

# Property regulation in South Africa: Paving the way for regulation in Lesotho

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## **Abstract**

Rapid growth of cities has become a trend in most countries, this is caused by urbanisation wherein people move from the rural areas to the urban areas in search of employment. It goes without saying that such population needs housing. However, it is unusual to find land for housing in an already crowded place. Therefore, to curb this shortage in housing, countries like South Africa have resorted to adoption of fragmented property holding in and around the cities. Thus, in an attempt to curtail housing shortages in the urban area as well as land shortage, communal property schemes were adopted together with their governing legislation namely, *Sectional Titles Act 95 of 1986*, *Share Blocks Act 59 of 1980* and *Property Time-sharing Control Act 75 of 1983* to name a few.

Likewise, Maseru, the capital city of Lesotho is also experiencing rapid growth in population. Hence, with the introduction of Lesotho's Sectional Titles Bill 2013 came a ray of hope that the land and housing shortage in Maseru would be addressed. With this in mind, this suggested that the Government of Lesotho together with all concerned stakeholders thought it necessary to address this problem through the 2013 Bill which, for the most part follows the South African *Sectional Titles Act* of 1986. It is for this reason that this study was embarked on to show other forms of property holding akin to sectional titles as well as their regulation, which can all be used to eliminate housing shortages in Lesotho.

## **Keywords:**

Lesotho, South Africa, land, leasehold, freehold, fragmented property holding, housing policy, ownership, management, sectional titles, exclusive use area, unit, common property, developer, body corporate, share block scheme, share block company, use right, housing interest, time-share, retirement scheme.

## Opsomming

Die vinnige groei van stede het 'n neiging in meeste lande geword; Dit word veroorsaak deur verstedeliking waar mense uit die landelike gebiede na die stedelike gebiede beweeg op soek na werk. Dit is nodeloos om te sê dat hierdie bevolkings behuising benodig. Dit is egter ongewoon om grond vir behuising in 'n reeds stampvol plek te vind. Daarom om hierdie tekort na behuising te bekamp, het lande soos Suid-Afrika die aanvaarding van gefragmenteerde eiendomsbelang in en rondom die stede aangegryp. Dus, in 'n poging om behuisingstekorte in die stedelike gebiede, sowel as landelike tekorte aan bande te lê, is die gemeenskaplike eiendom skemas tesame met regerings wetgewing naamlik *die Wet op Deeltitels 95 van 1986, Aandeel Blokke Wet 59 van 1980 en Wet op die Beheer eiendom Tyd-sharing 75 van 1983*, om 'n paar te noem aangeneem.

Eweneens ervaar Maseru, die hoofstad van Lesotho, ook vinnige bevolkingsgroei. Met die bekendstelling van Lesotho se Deeltitels wetsontwerpe 2013 het die hoop ontstaan dat die grond en behuisings tekort in Maseru aangespreek sal word. Met dit in gedagte, het die regering van Lesotho tesame met alle betrokke partye dit nodig gedink om hierdie probleem aan te spreek deur middel van die Deeltitels Wetsontwerp 2013 wat grotendeels die Suid-Afrikaanse *Wet op Deeltitels 95 van 1986* volg. Dit is om hierdie rede dat hierdie studie onderneem is, om sodoende ander vorme van eiendomsbelang soortgelyk aan die Deeltitels wetsontwerpe hul regulering uit te wys, wat gebruik kan word om behuisingstekorte in Lesotho te elimineer.

### **Sleutelwoorde:**

Lesotho, Suid-Afrika, land, huurbesit, eiendomsreg, gefragmenteerde eiendom belang, behuising beleid, eienaarskap, bestuur, deeltitels, uitsluitlike gebruiksgebied, eenheid, gemeenskaplike eiendom, ontwikkelaar, regspersoon, aandeelblokskema, aandeelblokmaatskappy, gebruik reg, behuising belang, tyd-deel, aftree-skema.

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## List of abbreviations

BG	Bulletin of Geography
CILS	Critical Inquiry in Language Studies
EJCL	Electronic Journal of Comparative Law
GJICL	Georgia Journal of International and Comparative Law
IDA	International Development Association
IMF	International Monetary Fund
LAA	Land Administration Authority
LPRC	Land Policy Review Commission
TSAR	Law Journal of Southern Africa
LHLDC	Lesotho Housing and Land Development Corporation
LSPP	Land Survey and Physical Planning
LPLD	Lexisnexis Property Law Digest
NC	New Contree
PDR	Population and Development Review
SDA	Selected Development Area
SADJ	South African Deeds Journal
SLR	Stellenbosch Law Review
UF	Urban Forum
UN	United Nations

# 1 Introduction and problem statement

## 1.1 Introduction

Land ownership in Lesotho vests in the Basotho Nation and is held in trust by the King.<sup>1</sup> According to Selebalo,<sup>2</sup> under customary law, Chiefs were responsible for land allocation and the citizens only had the use rights to the property. As a result, the land had to revert back to the Chief when the holder died; however, this never happened in practice. An analysis of this reversion issues will be made in the succeeding section. At this point it suffices to state that the “reversion” was seen as an impediment to property development in the urban sector. Thus, in 1967 there was a slight change to this system through the introduction of the *Land Act* 24 of 1967 (hereinafter the *Land Act* 1967) and the *Deeds Registry Act* 12 of 1967 (hereinafter the *Deeds Registry Act*).

