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DISENFRANCHISED HERITAGE. ANCESTRAL GRAVES AND THEIR LEGAL PROTECTION IN SOUTH AFRICA.

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A dissertation submitted to the Faculty of Science, University of the Witwatersrand, in fulfilment of the requirements for the degree of Master of Science in Archaeology.

Johannesburg 2012

DECLARATION

I declare that this thesis is my own, unaided work. It is being submitted for the Degree of Master of Science at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in any other University.

_____

Benjamin Davido Saccaggi

27th of July 2012

ABSTRACT

This thesis begins by providing an account of the ancestral grave relocations of the Sekuruwe community in Limpopo province, South Africa. Sekuruwe claims that the manner in which their graves were relocated disrespected their cultural norms, and infringed their constitutional rights. Over three years of investigation, it was proved that the mine which relocated the graves acted negligently by badly damaging human remains, confusing graves and loosing skeletons. The thesis investigates Sekuruwe's case within three theoretical frameworks: Systemic oppression, legal claims to culture, and Ethnicity Incorporated. The role of heritage legislation is highlighted throughout the thesis, and the inadequacies of legislation pointed out with reference to the different theoretical approaches. The aim of the thesis is to understand the way in which Sekuruwe's claims of cultural insensitivity are in fact claims of injustice, which are argued through the bodies (and graves, and spirits) of the dead. I aim to understand the way in which these claims of injustice are structured by heritage legislation.

ACKNOWLEDGEMENTS

For the academic, emotional and financial support of those innumerable people and organisations that have made this thesis possible, I would like to express sincere gratitude to the following:

The Sekuruwe community, who openly welcomed my prying questions and without whose insights and explanations I could not have completed this thesis. Also every individual in this and the many other communities who have cooperated unceasingly throughout this thesis.

My supervisor, Dr Amanda Esterhuysen, whose academic, emotional and moral guidance has been my pillar of understanding throughout my undergraduate and postgraduate years.

The Department of Archaeology at Wits, whose welcoming and friendly environment captured me from the first lecture, and who have always gone out of their way to ensure I wanted for nothing.

The Origins Centre, for providing a wonderfully vibrant and comfortable surrounding for me to feel at ease, and who provided much needed employment throughout my time at Wits.

The Legal Resources Centre for allowing me to work on some of the most interesting cases, even though my qualifications were minimal. The support and insight of this organisation is certainly evident on every single page of this thesis.

Action Aid, Jubilee South Africa and the other organisations who have been involved in the Sekuruwe case, and who have always been willing to give their insights freely, and to take me along on any number of community visits.

The National Research Foundation and the Five Hundred Year Initiative, who provided funds for this research.

My family and friends, especially my Uncle, who managed to put up with my incessant conversations about my thesis without showing their boredom.

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INTRODUCTION

1.1. Introduction.

Sekuruwe village is a community that was recently resettled by Potgietesrus Platinums Limited, a platinum mine operating in Limpopo Province (owned wholly by Anglo Platinum, hereafter referred to as 'the mine') near Mokopane, South Africa (Figure 1). The community had previously lived on Blinkwater farm in the Mapela area for at least one hundred years before their relocation in 2006. In 2008 about 150 of their ancestral graves were exhumed from the community's traditional land and transported to a new cemetery near Sekuruwe village. By using tractor loaded back-actors to exhume the graves on Blinkwater farm the undertaker badly damaged, and in some cases completely destroyed the skeletons. At the time Sekuruwe approached different organisations complaining of the cultural insensitivity with which their ancestral graves had been relocated. After some argument, the mine agreed to fund the re-exhumation of both the original and new graves in an attempt to reassemble the skeletons so that they could finally receive a respectful burial. When writing this thesis in 2011 Sekuruwe's skeletons have still not been reburied. The community's disgruntlement over the treatment of their graves is a central concern in negotiations with the mine.

In 2009 Sekuruwe, assisted by the Legal Resources Centre (LRC), filed an affidavit against the validity of the lease agreement over the community's traditional land on Blinkwater, which had resulted in their relocation in 2006. It is argued that the community did not consent to the relocation, and that the lease of the property by the mine is unlawful and invalid. The LRC has also occasionally considered filing an additional application in the equality court covering the issue of Sekuruwe's grave relocations. Many of the arguments contained in this thesis were specifically devised in order to contribute to this application. Similarly, details in this thesis were specifically framed to expose the actions of the mine, and this was directly intended to be used to pressure the mine into compensating

the community for the destruction of, and disrespect towards, their ancestral graves.

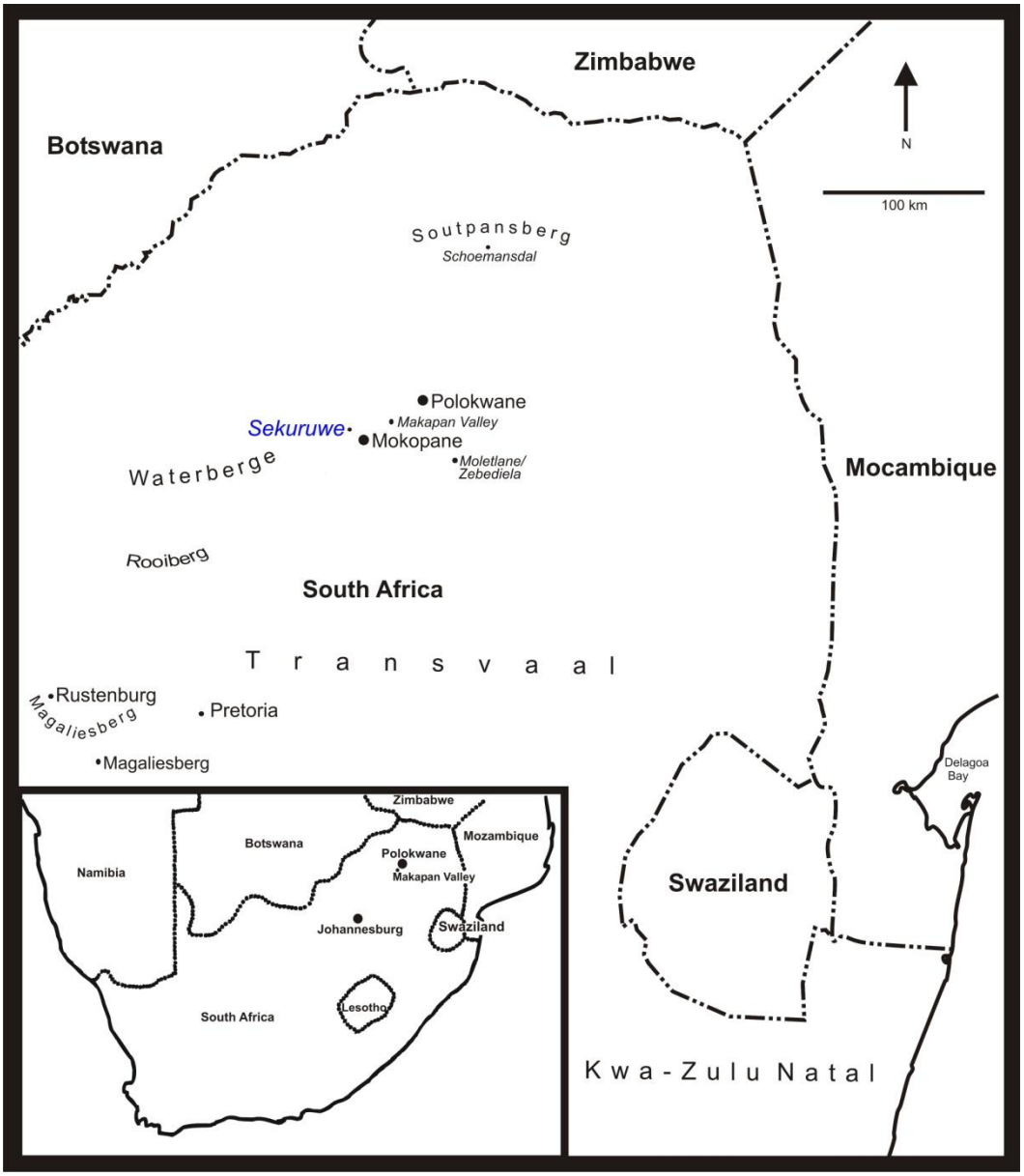


Figure 1. Showing location of Sekuruwe village, Limpopo, South Africa.

The compensation has included attempts to re-assemble the skeletons in preparation for reburial, and will also include the eventual reburial ceremony and financial compensation to the next of kin. Although I have put considerable effort into presenting an objective and unbiased account of Sekuruwe's grave relocations, and tried to criticize the relocations from an independent perspective,

this thesis is an intentional discussion around the topic. I aim to explore allegations of negligence and fraud with which the initial relocations were conducted, as well as investigate deficiencies in South Africa's heritage legislation which permitted these to occur.

This thesis uses Sekuruwe's grave relocations to demonstrate the interconnected role played by these ancestral graves in the community's battles with the mine. Proceedings to contest the lease agreement have been drawn-out and prolonged, and have heightened tensions between the mine and the community. Along with a group of NGO representatives, Sekuruwe continues to question the rights of the mine to develop their traditional land into a tailings dam, to move them off this land, and to later relocate their traditional graves. The cultural insensitivity with which the graves were relocated is a bitter point of contention. Dendritically incorporating themselves into the other legal debates over Sekuruwe's case, the ancestors and their graves have become a focal point for these arguments. Sekuruwe's ancestral graves, and their ancestral veneration, have been central to negotiations between the mine and the community since their (the graves') relocation. Much of this debate has been framed in terms of legality, referencing the National Heritage Resources Act and the Constitution of South Africa.

Rosemary Coombe (2005) argues that the mobilization of cultural identities can be a strategy of survival for communities affected by development. Coombe (2005: 40) argues that these mobilizations are often done with reference to the *legal rights* of traditional communities. These rights are delineated in national legislation and international conventions. Sekuruwe has appealed to South Africa's national legislation, constitutional human rights and government departments to contest the rights of the mine to relocate the community and their ancestors. With the assistance of the LRC and other NGOs, the community has argued that the protections of heritage in the National Heritage Resources Act were not enforced, that their constitutional right to the enjoyment of their cultural life was infringed, that government departments neglected to ensure the protection of these rights before giving permission for the mine's development of

Blinkwater, and that their cultural norms were disrespected by the way in which their graves were relocated. This thesis suggests that inadequacies in national legislation may have contributed to the injustices claimed by Sekuruwe.

This thesis explores the mobilization of Sekuruwe's ancestral veneration in terms of these legal frameworks, and structures the debate in terms of social justice. I do this by highlighting the role of ancestral veneration in conflicts between the community and the mine. I apply Young's (1990) theory of social justice, and discuss Sekuruwe's grave relocations in terms of systemic oppression. I argue that heritage legislation forms part of the systemic framework which permitted the disrespectful relocations to occur.

I explore the implications of these claims in terms of 'post-mortem justice'. Using Young's (2000) critical approach, I argue that the injustices inflicted on Sekuruwe were marginalization, powerlessness, cultural imperialism and violence. I point to three cases in the recent past in which the bodies of the dead have involved similar debates about justice. Controversy over Sara Baartman, Kennewick Man and the Prestwich Place cemetery each raised questions of rights, dignity, and justice in their contextual presents. In each case the debate has been raised over the treatment of the bodies of the dead. These debates, I suggest, can be metaphors for concerns over contemporary injustices experienced by those connected to these bodies. These connections vary from academic interest to spiritual relationships, and it is often between different connections to the dead that debate over their treatment arises.

The nested interconnection of Sekuruwe's ancestors with many aspects of their struggle against the mine has also introduced some economic concerns to their displeasure with the grave relocations. The mine has offered to cover expenses for the cultural reburial of the graves once the community has agreed to the terms. The ancestors have also been referenced in testimony relating to the mines consultation process and their legal rights in terms of relocation. I highlight aspects of the ancestors' incorporation in other debates concerning the farm lease,

and highlight the influence of economic concerns in these particulars. I discuss the similarities between Sekuruwe's ancestral veneration and the concept of 'Ethnicity Inc.' discussed by Comaroff and Comaroff (2009). 'Ethnicity Inc.' is described by Comaroff and Comaroff as the formulation of ethnicity/culture/identity specifically for the consumer market. Discussing the liability of the mine (in terms of law) to compensate Sekuruwe could be seen as the formulation of their relationship with the ancestors and their graves for financial enrichment. Although there are similarities to Ethnicity Inc, I point out differences in the economic considerations of Sekuruwe's ancestral veneration. In one way Sekuruwe is stressing the centrality of their ancestral beliefs in order to gain financial compensation from the mine; in another way the use of cultural rights and the ways in which this heritage is being economised do not follow Comaroff and Comaroff's description of Ethnicity Inc. Sekuruwe's mobilisation of their heritage may be better understood by Comaroff and Comaroff's (2004) definition of ritual.

This thesis aims to detail the dependence of Sekuruwe's arguments on legal principles throughout the concerns introduced above. The National Heritage Resources Act and the Constitution of South Africa have been the structuring guidelines of arguments against the mine, and the state. The primary aim of this thesis is to illustrate this structuring aspect of legislation throughout Sekuruwe's contestations with the mine.

1.2. Aims and Objectives.

The principal aims of this thesis are the following

-To relate an account of Sekuruwe's grave relocations formed from a synthesis of sources. To highlight the role of heritage legislation in debates between the mine and the community.

-To describe how this mobilization of culture is being done in terms of law. I do this by positioning my arguments in a theory of social justice from Iris Marion Young (1990), and consider the implications of the improper way in which Sekuruwe's graves were relocated. Here I use heritage legislation and constitutional rights, and argue that the injustice experienced by Sekuruwe is an example of systemic oppression.

-To understand the economic influences on Sekuruwe's identification with the ancestors. Sekuruwe's ancestral graves cannot be separated from debates about their land, their health, their futures, and the compensation owed to them by the mine. I aim to show that aspects of Comaroff and Comaroff's Ethnicity Inc. (2009) are evident in the economisation of Sekuruwe's ancestors, but that there are key differences.

The primary objectives of this thesis are the following:

-To give a contextual interpretation of Sekuruwe's ancestral veneration. I relate concepts of the ancestors from the literature to describe Sekuruwe's similarities with, and difference from these concepts. I aim to understand Sekuruwe's ancestral veneration as part of their inherited cultural lives which they are choosing to mobilize in a struggle for their rights.

-To introduce a framework for management of heritage resources based on the concept of free, prior, and informed consent described by Oxfam Australia (2007). This framework, developed to address mine/community relations in other parts of the world, would enable heritage management to focus on the rights of communities in relation to the protection of their mandate. I aim to provide a policy outline for the incorporation of this principle into South Africa's current legal protections of ancestral graves.

1.3. Outline.

Chapter Two gives a primary account of Sekuruwe's grave relocations, beginning with their exhumation in 2008 and ending with the discussions about the cultural ceremony which will be held when the skeletons are finally reburied. Emphasis is placed on concerns raised by the community and others about the relocations, with specific focus on the mine's consultation process. The community claims that they were not given adequate opportunity to consent to the relocations, and that the decisions were taken by a coalition of the mine, their consulting company, the tribal authority, the undertaker and state departments. These decisions were then imposed on the community. This Chapter also stresses the community's concern about the cultural disrespect paid to their ancestral graves by the exhumations, and the effect of this on the spirits of their ancestors and their (the community's) spiritual relationship with them.

Chapter Three focuses on understanding the violence perpetrated against Sekuruwe's ancestors by the disrespectful way in which their graves were exhumed, and the damage done to their skeletons. I examine literature on South Africa's cultural concepts of the ancestors and ancestral worship to position Sekuruwe's ancestors within a broader system of belief. I relate accounts of the ancestors given by Sekuruwe, and consider their similarity with, and differences from overarching concepts of ancestor veneration described in the literature. I consider the violence perpetrated against the Sekuruwe community by the disrespect of their cultural norms, and the destruction of the spiritual relationship between Sekuruwe and their ancestors caused by the relocations.

Chapter Four explores three historic cases in which the bodies of the dead have occupied similarly central places in debates about justice in the recent past. The stories of Sara Baartman, Kennewick Man and Prestwich Place are related, and similarities with Sekuruwe's case highlighted. I aim to illustrate the role played by the bodies of the dead in debates of justice for the living. I suggest that Sekuruwe's discontent over the treatment of their ancestral graves can be a

metaphor for larger debates. These are debates of justice for the living; debates about the validity of the lease over Blinkwater farm, the rights of mines to relocate communities from their traditional lands, and the rights of communities to consent to the relocation of their ancestral graves. I suggest that the centrality of Sekuruwe's ancestral graves to these debates is reflected similar to the centrality of other bodies of the dead in debates of the past.

Chapter Five presents the legal protections of ancestral graves offered by the National Heritage Resources Act. Here I discuss Sekuruwe's grave relocations in terms of law: was the exhumation of these graves legal in terms of South African law? The question pivots on three points: who has the right to give consent for the relocation of these graves, what constitutes consent, and what are the parameters of a proper exhumation. I consider answers to these questions given in law, and point to inadequacies in the Heritage Act in its protection of ancestral graves. I present some simple, and some difficult problems in the legislation, and consider possible solutions which could avoid similar cases in the future. This Chapter aims to illustrate the argument by Coombe (2005); that culture can be mobilised as a legally determined right. This Chapter considers what this legal definition is, what the protections for it are, and where these have fallen short of performing their mandate to protect the cultural heritage of South Africa.

Chapter Six further illustrates this by situating Sekuruwe's ancestral veneration in an argument from Young's concept of social justice. I argue that the legal loopholes in South Africa's heritage legislation pointed out in Chapter Five, which caused the grievances of Sekuruwe, both allow and are themselves an instance of systemic oppression. I consider Sekuruwe's grave relocations in terms of systemic marginalization, powerlessness, cultural imperialism and violence. I frame this critique in terms of the constitutional right to the enjoyment of cultural life. I argue that the disrespectful manner in which Sekuruwe's ancestral graves were exhumed exposed the systemic oppression of Sekuruwe by the mine, the state and the legislation. I conclude that the deficiencies of South Africa's heritage legislation discussed in Chapter Five, and illustrated by Chapters Two and Three,

constitute a contravention of legislation, and an infringement of the human rights of Sekuruwe community. Further, that this infringement is a result of systemic deficiencies in heritage legislation, as much as the actions/inactions of individuals.

Chapter Seven introduces literature on free, prior, and informed consent (FPIC). FPIC has been recently cited by organisations investigating mine/community relationships throughout the world. The parameters of FPIC are suggested as guidelines to ensure that communities affected by mining have adequate opportunity to affect development decisions which directly impact their futures. This Chapter adopts the frameworks of FPIC and applies it to the protection of cultural heritage in the face of development. I suggest that this should form the basis of legal frameworks which protect ancestral graves and cultural heritage, and incorporate this concept in a draft policy for the protection of ancestral graves in South Africa.

Chapter Eight explores the economic influences of Sekuruwe's engagement with the mine. These include, for example, the compensation paid for the initial relocations, and the negotiations for the provision of a cultural ceremony when the skeletons are reburied. I highlight similarities between Sekuruwe's mobilization of their cultural veneration of the ancestors and Comaroff and Comaroff's concept of 'Ethnicity Inc.' (2009). I also point to differences in the way Sekuruwe has mobilized their heritage, which is not purely economic, or purely for consumer capitalism or financial gain. I suggest that this mobilization may be closer to Comaroff and Comaroff's concept of ritual, which they argue is a negotiation of power (2004). This Chapter relates this concept while pointing to similarities with the Sekuruwe case.

Chapter Nine, in conclusion, reflects on the role of law in this case, and points to the way in which heritage legislation, and heritage were employed to argue for recognition of the violence against Sekuruwe as well as compensation for it. I suggest that Sekuruwe's grave relocations represent a particular example of the increasing role of heritage legislation in our interactions with the past. I suggest

that heritage legislation is increasingly dictating how the past is discovered, interpreted, and presented, even framing more spiritual interactions with the past in terms of law and legality. I conclude by reflecting on the role that Sekuruwe's ancestral graves have played in their struggle against the mine, and the dialectic influence of this struggle on Sekuruwe's spiritual identification with the ancestors.

1.4. Method.

This thesis synthesises the narrative of Sekuruwe's grave relocations from a number of sources. Since 2009 I have been involved with different organisations that interact with the community in different ways and for different reasons. As far as possible I have personally attended meetings where the grave relocations have been discussed, usually in an unofficial capacity connected with one of the organisations. My primary sources of information have been the community, organisations and documentation.

1.4.1. The community.

Regular community meetings are held under a large tree near the village cemetery, or in the school hall across the road. These meetings are attended by an array of community members. A large portion of the gathering is usually older woman, with a slightly smaller group of older men. Young to middle-aged community members frequently join the meetings, but are fewer and less vocal than their older relatives. Anyone is allowed to stand up and give their testimonies in these meeting, which has provided me with a broad collection of voices. Although the youth are not very vocal in these debates, they do stand up to give their opinions. Women are the most vocal, and have given countless testimonies at these meetings and in personal interviews. I have also visited community members in their homes where they continue to give these testimonies. Attending these meetings has provided me with a broad understanding of Sekuruwe's collective feelings towards the mine and the grave relocations. Although this thesis attempts

to synthesize the Sekuruwe community's varied testimonies into one narrative, I have also tried to show variations when presenting the history of Sekuruwe's case.

Other meetings with the community have been with the Sekuruwe Community Council on more official terms, usually for legal discussions. The Council originated from a collective of vocal community members who spearheaded the contacting of NGOs to request assistance with their struggle against the mine, and later concerning the relocation of their graves. This council is comprised of middle-aged to elderly men who have varying positions of influence in the community. Meetings with the Council are held in the primary school and seated at desks. I believe that the Council honestly and vigorously concern themselves with ensuring that their representations are the views of the community at large.

Concerted effort is made to hold general community meetings before and after every Council meeting where the opinions of the community are openly debated, and the mandate of the Council clearly determined. Decisions of the Council are also always taken back to the community for verification, and organisations (NGOs and lawyers) involved in Council meetings are asked to attend these community meetings. This allows the community to be aware of the negotiations taking place between the council, the mine, and other organisations, and no-one is ever shy to voice their displeasure with any of these decisions. It also allows the community an opportunity to question these individuals (representatives of the mine, or attorneys assisting the community) about their objectives and motivations. I believe the Community Council to be a structural aspect of Sekuruwe's collective identification: community members all identify, to various degrees with the representations made by the council.

1.4.2. Organisations.

Different organisations have been involved with the community for various reasons, mostly in connection with their grievances with the mine. These organisations have each exerted their influence on the case in different ways; for

example Action Aid has assisted in the mobilisation and organisation of Sekuruwe's 'resistance', as well as their connections with other communities and NGOs, while the Legal Resources Centre has helped formulate legal argument opposing the lease of Blinkwater, and the relocations of the community's graves. Information gained from these organisations has been incorporated into the narrative.

The mine has frequently tried to communicate with the community through representatives hoping to resolve their grievances over the lease as well as the graves. Although I hold reservations about these representatives, they have offered information about the mine's concerns and objectives. They have also offered explanations for the actions of the mine, and raised concerns about the legal protections of ancestral graves. This information has helped to balance my understanding of the Sekuruwe case.

My relationship with the LRC specifically has provided invaluable insight into the formulation of legal argument against the mine, as well as the complexities of negotiations between the mine and the community. Although some information about the mine's offers to settle and some legal argument is *sub judice*, I have used certain other information from this source to structure arguments in this thesis.

Relationships with other organisations such as Action Aid and Jubilee have also helped to highlight the complexities of this case. These organisations have also been key to my understanding of the ubiquities of community struggles against mining nationally and abroad. This understanding has equally influenced the arguments in this thesis, as well as the solutions I have proposed.

1.4.3. Public documents

Some of the organisations involved have also published reports on Sekuruwe's case. These publications have mostly dealt with broader concerns about the

impact of mining on rural communities, and have included numerous other communities and concerns. The mine, Action Aid and the South African Human Rights Commission have all published findings on mining impacts in Limpopo, which have also covered the issue of grave relocations. I have used these reports to present the opinions of these different organisations.

1.5. Literature review.

1.5.1. Cultural Heritage

This thesis focuses on the role of cultural heritage within a particular political situation; the cultural veneration of the ancestors in the context of a political struggle over resources and recognition. In its simplest form, this struggle is the polarization of Sekuruwe against the mine. Sekuruwe's appeals sometimes to, sometimes from, sometimes against the state and other authorities introduces a complexity of power struggles to this simple polarization. This thesis focuses on one aspect of the framework in which this struggle is being fought: cultural heritage legislation. In this section I consider the construction of heritage, and the identifications with a particular heritage by a specific group of people for a particular reason. This section reviews the literature relevant to the concepts in this thesis by discussing four topics. First, the difference between 'past' and 'heritage' as described by Lowenthall (Fabricating Heritage 1998) is outlined to demonstrate the constructed nature of heritage. Schama's concept of constructed heritage (memory) from *Landscape and Memory* (1995) is used to augment Lowenthall's description. Second, the conceptual framing of heritage as a social asset, discussed by Coombe *Legal Claims to Culture* (2005) and further explained by Silverman and Ruggles (2007) in terms of 'rights'. This is considered alongside Graham et al. *a Geography of Heritage* (2000). Here I outline heritage as an *asset* employed to the advantage of a particular group who identifies with that heritage. The employment of this heritage is increasingly being done through means of law, on which this thesis focuses. The wording of legislation also shows its comprehension of this concept: the Heritage Resources Act describes heritage

as an irreplaceable *resource*. Finally, an example of the economic construction and purposeful use of heritage is related from Comaroff and Comaroff's *Ethnicity, Inc.* (2009): the dialectic interactions of cultural heritage and economics. This thesis aims to demonstrate a similar dialectic construction of heritage.

1.5.1.1. Constructing Heritage

Lowenthal (1998) describes the difference between 'history' and 'heritage' in terms of 'fact' and 'fiction'. History can be seen as a version of the past, a particular construction of a narrative which asserts that certain events followed each other. Such a version of the past could be negated by revealing inaccuracies in the facts of the account, calling into question the relationship between events. Heritage, on the other hand, is a 'declaration of faith in a version of the past' (Lowenthal 1998: 3). This declaration of faith' can be an identification with an aspect of the past, which the individual or group feels is of particularly significant to them. It is the act of feeling emotionally connected to a specific aspect of a narrative from the past. Lowenthal suggests that this heritage is a construction created through interaction with various factors within a multitude of histories. That is to say, that heritage is the personal or group selection of what parts of the version of the past (history) they are emotionally connected to. This takes place by the process of actively remembering portions of the past in relation to the present; public holidays, festivals, personal reflections on the events of the past etc. This generates meaning in the present. 'Meaning' is derived from this 'declaration of faith in a version of the past'; heritage is the identification with the past (Lowenthal 1998:3).

Similarly for Schama (1995), heritage is the interaction with the past in the present; it is the process of human agency in choosing to remember something from the past. Heritage is then what we remember about the past as opposed to what some other person might remember from the same past. In its simplest form, heritage is purely memory: it is a construct of memory, of what people remember. For Schama, the act of remembering creates heritage as it is this aspect of the past

that exists in the present through our recollection of it; heritage is those parts of the past which are actively recollected in the present, through determined action inspiring memory. This can be politicized to serve a certain agenda. If certain recollections of the past in the present (memories) are incorporated into a national narrative, it could lead to the oppression of groups of people remembering unsanctioned ('extra-nation narrative') versions of the past. Laurajane Smith (2006) argues that national heritage is the collection of values and meanings from the past. These are synthesised from various versions of the past identified with by different individuals and groups into a collective national heritage. Smith (2006) considers heritage as the personal property of the individual, but having the capacity to transcend stagnant personal boundaries to be incorporated into a sliding scale of histories: personal, communal, social, national and universal.

Weiss (2007) supports such a view, but further explains that there is no action is pre-requisite for heritage. Weiss argues that heritage is more than parts of the past incorporated in the present, but is synonymous with the actions of individuals reflecting the importance they place on the past. Because there seems to be no act which is not intentional, Weiss thinks that all heritage is political, since all action in either the protection or the destruction of mnemonic aspects of the past will be for the promotion of a specific agenda. This can be for numerous reasons, as simple memory can be political if it is opposed to the dominant ideology.

Silverman and Ruggles (2007) define heritage as the vehicle through which we access identities in the present. Reference to the past constructs our identity in the present, and this 'reference' is heritage. That is to say, we cannot understand ourselves in the present without a reference to some known past, to which we are related, giving us a location in the present. It is the intangible process for the procurement of identity, but not part of identity itself. Lipe (1984) argues that this vehicle can be a social asset. This is used by individuals seeking to assert identities either in solidarity with, or identification from, other individuals, larger groups or nations. Thus it is the confirmation that one is at a similar or different 'location' in the present to a group: asserting one's identification with or against

that group. How is this similarity of 'location' expressed? Through expressing common faith in a similar version of the past. Dawson Munjeri (2005) accepts this argument by demonstrating heritage's use as a mechanism for the construction of personal and social identities in relation to other, similar or differing identities. For Munjeri (2005), heritage is the interaction of the present with the past. Heritage is produced through the interaction of the society, their cultural values and the structural framework in which they function. Each of these factors invariably references the past, mostly to gain legitimacy in the present. Munjeri (2005) suggests that the factors of society, cultural values and structural frameworks interact with each other equally to produce the cultural norms of society, which are as much a reference to the past as they are a construct of the present.

Byrne (2004) explains that this reference to the past serves to provide a connection between it and the people who reference it. In cases of claiming a space as important to heritage, the group invariably claims that they are connected to this place, not only geographically by also temporally and spiritually. Such actions provide people with 'footholds' in the present, by reference to their connection to the past. Byrne is concerned primarily with the ownership (evidenced through management) of heritage and the past, which is done primarily through the State. In such a situation the state is the deciding factor in which locally relevant heritage (connection to the past) to hold as legitimate (incorporating it into the national identity) and which are irrelevant and nelected, resulting in marginalisation. In Sekuruwe's case, these footholds have been systematically destroyed by first their removal from their ancestral land, and then the removal of their ancestral graves from this land as well.

Jean Comaroff in *The end of History, again?* (2004) describes the increasing tendency of histories to be more atomistic and localised in 'the postcolony'. These smaller histories (with a lower case 'h') are constituted to address specific concerns, or to achieve particular benefits. She therefore assumes that heritage is created always towards a specific agenda. History (with a capital 'H') forwards

the agenda of a nation state by creating the national narrative. The smaller histories are formed by those who's agenda is not addressed by the state, nor its national narrative. This concept will be echoed throughout this thesis as I attempt to understand Sekuruwe's deployment of their cultural heritage.

Hoffman (2006) describes heritage as the process of remembering. The past and heritage are distinguished by what people do in the present. Aspects of the past are actively recalled in the present for personal reasons, and this generates heritage. Hoffman further states that heritage is often a mechanism by which societies demonstrate a connection between the present and the greatness of the past, allowing them legitimacy. Donatius Kamamba (2009) furthers this notion by stressing that heritage is the social value we place on the past. This value is specifically constructed to give a particular understanding of the present. For Kamamba heritage is the past used as a resource in contemporary constructs of norms in the present.

1.5.1.2. Heritage's uses

Graham *et al.* (2000) focuses on national level heritage as a commodity used by a country for the purpose of 'nation building'. Heritage is a valuable resource of political power. For Graham *et al*, heritage represents a conscious assimilation of versions of the past into the present for specific political purposes. Lowenthal (1998) echoes this by describing a number of reasons (for example nostalgia for imperial self esteem in Britain, or addressing social and economic unrest in America) for the promotion of heritage on a national level. National heritage is the version of history which is most beneficial to those who promulgate it. Heritage serves in some way to support a contemporary ideology. As little more than a tool of politics, this concept of heritage clearly demonstrates the role of the past in conflicts of recognition. In places of contested heritage, the past becomes fractured into conglomerate histories of different groups of political opposition. Such a situation inevitably leads to the silencing of certain histories (heritages) by others, with the stronger political units able to claim greater legitimacy for their

personal espousal of history over others. This sentiment is echoed by Scham (1998), who describes the complexities over control of the past. Those agencies (usually the State) which controls the representation of the past in the present, necessarily determines what past is of importance, and how it is being used in the present, usually to the end of justifying the acts of the State by marking them as the legitimate representatives of the past. Scham (1998) also points out that in such cases those who are unable to 'control' the past, through lack of economic or political ability, must necessarily succumb to marginalisation. Scham (2003) further argues that the claiming of local heritages is a political act of opposition to the State, a determined choice recognising the importance of a history that is not recognised by the national narrative. This act affirms connection and importance of places and parts of history that are ignored by the State, and the acts are often performed by those who feel neglected by the State in other ways.

