents of ownership. The holder of the right of leasehold on the other hand acquires *inter alia* the right to use and improve the leasehold site and to hypothecate the right of leasehold.

The Expropriation Act defines "*owner*" in relation to land or a registered right in or over land, as the person in whose name such land or right is registered. So, what we in fact are dealing with here, are separate and distinct rights which would not only have to be separately expropriated but also separately valued.

That this is the correct position, is clear from *s*8(1) of the Expropriation Act, which reads as follows -

"The ownership of property expropriated in terms of the provisions of this Act shall, subject to the provisions of section 3(3), and on the date of expropriation, vest in the State, released from all mortgage bonds (if any) but if such property is land, it shall remain subject to all registered rights (except mortgage bonds) in favour of third parties with which it is bonded, unless or until such rights have been expropriated from the owner thereof in accordance with the provisions of this Act."

Depending on the requirements of the expropriating authority, it is conceivable that the rights of the owner of the leasehold site may not be required at all. For example, where a servitude of right of way is to be expropriated. In this example the expropriating authority requires only a right to use the leasehold site or part thereof; and the right to use the leasehold site, by operation of law [74], vests in the holder of the right of leasehold and not in the owner of the leasehold site; although the owner of the leasehold site does in fact retain a reversionary interest therein should the right of leasehold terminate or be cancelled.

72. See discussion 2.3.1 above.
73. With the possible exception in the case where the owner of the land is in a position to require payment of a conversion price in the event of such right of leasehold being converted into ownership.
74. S83(5) of the Black Communities Development Act.

In view of the reversionary interest which the owner of a site which is subject to a right of leasehold, will in every case retain, it is submitted that the interests of both the owner of the leasehold site and the holder of the right of leasehold should, in every case, be expropriated. If this is not done the expropriating authority could find itself in a difficult position vis-à-vis the owner of the leasehold site if the right of leasehold should ever terminate or be cancelled.

The example quoted above poses interesting questions in regard to the right of leasehold and the holder thereof. What will, in fact, be expropriated? The holder of the right of leasehold does not own the leasehold site but holds a right of leasehold which comprises a totality of various rights in respect of the leasehold site. These include the right to erect improvements on the leasehold site and the right to occupy any building thereon. As has been seen, improvements of a permanent nature effected to the leasehold site accede to such site by *inaedificatio* and become part of the leasehold site owned by the registered owner. The question that arises here is whether it is competent to expropriate only portion of the rights which vest in the holder of a right of leasehold. By analogy it would not appear possible for the holder of a right of leasehold to cede a portion only of the rights which s53(5) of the Black Communities Development Act vests in him, to a third party; or to cede for example, his right of leasehold insofar as it relates to only portion of the leasehold site, to a third party.

If this supposition is correct an expropriating authority requiring a two metre road-widening servitude in respect of a leasehold site, may find itself obliged to expropriate not only such portion of the site from the owner thereof but also the right of leasehold as a totality of rights, from the holder of the right of leasehold. Clearly, such an approach would be untenable and some other acceptable solution is needed.

The logical consequence to be arrived at is for the leasehold site or portion thereof as well as any specific right therein to be expropriated and for the totality of the rights vested in the holder of the right of leasehold to thereupon relate only to the remainder of the leasehold site which will not be affected by such expropriation.

It is also essential that the question of compensation be dealt with in an equitable manner; this particularly so where improvements have been effected to the portion of the leasehold site which has been expropriated. In the context of a normal landlord and tenant situation, if the lease terminates as a consequence of expropriation the tenant will normally be entitled to compensation. The Expropriation Act does not specify any formula whereby such compensation is to be determined and general principles must be applied [75].

If the holder of a right of leasehold is regarded as being in a similar position to that of a tenant who has effected improvements to leased property, then it is submitted that unless circumstances are present which could require the payment of a conversion price if the right of leasehold were converted into ownership, compensation should be payable to the holder of the right of leasehold as if he were the owner of the leasehold site as well. This is for the reason that if the owner of the leasehold site is not in a position to require the payment of a conversion price in circumstances where the right of leasehold were converted into ownership, virtually no pecuniary value can be attached to the reversionary interest which he will have in the leasehold site.

It is clear that if the question of compensation for expropriation arises in regard to a leasehold site and the right of leasehold relating thereto, a clear understanding of the nature of rights of leasehold and of the rights vesting in the respective parties involved will be essential if an equitable result is to follow.

75. Further discussion in regard to these principles would be beyond the scope of this work. For a comprehensive exposition of the factors to be taken into account in such instances, see A Gildenhuys: Onteieningsreg at 233.

3.5 CONSUMER PROTECTION

"The right of nature, which writers commonly call the jus naturale; is the liberty such man hath, to use his own power, as he will himself, for the preservation of his own nature ... that is to say ... of doing anything, which in his own judgment, and reason, he shall conceive to be the aptest means thereto." [76]

Hobbes was a proponent of the natural law approach to freedom of contract but at the same time acknowledged that such a freedom could only be permitted in an absolute form in a society where the individual was free to act without external legal restrictions or social impediments.

The concept of freedom of contract is an expression of the theory expressed by Hobbes although this concept may be traced back to the social, economic and political philosophies of earlier times. The nature of freedoms such as the freedom to contract, was expressed by acknowledging the existence of a fundamental right such as this; and once such principle was accepted the logical consequence which followed was that such rights could be waived or transferred by contract from one person to another.

It was this early formulation of the concept of freedom of contract which was later adopted as a social and economic corner-stone of the relationship between man and man. By applying these principles it could be argued that a man should be permitted by society to pursue matters of his own concern without interference or restriction, irrespective of the view of other members of that society as to the wisdom of his actions. Clearly this freedom would require limitations where the interests of society in general, or of other persons were affected by such pursuit.

The basic principle of freedom of contract is part of p+8X South African law and has been propounded by our courts on many occasions. In the words of Innes C J -

"If people must sign such conditions they must, in the absence of fraud, be held to them. Public policy so demands." [77]

76. T Hobbes : Leviathan, at 145.
77. Wells v South African Alumenite Company 1927 AD 69 at 73.

This principle was stated in a different way by Potgieter J as follows:-

"It is a general principle of our law that parties shall not be fettered in their contractual freedom unless their agreement is against public policy or prohibited by law". [78]

In analysing a number of the judgments of our courts, dealing with the concept of freedom to contract, Aronstam [79] concludes that the doctrine is used in four distinct senses. Firstly, to mean that persons should be free to negotiate the terms of their contracts without legislative interference. Secondly, to mean that where persons have entered into a contract, the provisions of that contract should not be interfered with and should be given full legal effect. In the third sense, the doctrine is used to mean that a person should be free to select the person with whom he contracts; and fourthly, to mean that a person should be free not to contract at all.

Aronstam goes on [80] to point out that the inherent weakness in the application of the doctrine of freedom to contract, namely that in each of the senses listed above, an assumption is made that both parties to a contract are bargaining from positions of equal strength, and that each is quite free to accept or reject any term that the other might wish to impose in the contract, whereas in reality, such true equality rarely exists.

Apart from the obvious factors influencing bargaining, such as necessity and the use of standard form contracts, it is submitted that the point made by Hobbes [81], namely that freedom of contract can only be permitted in its absolute form where there are no external legal restrictions or social impediments present, is today still very valid.

Modern American law also recognizes that the inequality of bargaining power can in certain instances lead to what is called *"unconscionability"*. This may be as a result of the general structure and circumstances of the market place or from the individual personal circumstances of one or

78. Shifren & others v SA Sentrale Ko-op Graanmaatskappy Bpk 1964(2)SA 343(O) at 346-7.
79. P Aronstam : Consumer Protection, Freedom of Contract and the Law, at 13
80. At 14
81. Op cit at 46

both parties. [82] Peden cites the following words of Mr Justice Frankenfurter who attempted to enunciate a general rationale in United States v Bethlehem Steel Corp.[83] -

"Does any principle in our law have more universal application than the doctrine that courts will not enforce transactions in which the relative positions of the parties are such that one has unconscionably taken advantage of the necessities of the other? . . . .
. . . . More specifically, the courts generally refuse to lend themselves to the enforcement of a 'bargain' in which one party has unjustly taken advantage of the economic necessities of the other."