However, the only modification brought about by this legislation was registration of titles for non-agricultural land in terms of section 16 of the *Deeds Registry Act*, while the *Land Act* formalized the customary land allocation system by introducing documentation as proof of allocation. In 1979 a new *Land Act* 17 of 1979 was promulgated. According to its preamble, its principal objective was nationalization of land in Lesotho, which meant that all rights in land were leased from the state. Under this Act only three land tenure systems were recognized, namely; leasehold, allocation and license.

Leasehold tenure became the predominant landholding system in the urban areas with the introduction of the Land Administration Authority (hereinafter LAA) and the *Land Act* 8 of 2010 (hereinafter the *Land Act* of 2010). The LAA is a new autonomous agency responsible for land administration that replaced the separate departments that were responsible for issuing leasehold titles to land, registration of deeds, and cadastral surveying and mapping.<sup>3</sup> The *Land Administration Authority Act* 9 of 2010, and the more controversial *Land Act*, were enacted under the auspices of the “Land Administration Reform Project” and support of the Millennium Challenge Corporation.<sup>4</sup> The controversy of the new *Land Act* lies in the fact that it gives the Minister responsible powers to regulate

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1 S 107 of the Lesotho Constitution 1993 read with s 4 of the *Land Act* 2010.

2 Selebalo 2007 [www.fig.net](http://www.fig.net).

3 Preamble to the *Land Administration Authority Act* 9 of 2010.

4 A United States non-governmental organisation that was established to reduce poverty and increase economic growth in Lesotho.



ground rent,<sup>5</sup> dictate what the land can be used for and exempt certain companies from being disqualified from holding title to land in Lesotho, according to sections 26 (2) (c) and 92 (2)(i) respectively. However, the inclusion of foreigners (foreign companies) to land ownership is seen as a boost on investment, since nationals barely have enough capital to acquire majority shareholding in investment companies.<sup>6</sup> In-depth discussions of these Acts will be made in the succeeding sections.

With this said, it is essential to note that individual landholding in the urban areas becomes scarcer by day because available land for new developments is hard to find. Thus, it will be shown throughout the research that adoption of communal schemes like sectional title schemes, share block schemes and retirement schemes is not a bad idea. These forms of fragmented property holding already exist in South Africa hence the reason for choosing it as a study area.<sup>7</sup> Alternatively, South Africa's property market is on the rise and will continue growing, more so with the strict regulation it has in this regard. Consequently, the study will look into South Africa's property regulation and legal framework against Lesotho's own framework to examine if anything is to be learnt from the former. However, it is an obvious fact that Lesotho is much smaller than South Africa both in size and economy, as such the growth and development of communal schemes that will be recommended by this study may not be comparable in all respects. However, useful lessons can be learnt by the way South Africa has regulated its communal property market since their inception.

## **1.2 Problem statement**

As has been mentioned above, there is no housing policy in Lesotho, as a result, this leads to little or no control over land development process and hinders proper land management by the government. In Ntlaloe's<sup>8</sup> opinion, "...lack of housing policy in Lesotho has led to unplanned settlements with sub-standard housing." More often than not, a housing policy helps to identify and set target groups in most need of land, after which proper and relevant mechanisms are put in place to help the target groups access housing.<sup>9</sup> Social and economic conditions require of the legislature to provide the means

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5 Discussed on pages 16- 19.

6 Selebalo 2007 [www.fig.net](http://www.fig.net).

7 Pienaar *Sectional Titles* 57.

8 Ntlaloe *Assessment of Land Act 17 of 1979* 13.

9 Andrews *et al* 2013 [www.housingfinance.org](http://www.housingfinance.org).

to acquire title in immovable property jointly as opposed to individual title to immovable property. Pienaar<sup>10</sup> is of the opinion that joint title in urban property is economically necessary, for this kind of tenure guarantees enjoyment of property by a group of people that would otherwise be used by an individual. He<sup>11</sup> buttresses this by saying:

Mass urbanization and limited available urban land are characteristics of all modern cities and the demands of overpopulation and dwindling non-renewable natural resources necessitates economic adaptation.