Further to an understanding of the construction of heritage, is the purposeful employment of heritage in contextual debates. For this thesis I focus on the concept of heritage as a human right, and the ends to which this right can be asserted. Rosemary Coombe (2005) explains the mechanisms by which culture has become an increasingly important resource. Coombe points to globalization, capitalism and international legal frameworks in the plights of indigenous and first peoples. In order for culture to be discussed internationally, on the global scale, it has become enveloped in definitions of law and legality, which have been framed in international conventions. Thus, culture has become a legally determined *right*, and indigenous people throughout the world are increasingly making use of internationally recognised conventions of protecting cultural rights to assert claims from, and against the state. In discussing the global trend towards a specific human rights discourse, Benhabib (2007) also states that human rights have become the language of the international community. In this development, those rights which are specific to people, for example cultural rights, are harder to define, as well as discuss cross-nationally, than the (usually classified) first generation right. Using the rights determined in these conventions, indigenous peoples (often historically marginalized) have begun to make demands on the

state not only for recognition of cultural sovereignty to varying degrees, but also for the allocation of resources, both natural and capital. Coombe (2005) argues that the assertion of these cultural rights can be seen as claims to advance a specific political aim in their contextual politics and economies. Cultural heritage is then the use of a legally determined right to bargain for recognition and resources in a political context.

Weiss (2007) describes the more recent trend in heritage towards debates of recognition, which many nation states have attempted to address through such legislation. Weiss stresses that although legislation often concerns itself with the promotion of local heritage and the importance thereof, the practise of considering all heritage as important, and affording it State protection, is seldom achieved. Focussing on South Africa, Weiss argues that the main focus of heritage seems to be the production of a national identity to the end goal of generating tourism funds. In such a situation, those heritage resources which cost the state money to protect, yet do not generate income, are seldom adequately considered or protected in law. This leads to the promotion of those heritages capable of generating income, and the neglect of other (perhaps spiritual) heritages.

The production of these narratives, either nationally or locally, is caught up in the assignment of 'significance', according to Lafrenz Samuels (2008). This significance has no objective value, but is concerned with addressing particular interests in the past, which are being invoked in the present.

1.5.1.3. Economising Heritage.

As an example of this determined 'use' of heritage, Comaroff and Comaroff (2009) investigate the construction of ethnicity in the contemporary capitalist market. Heritage is described as the projection of contemporary culture onto the past; the process of describing the past in connection to the cultural ideas of the present. The Comaroffs detail the manner in which culture is actively being constructed for commercialization, and how this influences heritage as the

'history of authenticity'. Comaroff and Comaroff describe the process of constructing cultural identity in the form of marketable branding. Using the Royal Bafokeng Nation and San Bushmen Hoodia cases as examples, they explain that the commoditisation of culture is as much political as economic; it exists in a dialectic influence of economics and culture (Comaroff and Comaroff 2009). This thesis attempts to understand Sekuruwe's appeal to legal protections of cultural heritage through economic terms brought about by negotiations for compensation from the mine.

In the case of Sekuruwe, they and many other traditional communities express their strong spiritual link to their ancestors, and the central role of their (the ancestors') graves in their cultural life. In reality grave visitation before the relocation in 2008 was probably more sporadic, infrequent and less formalised than Sekuruwe's testimonies[1]. The pointed explanations of the importance of the ancestors, their graves and the rituals regularly performed there are most likely more a political strategy than a historical account. In the Comaroffs' example, the Royal Bafokeng Nation have actively branded their culture for determined economic reasons. On a smaller scale, I suggest that Sekuruwe has revitalized their spiritual connection to the ancestors and their graves in a critical political struggle: the treatment of their ancestral graves has become a focus point in legal battles against the mine and government for a sustainable livelihood. A livelihood, they claim, lost to the greed of the mine. The other communities interviewed had similar reasons for testifying of the centrality of their ancestral graves.

Comaroff and Comaroff (2009: 6-22) describe the commoditisation of culture as a struggle to assert existence and achieve wealth by many first nations. I argue that the culture around graves is being used as leverage in a limited arsenal against the mines, and claiming rights to culture is just one mechanism by which these communities are fighting for survival in the face of the industrial giants. The construction of the importance of graves follows a similar mechanism as

[1] This was highlighted when some community members struggled to give accurate details of the deceased, or accurately locate their graves.

described by the Comaroffs. The ultimate aim of this construction is not, however (purely) economic, but also political.

Comaroff and Comaroff (2009: 86-117) investigate who the beneficiaries of such a consolidated heritage are, and how this consolidation is benefitting them (economically). In the case of the Royal Bafokeng, emphasis is placed on a homogeneous cultural identity shared by all members of the tribe. This homogeneous tribal identity is needed to legitimise the administration of the tribal lands under the royal family. This administration includes the conclusion of mining contracts, and the management of revenue from these. Similarly for other claimants of the past, representing a homogeneous, important and (above all cultural) link to the ancestors has a very definite aim: the formal recognition of the rights of rural communities in the face of national development goals. The neglect of rural South Africa is seen by some as one of the major failings of the current government. The consolidation of culture and heritage by these marginalised communities serves to counter-strike this ineptitude: through the formalization of cultural heritage, rural communities are able to enter debates with the claim to legal *rights* from the government. This would entail the government's legal mandate to provide protections of these rights, and their obligation to compensate communities where they have failed to do so. The LRC has suggested arguing these matters through the courts in the hopes for a ruling in favour of the constitutional rights of the community to have their heritage (ancestral graves) protected. Or at least, to find the mine liable for reparations due to the infringement of these rights. This would rest on the understanding that ancestral veneration, which encompasses both belief in the ancestors and the active visitation of their graves for ceremonial purposes, be a central and integral aspect of the cultural life of the community. Coincidentally, the centrality of the ancestors is a main theme found in interviews with community members, as suggested earlier.

1.5.2. History of the Heritage Act

The National Heritage Resources Act 25 of 1999 serves as the legislative outline of heritage management in South Africa. Not only does the Act define the mechanisms for heritage protection, but also defines the scope of the act. The Heritage Act replaced the National Monuments Act 28 of 1969, and had a much broader definition of heritage, and better defined the requirements for permit applications in cases where heritage would be altered. This section provides an overview of the historic development of the Heritage Act by listing its preceding acts. References to these acts from Deacon and Pistorius (1996), Pistorius (1996) and Hall (2009) are included for comment on both the prior and current legal protections of heritage. This historic background to the Heritage Act is included to frame the interpretation of the Heritage Act in this thesis within a historic context of recognition and exclusion.

The less formal authority which existed prior to 1911 for the protection of heritage focused mainly on the export of cultural objects and human remains. Regional regulations governed the export of human skeletons and cultural objects for anthropological purposes (Legassick & Rassool 2000). The first official 'heritage agency' was organised in 1905 as a result of activism opposing the demolition of the Castle in Cape Town for new rail roads. The South African National Society endeavoured to 'preserve from destruction all ancient monuments and specimens of old colonial architecture remaining in South Africa, to keep systematic records of such places...where they cannot be saved; to compile a register of old furniture and other objects in South Africa and to take all possible measures to discourage their removal from the country;...and to endeavour to promote ...a conservative spirit towards the remains and traditions of old colonial life' (Deacon & Pistorius 1996:4). The National Society's main function was the protection of colonial relics, as these were considered a vital aspect of the country's genesis. Pre-colonial structures and objects were given little consideration, with the main focus on imperial heritage. The protection of rock art was however, included in the mandate of the National Society, who

opposed the removal of the art for sale outside the country (Deacon & Pistorius 1996).

The first formal legislative protection of heritage was the Bushman Relics Protection Act of 1911. The Act protected rock art and the contents of graves, caves, rock shelters, middens or shell-mounds of 'the South African Bushmen or other aboriginals' (Deacon & Pistorius 1996: 4). The focus of the Bushman Relics Act was clearly broader than the aims of the National Society. The Act protected broader categories of heritage, including the heritage of native peoples, and also required a permit from the Minister of the Interior to export any 'bushman relics' (Deacon & Pistorius 1996).

The 1923 Natural and Historical Monuments Act retained this protective scope in addition to establishing the Commission for the Preservation of Natural and Historic Monuments. This Commission was the implementation body for, and considered applications in terms of, the Act. Similar to today's management structure, the Commission acted as 'trustee' of heritage objects and places of historic, aesthetic or scientific interest. The Natural and Historic Monuments, Relics and Antiques Act of 1934 further allowed the Commission to declare the protections of sites or objects in terms of their significance (Deacon & Pistorius 1996).

In 1969 the National Monuments Act established the National Monuments Council, and provided it with greater legal power to declare the protection of sites of historic significance. The objectives of this Council were to preserve and protect historical and cultural heritage, to encourage and to promote the preservation and protection of that heritage, and to co-ordinate all activities in connection with monuments and cultural treasures in order that monuments and cultural treasures would be retained as tokens of the past to serve as an inspiration for the future. This was a significantly broader concept of heritage than was included in earlier legislation (Deacon & Pistorius 1996).

Pistorius (1996) explains that the need for better definitions of heritage and the mechanisms of its protection brought about a number of amendments to the National Monuments Act, which was finally repealed in 1999 by the new National Heritage Resources Act. The 1999 Heritage Act was the result of a task team set up by the Minister of Arts and Culture. Their aim was to formulate a strategy for the promotion and protection of South Africa's heritage. This was challenging given the diversity of South Africa's historic past (Hall 2009). The Heritage Act addressed this by attempting to promote and protect a diversity of heritage, ensuring that none were excluded in the new, multi-cultural South Africa (Pistorius 1996).

The National Heritage Resources Act (25 of 1999) describes heritage as a unique and precious *resource*, which can in no way be renewed. Heritage is said to be at the centre of our spiritual wellbeing, and a resource in the promotion of a national South African identity. The protection of heritage for the enjoyment of future generations is the goal of the Heritage Act. Dawson Munjeri (2005) discusses the possibility of difficulties in applying a legal framework to a fluid notion such as heritage. To apply strict rules to the fluidity of heritage, he suggests, legislation should allow for as many participating bodies as possible to be consulted. This would allow heritage concerns to be dealt with on a case-by-case basis, always with the participation of those most concerned. Munjeri (2005) points out that according to the Act, The South African Heritage Resources Agency (SAHRA) should also be the instigator and manager of these debates, and should at all times consider its ultimate goal of promoting a national South African heritage.

Hall (2009) commented on the implementation of assessment and permit application processes for the protection of heritage. He suggests that the measures of Heritage Impact Assessments and applications for permits from SAHRA will allow all potential alteration of heritage to be adequately considered. This will allow SAHRA to adequately manage and conserve heritage. Hall also states that the involvement of multiple negotiators in the management of heritage should be the focus of SAHRA. Madiba (2009) also argues that the impact assessment

process will highlight local heritages which have been previously excluded. Expressly protecting ancestral graves is also an improvement from previous legislation as the Heritage Act acknowledges the importance of these graves to many South Africans and confirms their importance in the new South Africa (Hall 2009).

The Heritage Act also devolved more authority to the provinces and local heritage bodies as a political statement against apartheid's centralised government. The broad definition and protections given to heritage were also considered to enable all South Africans to feel that their past is of significance, and that they are not excluded (Hall 2009).

Cultural rights are also enshrined in the Constitution (the Constitution of the Republic of South Africa Act 108 of 1996). The Constitution protects the right to participate in the cultural life of one's community. This is a second generation right, as it is a socio-economic right rather than a right of the person or identity. Socio-economic rights are mostly progressive (measures must be taken to realise the right over time) dependant on the resources of the State. Thus the State has an obligation not to infringe on the right, but has limited duties to promote the right: the State should implement the progressive attainment of this right through legal and institutional means. Schmidt (1993) however argues that a cultural past is as important as any other right. Cultural heritage is seen as a link to the past, and used in constructing our identities. These identities are cultural, and involve decisions about how we perceive our place in the world. For Schmidt, the right to a cultural life is based on having a cultural history. If the state is to protect cultural life, it must equally protect the cultural history (heritage) which informs that life (Schmidt 1993).

This thesis aims to contribute to this argument by focussing on specific problems in heritage legislation and management which contribute to injustice.

1.6. Discussion.

Whilst complex and specific, the Sekuruwe grave relocations echo themes evident in past cases of debate around the bodies of the dead. Sekuruwe involves debates not only about the bodies of the dead, but also their graves and spirits. Generally, this thesis adopts the interdependence of graves, skeletal remains and ancestral spirits, which can all be seen as aspects of the same thing. The community claims a cultural identification with their ancestors; their spirits and bones. In most instances the identification with the ancestors is an immediate familial relationship. Ultimately, debate concerns the legitimate authority of Sekuruwe to decide on the treatment of their ancestors by the mine. If we accept Sekuruwe's legitimate identification with their ancestors, we must acknowledge them as the ultimate authority on how the ancestors should be treated. Acknowledging this would lead us to believe, retrospectively, that the treatment of the ancestors has been unjust, and must be remedied in the present. In reality this is a far broader debate. Sekuruwe claims they have been mistreated by the mining industry in the area. They claim their relocation by the mine was not adequate, and that they deserve redress for this. Sekuruwe feels they are denied participation in decisions concerning the expansion of the mines, the impact of this on the environment, and the decisions of authorities over their traditional land. These decisions seem to be concluded at the national level between government departments and international mining giants. The rural communities on which these decisions impact are left largely out of the loop, and have little means of asserting their opinion, much less authority over the future of their land and livelihoods.

The ancestors contribute significantly to the debate of legitimate authority. If we conclude that Sekuruwe represents the ultimate authority on the treatment of the ancestors, we imply their authority over numerous additional cultural decisions. Most importantly, it implies their authority over traditionally occupied land, and the actions of the mining industry in culturally significant areas. In addition, we must then assume that authority over the treatment of ancestral graves relies inclusively on familial, cultural and spiritual grounds. By extension,

considerations over the expansion of mining in this area must likewise consider concepts of cultural and spiritual significance; and must give ultimate authority to those identifying with these concerns.

I cannot discuss the entirety of these implications in this thesis. I focus only on the legitimacy of Sekuruwe's identification with the ancestors in law, and the implications this has. Most importantly, legitimacy would mean they have absolute authority over decisions relating to the ancestors. In addition, they have a meaningful claim concerning the injustice of the treatment of the ancestors. This thesis explores these concerns, and notes the impact of various factors on the outcome of the debates.

I aim to understand the political ends for which Sekuruwe is struggling, and to understand the role played by their ancestral graves in this struggle. I argue that heritage legislation and human rights law form a basic aspect of this struggle. The debate around Sekuruwe's ancestral graves centres on questions of legality, and the role of the state in protecting the constitutional cultural rights of its citizens.

I explore the role of the ancestors in Sekuruwe's struggles against the mine, and their claims from and against the state. I frame the question in terms of heritage legislation, which is the language through which arguments by the community are being structured. I aim to demonstrate the increasing role of heritage legislation, and human rights law, in not only the use of cultural heritage for political ends, but in the shaping of the very cultural heritage that is used for these ends.

CHAPTER TWO:
THE RELOCATION OF SEKURUWE'S ANCESTRAL GRAVES

2.1. Introduction

In 2008 some 150 ancestral graves were relocated from Blinkwater farm in Limpopo Province, South Africa, to the newly settled Sekuruwe village (Figures 2 and 3). The community was relocated from Blinkwater in 2006 after a lease over the property gave Potgietersrus Petroleum Limited (the mine) the right to construct a tailings dam there. The property had originally been used for cattle grazing and agriculture. The natural spring on Blinkwater is also sacred to the local villages. Before they were relocated the community had buried their dead in their village on Blinkwater following traditional customs. Many of the burials were under large trees, or near large boulders in and around the village. The community would have visited these graves to communicate with their ancestors, whose spirits are said to dwell at their graves. Sekuruwe follow traditional customs of ancestral veneration, which considers the spirits of the deceased as integral parts of everyday life. The ancestral spirits are thought to bring fortune, and stave off the evil powers which cause misfortune. The ancestors are visited at their graves where they are told of the news of the village and family; the arrival of children and the hardships they are experiencing etc. The ancestors are appealed to for their assistance in bringing good fortune to the family. The ancestors will withdraw their benevolence if angered or neglected, which will invite forces of evil to inflict misfortune on the family and village. Sekuruwe's descriptions of the ancestors are discussed in more detail in the next Chapter.

The original lease of Blinkwater farm gave the mine the right to develop the property and relocate any graves. The mine gave their consulting body, the 'Section 21', the mandate to get consent forms signed by the next of kind of each graves. The mine also consulted with a local undertaker, apparently at the

request of the community, to perform the relocations. Although guidelines exist governing the relocation of ancestral graves, not least exhuming any human remains, the mine and the Undertaker determined their own guidelines for the relocation[2]. In May 2008 the media was alerted to disquiet at the new Sekuruwe cemetery, which was clearly caused by displeasure with the relocation process which was underway at the time (for example 'Urgent Media Alert' by Jubilee South Africa).



Figure 2. Showing location of Sekuruwe village in relation to Mokopane, Limpopo. Edited from Google Maps.

[2] 12.08.2009 – Interview with G. Morris. Project manager, Anglo Platinum. Marshaltown, Johannesburg.



Figure 3. Map showing location of Sekuruwe and Blinkwater farm in Limpopo, South Africa. Edited from Google Earth.

Numerous accounts of the relocations exist due to testimonies from the community being related countless times to numerous organizations and passed through a network of NGOs and back again. The community say they noticed more coffins intended for reburial at the new cemetery than had been exhumed from Blinkwater. Suspecting foul play, community members attempted to prevent the reburials by filling in the newly dug graves and throwing stones at the undertaker's vehicles. Some community members were arrested and charged with destruction of property. Jubilee Limpopo, a grassroots organisation working in the area, stated that the protests were connected with the community's anger about the desecration of their graves. Jubilee claimed that human rights were being undermined: the disrespect of the ancestors during relocation was an infringement of human dignity, both for the ancestors and the living community. They also claimed that families had not been properly consulted about the relocation of their ancestral graves ("Urgent media Alert" 2008). Later investigations would reveal that the exhumations had badly damaged, and in some cases completely destroyed, the human

remains exhumed from the graves[3]. Other news reports stated that the community was angry about the way their graves and ancestors had been treated, and that human remains had been left strewn on the ground at the original gravesites ("Angloplat activities cause grave concern" 2008, "Graves damaged during relocation" 2008).

The South African Human Rights Commission later published a report, *Mining-related observations and recommendations*, which was followed by Action Aid's *The impact of Anglo Platinum* . These reports exposed some serious allegations against platinum mining in Limpopo. Central to these allegations was the mistreatment of relocated rural communities, who had suffered inferior infrastructure, contaminated water and culturally insensitive grave relocations.

The South African Human Rights Commission's report expressed concern about community allegations of lack of consent and cultural sensitivity around the relocations (SAHRC 2008)[4]. *Mining-related observations and recommendations* related the Sekuruwe community's claim that proper consent had not been obtained from families for the relocation of their ancestral graves. Sekuruwe claimed that consent was only given after threats from the Section 21 (mine appointed consultation body), and that in some cases the grave was relocated before the family was approached to give consent. The SAHRC also mentioned the disrespect of the graves and the cultural beliefs of the Sekuruwe community, pointing to the improper process of relocation: graves were not exhumed properly and bones had been left lying on the ground. Some bones had also gone missing in the process, and the disarray of the new cemetery

[3] See Steyn, M. 2009. *Report on human skeletal remains from Sekuruwe (Blinkwater) graves*. Forensic Anthropology Research Centre. Department of Anatomy, University of Pretoria. [Unpublished Report]. And Roodt, F. 2010. *A concise report of the Blinkwater/Sekuruwe graves relocation and remedial process. Anglo Platinum – Mogalakwena section.* Vhufa Hashu Heritage Consultants cc.

[4] 15. 04. 2009. 'Meeting with Sekuruwe Community concerning the re-exhumation of relocated graves'. Minutes. Anglo Platinum Mine.

made it impossible for families to identify individual graves. The SAHRC also expressed concern that the community had approached the police and the Mapela Tribal Authority for assistance, but had not received an adequate response from either (SAHRC 2008)

Action Aid's 2008 publication focused primarily on the relocation of communities in Limpopo. *Precious Metal* strongly criticized the strategies of community consultation employed by the mine. Action Aid claim that the legal provisions for consultation, and the mine's community consultation programs are generally vague and lack important details. There are no stipulations about the type of interaction between the mine and community, nor reference to any specific information which should be provided to communities before they can give consent. The report was highly critical of section 21's, the consultation bodies commonly set up by the mine as intermediaries with the community (Action Aid 2008).

The mine first responded through the press stating that the Sekuruwe exhumations were done in full compliance with the law, and that consent had been obtained from the next of kin, Mogalakwena Municipality, Waterberg District Municipality, Mapela Tribal Authority, Sekuruwe Section 21 and the office of the Premier, Limpopo ("Angloplat took every care" 2008). The mine further stated that consultation had been conducted with the next of kin since 2007, and that the next of kin had been present for the exhumations, and signed testimonials that they were pleased with the process. The mine had also covered the cost of coffins, transfer and reburial of the graves at Sekuruwe, and had paid R1500 compensation for each grave in excess of the required R750. Finally, the mine claimed they had taken great care to respect the customs and rituals of the next of kin. In closing, they stated that 'Anglo Platinum carried out these exhumations with all the necessary legal permissions, with the express written consent and participation of the next of kin, and with due respect for African burial customs' ("Angloplat took every care" 2008).

SAHRC recommended that the mine engage with all interested stakeholders to negotiate a remedy for the grave relocation situation. They also requested to be provided with evidence of consent from each next of kin, and to be given specific details concerning the process of negotiation with the community at large before the relocations took place. They specifically wanted to know whether the next of kin had been informed of their right to refuse to give consent for the relocation of their graves (SAHRC 2008).

In a responding report, Anglo Platinum defended the integrity of the section 21 companies with whom they interacted, stating that these negotiating bodies were the appointed representatives of the community. *The Facts* was, however, silent on the issue of grave relocations (see Anglo Platinum 2008).

Over the past three years these relocations have been the centre of animosities between the mine and Sekuruwe community. Legal proceedings contending the validity of the lease on Blinkwater have also complicated the matter[5]. In 2009 the mine undertook to remedy the initial relocations by employing professional archaeologists to re-exhume all graves and reassemble the skeletons (see Figure 4). This process has recently been completed, and negotiations for the final reburial of Sekuruwe's ancestors are currently underway. Ancestral grave relocations have also become a concern for other communities in the surrounding area, with many claiming that improper relocations are taking place in connection with other
mining companies. The relocation of ancestral graves has also been discussed in other forums[6].

[5] The contestation of the lease agreement and the issue of grave relocations is often conflated into one discussion. 18.09.2010 – Interview with S. Sibanda, LRC representative. Pilansberg, Limpopo.

[6] The Sekuruwe case and the legal protections of ancestral graves have received attention at the International Alliance on Natural Resources in Africa Conference (January 2010), The Sunday Times Newspaper (October 2010), Talk Radio 702 (October 2010), the Origins Centre Public Lecture Series (October 2010), the Five



Figure 4. Showing community celebrations when hearing that the mine would re-exhume all burials. Courtesy Dr Esterhuysen.

Initial contact with the Sekuruwe community commonly involved invitations to large community meetings, called by elders in the community. These community meetings comprised mostly middle-aged to older members, and were held either in the school hall or under a large tree across the road. Dialogue usually consisted of participants standing to relate their testimony, ask questions and give opinions. From these meetings the general outline of the case was slowly pieced together. Later communications with the community were mediated through the 'Sekuruwe Community Council' who had been democratically elected to represent the community in their legal case against the lease agreement on Blinkwater. My interactions with the community (and other communities in the area) have

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Hundred Year Initiative Conference (November 2010), the Foundation for Human Rights' Public Policy Dialogue on Mining, Communities, and Workers (February 2011), the British Institute in East Africa's workshop on the Role of Law in Development (June 2011), and the Association of South African Professional Archaeologists' biannual conference (July 2011).

involved a series of nested investigations by different organisations. Involvement by the Legal Resources Centre, Jubilee South Africa, Action Aid, IANRA, SAHRA and SAHRC and other organisations has all been aimed at various aspects of Sekuruwe's unique situation. Certain community members have also become central to my understanding of this case, as they have been involved with most, if not all, of the investigations and investigating bodies. The understanding presented in this thesis represents a synthesis of information gained from the community at large, the Sekuruwe Community Council, and my roles in and with the various investigating bodies involved in this case.

2.2. Sekuruwe's ancestral graves

As introduced above, Sekuruwe's ancestors were buried on Blinkwater according to the customs of the community. The exhumation of these graves should have required the skills of an experienced archaeologist. In order to relocate such rural graves, the family of the deceased would need to point out the location of their relative's burial site. This is because grave markers can be natural features, and community knowledge is needed to locate the graves. The locations pointed out by the family may also not be precise, as the graves may be old and their exact location and orientation forgotten. Excavation techniques should compensate for this: test pits should be dug over the identified area to find the skeleton. When evidence of the burial is found, the excavation will continue to expose the skeleton[7]. The skeleton should then be documented, noting its particulars including the positioning of the skeleton and the presence of grave goods. Once documented, the skeleton can be removed, along with any grave goods and any marker of the grave, and taken to the new cemetery. The reburial of the remains in new graves should also be done in accordance with the burial customs of the next of kin.

[7] More recent burials may be in coffins. Once the coffin is found by the test pit the excavation can continue to exhume the coffin. The process for formal graves, or graves in a cemetery is different. A mechanical digger may remove the first 4 to 4.5 feet of soil above the coffin. Shovels can then expose the coffin, dig around and remove it.

2.3. The Sekuruwe grave relocations

The mine, apparently at the request of the community, contracted Phuti Funeral Services[8] to relocate their graves from Blinkwater to Sekuruwe ('Angloplat took every care' 2008). As a local undertaking company, the mine assumed Phuti would be aware of the appropriate methods for such relocations. The mine and Phuti arranged a schedule for the relocation of the graves, which involved the use of mechanical diggers (tractor-loaded-back actors or TLBs)[9]. Although this process would have been adequate for the exhumation of 'formal graves' (as described in footnote 6 above), it proved detrimental to the relocation of Sekuruwe's ancestral graves.

Although SAHRA has guidelines on the proper exhumation of graves that are over 60 years old, these specifications are not in national legislation, and knowledge of their existence is limited. The lack of these guidelines in the eyes of the mine resulted in their own invention of protocol for the relocation of these graves.

At 4 am on the 29th May 2008, Phuti began exhuming the graves on Blinkwater using the mechanical diggers (SAHRC 2008). The mechanical diggers raked up the soil over the grave with no regard for their depth or orientation (see Figures 5 & 6 for evidence of the mechanical diggers). Some skeletons were badly damaged by the machinery in this way, and human remains were scattered on the ground, in the soil-wake of the back actors and the infill of the graves (SAHRC 2008, Roodt 2010). At the time the mine stated that family members had been present at the exhumations, that traditional customs had been respected, and that family members had signed testimonials that they were satisfied with the process

[8] 15. 04. 2009. 'Meeting with Sekuruwe Community concerning the re-exhumation of relocated graves'. Minutes. Anglo Platinum Mine.

[9] 12.08.2009 – Interview with G. Morris. Project manager, Anglo Platinum. Marshaltown, Johannesburg.

("Angloplat took every care" 2008). Contrary to this, the community claimed that they never witnessed the exhumations, that no customary rituals were performed, and that they had not given consent for the relocations[10].



Figure 5. Community member pointing to evidence of TLB scraping up grave on Blinkwater. Courtesy Dr Esterhuysen.

At the new cemetery, the community claims they noticed more coffins for reburial than they expected. Assuming these additional coffins were invented to claim the compensation from the mine (which was paid per grave) the community tried to stop the reburial by protesting and stoning the undertaker's vehicles[11]. Phuti then quickly buried the coffins, which led to the new cemetery being in complete disarray (Esterhuysen 2009). Burials which had once been together were split up, some names appeared on two or more tombstones, and some graves had two

[10] 22.02.2009 – Sekuruwe community meeting and interviews with community members. Attended by Saccaggi and Esterhuysen. Sekuruwe Village, Limpopo.

[11] *Ibid.*

tombstones[12]. The community also claimed that some burials were missing entirely from the new cemetery[13]. The community approached the police[14] and the Mapela Tribal Authority for assistance, but received no help from either body (SAHRC 2008)[15]. The community also wrote to SAHRA's provincial branch in Limpopo requesting assistance concerning the desecration of their graves[16], but being largely non-operational, this request did not reach SAHRA's main office.

Esterhuysen, an archaeologist from Wits University, visited Sekuruwe in July 2008, where she was shown the disarray of the new cemetery by the community (Figures 7 and 8). The community claimed that some members had not given consent, and that those who did give consent had not done so freely. Esterhuysen was also taken to the original graves on Blinkwater, where she noted bones scattered on the surface of the exhumed graves (Figure 9). In her report, Esterhuysen (2008) stated that the community had not been aware that graves older than 60 years old required a permit from SAHRA to exhume.

[12] 22.02.2009. 'Meeting with Sekuruwe community'. Minutes. SAHRA. BGGU. And Letter from SAHRA to Anglo Platinum. 22.02.2009. 'Meeting with SAHRA Burial Grounds and Graves regarding grave exhumations and relocation at Blinkwater 820 LR'

[13] 22.02.2009 – Sekuruwe community meeting and interviews with community members. Attended by Saccaggi and Esterhuysen. Sekuruwe Village, Limpopo.

[14] Although it was assigned a number (549/06/08), this case was not pursued, and has not been resolved. In their minutes of a meeting in April 2009, the mine claims that they personally contacted the police on behalf of the community. 15. 04. 2009. Meeting with Sekuruwe Community concerning the re-exhumation of relocated graves. Minutes. Anglo Platinum Mine.

[15] 15. 04. 2009. 'Meeting with Sekuruwe Community concerning the re-exhumation of relocated graves'. Minutes. Anglo Platinum Mine.

[16] Letter from Sekuruwe village community to SAHRA. 23.08.2008. (no subject)



Figure 6. Graves of Jim and Sana Shiburi showing clear evidence of a back actor being used. Courtesy Frans Roodt.

The use of mechanical diggers also contravened the National Heritage Resources Act, and had caused damage to the skeletons which had been crushed and broken. Esterhuysen recommended that the graves be re-exhumed to determine the extent of damage caused by the relocations[17].

[17] Unpublished report by Esterhuysen (2008) after visit to Blinkwater and Sekuruwe on 17th July 2008. Compiled for SAHRA

Report by Esterhuysen (2011) 'Report on the Sekuruwe Grave Relocations produced for the Legal Resources Centre to assist with negotiations between the Mine and the community at Sekuruwe'



Figure 7. Sekuruwe cemetery showing one grave with two tombstones. Courtesy Amanda Esterhuysen.

Esterhuysen alerted SAHRA's main office to the situation, who agreed to contact the mine and requested that two graves (known to have been over 60 years old) be re-exhumed to assess the process of exhumation. The re-exhumation of these graves revealed the extent of the damage done by the mechanical digger which left portions of the skeletons *in situ*, and broke others which were found in the backfill of the graves. From this, SAHRA requested that all graves over 60 years old be re-exhumed by a forensic anthropologist to determine the extent of damage caused by the initial exhumations. All other graves were also re-exhumed by a heritage practitioner in an attempt to locate and reassemble the broken and dislocated skeletons[18].

[18] Letter from SAHRA to Morris, Anglo Platinum. 2009.04.16. ('Meeting with SAHRA Burial Grounds and Graves regarding grave exhumations and relocation at Blinkwater 820 LR')

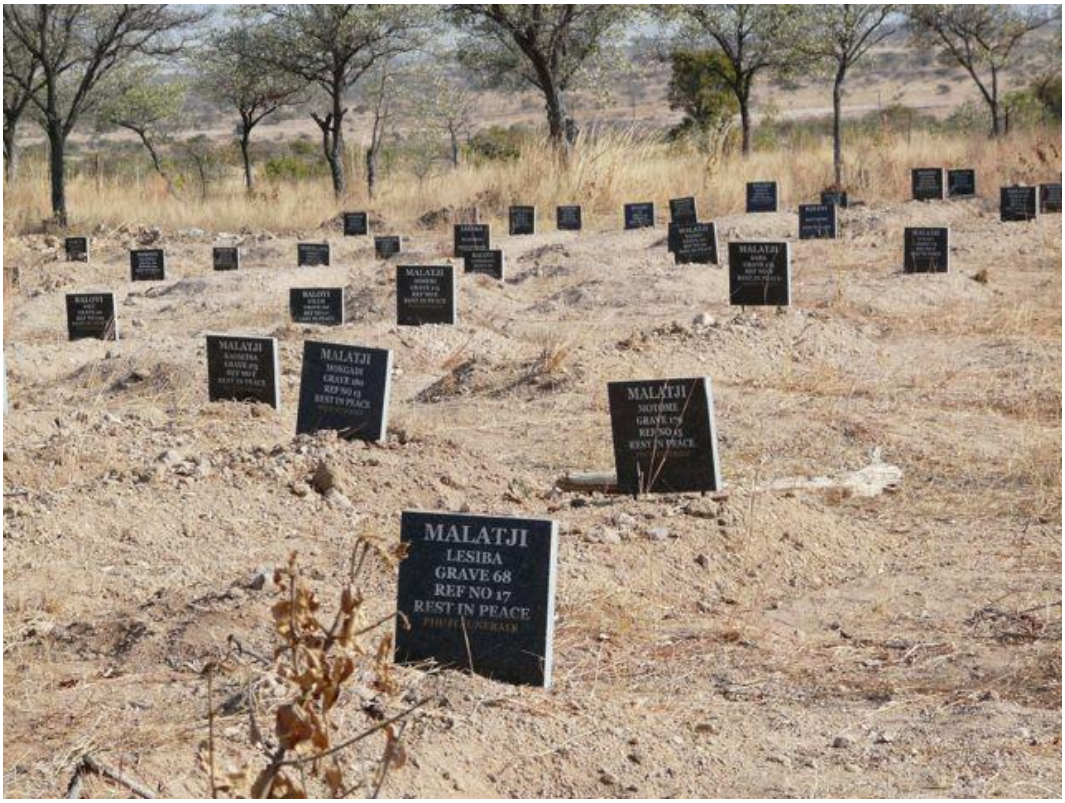


Figure 8. Sekuruwe cemetery showing collection of Malatji graves thought to be fictitious. Courtesy Dr Esterhuysen.