In comparing the position in Australia with that in the United States, Peden also makes the point [84] that unequal bargaining power is often linked with the use of a *"contract of adhesion"*, that is a contract imposed by a party enjoying superior bargaining strength and offered to a weaker party on a "take it or leave it" basis. In such a situation an absence of meaningful choice is recognised.

In England there has also, in recent years, been a greater recognition of the need to provide protection for the consumer against unfair trade practices of this nature. A Fair Trading Bill was introduced in 1972 which provided machinery whereby offences could be created by the Secretary of State for Trade and Industry in circumstances where a trade practice was likely to have the effect of misleading or confusing consumers with regard to the nature, quality or quantity of goods or service, or of misleading consumers as to their rights and obligations, or of subjecting consumers to undue pressure, or where contractual terms were so adverse as to be unequitable. [85]

This trend in English law has led to a stream of consumer related legislation, much of it concerned only to create criminal sanctions as

82. J R Peden: The Law of Unjust Contracts 1982
83. 315 US 289 at 326
84. Op cit at 39
85. For further discussion see G Borrie and A L Diamond: The Consumer, Society and the law : 3 ed - 1973

opposed to civil rights. P S Atiyah points out [86] that most of these consumer protection statutes are designed to afford a remedy where the grievance does not justify the cost and trouble of instituting civil proceedings. In certain cases compensation orders may also be made in criminal cases.

It is clear from the above that through the centuries there has been an increasing awareness in western countries of the need for consumer protection and the trend is clearly to create such protection by means of specific legislation.

It is against the background sketched above that the position of blacks in relation to the acquisition of rights of leasehold and the improvement of leasehold sites is of particular importance. With the introduction of the system of 99-year leasehold blacks were for the first time exposed to new and previously unexperienced contractual problems from a very definite position of inequality. This position of inequality stems essentially from two factors. The first being that the home language of most South African blacks and the language in which they have been educated is not one of the official languages of South Africa. For this reason blacks are immediately placed at a disadvantage in any contractual dealings with persons other than blacks arising out of the language difference.

The second factor which places blacks at a disadvantage in such dealings is that initially in the great majority of cases the other contracting party with whom the black is obliged to negotiate has a distinct social and economic advantage and wider experience in respect of property matters. Blacks were for the first time acquiring or constructing homes and were contracting in most such instances with parties who were in turn, experienced in such matters. Apart from novel legal concepts there were questions of specifications and guarantees and many other areas of contract to be understood and negotiated. In this regard a black certainly could not be regarded as free from what Hobbes termed social impediments [87].

86. P S Atiyah: The rise and fall of freedom of contract : 1979 at 703.
87. Op cit at 46.

The acquisition of property rights by blacks was a vital step forward in the social, economic and political advancement of the peoples of South Africa and it is submitted that in the light of the aforegoing, there is a clear need for some measure of statutory consumer protection to be introduced.

In confronting the difficulty presented by the language factor our common law does offer a limited form of assistance. Where the reader of a contract is either illiterate or unable to understand the terms of such contract because he is ignorant of the language in which it is written, and the other contracting party is aware of this illiteracy or ignorance, it is the duty of that party to ensure that the terms and conditions of the contract are understood. This principle was expounded and applied by de Wet A J in the case of Mzobe v Prince Service Station [88]. Apart from the above principle, there are also cases in which our courts have assumed an overriding authority to interfere with private contracts in instances where it is found to be necessary to safeguard the public interest on the grounds of public policy [89].

Other than the limited degree of consumer protection which the application of these common law principles could, in the context of 99-year leasehold, afford a black, the Black Communities Development Act also makes provision for a limited degree of consumer protection. This protection is contained, for example, in *s*57A(1)(b), which provides that in circumstances where the holder of a right of leasehold has waived the right to convert such right of leasehold into ownership without payment of any conversion price, the disposal price of the right of leasehold, together with the conversion price concerned, may not exceed the prescribed disposal price which would have been payable in respect of the land, had the owner transferred ownership of the land.

This, it is submitted, does not go nearly far enough, and in my view, the Act should make provision for certain compulsory disclosures to be contained in every agreement of sale relating to a right of leasehold. It is my view that every such agreement relating to a right of leasehold should contain a disclosure as to -

88. 1946 NPD 138 at 143

89. Morrison v Angela Deep Gold Mines Ltd 1905 TS 775 at 785 where Mason J said the following: "It must be shown that the arrangement necessarily contravenes or tends to induce contravention of some fundamental principle of justice or of general or statutory law, or that it is necessarily to the prejudice of the interests of the public."

3.5.1 whether the township, in which the site to which the right of leasehold relates is situated, has been declared an approved township for the purposes of enabling the right of leasehold to be converted into ownership (ie Has *s*46 of the Deeds Registries Act been complied with and a township register opened?); and

3.5.2 whether the consent of the owner of the site to which the right of leasehold relates would in due course, be required to consent to a conversion of the right of leasehold into ownership, with the result that the holder of the right of leasehold may at such time be required to pay a conversion price to the owner of the site in terms of *s*57A of the Act before obtaining the consent of such owner.

It is submitted that in many ways the sale of a right of leasehold may be compared to a sale of land in an unproclaimed township; and for this reason a purchaser of a right of leasehold should be made aware of the specific points referred to above. There may even be merit in taking the question of compulsory disclosures further, to include, for example, a statement drawing the purchaser's attention to the fact that transfer duty may be payable before the right of leasehold may be converted into ownership. There is also room for arguing that the purchaser of a right of leasehold should be informed of the basis upon which the right of leasehold was initially registered. In other words, has the leasehold site been surveyed by a land surveyor, or was registration effected on the basis of a plan or aerial photograph? These facters can be very important. It has been seen that *s*52(5) of the Act requires, in such circumstances, that the site be surveyed by a land surveyor within four years of the date of grant of the right of leasehold, failing which the holder of the right of leasehold will, in terms of s52(7), have, *inter alia*, the right to have the premises concerned so surveyed and to recover the cost thereof from the leasehold grantor. It appears that the holder of a right of leasehold, will in such circumstances have to exercise this right within a reasonable time, failing which he may be found to have forfeited such right. It may even be that the right to recover the cost of such survey from the leasehold grantor will prescribe if the right is not exercised within the prescribed time once the period of four years has expired.

These issues are fundamental to the value of a right of leasehold and its potential for conversion into ownership; and in my view, some form of statutory consumer protection should be afforded the purchaser of a right of leasehold in such circumstances.

CHAPTER 4

CONVERSION INTO OWNERSHIP

4.1 GENERAL

As has been mentioned, a major change which was introduced by the Black Communities Development Amendment Act was to provide for both the acquisition of ownership of land *ab inutio*, and the conversion of leasehold rights into ownership. Although it is beyond the scope of this work to examine the question of such ownership other than in the context of conversion, it should not at any stage be overlooked that the amendment act does also envisage that a competent black person may be given ownership *ab initio*. This is evident from *s*41(1) of the Act as read with *s*57D. Section 41(1) specifically provides that land or premises in a development area may, subject to the provisions of the Act, be acquired by a competent person, and in terms of *s*57D, a board or local authority may not unreasonably refuse to dispose of leasehold or ownership, as the case may be, to any competent person who is a black and who is willing and able to purchase any leasehold or erf in a township of which the State, the board or the local authority is the owner or which vests in the State, such board or local authority, and the board or local authority shall dispose to such purchaser such rights, whether leasehold or ownership, as the purchaser may prefer to acquire.

The conversion of rights of leasehold into ownership is dealt with in *s*57A of the Act, which provides that any right of leasehold in respect of a leasehold site may be converted into ownership by registration of the ownership in a registration office, and no compensation shall be payable by the holder of the right of leasehold to the owner of the land as part of any conversion price for any reversionary interest vesting in the owner and such owner shall be deemed irrevocably to have consented to such conversion. It is to be noted, however, that although no compensation

will be payable to the owner of the land where an existing [85] right of leasehold is converted into ownership; where future rights of leasehold are concerned the owner of the land in respect of which leasehold rights are to be registered, may by agreement with the holder of the right of leasehold cause a special condition to be registered against the certificate of grant of leasehold whereby the holder of the right of leasehold waives the right to obtain conversion into ownership without the consent of the owner of the land and without the payment of a conversion price [86].