At the rate the allocation of urban land is going in Lesotho currently, some number of years down the line, there will be no land to allocate anymore. It is for this reason that individual ownership of urban land is discouraged by Van der Merwe<sup>12</sup> where he opines that sectional titles schemes and share block schemes (apartments) should be encouraged as they allow exploitation of the land and the building to its full economic potential. Therefore, the purpose of this study is to determine if Lesotho's problem of landlessness can be curbed with the advent of communal property schemes with reference to the South African position. This is a time when there is urgent housing shortages especially near places of employment and this situation must compel countries to propagate legislation to regulate apartment ownership.

### *1.2.1 Consequences of non-regulation*

#### 1.2.1.1 Scarcity of urban land

With the creation of sectional titles as an example, on a piece of land that would otherwise be allocated to an individual, there would be more than hundreds of people dwelling thereon. This would mean that land is spared and being economical with land would imply that there would be more land on which to erect commercial infrastructure by the town planning authorities.

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10 Pienaar *Sectional Titles* 8.

11 Pienaar *Sectional Titles* 8.

12 Van der Merwe 2012 *TSAR* 5.

### 1.2.1.2 Shortage of residential accommodation

Johnson<sup>13</sup> asserts that there is increasing “landlessness and homelessness” in Lesotho owing to rapid urbanization. Selebalo<sup>14</sup> too, is of the opinion that homelessness leads to informal settlements in the urban areas but then Lesotho Government’s policy towards the informal settlements has not been clearly defined in policy documents.

The principal guidance is said to be in clause 17 of the Lesotho Constitution.<sup>15</sup> For example, Ntlaloe<sup>16</sup> states that in 1985 the Lesotho Government intervened in a project known as Mabote Project to formalise and replan informal settlements that were being developed in the North East periphery of Maseru city. This entailed collecting the ‘form Cs’<sup>17</sup> from the informal settlers; re-planning the areas and reallocating the settlers new properly planned land parcels. This intervention was successful partly because the settlers had not yet done substantive developments when the project started and the legality of the processes were ignored.<sup>18</sup>

### 1.2.1.3 Building costs

According to a fiscal study conducted by Andrews,<sup>19</sup> nearly 50% of Basotho households earn less than M1 000<sup>20</sup> a month and cannot easily afford to purchase formally developed houses. Therefore, commercial banks are the primary source of housing finance, with mortgage loans increasing by over M294 million or more than 149%, as of 31 March 2013, primarily because of a programme of land titling.<sup>21</sup> In 2007 Select Management Services Lesotho was introduced and has been one of the housing finance services providers, offering non-mortgage housing microloans.<sup>22</sup> It was later suspended by the government because it made good its debts by deducting from the government employees’ salaries yet

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13 Johnson 2013 [www.laa.org](http://www.laa.org).

14 Selebalo 2001 [www.saprn.org](http://www.saprn.org).

15 5 of 1993.

16 Ntlaloe *Assessment of Land Act 17 of 1979* 20.

17 Selebalo ( 2001 [www.saprn.org](http://www.saprn.org).) a “form C” was proof of land title in Lesotho before the lease system was introduced by the *Land Act* 1979 and *Land Act* 2010 respectively.

18 Ntlaloe *Assessment of Land Act 17 of 1979* 21.

19 Andrews *et al* 2013 [www.housingfinance.org](http://www.housingfinance.org).

20 Maloti (M) is Lesotho’s currency and M1 is equal to R1 [South African rand (R)]

21 Andrews *et al* 2013 [www.housingfinance.org](http://www.housingfinance.org).

22 Leduka 2012 [www.saprn.org](http://www.saprn.org).

it was not a registered financial institution. Pienaar<sup>23</sup> too, acknowledges the rising cost of building material and labour.

### **1.3 Objectives**

- a) To determine if Lesotho's non-regulation in the housing sector can be curbed with the introduction of fragmented property holding, namely: overpopulation, housing (land) shortage and high costs of building material. As a direct consequence of non-regulation, it will be shown that the absence of a housing policy leads to overpopulation as well as unplanned settlements in the urban areas.<sup>24</sup> This happens as individuals migrate to the urban areas in search of employment. In turn, if everyone places their house anywhere without supervision, the land on which to build will ultimately run out.
- b) To determine if housing development for the low and middle income groups can be achieved since there are lower construction costs and smaller land units.<sup>25</sup>

### **1.4 Research question**

Therefore, the research question for this dissertation is whether the introduction of communal property schemes can eliminate the problem of land and housing shortage in the urban areas in Lesotho.

### **1.5 Methodology**

The research is principally centred on a literature study of relevant text books, journals, legislation, case law and internet sources relating to the regulation of rights to immovable property. A comparison between South Africa and Lesotho is essential so that recommendations can be made on how Lesotho can learn from South Africa, since the property regulation in South Africa is more sophisticated and regulated.

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23 Pienaar *Sectional Titles 8*.