According to the legislation, SAHRA should have been contacted at the earliest convenience, and long before the relocation of any of the graves. Their involvement in this case at such a late stage prevented them from supplying the oversight of the relocation process necessary to ensure it was carried out properly.

The re-exhumation of these graves revealed the gross negligence with which Phuti had conducted the relocations. At the site of the original graves, portions of skeletons were found *in situ*, revealing that the mechanical digger had not fully exhumed the grave (Figure 10 provides an example). The TLB had also damaged and broken bones, as well as confused them with the exhumed soil. Some of these bones had been left exposed on the surface. The exhumation of the new graves at Sekuruwe revealed that bones were indeed missing. These exhumations also

confirmed the community's suspicions that some of the graves had been invented, as coffins were found filled only with sand[19].



Figure 9. Human vertebra found on surface of exhumed grave on Blinkwater. Courtesy Dr Esterhuysen.

In a letter to Anglo Platinum (dated 16 April 2009) SAHRA stated that the exhumation of these graves (those over 60 years old) had been done without a permit, and was thus illegal. They stated that the method of exhumation had damaged bones, left portions of skeletons *in situ*, and disturbed bones found in the backfill. SAHRA also stated that 'no work should be undertaken on the area of the

[19] Roodt, F. 2010. *A concise report of the Blinkwater/Sekuruwe graves relocation and remedial process. Anglo Platinum – Mogalakwena section.* Vhufa Hashu Heritage Consultants cc. [Unpublished Draft Report]

ancestral graveyard until the process of rectification for the identified graves has been completed'[20].



Figure 10. Re-excavation of original grave showing only head removed by Phuti and reburied in new cemetery. Courtesy Frans Roodt

The mine agreed to this process, and provided finances for the re-exhumation of all relocated graves on Blinkwater and at Sekuruwe. An apology letter issued in 2009 expressed regret for the pain and suffering caused by the grave relocations, and the mine's commitment to the rectification of the original relocations[21].

[20] Letter from SAHRA to Morris, Anglo Platinum. 2009.04.16. ('Meeting with SAHRA Burial Grounds and Graves regarding grave exhumations and relocation at Blinkwater 820 LR'): pg 2.

[21]. Anglo Platinum to Chairperson of Sekuruwe Community. 2009.09.23 .('Apology – Blinkwater grave relocation'). Delivered by hand.

2.4. Negotiation and Consent

2.4.1. Blinkwater farm's lease

The initial lease agreement over Blinkwater was concluded in 2006. The lease included an agreement for the relocation of graves. There was no mention made in the lease about the requirements of consent, consultation, permit application or the technique of relocation. It is also unclear if the Environmental Impact Assessment (presumably reviewed by the Minister of Rural Development and Land Reform, the Minister of Mineral Resources, and the Minister of Environmental Affairs[22] before endorsing the lease agreement) mentioned any of these factors, specifically the requirement for a permit from SAHRA to relocate graves over 60 years old.

In the same year representatives from the mine surveyed the property with members of the community to locate and record the specifics of each grave[23]. This included the location of the grave and the family relative (next of kin) from whom consent would be required[24]. Information on the approximate age of the grave was not recorded, nor was it deemed relevant at this stage. The location and documentation of the graves was also concluded before the community had been asked for consent.

The endorsement of the lease agreement by the state already gave the mine the right to exhume and relocate the graves in 2006 as it was included in the terms of the lease. This was before any negotiation on this topic had taken place with the

[22] These three state departments comprise the first, fifth and sixth respondents in the case contesting the validity of the lease agreement.

[23] 22.05.2010. Visit to Blinkwater Farm with Esterhuysen, Roodt and mine representatives.

[24] Gaining consent from the living relative was supposedly done in accordance with the Human Tissues Act which governs the transport of human remains. However the Act itself does not specify any consultation of the living relatives. It is more likely that this was dictated more by informal policy than by adherence to legal regulations.

community, and before any permits had been sought from SAHRA or the municipality for the relocation. This led the mine to continue construction on the property during negotiations for the reassembly of Sekuruwe's skeletons[25].

2.4.2. Section 21

In keeping with Anglo Platinum's general practice, a non-profit organisation was constituted to act as an intermediary body between the mine and the Sekuruwe community. Constituted as a 'section 21' company this body was comprised of community members acting as a negotiation body between the parties. 'The Section 21' (as these companies have come to be known in Sekuruwe and neighbouring communities) acted as middlemen in the negotiations for the lease of Blinkwater. Allegations about the corruption, intimidation and blatant fraud of this company pertaining to the conclusion of the lease agreement in 2006 have been levelled at this company since its creation[26]. The issue of Blinkwater's lease has been conflated with the debacle over Sekuruwe's graves, and the community wishes to see both issues resolved through law[27].

Meetings with the Sekuruwe community at large alleged that the Section 21 received pay-offs from the mine; received better housing during relocation to the new village, and had access to better resources than the general community. Whatever the facts, the payment of stipends to the Section 21 is certainly a point

[25] On a visit to Sekuruwe on 22.05.2010 with representatives from Action Aid, the construction of Blinkwater already included scrapings, fencing and large machinery moving around the property.

[26] For a general critique of section 21 companies in the Mapela area see Action Aid (2008). Specific allegations against the Section 21 at Sekuruwe (officially registered as 'Sekuruwe Company') are detailed in court papers: Mphohlele James Shiburi and Others v the Minister of Rural Development and Land Reform and Others. NGHC 78195/2009.

[27] 07/08.10.2010 - Meetings with communities in Mapela area. Attended by Saccaggi, representatives from Jubilee South Africa, Action Aid and Bread for All.

of animosity amongst community members, and distrust of the Section 21was already prominent at the time negotiations for the relocation of graves began (Action Aid 2008).

2.4.3. Consultation; the mine's view

The mine stated that numerous consultations were held with the community for the relocation of the graves ("Angloplat took every care" 2008)[28]. These meetings were apparently organised by the Section 21, and attended by the majority of the community as well as representatives of the mine[29]. The mine considered the Section 21 the legitimate representatives of the community[30], and any consultation with this body was then assumed to represent consultation with the community as a whole (Anglo Platinum 2008).

The mine also maintained that they justly and adequately compensated the Sekuruwe community, not only for the relocation of their ancestral graves, but also for their relocation from Blinkwater farm. They claimed that all this was conducted with the full participation of the community, as well as relevant permission from state departments and the Mapela Tribal Authority[31].

[28] Published in response to the two Business Day articles in October 2008 concerning the relocation.

[29] 12.08.2009 – Interview with G. Morris. Project manager, Anglo Platinum. Marshaltown, Johannesburg.

[30] 15. 04. 2009. 'Meeting with Sekuruwe Community concerning the re-exhumation of relocated graves'. Minutes. Anglo Platinum Mine.

[31] 12.08.2009 – Interview with G. Morris. Project manager, Anglo Platinum. Marshaltown, Johannesburg.

2.4.4. Consultation; Sekuruwe's view

Contrary to this, the community claimed that the Section 21 were the puppets of the mine, and did not represent the voice of the community[32]. The community claimed that no general negotiations were held, and they were never directly consulted about the future of their ancestral graves (SAHRC 2008)[33]. Action Aid's publication also drew attention to the fact that the Section 21 companies (Sekuruwe's Section 21 as well as other Section 21's in the area) were not democratically elected, had no accountability to the community, had no experience or training in negotiation, and were also financed and advised by the mine. Actions Aid argued that these factors negate the Sections 21's capacity to legitimately represent the views of the community (Action Aid 2008).

From community testimonies, it appears that the signed consent forms produced by the mine were obtained when a Section 21 member approached a family member (not in a general meeting) to 'negotiate for consent'. The community claims that in many cases the next of kin did not fully understand the process of negotiation, or the implications of the relocation to which they were consenting. Many community members do not understand English, and some are illiterate, making it impossible to understand the consent forms they were signing. Although the mine claimed that the Section 21 interpreted these for them, many claimed that they did not understand the English forms[34].

From the testimonies of some community members it is also clear that they were coerced into giving consent. Some claimed they were told that the tailings dam would be constructed anyway and their graves would be buried underneath it.

[32] 2010 October 07 – 08 – Meetings with communities in Mapela area. Attended by Saccaggi, representatives from Jubilee South Africa, Action Aid and Bread for All.

[33] 2009 February 22 – Sekuruwe community meeting and interviews with community members. Attended by Saccaggi and Esterhuysen. Sekuruwe Village, Limpopo.

[34] 21.06.2009 – Sekuruwe community meeting. Attended by Saccaggi, Esterhuysen, and SAHRA representatives. Sekuruwe Village, Limpopo.

Community members then signed consent in order to save their ancestral graves. Others felt that the compensation offered (R1500 per grave) was used to bribe community members into giving consent[35].

Some testimonies also relate that consent was obtained from irrelevant community members. Numerous testimonies state that the Section 21 approached old women with no connection to the particular grave, telling her to sign the form and receive R1500. In other cases where the next of kin refused to give consent, the Section 21 would then seek out another family member (or random community member) to sign the form. These community members were often enticed to sign the forms with the promise of the R1500 compensation[36].

Additional testimonies state that some exhumed remains were presented to family members after exhumation (in one case in a black bag) and the family members charged with the reburial. This occurred late in the evening, and the relatives were forced to employ local community members (at up to R2500 per grave) to dig a new grave and rebury the remains so late at night. In one case there was no possibility of finding men to dig a grave so late at night, and the woman was forced to keep the remains in her home overnight to be reburied the following day, at her expense. The families claim that, only when they were presented with the remains to be re-buried, did they become aware of the exhumation of their graves[37].

2.5. Re-exhumations and re-assembly

The mine agreed with the community to employ a qualified heritage practitioner to re-exhume all graves in the new cemetery and from Blinkwater to assess the

[35] 22.02.2009 – Sekuruwe community meeting and interviews with community members. Attended by Saccaggi and Esterhuysen. Sekuruwe Village, Limpopo..

[36] *Ibid.*

[37] 21.06.2009 – Sekuruwe community meeting. Attended by Saccaggi, Esterhuysen, and SAHRA representatives. Sekuruwe Village, Limpopo.

damage to the skeletons. These exhumations revealed graves on Blinkwater still with entire skeletons, or large portions of the skeleton which had been missed by the TLB *in situ*. Skeletons in the new cemetery were badly damaged, with large portions of the skeleton missing. These skeletons have now been reassembled by a forensic archaeologist and the heritage practitioner who re-exhumed them.

The additional graves in the new cemetery represented a difficult problem in this rectification process. Community members stated that these graves had been invented by a collusion of the Section 21 and Phuti. Exhumations confirmed that the graves were fictitious, and probably invented to capitalise on the compensation which was paid per grave. Before the re-exhumation determined this however, consent was needed from their next of kin for the re-exhumation (Roodt 2010). The relations of these additional graves were impossible to contact, and the community took this as evidence of their guilt. Ultimately, the consent of the Sekuruwe Community Council was given for the re-exhumation of these graves, which eventually proved that the graves were fictional, as they contained nothing but bags of sand (Figure 11)[38].

In a letter concerning the progress of the reassembly in 2010 (written after a visit to the laboratory of Frans Roodt on 22 May 2010) Esterhuysen concludes three points[39]. The first is that the process of reassembly was being completed to the best possible standards given the circumstances. Second, that there remained missing bones for two reasons; on the one hand, certain of the bones were, prior to exhumation, in such a state of decomposition that their exhumation by the back-actor would have destroyed them completely.

[38] 17/18.06.2010 – community meetings at Sekuruwe and Backenburg. Attended by Saccaggi and Esterhuysen. Mokopane, Limpopo.

[39] Esterhuysen's conclusions are based on personal knowledge of this case as well as the reports of Roodt (2010) and Steyn (2009).

On the other hand, in cases where the skeleton was not badly decomposed, the missing bones were probably lost during the process of exhumation, when the back-actor scraped up the graves and spilled remains on the ground. Thirdly, Esterhuysen mentioned that the progress of construction on Blinkwater farm had made it impossible to retrieve any of these lost remains. The letter concludes by stating that at the time, all possible measures had been taken to remedy the situation caused by the initial exhumations in 2008.



Figure 11. Contents of coffin reburied in new cemetery by Phuti showing no remains and indicating an invented family member. Courtesy Frans Roodt.

Roodt's report on the reassembly of the re-exhumed graves was submitted in April 2011. The report confirms that in most cases skeletal remains, and sometimes entire skeletons, were found *in situ*, i.e. they had not been entirely exhumed in the first place. Bones were also retrieved from the backfill of the original graves, indicating the destructive actions of the mechanical digger. Further, when these remains from the original burial were combined with the remains excavated from the coffins at Sekuruwe, missing bones were noted (see

Figure 12). Roodt states that many of the bones were badly damaged, either due to natural processes or the improper exhumation techniques used by Phuti[40].



Figure 12. Sorting of combined remains from original and new grave in preparation for reburial. Courtesy Frans Roodt.

2.6. Construction on Blinkwater

During a visit to Blinkwater farm on 6th July 2010 attended by myself, Esterhuysen, Roodt and representatives from the mine, the progress of construction on the tailings dam was already well underway. The top soil covering the area had been removed (Figure 13). Although it was clearly stated by the mine representatives, and confirmed by Roodt that the areas around each original grave had been cordoned-off and extensively searched for any remains lying on the

[40] Roodt, F. 2010. *A concise report of the Blinkwater/Sekuruwe graves relocation and remedial process. Anglo Platinum – Mogalakwena section.* Vhufa Hashu Heritage Consultants cc. [Unpublished Draft Report]

surface[41], any human remains which had been outside these cordoned areas would have been scraped up with the top soil. In addition, any markers of graves which had existed had been removed along with the topsoil on this portion of the farm. This concern was originally raised by the community to halt the construction on the farm in 2009[42], prompting SAHRA's letter to Anglo Platinum requesting that activity on the property be stopped[43].



Figure 13. Blinkwater farm showing the scraping of the top soil.

It is of further concern that the speedy progress of construction on the site will hamper the cleansing and other cultural ceremonies which the Sekuruwe community will be required to perform to settle the displeasure of the ancestors

[41] 06.07.2010 – Visit to Blinkwater farm with Esterhuysen, Roodt, and mine representatives.

[42] 22.02.2009. 'Meeting with Sekuruwe community'. Minutes. SAHRA. BGGU.

[43] Letter from SAHRA to Morris, Anglo Platinum. 2009.04.16. ('Meeting with SAHRA Burial Grounds and Graves regarding grave exhumations and relocation at Blinkwater 820 LR')

(The initial filling of the dam had already commenced on a visit to the Mapela area on 8 October 2010)[44]. The community feels that the ancestors cannot rest without their bones, and are also anxious to see the final reburial of these remains[45].

At the time of writing this thesis, Sekuruwe is considering the particulars of the ceremony to be performed when the remains are finally reburied. This reburial is scheduled for sometime near the end of 2011. At this time, the community and the mine are in the process of agreeing to the particulars of coffins, animals for slaughter, food, etc. which will accompany the reburial. At the moment it is unclear if this reburial ceremony (along with the rectification process and the financial compensation to the community) will be included in the particulars of a settlement offered by the mine covering all disputes between them and the community. This settlement offer by the mine is inclusive of the lease of Blinkwater as well as the graves issue, but it is unclear if the community will accept this settlement, or choose to divorce the compensation for their graves from their contestation of the lease.

A few issues remain unresolved at this point. The community feels they were not given opportunity to search Blinkwater for the bones which were strewn on the surface, which would now have been scraped and piled along with the top soil. The lack of adequate recording at the time of exhumation has also caused confusion as the lists of graves and next of kin compiled by the mine, Esterhuysen and Roodt do not correspond[46]. At this point the mine seems anxious to settle the matter, and these concerns may be overlooked in the interest of a speedy conclusion.

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[44] Letter from Sekuruwe community to the mine. 21.05.2010. (no subject)

[45] 2010 June 17 – Visit to the laboratory of Roodt attended by Saccaggi, Esterhuysen and representatives of the Sekuruwe Community Council to view the re-assembly process.

[46] Report by Esterhuysen (2011) 'Report on the Sekuruwe Grave Relocations produced for the Legal Resources Centre to assist with negotiations between the Mine and the community at Sekuruwe'

2.7. Different communities, similar stories[47]

The details of Sekuruwe's ancestral grave relocation cannot be discussed in isolation from similar cases in and around the Mapela area. In January 2010 I presented an outline of community rights relating to ancestral graves at a conference of the International Alliance on Natural Resources in Africa (IANRA). This, together with increased exposure of the Sekuruwe case in the media has caused many communities to come forward with claims that their ancestral graves were, or are being, improperly exhumed by mines.



Figure 14. Map of Mapela region showing communities mentioned in Section 2.7. Google Earth 2011.

[47] The haphazard nature of some community meetings resulted in the collection of testimonies which are difficult to verify. The constitution of communities in this area is also not ridged because of recent mine relocations. Some communities self-identify as collectives, although these differ from the strict confines of the geographic settlements of the mine. Because of this testimonies were collected from community members that could not be verified geographically. The testimonies of these communities are related in Appendix B.

Details of Sekuruwe's claims are echoed by these communities, and a number of general trends have emerged. Below I list brief details of the claims of these communities, all of which will require additional research to understand their individual complexities. My aim is to demonstrate the threads of similarity with the Sekuruwe case, showing that these problems are common and systematic.

Ga-Molekana. Mapela Area.
I visited the Ga-Molekana community in October 2010 with delegates from Bread for All and Action Aid. This community claims that their ancestral graves were relocated from their traditional land to a new cemetery near their relocated village without their proper consent. The community claims that this was done by agreement between the section 21 and the mine, who paid the section 21 to arrange consent from the families. The mine also negotiated with the Induna (headman) of the area, but the community claims that individual families were never asked to provide any information (location or age) for the graves. The community claims that some of these graves were much older than 60 years old, and state they were never shown any permit from SAHRA for the exhumations. The community also claims that they were not present for the exhumations, which were done with a mechanical digger in a similar fashion to the Sekuruwe exhumations.

After hearing about the results of Sekuruwe's re-exhumations, which revealed damage to the skeletons and bones still in original graves, they suspect that their situation is similar. They ask for the re-exhumation of their graves to assess the process of their relocation[48].

Ga-Pila. Mapela area. (Remaining members of original village who refuse to relocate).

[48] 07/08.10.2010 - Meetings with communities in Mapela area. Attended by Saccaggi, representatives from Jubilee South Africa, Action Aid and Bread for All.

Along with delegates from Bread for All, I was asked to visit an old lady at her home in Ga-Pila. This woman told us of the community's relocation to Sterkwater, where they have complained about inferior infrastructure and contaminated water. This woman is one of a handful who has remained at Ga-Pila refusing to be relocated. They claim never to have been consulted about the relocation, and that the mine has no right to move them. The remaining houses have had all amenities cut off, allegedly through collusion between the mine and the local municipality.

This community claims that they originally refused to give consent for the relocation of their graves, but this was ignored and the graves were moved anyway. They claim that some exhumations happened late at night while families were sleeping, and that they could not be sure the bones were removed properly as they didn't witness the exhumations. They claim a mechanical digger was used for exhumation, and that bones were broken and left on the ground. One woman claims that the remains were placed in a cardboard box for reburial, and some bones were purposefully broken by the undertaker to fit into the box. The community states that the graves were reburied without headstones, and there is no way of knowing which bones are in which graves.

The small community which later gathered in the yard of the house told of their ancestors' wanderings about. They said that the ancestors had not relocated to Sterkwater because their bones were not moved properly: their bones had gone, but their spirits remain near Ga-Pila. The ancestors are said to be wandering around in the village, lost and depressed. The anger of the ancestors over the treatment of their bones has brought endless illness and loss of income to this community, as well as the portion of the village that relocated to Sterkwater[49].

Rooivaal and *Malokong*. Mapela area.

[49] 07/08.10.2010 – Meetings with communities in Mapela area. Attended by Saccaggi, representatives from Jubilee South Africa, Action Aid and Bread for All.

The Rooivaal and Malokong communities have both been affected by a granite mining company working in the hilltops near their villages. Some of the youth employed by the mine have reported being ordered to exhume community graves and destroy bones. Community members have not been able to access the sites where this is reported to have occurred, as the mine has cordoned off these areas. They are unable even to visit the graves to communicate with their ancestors, as well as check if the rumours of their graves' destruction are true. If these stories are fanciful, they are none the less disturbing; communities in this area honestly feel as if their very cultural roots are being systematically attacked by the advance of mining[50].

Mokgoabading. Near Backenburg, Limpopo.
The Mokgoabading community was relocated in 2007 by a platinum mining company. They have actively informed the media that this relocation was forceful, and that they were not involved in any of the negotiations between the mine and the tribal authority. It appears that family members gave consent for the relocation of their ancestral graves, which included specific agreements about headstones and proper fencing off of the new cemetery. When the community noticed the new cemetery was not to the standards agreed upon, they contacted 'Naledi', a logistics company who apparently handled the negotiations for the relocation of the village and the graves[51]. This company has contacted the mine requesting information concerning the agreements about the cemetery, but the matter has not gone further.

The community further claims that a mechanical digger was used for the exhumations, and that in many cases the family did not witness this themselves. They are suspicious that no bones were actually exhumed, after hearing what had happened to Sekuruwe. The community claims that the mine disrespected their

[50] *Ibid.*

[51] 17/18.06.2010 – community meetings at Sekuruwe and Backenburg. Attended by Saccaggi and Esterhuysen. Mokopane, Limpopo.

ancestors and their culture by exhuming them without the family's presence, proper consent, or the necessary rituals for the relocation of the ancestral spirits[52].

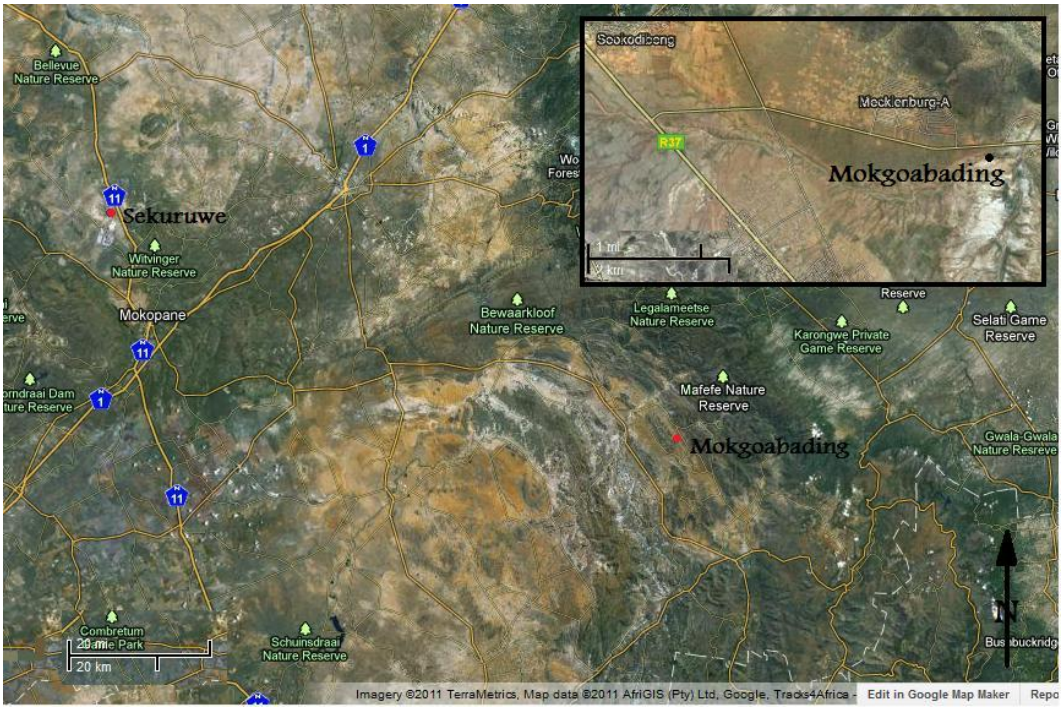


Figure 15. Showing location of Mokgoabading community in relation to Sekuruwe. Edited from Google Maps.

Some community members say that the spirits of the ancestors are still at the original graves, either because their bones are still there, or because they did not follow their bones to the new cemetery. They say the ancestors are angry, and bring them headaches and nightmares, and make their children ill because they were not respected[53].

In a neighbouring community, some members of which attended the meetings at Mokgoabading, consent for the relocation of ancestral graves was at first refused. The community requested shares in the mine as compensation to relocate their graves, which the mine refused. There seems to have been no grave relocations as

[52] Letter from Mokgoabading community to Saccaggi. 2010.04.16. (no subject)

[53] 17/18.06.2010 – community meetings at Sekuruwe and Backenburg. Attended by Saccaggi and Esterhuysen. Mokopane, Limpopo.

yet, but there are rumours that some graves have been secretly exhumed, and that others will be destroyed as soon as the mine begins operations. In a recent meeting I was told the mine had approached the community again with an offer for the compensation of the graves. No graves have yet been relocated, but the community representative explained that the mine was persistent and he feared the rumours of secret exhumations were true.

Mabusela. Mapela area.
The community claims that they were approached by representatives of the mine for consent to relocate their ancestral graves. The community agreed to this, but were never asked to provide any details about the age or location of their ancestral graves. The mine has since fenced off the burial grounds where the graves are, and they have not been able to visit these graves for over a year. They have become increasingly distressed as people employed by the mine have told them that their graves are being destroyed rather than relocated, yet they have not been able to get any response from the mine, the Tribal Authority or the police[54].

A few individual accounts of relocations are also worth outlining here, as the trauma of these individuals is evident in their testimonies.

Mr Nuni claimed at a Sekuruwe community meeting that his graves had been relocated at 10pm at night. He stated that he did not witness the exhumation, and had to pay R800 for the reburial himself. He was not permitted to look inside the coffin to see if the bones were there. He claims he is not sure if his graves were exhumed accurately since he did not have a chance to inspect the coffin. He stated that he gave consent for the relocation, but was not told when it would take place, which is why he was unable to witness it personally[55].

[54] 07/08/10.2010 – Meetings with communities in Mapela area. Attended by Saccaggi, representatives from Jubilee South Africa, Action Aid and Bread for All.
[55] 21.06.2009 – Individual testimonies recorded at Sekuruwe community meeting. Attended by Saccaggi, Esterhuysen, and SAHRA representatives. Sekuruwe Village, Limpopo.

Mrs Mayoni claimed that her relative's grave was also exhumed late at night. The coffin with the remains of the grave was brought to her house, and she was told to rebury it herself. She could not find anyone to rebury the grave for her so late at night, and so had to keep the coffin in her house until it could be buried the next day[56].

Mr Matangwe stated that he witnessed the exhumation of his grave, but claims he saw only sand being put into the coffin. He claimed he did not think that his ancestor was exhumed properly, or that the bones were actually buried in the new cemetery, it was probably just sand. He had to use the compensation money to erect a tombstone[57].

Mrs Taphe claims that in one spate of exhumations in a village near Sekuruwe, the new coffins were kept together in a tent for a while, where she claims they became confused, and the wrong people were buried in the wrong graves. She also had to use her compensation to pay for the reburial[58].

2.8. Discussion

Much more research is required to fully understand the complexities of these additional cases, as well as the Sekuruwe case itself. The details presented above show a synthesis of information gathered from interviews, some of which have been corroborated by additional testimonies, while other information remains hearsay. My aim has been to show the common threads of testimony which run through these claims, and which reflect Sekuruwe's own experience. The primary focus is on the process of negotiations and the signing of consent. Communities claim that negotiations were not fair, and that they were not given all the relevant information to consent. The use of section 21's as negotiating bodies is also

[56] *Ibid.*

[57] *Ibid.*

[58] *Ibid.*

generally disliked. SAHRA was not included in any of these cases during the negotiations or relocations, nor were they applied to in terms of the Heritage Act for a permit to relocate graves over 60 years old. This may be due to the general lack of knowledge about the legal protections of these graves, and the role that SAHRA should play in their relocation. Communities were also unaware that graves over 60 years old require a permit from SAHRA for relocation. In addition, none of the communities were satisfied with the relocations because of the lack of cultural ceremony and the damage done to the bones by improper exhumation techniques. This has resulted in the loss of their connection to their ancestral spirits, as the ancestors have been dislodged from their graves and the communities are unable to communicate with them.

Although the Sekuruwe community is satisfied that the exhumation and reassembly process was conducted to the highest standards, they are upset over the missing bones which cannot be retrieved. Had the mine permitted them to search Blinkwater before scraping the top soil, this uncertainty could have been prevented. Appeals from the community for the mine to cease operations in order for them to do this went unheeded, and access to the property remains restricted. The ancestors, they claim, cannot be fully laid to rest if their bones are still missing.

The discussion of Sekuruwe's grave relocations in public forums has lead to the spread of information, which had helped additional cases (mentioned above) come to light. It has also ensured that the issue of legal protections for graves is being considered by a wider platform.

In 2010 *The Times* newspaper (10 October 2010) quoted me stating that 'grave relocations 'disrespect human dignity''. The mere process of grave relocation is not an issue in itself. In fact, grave relocations are likely to become a necessity with the increase of mining in many rural parts of South Africa. Given the culturally significant belief in the ancestors, and the importance of ritual performed at the grave site to communicate with the ancestors, the process of

grave relocation needs to be culturally sensitive. *The Times* explained that inappropriate excavation techniques were employed, and that Sekuruwe felt their ancestors (and the cultural belief in them) had been disrespected (Van Rooyen 2010). The publication of *The Times* article online (http://www.timeslive.co.za) was met with mixed response. Some applauded the emphasis given to the culturally important belief in the ancestors, and the initiatives being taken to adequately protect them. Others accused the focus on ancestral beliefs of being primitive, backward, and unworthy of consideration in the 'new [enlightened] South Africa' (for examples of comments see anonymous comments on 'Grave relocations 'disrespect human dignity''. *The Times* 2010).

Like many rural communities in the shadow of giant mines, this community has lost some of their traditional ways of life and means of making a living. Sekuruwe and other nearby villages have struggled to adapt to the presence of mines and their relocation from their traditional lands. Poverty in this area is dire, and many rural families are becoming increasingly dependent on handouts from the State in order to stay alive (Action Aid 2008). Sekuruwe and neighbouring communities have also recently entered the national debate concerning the nationalisation of the mines. Although 'the nationalisation debate' is sometimes presumed to be the result of idle ramblings of political problem children, the topics' coverage in the media, NGO sector and the courts may be an indicator that it is more of a vital debate in the new South Africa. Sekuruwe and neighbouring communities are actively involved in this conversation, and have representative delegates on commissions debating it. This has been chiefly organised by a set of NGOs and grass-roots organisations, who lobby the inclusion of such communities in these national debates. The legal protections of ancestral graves, and the cultural rights of rural communities have become a part of theses debates concerning community rights in the face of mining.

Appealing the lease agreement over Blinkwater farm was the first interaction between the LRC and the community. Of concern is the rate at which Blinkwater is being developed, and the delays in court decisions which allow construction to

continue. Sekuruwe has repeatedly appealed to the mine to cease construction on Blinkwater until the case has been settled. Calls for access to the sacred spring, grazing for livestock, and searching the property for missing bones have all been ignored. The mine itself has conflated the ancestors with the appeal of the lease, offering a settlement covering the confirmation of the lease, the provision of infrastructure and the provision of a cultural ceremony for the reburial of the graves, and compensation for the next of kin. The community feels dissatisfaction with the rectification process of the skeletons, arguing that the mine should have allowed them to search Blinkwater before removing the top soil. Delays caused by this and other factors have lead to a delay in settlement. At the same time, the tailings dam continues to be filled, and by the time Sekuruwe's appeal is heard in court there may be nothing of value to return to the community.

Ultimately, the Sekuruwe community has a relationship with their ancestors which is part of their cultural lives, the right to which is protected by the Constitution. Sekuruwe has the greatest interest in the future of the graves, since these graves are vital to their continued spiritual relationships with their ancestors, and the enjoyment of their cultural life. The inappropriate relocation of these graves, mainly on the authority of the mine, Phuti and the Section 21, interfered with Sekuruwe's spiritual link to the ancestors. Further, Sekuruwe's lack of adequate participation in the process of decision on the future of the graves deprived them of their authority over these graves. I suspect this debate will not end with the reburial of the remains, but continue to be discussed in various networks and incorporated into even broader topics. The mine's inappropriate exhumation of Sekuruwe's graves disenfranchised them from their heritage by severing their spiritual relationships with their ancestors, disrespecting their cultural norms and infringing their constitutional rights.