It is clear from the aforegoing that the consent of the registered owner of the land in respect of which leasehold rights have been granted, will be required, before any right of leasehold registered after 15th September 1986 may be converted into ownership. The introduction of this provision into the Act has the effect of giving the reversionary interest of the registered owner of land which is subject to leasehold rights, a pecuniary value and it can be anticipated that where township developers in particular, establish leasehold townships and grant rights of leasehold subsequent to 15th September 1986, it will be a term of the grant of such rights of leasehold that the grantee waives the right to obtain conversion into ownership without the consent of the owner of the land and without the payment of a conversion price. Where a certificate of grant of leasehold does not incorporate such a waiver or have such a waiver registered against it, the registered owner of the land will not be required to consent to conversion into ownership and will not be in a position to demand payment of a conversion price [87].

4.2 TRANSFER DUTY

Where a right of leasehold is granted to a competent person or a registered right of leasehold is transferred to a competent person, no transfer duty is payable in respect of such transaction [88]. Where,

85. The relevant date here being the date of commencement of the amendment act, namely 15 September 1986.
86. S57A(1)(a).
87. In cases where the consent is required and a conversion price may be demanded, s57A(1)(b) limits the amount of any conversion price which may be demanded.
88. S53(6).

however, a right of leasehold registered after 15th September 1986 is converted into ownership, it is clear that transfer duty will be payable on the value of the land together with any improvements thereon as at the date of such conversion.

It may possibly be inferred from the wording of s57A(2) that no transfer duty will be payable where a right of leasehold which was registered prior to 15th September 1986, is converted into ownership. The Chief Registrar of Deeds, however, has taken the view [90] that this is not the case and that transfer duty will be payable in respect of the conversion of a right of leasehold into ownership, irrespective of when such right of leasehold was registered. This approach is based on the view that s57A(2) cannot be seen in isolation but must be read in conjunction with s2 of the Transfer Duty Act. If the Chief Registrar of Deeds is correct in his view, then a most illogical situation would result. Where a right of leasehold registered after 15th September 1986 is converted into ownership, transfer duty will, in terms of s57A(2), be calculated on the value of the land together with any improvements thereon; whereas in the case of the conversion into ownership of a right of leasehold registered prior to 15th September 1986, transfer duty will be calculated in accordance with the provisions of the Transfer Duty Act. Section 2 of the Transfer Duty Act in turn, imposes a transfer duty on the value of any property acquired by any person by way of a transaction or in any other manner, or on the amount by which the value of any property is enhanced by the renunciation of an interest in or restriction upon the use or disposal of that property.

Two points arise in regard to s2; the first being whether we are in fact here dealing with an *"acquisition"* as contemplated by this section at all; and secondly if the conversion is to be regarded as an acquisition for the purposes of the Transfer Duty Act, what is the value of the property so acquired?

As to the first point, there appears to be room for arguing in the first place that a conversion of an existing limited interest into full ownership is not an acquisition within the meaning of s2 of the Transfer Duty Act. There is no transfer of ownership registered; the act of conversion takes place upon an endorsement being placed upon the title deed under which

89. S57A(2).
90. See Chief Registrar's Circular No 2/1987 dated 14 January 1987.

the right of leasehold is held [91]. What we are dealing with here is the conversion, by operation of law, of a limited interest into an absolute right; there is no question of the transfer of rights from one party to another.

Certainly in my view there is a strong argument for saying that there can be no question of an acquisition for transfer duty purposes in circumstances where the consent of the registered owner of the land, to the conversion into ownership, is not required in terms of s57A of the Black Communities Development Act. In cases where the consent of the registered owner is required, it may in such cases be more appropriate to regard such consent as a renunciation of an interest in or restriction upon the use or disposal of the property, rather than as an acquisition of property.

Clearly there are questions of interpretation and practical application to be resolved in regard to s57A(3); but if we look at the intention of the legislature insofar as it may be gleaned from the wording of the section, as considered in the context of the whole of the Black Communities Development Amendment Act [92], there appears an overriding intention to introduce ownership for blacks and in the writer's view to gradually phase out the system of 99-year leasehold altogether. For this reason it would have been necessary for some mechanism to be created whereby existing rights of leasehold could be converted into ownership without any cost to individual holders. If this were so, by exempting rights of leasehold registered prior to 15th September 1986 from the payment of transfer duty, not only would the holders of existing rights of leasehold be encouraged to convert such rights into ownership, but blacks wishing to acquire land after 15th September 1986 would be more likely to opt for ownership *ab initio* in the knowledge that transfer duty would in any event, be payable in respect of conversion if they opted initially for leasehold, and thereafter elected at a later stage, to convert such rights of leasehold into ownership.

In further support of my view, it is submitted that s52(15) of the Act may possibly also be construed as taking the conversion of a right of leasehold into ownership outside the ambit of the Transfer Duty Act altogether.

91. S16B of the Deeds Registries Act as inserted by the Schedule to Act 74 of 1986.
92. Act 74 of 1986 introduced inter alia s57A.

This section provides that no money, other than such money as may be prescribed, shall be payable in respect of any transaction entered into or the performance of any act in terms of the Black Communities Development Act.

If this section was not so construed by the legislature, and if my submissions are not correct, one is left wondering what purpose was sought to be achieved by including *s*57A(2) at all. Section 53(6) provides that no provision of the Stamp Duties Act shall apply and no transfer duty shall be payable with reference to any document executed or any transaction entered into or any other act performed in terms of *ss*53 to 55 inclusive, and in consequence, all leasehold transactions were already exempted from the provisions of the Transfer Duty Act. If the intention had been for conversions into ownership of rights of leasehold registered both before and after 15th September 1986, to be subject to the payment of transfer duty, *s*57A(a) would not, it is submitted, have been required at all.

As has been pointed out, the Chief Registrar's view leads to the illogical result that where a right of leasehold registered after 15th September 1986, is converted into ownership, transfer duty will be payable in terms of *s*57A(2) of the Black Communities Development Act on the value of the land together with any improvements thereon as at the date of conversion; whereas transfer duty in respect of the conversion into ownership of a right of leasehold registered before 15th September 1986, will be payable in accordance with the provisions of the Transfer Duty Act.

The determination of the value of the property for transfer duty purposes, in both instances causes difficulty. Where the conversion relates to a right of leasehold registered prior to 15th September 1986, the consent of the registered owner of the land to the conversion, is not in terms of *s*57A(1) required, and the holder of the right of leasehold cannot be required to pay any conversion price to the owner of the land. Transfer duty will therefore be payable on the declared value of the property [93]. Property in this context includes land and any fixtures thereon and also includes any real right in land. For transfer duty purposes it is clear that it is the value of the land and any fixtures thereon, which is to be

93. See s5(1) of the Transfer Duty Act as read with ss5(6) and 5(7)(a) thereof.

determined. As the land is already subject to a right of leasehold it will, it is submitted, effectively be the residual right [94] of the owner of the leasehold site which must be valued for transfer duty purposes. In such circumstances this residual right amounts to no more than an empty shell deprived of any content to which a pecuniary value may be attached; and one must bear in mind that in such a case the holder of the right of leasehold cannot be required to pay any conversion price whatsoever. In consequence no transfer duty should ever be payable in these circumstances. This result must, it is submitted, mitigate strongly against the Chief Registrar's understanding of *s*57A(2) of the Black Communities Development Act being correct. Apart from the abovementioned difficulty relating to the conversion into ownership of rights of leasehold registered prior to 15th September 1986, there are further difficulties in applying *s*57A(2) to conversions into ownership of rights of leasehold registered after 15th September 1986.

The chief difficulty in the latter instance lies in determining the date of conversion for the purposes of determining the value of the land together with any improvements thereon as contemplated in *s*57A(2). In terms of *s*57A(1) of the Act a right of leasehold may be converted into ownership -

"*...by registration of the ownership in a registration office...*";

and *s*16B(1) of the Deeds Registries Act, as amended by the Schedule to the Black Communities Development Amendment Act, provides that -

"*...conversion of a right of leasehold into ownership ... shall be effected by endorsement...*".