24 Ntlaloe *Assessment of Land Act 17 of 1979 17*.

25 Pienaar *Sectional Titles 9*.

## **1.6 Organisation of the study**

### **Section 1- Introduction and problem statement**

In this section, an introduction as a background to the problem will be given. The section will also show why the researcher encourages an adoption of fragmented property forms as is the position in South Africa.

### **Section 2- Legislative framework of landholding in Lesotho**

This section will show some sort of informal regulation of immovable property in urban areas since it was shown above that there is no housing policy in the country. This will be done in an attempt to show how Lesotho has been surviving without these forms of property holding.

### **Section 3- Urban landholding in Lesotho and South Africa**

A number of statutes in Lesotho are similar in most respects to those enacted in South Africa, therefore, using the abovementioned South African legislation as prototype will not be problematic subject to a few changes. In effect, this section will show the differences in immovable property regulation between the two countries.

### **Section 4- Development of fragmented property forms in South Africa**

There have been different forms of property holding legislation dating as far back as the 1970's. Some call them different forms of property holding, while others call them fragmented property schemes but at the end of the day everyone is talking about communal property schemes other than individual ownership.

### **Section 5- Summary, recommendations and conclusion**

In the final section, a summary, recommendations and conclusion will be made in connection with the authorities that will be cited in the body of the research. It will ultimately be suggested how such recommendations should be implemented to ensure proper regulation of this 'new' market.

## 2 Legislative framework of landholding in Lesotho

### 2.1 Introduction

It is not possible to address housing issues without reference to accessibility of people to land. Ferguson *et al*<sup>26</sup> buttress this and opine that the housing process starts with the acquisition of land; it may be through squatting or the purchase of a plot in a subdivision. They continue that housing and home ownership have turned into economic assets, more so in the developing world.<sup>27</sup>

Land in Lesotho is held by statutory leasehold: The citizens enjoy use rights and the Basotho nation owns all land in Lesotho.<sup>28</sup> In terms of section 107 of the *Lesotho Constitution*, 1993 as well as section 4 of the *Land Act* 8 of 2010 (hereinafter the *Land Act* 2010), all land is owned by the Basotho nation and is held in trust by the King, currently King Letsie III. Under a leasehold system, the leaseholder has the right to use and enjoy property for the agreed period. For all intents and purposes in Lesotho, a leaseholder is a person who holds title to state land and such title is registered at the Land Administration Authority (henceforth the LAA). This leaseholder may similarly lease out that very land under a sub-lease agreement.<sup>29</sup> Hence, Lesotho's sub-lease agreement compares with South Africa's lease agreement.<sup>30</sup> If the property is a tract of land, the leaseholder is entitled to erect buildings on the property. The buildings become the property of the nation at the end of the lease period.<sup>31</sup> Issues of maintenance, removal of the structures and transferability of the leased property will be discussed in section 3. At this point, however, it suffices to say that as a matter of principle, upon termination of the lease,<sup>32</sup> the property is returned to the lessor. Nonetheless, the leasehold in Lesotho has not been in place long enough to have had expired leasehold agreements. In practice, the leasehold on the state

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26 Ferguson 1999 [www.housingfinance.org](http://www.housingfinance.org).

27 Ferguson 1999 [www.housingfinance.org](http://www.housingfinance.org).

28 In terms of the Land Policy Review Commission (LPRC) 2000 however, all land in Lesotho currently vests in the Basotho Nation and is held by the state through the National Land Council as the representative of the Nation, hence, according to the recommendation section 107 of the Constitution 1993 and section 4 of *the Land Act* 2010 is to be amended to give authority to the Land Council. Similarly, the LPRC 2000 advised that customary or communal land holding be done away with as well. Reasons advanced for this position are that it is not conducive for efficient land management and/or administration, security of tenure, high productivity and economic development. Hence all land that was held customarily is to be turned into leasehold system in terms of the report.

29 S 5(1)(f) *Land Act* 2010.

30 In both instances property is the subject matter of the agreement, the major difference is that in Lesotho, the sub-lessee leases the land from the leaseholder while in South Africa the lessee leases the land directly from the owner thereof.

31 Rakodi and Leduca 2005 [www.dfid.gov.uk](http://www.dfid.gov.uk).

32 At the instance of either party or when the lease agreement has run its course.

land is inherited by the family of the leaseholder. In effect, when the state leases the land to individuals, the land is never returned to the state unless it has become apparent that it has been abandoned, at which stage the Minister responsible is entitled to terminate the lease agreement.<sup>33</sup>

Typically, a leasehold agreement is usually granted for a period of time, for example a period of 99 years. In Lesotho for residential property the leasehold runs up to 90 years while for commercial property it runs for 60 years.<sup>34</sup> At the end of which period, it may start again and run for another defined number of years. The leaseholder may sell or sublet the land during the period of the lease.<sup>35</sup> In Lesotho, leasehold agreements are registered at the offices of a newly formed autonomous body called the LAA. Before the LAA came into being, the registration of title to land was registered at the Deeds Registry in terms of the *Deeds Registry Act* 12 of 1967. The principal aim of the establishment of the LAA was to replace the separate departments that were responsible for issuing leasehold titles to land, registration of deeds, and cadastral surveying and mapping.<sup>36</sup>