2.9. Conclusion.

This Chapter has presented the history of Sekuruwe's grave relocations as accurately as possible without loosing sight of my own biases, and the possible

biases of those giving information. I have related that the relocations were inappropriate in three ways. First, the consent obtained for the relocation of these ancestral graves is highly suspect. The tainted image of the Section 21, and the community's general consensus that they were given no choice in the matter, suggest that the majority of consent was not adequate. According to the Heritage Act, the developer and community must come to an agreement over the future of their graves. The Sekuruwe community is unlikely to have consented to the improper process of relocation, the damage to the bones and the disarray of the new cemetery. 'Agreement over the future of the graves' was then either on false premises, or grossly contravened. Second, the mine failed to apply for a permit from SAHRA to relocate the burials. This contravened the Heritage Act, as SAHRA is the only body with legal authority to issue such a permit, once it is satisfied with the consent of the living relatives. Third, the method of exhumation used was detrimental to the integrity of the skeletons. The mine failed to employ a qualified archaeologist with the relevant field experience, which contravened the guidelines of SAHRA.

CHAPTER THREE:
VENERATION OF THE ANCESTORS

3.1. Introduction

This Chapter begins by summarising descriptions of the ancestors, and ancestral worship discussed in the literature by Fortes (1965), Kopytoff (1971), Hammond-Tooke (1981) and others. Kopytoff suggests that belief in the ancestors, and the culturally prescribed systems of interaction with these spirits, share certain generalised characteristics throughout southern Africa. This is echoed by Fortes and Hammond-Tooke. I give further descriptions of the ancestors by Krige (1950), Eiselen (1966), Berglund (1976) and others, all of whom have published on ancestral veneration in South Africa. I aim to use these descriptions as the background to this Chapter, and to locate the description of Sekuruwe's ancestors within a broader context of traditional African culture and relationship with the ancestors. I then relate Sekuruwe's descriptions of the ancestral spirits, which shows the interaction between living and dead throughout many aspects of daily life, in addition to ceremony. I then explain the connection between the ancestral spirits and their graves, and explain that these graves provide a focal point for interactions between the community and their ancestors.

I investigate the impact of Sekuruwe's grave relocations on the spirits of the ancestors, and consequentially on the lives of the Sekuruwe community. I conclude that the relocation of the ancestral spirits was overlooked during the relocation of their graves, causing the spirits to become lost and depressed. Further, the relocation of ancestral spirits is likely to be of concern in future grave relocations elsewhere in South Africa, and the legal protections of ancestral graves should therefore include these considerations.

I aim to understand Sekuruwe's ancestors as both a contemporary cultural belief which is being mobilized in a struggle against the community's

disenfranchisement, and as a belief which is as much a part of the community's inherited culture as it is the generated result of contemporary issues.

3.2. Ancestral veneration in southern Africa

Fortes (1965) suggested that reference to ancestors in the cultural groups of southern Africa showed a comparatively uniform framework. Fortes described the generalities of ancestor worship by summarising: ancestors hold mystical powers and authority. They conduct a functional role in daily life, especially that of their direct descendants. African 'kin-groups' can be described as communities of the living and the dead. The authority of the ancestors can vary between benevolent to punitive. Krige and Krige (1943) describe the ancestors as the protectors of their family, ensuring that no harm comes to them so long as they are not neglected. The good will of the ancestors is gained through dedication, and neglect can result in misfortune. The relationship between the ancestors and the kin-group is mediated through the elders of the society, who communicate with the ancestors on behalf of the community (Fortes 1965).

Hammond-Tooke (1981) explains the overarching understanding of ancestors in the Bantu-language groups of southern Africa. In essence social groups in southern Africa have an 'association' between the living social group and the dead ancestors of that group. A social group in this light is described as a collection of culturally similar people, who identify with the ancestors of that group to form a kinship. Hammond-Tooke (1981: 24) describes the ancestors of a group as the collective set of spiritual guides which solidify the group into a kinship. This kinship group forms a community by virtue of their cultural affiliation, geographical location and customary ways of life. Further, they are joined together in the collective worship or veneration of a set of ancestors, usually the deceased generation just older than the current generation of elders. The elders, the oldest generation of the social group, are the highest level of living authority, who appeal to the ancestors as their seniors on behalf of the group (Hammond-Tooke 1981: 24).

Kopytoff (1971) described ancestral beliefs among the Suku of south-western Congo (Kinshasa), which have similarities to southern Africa, particularly in terms of ancestral beliefs. Kopytoff relates that deceased members of a lineage are appealed to collectively in times of misfortune. They are also involved in more secular activities such as marriage, the breaking of sexual taboos, the 'coming-out' ceremony for infants, and before the large communal hunts of the dry season (Kopytoff 1971: 130).

To communicate with the ancestors, Kopytoff (1971) describes how the head of a lineage and two or three older men of his generation go at night to a grave. The grave can be any burial of a deceased member of the lineage who was older than any of the men. There is no special burial place and the dead are buried at random in the veld. The graves are not maintained except for their visits, and they eventually return to bush. This causes the exact location of older graves to be forgotten with time (Kopytoff 1971: 130). The men will 'feed' the ancestor at the grave by burying offerings in a small hole in the ground by the grave. Kopytoff quotes a generic conversation which occurs with the ancestor: "You, [such and such], your junior is ill. We do not know why, we do not know who is responsible. If it is you, if you are angry, we ask for forgiveness. If we have done wrong, pardon us. Do not let him die. Other lineages are prospering and our people are dying. Why are you doing this? Why do you not look after us properly?" (Kopytoff 1971: 130). He claims that the communication, as a monologue, conforms to regular speech with living elders. The communications contain complaints, scolding and appeals for forgiveness and assistance.

Kopytoff (1971) argues that the 'cult' of ancestor 'worship' would be better described along lines of linear authority structures. Kopytoff argues that the 'cult' is that of elders. He describes the lines of authority linearly from senior to junior. All juniors owe honour and respect to their seniors, who are in their own right, junior to the older generation. This obligation continues after the death of the senior. The role of the senior to provide for the junior and be authoritative is

similarly maintained from beyond the grave. Only the mechanism of the interaction is altered into ritual as purely consequential. Krige and Krige (1943) explain that communication with the ancestor can take many forms, but includes verbal communication and the offering of beer, and sometimes a slaughtered animal, most usually at the grave where the person was buried. Kopytoff (1971) points out that the linguistic distinction between the living 'elder' and the dead 'ancestor' is not always made in African languages. 'Worship of the ancestors' is also no more formal than interactions with living elders at official ceremonies. This understanding is echoed by Hammond-Tooke (1981: 23), who states that communication with the ancestors is linked generationally along lines of authority.

Kopytoff (1971) described this in relation to the generalized association between growth, age, maturity, ancientness, eldership, ancestorship, and authority in African culture. He describes ancestors as above all elders, and communication with them is similar in framework to formal communication with living elders. The powers of the ancestors are more a retention of power by elders after death.

3.3. Ancestral veneration in South Africa

Berglund (1976) describes the concept of ancestors held by the Zulu, and shows their similarity with other South African cultures. Berglund emphasises that the ancestors are not separate from living lineages, but are a part of them, only existing in forms and having powers other than the living. The ancestors are part of the linear structures of authority, and form the highest rung of this authority second only to more senior ancestors and god. Living lineages are closely connected to their ancestors on a spiritual and emotional level, relying on them for general prosperity and appealing to them in times of need (Berglund 1976: 119). Krige (1950) suggests that concepts of 'god' and 'heaven' are ill defined in Zulu cultural thought because the ancestors are the most immediate connection in terms of spirituality. Ancestors are active spiritual participants in daily life, and are therefore more prominent in notions of spiritual power than higher spheres of

spiritual authority. Krige (1950) explains that all prosperity is attributed to the benevolence of the ancestors, as they actively ensure that good fortune befalls their direct descendants. Schapera (1953) gives a similar description of the ancestors of the Tswana, explaining that after death people become spirits. These spirits maintain an active interest in the lives of the living, especially their direct descendants. They reward devotion with good health and prosperity, but can also punish with sickness, economic loss and misfortune those who neglect to pay them the proper respect. Berglund (1976) states the ancestors are responsible for forming a child in the womb, constructing both the body and spirit of the child. Children are formed by the ancestors from the beginning, and are watched over throughout their lives. When they eventually die, all members of the lineage join the society of the ancestors. A person's social status and importance in life will be mimicked in the afterlife by his spirit (or shade). Influential members of a group become influential ancestors, and are appealed to for assistance and guidance in the same way as when they lived (Berglund 1976: 284).

According to Berglund (1976: 294), the ancestors can manifest their presence in a number of ways. The ancestors are described as generally in the presence of their surviving lineage, and are known to be wherever members of the lineage are. However, the ancestors have certain 'favoured' places, and 'communion' with them is usually performed in these locations. Visiting the village in the form of snakes is believed to be the most common, while visitation in dreams is known when the ancestors have a particular message to convey. The ancestors can also inflict hardships such as illness and death to let their lineage know that they are unhappy with their devotion. Krige (1950: 288) clarifies this by suggesting that misfortune is not directly inflicted by the ancestors. Rather, when angered the ancestors withdraw their benevolence, allowing forces of evil to afflict the lineage, bringing misfortune, illness and death. The ancestors are then appealed to in the hope that they will once again provide protection against these evils, and restore prosperity (Berglund 1976).

In Zulu culture, the ancestors are communicated with through ritual. These rituals vary considerably depending on the nature of the communication, but usually involve the slaughter of an animal and the ritual drinking of beer. Both function as social occasions, to which the ancestors are invited to join, assuring them that they are part of the village. This serves to ensure that the ancestors are constantly among their surviving lineage, continually providing protection against evil and allowing fortune to flow in the community (Berglund 1976).

When calamity befalls a village, the ancestors are appealed to by way of ritual communion. This is to restore the relationship between the ancestors and their survivors, who are in need of their spiritual powers for protection against evil and the enjoyment of good fortune (Eiselen 1966).

Esterhuysen (2008) relates that the explanation of misfortune is often 'ancestral wrath', along with other spiritual causes such as pollution and witchcraft. The ancestors are generally benevolent, but if offended or neglected can be responsible for misfortune and illness (Janzen 1992 in Esterhuysen 2008). The main desire of the ancestors is to be remembered by their descendants (Esterhuysen 2008). Visited regularly and kept 'in-the-loop' of communal goings-on the ancestors reward the dedicated with good health, harvests and offspring. Setloane (1967) explains that it is always better to maintain a good relationship with the ancestors, rather than approaching them only in times of hardship. Withdrawing their benevolence does not at first lead directly to harm, but rather permits misfortune to befall the community (Kopytoff 1971). Continued neglect or insult can cause the ancestor to actively inflict harm in the form of illness, drought and sleeplessness.

3.4. Sekuruwe's ancestors

In interviews recorded during visits with various communities in the Limpopo area, the understanding of the ancestors and their role in daily life reflects the generalized discussion above. Sekuruwe's description of the ancestors also

introduces some specific ideas not mentioned by the authors above. In this section I detail the description of ancestors given mainly by Sekuruwe, but also relate descriptions from neighbouring communities with similar cultural beliefs in the spirits of the ancestors. I refer also to Mönnig's *The Pedi* (1967) in reference to specific cultural description of relationships with the ancestors. I aim to show that the ancestors are not only conceived of as real actors in the daily lives of the Sekuruwe community, but also that they are an important aspect of their cultural lives, and a well established tradition.

When asked to describe the ancestors, the Sekuruwe community usually relate stories about the role of the ancestors in their lives. Through the details of these stories, the generalized understanding of the ancestors seems to be similar to Esterhuysen's (2008) description of ancestors as the benevolent spirits of deceased elders. The ancestors are the dead relatives of the community or family, and are seen as still active members of the community or family[59]. The ancestors assist the community in their daily lives by providing good fortune and protection. They are asked for help if there is trouble in the community or the family[60]. This can be unexplained illness, infertility, poor harvest or ill fortune. The ancestors can also take the problems of the family to god, who will then help the family on behalf of the ancestor[61]. Mönnig (1967) explains that the living and the dead have mutual responsibilities to one another. While the ancestors are said to provide protection (both spiritual and temporal) the living are required to show them devotion, and ensure they are remembered by their descendants.

[59] 08.10.2010. Meetings with communities in Mapela area, Limpopo.

[60] 17/18.06.2010 – community meetings at Sekuruwe and Backenburg. Attended by Saccaggi and Esterhuysen. Mokopane, Limpopo.

[61] 08.10.2010. Meetings with communities in Mapela area, Limpopo.

The Sekuruwe community describes their ancestral graves like churches, because they go there to ask for help from the ancestors[62]. Although the ancestors are everywhere, they live at their graves. This is why communication with the ancestors must take place at their graves[63]. The community does not pray to the ancestor like they would pray to god, but the communication is said to be similar[64]. Communication with the ancestor is not strictly prescribed, and different communities confirm that the method of communication depends on what the ancestor is being asked for. The Sikemeng community told of how some families sing and dance, while others give offerings and pray to the ancestor. Offerings of snuff, beer and the blood of a slaughtered goat can be made to the ancestor at the grave. These offerings go to the ancestors and make them happy, and they will then help the family with the problem they have brought to the ancestor. For very important ceremonies the advice and assistance of a traditional healer is needed to ensure that the ancestor is communicated with properly[65].

The ancestors become angry if they are not visited or paid proper respect. They will then stop helping the family or community, and evil forces will be able to inflict ill fortune[66]. If any misfortune cannot be explained, the ancestors are said to be unhappy, and ceremonies are needed to ask them for forgiveness, and to return their blessings on the community[67]. Mönnig describes the principal method of communication by the ancestors as visiting their descendants in dreams. These

[62] 02.03.2010 – Interview with Mr Shiburi. Steps of Constitutional Court, Johannesburg. And 17.06.2010 – Visit to the laboratory of Roodt attended by Saccaggi, Esterhuysen and representatives of the Sekuruwe Community Council to view the re-assembly process.

[63] 02.03.2010 – Interview with Mr Shiburi. Steps of Constitutional Court, Johannesburg. And 08.10.2010. Meetings with communities in Mapela area, Limpopo.

[64] 17.06.2010. Meeting with Sekuruwe Community Council.

[65] 08.10.2010. Meetings with communities in Mapela area, Limpopo.

[66] *Ibid*.

[67] 02.03.2010 – Interview with Mr Shiburi. Steps of Constitutional Court, Johannesburg. And 08.10.2010. Meetings with communities in Mapela area, Limpopo.

dreams are often accompanied by unexplained misfortune, and demonstrate that the displeasure of the ancestors is behind this hardship (1967)

Sekuruwe's beliefs in ancestors also include descriptions of female ancestors, and the visitation of these women's graves. The spirits of deceased women are also visited for 'ritual', although seldom for authoritative guidance. These female ancestors also desire to be remembered by the community, and visits to their graves are to inform them (often in a conversational manner) of the happenings of the community. Female ancestors can be asked for assistance, and are known to inflict sleeplessness on their closest relatives.

The 'closeness' of the ancestors is spoken of when describing visitation of the graves. Visits to the graves of the ancestors are not formally defined along linear lines of authority. Although it is usually older community members who visit the graves of the ancestors, this is not rigidly followed. Any community member can visit the grave of a direct ancestor, although the regular visits are the duty of the closest relative[68]. For Sekuruwe, in accordance with general ideas about the ancestors, the ancestors represent the highest authority appealed to by the elders, who are seen as the highest living authority. As cultural systems change with the introduction of regional, tribal and municipal authorities, as well as Christianity and capitalism, the ancestors seem to have maintained their authority in a less structured form than that described by the authors above. In Sekuruwe, the ancestors are not the collective body of higher authority, but are considered more on personal grounds of interaction with direct family relatives. Although the ancestors of the Mapela chieftaincy may still maintain rigid hierarchical lines of authority, these ancestors are not mentioned by the community: their primary focus remains their own personal ancestors, and the misfortune inflicted on them (the ancestor and the family) by the relocations. The ancestors are mainly appealed to by individuals and families for crises that affect them personally. The ancestors may be evolving more as the spiritual guides for those directly connected with them through the frequent visitation of their graves. Collectively,

[68] 02.03.2010 – Interview with Mr Shiburi. Steps of Constitutional Court, Johannesburg.

this is at the core of their cultural life, as the connection to these spirits permeates all aspects of their lives, as well as cultural ceremonies. The ancestors are the highest power for appeals for assistance, and also for moral guidance.

3.5. Relocating the ancestors

Although the relocation of ancestral graves for the expansion of mining is a modern phenomenon, details of the ceremonies required for such relocations are often given by communities. These ceremonies, similar to the ceremonies of communication, vary in different communities and amongst different elders in those communities. Most confirm that these ceremonies must be decided by the family or community connected to the graves. Most descriptions of the ceremony detail the relocation of not only the physical grave, but also the ancestral spirit, who must follow their grave to their new resting place[69]. These families may also need the advice and assistance of a traditional healer to ensure that the grave is relocated properly, and that the ancestor is happy with the relocation[70].

As an outline, the process has been described as starting with the family of the ancestor visiting the grave to give offerings. They must then explain to the ancestor that their grave is going to be moved, and ask the ancestor to follow their bones to the new cemetery so that they can continue to be close to the community[71]. The original grave must be cleansed after exhumation, so that it is not occupied by evil spirits once the ancestor has been relocated. There, additional ceremonies are needed (most descriptions include slaughtering a goat or cow) to ensure that the ancestral spirit will live at the new grave[72].

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[69] 18.09.2010 – Interview with S. Sibanda, LRC representative. Pilansberg, Limpopo.

[70] 2010 October 07 – 08 – Meetings with communities in Mapela area. Attended by Saccaggi, representatives from Jubilee South Africa, Action Aid and Bread for All.

[71] 02.03.2010 – Interview with Mr Shiburi. Steps of Constitutional Court, Johannesburg

[72] 2009 February 22 – Sekuruwe community meeting and interviews with community members. Attended by Saccaggi and Esterhuysen. Sekuruwe Village, Limpopo.

Because the ancestor is part of the family, the family must be there during the exhumation so that the ancestor can know they are being taken to their new home by their family members. The rituals performed at the graves can also only be done by the family, sometimes with the assistance of a traditional healer[73].

The spirit must be lead to the new grave with their bones, so that they do not get lost on the way. At the new grave they must also be offered beer and a slaughtered goat so that they can be happy with their new home. This will ensure that the ancestor lives at their new grave, and that the family is able to visit them and continue to have a relationship with them[74].

The displeasure of the ancestors is said to stem from the irreverence they were shown during relocation. The spirits of the ancestors are said to be lost and wandering around, because their bones have been broken and damaged, and some entirely lost: the ancestors do not know where their bones are[75]. The anger of the ancestors is claimed as a cause of the misfortune of the community. Community members at Sekuruwe and elsewhere often relate stories of headaches, nightmares, poor crops and general misfortune brought about by the anger of the ancestors. This is exacerbated by the impossibility of visiting the ancestors because they no longer reside at their graves; their original graves were destroyed during relocation, and their spirits were not taken to the new graves, causing them to become lost and wander around the landscape. Their spirits have now become angry at being both disrespected and neglected.

The community has expressed concern about the burial of skeletons with missing bones. No direct answer can be obtained about the implications of these missing bones, and the question is usually deferred to consultation with a traditional healer

[73] 2010 June 17 – Visit to the laboratory of Roodt attended by Saccaggi, Esterhuysen and representatives of the Sekuruwe Community Council to view the re-assembly process.
[74] *Ibid*.
[75] 2010 June 17 – Visit to the laboratory of Roodt attended by Saccaggi, Esterhuysen and representatives of the Sekuruwe Community Council to view the re-assembly process.

in the future[76]. It may be the case that the destruction of the skeleton causes the death of the ancestor (as described by a Zulu informant (Berglund 1976: 81)), but the opinion of Sekuruwe on this issue has been crowded out by discussion on other aspects of negotiation.

3.6. Spiritual authority

To understand the legal implications of Sekuruwe's relocations, this thesis concerns the rights of Sekuruwe in relation to their ancestral graves. I base these considerations on the spiritual relationship existing between the community and their ancestors. I aim to understand the mobilization of the ancestors in response to displeasures with the mine. The injustices felt by Sekuruwe at the hands of the mine incorporate them within a much broader topic in South Africa. The neglect of rural South Africans can be seen as one of the major failings of the current government. The consolidation of culture and heritage here serves to counter-strike this ineptitude by asserting the importance and (legal) relevance of the community's cultural rights. Through the mobilization of cultural heritage, these rural communities are able to enter debates with the claim to legal rights from the government. The courts may soon be called on to decide on the constitutionality of inappropriate ancestral grave relocations. A court may also have to decide on the obligations of the mine in terms of compensation in this and other cases, and on the rights of communities in relation to their ancestral graves.

Sekuruwe's ancestors are a part of their daily lives, and the belief in the ancestor is part of their culture. Belief in the ancestors is part of Sekuruwe's, and other communities', enjoyment of their cultural lives, the right to which is protected in the Constitution. The ability to visit the ancestral graves, and the right to decide on the future of these graves, are also part of this Constitutional right.

[76] 2010 June 17 – Visit to the laboratory of Roodt attended by Saccaggi, Esterhuysen and representatives of the Sekuruwe Community Council to view the re-assembly process.

Sekuruwe argues that they were excluded initially by inadequate methods of negotiation, and were also given no opportunity to decide on the cultural ceremonies required for this relocation. That is to say that they are the ones who, by virtue of cultural ties to the ancestors, should have had the authority to describe these and other details relating to the relocation of their ancestral graves.

3.7. Conclusion

The veneration of the ancestors has a long history in the traditional life of black South Africans, though it may appear that through changes in social organization and structures of authority, the prescribed description and interaction with the ancestors has become less rigid. However, the ancestors still continue to play a central role in the daily lives of many rural South Africans, and are still seen as a potent spiritual authority. For Sekuruwe, the ancestors are important to their spiritual wellbeing, as well to their physical prosperity.

Sekuruwe has a very important connection to the ancestors, and to their physical remains. Removing the decision over the future of the ancestors from those in spiritual communion with them effectively disconnected them from their culture, their spiritual ties to the ancestors, and their own history and heritage.

Because the community was not involved in discussion over the future of their graves, they were unable to ensure that their ancestral spirits accompanied their graves when moved to the new cemetery. Neglecting to relocate these spirits shows the negligence toward Sekuruwe's cultural beliefs, and has resulted in the destruction of their spiritual relationships with their ancestors.

This thesis aims to understand Sekuruwe's descriptions of the ancestors as a mobilization of their cultural heritage. Their concept of the ancestors can be seen as both an inherited cultural belief as well as a contemporary social construction in response to threats from the mine. This construction cannot be formed in isolation from the other grievances of the community, especially since it is the

mine that disrespected their cultural beliefs. The loss of their traditional ways of life, means of making a living, the destruction of their ancestral graves, and the destruction of their spiritual relationships with their ancestors are all the result of encroaching mining. This thesis focuses on the role of Sekuruwe's ancestral beliefs in debates about their rights to traditional land, and compensation from the mine. I believe this struggle centres on Sekuruwe's feelings of injustice, which involves the claims mentioned above.

The relocation of Sekuruwe's graves are similar in this respect to some historic cases in which the bodies of the dead have caused debate. Three of these cases are discussed in the next Chapter to highlight their similarities with the Sekuruwe case. I also argue that these cases encompass broader debates about justice, which debates are discussed through references to the bodies of the dead. Also, the treatment (or alteration of treatment) of these bodies can be seen as a symbolic form of restorative justice, not only for the human remains concerned, but for those who identify with these bodies.

CHAPTER FOUR:
POST-MORTEM JUSTICE

4.1. Introduction

This Chapter considers three cases in recent history where debate has arisen centering on the remains of the dead. I begin by giving accounts of the cases of Sara Baartman, Kennewick Man and Prestwich Place. The issues arising around these human remains show that the bodies of the dead can occupy central places in debates about recognition, inclusion, rights, the authority of the State, and above all justice. Throughout this thesis the bodies of the dead are considered inclusive of the burial, physical remains, spiritual personality and symbolic representation of these bodies. These debates are also evident in the case of Sekuruwe's ancestral grave relocations; my aim being to show the universality of Sekuruwe's concerns as well as their particularity.

I highlight similarities between these cases and that of Sekuruwe concerning issues of justice. The aim of this Chapter is to demonstrate the role that can be played by the bodies of the dead, as they become icons of the injustices inflicted on the living. I suggest that the treatment of the remains of the dead has, in Sekuruwe and the historic cases, mimicked the experiences of the living. Displeasure with the way these remains are treated has come from emotional, cultural and political mobilizations. In essence, I suggest that the controversy over these remains entails argument over the right to determine the treatment and fate of the bodies, as well as the fate of the spirits and the communities who identify with these bodies.

Debating issues of justice by reference to the bodies of the dead, post-mortem justice, entails discussions of justice for the living using the bodies of the dead as metaphor. I aim to outline the importance of the remains of the dead, including

their extended aspects such as their spirits and burials, in debates of justice, and the similarities between Sekuruwe and these three historic cases.

4.2. Sara Baartman.

Arguably one of the most exploited human beings of history to have been so well recorded, Sara Baartman, (circa 1789 – January 1816) was reburied in her presumed place of birth, the Gamtoos Valley, Eastern Cape Province, South Africa, after returning to her country of origin after 192 years in exile. Born in the Camdeboo in the Eastern Cape, she grew up on a colonists farm, with her and her family being drawn into servitude. She later travelled to Cape Town to serve an unknown list of colonial masters, before finally travelling to Europe (Crais & Scully 2009). Most of the literature on the life of Sara Baartman focuses on the last few years of her life, which saw her become an icon of racial and sexual ideology (Crais & Scully 2009). I give no detail of this part of her life here, since it is the popular memory of her that is important to illustrate my argument. I do not wish to discredit the particulars of her life in this way, but only to argue that the iconic image with which she became identified served to rouse popular opinion concerning the treatment of her remains. The British Naval Surgeon, William Dunlop then took her to London in 1810, where she displayed her naked body to curious Europeans. Sara (Saartjie) was paraded at circuses, displayed at museums, medical and other universities, and in bars until her death in France in 1815/1816, probably of syphilis, by which time she had succumbed to alcoholism. At the time of her death she had been the property of an animal trainer (Qureshi 2004).

Her remains were acquired by Georges Cuvier, a French naturalist and zoologist. Cuvier was one of France's foremost scientists, and the father of comparative anatomy. His scientific legacy and contributions to the field led his study of Sara to be seen as one of the most authoritative works on 'the hottentot' (Crais & Scully 2009). Cuvier made a cast of her body, dissected her and preserved her brain, genitals, and breasts in specimen jars. These 'artefacts', along with her

skeleton, were displayed in the *Museé de l'Homme* in Paris until at least 1976 (Qureshi 2004).

Throughout her life, and continuing after death, Sara's body represented the European concept of African primitivism, sexuality and subjugation. Throughout her life, and long after her death, Sara came to represent ideas of empire, gender, race and (above all) African sexuality. The Colonial epoch had plundered Africa for its recources, both raw and human. These were ruthlessly exported around the world as commodities to be bought, sold, and owned. Millions of Africans were traded in a global market which considered them sometimes as animals, sometimes as objects. The showing of Sara Baartman as a museum display of African primitivism and sexualty was the ultimate dehumanization, and the ultimate objectivication of her body (Qureshi 2004).

After democracy in 1994, the (then) president of South Africa Nelson Mandela requested the return of Sara Baartman's remains for burial. President Mandela believed that she had been stolen from Africa, and the return of her remains for a dignified burial would restore her dignity. After lengthy legal battles and the passing of new legislation in French parliament, the remains of Sara Baartman were finally buried on National Women's Day (3 May 2002). France resisted the return of her body, as it constituted part of the collection of a great scientist, and the country attempted to maintain its superiority in this field. It was however agreed, that any scientific progress founded on racism was suspect, and should not be celebrated (Crais & Scully 2009). In his letter, (then) President Thabo Mbeki emphasised that Sara exemplified the tragic history of the colonized and oppressed in our country, and on the continent. Her final repatriation to her place of birth stood for the struggle to uproot many centuries of humiliation and inhumane treatment of African peoples by European nations. She represented the struggle for Africans to restore their dignity, and their continuing struggle for emancipation. The return of Sara Baartman's remains to South Africa respresented the overthrow of colonial concepts from the past, and the re-interpretation of Sara's image in the present. The return of her remains to South

Africa respresented the overthrow of the colonial epoch, and the beginning of a new age (letter from the Office of the President, South Africa 2004).

The remains of Sara Baartman, and what she came to represent, continue to be recollected today. The image of her was certainly more popular than her actual personality, and it was this idea of her with which people identified (Crais & Scully 2009). Her repatriation represents more than just the physical relocation of her remains from one place to another. The burial of Sara Baartman was an active statement of moral and political intention, and the process of her repatriation excessively used as a flagship for governmental success. Not only was her return a symbol of overcoming colonialism, but also came to represent the more immediate struggle against apartheid. The remains of Sara Baartman continue to represent the triumph of South Africa's liberation from European imperialism. As one of the most exploited persons in documented history, Sara Baartman was able to overcome the sadistic concepts of Eurocentricism and become a symbol of both race and gender liberation with her post-mortem return to South Africa (Qureshi 2004).

The image of Sara Baartman is even invoked today by a welfare organisation. The Saartjie Baartman Centre for Women and Children is a human rights-based, non-governmental organisation that aims to provide a 'comprehensive range of services that are accessible and safe to women and children...'. The focus of the Centre is wide, ranging from services for abused women and children, research on issues affecting women and children, to outreach programmes for ending violence against women and children[77].

Ultimately, Sara's return to South Africa was a symbolic act of restorative justice, of restoring dignity to Africa and Africans after the horrors of colonialism. Even in death, the treatment of Sara's body was seen as unjust and racist, as it effectively placed her in the 'ownership' and under the dominion of Europeans.

[77] From the Saartjie Baartman Centre for Woman and Children homepage: http://www.saartjiebaartmancentre.org.za

Burying her remains in the Gamtoos valley righted this injustice, and was a symbolic liberation of all Africans from European domination.

The disrespectful way in which Sekuruwe's ancestors were relocated in 2008 was similarly a case of unjust treatment of human remains. Largely excluded from negotiations about the relocation of the graves also took authority away from the community to determine the treatment of these remains, placing the authority in the hands of the mine. The treatment of Sekuruwe's ancestral graves also mirrors the community's relocation by the mine, which they claim they did not consent to.

Sekuruwe's grievances with the mine over the treatment of their ancestral graves mirrors their grievances over their own relocation. As was the case with Sara Baartman, external authorities were able to decide on the treatment of both the community and their graves: the mine in coalition with state departments etc. determined the future of the community as well as their graves. The damage done to Sekuruwe's ancestral skeletons also mimics the treatment of Sara Baartmans body, although the back actors were somewhat less meticulous than Cuvier.

It is hoped by the community that the reburial of their graves, similarly to the burial of Sara Baartman, will in part restore the dignity of their ancestors, as well as be a symbolic restoration of their own dignity after being so poorly treated by the mine.

4.3. Kennewick Man.

NAGPRA, the Native American Graves Protection Act, was intended to ensure the cultural rights of Native American Tribes in respect of their ancestral graves. The new legislation introduced mechanisms by which archaeologists and other scientists interacted with Native Americans to reach consensus. Consultation, collaboration and eventual repatriation were to resolve all conflicts between researchers and Native Americans, particularly concerning their ancestral burials (Ferguson 1996). This was a result of long battles in the United States concerning

the display of Native American burial grounds as exhibits. Native Americans believe that the bodies of the dead are sacred, and should not be treated lightly. The display of Native American remains, as well as other cultural and spiritual objects in museums as artefacts had become a debated topic (Fortes 2008).

The first remains of Kennewick Man (his skull) were found in 1996 in the Columbia River near the town Kennewick. The skull was given over to police and inspected by the coroner James Chatters. Chatters found that the skull had European features, but stated its age was unknown. With a permit issued in terms of the Archaeological Resources Protection Act, a search of the surrounding area found a further 350 pieces of bone (Chatters 2004). The skeleton became known as Kennewick Man and would soon become the centre of a debate in the United States. With additional studies, Kennewick man was found to have been between forty and fifty five years old when he died. He was 170 -176 cm tall and had a stone point projectile embedded in his hip. The projectile was the first evidence that Kennewick man was older than expected. AMS dating later revealed the skeleton was some 9000 years old. This made Kennewick man one of the oldest and best preserved human skeletons in North America. Because little is known about the original peopling of America, Kennewick man could have provided invaluable information on this question (Nielson 2010).

Representatives of Native American Tribes began to contact authorities with concern over the treatment of the skeleton. This began in July of 1996 after the possible antiquity of Kennewick Man had been published. A coalition of five Native American Tribes[78] claimed the skeleton under the Native American Graves Protection Act. The Act required that all Native American burial remains found on federal ground be repatriated to the affiliated Native American Tribe. A notice of intension to repatriate the remains was issued in September to the coalition of tribes. This ignited an outcry by the scientific community who wished to study the

[78] The Confederated Tribes of the Umatilla Indian Reservation (CTUIR), the Confederated Tribes of the Colville Reservation, the Yakama Nation, the Nez Perce Tribe, and the Wanapum Band)

remains. In October of the same year, the Asatru Folk Assembly (a Californian society following Norse religion) claimed that if the remains were Caucasian, there was a chance that they too were culturally linked to Kennewick man (Burke *et al*. 2008).