From these sections it therefore appears clear that conversion into ownership will in fact take place only upon endorsement of the title deed in respect of the relevant right of leasehold. This will be difficult to apply in practice as transfer duty will have to be paid and the receipt therefor lodged with the relevant registrar of deeds before the necessary endorsement can be obtained.

94. See discussion 4.1 above.

It is submitted that a more logical approach would be to determine the value of the land together with any improvements thereon for transfer duty purposes as at either the date on which the application for conversion is signed by the holder of the right of leasehold or the date upon which it becomes competent for the right of leasehold to be converted into ownership in terms of the Black Communities Development Act, as read with *s*46 of the Deeds Registries Act [95], whichever is the later date.

The other alternative would be to look at the date upon which the owner of the land consents to the conversion into ownership. However, this would also appear impractical as the consent of the owner of the land will not, in terms of *s*57A(1) be required in every case.

A further point in support of my suggestion is that if an alternative method were adopted, a most inequitable and harsh result would follow. An illustration of this would be the case where the holder of a right of leasehold originally acquired such right of leasehold at a time when the site concerned was unimproved, but thereafter improved the site by the erection of a dwelling thereon. It could not, it is submitted, have been intended that transfer duty should be paid on the value of both the land and the improvements in such a case before the right of leasehold could be converted into ownership. Such an approach would not only cause financial hardship but also, in principle, discourage the holders of rights of leasehold which were registered after 15th September 1986, from converting their leasehold rights into rights of ownership.

By specifically legislating in *s*57A(2) of the Black Communities Development Act that transfer duty shall be payable on the value of the land together with any improvements thereon, it may be argued that the nature of the right which the owner of the land has in such land, becomes irrelevant and that for the purposes of assessing transfer duty no regard will be had to the fact that the right of ownership which the owner has in the land, is subject to the very extensive rights therein of the holder of the right of leasehold. This would not be the correct approach. Section 5(7)(a) of the Transfer Duty Act specifically directs that in determining

95. See 4.4 below.

the fair value of the property, the Commissioner shall have regard *inter alia* to the nature of the real right in land on which transfer duty is to be paid, and the period for which it has been acquired. It cannot, it is submitted, have been intended that where a right of leasehold registered prior to 15th September 1986 is converted to ownership on the one hand, transfer duty is to be assessed on the value placed on the residual right of the owner of land already subject to leasehold rights; but where on the other hand, a right of leasehold registered after 15th September 1986, is converted to ownership, transfer duty is to be assessed on the value of the land together with any improvements thereon as at the date of such conversion.

The introduction of transfer duty in respect of the conversion of a right of leasehold into ownership has given rise to a host of complex problems. Although a ruling was, at the time of writing, awaited from the Commissioner for Inland Revenue in regard to certain aspects of these difficulties, it is submitted that this is a case where there is an urgent need for the legislation to be amended.

Although these difficulties are not only of a legal nature but also of an extremely practical nature, they have to my knowledge not yet come to the fore. The reason for this, as far as I can establish, is that no conversion of a right of leasehold into ownership had, at the time of writing, been registered in any deeds registry in the Republic. The reasons for this will be discussed later. It is important that these questions be resolved as soon as possible. The legislature should not allow itself to be seen, on the one hand, as creating a mechanism for blacks to obtain ownership in land, but on the other hand as levying harsh transfer duties in an inconsistent and unfair manner particularly when these duties can in any event be ill-afforded by the vast majority of the black population.

To arrive at a fair and equitable basis for the imposition of transfer duty, the entire question of property rights for blacks, whether on a leasehold or ownership basis should be placed in perspective. We have, at present, a system of 99-year leasehold and all transactions in respect of leasehold rights have been exempted from the provisions of the Transfer Duty Act. The nature of the rights afforded a holder of a right of leasehold in their sum total, amount to virtual ownership of the land itself; so much so that

the consequent diminution in the rights of the owner of land which is subject to such rights of leasehold leaves the owner of the land with virtually no pecuniary or other interest in the land at all, save the right to a nominal annual rental and a remotely contingent reversionary interest in the unlikely event that the right of leasehold should terminate through effluxion of time or otherwise [96]. Against this background, legislation has been introduced to permit not only the acquisition by blacks of ownership in land, but also the conversion of both existing rights of leasehold and also rights of leasehold which may be registered in the future, into ownership. The ultimate goal must be to have one system of land registration only, which affords ownership of land to all members of the population.

In circumstances where the legislation permits a black person to acquire ownership of land there should not be any factor which will encourage such person to opt instead for 99-year leasehold tenure. This approach is in fact reinforced by s57D of the Act which directs that in appropriate circumstances, a competent black purchaser shall be given -

"*...such rights whether leasehold or ownership, as the purchaser may prefer to acquire*".

Against this background it would not be correct now to seek to impose a transfer duty on the value of rights which a black person not only already holds, but which rights were, at the time they were granted to such person, specifically exempted from the payment of transfer duty. The conversion of a right of leasehold into ownership effectively confers on the holder of the right of leasehold those remaining incidents of ownership which will make his title to the land complete. As has been seen [97] the actual content of such residual right which remains in the owner of the land is virtually nil.

For the above reasons it is submitted that the legislation should be amended to provide that where a right of leasehold is converted into ownership, transfer duty shall be payable on the aggregate of the value of the right of leasehold determined in accordance with the provisions of

96. See 2.3.1 above.
97. See 2.3.1 above.

s5(1) of the Transfer Duty Act [98], and such amount, if any, as may be payable by the holder of the right of leasehold, as a conversion price in terms of s57A(1) of the Black Communities Development Act; and the date of acquisition in such instances should be the date upon which it becomes legally competent [99] to register such conversion of a right of leasehold into ownership or, in cases where the consent of the owner of the land is required, the date of such consent, whichever is the later date.

4.3 FORMAL REQUIREMENTS FOR CONVERSION

Section 57A of the Act provides simply that any right of leasehold in respect of a leasehold site may be converted into ownership by registration of the ownership in a registration office. The section then continues to deal with the circumstances in which a conversion price may be payable to secure the consent of the owner of the leasehold site to such conversion, and the imposition of transfer duty, which has been dealt with above. The only further guide as to how conversion is to be procured is contained in the Schedule to the Black Communities Development Amendment Act which in turn has amended the Deeds Registries Act by the insertion therein of s16B.

In terms of s16B the conversion of a right of leasehold into ownership in terms of s57A of the Black Communities Development Act, shall be effected by the endorsement in the manner prescribed of the title deed under which the right of leasehold is held, and such endorsement shall set out such conditions of title as may be applicable to the property concerned.

This new section goes on to provide that where the right of leasehold which is to be converted into ownership is hypothecated with a registered mortgage bond, such mortgage bond shall be produced to the registrar by the holder thereof upon the request and at the expense of the holder of the right of leasehold concerned, and the registrar shall, before causing

98. S5(1) reads as follows: Value of property on which duty payable:-
(1) The value on which duty shall be payable shall, subject to the provisions of this section -
(a) where consideration is payable by the person who has acquired the property, be the amount of that consideration; and
(b) where no consideration is payable, be the declared value of the property

99. As will be seen later s46 of the Deeds Registries Act will have to be complied with before a right of leasehold in respect of a site in a township may be converted into ownership.

the abovementioned endorsement to be made, cause an endorsement to be made on the mortgage bond to the effect that the conversion has taken place.

New forms were prescribed [100] in terms of regulation 8 under the Deeds Registries Act to cover the actual wording of the endorsement contemplated to the title deed under which a right of leasehold is held as well as that to any mortgage bond under which a right of leasehold may be hypothecated, and the form of application to be made by the holder of the right of leasehold wishing to convert such right of leasehold into ownership.