## **2.2 Immovable property regulation in urban areas**

### **2.2.1 Land Act 20 of 1979**

This Act was the first in the history of land legislation that introduced the leasehold system since Lesotho's independence in 1966. It nationalized land; this meant the land belonged to the nation but was held in trust by the King. Hence, all rights were to be leased from the state.<sup>37</sup> Leduka<sup>38</sup> opines that this Act gave leaseholders exclusive possession and enjoyment of leased land, subject to statutory conditions that it could be attached. Under the Act, leaseholds differed depending on land use or purpose. For residential, educational and professional purposes it was 90 years, while for commercial purposes the lease agreement ran for 60 years. In both instances, title could be renewed with the consent of

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33 S 37 *Land Act* 2010.

34 S 32 *Land Act* 2010.

35 Rakodi and Leduka 2005 [www.dfid.gov.uk](http://www.dfid.gov.uk).

36 Preamble to the *Land Administration Authority Act* 8 of 2010.

37 See 2.1.

38 See also Part V, Sections 44 and 49 that made provision for setting aside certain areas of land Selected Development Areas (SDAs).

the Minister.<sup>39</sup> He<sup>40</sup> adds that the Act was "...a compromise between traditional and modern tenure forms."

Additionally, Leduka seems to be very critical about this Act. He<sup>41</sup> is of the opinion that while the *Land Act 20* of 1979 (hereinafter the *Land Act 1979*) was commended to have been premised on a policy of evolutionary change, to him prerogatives of traditional authorities remained the same. His basis for this contention is twofold: Firstly, he says the traditional authorities were still an integral part of the Interim National Assembly that enacted the *Land Act 1979*, as well as being cabinet ministers. Secondly, he<sup>42</sup> asserts that the implementation framework of the *Land Act 1979* ensured that chiefs were represented at virtually all levels of the implementation and enforcement process.<sup>43</sup>

It is imperative, however, to note that under the *Land Act 1979*, no alternative forms of title were recognized. This was unsatisfactory because around this time there was rapid urbanization.<sup>44</sup> Nonetheless, this was an improvement judging from the preceding land tenure which consisted chiefly of customary tenure under colonial rule and chief 'allocations' under the *Administration of Land Act 16* of 1973.

In a speech made by the Minister of Local Government and Chieftainship, Sekatle,<sup>45</sup> mentioned that there is no proper land regulation in Lesotho. It goes without saying that this is a very serious issue for any country:

... [T]he country strives for optimum and efficient utilization of its few resources. Land is one such resource that would contribute to Lesotho's development if it were managed properly.<sup>46</sup>

She<sup>47</sup> further mentioned that Lesotho's land problems, *inter alia* the deficiencies and weaknesses in the administration and management of land, lie central to all land issues.

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39 It must however be noted that for both the *Land Act 1979* and the *Land Act 2010*, the leasehold system has not been in place long enough for anyone to have been able to renew it. In effect, leases that were registered under the *Land Act 1979* only "lived" for about thirty years before the 2010 Act took over.

40 Rakodi and Leduka 2005 [www.dfid.gov.uk](http://www.dfid.gov.uk).

41 Rakodi and Leduka 2005 [www.dfid.gov.uk](http://www.dfid.gov.uk).

42 Rakodi and Leduka 2005 [www.dfid.gov.uk](http://www.dfid.gov.uk).

43 He gives an example of this by pointing out that over and above being policy-makers and legislators, chiefs were *ex officio* chairpersons of all land allocating authorities and one of them sits would sit as an assessor in the Land Tribunal.

44 Urbanization referred to a process by which an increasing proportion of a country's population ends up living in towns or cities. According to a census conducted by UNHABITAT, around 1966, the level of urbanization was 7%. While in 1976 it had grown to 11%, grew to 14% in 1986, 19% in 1996 and to 23% in 2006.

45 From a paper presented at the World Bank Annual Conference on Land Policy and Land Administration 2010.

46 Report by World Bank on Land Policy and Land Administration "Securing Land Rights for the Poor and Marginalized in Lesotho" 3.



Further, failure by those mandated to administer and manage land over the years since independence have contributed to the urgent need for land reform. According to her,<sup>48</sup> this non-regulation has posed problems in the country as it results in unplanned settlements and illegal encroachment of settlements on land.