Eight anthropologists then opened a case in the Magistrates court in Portland, Oregon to prevent the Army from repatriating the skeleton. The media stated that the find may lend credence to the theory that the early inhabitants of America had come from European stock (Egan 1996). In addition to claims of scientific inquiry, the anthropologists argued that it could not be proved that the remains were in any way related to any of the tribes claiming them. DNA analysis carried out in 2000 was inconclusive, and could not demonstrate any link to present day Native Americans (Burke *et al*. 2008).

The crux of debate over Kennewick Man was over ownership and authority. The scientific community argued that the skeleton was of irreplaceable value to understanding questions of the past, specifically the migration into, and colonisation of the Americas. The anthropologists who filed for access to the bones argued that there was no clear cultural affiliation of this skeleton to any known Native American Tribes. Appealing for the immediate repatriation of the remains, the Native American Tribes contended that Kennewick man was a 'great ancestor'. As their descendants, Native Americans had a cultural and spiritual obligation to ensure his dignified burial. They claimed that the scientific study of the remains was a desecration of the Ancient One's body, and was disrespectful to Native American culture (Burke *et al*. 2008).

Kennewick man exposed a number of difficulties in NAGPRA, particularly the extent to which affiliation had to be demonstrated. At the centre of the debate was the scientific versus the spiritual. The value of the find for the scientific community came up against strong opposition with the spiritual dignity of the remains. For the first time the debate was also held through the courts, since it centred on a technicality of legislation. The role of the legal structure in deciding

the fate of this matter was paramount. Here, the introduction of legislation to protect the vulnerable spirituality of Native American graves lead ultimately to confusion. In 2004 a 9th circuit court of appeal stated that NAGPRA would have to be amended to avoid future complications. The court denied the coalition of Native American Tribes their claim to the remains, stating that they were unable to demonstrate adequate cultural affiliation ('Kennewick man on Trial' n.d.).

The Native Americans claimed that the treatment of human remains had implications for the spirits of the deceased. Many Native Americans continue to practise traditions which revere the dead and assert a spiritual connection between the living and the dead. Nevertheless it was argued by the scientific community that the remains of Kennewick were too old to be affiliated to any contemporary Native American Tribes. The skeleton was also more Caucasoid than Native American, and lacked skull flattening from board-binding in infancy. The presumption was that this skeleton represented an American inhabitant predating the existence of (today called) Native Americans. The Native Americans asserted that their oral traditions state they descend from the first inhabitants of the continent, and represent the 'first nation'. Claiming that Kennewick predates any known Native American inhabitants, and that he had no cultural connection to these inhabitants, automatically negated Native American beliefs and traditions. Further, this claim prevented the legal repatriation of the skeleton to Native American Tribes.

The Tribal coalition which laid claim to the skeleton refuted this. The age of Kennewick Man suggested, to them, that he was a 'great ancestor'. The remains needed to be reburied with relevant ceremony and ritual in order to lay the spirit of this ancestor to rest. Claiming a cultural identification with Kennewick Man had two implications. First it alerted the wider world to the presence of Native American Tribes by asserting their identity, and claiming recognition of their existence and rights to cultural lives. Second, this identification claimed that they had a legitimate, legal right to decide on the treatment of the remains of Kennewick Man (Burke *et al*. 2008). In other words; if the cultural link between

contemporary Native American Tribes and Kennewick Man was recognised as legitimate, then their identity as a cultural group, their legal rights in terms of this, and their authority to determine the treatment of Kennewick Man's remains must follow.

The debate rested on the recognition of the 'link' between contemporary Native American Tribes and Kennewick Man. The decision was ultimately based on anthropological similarities. It was concluded that the physical and cultural dissimilarities between these two meant there could be no legitimate identification between them. This conclusion rested on legal definitions in NAGPRA, which required cultural affiliation for repatriation. The details of this 'cultural affiliation' were not expressly defined in the Act, and it was eventually decided by the courts on a balance of probabilities (Burke *et al*. 2008). Unable to demonstrate cultural similarities, the spiritual claim was thought to be too abstract, and the law concluded that spiritual connections did not constitute a solid enough relationship between the Native Americans and the remains of Kennewick Man. This implied three things: first, it negated the legitimacy of spiritual claims which could not be supported by physical evidence; second, it denied the claim that Native Americans had a legitimate right to decide on the treatment of these remains; and finally, this decision negated the claim to identity and legitimacy by the Native Americans which was contained in this debate. The Native American claim was that there existed a spiritual connection to Kennewick Man which legitimatized their authority over his treatment. The court decided that this spiritual connection (whether it existed or not) did not represent a legitimate, legal connection, and denied the Native Americans authority over the treatment of the remains (Burke *et al*. 2008).

In addition, the fact that this was the decision of the State demonstrates the power relations present here. Even if the court had found the Wanapum Tribe (one of the initial Tribes in the coalition claiming Kennewick's remains) to have legitimate authority over these remains, this authority would still have been conferred or granted by the State. The State then has the power to decide whether or not the

Wanapum had legitimate authority in this case; the Wanapum not only claimed authority over the remains, but claimed authority *from* the State, requesting the courts to grant them the authority they felt they already had. NAGPRA neglected to consider spiritual affiliations in regard to criteria for repatriation. This effectively negated the relevance of spiritual beliefs held by a legally recognized and protected group of people.

The rigid and empirical nature of law makes it nearly impossible to consider spiritual matters. This poses a problem for the application of heritage legislation when the heritage is, by nature, spiritual. In attempts to protect what is valuable from the past, legislation cannot avoid encountering the spiritual concerns of cultural groups.

In Sekuruwe's case, heritage legislations failure to deal with important aspects of the grave relocation, namely consultation, consent and the spiritual significance of the graves, caused much of the problems evident in the case.

4.4. Prestwich Place.

When construction works in Cape Town exposed the Prestwich Place cemetery, the burials quickly gained public interest. The cemetery had, throughout the 17th and 18th centuries been located outside of the strict confines of the city of Cape Town, where the gallows were situated (Shepherd 2007). The cemetery was the final resting place of not only slaves from East and West Africa, but also Khoikhoi, Europeans, African Muslims, free blacks and other members of the Cape Colonies' underclass. The cemetery contained around 3000 individuals, and covered over a kilometre square. These individuals had been denied a resting place within the confines of the city, which was reserved for the civilized colonial authority (Jonker 2005).

Representing a historically heterogeneous community, the burials raised issues of geographic politics from the past. Confined to internment outside the strict

confines of the city of Cape Town at the time (1800s) the Prestwich Place burials raised similar debate around racial exclusion in the present. The nature of the community of people buried there suggested that no one contemporary group could lay unambiguous claim to them. A small group of concerned members of the public formed the Prestwich Place Committee[79], and attempted to have the construction halted. Concerns for the dignity of the deceased caused the Committee to petition for them to remain *in situ*, and their location to be declared a Heritage Site. SAHRA eventually issued permission for their exhumation, stating that appeals from the public were emotive, and gave no clear reason for the burials to remain in place. The developer was also under pressure to continue construction as the luxury apartments of 'the Rockwell' had been pre-sold for exorbitant amounts. Excavation of the skeletons removed them to Woodstock Day Hospital in April 2004, and eventually the newly constructed Prestwich Place Memorial and Visitors Centre. The decision to exhume the bodies was directly appealed to the then Minister of Arts and Culture, but was dismissed (Kashe-Katiya 2010).

The memorial now houses the remains of the Prestwich Place cemetery in a modern version of a mausoleum, which is open to the public. The centre intended to be an interactive public space debating the meaning of racialised and geographic class structure in Cape Town. The memorial planned to promote interactions with the past, the reclamation of marginalized identities, and ultimately the generation of profit. Although somewhat forgotten of late, the memorial continues to attract visitors to its exclusive coffee shop. The memorial now stands testament to the demands of development and the objectification of human remains for political ends (Kashe-Katiya 2010).

The Prestwich place cemetery demonstrates the political nature of graves which stretches over time. Initially, the cemetery was used to deposit the bodies of those not allowed inside the confines of the city. In the past the cemetery was used to

[79] The Committee was originally the Hands Off Prestwitch Place Ad Hoc Committee (HOPAHC)

enforce structural class distinction; ensuring that those buried beyond the city limits would continue to be denied citizenship even in death. When exposed in 2003, the graves of the deceased became the central foci for issues of identity in the Cape's historic underclass. With much of the city still structured along racially organized segregation, Prestwich Place served as a banner to claim equality in modern South Africa (Jonker 2005). Prestwich Place also raised questions of legality. The question especially centred on heredity, and the value given to the opinion of descendants. Disagreement arose between those with archaeological interest in the burials, and those who felt the burials should be preserved *in situ* to restore the dignity and identity of the Cape's historic underclass (Shepherd 2007). It was not adequately argued that any one group represented a descendant of the Prestwich Place burials. Because of this the decisions of SAHRA were given precedence.

For Sekuruwe, SAHRA (although only after the fact) played a similarly definitive role as they were able to pressure the mine into agreeing to the re-exhumations, which exposed the negligence with which the graves were moved. In case too involved contestation over who represented a legitimate authority over the future of the graves.

4.5. Discussion: Sekuruwe's ancestral graves

The case of Sara Baartman raised concerns about the disrespectful way in which her remains were treated. Sekuruwe's ancestors' skeletons were similarly disrespected by being damaged, destroyed and confused during their exhumation. This contradicted the cultural reverence given to the bodies of the dead, and so disrespected Sekuruwe as much as the remains of their ancestors. The burial of Sara's remains also showed that this disrespectful injustice could in part be remedied, if only symbolically. The same symbolic restitution of dignity for Sekuruwe's ancestors may result in their final reburial, which would also symbolically restore dignity and justice to the Sekuruwe community.

The spiritual affiliation of Native Americans to Kennewick Man is also echoed in Sekuruwe's spiritual relationships with their ancestors. Legislation also played a similarly authoritative role in both cases: the right to determine the treatment of the remains rests on legal requirements. For Sekuruwe, the legislation requires that the consent of the next of kin is required before SAHRA can issue a permit for the relocation of certain graves.

The Prestwich Place cemetery also highlighted the role of legislation, as well as the role of SAHRA in giving authoritative opinions over who does, and who does not have the right to determine the future of the graves.

4.6. Conclusion

This Chapter has aimed to illustrate how the bodies of the dead can serve as foci for contemporary debates over justice. These can concern the unjust treatment of people in the present, with the bodies of the dead being used as a metaphor: the mistreatment of the bodies of the dead, as well as their spiritual personalities, is described similarly to feelings of injustice over the treatment of the living who are identified with these bodies. Sekuruwe is in the middle of different debates about the rights of rural communities in the face of encroaching mines. This not only concerns their right to determine the future of their ancestral graves, but also their cultural life-ways in general. Not only the future of their relationship with their ancestors, but also their future livelihoods are affected by the mines. My aim in this Chapter has been to illustrate the fact that Sekuruwe's case does not only concern the inappropriate way in which their ancestral graves were relocated. This concern is nested in other debates about the rights of mines to relocate communities, and the compensation due to communities who are adversely affected by mining. This ranges from the responsibility of mines to provide infrastructure and compensation, to their obligations in terms of negotiation and adequate processes of relocating graves. Taking this to its conclusion, I argue that Sekuruwe's ancestral grave relocations represent their systemic oppression as will be discussed in Chapter Six.

CHAPTER FIVE:
LEGAL PROTECTION OF ANCESTRAL GRAVES

5.1. Introduction

This Chapter aims to illustrate the argument by Coombe (2005); that culture can be mobilised as a legally determined right. This Chapter considers what this legal definition is, what the protections for it are, and where these have fallen short of performing their mandate to protect the cultural heritage of South Africa.

Culture, and cultural rights are becoming an increasingly important resource in reducing social conflict, spurring economic development, and preserving diversity. Claims to culture, and cultural rights, are discussed in the national legislation of many nations, and in international conventions. The rights outlined in these documents enable people to claim duties from the State which are premised on their culture (Coombe 2005: 36). Internationally, the duties of the state in protecting the cultural lives of minorities, first peoples, and other ethnically distinct groups, are becoming better defined and more exacting. International activism around this topic has also increased its awareness, and awareness of the benefits which can be derived from claiming these rights. Asserting cultural rights from, or against the state, is more than just a demand for recognition, more than simple identity politics, but can also be to advance political leverage. This is enabled by the legal protections of cultural rights, which the state has a duty to protect (Coombe 2005: 49).

I agree with Coombe that culture can be invoked to advance political aims. It is not just culture which is invoked here, but specifically the *right* to culture which gives the Sekuruwe community leverage in their political struggle against the mine. This Chapter aims to explore the legal terms of this right. I do this by discussing the legal protections of ancestral graves in the legislation. I also point to aspects of this protection which fall short of the importance placed by

Sekuruwe on their ancestral graves. These shortfalls were highlighted in Chapter One, and suggestions for their amendments are made here.

This Chapter begins by discussing the legal protections of ancestral graves in two parts. First, I begin by explaining the legal definition of ancestral graves as per the National Heritage Resources Act, and specific delineations of different categories of graves. I then discuss the procedural requirements for the alteration of graves, and the Impact Assessment process outlined in the Act. I explain the role of the South African Heritage Resources Agency, and their role in the implementation of the legal protections. I discuss the criteria used by SAHRA to assess applications for the alteration of graves, and the rights which permits give to developers. I consider the role of each aspect of protection (legislation, application process and SAHRA's management) in relation to the Sekuruwe grave relocations. Second, I suggest that the improper relocations at Sekuruwe were due to a combination of factors relating to legislation, processes of application and the managerial role of SAHRA in the protection of ancestral graves. I conclude that remedies to these problems must be introduced if ancestral graves are not in future to suffer the same treatment as the Sekuruwe graves.

5.2. Heritage, according to the Heritage Act

The Heritage Act follows the protective concepts of UNESCO's 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage. The Convention introduced three administrative objectives for the promotion of heritage. The first is the co-operation of scientific and educational facilities to ensure the promotion of generalized awareness around the nature and importance of cultural heritage. Second, active campaigns both internationally and nationally, to promote the involvement of all sectors of society in the maintenance of heritage resources are mentioned. The final objective is the construction and administration of basic frameworks for the protection of cultural heritage (UNESCO 1972). The objectives of this Convention are intended for adoption by independent nations. Nations are supposed to adopt the general principles of the

Convention and develop local mechanisms of legalization and administration along lines of the International Covenant on Economic, Social and Cultural Rights (UNESCO 1966).

South Africa's Heritage Act can be seen as the local adaptation of these general principles, and the formulation of legal and administrative mechanisms. The Heritage Act defines the national estate as consisting of all heritage resources. The Heritage Act states that all laws and procedures which govern the protection of heritage should be clear and generally available. They should provide comprehensive guidelines to the management of heritage to all concerned (s5(3)(a)&(b)). The Heritage Act itself provides certain of these guidelines, and creates the national management authority for the clear administrative function of protecting heritage. The South African Heritage Resources Agency (SAHRA) created by s13 is the enactment body of the Heritage Act.

Heritage is considered the property of the State, and administered through SAHRA. Heritage resources are organised on a hierarchical grading system according to their significance. Grade I, II and III heritage resources are intended to be managed by the National Heritage Body, Provincial and local heritage bodies respectively (s6). Although all heritage objects are considered part of the national estate (s3(1)), their significance is categorized along local, provincial and national lines (s7). Their categorization along these lines links directly with the delineation of management authorities for Grade I, II and III heritage resources. The powers of SAHRA are delegated to provincial or local heritage authorities when the significance of the heritage resource is in Grades II and III. This means that SAHRA is intended to manages only Grade I heritage resources, while provincial and local heritage bodies manage Grades II and III.

The Heritage Act describes heritage as a unique and precious resource, which can in no way be renewed. The Act claims that heritage is at the centre of our spiritual wellbeing, and a resource in the promotion of a national South African identity. The Act seeks to promote and protect heritage for the enjoyment of future

generations, and considers heritage a fundamental aspect of a united South African identity. The Heritage Act states that heritage resources have a lasting value in their own right, as well as an important role in structuring individual and national identities (s5(1)(a)&(c)). Each generation is mandated with the protection of such valuable, finite and irreplaceable heritage (s5(1)(a)). Cultural heritage is defined by s2(xvi)&(vi) as any place or object of historical, social or spiritual value or significance. Living heritage is defined as cultural tradition, oral history, performance and ritual significant to the cultural life of a community (s2(xxi)).

5.3. Ancestral Graves.

The Heritage Act defines a grave as any place of internment, including the contents, headstone (or other grave markers) and any structural marker of the place (s2(xiii)). Graves are also referred to as 'heritage resources' (end noted s2(xvi)). Section 3(2)(g)(i) expressly includes the definition of ancestral graves which are of cultural significance to present communities. This general definition and 'blanket' protection is given further detail in s36 (Burial Grounds and Graves). In this section, graves are categorised along administrative divides. Graves are first divided between those inside and outside of a formal cemetery. Those outside a formal cemetery are further divided between graves younger and older than 60 years old.

No person may alter a grave which is over the age of 60 years (36(3)(b)) in any way without first obtaining permission from SAHRA (s36(3)(a)). SAHRA is mandated with considerations of the 'proper arrangement' for the removal and re-internment of these graves (s36(3)(b)). No such grave may be altered without a permit from SAHRA. This permit should only be granted once SAHRA is confident that adequate arrangements have been made for the process of alteration (relocation) contemplated by the applicant (s36(4)). For this the applicant must make a concerted effort to contact and consult with communities and individuals who by tradition have an interest in the graves (s36(5)(a). The applicant must also

show evidence of agreement with these individuals or communities regarding the future of the graves (s36(5)(b)).

5.4. Application to SAHRA for the alteration of graves

For any development defined by section 38(1)[80], the developer must, at the earliest convenience, contact SAHRA and inform them of the intended development (s38(1)). SAHRA then has the opportunity to consider if the development will affect any aspect of heritage and instruct the developer to submit a Heritage Impact Assessment (s38(2)). SAHRA can also instruct the developer to contact a provincial or local heritage authority if it decides the heritage should be administered on a provincial or local level.

The heritage report may include any specific aspects that the relevant heritage authority has stipulated, as well as the following (38(3)):
-The identification and mapping of all heritage resources within the proposed development area (s38(3)(a))
-An assessment of the significance of the heritage along the Grading system discussed above (s38(3)(b))
-An assessment of the impact that the development will have on the heritage, including consideration of socio-economic impacts (s38(3)(c)&(d))
-Results of consultations with communities whose heritage will be affected by the development, as well as any other interested parties (s38(3)(e)&(f))

[80] The construction of road, wall, power line, pipeline, canal or similar construction, or barrier longer than 300m (38(1)(a)), the construction of a bridge or similar structure longer than 50m (38(1)(b)), any development which will change the character of a site exceeding 5 000m2 (38(1)(c)(i)), involve three or more subdivisions of a site (38(1)(c)(ii)), will involve similar subdivisions which have been consolidated in the last three years (38(1)(c)(iii)), incur costs in excess of SAHRA's regulations (38(1)(c)(iv)), the rezoning of a site more than 10 000m2 in diameter (38(1)(d) or any category of action declared by the regulations of SAHRA (38(1)(e)), fall within this category.

Once SAHRA has considered this report, it can, in consultation with the developer, decide on an appropriate method of development which takes into consideration the value of the heritage resource which will be affected. In the case of grave relocations, SAHRA will assist the developer with the correct procedures of exhumation, and only issue a permit for this exhumation to a qualified archaeologist with relevant field experience (SAHRA.BGGU 2009b). They will also only issue a permit for the relocation of these graves if they are satisfied that the community traditionally connected to the graves has agreed to the process, and has provided free and informed consent (SAHRA.BGGU 2009a). These protections, however, only cover graves over 60 years old and outside a formal cemetery.

To relocate graves under 60 years old and outside a formal cemetery, permission from the provincial or local heritage authority is needed. There are no formalized guidelines for this application process, no definite framework for consultation with communities, nor is there a concrete understanding of what constitutes a local heritage authority.

Graves inside a formal cemetery require permission from the local municipality as well as the provincial health department. There is also no set process of application covering such graves, nor any definite framework for community consultation.

If the Heritage Impact Assessment identifies any graves older than 60 years old and outside of a formal cemetery which will be affected by the development, specific guidelines exist for an application to SAHRA (s36, Heritage Act. s2, SAHRA Guidelines). These involve specific considerations of consultation with, and consent from, the local community or individuals traditionally connected to the graves concerning the future of those graves (s1. SAHRA Guidelines. (SAHRA 2009))

After considering the Heritage Impact Assessment provided by the developer, SAHRA will decide if the development is permitted to continue (s38 (4) (a)), if any compensation is due to the community (s38 (4) (d)) and if there is a need to appoint a specialist to the process (s38 (4) (e)) (Heritage Act). Cultural heritage is important to living communities as a part of their history and beliefs. These communities are entitled to consultation and participation in decisions concerning the alteration of their heritage (s5(4)).

5.5. Conflicting Acts

Section 38(8) of the Heritage Act stipulates that if an application for development is governed by any other Act, that process of application must take precedent over the process stipulated in the Heritage Act. The Minerals and Petroleum Resources and Development Act (28 of 2002) expects an application for mining development to be submitted to the regional office of the Department of Minerals and Energy (s10(1)). If the application is done in the prescribed manner, the office will instruct the applicant to complete an Environmental Impact Assessment, and stipulate any specific inclusions for the assessment (s22). The application must include evidence of consultation with interested parties, including lawful occupants of the land (s27).

According to the Development Regulations of the Minerals and Petroleum Resources Act[81], the impact assessment must also include social and cultural impacts of the development (s49(1)(c), s50(c)) and describe how interested parties were contacted, as well as the agreements reached between them and the developer (s49(1)(e), s50(f)).

The regional office should then submit portions of the EIA to the relevant State organs, which includes the South African Heritage Resources Agency. These State organs must approve the relevant sections of the report, and can contact the

[81] Minerals and Petroleum Resources and Development Act 28 of 2002. Minerals and Petroleum Resources and Development Regulations.

developer directly to require amendments (s49(2)-(6)). Once the application is approved, the developer must also submit a management plan which considers the impact on the environment, as well as historic and cultural aspects which will be effected by the development (s51(a)(iv)). The management plan must conform to provisions within the National Environmental Management Act (107 of 1998) as well as the Heritage Act (s37(1), s39(3)). This management plan is also subject to review by the relevant State organs to which portions of the EIA were submitted, who must receive the management plan from the Regional office on behalf of the developer.

The National Environmental Management Act (NEMA) attempts to consolidate the application and management processes along lines of co-operative government (NEMA. Preamble). According to this Act, the submission of all applications for development to different departments must also be considered by the Committee for Environmental Co-ordination (s1). Issues of cultural heritage must be incorporated into the EIA (s1(1)(1)(iv), s1(2)), and then considered by the Committee in consultation with the South African Heritage Resources Agency. The Committee is to receive submissions from various authorities in different fields, and provide the final authority on the permission to proceed with development.

Similarly, the National Heritage Resources Act attempts to create a consolidated process of heritage management. This attempt fails as many applications are submitted to other authorities, who are not necessarily aware of their mandate to forward sections of the EIA to SAHRA.

5.6. Confusion over application procedures

The first step is the developer's intention to develop a piece of land, for which they will need permits from various State departments. These may include an Environmental Impact Assessment, in which the Cultural (or Heritage) Impact Assessment often forms a section. The criteria for performing a Cultural Impact

Assessment (CIA) is set out by the Heritage Act, wherein the developer must explain certain concerns for the impact on cultural heritage.

The heritage practitioner compiling this report is expected to state the existence of traditional graves, and inform the developer of the legalities surrounding these. If the graves are under 60 years old, the heritage practitioner should advise the developer to apply to the appropriate provincial or local authorities. This will be the municipality, the health department, and any other local authority that has an interest in the graves. These authorities, in theory, will need to be furnished with evidence of consent from living relatives for the relocation of the graves.

If the graves are over 60 years old, permission for their relocation must come from SAHRA. SAHRA's guidelines make it clear that permission will only be given if adequate consent to the relocation is given by living relatives. Also, permits to exhume the graves are only issued to qualified heritage practitioners, who have the relevant understanding of traditional graves as well as the necessary field experience. No permit for relocation will be issued by any of these authorities before they are satisfied that the living relatives are content with the agreements for relocation and have accepted all the terms relating to the future of the grave.

Although simple, this process is fraught with loopholes that are easily exploited by negligent individuals. First, the identification of traditional graves in a given area rests entirely on the skill of the heritage practitioner. In cases where these practitioners have not properly surveyed the development site, not specifically mentioned the existence of traditional graves, or been persuaded to neglect this mention, the existence of these graves cannot come to the attention of any protective authority. Further, there is no structural system by which such heritage practitioners are policed, making it difficult for developers to judge the quality of the Cultural/Heritage Impact Assessment (CIA/HIA), or the heritage practitioner.

Second, even if traditional graves are noted, their exact age may be omitted. Or the CIA may not specifically mention the need to contact SAHRA if the graves are over 60 years old. In fact, the CIA may not mention any criteria for the relocation of these graves, and since no heritage authority has been made aware of the existence of the graves, or the intention to move them, they can easily be relocated 'under the radar'. A suspicious general trend is the application for permission to local heritage authorities instead of SAHRA. These include the municipality, provincial health department, and Tribal authorities. These authoritative bodies are entirely inept at understanding the technicalities of traditional graves, their cultural significance, or their legal status. And even when such authorities are aware of there issues, they seem to be easily convinced to give permission for relocation in exchange for benefits. There is no manner of policing the adequacy of this permission.

Finally, the legal requirements for community engagement are simply too vague. Consent has frequently been interpreted in the slightest of manners to mean a signature on a form. There is no mechanism by which authorities can check on the legitimacy of this signature. These forms are often the result of coercion, bribery, intimidation and blatant fraud. Yet the State authority giving permission for the relocation of the graves has no means of verifying this consent, save personal inquiry.

5.7. Some general legal difficulties

Sections dealing with community involvement are vague. The Heritage Act sees SAHRA as the ultimate authority on all decisions of heritage. Nowhere is SAHRA expressly required to obtain the opinion of the community whose heritage will be affected. Where community participation is mentioned, no structural explanation of this participation is defined. This results in communities often being left out of decisions concerning their heritage.

Heritage conservation is far more complex than the Heritage Act recognizes. With multiple players in any situation, the heritage body is not given adequate instruction on how to engage these actors, nor to what extent such engagement is fundamental to the development of adequate heritage protection programs (Kamamba 2009).

The definition of heritage in the Heritage Act is also problematic. The Act sets out to protect mostly physical heritage objects. Although descriptions are given of 'living heritage' including beliefs, traditions, customs, oral history and indigenous knowledge, there is no mechanism in the Act for protecting this heritage. The role of SAHRA in the promotion of this heritage is also unclear.

The Heritage Act attempts to avoid over-rigidity by introducing the declaration mechanism of SAHRA. This allows SAHRA to declare any place or object as heritage. This avoids the difficulty of an over rigid definition of heritage, as the scope can then be determined by ad hoc declarations of SAHRA. On the other hand, there are no guidelines for this declaration. SAHRA are given no instructions of the general considerations for the declaration of a heritage object. Also, there are no criteria for the appointment of individuals to SAHRA.

The problems mentioned above become more evident when applied to actual situations. The explanation of cases where graves were improperly relocated serves to illustrate these problems further.

5.8. Specific difficulties with the Heritage Act in relation to the Sekuruwe relocations

5.8.1. Cultural/Heritage Impact Assessment

The original impact assessment for Sekuruwe mentioned only the existence of graves on the property, which would need to be moved. This implied first that it was permissible to relocate them, and also failed to provide any specific

guidelines to the developer concerning the procedure for this relocation[82]. The mine stated that it was aware of the requirement of permission from SAHRA for the relocation of graves over the age of 60 years old[83]. Yet they maintain that they were unaware (given the initial environmental report) that any graves of this age were present[84]. Permission for relocation was then never requested from SAHRA, and the Burial Grounds and Graves Unit were never informed about the relocations until after the fact.

Usually, the developer will only apply to SAHRA if they are expressly informed of this requirement by the Cultural Impact Assessment section of the Environmental Impact Assessment. When these reports are inadequately done, the loophole created allows the developer to either ignore the existence of the graves entirely, or treat all graves as though they do not require permission for relocation from SAHRA. A problem arises where the original heritage impact assessment fails to specifically mention the impact on heritage, the age of the graves or the fact that permission for their alteration will need to be obtained from SAHRA if they are found to be older than 60 years old. Since SAHRA will not be contacted under these circumstances, impact on cultural heritage in connection with the traditional graves will not come to their attention, which is what happened in the case of the Sekuruwe graves.

[82] I have not personally obtained this impact assessment, and rely on an interview with Gregory Morris where he explained the contents of the report. 12.08.2009 – Interview with G. Morris. Project manager, Anglo Platinum. Marshaltown, Johannesburg.

[83] 12.08.2009 – Interview with G. Morris. Project manager, Anglo Platinum. Marshaltown, Johannesburg.

[84]The difficulties encountered by the fact that various legal structures and government bodies cover similar aspects of development (ie. Environment and heritage) may be a contributing factor to the difficulties discussed in this thesis. The multiple layers of legislation may be the defining factor in the state's inability to enforce decent management of heritage resources.

5.8.2. Consent

5.8.2.1. The Section 21

Disdain for mine appointed section 21s seems common in the Mapela area. If not actually called section 21's, intermediary consulting bodies are often set up by the mines, and usually have some level of community participation by appointing members of the community to some form of council.

Sekuruwe's Section 21 is particularly problematic. Once set up, members of the Section 21 enjoyed relative autonomy. There were no mechanisms of accountability to the community, and members could also not be removed. The mine also financed the legal advisors of the Section 21, and seemed to have negotiated with them (the section 21) exclusively. Members also receive a stipend from the mine. In this rural community where income is scarce, this is a contentious point of resentment (Action Aid 2008).

This company, as the 'official' voice in the relocation negotiations, were tasked with collecting consent for the mine. The community's feelings towards the Section 21 at the time of relocations is unclear, but today members of the Section 21 are generally distrusted and disliked. Sekuruwe feels that they coerced consent from some relatives, fraudulently obtained it from others, and were generally the puppets of the mine. The Section 21 is also fingered in the accusations concerning the invented graves. Along with Phuti, it seems the autonomous functioning of the Section 21 allowed their fraud and negligence to go unchecked.

The Section 21 does not represent an adequate mediation body between Sekuruwe and the mine. The members of Section 21 had no training or experience in mediation, and could not be expected to understand the complexities of consent for the relocation of ancestral graves. They can also not be seen as an adequate representative body of the community. That is to say that any negotiations between the mine and the Section 21 cannot be generalized to mean consultation

between the mine and Sekuruwe. The Section 21had no means of transparency, community reporting or control. There was no known means by which the opinion of any member of Sekuruwe could be voiced through the Section 21. Finally the tainted image of the Section 21, through which all negotiations were conducted, brings the consent obtained into question.

5.8.2.2. Consultation

As discussed in Chapter Two, the sentiments of Sekuruwe regarding consultation are also echoed by other communities. Many state that they did not fully understand the procedures and implications of the relocation. The problem of language was also raised. Most of the official documentation was in English. Although conversations with the Section 21 presumably happened in Pedi, any interactions with the mine would have been done in English, which many cannot understand.

Testimony has also been given that the Section 21 actively coerced consent from relatives. Some state they were told the relocation was a foregone conclusion, and the (consent) forms were only to claim the compensation. Others were told that the grave would be buried under the tailings dam if they did not consent to its relocation. Some allude to verbal pressure and threats.

The community also testified that the Section 21 actively sought out older community members, particularly women, whom they knew would not understand what was happening. They may also have coerced random community members to sign consent forms if the relative refused.

No-one was informed of their right to refuse the relocation of their ancestral grave. Nor was anyone informed that they had the right to request a ritual ceremony, and demand to be present at the exhumation and reburial. None of these provisions are expressly included in the legislation.

Of those who signed consent for relocation, a large proportion claim they either did not understand the process, or felt they were coerced into signing. Consent obtained in such circumstances cannot be legitimate.

5.8.2.3. Next-of-kin

As mentioned above, the Section 21 may have obtained consent from irrelevant community members if the family member refused. This was the case with Mr Shiburi, whose grandfather's grave was relocated with consent from his (Mr Shiburi's) cousin. This raised the problem of legitimate relationships, as both Mr Shiburi and his cousin are direct grandchildren of the deceased. In the case of conflict between living relatives over the relocation of a grave, the legislation provides no guidance whatsoever.

5.8.2.4. Compensation

R1500 is a lot of money in a place like Sekuruwe. Jobs are very scarce, and most people rely on pensions and pitiably small-scale agriculture in sandy soils. Greed for this compensation underpinned a lot of the complications. It enticed community members to give consent for graves that were not their own. The Section 21 may also have had a few deals for the invention of graves to capitalize on the compensation. The compensation is also said to have been used to 'trick' older people into giving consent without understanding what was happening.

Although compensation is a legal requirement (prescribed by the Heritage Act), no guidance is given on the amount, mechanism of payment or any other factor relating to the compensation.

5.8.3. Process

Although the Heritage Act covers ancestral grave relocations specifically, it does not provide a schedule for this. SAHRA's policies provide only outlined

principles, but do not provide a detailed enough explanation. This allowed the mine, Phuti and the Section 21 to generate their own procedures as they went along. The procedure agreed upon between the mine and Phuti would never have been approved by SAHRA, but was unfortunately not brought to their attention until after the fact.