Could a right of leasehold be converted into ownership as simply as *s*57A of the Black Communities Development Act and the new *s*16B of the Deeds Registries Act contemplated? Indeed not! Having been persuaded in the first instance to permit the registration of rights of leasehold in respect of sites not yet surveyed by a land surveyor, the Chief Registrar of Deeds was not likely to allow such rights now to be converted into ownership merely by the affixing of a simple endorsement to the relevant title deed. The Chief Registrar of Deeds has now ruled [101], quite correctly it is submitted, that before ownership in land or any act of registration relating to ownership in land, may be registered in a deeds registry, the provisions of the Deeds Registries Act and in particular *s*46 thereof, must be complied with in full. It would therefore, be very misleading to take for granted the right of every holder of a right of leasehold to convert such right of leasehold into ownership merely on the basis of *s*57A of the Black Communities Development Act. Such conversion will only be possible where there has been full compliance with *s*46 of the Deeds Registries Act, in that the title deed, general plan and small scale diagram have been produced to the relevant registrar and a township register has been opened in respect of the township in the normal way.

Where a general plan has already been filed in a deeds registry for the purposes of the registration of rights of leasehold only, no ownership or conversion into ownership will be capable of registration until such time

100. Forms XX, YY and ZZ respectively
101. Chief Registrar's Circular No 2/1987 dated 14 January 1987 : para 1.3.3.

as the general plan of the township has been endorsed by the Surveyor-General to indicate that such plan is in accordance with the small scale diagram and title deed which is registered in the deeds registry.

The difficulties arising out the conversion of rights of leasehold into ownership have also been addressed by G Radloff [102], who makes the point there are instances where rights of leasehold cannot be converted into ownership even though a general plan of the township has been prepared and approved by the Surveyor-General. The instances cited by Radloff are -

4.3.1 where the owner of the land was not the grantor of the right of leasehold. In such a case the developer/grantor acted as agent for the owner, but for conversion purposes will first have to become the owner which will require compliance with *s*14 of the Deeds Registries Act and the production of a new title deed in the name of the grantor.

4.3.2 where there are various registered owners of the land on which the leasehold township was established. In such an instance the developer/grantor will first have to obtain transfer of the various components, which may in turn have to be consolidated to enable *s*46 of the Deeds Registries Act to be complied with.

4.3.3 where the grantor of the leasehold is the registered owner of the land, but the leasehold township comprises separate pieces of land. In such a case it may not be possible for the component pieces of land to be consolidated where such component pieces are not all adjacent to each other.

4.4 THE CONSEQUENCES OF CONVERSION

Apart from the obvious consequence of vesting the erstwhile holder of a right of leasehold in respect of a particular site with the ownership of such site, the fact of conversion of the right of leasehold into ownership

102. G Radloff presented an address entitled "The Black Sector" at a series of seminars held around the Republic during late 1986 as part of the continuing legal education program of the Association of Law Societies.

will have other important consequences as well. In view of the fact that conversion has the effect of merging what amounted to two separate interests in the land, each such interest capable of being exercised or dealt with in different ways, the concept of conversion into ownership has given rise to what were previously inconceivable notions. For example, there does not appear to be any reason why land in respect of which a right of leasehold has been registered could not be mortgaged by the registered owner of the land. Equally it is accepted that the right of leasehold in respect of such site is capable of being mortgaged by the holder of the right of leasehold. Such mortgage bond would in the first case hypothecate the land subject to the right of leasehold which has been granted in respect thereof, and in the second case would hypothecate the right of leasehold and not the land. The reason why this phenomenon has not as yet materialised in practice is that it has only with the passing of the Black Communities Development Amendment Act of 1986 become possible for a township developer to grant leasehold rights in respect of land owned by it. Generally speaking existing leasehold townships have been established on land owned either by the State or on land owned by the various Development Boards; and in consequence such land was not hypothecated under mortgage bonds.

Section 57A of the Black Communities Development Act clearly does not contemplate that where a right of leasehold is hypothecated under a mortgage bond that the mortgagee under such mortgage bond will be required to consent to the conversion of such right of leasehold into ownership. This view is borne out by the wording of *s*16B of the Deeds Registries Act, *ss*(2) of which provides that where the right of leasehold which is to be converted into ownership is hypothecated with a registered mortgage bond, that bond shall be produced to the registrar by the holder thereof upon the request and at the expense of the holder of the right of leasehold concerned, and the registrar shall, before causing the endorsement referred to in *ss*(1) to be made, cause an endorsement to be made on the mortgage bond that the conversion has taken place.

The only circumstance in which it appears that the holder of a mortgage bond hypothecating a right of leasehold will be required to consent to the conversion of such right of leasehold into ownership, will be where upon

conversion restrictive conditions are to be imposed which may affect the rights of such bondholder. This requirement is evident from the footnote to form ZZ which prescribes the wording of the endorsement to be affixed to such mortgage bond upon conversion of the hypothecated right of leasehold into ownership.

How these procedures will work in practice remains to be seen, and although the need to simplify procedures and keep the costs of conversion to a minimum, is clear, the procedure which has been created is far from satisfactory. A mortgagee who holds a mortgage bond which hypothecates a right of leasehold will be obliged to produce such mortgage bond for endorsement as follows:-

"The right of leasehold mortgaged hereunder has been converted to ownership subject to the conditions in T_____" [103].

A mortgage bond initially drafted to hypothecate one form of security, namely a right of leasehold, will now by operation of law and without the consent of the mortgagee, hypothecate a totally different form of security, namely land held under freehold title. It is conceded that in such circumstances the quality of the security hypothecated will in the overall context be enhanced by its conversion into ownership; but nevertheless we are dealing here with different concepts. Where a conversion takes place in respect of an existing right of leasehold there will be clauses in the mortgage bond which are no longer appropriate, and conversely, there are likely to be additional provisions which the mortgagee would wish to have incorporated in the mortgage bond upon conversion of the mortgaged right of leasehold into ownership. An obvious example of this would be a clause which in the case of a mortgage bond hypothecating a right of leasehold, obliges the mortgagor to pay all site rentals timeously and which affords the mortgagee the right to effect such payments on the mortgagor's behalf in the event of the mortgagor failing to make such payments, and to recover any amounts so paid under the mortgage bond. In the case of a mortgage bond hypothecating land the corresponding clause would have related to the payment of assessment rates.

103. See prescribed form ZZ under the Deeds Registries Act regulations.

Apart from the above-mentioned difficulties, it is of concern that a township developer may grant rights of leasehold in a leasehold township without the consent of the holder of a mortgage bond hypothecating the land as such [104]. Where this happens a mortgagee will find the value of the security hypothecated under the mortgage bond reduced to a point where such mortgagee has n real security whatsoever.

The Chief Registrar of Deeds has endeavoured to prevent such a situation from arising [105] by relying on s56 of the Deeds Registries Act. On this basis, before a certificate of leasehold is issued in respect of land which is mortgaged, the actual leasehold site will be required to be release d from the operation of any mortgage bond which hypothecates the land, and not only the actual righ' of leasehold. This may prove extremely difficult to control in practice, particularly in he Transvaal, where rights of leasehold may be registered in the Deeds Registry at Johannesburg in respect of sites situated on farm land registered in the Deeds Registry at Pretoria and possibly hypothecated under a mortgage bond which has also been registered in that registry.

In my view s56 of the Deeds Registries Act does not cover this eventuality but clearly some form of control is essential to prevent difficulties of this nature arising. There is here also an urgent need for amending legislation to be passed, but in the meantime any conve ancer wishing to compel a registrar of deeds to effect registration of any leasehold transaction in respect of land which has been separately hypothecated under a mortgage bond, and without first procuring the release of such land from the operation of the mortgage bond in terms of s56 of the Deeds Registries Act, may have to look to the courts for assistance.

104. See s52(1) of th Black Communities Development Act.
105. See Chief Registrar's Circular No 2/1987 dated 14 January 1987 para 8.