However, in the early 2000's new land legislation ensued. As an outcome of an extensive consultative process that included the establishment of a Land Policy Review Commission<sup>49</sup>(hereinafter the LPRC); the *Land Act* 2010 was promulgated. In terms of section 9 of the *Land Act* 2010, sectional title holding is recognized. Furthermore, in 2013 a *Sectional Title Bill* was introduced before Parliament.<sup>50</sup> With the 2000 LPRC came new and welcome changes. According to the committee, if the recommendations are anything to go by, freehold is to be recognized in Lesotho. However, in terms of the LPRC, only industrial developments and high rise buildings for residential or commercial purpose are to be held under freehold.

### 2.2.2 *Land Act 8 of 2010*

In its preamble, the *Land Act* 2010 states that the purpose of the Act is to:

...repeal and replace the law relating to land, provide for the grant of titles to land, the conversion of titles to land, the better securing of titles to land, the administration of land, the expropriation of land for public purposes, the grant of servitudes, the creation of land courts and the settlement of disputes relating to land; systematic regularization and adjudication; and for connected purposes.

The *Land Act* 2010 maintains that all urban and commercial land parcels must be held under a leasehold system.<sup>51</sup> Sectional title is a form of rights to property. Although to an extent similar to rights to land provided by leasehold, sectional title in Lesotho refers to a person or entity having rights to a unit in a building complex, without the owner necessarily owning the land it stands on.<sup>52</sup> The *Land Act* 2010 was the first statute in Lesotho to introduce forms of property holding other than customary landholding since her

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47 Report by World Bank on Land Policy and Land Administration "Securing Land Rights for the Poor and Marginalized in Lesotho" 7.

48 Report by World Bank on Land Policy and Land Administration "Securing Land Rights for the Poor and Marginalized in Lesotho" 7.

49 Ramodibedi 2000 *Lesotho's LPRC* 1999- 2000.

50 At the time of writing, the Parliament of Lesotho was dissolved by the Prime Minister in terms of his Constitutional powers under section 83. The prorogation is said to last 9 months. There has been intervention from the Southern African Development Community (SADC) but the situation remains the same.

51 S 5 thereof states that a lease or allocation to a piece of land shall be given subject to certain servitudes: For example, mineral rights, water rights and so on.

52 Preamble to the *Sectional Titles Bill* 2013.

independence in 1966. However, with the introduction of the *Sectional Titles Bill* of 2013, the likelihood is that section 9 of the *Land Act* 2010 introducing sectional titles, might be repealed. This section provides that:

9. (1) There shall be title rights to be known as sectional titles.
- (2) A sectional title shall be enjoyed in a unit within a complex or building without necessarily exclusively holding the title to land on which the complex or building is attached.
- (3) An existing leaseholder may create sectional titles in accordance with the regulations.
- (4) The Registrar may register leases and derivative rights in respect of sections of buildings, whether or not the section or common area is attached to land.
- (5) All cadastral and registration documents in relation to sectional titles shall take into account the distinction between rights attributable to individual units and rights attributable to common areas of the building which is the subject of registration of sectional titles and shall-
  - (a) Divide the building into sections and common area; and
  - (b) Provide for separate *ownership* in the sections, coupled with joint *ownership* in the common area.<sup>53</sup>
- (6) Upon registration, rights to individual sections may be freely transferred in whole or in part.

### 2.1.3 Sectional Titles Bill 2013

Shortly after the *Land Act* 2010 was promulgated, it was proposed by different stakeholders that a comprehensive act governing sectional titles be passed, since the introductory provision<sup>54</sup> in the *Land Act* did not introduce a full legislative basis. The Bill has been modeled along the South African sectional titles legislation in so far as it provides uniformity and consistency of practice useful to stakeholders.<sup>55</sup> The motivation behind the Bill confirms that this was a great idea, since the banks and insurance houses that operate in the southern African region are more accustomed to the South African sectional titles practice. Furthermore, South African court judgments are routinely followed by the Lesotho courts as established precedents.

However, it has been cautioned that legislation must be tailored to meet the particular circumstances and needs of Lesotho. The central distinguishing factor in this case would be the fact that in South Africa land is held under freehold whereas Lesotho's landholding

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53 The *Land Act* 2010 makes mention of "ownership" of section throughout section 9. It is cautioned that this does not imply ownership of land on which the building is erected but ownership in the context of a unit holder having title in the unit, hence should not be confused with the notion of freehold.

54 S 9 of the *Land Act* introduces sectional titles. Thus it goes to show that there is appreciation of the concept of ownership of buildings without necessarily owning the land to which they are affixed. This is not a foreign concept in Lesotho since all land is leased to the citizens by the state.

55 Different stakeholders include banks and insurance companies and other financial services providers.

is held only under leasehold as mentioned above.<sup>56</sup> Consequently, under the Lesotho sectional titles legislation, sections and common property are to be held under a leasehold system in accordance with the provisions of the *Land Act* 2010 and other applicable laws. In terms of the explanatory notes of the Bill, the objectives are as follows:

- a) to overcome shortages of land in more densely populated areas
- b) to provide a form of tenure which is acceptable to lending authorities as security for loans<sup>57</sup>
- c) to provide a form of development which is attractive to developer and investors
- d) to provide a form of accommodation which is more secure from the incidents of crime
- e) to provide accommodation at a more affordable price
- f) to make provision for an association to govern the affairs of the sectional titles holders since they will be sharing common property.