5.8.4. Community awareness

Most communities in the areas I have visited were unaware of their legal rights in relation to their ancestral graves. This allows mines (or other developers) to negotiate relocations on their own terms. Communities are not aware that they are entitled to decent compensation, to ritual ceremonies or have the right to refuse the relocation. In cases where consent for the relocation was negotiated between the mine and another authority (usually the tribal authority) the community is unaware that they can refuse this agreement. Communities are also unaware of who to contact should they be unhappy with the process of grave relocations, and they often feel they have no line of recourse. This further allows the mines to relocate graves in whichever way they decide, knowing the communities will be unable to resist, or even complain about the process[85].

As described in Chapter Two, increased awareness of the legislation led to more communities claiming rights from mines. The high impact of knowledge of the legal protections can be seen through the communities' uses of the Heritage Acts' own terminology. Colwell-Chanthaponh (2004) describes the tacit structuring of legislation on communities' perceptions of the past, as they (in Sekuruwe's case) refer to the importance of the 60 year divide, the consultation process, and their cultural heritage, all of which is primarily defined by the Heritage Act itself.

[85] Due to increased publicity of Sekuruwe's case, this shortfall has begun to change as more and more communities become aware of their rights and how to claim them. The capacity of SAHRA to respond to allegations of improper grave relocations from communities needs to be further developed.

5.9. Conclusion

Although legal protections exist to ensure that ancestral graves are relocated with adequate dignity, the implementation of these protections has proved their inadequacy. The Sekuruwe and other cases of grave relocation are undoubtedly the result of negligence on the part of the mine, and misconduct on the part of the undertaker. Although this case resulted from the misconduct of these bodies, the legislation itself provided the shortfalls which were easily exploited.

Understanding the importance of ancestral graves to the cultural lives of these communities is paramount to adequate legal protection. Communities, and those with spiritual connections to the ancestors, must be given authority over the future of these graves. These individuals need to be incorporated into negotiations for the relocation, and must also be given authority to oversee the process of exhumation and reburial. Oversight for the process of relocation must also be provided to ensure that negotiations are fair, that there is proper consent, and the relocations carried out with the respect required for ancestral graves.

Although these conditions are incorporated into current legislative protections, the implementation of these shows their inefficiency. The authority of an oversight body, along with the proper consent of the community, must be properly incorporated into the procedure of permit application. I do not suppose that better legal protections will automatically remedy the problems detailed in this thesis, since many relate specifically to the implementation of already existing protections. To ensure that ancestral graves are adequately protected however, the legislation, application process and managerial implementations must all be reviewed, consolidated and properly implemented. The recommendations of this thesis focus specifically on the legal protections, which will only be effectual if properly implemented. Although I consider aspects of implementation, and the management structure of permits, these can only operate efficiently if the underlying legislation is adequate.

In the next Chapter I explore the implications of these legal shortfalls, which resulted ultimately in the systemic oppression of the Sekuruwe community through the mistreatment of their ancestral graves.

CHAPTER SIX:
VIOLENCE AGAINST THE ANCESTORS

> ...oppression also refers to systemic constraints on groups that are not necessarily the result of the intentions of a tyrant. Oppression in this sense is structural, rather than the result of a few people's choices or policies. Young (1990: 41)

6.1. Introduction

By alleging that the mine disrespected their ancestral graves, Sekuruwe makes a specific legal claim. This is a claim on the Heritage Act and the Constitution, which protects their right to enjoy their cultural life. This cultural *right* gives Sekuruwe the leverage they require to influence the actions of the mine. In the Chapters above I discussed the broader implications of Sekuruwe's claims, which are not only about cultural insensitivity, but also the injustices they feel at the hands of the mine. This Chapter explores the implications of Sekuruwe's claims and aims to understand the legislative loopholes explained in Chapter Five, and their culpability in the injustices against Sekuruwe.

This Chapter applies Iris Marian Young's definition of systemic oppression in *Justice and the Politics of Difference* (1990) and situates Sekuruwe's grave relocations in the context of systemic marginalization, powerlessness, cultural imperialism, and violence. Sekuruwe's claims of cultural rights violations centre on three dissatisfactions: the community was not given adequate opportunity to decide on the treatment of their ancestors; the disrespect paid to these ancestors by the exhumations, which damaged and lost bones; and the affront to their cultural norms, and infringement of their cultural rights.

The spiritual relationship between Sekuruwe and their ancestors was irreparably damaged, and the damage to the graves and disrespect paid to the ancestors were

carried out without the full and fair consent of the Sekuruwe community. This Chapter considers the claim to cultural respect for the ancestors as an invocation of heritage similar to that explained by Comaroff and Comaroff (2009): representations of the veneration of the ancestors are a mobilisation of Sekuruwe's cultural identity towards a specific political end. This mobilisation is specifically aimed at conflict with the mine. In this case claims to heritage and culture are not solely political or economic as Comaroff and Comaroff's Ethnicity Inc. (2009), but seek specific redress for the indignity suffered by the ancestors and the community. They are the identification with cultural concepts of the ancestors to ensure that cultural dignity is restored to these spirits through the proper reburial of their remains. This redress involves the appeasement of the ancestors so that the spiritual connection between them and the community can be restored.

This Chapter first outlines what I take as the social group of Sekuruwe, based on definitions given by Young (1990). I consider the identification with the ancestors: Sekuruwe is described as a collective of people actively identifying with the cultural veneration of the ancestors. Members of Sekuruwe community who are actively involved with debates against the mine, community members who identify with the collective appeal for cultural respect for their ancestral graves, and community members less enthusiastically disgruntled with the mine over its treatment of the community and the disrespect they paid to their ancestral graves, all form part of this group.

Second, I relate concerns raised by Sekuruwe concerning the cultural disrespect paid to their ancestors. Here I relate the voices of Sekuruwe in their appeals for the respect of their ancestors, and understand what exactly the community is claiming as their right to cultural life. I then introduce Young's concept of injustice as the exercise of domination and oppression. I point to situations throughout the relocation of the ancestral graves to support my argument that Sekuruwe has suffered systemic marginalization, powerlessness, cultural imperialism and violence.

Third, I explain the role of law and the heritage management system in the perpetration and perpetuation of these injustices, and suggest that these problems relate as much to *systemic* injustices as to the actions of the individuals concerned. I conclude that heritage legislation has determined a large aspect of the way in which this case has progressed so far, and I argue that adequate thought needs to be dedicated to ensuring the that law properly protects the cultural rights of this and other communities in the future.

6.2. Sekuruwe

In Chapter Two I described my involvement with the Sekuruwe case, as a researcher, through the LRC and other NGOs. This thesis represents a synthesis of information gained from the various sources: the community as a collective, the Community Council, specific member of the community, the mine and other bodies. The details of Sekuruwe's grave relocations synthesised in Chapter Two are the result of numerous voices from the community. By listening to these varied voices an understanding can be given of the general responses of the community, their feelings towards the mine, and how their ancestors were treated. Because it is not possible for me to understand the intricacies of the experiences of Sekuruwe, I frame my understanding in terms of Young's definition of systemic oppression. I also use her definition of a social group to understand the variability of Sekuruwe's identification with the ancestors, and experiences of the relocation of their ancestral graves.

Members of Sekuruwe village feel different levels of connection to the ancestors. For some, the ancestral graves represent the centre of their lives, as these graves were visited frequently to communicate with the spirits of the ancestors. At the other end of the spectrum, younger members of the community seem not to regard the ancestral graves as vital to their daily lives, and do not experience the influence of the ancestors on their emotional wellbeing. At the extreme, it appears that some community members have no regard for the cultural importance of the

ancestors, but are only concerned with these graves for political/economic reasons. Despite these variations, the general identification with the ancestral spirits and graves by many members of the community relates to the overarching concept of the importance of the ancestors described in Chapter Three.

According to Young, a social collective encompasses a group of individuals who actively identify with each other, and have a specific affinity with other members of the same group with whom they share specific similarities (Young 1990: 43). For the Sekuruwe community, a collective identity can be described by various aspects of their identification with the importance of their ancestral graves. Individuals of the community are identified by their ancestral belief system, and their cultural ways of life. This includes the cultural respect paid to the graves of their ancestors. They also identify with one another in terms of their experience of ill treatment at the hands of the mine. Those relocated by the mine in 2006 all feel a common anger at having the decisions of the relocation imposed on them, and feel that the mine has not fulfilled the promises they made for the construction of buildings and upgrading of roads[86]. They also feel a common outrage at being deceived by the mine's employment of the Section 21 to manage the negotiations, both for their initial relocation as well as the relocation of their ancestral graves. This they feel was a tactic employed by the mine to limit the contribution made by the community to the negotiations, and a mechanism used by the mine to cause conflict within the community. The community also collectively identifies with the importance of the ancestral graves, at least for the fact that they feel they were not given adequate opportunity to determine the future of these graves, and that these decisions were made by the deceptive tactics of the mine, the Section 21, Phuti and the Tribal Authority. The final collective identification can also be expressed as a negative stance against the mine: the community is opposed to the mine's actions in their dubious conclusion of the lease agreement, and their construction of the tailings dam despite numerous requests for this to stop.

[86] Ironically, the mine's settlement offer includes provision for the building of a clinic and the upgrading of roads. These provisions were contained in the original lease agreement, which was contested by the community as invalid.

Essentially, Sekuruwe can be understood through three aspects of social collectively. First, their collective cultural veneration of the ancestors and their graves binds them in a community of similar cultural identities. Second, the feeling of collective injustice has 'imposed' a sense of community through the common experience of trauma. Alan Petersen and Deborah Lupton (1996) describe this as the site of shared injustice, of a sense of solidarity and resistance. It is this common experience which forms individuals, strategically, into a community. Third, the mine as a common 'enemy' has also grouped members of this and other communities into 'strategic collectives' of individuals (Petersen & Lupton 1996). Each of these aspects of identification as a social collective relates to the communal, and cultural identification with the importance of the ancestors, their remains, spirits and graves.

The community of Sekuruwe can also be described by Lipe's (1984) description of heritage: as a vehicle through which we access identity. Here a common heritage can serve as an identifying aspect which relates people to each other, and separates them from others.

It is this loose collection of community members who all identify on some level and in some way with the struggle against the imposition of the mine's authority on their lives that represents the community of Sekuruwe. Other political and economic struggles are also enmeshed with Sekuruwe's identification with the importance of their ancestral graves.

6.3. Sekuruwe's identification with the ancestors

Sekuruwe claims that the ancestors are important to their spiritual and emotional wellbeing, and that respect of their ancestral graves is part of this importance. In Chapter Three I outlined Sekuruwe's descriptions of the ancestral spirits, and their descriptions of respect paid to their graves. The ancestors are a central focus of

Sekuruwe's cultural lives because the ancestral spirits assure the good fortune of the community.

As discussed in Chapters Two and Three, the community states that the manner of exhumation disrespected their ancestors by damaging, destroying and sometimes misplacing their remains. They also state that they were not given adequate opportunity to engage in discussions concerning this exhumation, and feel that the decisions about the relocation were taken by others. They claim that the improper relocation of their ancestral graves brought about the displeasure of the ancestral spirits. This has brought misfortune to the community as their ancestors no longer provide benevolent protection. This is exacerbated by the fact that the community is unable to apologise to the ancestors for the disrespect paid to them: they are unable to communicate with their ancestors since their remains have not yet been reburied.

The exhumation of Sekuruwe's ancestral graves in 2008 resulted ultimately in the infringement of Sekuruwe's cultural rights by disregarding their cultural norms, disrespecting their ancestors, and denying them the opportunity for adequate engagement concerning the future of their ancestral graves.

6.4. Systemic oppression, *Justice and the Politics of Difference*

Young (1990) outlines a critique of contemporary concepts of justice which, she argues, are based on distributive concepts: dividing fixed resources amongst individuals. All modern democracies base concepts of justice on the distribution of resources and, in liberal democracies, social assets and 'rights'. Young (1990) exposes difficulties with this distributive concept of justice, one being that social assets (such as rights) are difficult to conceive of as distributable. According to Young, rights are 'relationships, not things, they are institutionally defined rules specifying what people can do in relation to one another. Rights refer to doing more than having, to social relations that enable or constrain action' (Young 1990: 25). Justice is then the ability of every individual, as well as all collectives of

individuals, to have an active role in deciding the norms and rules of the system in which they exercise these rights (Young 1990: 34). The ability to interact with an overarching structural framework to decide on the norms and rights affecting individuals and communities is defined as 'opportunity', which is a 'concept of enablement rather than possession; it refers to *doing* more than having. A person has opportunities if he or she is not constrained from doing things' (Young 1990: 26). Social justice is then a debate concerning not the distribution of resources or rights, but a debate around the institutional conditions necessary for the development and exercise of individual and group rights. Oppression, according to Young, is the disabling or restraint of any conditions necessary for the full operation of these rights (Young 1990: 39). Young defines five 'faces' of systemic oppression, which is the institutional limitation of certain rights by virtue of limiting the enabling conditions of these rights. Below I argue that Sekuruwe's grave relocations are evidence of Young's conception of marginalization, powerlessness, cultural imperialism and violence. It will become apparent that these oppressions resulted as much from the structural systems of heritage legislation and management as they did from the actions of the individuals and companies involved.

6.4.1. Marginalization

Young (1990:54) describes the occurrence of marginalization as a group experiencing decisions that are taken by other (usually higher) authorities. The end results of these decisions are then enforced on the group without their consultation or consent. As Discussed above, the Sekuruwe community claims that the decisions concerning the relocation of their ancestral graves were taken by the mine and the Section 21 company. They claim that the Section 21 was financially manipulated by the mine. They also claim that the community and those directly related to the ancestral graves were not consulted, or were improperly consulted for their consent for the relocation of these graves. They further state that in cases where consultation did take place with the community it was manipulated by the fraud of the undertaker and the Section 21. The

community was also not involved in the decisions concerning the exact manner of exhumation and reburial. This decision was taken in discussion between the mine and the undertaker, and the results of this decision inflicted on the graves of Sekuruwe, and on the community.

The improper negotiations between the mine and the community of Sekuruwe resulted from two factors. First, the legal requirements for consultation and consent are poorly defined in the Heritage Act. The mine also did not concern itself with the protections offered by the Heritage Act as they did not recognise any graves as over 60 years old and requiring the involvement of SAHRA. This permitted the mine to use the simplest, and most expedient and malleable mechanism of community engagement by constituting a Section 21company. It also permitted the mine to determine its own minimum requirements for consent: having a signature at the end of a page stating that the grave/s may be relocated. The regulations' poor definition of consent also permitted the mine to construct its own schedule of exhumation in discussion with the undertaker. The community of Sekuruwe was not given the opportunity to debate these plans, determine the culturally appropriate manner in which the graves should be exhumed, or to decide on the cultural ceremonies which should have accompanied the relocation of their ancestral graves. The loose definition of 'consultation' in the Heritage Act has also resulted in uncertainty about the rights of communities: which aspects of the relocation are they entitled to determine.

Second, the lack of any oversight bodies allowed the mine to act very much autocratically in its decisions over the future of Sekuruwe's ancestral graves. The Heritage Act requires that SAHRA issue a permit for the relocation of any graves over the age of 60 years old. This permit is supposed to be considered on the basis of adequate community consultation, and only issued to a qualified archaeologist. Confusion over the exact process of application to SAHRA, and the poorly publicised nature of these regulations caused the mine to refrain from making this

application[87]. This resulted in SAHRA's absence from the case until after the ancestral graves had been irreparably damaged by their exhumation with the back-actor. This also excluded SAHRA from ensuring that proper negotiations had taken place between the mine and the community, and also prevented them from appointing a qualified archaeologist to deal with the exhumations.

6.4.2. Powerlessness

Young (1990: 56) defines powerlessness as the experience of being unable to approach any adequate (state) organization for recourse to an injustice suffered. This involves first the experience of not having any, or not knowing which, authoritative body to approach with a complaint. Second it involves the inability of many authoritative bodies to act decisively in response to such a complaint, which ultimately results in neglecting the injustice complained of. Sekuruwe's first appeal for assistance was to the police. They claim that the police visited Blinkwater after the exhumations on their request and saw human remains strewn on the surface of the exhumed graves (Roodt 2010). The community claims that these bones were collected by the police, who apparently handed them to the mine, claiming that it was the mine's responsibility to address the complaints[88]. National ministers of various departments have also been appealed to throughout this case. These include the ministers of Rural Development, Mineral resources, Land and Agriculture, and the Provincial Premier. Most communications have received no response, while some responses were inadequate or severely late. The community has also sought assistance from NGO's such as Action Aid, Jubilee South Africa and AINRA. These organizations have also appealed to government departments for assistance on behalf of the community, but have also received little response. The chief legal assistance for the community came ultimately from

[87] 12.08.2009 – Interview with G. Morris. Project manager, Anglo Platinum. Marshaltown, Johannesburg.

[88] The relationship between the community and the mine is also strained because of the arrests during the exhumation in 2008. Community members have been charged with assault, an allegation they struggle to contest given their limited resources.

the Legal Resources Centre, who had been assisting the community with the court application for the review of the lease of Blinkwater farm and their subsequent relocation. The LRC and other organizations have raised enough public awareness and political pressure to lead to a presidential visit to Sekuruwe village in 2009 and 2011[89]. The mine stopped construction on the tailings dam after these visits, and negotiations were almost instantly begun for the final reburial of the remains, and the payment of compensation. As in 2009, the State 2011 visit's impact may already be wearing off, while negotiations halt for the community to submit the details required for the cultural reburial.

The community also previously appealed to SAHRA, but to a provincial branch, with the main office only becoming aware of the situation much later. The Burial Grounds and Graves Unit then became involved in the investigation of the case. SAHRA was instrumental in recommending the initial re-exhumations, which revealed the negligence with which the graves had been relocated. SAHRA has also been a vital authority on the improper nature of these exhumations, and contributed to instigating other organizations such as the South African Human Rights Commission to investigate the case further. After investigations in 2008 SAHRA reported that the exhumations showed clear negligence, and that all the relocated graves needed to be re-exhumed. In this report sent to the mine, they also requested the mine to halt construction on Blinkwater farm until the graves had been re-exhumed, reassembled and properly reburied[90]. Construction had semi-halted until the graves on Blinkwater had been exhumed, but did not allow searches for missing skeletal parts. Construction resumed almost immediately after the original graves had been re-excavated and their contents removed, also shortly after each State visit.

[89] Both visits to Sekuruwe in 2009 and 2011 by a high ranking government officials coincided precisely with upcoming elections. These visits caused the mine to halt operations for a time in each case.

[90] Letter from SAHRA to Anglo Platinum. 22.02.2009. ('Meeting with SAHRA Burial Grounds and Graves regarding grave exhumations and relocation at Blinkwater 820 LR')

The legal authority of SAHRA over such matters is poorly defined in the Heritage Act. It is unclear if SAHRA has the legal capacity to find the actions of the mine negligent and in contravention of the Heritage Act, or if such decisions can only be made by a court. Also, the authority of SAHRA to demand any remedying action from the mine is not properly understood, nor whether such demands would also need to be enforced by a court. The fact that the community was, at the time, unaware of the existence of SAHRA, the fact that only SAHRA can provide permission for the exhumation of certain graves, or that SAHRA could have been of any assistance in terms of recourse, further contributes to the powerlessness of the community.

6.4.3. Cultural imperialism

Young's description of cultural imperialism focuses on issues of representation and silence. In her conception, the dominant culture has the power to silence voices from subservient cultures, as well as represent them according to their own biased constructs (1990: 59). In Sekuruwe's case, cultural imperialism can be more broadly defined. In this case I think cultural imperialism involves the neglect of a group's cultural norms. It envolves the knowledge that a specific group has cultural beliefs relating to their ancestral graves, and not permitting them decisions over those graves. For Sekuruwe, this was experienced by the disrespect paid to their ancestral graves resulting from the collaboration of the mine, the undertaker and the Section 21 company, for all the reasons introduced above. This cultural imperialism occurred especially because of the marginalization and powerlessness of Sekuruwe, leaving the mine able to drive its own agenda, as well as the undertaker and the Section 21 to act according to their own decisions.

In essence Sekuruwe's ancestral beliefs were disregarded in light of the national agenda for development. The concerns of rural communities are of little consequence to State departments when considering the development of further mining. This is evident in the States conclusion of the lease over Blinkwater farm

without any knowledge of the effects this may have on Sekuruwe's lives, livelihoods, and spiritual wellbeing. It should also be noted that the lease was signed even after the LRC had appealed to the minister stating that the community was not satisfied with the conditions of the lease[91].

Although there is a larger debate about cultural imperialism which has silenced and obscured the voices of Sekuruwe, this thesis focuses only on the treatment of their ancestral graves. In a broader debate, Sekuruwe may represent 'collateral damage' in the agendas of development and capital adopted by the mine, Tribal Authority and Provincial departments. Laurajane Smith's (2006) concept of heritage is a collection of values from the past forming one narrative. Applied to Sekuruwe, national heritage would be the values of the past serving a nationalist agenda; seeking to promote one collective history. In such a scenario the protection of rural ancestral graves, which threaten the expansion of mining, would be a low priority.

Laplante and Spears (2008) claim that 'extractive industry expansions are located near communities that are marginalized geographically, economically and politically within their countries, and in countries that are marginalized within the international system' (Laplante & Spears 2008: 77). The argument of these authors against the imperialism of development (mining) and the solutions they offer will be fully explored in the next Chapter.

6.4.4. Violence

The *systemic* violence inflicted on Sekuruwe by these relocations is evidenced by the lack, or delay of recourse, which has followed each of the following forms of violence on the community. First, the physical violence served on community members who protested the reburial of the graves at the new cemetery may have been an overreaction by the police force. In addition to the physical violence on

[91] See Mphohlele James Shiburi and Others v the Minister of Rural Development and Land Reform and Others. NGHC 78195/2009.

community members, their arrests by the police also effectively stopped them from expressing their displeasure with the relocation process. This silenced their voices to express their feelings of injustice and silenced their claims to cultural rights. Second, the psychological violence inflicted on the community by the physical ripping of their ancestors' remains from the ground with back-actors, showing no respect for cultural norms, placing these remains in body bags, burying them in disarray and misplacing some of them, cannot go unnoticed. Not only was this process of relocation culturally insensitive, but I believe emotionally traumatic to the community of Sekuruwe, whose ancestors represent an important and fundamental aspect of their spiritual wellbeing.

Finally, I would suggest that the manner in which the remains of Sekuruwe's ancestors were torn from their graves infringed on the dignity of the ancestors, and was an act of violence against them. The irreparable damage caused to the remains of these humans represents the ultimate disrespect paid to them, and inflicted on their bodies. Denying their descendants the opportunity to ensure proper cultural ceremony for the relocation of these graves also infringes the cultural rights of Sekuruwe's ancestors. This ultimately severed the spiritual link between the ancestors and the community, ensuring that they are currently unable to communicate with each other.

6.5. Structures of law

The disrespectful nature in which Sekuruwe's ancestral graves were relocated represents an infringement of their right to the enjoyment of their cultural lives. It is also an infringement of the provisions of the Heritage Act. I would argue that improper implementation of the Heritage Act is also one of the primary causes of these infringements and oppressions. National heritage legislation needs to reflect the values placed on heritage by those who are most closely connected to it. The Heritage Act should include provision for, first a more refined definition of ancestral graves, that ensures that all graves are encompassed in the same category. Second, the process of application for permission to relocate any graves

should be made clear. Third, the Heritage Act should outline the criteria for an adequate application to SAHRA. These should include provisions of proper negotiation, in which a representative from SAHRA is present, and the consideration of the cultural ceremony desired by the next of kin. The structural arrangement of SAHRA, as well as their role in the promotion and protection of heritage should also be better defined in the Heritage Act, as well as their own policies and regulations.

6.6. The South African Heritage Resources Agency

The positive outcomes of this case must not be overlooked. Considering the possible outcomes, and taking notice of the position in which other communities today find themselves, the achievements of Sekuruwe against the mine must be noted. SAHRA was able to pressure the mine into re-exhuming all the burials, and pressure from the community (backed by the LRC, SAHRA and other NGOs) has forced the mine into attempts at settling the matter. This has included offers of infrastructural and educational investments, the financing of cultural ceremonies for reburial, and the provision of financial compensation. These positive achievements have been the result of effective structural support for Sekuruwe, namely the civil society involvement which has lent sufficient credence to the case to pressure the mine. This support has been further aided by reference to legal canon: the Heritage Act, and more importantly the Constitution.

It is unfortunate that this body (SAHRA) did not have the opportunity to provide substantially better oversight to the case, or be involved at a far earlier stage. In terms of the Heritage Act, only SAHRA can give permission for the exhumation of graves over 60 years old, and only given to qualified archaeologists with relevant field experience. Had an archaeologist exhumed the skeletons, much of Sekuruwe's suffering would not have occurred. SAHRA could also have ensured that consultations between the developer and the community had reached the point of consensus before exhumations took place.

I suggest that Sekuruwe's oppression resulted from flaws in heritage legislation and its implementing management authority; the National Heritage Resources Act and the South African Heritage Resources Agency. The legislative amendments introduced in the previous section can only offer a functional solution if they are adequately implemented by a heritage authority. This body requires first the provision of greater resources, the employment of more trained and professional archaeologists/anthropologists rather than political appointments, and better organizational outlines provided by the Heritage Act. In addition SAHRA should engage their issuing of permits with a more active role in the promotion and protection of heritage. SAHRA should ensure that the process of application for a permit is well defined, and well publicised with developers, mines and communities. The requirements for adequate submission of such an application should also be well and widely publicised, and easily available. SAHRA should also visit the community for which a permit is being applied. This would ensure that an oversight body will be alerted early of community sentiments. This will also allow SAHRA to provide better feedback on applications for permits, as well as ensure better evaluation of these applications before permits are issued. SAHRA's appointed archaeologist should also involve the community in the exhumation of their ancestral graves to ensure that the remains are treated with the cultural respect desired by the next of kin.

6.7. Conclusion.

Claims on the Constitutional right to cultural life have frequently been referenced in debates over Sekuruwe's ancestral grave relocations. The Constitution enshrines the right to participate in the cultural life of one's choice (s30) and ensures that no one may be denied of the right to enjoy their culture (s31(a)). Above I have attempted to demonstrate the infringement of Sekuruwe's cultural rights by the disrespect shown to their ancestors. I have argued that the improper relocation of Sekuruwe's ancestral graves resulted in marginalization, powerlessness, cultural imperialism and violence against the Sekuruwe community, their ancestral graves and their ancestors. Sekuruwe's Constitutional

right to dignity, and to have their dignity respected and protected (s9(3)) was also infringed by the disrespect of their ancestral graves. These infringements rest ultimately on three systemic oppressions. First, Sekuruwe did not adequately participate in the negotiations concerning the relocation of their ancestral graves. These decisions were taken by other bodies who should have no business in tampering with the spiritual welfare of anyone. Second, the grossly negligent process of relocation was disrespectful to the cultural beliefs of Sekuruwe, to their spiritual relationships with their ancestors, and to their ancestors. Third, the lack of proper legislative protections, and the inability of many state bodies (including SAHRA) to provide decent recourse to Sekuruwe, demonstrates the failures evident in the (legal) implementation of the Constitutional right to the participation in the cultural life of one's choice.

The South African Human Rights Commission reported that '...the potential human rights implications of the relocation of graves are manifold' (SAHRC 2008: 45). The Constitution states that everyone has the right to use the language and to participate in the cultural life of their choice (s30), and that persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community to enjoy their culture, practise their religion and use their language (s31(1)(a)). It is the Constitutional right to a cultural life which has provided the legal framework for Sekuruwe's claims of injustice against the mine.

To address the problem is to realize that they are not the result of the actions of individuals, but the function of a system that discriminates against a specifically defined group. Justice would require the active, effective, and adequate involvement of such oppressed groups in debates concerning the remedies for the injustices they experience (Young 1990: 34). This Chapter has argued that Sekuruwe's experience of having their graves relocated resulted in marginalization, powerlessness, cultural imperialism and violence. I have also attempted to show that these oppressions resulted from specific inadequacies within South Africa's heritage legislation and heritage management system.

Above I suggested improvements to the Heritage Act and the operations of SAHRA. The definition of ancestral graves in the Heritage Act should be altered to include all graves under one category of protection. The application process for the relocation of any graves should be well defined, and should include provisions for adequate application. These provisions should include guidelines for negotiations with the community, and the involvement of SAHRA in these negotiations. The structural configuration of SAHRA should also be clearer, and their mandates in respect of the promotion and protection of heritage (and in particular the protection of ancestral graves) should be well defined. SAHRA should ensure that the provisions of the Heritage Act are enforced by arranging for the mediation of negotiations between developers and communities in cases where graves are to be relocated. Representatives from SAHRA should provide wide publication of the requirements for adequate consent, the proper application process, and guidelines for the consideration of cultural respect in terms of these graves.

CHAPTER SEVEN:
FREE, PRIOR AND INFORMED CONSENT

> 'It is not surprising that the predominant concerns of communities affected by extractive industry projects in recent years relate to their inability to control and failure to benefit from such projects. Most of the projects realized as a result of the 1980's extractive industry expansion are located near communities that are marginalized geographically, economically and politically within their countries, and in countries that are marginalized within the international system....People most affected by extractive industry operations in the developing world tend to have less access to justice, formal political processes, decision-making structures, social services, economic systems and land tenure systems, and they experience higher rates of poverty, discrimination and prejudice.'
> (Laplante & Spears 2008: 77)

7.1. Introduction

In Chapter Five I outlined the legal protections of ancestral graves, and touched on those that protected cultural heritage in general. I focused on three areas of contention highlighted by the grave relocations at Sekuruwe. These were the permit application process, the involvement of SAHRA, and the terms of consent. This Chapter revisits these concerns to suggest changes in heritage management which could serve to mitigate these problems. I then introduce the framework of community engagement described by Laplante and Spears (2008): Free, Prior and Informed Consent (FPIC). I argued before that the actions of the Sekuruwe community did not amount to adequate consent to the relocation of their ancestral graves. The community was unaware of their rights, and of the legislative protections provided for their ancestral graves. Some consent was also fraudulently obtained, with the invention of additional graves being the most blatant example of this. This was based on the lack of adequate consultation, neglect to discuss important aspects of the agreement, and the fraudulent gaining

of signatures. Interaction with international NGOs has greatly assisted Sekuruwe in their struggle against the injustices of the mine. I have therefore used literature from organisations dealing with the relationships between communities and mines. Oxfam Australia's 2007 report on FPIC[92] is used to critique Sekuruwe's lack of consent, and also outline parameters for FPIC. The Environmental Law Institutes' 2004 report on Free, Prior and Informed Consent[93] is used to suggest changes in South Africa's policy towards negotiations between mines and communities, in particular in relation to the protection of their ancestral graves.

7.2. Systemic oppression

Chapter Six above argued that the difficulties in the relocation resulted in the infringement of the Sekuruwe's constitutional rights. I further argued that this infringement was as much a result of the structural failures of heritage legislation and management as the in/actions of agents. Here I restate the problems found in heritage legislation and management concerning the permit application process and the involvement of SAHRA. I suggest policy reforms to mitigate the problems detailed in Chapters Five and Six above.

7.2.1. The Permit Application Process

Currently, the Heritage Act ensures that no grave over 60 years old may be exhumed without a permit issued by SAHRA. On the face of it, this application process allows a competent heritage authority to ensure that no graves are exhumed before they ensure that the application meets the parameters of adequate conduct.

[92] Oxfam Australia. 2007. Free, Prior and Informed Consent: the Role of Mining Companies.

[93] Environmental Law Institute. 2004. Prior, informed consent and mining. Promoting the sustainable development of local communities.

The protections offered by the application process only apply to a specific category of graves. This is not only problematic when the age of graves can not be easily determined, but also allows developers to 'assume' graves to be under 60 years old. The arbitrary categorization of graves according to age does not reflect the value placed on these graves by the communities which revere them. As described in Chapter Three, both older and younger graves are visited by the community to communicate with the ancestors who live there. The cultural respect given to the graves of the ancestors in traditional African custom is a part of Sekuruwe's cultural heritage, and their constitutional right to the enjoyment of their cultural life.

The provisions of the Heritage Act concerning applications for permits are not strictly adhered to. SAHRA have their own guidelines for permit applications, as do other Acts concerning environmental permit applications, which often include a cultural impact section. Non-compliance with the proper permit application processes is most likely a combination of factors ranging from willing ignorance, to confusion over conflicting pieces of legislation. The low publicity of these provisions has also resulted in the lack of community knowledge concerning their rights over their ancestral graves. This offers an easily exploited loophole in cumbersome application processes. Sekuruwe's case illustrates this, as the mine was able to proceed in their exhumations without a permit from SAHRA.

Even in cases where application for the relocation of graves is brought to SAHRA, most negotiations with the community would have taken place before this application. This allows the developer to present an application containing the consent of the community, without any third party to verify the fairness of this consent. SAHRA also lacks the capacity to properly assess these applications. They are not required to visit the site for which an application has been submitted, nor are they required to ensure that the developer follows through with adequate means of exhumation.