CHAPTER 5

COMPARATIVE STUDY : 99-YEAR LEASEHOLD IN URBAN TRUST AREAS

5.1 INTRODUCTION

The system of 99-year leasehold contained in the Black Communities Development Act is, as has been seen [106], applicable to urban land, other than land owned by the South African Development Trust, and which does not fall within the boundaries of any of the national states. Rights of leasehold in such urban land may in terms of the Black Communities Development Act, be granted by a board, local authority, township developer or the State, as the case may be, and in the case of -

5.1.1 a board or local authority, in respect of land of which the board or local authority is the registered owner, or which vests in the board or local authority or which has been made available to such board or local authority in terms of the provisions of *s*34(9) of the Act;

5.1.2 in the case of a township developer, in respect of land of which it is the registered owner or which has been made available to such developer in terms of the provisions of *s*34(9) of the Act, and

5.1.3 in the case of the State, in respect of land owned by or which vests in it.

Apart from the system of 99-year leasehold contemplated in the Black Communities Development Act, 99-year leasehold rights may also be granted in respect of land which is owned by or which vests in the South African Development Trust [107]. This latter system of 99-year leasehold is governed by the provisions of Proclamation R293/1962 which was

106. S52(1).
107. Established in terms of s4 of the Development Trust and Land Act 18 of 1936.

promulgated in terms of *ss*6(2) and 25(1) of the Black Administration Act 38 of 1927 read with *s*21 of the Development Trust and Land Act 18 of 1936. Although Proclamation R293/1962 also makes provision for forms of land tenure other than 99-year leasehold, which include the acquisition of ownership, this comparative study will be confined to the respective systems of 99-year leasehold.

The concept of 99-year leasehold contemplated in chapter 2A of Proclamation R293/1962 was introduced in 1983 [108], which was some five years after the first generation legislation dealing with 99-year leasehold had been introduced into the Blacks (Urban Areas) Consolidation Act.

5.2 THE GRANT OF LEASEHOLD RIGHTS

In terms of *s*1(1)(a) of chapter 2A of Proclamation R293/1962, the Director-General of the Department of Constitutional Development and Planning may grant a right of leasehold to any competent person in respect of land of which the South African Development Trust is the registered owner or land which vests in the Trust. Such right will also be for a period of ninety-nine years and where such right of leasehold is transferred to another competent person the currency of the right of leasehold shall be for a like period of ninety-nine years as from the date of such transfer.

The important requirements in terms of Proclamation R293/1962 are the following:-

5.2.1 A right of leasehold may only be granted by the Director-General in respect of land of which the Trust is the registered owner or which vests in the Trust;

5.2.2 A right of leasehold may be acquired or held only by a "*competent person*" [109]. Competent person in relation to a right of leasehold granted in terms of Proclamation R293/1962 includes [110]:-

108. PR 153/1983 in GG 8933 RG 3630 dated 14 October 1983.
109. See also chapter 2A regulation 1(2).
110. Refer to the definition of "competent person" in s1 of chapter 1 as read with s6(1) of chapter 2.

5.2.2.1 a black person;

5.2.2.2 an association;

5.2.2.3 a township developer;

5.2.2.4 a financial institution as defined in the Financial Institutions (Investment of Funds) Act 56 of 1964; or

5.2.2.5 any other institution, body or person specially approved by the Minister of Constitutional Development and Planning to acquire and hold such site.

The aforementioned Financial Institutions (Investment of Funds) Act was in fact repealed by the Financial Institutions (Investment of Funds) Act 39 of 1984 and such reference may be regarded as referring to the repealing Act. It is interesting to note that a financial institution as contemplated in the aforesaid Act, and which includes inter alia building societies, does not fall within the definition of a competent person for the purposes of acquiring a right of leasehold in terms of the Black Communities Development Act. This is a most unfortunate difference from the point of view of building societies and other institutions contemplated in the Financial Institutions (Investment of Funds) Act, which finance the acquisition of rights of leasehold under the Black Communities Development Act. Building societies and such institutions are under this latter Act dealt with on the same footing as any other mortgagee. Section 52(11)(a) of this Act provides that where a right of leasehold is offered for sale at a sale in execution or at a sale in consequence of the insolvency or liquidation of the holder of the right of leasehold, the right may be purchased only by a competent person or by the board or local authority concerned, but where the proceeds of the sale are not sufficient to recover the judgment debt and costs or the debt, as the case may be, and all claims that are preferent to such judgment debt and costs or such debt, any mortgagee may purchase such right of leasehold. In view of the importance of building society finance in making the system of leasehold work, this provision appears to complicate matters unnecessarily,

particularly insofar as building societies are concerned. Where a mortgagee does purchase a right of leasehold in terms of *s*52(11)(a) of the Black Communities Development Act, the mortgagee may only sell the right of leasehold or let the premises concerned to a competent person during a period not exceeding twelve months from the date of purchase, or such extended period as the Director-General may in writing determine [111].

To this extent, by constituting a competent person for the purposes of acquiring or holding a right of leasehold in terms of Proclamation R293/1962, a building society or such other institution as defined, is in a far better position vis-à-vis the security afforded by a mortgage bond hypothecating a right of leasehold. Although Proclamation R293/1962 contains a corresponding provision [112] to *s*52(11)(a) of the Black Communities Development Act, it differs in the important respect that mortgagees who are not competent persons are dealt with on a separate footing. The corresponding provision provides that where a right of leasehold is offered for sale at a sale in execution or at a sale in consequence of the insolvency or liquidation of the holder of such right of leasehold, the right may be purchased only by a competent person, but where the proceeds of the sale are not sufficient to recover the judgment debt and costs or the debt, as the case may be, and all claims that are preferent to such judgment debt and costs, or such debt, a mortgagee may purchase such right.

Proclamation R293/1962 also does not limit the period for which a mortgagee who has purchased a right of leasehold in terms of regulation 3(2)(a) of chapter 2A, may hold such right of leasehold, as is the case under the Black Communities Development Act [113]; but the Proclamation is not clear on whether a mortgagee, other than a competent person, who does at a sale in execution, purchase such a right of leasehold may

111. See regulation 19A.
112. See chapter 2A regulation 3(2)(a).
113. See footnote 18 above.

have such right transferred into its name. It should, nevertheless, be noted that in terms of regulation 6(2) of chapter 2, where a right of leasehold is granted, issued or transferred to a person or a body other than a black person, the Minister may, notwithstanding anything to the contrary in the regulations, determine that such right shall, while it is held or exercised by such person or body, be subject to such restrictions as may be specified by the Minister and thereupon such right shall be held or exercised by that person or body subject to such restrictions.

Regulation 4(1) of chapter 2A of Proclamation R293/1962 clearly contemplates that a right of leasehold may be transferred to a mortgagee, but regulation 3(2)(c) provides that the Trust may, on conditions agreed upon with the holder of a right of leasehold, purchase such right and may sell to a competent person on behalf of the mortgagee referred to in regulation 3(2)(a) of the same chapter, for an amount equal to the amount of the judgment debt and costs or the debt, as the case may be, and the amount of any preferent claims. This regulation is most obscure and it is not clear under what circumstances the Trust may purchase the right of leasehold, or whether in circumstances where the Trust does exercise this right, the Trust would upon such purchase pay the mortgagee the amount of the debt or whether the Trust would act merely as a selling agent.

In the case of a right of leasehold held under Proclamation R293/1962, the right to occupy the site to which the right of leasehold relates, is directly linked to the question of competency and where the holder of a right of leasehold for any reason ceases to be a competent person, he will forfeit the right to occupy the site but not the right of leasehold. Although a similar situation originally prevailed in respect of rights of leasehold registered under the Black Communities Development Act, this is no longer the case [114]. The present position is probably the result of the wide ambit of the definition of competent person insofar as blacks are concerned [115].

114. S52(13) of the Black Communities Development Act was repealed by Act 74 of 1986.
115. S1 of the Black Communities Development Act. Definition of "competent person" amended by Act 74 of 1986.

5.2.3 In terms of Proclamation R293/1962, a right of leasehold may be granted only in respect of a leasehold site surveyed by a land surveyor and in accordance with the relevant general plan [116]. For such purposes a general plan means a plan of the township or of a portion thereof approved by the Minister, indicating the relative positions and dimensions of the streets, blocks, parks and sites situated within such township and signed by a land surveyor, where such plan was drawn from a survey done by the land surveyor personally or under his personal supervision or, where such plan is compiled from particulars obtained from a survey or surveys, done by any other land surveyor or land surveyors.