It may prove unnecessary to go through the provisions of the Bill, for its provisions are similar to the South African *Sectional Titles Act* in all respects. The only difference between the two is seen in the phrases “owner” and “bodies corporate” in the South African Act have been substituted with “title holder” and “association” respectively. As shown above, these differences in expression may owe to the dissimilarity in tenure systems, *viz*; freehold versus leasehold system.

### **2.3 Lesotho Housing and Land Development Corporation (LHLDC)**

Leduka<sup>58</sup> opines that around the 1960's, Lesotho experienced shortage of shelter and this became evident when people started renting in the urban areas. However, he believes it is for this reason that the Lesotho Housing Corporation (LHC now the LHLDC) was established.<sup>59</sup> The LHLDC is a parastatal formed under the Ministry of Local Government in 1988. Its primary mandate was acquisition and development of land for housing. Though this task is broad, it has mainly been involved with the provision of serviced plots and rental units. Besides from the Land Survey and Physical Planning (LSPP) whose mandate overlapped with that of the LHLDC, the Land Administration Authority (hereinafter the LAA) is currently responsible for provision of land and housing.<sup>60</sup>

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56 The LAA is the authority responsible for the drafting of the *Sectional Titles Bill* failed to acknowledge the LPRC's recommendation that Lesotho should recognize freehold tenure in particular circumstances.

57 The commercial banks in Lesotho are reluctant to extend credit to the general public and to housing alike, the main reason being the risk factor involved as there is no housing policy in place to regulate such transactions.

58 Leduka 2012 [www.afresnet.net](http://www.afresnet.net).

59 Leduka 2012 [www.afresnet.net](http://www.afresnet.net).

60 UN Habitat *Land Tenure, Housing Rights and Gender in Lesotho* 42.

Maleleka<sup>61</sup> is of the opinion that human development is a vital part of socio-economic growth and development and the affordability of decent housing is considered a vital component of better livelihoods. Notwithstanding the right to adequate housing being a basic human right in most constitutions<sup>62</sup> and international treaties,<sup>63</sup> the Lesotho Constitution makes no provision in this regard.

Before the introduction of the LAA in 2010, the majority of the land for settlement was obtained through informal processes. In 2005, around 70% to 90% of the households in Maseru obtained their land by bypassing formal land acquisition procedures. However, this practice was curbed when the LAA introduced the regularization project wherein the all unregistered plots were to be “regularized.”<sup>64</sup> Regularisation refers to the process of registering land parcels that were not registered in terms of the *Land Act* 2010, in this way, the land parcels are regularised and the holders thereof are issued with title to land (lease).<sup>65</sup>

Leduka<sup>66</sup> asserts that African cities are rapidly urbanizing and the result of this is inevitable: there is an urgent need for such cities to accommodate growth, Maseru included. Growing populations imply that there is increasing pressure for cities to provide economic opportunities, housing and other services. He avers that the process by which urban land is acquired, held, exchanged and regulated in these cities is complex and the complication emanates from historical legacies in which they have inherited multiple legal systems of urban land supply based on pre-colonial and colonial practices.<sup>67</sup>

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61 Maleleka 2009 [www.cps.org.za](http://www.cps.org.za).

62 In terms of the South African Constitution, s 26(1) thereof, everyone shall have the right to have access to adequate housing.

63 Similarly, provision for housing is enshrined in the *Universal Declaration of Human Rights* (1948) article 25 thereof, the *European Convention of Human Right and Fundamental Freedoms* as examples. It is also worth noting that Lesotho is a signatory to these and many more international instruments.

64 S 30 *Land Act* 2010.

65 In conformity with s 30 of the *Land Act* 2010, the project works in such a manner that a regularisation team visits a village and evidence is collected together with a list of land claimants. The area chief is then consulted and will where necessary support occupiers' land rights claims. The list is then published or posted to give everyone an opportunity to correct the data collected and to object if necessary to other people's claims. At the end of the publication period, the claims, updated records and any objections are given to the Commissioner of Lands who adjudicates based on the evidence submitted. He then determines who is the rightful claimant and thereafter grants a lease to that person. Residents of declared land regularisation areas are advised to furnish any title documents (certificates of allocation, chief's letters or affidavits), to justify their claim to land. While land occupiers are encouraged to clearly mark the boundaries of their land plots in order to avoid any misunderstanding or disputes about the size of their land.

66 Rakodi and Leduka 2005 [www.dfid.gov.uk](http://www.dfid.gov.uk).

67 More so owing to the fact that the colonial powers in Africa introduced urban land administration systems that were modelled on the systems of their home countries.