7.2.2. Permit application amendments

To address this inadequacy, four aspects of the application process must be amended, and these amendments properly enforced. First, all graves should be categorized under the same protections as currently reserved for graves over 60 years old. This should also encompass 'formal' graves in cemeteries, as these graves are also of important concern to present families and communities, irrespective of culture. The families and communities traditionally connected with these graves should have the right to give consent for any alteration of their family graves.

Second, all applications concerning the alteration of any cultural heritage, specifically the relocation of ancestral graves, should be considered by the BGGU of SAHRA's main office. This would ensure that any alterations of graves will come to the attention of SAHRA's national office, to ensure that the processes are carried out properly and that SAHRA is involved in the relocation from as early a date as possible. This should constitute a centralised organization and application process to avoid uncertainty about application or authority. This will ensure that all graves are given the same consideration, and each community is guaranteed the cultural respect of their ancestors during the process of relocation. The capacity of SAHRA and its Burial Grounds and Graves Unit also needs to be drastically considered.

Third, SAHRA should develop a detailed list of criteria for the issuing of permits to relocate ancestral (or any) graves. SAHRA themselves should ensure that information obtained in the application is accurate by visiting the sites to meet personally with the communities involved. Permission for the relocation of any graves should only be given on the grounds of adequate community consent, ensuring community knowledge and agreement about the details of the exhumation, including cultural ceremonies to be performed. Permission for the exhumation of any graves should only be issued to a qualified professional with relevant experience, as required by current guidelines.

Fourth, developers should involve the heritage authorities at the earliest possible date. This would ensure that the intended development first comes to the attention of SAHRA, who could then appoint (recommend) the employment of a qualified surveyor to assess the heritage impact of the development on the area. The report produced by such a qualified individual (or body) would be more reliable in its assessment of cultural impact. They would then be able to refer the applicant to the relevant local or provincial authority, or retain the case for consideration by SAHRA (due either to its national significance or the absence of relevant competent authorities).

7.2.3. Involvement of SAHRA

The legislative and managerial problems pointed out in Chapters Five and Six concerned the late involvement of SAHRA in the process of negotiating consent. This was due to the mine's lack of informing SAHRA by way of a permit application. Many contractual obligations were entered into concerning the development of Blinkwater farm in the ignorance of SAHRA. The lease of Blinkwater contained the right for the mine to relocate graves from the property. Only SAHRA has the legal capacity to issue a permit for the exhumation of graves over 60 years old, and only a qualified archaeologist may perform these exhumations. SAHRA could have provided the mine with valuable instruction on the proper methods of exhumation, and the cultural sensitivity which should be paid to such graves. Further, SAHRA could have visited Sekuruwe before the relocations to assess their understanding of the process and evaluate their consent for the relocation.

Cultural ceremony during the relocation of graves is not considered in the Heritage Act. The cultural necessity for these ceremonies should warrant their inclusion in agreements for the relocation. This principle should be included in the terms of consent.

Mechanisms to remedy the problems pointed out above should begin with the enforcement of legal mechanisms for early application to SAHRA. All applications should be submitted to the head office to maintain a centralized managerial structure. SAHRA should also be involved in reaching agreement between mines and communities over the future of their graves, and assess their consent to the relocations.

Second, general awareness of relevant legislation would assist in better adherence to procedure. SAHRA should endeavour to publicise the mandates of application for the alteration of cultural heritage in general, and the relocation of ancestral graves in particular. These should include reference to the early application for permits, the involvement of SAHRA in negotiations for consent to alter their heritage, specifically their ancestral graves, and the proper procedural requirements for the relocation of these graves, including the provision of cultural ceremonies.

Ultimately the functions of SAHRA must evolve with their growing capacity. The ability of SAHRA representatives to frequently travel to distant parts of South Africa to listen to rural communities considering the relocation of their ancestral graves is currently limited. This endeavour is, however, vital to the adequate implementation of the protections for ancestral graves, and cultural heritage.

7.3. Consent.

Consent is a key concern in this case. The right for people to decide on the alteration of their cultural heritage, their ancestral graves, and their spiritual relation with their ancestors should never be infringed upon by any individual or mechanism of law. In Chapter Five I argued that the definition of consent is not detailed enough in the Heritage Act. I have suggested that Sekuruwe did not fully consent to the relocation of their ancestral graves; they were not aware of their rights in terms of their ancestral graves. There is also no means by which

fraudulent consents (exposed by the invention of fictitious graves) can be distinguished from proper consent, rendering all consent questionable.

Here I further my argument that the Sekuruwe community did not adequately consent to the relocation of their ancestral graves by reference to the work of Laplante & Spears (2008). Here I consider the scope of Free, Prior and Informed Consent (FPIC), and its application to the Sekuruwe grave relocations.

7.3.1. Free, Prior and Informed Consent.

Laplante and Spears (2008) critique current policies of community-mine engagement, arguing that they have resulted in a staggering number of communities bringing disputes forward concerning the control of resources, particularly land, and the right to control the future direction of their lives. They describe Free, Prior and Informed Consent (FPIC) as an institutional mechanism of ensuring that communities affected by mining maintain the capacity to continue to live in the manner they choose. This involves the protection of their means of making a sustainable living, as well as the enjoyment of their ways of life. Laplante and Spears suggest that the underlying causes of many communities' opposition to mining are their lack of control over resources and their own destiny (Laplante & Spears 2008). Sekuruwe is further opposed to the mine for the cultural disrespect paid to their ancestral graves, their ancestors, and themselves.

The agreement mechanism of FPIC begins when local communities are informed of development projects in a timely manner, and given adequate opportunity to influence decisions of the development before operations commence. Local communities should be given opportunity to debate developmental terms addressing their specific conditions of economic, social and environmental impacts before the development is permitted to go forward (Oxfam Australia 2007). The consent process requires that communities take an active part in the decision making processes. This includes having sufficient social capital in the form of institutional support. FPIC requires, basically, that all stakeholders are

equally invited to participate in the decision making process, and possess sufficient resources to influence these decisions and ensure the protection of their right to make a living, and their right to their ways of life (Laplante & Spears 2008).

7.3.2. Free, Prior and Informed Consent as an operational mechanism

In terms of implementation, consent is required to be given free of coercion or manipulation, and must be 'entirely voluntary' (Laplante & Spears 2008: 88). It should also be given before any authorisation from state institutions can be given. The consent also needs to be informed by meaningful participation and consultation, ensuring that communities have the right to decide on questions of development which directly affect them (Oxfam Australia 2007). They should also have adequate voice in decisions over the future of their ancestral graves, and the cultural respects which need to be paid to the spirits of the ancestors.

This would require affected communities to be fully informed about their rights in relation to cultural heritage and ancestral graves, as well as in possession of sufficient social capital to demand these rights (Laplante & Spears 2008: 88). Communities should have access to independent advisors to assist in such claims (Oxfam Australia 2007). In this case, SAHRA could be involved as a representative of communities in negotiations for consent. They could also better evaluate permit applications if they were better resourced. SAHRA's involvement in similar cases may lead to agreements being enduring and more meaningful, and may be better monitored to ensure compliance.

7.4. Consenting to the relocation of ancestral graves

The scope of a community should not be too strictly defined, as communities are often not homogeneous and represent a collection of varying interests. All stakeholders should be appealed to for inclusion in decisions about the future development. This general inclusion will then allow independent assessors to

determine which stakeholders have adequate reason to participate in decision making processes (Oxfam 2007). For graves, this would mean the general invitation of any concerned individuals concerning the relocation of the grave. The relationship of each individual to each grave should be properly noted and documented, and an independent party (SAHRA) be nominated to decide on conflicting claims to graves. The *ad hoc* constitution of such 'relevant stakeholder communities' should be determined by SAHRA. The need to ensure adequate consultation is specifically important when considering terms of consent. Ensuring that important details of the relocation process have been agreed to between the mine and the community ensures that operations such as those at Sekuruwe would not be legally permissible, as the details of the relocation process would have been discussed, debated, agreed upon and documented.

This collection of individuals should have adequate opportunity and capacity to influence decisions concerning the relocation of the graves. This includes the parameters of consent, the technical details of the relocation and the cultural ceremonies which are to accompany the relocation.

This can only be achieved with wider access to information by communities in the face of encroaching mining (Oxfam Australia 2007). It is not only important that communities are made aware of their rights concerning the future of their ancestral graves, but also that they are provided with adequate means of engaging meaningfully with the decision making processes of the developer. The provision of this information, as well as the capacity to engage with the mine, could be provided with the assistance of SAHRA in promoting heritage.

7.5. Conclusion

Prior, informed consent and mining. Promoting the sustainable development of local communities, published by the Environmental Law Institute (2004), defended the concept of FPIC in terms of international law. The Institute argued that global communities were increasingly coming into conflict with development,

with increasing reference on the rights of communities to determine the decisions of developments that effect their ways of making a living, and their ways of life. The report noted the growing trend of national governments to incorporate social and environmental responsibility protocol into national level legal structures, and in some cases enforce these through courts. This is certainly the case in South Africa where national legislation governs the issuing of mining permits controlled by state institutions, and requires the submission of numerous (sometimes conflicting) 'impact assessments'.

Laplante and Spears (2008) argue that the protection of communities against mines can only be through the provision of resources, social and financial, to assist in the adequate participation of communities in the decision making processes of development. The provision of full, prior and informed consent, with specific reference to the role of SAHRA and particular provision for cultural concerns, should form the basis of policy towards the protection of ancestral graves and cultural heritage.

This Chapter has aimed to introduce the concepts of FPIC, and suggest their applicability to heritage protection in South Africa. With consent being a central concern, the formulation of the requirements for consent in the legislation could benefit from incorporating FPIC, as well as other concepts of community/mine relationships.

CHAPTER EIGHT:
ECONOMISING THE ANCESTORS

8.1. Introduction.

This Chapter aims to further understand Sekuruwe's mobilization of their cultural beliefs in terms of appealing to legally defined cultural rights. The influence of negotiations over the financial compensation owed to the community can not be overlooked in this appeal to legal rights. In the Chapters above I have described Sekuruwe's claims to cultural rights in terms of gaining political leverage. This leverage, I believe, can be employed in two ways. Firstly, leverage for the provision of cultural ceremony at reburial, and the restoration of the dignity of the ancestors and the community at the expense of the mine. Second, appeals to cultural rights and legislative infringements can also be used as leverage concerning the particulars of this ceremony, and the amount of compensation owed to the community. This Chapter focuses on the economization of Sekuruwe's ancestral veneration due to the influences of financial concerns.

This Chapter begins by outlining Comaroff and Comaroff's concept of Ethnicity Inc. (2009) which is that 'cultural identity...represents itself ever more as two things at once: the object of choice and self-construction, typically through the act of consumption.' (Comaroff & Comaroff 2009:1). I discuss the similarities between Comaroff and Comaroff's Ethnicity Incorporated and the economic concerns of Sekuruwe in relation to their ancestral graves. I also point to differences in the lack of capitalization of Sekuruwe's ancestors, which is an important aspect of Ethnicity Inc. I further suggest that Sekuruwe's mobilization of their ancestral beliefs can be understood in terms of the Comaroff's concept of ritual (Comaroff & Comaroff 2004). 'Ritual as a negotiation of power' explains the increasing resort to cultural means of policing evil as an act of reclaiming power from a perceived failed state. Sekuruwe's claims to cultural rights show similarities with this concept, which I explain in terms of legal appeals. I find it

impossible to relate Comaroff and Comaroff's (2004) explanation of 'ritual as a negotiation of power' without including a brief background of the paper (and the concept of witchcraft) from which it originates. It is to this end that I have included some details on witchcraft, derived exclusively from Comaroff and Comaroff (2004) so to better present my argument for the application of 'ritual as a negotiation of power' to the Sekuruwe case.

I conclude that the concepts of Ethnicity Inc. and ritual described by Comaroff and Comaroff (2004; 2009) allow a perspective on the mobilization of Sekuruwe's cultural rights. I also suggest that a legal conundrum described by the Comaroffs in their discussion of ritual is also present in Sekuruwe's case; the conflicting constructs of Euromodern law and African cultural beliefs (Comaroff & Comaroff 2004).

8.2. Comaroff and Comaroff's Ethnicity Inc (2009).

Comaroff and Comaroff (2009: 21) treat 'ethnicity, culture, and identity not as analytic constructs but as concrete abstractions variously deployed by human beings in their quotidian efforts to inhabit sustainable worlds'. This echoes the concept of heritage described by Lowenthal (1998) and Coombe (2005): as a resource used by people to gain advantage. Ethnicity Inc. is the deployment of 'ethnicity, culture, and identity' as defined by capitalism. Its two pillars are first the incorporation, structuring, and formulating of ethnic nations into corporations. And second the increasing commoditisation of the products of cultural practises (Comaroff & Comaroff 2009: 21).

Comaroff and Comaroff (2009: 98 – 114) illustrate this concept through reference to the Royal Bafokeng Nation. The Royal Bafokeng Nation, seen as a 'brand' by Comaroff and Comaroff, have utilised their unique legal privileges by resorting to claims of cultural identity. These claims include the authority of traditional leaders, which is protected under the South African Constitution. Through such traditional leadership, the Bafokeng royal family has become wealthy through

mining contracts on their traditional land. The exercise of authority in negotiating these contracts rests in the Royal Bafokeng's legal authority to administer their traditional lands autocratically with minimal intervention from the state or their 'subjects' (Comaroff & Comaroff 2009: 98 - 114).

Comaroff and Comaroff (2009) suggest that the Royal Bafokeng Nation is economising their culture for financial benefits. The generation of the cultural identity 'Bafokeng' is specifically aimed at gaining economic advantage. In addition, the benefits that a cultural identity such as 'Bafokeng' can bring are defined in law, and it is by relying on these laws that Ethnicity Inc. is able to be deployed by people who 'have culture' for economic benefit (Comaroff & Comaroff 2009: 116).

In summary, 'Ethnicity Inc.' is the deployment of ethnicity, culture, and identity as a commodity in the capitalist economy. This commodity is then exchanged for financial benefits, which can be currency or business. Although 'Ethnicity' as a commodity does not seem to reduce with its consumption like other commodities, it gains direct economic value from the legal frameworks which govern it. This thesis has aimed to discuss these frameworks with reference to their deployment by Sekuruwe.

8.3. Economising the ancestors.

In the case of Sekuruwe's mobilization of their cultural heritage, the community is appealing to law for the protections this can offer. This is both in terms of the Heritage Act and the Constitution, which protect Sekuruwe's ancestral graves and their right to the enjoyment of their cultural lives. Although this appeal to law has economic influences because of the compensation offered by the mine, Sekuruwe's ancestral graves are not gaining direct economic value through their commoditisation.

In Sekuruwe's case, legal protections are being appealed to in two ways. The first is to argue the culpability of the mine in their infringement of legislation and the Constitution. Second, the culpability of the mine in terms of the legislation and Constitution also determines the obligations of the mine in terms of compensation. This compensation has three aspects; the rectification process to retrieve and reassemble the skeletons, the provision of a cultural ceremony at reburial, and the amount of compensation due to each family.

Comaroff and Comaroff (2009) argue that the Royal Bafokeng Nation is promoting a collective and finite set of cultural traits which constitute their identity specifically for the capitalist market. Sekuruwe however, is mobilizing one specific aspect of their cultural belief system, which is important to each member of the community to different degrees rather than one collective and finite set of cultural traits. This mobilization is then used to claim legally protected rights, rather than to gain advantage in a capitalist market. This echoes Jean Comaroff's (2004: 9) description of increasingly atomised heritage, where the veneration of the ancestors is not a full scale generation of a cultural identity, but rather the mobilization of one aspect of a common cultural belief system.

The rectification process was required because of the original actions of the undertaker, under the direction of the mine. The skeletons needed to be reassembled to assess their level of damage, and also to be reburied so that Sekuruwe can continue their spiritual relationship with their ancestors. This was financed by the mine. The cultural ceremony at the reburial will similarly be required to put Sekuruwe's ancestors to rest, so that the community can continue visiting them at their graves. This will also be financed by the mine. The compensation owed to each family will obviously come from the mine. Thus, all three aspects of Sekuruwe's negotiations for compensation can be analysed through their economic dimension.

In accordance with Comaroff and Comaroff's (2009) discussion on the benefits reaped from Ethnicity Inc. disparate advantages are generated from two

structuring process of the concept. First, the benefits of consolidated culture can only accrue to those who conform to this consolidation. This leads to the oppression of sub-narratives within cultural identities prepared for the consumer market. Although I have not personally been privy to any such actions at Sekuruwe, it would certainly be true that any person claiming identification with the ancestors not in line with the notions presented by the Community Council, would in some way or the other be marginalised, and unable to benefit from the eventual financial compensation from the mine. It may even be true that such individuals would be unable to give an authoritative opinion on the cultural ceremony for the reburial of their ancestral bones, making their marginalisation also spiritual as well as financial. I suggest that such a situation could be remedied by reliance on free, prior, and informed consent, which places the focus of decision on the individual once they are aware of their rights.

Second, marginalisation is caused by the legal frameworks which demand a specific construction of cultural identity in order to access the privileges provided in law. Although the Heritage Act is less demanding on the nature of cultural affiliation to an ancestral grave, it is none the less the case that claims to spiritual authority are being done through the legislation. It would follow that individuals seeking identification with their ancestors through other means would be excluded from the main group in this case, and subsequently marginalised.

Although the mobilization of Sekuruwe's ancestral veneration can be seen in economic terms similar to Ethnicity Inc. it lacks capitalization and has a different reliance on law. Comaroff and Comaroff (2009) describe 'Ethnicity Inc.' as the capitalization of ethnicity/culture/identity directly exchanged for financial benefit, either through the sale of the products of cultural production, or the provision of corporate advantages. These provisions are provided in law, and these laws are utilized by those seeking to capitalise on their ethnicity/culture/identity. Sekuruwe, however, appeals to the specific rights which these cultural laws give them in terms of their ancestral graves. The infringement of these rights demonstrates the culpability of the mine, and obliges them to compensate the

community for the disrespect of their ancestral graves. Through negotiation, this obligation has encompassed the rectification process, the ceremonial reburial, and the payment of compensation to the next of kin. As each of these aspects of compensation involve finances, their details have been central to disagreements between the mine and the community.

Sekuruwe's mobilization of their ancestral belief can then be understood in the following way: the actions of the mine, encompassing their lack of consultation and improper methods of exhumation, disrespected the cultural norms of the Sekuruwe community. This affront to Sekuruwe's dignity is defined in law, as an infringement of the Heritage Act and the Constitution of South Africa. Having this legal right affords Sekuruwe the capacity to demand reparation from the mine, which can be enforced by the legislation through the courts. The mine's obligations for reparation are then economised through the financial aspect they involve: employment of professional archaeologists, financing of the cultural reburial, and the payment of compensation, etc. I suggest the mobilization of Sekuruwe's ancestors is more an appeal to a legally defined right (as described by Coombe 2005) than a mobilization for economic exchange (as described by Comaroff and Comaroff's Ethnicity Inc. 2009).

8.4. Ritual, power, and legal rights to authority.

Sekuruwe's appeal to legal rights rests on their legitimate claims to a cultural heritage, one that regards ancestral spirits as part of every day life, and ancestral graves as the sacred places visited to communicate with these spirits. This cultural claim asserts Sekuruwe's authority to determine the future of their graves, and the future of their spiritual relationship with the ancestors. This claim is complex, referencing spiritual connections to the dead, claims to cultural beliefs and legal rights.

In *Policing Culture, Cultural Policing* (2004) Comaroff and Comaroff discuss the increase in witch killings in South Africa in recent years. The article introduces

debate around the legal conundrum implied by witch killings. To reference witchcraft here is not to enter into discussion on the topic. I would argue (and will expand below) that the concept of cultural mobilisation discussed by Comaroff and Comaroff (2004) is a useful construct through which to understand Sekuruwe's references to their spiritual connections with the ancestors. The brief outline of Comaroff and Comaroff's (2004) paper serves to illustrate the background from which the concept originates in order to more fully explain its application in this thesis. The cultural belief in witches, as well as the cultural mechanisms employed to manage them, are said to be at the centre of fundamental contradictions in 'the post colony'. Beginning in the last years of apartheid, cultural violence (especially witch killings) have seen a perplexing increase. Comaroff and Comaroff (2004: 515) claim that more cases of ritual murder are coming before the courts than ever before. They claim this rise is linked to the sentiments of many rural South Africans. It was thought that 1994 would bring employment, housing, wealth and well-being. Instead many are faced with poverty, and now accuse the State of not meeting its promises, favouring the rich and being absolutely corrupt. Cultural policing is described as a means of redressing these failures of the modern state by appeal to older cultural notions. Comaroff and Comaroff (2004: 514) argue that cultural policing is performed mainly by youths, and demonstrates a distinctly hybrid concept of local justice.

Belief in witches and witchcraft is generally outlined as relating to the normative correlations between moral order, social value and material equality. Witchcraft is often the first explanation given for misfortune. Although the exact workings of this magical craft are not widely known, they are said to be regularly employed by those with the relevant knowledge. Magical powers are used for antisocial and selfish ends, usually with the intention of appropriating the life force or social/fiscal wealth of others. Ritual specialists are employed to counter the actions of these malevolent witches, but they are usually viewed with suspicion. It is generally held that even these protective ritual specialists will, for the right price, turn their crafts to more sinister schemes. In the South African context, witchcraft entails the everyday belief in the movements of evil forces. Some of

these are set in motion by the active desires of wicked people, and their effects on the innocent need to be negated by the employment of counter-measures (Comaroff & Comaroff 2004: 518).

Evidence of witchcraft is definitely nonspecific. References can include physical illness, delusion, the death of family or livestock, and the loss of work, disappearance of belongings, crop failures, and sudden misfortune in general. Witchcraft is also described in relation to its modern adaptation to capitalism. Ritual murder is described as big business, with human organs sold for magical potions (*muti*) at exorbitant prices. Rural entrepreneurs are also said to turn people into zombies, who labour at night for the benefit of their masters (Comaroff & Comaroff 2004).

Attacks against witches are usually perpetrated by the young, usually male, unemployed populations of rural villages. Although powerful/successful members of the community are widely expected to have dealings in the black arts, it is the more vulnerable who suffer the 'policing' of these youths. Older (usually single and childless) woman are the main focus of accusations, and exterminations. In their actions of violently policing the fortunes of their communities, these youths are negotiating the means of power (closely linked to material wealth) for themselves and their communities (Comaroff & Comaroff 2004: 521).

Comaroff and Comaroff (2004: 515) present a pertinent question: what are the implications for the contests over the legitimate use of force in the new South Africa? Can cultural relativism and legal universalism co-exist? With the constitution placing absolute individual rights above <u>all</u> else, how is the country to understand cultural rights, or the collective rights of any kind of community? The contradiction which such cultural beliefs raise is defined in terms of legality. The 'new' South Africa is founded on a modernist concept of the 'nation-state', a deep investment in democracy and human rights, and an idealized constitution (generalized by Comaroff and Comaroff (2009) to 'the rule of law'). In contrast, many South Africans feel that freedom has brought little benefit to out-of-sight

places, especially in the form of material wealth. In the northern provinces, such sentiments are said by Comaroff and Comaroff (2004: 523) to give rise to community efforts to redefine order. This extends to the use of cultural means to police 'evil'. The contradiction is that witch killings negate the state's authority regarding the legitimate use of force. If the cultural belief in witchcraft is acknowledged by the government (probably through means of law), then by implication the cultural means of protection against the evils of witchcraft (murdering witches) must also be acknowledged, accepted, and legalized. Conversely, condemning witch killings as a common crime would negate the majority of South Africans' cultural beliefs, and human rights. It would also criminalize the only (culturally) known means of self-defence against the evils of witchcraft, leaving countless South Africans vulnerable to the misfortunes of spiritual magic. Again, the state fails to ensure the safety of its citizens, the paradox is complete (Comaroff & Comaroff 2004).

The difficulties in co-existing systems of law are also discussed (although less convincingly) by Duncan Ivison in his attempts at understanding Aboriginal rights. According to Ivison (2003) the mere discussion of Aboriginal versus European rights serves to highlight institutional disparities; the mere act of questioning the relationship between these two systems re-states the distinction between primitive and modern, European and native. Conversely, Goodale (2002) considers the act of incorporating different legal structures into one unified whole within a nation, and amongst nations into a transnational body of legislation, an inevitable result of globalisation. For Goodale, 'sympathetic law' takes account of different points of view and tries to incorporate them into a cohesive whole, rather than trying to determine between the two which is more applicable in the situation. Although I think such an approach commendable, the fundamental contradictions between African cultural concepts and Euromodern law pointed out by the Comaroff's above could not be addressed by such an approach.

By 'cultural policing' Comaroff and Comaroff (2004) mean the culturally relevant mechanisms which are employed to safe-guard the well-being of the community.

Comaroff and Comaroff do not define cultural policing in terms of vigilantism, or revenge of the poor against the rich, but as a cultural mechanism of self protection. In the context of South Africa, where most people 'have' culture, there seems to be an irreconcilable difference between African Culture and Euro modernism (Comaroff & Comaroff 2004). This introduces a key aspect at the centre of this thesis: how does the modern legal framework of South Africa adequately protect the cultural beliefs of many traditional people? *Policing culture, Cultural policing* (Comaroff & Comaroff 2004) considered a violent and destructive aspect of such cultural beliefs. Belief in the power of the ancestors, and the obligation to respect them are somewhat less violent, but no less cultural. They are also no less perplexing to legislate; the belief in supernatural forces is strange to the Constitution, yet is expressly protected by the right to the enjoyment of cultural life.

The legal framework which protects ancestral graves at once calls them 'ancestral' while showing little understanding for the cultural importance of these graves. Consultation for relocation may have brought these considerations to the fore, but it has been ill implemented and ineffective. Sekuruwe's authority over the future of their ancestral graves rests on their provisions in law. Although they are given the right to consent by the Heritage Act, and the right to the enjoyment of their cultural lives by the Constitution, neither of these documents mentions the spiritual relationship between the living and the dead as a reason for the protection of the ancestral graves. Although this conundrum is less obvious and more placid than discussed above, I suggest they are similar in that questions of spirituality and cultural veneration of ancestral graves are hard to define in terms of modern legal thought. This conundrum was similarly evident in the case of Kennewick Man.

Comaroff and Comaroff (2004: 527) describe ritual as a retreat to older forms of knowledge. In the current perplexing situation, many South Africans find themselves without adequate explanations. How, after 1994, did some become so rich, and others remained so poor? What are the means by which newly rich

people generated their wealth? And given that there is no other direct explanation for the level of poverty experienced by many South Africans, could the forces of evil be at work in the continued circumstances of these communities. With these thoughts, traditional communities have begun to revert to cultural understandings of misfortune, and the mechanisms to remedy it. This practise, for those who perform it, is an active political statement: since the government has neglected to protect them from the misfortunes (poverty) brought about by evil forces (or has been actively involved in the use of these forces for their own good, and for the continued impoverishment of the poor), individual communities reclaim power over their own fortunes. This is accomplished by eradicating evil and evil doers from their midst who have 'clearly' brought about these misfortunes.

The formalization of cultural beliefs concerning the ancestors is no less an act to reclaim power. The rituals described for interacting with the ancestors, and for relocating them are similarly deliberate. Communities claim a uniform, defined and highly important cultural reverence for the ancestors and their graves. This is a reaction to the recent disrespect paid not only to the ancestors, but also the communities. It is an act of power negotiation, which relies heavily on the protections already held in law.

In many cases the coming of mines to rural areas brought little of what was expected or promised. Communities remain poor with little employment for the youth. To complicate the matter, relocation has often deprived them of their agricultural land, and they are left without any means to sustain themselves. Or at least, they have been deprived of their 'cultural means' of sustaining themselves. Encroaching mining has been devastating for many rural communities: first traditional grounds are appropriated and communities relocated (loosing the traditional connection to the land). Then agriculture (vital to rural subsistence) becomes impossible, and at last the ancestors are insulted by having their graves destroyed, which in turn decimates the communities spiritual centre. Not only is this an attack on the culture of these communities, but on their individual dignity.

In response cultural values have been mobilised. A comprehensive, and unquestionably important *cultural belief* is easier to litigate, and simpler to argue in terms of legal protections for culture because of the existing legal frameworks of the Heritage Act and the Constitution. The belief in ancestors which is currently being presented is a political construction, and is being used to very specific ends. Following on the descriptions of constructed heritage, these rituals are the result of an active mobilization of culture and an intentional placing of importance on one's ancestral beliefs and graves in order to re-negotiate power in the face of the mine. In this case the importance of ancestral spirits is being used to argue mistreatment from the mines, which is being used to negotiate for compensation. If we are able to understand the political nature of the belief in ancestors, as well as the mechanism by which this is being mobilised, we can consider the principles of law that should be applied to the protection of these ancestral graves.

8.5. Conclusion

This chapter has aimed to understand the economic influences of the mine in Sekuruwe's case. I argued that financial concerns are involved in many aspects of Sekuruwe's disagreements with the mine, and in the negotiations for rectification of the cultural insensitivity shown during the relocations. I suggest that Sekuruwe is appealing to heritage law and the Constitution to argue that the mine has acted improperly when it relocated their ancestral graves without adequate respect to their cultural values. Seeking compensation from the mine for this culpability involved the rectification process, and will involve the ceremonial reburial and financial compensation. Although this mobilization of heritage is similar to the concept of Ethnicity Inc. discussed by the Comaroff and Comaroff (2009), Sekuruwe's claims on heritage law are dissimilar in two ways. First, Sekuruwe's ancestral veneration is not directly capitalised through their evaluation, rather it is the evaluation of the injustice done to Sekuruwe by disrespecting their cultural beliefs that is being evaluated financially. Second, Sekuruwe is not relying on

privileges in heritage law to gain economic advantage, rather they are appealing to unique protections in the law to give them specific redress for their injustices.

In short, this is more than the economization of the ancestors as would be described by Ethnicity Inc. It is a mobilization of a cultural belief which contributes to the community's discontent about their treatment at the hands of the mine, and their argument for compensation for this unjust treatment. Referencing the disrespect paid to the ancestors is not simply done for financial payoffs, but feeds into arguments of the mines unjust actions against the ancestors as well as the community.

I have also aimed to understand Sekuruwe's mobilization of their ancestral beliefs through Comaroff and Comaroff's concept of ritual (2004). The mobilization of these beliefs can be understood as an appeal to law for the leverage required to receive compensation from the mine. This includes the rectification process, the ceremonial reburial and the financial compensation. This thesis has aimed to understand these appeals to law, and highlight aspects of legislation which are inconsistent with the value placed by Sekuruwe on their ancestral graves.

This appeal to legislation highlights the legal conundrum explored by Comaroff and Comaroff (2004), in that modern law conflicts with concepts of cultural belief, for example, the belief in the ancestors. In truth, if the law truly reflected the value of these graves, the mine would have been liable for assault with intent to do grievous bodily harm, and with disrespecting the cultural rights of the ancestors themselves by desecrating their bodies and severing their spiritual relationship with the community.

CHAPTER NINE:
CONCLUSION

This thesis has aimed to illustrate that Sekuruwe's case is an example of the increasing role of cultural law in the identification of people with their heritage. In Chapters Two and Three I narrated Sekuruwe's ancestral graves relocations from a synthesis of information provided by information and obtained from documentary sources. I highlighted details of the case which related to the role of heritage legislation and appeals to the laws protecting cultural heritage. I also pointed to economic influences which have added complexity to the case, these being the financial concerns of compensation, the re-exhumations, the reburial ceremony and the final compensation. Chapter Four described the cases of Sara Baartman, Kennewick Man and Prestwich Place, highlighting their similarities with Sekuruwe, and pointing to their equal amount of complexity. I suggested that this complexity was the result of numerous debates taking place concerning the justice owed to both the living and the dead. These multiple debates all converge on the treatment of the bodies of the dead, and the authority to decide over this treatment. I suggested that debates over the treatment of the bodies of the dead, both their physical remains and their spirits, mirrored arguments of injustice meted out to the living; the individuals and communities connected to these bodies.

Chapter Five appealed to Coombe's theory of the relationship between culture and law (Coombe 2005), and suggested that the Sekuruwe case was an example of the increasing appeals to cultural law by marginalized groups. Using Coombe (2005), I suggested that Sekuruwe was using their cultural heritage within the context of the protections provided by heritage legislation. The Chapter proceeded to discuss South Africa's heritage legislation in terms of its protection of ancestral graves. Here I highlighted aspects of heritage protection which allowed for the disrespect of Sekuruwe's cultural norms at the hands of the mine. These aspects are primarily the definitional confines of ancestral graves, and the vagueness of

clauses dealing with consultation and consent, as well as the role of the South African Heritage Resources Agency. Chapter Six applied the critical theory of social justice described by Young (1990), and argued that these inadequacies in the legal protection of ancestral graves are evidence of systemic oppression. Chapter Six illustrated the role of Sekuruwe's ancestral beliefs, and their cultural heritage, in the contemporary debate about community rights in the face of mines. This Chapter argued that the treatment of Sekuruwe's ancestral graves demonstrated the systemic marginalisation, powerlessness, cultural imperialism and violence perpetrated against the community. I also highlighted the role that heritage legislation played in framing these debates, and influencing their outcomes.