There is an apparent conflict between regulation 1(4) of chapter 2A which requires the existence of a general plan, and regulation 1(1)(a) of chapter 2A which provides clearly that a right of leasehold may be granted in respect of any leasehold site, and a leasehold site may according to the definition thereof, be indicated on either a diagram or a general plan.

Either way a site is required to be surveyed by a land surveyor before a right of leasehold may be granted in respect thereof. This is in clear contrast to the present requirements of the Black Communities Development Act where the absence of proper survey in many townships has resulted in this requirement being watered down to a point where all that is required for the registration of a right of leasehold is that the land must be situated in a development area and the premises concerned must be shown on a diagram, aerial photograph or plan showing the relative situation of such premises and such diagram, photograph or plan must have been certified by an officer in the Department of Constitutional Development and Planning as relating to such premises [117]. Such certification takes the form of the allotment of a reference number to such diagram, aerial photograph or plan; but before such allotment may take place a land surveyor must furnish an identification certificate in respect of such site in the prescribed manner [118].

116. Chapter 2A regulation 1(4). See also the definitions in chapter 1 s1 of "diagram"; "general plan"; "leasehold site"; "ownership unit" and "township".
117. S52(5).
118. Regulation 6.

5.3 THE REGISTRATION OF LEASEHOLD RIGHTS

It is important to note that in terms of Proclamation R293/1962 [119], the provisions of the Land Survey Act do not apply to the survey of land granted under the Proclamation and the provisions of the Deeds Registries Act do not apply to the registration of any deeds in respect of such land. This is for the reason that, in the normal course, the registration of all rights of leasehold will not be effected in terms of the Deeds Registries Act, as is the case under the Black Communities Development Act.

In terms of regulation 1(1) of chapter 9 a deeds registry is established in the office of every Chief Commissioner in which all documents relating to immovable property in any township in the area of jurisdiction of such Chief Commissioner are to be registered.

It is therefore clear that the Deeds Registries Act has no application in any deeds registry established in terms of the aforesaid regulation. However, Proclamation R293/1962 provides that any person who desires to substitute a deed of transfer for a right of leasehold may do so and cause a deed of transfer to be registered in the manner prescribed in the Deeds Registries Act [120].

Where this procedure is followed, reference must be had to the proviso to regulation 3(2) of chapter 1 which provides that the provisions of the Land Survey Act shall apply to the survey of land registered by means of a deed of transfer, and the provisions of the Deeds Registries Act shall apply to the registration of any deed of transfer in respect of any such land.

In the light of the provisions of s57A of the Black Communities Development Act which permit the conversion of a right of leasehold into ownership one might infer that the substitution of a deed of transfer for a grant of leasehold, in terms of Proclamation R293/1962 has the effect of converting such right of leasehold into ownership. Such an inference would, however, be incorrect.

119. Chapter 1 regulation 3(2).
120. Chapter 1 regulation 1C.

Proclamation R293/1962 permits the acquisition of ownership of land as distinct from 99-year leasehold rights [121]; and such ownership may be held under deed of grant registered at the deeds registry established at the office of the relevant Chief Commissioner or under a deed of transfer registered in terms of the Deeds Registries Act. There is no facility under Proclamation R293/1962 whereby a right of leasehold may be converted into ownership; and although the procedures may appear to be similar to those provided for in s57A of the Black Communities Development Act as read with s16B of the Deeds Registries Act, the concepts and their respective consequences differ totally. In the first case we have a conversion of a right of leasehold into ownership with both rights being registered in terms of the Deeds Registries Act by way of endorsement of the title under which the right of leasehold is held. In the second instance we have the substitution of a different form of title deed, namely a deed of transfer for the existing title under which the right of leasehold is held without any transfer or change in the nature of the rights taking place. The existing title registered at the office of the relevant Chief Commissioner on the one hand, and the deed of transfer on the other hand being registered in the relevant Deeds Registry established in terms of the Deeds Registries Act.

The one consequence which follows in respect of both conversions into ownership in terms of the Black Communities Development Act, and the substitution of a deed of transfer for a deed of grant in terms Proclamation R293/1962, is that in both cases, before registration can take place s46 of the Deeds Registries Act must be complied with [122].

5.4 THE LEGAL POSITION OF BLACK [illegible]

In dealing with the system of 99-year [illegible]ld as contained in the Black Communities Development Act, it has been seen [123] that a competent black person will not necessarily also have contractual capacity; and that

121. Chapter 1 regulation 1A.
122. See discussion in chapter 4.
123. See 3.1 above.

whereas the question of competency is determined in accordance with the Act, the contractual capacity of a black person on the other hand is influenced and determined by both the South African common law and the customary law of blacks. The scope of this work does not permit an analysis of the contractual capacity of black women under customary law and the reader has been referred to further sources [124] for additional material in this regard.

As has been seen, the Laws on Co-operation and Development Act [125] introduced s11A into the Black Administration Act, with the result that by statute the contractual capacity of a black woman to perform any juristic act with regard to the acquisition of a right of leasehold or sectional leasehold in terms of the Blacks (Urban Areas) Consolidation Act, or the Black Communities Development Act as well as the right to dispose of or deal with such right in any way, will be determined as if she were not subject to black law and custom.

The effect of s11A is that the difficulties in determining and applying black customary law to black women for the purposes of 99-year leasehold under either the Blacks (Urban Areas) Consolidation Act or the Black Communities Development Act have in effect fallen away. What is important to note is that s11A of the Black Administration Act has no application in regard to rights of leasehold registered in terms of Proclamation R293/1962, or, in fact, in regard to ownership of any form. In addition it should not be overlooked that the Black Administration Act may, in any event, have no application in the self-governing territories. In consequence the practical difficulty of determining whether a black woman has contractual capacity for the purposes of acquiring or dealing with a right of leasehold under this proclamation still exists and the building society movement in general is likely to be reluctant to grant loans to black women for the purposes of acquiring rights of leasehold under Proclamation R293/1962 other than in special circumstances.

124 See footnote 55 above.
125. See 3.1 above.

5.5 CONCLUSION

It is of interest to compare the system of 99-year leasehold contained in the Black Communities Development Act with that provided for in Proclamation R293/1962, for as has been seen, in some respects the former system of 99-year leasehold is the more advanced system, whereas in other respects the latter system appears to have been developed further.

Both systems of 99-year leasehold are based upon the requirement of competency and as has been seen, certain financial institutions will, as mortgagees, be in a stronger position vis-à-vis a right of leasehold registered in terms of Proclamation R293/1962 than they would be in respect of a right of leasehold registered in terms of the Black Communities Development Act. This is somewhat anomolous as by far the greater number of rights of leasehold registered to date in South Africa have been registered in terms of the Black Communities Development Act and this has been the area in which there has been the greater need for the involvement of building societies and other financial institutions.

On the other hand, the system of 99-year leasehold under Proclamation R293/1962 does not appear to have succeeded at all, primarily for the reason that ownership may, in terms of the proclamation, be acquired *ab initio* in urban trust areas without any added requirements as far as competency, land survey and costs are concerned. For this reason there does not appear to be any basis at all for maintaining the present system of 99-year leasehold in urban trust areas.

As has been shown, the question of land survey has proven to be a major obstacle standing in the way of black property rights, whether under the Black Communities Development Act, or in terms of Proclamation R293/1962. The registration of freehold ownership in urban trust areas has not encountered the difficulties presented by the Deeds Registries Act for the reason that ownership in urban trust areas is registered at the

office of the relevant Chief Commissioner and not at a deeds registry constituted in terms of the Deeds Registries Act. The provisions of the Deeds Registries Act will only become a factor in the event of the owner of land or the holder of a right of leasehold, as the case may be, desiring to have a deed of transfer substituted for the title under which such ownership of land or the right of leasehold in question was originally registered.

The fact that all property rights under Proclamation R293/1962 have, until now, been registered in the office of the relevant Chief Commissioner has sidestepped the necessity for watering down the requirements as far as the survey of sites is concerned, as has been the case in respect of rights of leasehold registered under the Black Communities Development Act where the registration of leasehold rights may now, in certain circumstances, be procured on the basis of a plan, aerial photograph or diagram.

As far as the actual registration procedures under Proclamation R293/1962 are concerned, it appears that similar problems will be experienced to those initially experienced in regard to the registration of rights of leasehold in terms of the Black (Urban Areas) Consolidation Act [126].

Unfortunately, the dismantling of the system of 99-year leasehold as contained in Proclamation R293/1962 will not achieve anything, for as has been seen, the acquisition of ownership *ab initio* is a far more attractive proposition for blacks, and in any event, for so long as such ownership is to be registered in the office of a Chief Commissioner and not in a Deeds Registry constituted in terms of the Deeds Registries Act, the problems arising out of land survey will also be avoided. However, if any move should be contemplated to provide for the registration of all ownership countrywide in deeds registries constituted under the Deeds Registries Act, then the question of land survey and compliance with *s*46 of the Deeds Registries Act will again rear its head.

126. See 1.3.6 above.

CHAPTER 6

OVERVIEW

6.1 SUCCESS OR FAILURE?

In analysing the system of 99-year leasehold in South Africa since the time of its inception in 1978 through to the present time under the Black Communities Development Act, it is clear that the concept of 99-year leasehold has undergone a total transformation. What started off as a form of long-term tenancy available to a limited number of blacks, has developed to a form of land tenure which is in fact leasehold in name only and is available to virtually the entire black population of South Africa. I have already expressed the view that the system of 99-year leasehold may in time come to be regarded as no more than a stepping-stone in the development of property rights for blacks in South Africa.

It is clear that any view as to whether this system of 99-year leasehold is successful or not, must be taken in the light of two differing perspectives. The first is to regard the present system of 99-year leasehold as an end in itself, that is, to perceive it as a form of land tenure which is to feature permanently on our statute books. The second perspective, which I hold, is that time will see the total dismantling of the system of 99-year leasehold and the eventual substitution therefor of universal ownership. My reasons for holding this view are set out below.

From the first perspective the system of 99-year leasehold, as it has evolved to the present time, cannot be regarded as achieving any marked degree of success. The degree of success in this regard being gauged by the measure in which the system has alleviated the ever-increasing need for housing in the black community on the one hand, and on the other hand, by the extent to which the system has engendered a desire amongst blacks to own their own homes. On both counts only a limited degree of

success has been achieved. The shortage of leasehold sites available, coupled with the difficulties arising out of land survey, have largely been responsible for limiting such success in respect of meeting the serious housing shortage confronting the ever-increasing urban black population.

Apart from these practical shortcomings, the more penetrating criticism of the system of 99-year leasehold is that it is not seen by blacks as ownership of a form which encourages a desire to acquire a home of one's own.

In other words, the concept of home-ownership must be seen as a goal worthy of striving for, of saving for, and of investing in. Home-ownership must afford a sense of pride and achievement and also be regarded as a long-term investment which cannot be taken away. The vast majority of blacks cannot be expected to view 99-year leasehold tenure as a secure form of perpetual title which satisfies all these desires, and the fact that leasehold title under the present system of 99-year leasehold does in fact have all these attributes cannot alter the perception that leasehold title is not ownership. In the words of Penny & Koornhof [127] -

"Freehold ownership gives security, it provides protection to the owner against inflation, it encourages saving, it stimulates the filtering phenomenon by which occupants move to better housing as their means permit and thus creates a middle class. Ownership of property leads to a society in which the majority have a stake worthy of preservation, a society they will safeguard ;..."

Seen from the second perspective, the system of 99-year leasehold is no more than a step in the direction of ownership, and in my view, no other conclusion can logically be drawn, even if ultimate ownership for blacks was not contemplated in 1978. Seen against the provisions of *s*57A of the Act, which contemplates the conversion of leasehold rights into ownership, and *s*41(1) which contemplates the acquisition by blacks of ownership in land *ab initio*, one cannot seriously believe that the system of 99-year leasehold will form a permanent form of land tenure in South Africa.

127 Dr P Penny & Dr J Koornhof : Housing under the new dispensation: The property development industry - Juta's South African Journal of Property September 1986 2.

Against this latter perception of the system of leasehold, one cannot be over-critical. A form of long-term tenure was created which at no time purported to convey ownership or the equivalent thereof to blacks, although it did in fact go a long way towards creating a form of land tenure which very nearly approached ownership. Practical problems cannot in all cases merely be dismissed and the practical problems arising out of survey were very real. Great store is set by the system of land registration in South Africa and the security of title and protection afforded registered real rights thereby; and these attributes of our system of land registration cannot be watered down lightly.

With this in mind, the system of 99-year leasehold certainly did achieve a measure of success, and recognition should be given to this fact.

6.2 RECOMMENDATIONS AND THE FUTURE

What has been said under 6.1 above cannot leave one in any doubt as to what recommendations should be made and the future road to be followed in regard to the question of property rights for blacks. Clearly, ownership for all population groups must be strived for; but more than that, in addition to a universal freedom to acquire and own land, what is also needed is a universal system of land registration.

Apart from the cost and practical difficulties of maintaining separate systems of land registration with their separate requirements and regulations, there should not be perceived to be separate systems of land registration for the various ethnic groups. This can only result in the view that one such system is better than the other and this could not be expected to find acceptance among blacks, even if this were not, in fact, the case.

What is needed is ownership of land by all population groups and one system of land registration under which all rights to land are registered irrespective of who or what the owner may be. Not only would equality of title and rights be seen to exist, but it would in fact exist from an economic point of view as well. This would be so because the same considerations would apply to all land in South Africa for determining values and commercial risks. Legal obstacles would not deter institutions

and the private sector from investing in rights in land which in fact fulfil man's ambition, create a sense of social stability and security and at the same time providing a much needed stimulus for the concept of capitalism.

It is easy to criticise and to make suggestions, particularly without the knowledge or understanding of the many difficulties to be countered. This is not a work on politics and the writer does not propose to refer further to the political factors and hurdles to be overcome before unrestricted ownership of land in South Africa in fact becomes a reality for blacks.

The Black Communities Development Act now provides for ownership and every effort should therefore be made to simplify and speed up the township establishment process to ensure that new townships to be established in development areas will be freehold townships *ab initio* in preference to leasehold townships with a potential for the conversion of leasehold rights into ownership once the provisions of the Deeds Registries Act have been complied with. Unfortunately, there is a conflict of interest here, since township developers are primarily concerned in turning over their profit as quickly as possible: and to this end leasehold townships must be viewed as the preferable option. On the other hand, it has been shown that rights of leasehold registered in respect of unsurveyed sites will not offer an attractive form of security to mortgagees. It may be that the banks and in particular the building societies are able to play an important role in promoting the registration of ownership as the sole form of title to land in new townships.

Another reason for avoiding the leasehold route in respect of new townships is the many difficulties which have been highlighted in regard to the conversion process provided for in s57A of the Black Communities Development Act. The problem in regard to new townships may prove to be far simpler than those relating to existing townships. New townships will be laid out on accepted town-planning principles subject to proper surveys being carried out. The absence of these principles having been applied in many existing townships continues to be possibly the greatest problem confronting both the granting and registration of leasehold rights and the conversion of existing rights of leasehold into ownership.

The authorities have introduced measures to involve the profession of land surveyors in the surveying of sites in existing townships and the preparation of general plans in respect of such townships. The main problems in this area appear to be time and cost. There is a clear need to devise some means to involve the business sector on a large scale in regularising the townships concerned, and it may also be that the profession of land surveyors should come forward with some formula for the speedy survey of entire townships which does not require "on site" surveying to be carried out. Possibly aerial survey of some form coupled with statutory authentication of boundaries and measurements may offer a solution worthy of consideration which will also meet the requirements of the Deeds Registries Act. Whatever solution may be decided upon it is clear that a high priority must be given to removing all practical obstacles at present standing in the way of ownership for blacks, as soon as possible.

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Act 90 of 1985 : Laws on Co-operation and Development Act

Act 74 of 1986 : Black Communities Development Amendment Act

Act 81 of 1986 : Mutual Building Societies Amendment Act

Act 82 of 1986 : Building Societies Act

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