Chapter Eight elaborated on this understanding by discussing the influence of economics on Sekuruwe's mobilization of their heritage. I suggested that Sekuruwe's case has similarities with, as well as differences from, Comaroff and Comaroff's concept of Ethnicity Inc. (2009). This chapter showed that the financial concerns arising throughout Sekuruwe's case were an influential factor in disagreements over the treatment of the graves, but that Sekuruwe was not directly capitalising their heritage for the consumer market. Instead, Chapter Eight argued that the community was appealing to protections defined by law, which in turn were being used as leverage for greater financial compensation. I then used Comaroff and Comaroff's concept of ritual (2004) to understand the power negotiations of Sekuruwe's mobilization of ancestral veneration. I argued that this was an appeal to the legal protections of cultural rights, and was a negotiation for the compensation owed to them by the mine. This negotiation of power, following to Comaroff and Comaroff (2004), was described as the mobilization of a culturally held belief. This mobilisation served to strengthen the community's claim of cultural insensitivity, which in turn was used to influence claims of financial compensation. I also highlighted the legal contradiction described by Comaroff and Comaroff (2004), and suggested that the same conundrum exists in the heritage legislation which protects Sekuruwe's ancestral graves: heritage legislation recognises and protects ancestral graves, but lacks the capacity to

define the spiritual significance of these graves due to the law's Euromodern foundations.

With the hindsight offered after three years of focus on this topic, I conclude this thesis by discussing three central focuses which drove my research. This thesis began with the improper relocations of Sekuruwe's ancestral graves in 2008. Over the three years of debate about Sekuruwe's ancestral graves many avenues of discussion have been explored. Many of the arguments presented here have come from conversations with organizations and individuals about the protection of heritage, and about the importance of the ancestors. This thesis is my synthesis of arguments formulated to address specific topics which have become relevant over the course of this case.

The first question which began the research was how, with all the protections provided by heritage legislation, was it possible for the exhumations at Sekuruwe to be carried out in such a culturally disrespectful manner. To address this question I composed, in Chapter Two, the narrative of Sekuruwe's case from their testimonies and a synthesis of other sources. Here I focused on elements of discontent pointed to by the community, as well as other problems made evident by the case. Chapter Two suggested that the problems encountered by Sekuruwe were a result of inadequacies in South Africa's heritage legislation and management. Chapter Three discussed the importance of the ancestors, and the cultural reverence paid to ancestral graves. This chapter was the result of my attempt to understand Sekuruwe's experiences of relationships with the ancestors, and of the destruction of their ancestral graves. Chapter Five then completed this avenue of questioning in relating the legal protections of ancestral graves, and noticing loopholes which permitted Sekuruwe's ancestors to be relocated in such a culturally disrespectful manner.

The second focus was to situate Sekuruwe's claims to ancestral veneration within the political context of their grievances with the mine. Here I tried to provide a more political framework for heritage, and how unhappiness over the treatment of

their ancestral graves was being used by Sekuruwe in a limited arsenal against the mine, which they claim has taken their land and their livelihoods. To understand this I argued that Sekuruwe's experience could be described as systemic oppression. This argument came to conclusion in Chapter Six, and was aimed as a demonstration of the way in which ancestral veneration can be used as a specific factor of argument concerned with social justice. I suggest that this can be similarly applied to other cases which have centred on the treatment of the bodies of the dead. These were related in Chapter Four, where I suggested that the bodies of the dead can become iconic in debates of justice. I suggest this post-mortem justice to be the contestation of rights and privileges in the present (justice for the living) done by reference to the treatment of the bodies of the dead (restorative justice for the dead) through those who identify with these bodies for cultural, spiritual and other reasons.

Third, this thesis aimed to understand the way in which the debate is framed through heritage legislation, as this is the language used to argue for the proper treatment of Sekuruwe's ancestral graves, and Sekuruwe's traditions. In addition to understanding the protections and shortfalls of heritage legislation in the first focus above, I focused on understanding the structuring parameters of heritage legislation on this case. Working from an explicit bias in favour of the claims of Sekuruwe, this thesis presented an argument for the recognition of Sekuruwe's human rights violations, which have both moral and legal consequences. The aim of Chapters Two, Three, Five and Six was first to argue that the violence to Sekuruwe's ancestral graves was an infringement of their constitutional cultural rights and then to locate inadequacies in heritage legislation which contributed to this infringement. These are addressed through the inadequacies highlighted in Chapter Five, with their consequences being explained in the narrative of Sekuruwe's grave relocations (Chapter Two). I then outlined the inadequacies of the legislation in terms of systemic oppression to understand the effects of these loopholes in terms of marginalization, cultural imperialism, powerlessness and violence (Chapter Six). Ultimately, my aim was to demonstrate the centrality of heritage, specifically the veneration of the ancestors, in a struggle of recognition

and resources; a battle of identities being fought through the language of constitutional cultural rights and heritage legislation. Chapter Five adopted free, prior and informed consent as a framework for determining cultural protections through legislation. This framework focuses the decisions of industry in terms of communities to be the privilege of the communities themselves, as it is their future spiritual lives which are to be adversely affected. In essence this Chapter is an implicit answer to a question underlying Chapters Five and Six: If heritage is centring dialogue on social justice, and this dialogue is framed by heritage legislation, how is this legislation to be structured? From the beginning of this thesis I considered fundamental difficulties of heritage *legislation*, in that the Euromodern framework has difficulty encompassing things spiritual. Taking this into account, heritage legislation should, I suggest, focus on the decisions of affected communities, as it is they who should decide the effects on their future, both temporal and spiritual. I have attempted to incorporate this concept into a policy paper (Appendix A) on the protection of ancestral graves.

I have aimed to structure this thesis as a continuingly questioning narrative. These questions have ranged from the assimilation of diverse testimonies into a narrative, to the impact of heritage legislation on Sekuruwe's spiritual relationship with their ancestors. Above I have restated my answers to these questions. In instances where this thesis could not, for lack of space or creativity, answer some theoretical conundrums, my aim has been to frame these questions along specific contemporary theories of social justice. One of these questions, the framing of which has been an additional aim of this thesis, and the posing of which is the conclusion, is the following:

If heritage legislation is increasingly the language through which debates over politicised pasts are being fought, what are the implications of this? If industry, often backed by national initiatives, is an opposing force in these political struggles, what is the role industrial interests will play in these debates? What is the impact of heritage legislation on the cultural connections to the ancestors, and the academic interest in the past, which can be destroyed by the whims of mining?

And finally, are there any theoretical implications for this influence; is heritage legislation a reflection of paradigms in archaeology?

APPENDIX A

Draft policy on the protection of ancestral graves

For the protection of ancestral graves, and the protection of the spiritual relationships between traditional communities and the spirits of their ancestors in South Africa.

The principles outlined in this paper represent considerations for the adequate ethical treatment of ancestral graves in South Africa. These principles relate specifically to cases where ancestral graves are to be relocated for development purposes, particularly mining, but may be applicable to the protection of other graves which are under threat of alteration. The recommendations in this paper are intended to supplement protections already provided in South Africa's heritage legislation (the National Heritage Resources Act 25 of 1999) and the policies and guidelines of the South African Heritage Resources Agency, as well as extend these protections to graves younger than 60 years old, and also graves in formal cemeteries.

This paper seeks to outline the principles relating to the adequate protection of the Constitutional right to the enjoyment of cultural life (ss30&31. The Constitution of the Republic of South Africa Act 108 of 1996), specifically relating to communities' spiritual relationships with their ancestors. This paper focuses on requirements for the ethical relocation of ancestral graves, as well as the spirits of the ancestors which are connected to these graves, and on the protection of the spiritual relationship between communities and their ancestors.

1. Principles

For the adequate protection of ancestral graves, and the spiritual relationship between communities and their ancestors, the following principles should be acknowledged:

1.1. Many South African religions, cultures and traditions maintain the continuity of the personality in spirit after the death of the physical body. This spirit or ancestor continues to form a part of the everyday life of these communities, and is an active contributor to the wellbeing, both spiritual and temporal, of the communities to which they are connected.

1.2. Many traditions and cultures maintain a spiritual relationship with the ancestor, which is mediated through rituals performed at the place of burial. The place of burial is believed to be the residing place of the ancestral spirit, who is attached to their physical remains interred there.

1.3. For all alterations to graves, the preservation of the spiritual relationship between the living and the dead must be protected. Only one with a spiritual relationship with the ancestor can have a legitimate capacity to consent to any alteration of their grave.

1.4. It should be remembered that in cases where graves are to be altered, different opinions will emerge as to the treatment of the graves, and the importance of preserving the spiritual relationship between the living and the dead. In such cases of conflict, the mediation of the South African Heritage Resources Agency should determine the merits of each claim.

1.5. It should be acknowledged that even in cases where there are no customary beliefs concerning the spirituality of the grave, there may still be legitimate connections to the grave for religious, emotional or other reasons. Those with such connections to the graves should also be given adequate opportunity to influence the decision making process for the alteration of these graves.

2. Definitions

2.1. A grave can be any place of human interment, or a memorial dedicated to the remains of the deceased.

2.2. The mortal remains of the deceased, as well as the marker and grave goods of the burial must be considered as part of the grave.

2.3. Ancestral graves are places of human interment where the spirit of the deceased is believed to dwell, and where the living go in order to communicate with these spirit.

2.4. Communities or individuals with relevant associations with these graves are those who maintain spiritual relationships with the ancestors, and who visit the graves to communicate with the ancestors. These associations must be considered broadly to include spiritual, cultural and emotional connections. Communities, families and individuals must be given opportunity to voice their opinions on the future of the graves, which opinions should be arbitrated by SAHRA.

2.5. In addition, other parties interested in the future of these graves, and entitled to opinion on the future of the graves can include the developer seeking to relocate the graves, as well as other organisations providing social capital to the community or individuals who maintain spiritual relationships with the ancestors. The opinions of all these parties should be considered by SAHRA when deciding on the issuing of permits for the relocation of these graves.

3. Consent

No grave should be altered in any way without the free, prior and informed consent of those connected to the grave. Those connected to the grave may include communities with cultural relationships with the ancestors as well as other individuals and bodies, whose opinions should be mediated by SAHRA. Consent

for the relocation of a grave cannot be considered adequate without the following provisions:

3.1. Communities/families/individuals must be informed of the proposed alteration to their graves prior to entering into contractual obligations on the part of the developer. These communities must be given adequate opportunity to engage in decision making processes concerning these developments and the possible impacts they will have on their graves, considering both the temporal, spiritual, and emotional implications.

3.2. In order to meaningfully engage with the decision making process about development and the future of their graves, communities must be provided with sufficient social capital to influence these decisions and processes. This capital can be provided by organisations forming sections of an *ad hoc* committee (see section 6).

3.3. In each case, consent to the alteration of graves should be considered with specific reference to the following:

3.3.1. The method of exhumation, and the participation of family and community members in this process. This exhumation may only be performed by a qualified archaeologist with the relevant field experience to be appointed by SAHRA.

3.3.2. The provision of cultural ceremony to ensure the transportation of the spirit of the deceased to the new place of interment.

3.3.3. The aspects relevant to the new burial, including graves stones, coffins and other details.

3.3.4. The payment of financial compensation to the relevant community/family/individual for the alteration of their graves.

3.4. Consent for the alteration of graves cannot be considered adequate until it has been verified by SAHRA, who can only verify consent on the principles above (section 3.3) as well as the following principles:

3.4.1. SAHRA must conduct a site visit to meet with the community/family/individual to ensure that they are aware of their rights in terms of the grave relocations, and have considered and agreed to all aspects of the relocation (see section 3.3).

3.4.2. SAHRA must appoint a qualified archaeologist with the relevant field experience to conduct the exhumations and relocations.

3.4.3. SAHRA must meet with the developer intending to alter the graves to ensure that they are aware of the requirements for relocation, and that they have engaged the community in decisions concerning the future of their graves.

4. Management.

SAHRA is the only authority with the capacity to issue permits for the relocation of graves. The issuing of these permits can only occur if SAHRA is satisfied that the community/family/individual has adequately consented to the relocation of their graves considering all aspects of the relocation.

4.1. No grave may be altered in any way without an alteration permit issued by SAHRA, who will only issue such permit if the following principles are adhered to:

4.1.1. An application for the alteration of graves must be submitted to SAHRA before any other contractual obligations are entered into on the part of the developer.

4.1.2. This application must include details of the proposed alteration to the graves, as well as details of community engagement seeking consent for the relocation of these graves.

4.2. SAHRA should not issue permission for the alteration of any graves without first obtaining the opinion of the community that is connected to these graves by visiting the site and meeting with the community/family/individuals.

4.3. SAHRA should consider all relevant opinions about the future of the graves before issuing a permit for their alteration. This should be on the following principles:

4.3.1. The importance of the graves to the local communities/families/individuals, with specific relevance given to cultural/religious/emotional connections to the graves and the spirits of the deceased.

4.3.2. SAHRA should ensure that all claimants to the graves are aware of their rights in terms of consent, and ensure that all aspects of the relocation have been considered and agreed upon (see section 3.3).

4.3.3. SAHRA should ensure that claimants to the graves are aware of their right to refuse relocation, as well as their rights to influence other aspects of the relocation (see section 3.3).

5. Permit.

No grave may be altered in any way without the relevant permission issued by SAHRA. An application must be submitted to SAHRA for the alteration of graves with the following considerations:

5.1. Notice of an intention to develop an area which will cause the alteration of graves must be locally publicised, inviting communities/families/individuals to submit concerns about the alteration of their graves.

5.2. All applications must be submitted to SAHRA's head office, which can then appoint either a regional office or the Burial Grounds and Graves Unit to consider the application.

5.3. Application from developer for the alteration of graves must be submitted to SAHRA at the earliest convenience, and at least before the conclusion of any contractual obligations on the part of the developer.

5.4. The application may include information on consultation with the relevant communities/families/individuals, as well as agreements reached between these and the developer for the future of the graves. However, these agreements cannot be considered valid until they have been confirmed by SAHRA (see section 3).

5.5. The application must also include the following considerations:

5.5.1. Details of the method of community/family/individual consultation and negotiation.

5.5.2. Proposed method of exhumation, transportation and reburial, including considerations of community participation in this process.

5.5.3. Considerations of the cultural/spiritual/emotional significance of the graves, and details of ceremonies or rituals required by such considerations in order to properly relocate the physical grave as well as the spirit connected to the grave.

5.5.4. Details of aspects of the reburial including the provision of tombstones, coffins etc.

5.5.5. Considerations of financial compensation to the relevant community/family/individual for the alteration of their graves.

6. Composition of *ad hoc* committees for the consideration of alterations to graves.

Where application has been made for the alteration of graves, SAHRA should lead the constitution of an *ad hoc* committee comprising all relevant bodies and individuals for the consideration of the application. This committee will serve to ensure that diverse opinions on the alteration of the graves are given adequate consideration, and that no single individual or body has the ability to unilaterally determine the future of the graves. The purpose of this *ad hoc* committee is also to ensure that the community has access to sufficient social capital to meaningfully engage with the decisions about development and the impacts of this on their future spiritual relationship with the ancestors and their graves.

This committee should be constituted on the following principles:

6.1. The community must be provided with independent legal and technical assistance to advise them on their rights. This assistance can come from SAHRA or from NGOs and state organizations which may be included in the *ad hoc* committee.

6.2. The *ad hoc* committee should be guided by SAHRA to negotiate the terms of agreement for the alternation of the graves. This committee should be comprised of the following:

6.2.1. The community, families and individuals connected to the graves under consideration

6.2.2. The developers and their legal and technical advisors

6.2.3. A representative from SAHRA who is dedicated to each specific case.

6.2.4. Additional organisations, religious institutions, and NGOs. These organisations should apply to SAHRA for inclusion in the *ad hoc* committee on behalf of the community. SAHRA should consider the application on the merits of each case, placing emphasis on the provision of social capital to ensure the meaningful engagement of the community in decisions effecting the future of their graves and their spiritual relationship with the ancestors.

6.3. SAHRA should be the mediator of this committee, and should decide on disputes within the committee relating to the future of the graves.

6.4. Decisions of this committee on the future of the graves needs to be formalised, documented and consented to by all participating bodies.

6.5. The agreements of this committee must further be verified by SAHRA before the issuing of permission for the alteration of graves.

6.6. Any contravention of the agreements of this committee by the developer during relocation will then constitute a breach of contract, for which the developer will be liable to SAHRA and the community.

APPENDIX B

Additional communities claiming improper ancestral grave relocations

The constitution of some communities in and around the Mapela area is not ridged because of recent mine relocations. Some communities self-identify as collectives, making their location difficult to determine geographically. Here I relate testimonies collected throughout my research from communities who's location I was unable to verify geographically.

Sikemeng. Drikop area.

On the same visit to Limpopo, it was found that the Sikemeng community testified that they had become concerned about the appearance of large machinery on their lands. They suspect the machinery is being used for prospecting. Hearing what has happened to other communities, they worry about their graves, which are buried on the mountain side. They claim not to have been consulted about the erection of the machinery, and are concerned that they won't be included in discussion about the relocation of their graves. They have approached the police requesting information, and to raise concerns about the safety of their graves, but were told that the mine had a right to prospect from agreements with the Tribal Authority[94]. The community has been unable to get comment from the mine or the Tribal Authority about the future of their graves.

Mashashleng. Near Polokwane, Limpopo

With a delegate from Action Aid, the Induna invited us to hear his testimony about the destruction of nearby graves. He claims the illegal mining of sand from the river bank has continued for over two years. The river bank is the border between two tribal authorities, who allegedly each bribe the municipalities to turn a blind eye to mining on their side of the river. For this service they receive a few kick-backs from the mine. This mining has exposed a number of skeletons which have reportedly been taken away with the mined sand or simply thrown into the

[94] 07/08.10.2010 - Meetings with communities in Mapela area. Attended by Saccaggi, representatives from Jubilee South Africa, Action Aid and Bread for All.

river. If the authorities are called (which, by evidence of numerous police documents, they often are) the blame is shifted to the other tribal authority[95]. This case has apparently come to the attention of SAHRA. The Induna claimed that no assistance could be had from the police, the illegal miners, or SAHRA to stop the mining or to assess the presence of burials.

Masilela, *Skosana* and *Mashlangu* families. Middleburg.

These families state that a nearby mine had bought their ancestral land, and since fenced it off. They are not able to visit the graves of their ancestors on this property, and have been told that some of the graves are being moved, but claim that they never gave consent for these relocations. They also claim they were never shown any permit from SAHRA, even though some of the graves were older than 60 years old. They have also been unable to verify the rumours of relocations since they cannot gain access to the property where their ancestors are buried[96].

Ga-Chaba. Near PPL mine.

This community was mentioned in the South African Human Rights Commission's report on rural communities in Limpopo. The community claim that PPL had began to bury non Ga-Chaba residents on their traditional burial grounds, which is against their custom and culture. The community claims that later, all these graves were removed from the site (now a mine dump) without the consent or even knowledge of the community. They have been unable to get any information from the representatives of the mine about the relocation of their graves (SAHRC 2008).

[95] 07/08.10.2010 – Meetings with communities in Mapela area. Attended by Saccaggi, representatives from Jubilee South Africa, Action Aid and Bread for All.

[96] 23.06.2010 – community meeting Masilela, Skosana and Maslagu families. Attended by Esterhuysen, Saccaggi and SAHRA representatives. Middleburg, Mpumalanga.

REFERENCES

Community meetings and interviews

2009 February 22 – Sekuruwe community meeting and interviews with community members. Attended by Saccaggi and Esterhuysen. Sekuruwe Village, Limpopo.

2009 June 21 – Sekuruwe community meeting. Attended by Saccaggi, Esterhuysen, and SAHRA representatives. Sekuruwe Village, Limpopo

2009 August 12 – Interview with G. Morris. Project manager, Anglo Platinum. Marshaltown, Johannesburg.

2010 March 02 – Interview with Mr Shiburi. Steps of Constitutional Court, Johannesburg.

2010 June 17 – Visit to the laboratory of Roodt attended by Saccaggi, Esterhuysen and representatives of the Sekuruwe Community Council to view the re-assembly process.

2010 June 17 – 18 – community meetings at Sekuruwe and Backenburg. Attended by Saccaggi and Esterhuysen. Mokopane, Limpopo.

2010 June 23 – community meeting Masilela, Skosana and Maslagu families. Attended by Esterhuysen, Saccaggi and SAHRA representatives. Middleburg, Mpumalanga.

2010 July 06 – Visit to Blinkwater farm with Esterhuysen, Roodt, and mine representatives.

2010 September 18 – Interview with S. Sibanda, LRC representative. Pilansberg, Limpopo.

2010 October 07 – 08 – Meetings with communities in Mapela area. Attended by Saccaggi, representatives from Jubilee South Africa, Action Aid and Bread for All.

Legislation, policy, and official documents

Human Tissues Act 65 of 198. South Africa: Government Gazette.

Mphoohlele James Shiburi and Others v the Minister of Rural Development and Land Reform and Others, 2009. SA (North Gauteng High Court. 78195/2009).

Office of the President, South Africa. 2004. *Letter from President Mbeki on Saartjie Baartman.*
Online. [http://www.upf.edu/materials/fhuma/hma/docs/mbeki.pdf]: 30.11.2010

SAHRA. 2009. *Guidelines*. [online]. Available: http://www.sahra.org.za. [15 August 2009]

SAHRA: Burial Grounds and Graves Unit. 2009. *SAHRA Guidelines on Public Consultation Requirement for Burial Permit Applications [Draft]*.

SAHRA: Burial Grounds and Graves Unit. 2009. *SAHRA Guidelines to Burial Grounds and Graves Permitting Policy [Draft]*.

The Constitution of the Republic of South Africa Act 108 of 1996. South Africa: Government Gazette.

The National Heritage Resources Act 25 of 1999. South Africa: Government Gazette.

United Nations Economic, Scientific and Cultural Organization. 1966. *The International Covenant on Economic, Social and Cultural Rights*. [online] Available: http://www.unesco.org/education/information/nfsunesco/pdf/SOCIAL_E.PDF. [3 September 2010]

United Nations Economic, Scientific and Cultural Organization. 1972. *Convention Concerning the Protection of the World Cultural and Natural Heritage*. [online] Available: http://whc.unesco.org [3 September 2010]

Media

"Angloplat activities cause grave concern". *Business Report*: 29 September 2008

"Angloplat took every care with grave removals". *Business Report*: October 2008

'Billy Hill', 'Doomsday_Dave**',** **'**FreeSpeech**'** and **'**august rain'. Anonymous comments on 'Grave relocations 'disrespect human dignity''. The Times. 2010**.** Online **[**http://www.timeslive.co.za/sundaytimes/article698394.ece/Grave-relocations-disrespect-human-dignity?commentsPage=true]: 28.12.2010.

"Graves damaged during relocation". *Business Report*: September 30 2008

Saartjie Baartman Centre for Woman and Children. Homepage: [http://www.saartjiebaartmancentre.org.za]: 28.12.2010.

"Urgent Media Alert" *Jubilee South Africa*. 28 May 2008.

Van Rooyen, K. 2010. ‘Grave relocations ‘disrespect human dignity’’. *The Times*. 10 October 2010.

Other

ActionAid. 2008. *Precious Metal. The impact of Anglo Platinum on poor communities in Limpopo, South Africa*. Johannesburg: ActionAid.

Anglo Platinum. 2008. *The Facts. Anglo Platinum’s response to Action Aid allegations*. Johannesburg: AngloPlatinum.

Benhabib, S. 2007. Another Universalism: on the Unity and Diversity of Human Rights. *Proceedings and Addresses of the American Philosophical Association* vol. 81 no. 2: 7 - 32

Berglund, A. 1976. *Zulu Thought-Patterns and Symbolism*. David Philip, Publisher: Cape Town & Johannesburg.

Burke, H. Smith, C. Lippert, D. Watkins, J. & Zimmerman, L. Kennewick man. 2008. *Perspectives on the Ancient One*. California: Left Coast Press Inc.

Byrne, D. 2004. Partnerships in the Heritage of the Displaced. *Museum International* vol. 56 no. 4: 89 - 97

Chatters, J. 2004. Kennewick Man. In: *Northern Clans, Northern Traces: Journeys in the Ancient Circumpolar World*. Smithsonian Institution. Online [http://www.mnh.si.edu/arctic/html/kennewck_man.html]: 23.12.2010.

Colwell-Chanthaphonh, C. 2004. Virtue Ethics and the Practice of History: Native American and Archaeologists along the San Pedro Valley of Arizona. *Journal of Social Archaeology* 4.1: 5 – 27

Comaroff, J. 2004. The end of History, Again? Pursuing the past in the postcolony. In S. Kaul, A. Loomba, M. Bunzl, A. Burton, J. Esty [eds.], *Postcolonial Studies and Beyond*. Durham: Duke University Press.

Comaroff, J. & Comaroff, J. 2004. Policing Culture, Cultural Policing: Law and social order in postcolonial South Africa. *Law and Social Inquiry,* 29.3: 513 – 545.

Comaroff, J. & Comaroff, J. 2009. *Ethnicity, Inc*. Durban: University of KwaZulu-Natal Press.

Coombe, R. J. 2005. Legal Claims to Culture in and Against the Market: Neoliberalism and the Global Proliferation of Meaningful Difference. *Law, Culture and the Humanities,* 1: 35 - 52

Crais, C. & Scully, P. 2009. *Sara Baartman and the Hottentot Venus: a ghost story and a biography*. Wits University Press: Johannesburg.

Deacon, J. & Pistorius, P. 1996. Introduction and Historical Background to the Conservation of Monuments and Sites in South Africa. In ICOMOS. *Monuments and Sites South Africa*. Sri Lanka: ICOMOS.

Egan, T. 1996. Tribe Stops Study of Bones that Challenge History. *The New York Times*: 30.09.1996

Eiselen, W.M. 1966. Religious Beliefs and Practises. In Schapera, I (ed.) *the Bantu-Speaking Tribes of South Africa. an Ethnographical Survey*. 247 – 270. Routledge & Kegan Paul Ltd: London

Environmental Law Institute. 2004. *Prior informed consent and mining. Promoting the sustainable development of local communities.* Washington D.C.

Esterhuysen. 2008. Divining the siege of Mugombane. *Journal of Anthropological Archaeology* 27: 461–474.

Esterhuysen. 2008. "Report on visit to Blinkwater and Sekuruwe on 17th July 2008". Compiled for SAHRA.

Esterhuysen, A. 2009. Undermining Heritage. *South African Archaeological* Bulletin 64: 1-3.

Ferguson, T. J. 1996. Native Americans and the Practise of Archaeology. *Annual Review of Anthropology* 25: 63 – 79.

Fortes, M. 1965. Some reflections on Ancestor Worship in Africa. In Fortes, M. & Dieterlen, G. (eds.) *African Systems of Thought*. London: Oxford University Press.

Fortes, M. 2008. Spirited Encounters: American Indians Protests Museum Policies and Practices. *ZeroAnthropology*. Online [http://zeroanthropology.net/2008/06/22/spirited-encounters-american-indians-protest-museum-policies-and-practices/]: 23.12.2010.

Goodale, M. 2002. The Globalization of Sympathetic Law and Its Consequences. *American Bar Foundation*: 595 - 608

Graham, B. Ashworth, G. J. Tunbridge, J. E. 2000. *A Geography of Heritage: Power, Culture and Economy*. London: Arnold.

Hall, A. 2009. Initiating a review of national heritage legislation in the South African experience. In ICCROM. *Legal Frameworks for the Protection of Immovable Cultural Heritage in Africa*. Rome: ICCROM.

Hammond-Tooke, W. D. 1981. Ancestor Religion. In Kuckertz, H. (ed.) *Ancestor Religion in Southern Africa. Proceeding of a seminar on Ancestor Belief.* Transkei: Lumko Missiological Institute.

Hoffman, B. T. 2006. *Art and cultural heritage: law, policy, and practice.* Cambridge: Cambridge University Press.

Ivison, D. 2003. The Logic of Aboriginal Rights. *Ethnicities* vol.3: 321 - 344

Jonker, J. D. 2005. Excavating the Legal Subject. The Unnamed Dead of Prestwich Place. *Griffith Law Review* vol. 14m no. 2: 187 – 212.

Kamamba, D. 2009. Cultural Heritage Legislation in Tanzania. In *Legal Frameworks for the Protection of Immovable Cultural Heritage in Africa*. Rome: ICCROM.

Kashe-Katiya. 2010. Prestwich Place Memorial: Human remains, development and truth. *The Archival Platform*. Online [http://www.archivalplatform.org/blog/entry/prestwich_place/]: 28.12.2010.

"Kennewick Man on Trial". nd. *The Burke Museum of Natural History and Culture*. Online [http://www.washington.edu/burkemuseum/kman/]: 23.12.2010.

Kopytoff, I. 1971. Ancestors as Elders in Africa. *Africa: Journal of International African Institute* 41: 129-142.

Krige, E. J. & Krige, J. D. 1943. *The realm of a rain-queen: a study of the pattern of Lovedu society*. Oxford University Press: London

Krige, E. J. 1950. *The Social System of the Zulus*. Shuter & Shooter: Pietermaritzburg.

Lafrenz Samuels, K. 2008. Value and Significance in Archaeology. *Archaeological Dialogues* vol. 15: 71 – 97.

Laplante, L. J. & Spears, S. A. 2008. Out of the conflict zone: the case for community consent processes in the extractive sector. *Yale Human Rights and Development Law Journal*, 11: 69 - 116

Legassick, M. & Rassool, C. 2000. *Skeletons in the Cupboard. South African Museums and the Trade in Human Remains 1907 – 1917*. Cape Town: South African Museums.

Lipe, William D. (1984) Value and meaning in cultural resources. In: H.Cleere (ed.) *Approaches to the archaeological heritage. A comparative study of world cultural resource management systems*: 1-11. Cambridge: Cambridge University Press.

Lowenthal, D. 1998. Fabricating Heritage. *History and Memory*, 10. 1: 5 – 19.

Madiba, P. 2009. The new Heritage Protection Act for South Africa. In ICCROM. *Legal Frameworks for the Protection of Immovable Cultural Heritage in Africa*. Rome: ICCROM.

Mönnig, H. O. 1967. *The Pedi*. Van Schaik: Pretoria

Munjeri, D. 2005. Legislation and practices: implications and the way forward. In: Ndoro, W. & Pwiti, G. (eds) *Legal frameworks for the Protection of Immovable Cultural Heritage in Africa*: 2-4. Rome: ICCROM

Nielson, P. I. 2010. Kennewick Man – Discovery of Ancient Skeleton. Caucasoid Skeleton Predates North American Paleo-Indians. *Suite101.com*. Online [http://www.suite101.com/content/kennewick-man----discovery-of-ancient-skeleton-a198694]: 28.12.2010.

Oxfam Australia. 2007. *Free, Prior and Informed Consent: the Role of Mining Companies*. Victoria: Oxfam Australia.

Petersen, A. & Lupton, D. 1996. *The New Public Health: Health and Self in the age of risk.* London: Sage.

Pistorius, P. 1996. Legislation and the National Monuments Act. In ICOMOS. *Monuments and Sites South Africa*. Sri Lanka: ICOMOS.

Qureshi, S. 2004. Displaying Sara Baartman. The 'Hottentot Venus'. *History of Science* vol.42: 233 – 257.

Roodt, F. 2010. *A concise report of the Blinkwater/Sekuruwe graves relocation and remedial process. Anglo Platinum – Mogalakwena section.* Vhufa Hashu Heritage Consultants cc. [Unpublished Draft Report]

Scham, S. A. 1998. Mediating Nationalism and Archaeology: A Matter of Trust? *American Anthropologist* vol. 100 no. 2: 301 – 307

Scham, S. A. 2003. Heritage and Reconciliation. *Journal of Social Archaeology* vol. 3: 399 - 415

Schama, S. 1995. *Landscape and Memory*. New York: Alfred A. Knopf.

Schapera, I. 1953. *The Tswana*. International African Institute: London

Schmidt, P. 1993. The human right to a cultural heritage. In Schmidt, P. & McIntosh, R. J. (eds.) *Plundering Africa's past*. Indianapolis: Indiana University Press.

Setiloane, G. M. 1976. *The image of God among the Sotho-Tswana*. Balkema: Rotterdom.

Shepherd, N. 2007. What does it mean to 'give the past back to the people'? Archaeology and ethics in the postcolony. In Hamilakis, Y. & Duke, P. G. (eds) *Archaeology and Capitalism: from ethics to politics*. California: Left Coast Press Inc. 99 – 114.

Silverman, H and Ruggles, D. F. (eds). 2007. *Cultural Heritage and Human Rights*. United States of America: Springer

Smith, L. 2006. *Uses of Heritage*. London: Routledge.

South African Human Rights Commission. n. d. *Mining-related observations and recommendations: Anglo Platinum, affected communities and other stakeholders, in and around the PPL mine, Limpopo*. Johannesburg: SAHRC.

Steyn, M. 2009. *Report on human skeletal remains from Sekuruwe (Blinkwater) graves*. Forensic Anthropology Research Centre. Department of Anatomy, University of Pretoria. [Unpublished Report].

Weiss, L. 2007. The Concept of Heritage. *Journal of Social Archaeology* vol. 7 no. 3: 414 – 431.

Young, I. M. 1990. *Justice and the Politics of Difference*. Princeton: Princeton University Press.

Young, I. M. 2000. *Inclusion and Democracy*. Oxford: Oxford University Press.