In the early 1980's, there was an attempt to bring a housing policy to life, but to no avail. The proposed policy underlined an urgent need for the adoption and implementation of an economically viable national housing policy by the government, and a commission to this end was elected accordingly.<sup>68</sup> In March 1987, the Land Policy Review Commission (hereinafter the LPRC) made recommendations and compiled them in two reports namely, the "National Housing Policy" as well as the "National Housing Implementation Plan." Contained in these reports were recommendations addressing the lack of housing policies which inhibits the ordered construction and provision of housing and economic supply of services on a cost recoverable basis. Further, the reports addressed specifically the land utilization in an attempt to reduce haphazard allocation of large plots and to achieve better use of remaining open land.<sup>69</sup>

Under the *Land Act* 1979, the Minister of Lands was entitled to declare certain plots as selected development areas (SDA's). The effect of the SDA declaration was to cancel existing rights and interests in land, pending direct grant of substitute leasehold rights by the Minister for Lands. The LPRC 1987 was dissatisfied with this practice and ruled down this authority as it came to light that these powers were being abused.<sup>70</sup> The *Land Act* 2010 too, has left out this authority as a result. Nonetheless, Leduca<sup>71</sup> was critical of the authority given to the Minister and pointed out that the law<sup>72</sup> was arbitrary and occasionally it was inconsistently enforced. This clearly rendered the formal land delivery system less reliable than alternative "informal" systems. In 2005 the World Bank, in association with the Government of Lesotho, (hereinafter the Government) engaged in deliberations on how to reduce poverty in the country. A number of issues were addressed; the housing policy was one of the issues in discussion. According to the Poverty Reduction Strategy Paper,<sup>73</sup> adoption of housing policies was the third objective of all eight objectives. In terms of this report, the aim of the Government was to:

...increase access to affordable housing through the implementation of the national shelter policy and national settlement policy and the capacity of the Lesotho Housing and Development Corporation.<sup>74</sup>

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68 National Housing Policy Reference Committee 1987. An assessment of the housing sector undertaken in 1998, revealed that, while people are generally successful in their efforts to provide some measure of shelter for their families, most of this housing is provided informally and constructed by the owner, financed by individual savings and, in urban areas, often constructed on illegally-held land without basic services.

69 *Lesotho Land Policy Review Commission* 1987 20.

70 Leduca *The Law and Access to Land for Housing in Maseru* 12

71 Leduca *The Law and Access to Land for Housing in Maseru* 12.

72 Part V Sections 44 and 49 of the *Land Act* 1979.

73 IDA and IMF *Poverty Reduction Strategy paper* 50.

74 Proposed strategy 3(a) *Poverty Reduction Strategy paper*.

To this end, strategies were devised by the participants and it was concluded that within three years (around 2008) the Government would have:

- ensured adequate provision for the land tenure needs of peri-urban areas;
- improved planning of settlements;
- reviewed, updated and implemented the National Settlement and Shelter Policies; and
- established a National Housing Authority and ease access to land for private sector housing development.

At a Human Settlements Conference<sup>75</sup> held in Istanbul, to which Lesotho was a participant, it was asserted that a national shelter policy helps in strengthening the Government's capacity to monitor standards within the sector. The principal objective of the policy according to the governing council is to achieve equality and social integration in human settlements. Further, it aims at facilitating full participation of all income groups in the provision and access to shelter. The report goes further to affirm that the draft policy is aimed at strengthening housing delivery mechanisms through the private sector.<sup>76</sup> Similar to the abovementioned objectives devised by the World Bank and the Government, the draft policy is mandated to address the empowerment of the informal sector in shelter delivery as well as to provide support for marginalized groups to access adequate shelter. At the time of writing,<sup>77</sup> none of these objectives had been met by the Government. However, a step in the right direction was the drafting of the *Sectional Titles Bill* as mentioned above.

## **2.4 Concluding remarks**

In the next section the writer will scrutinize the different forms of landholding in South Africa and Lesotho in an attempt to determine if these South African concepts will be feasible in Lesotho. The possibility of introducing a sectional title regime in terms of the 2013 Bill with the practical landholding situation in Lesotho will also be discussed. It has been shown in the preceding section that land holding in Lesotho is by leasehold whereas in South Africa, individuals have freehold title. Will land ownership concepts find application in a leasehold system? This question will be answered in the next section.

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75 UN Conference on Human Settlements (Habitat II) Istanbul 1996.

76 UNHabitat 1996 *Istanbul Declaration on Human Settlements PDR 593*.

77 August 2014.

### 3 Urban landholding in Lesotho and South Africa

#### 3.1 Introduction

In this section a comparative analysis of the nature of the South African freehold system and the Lesotho leasehold system will be given. This section will discuss what each right therein entails and how one differs from the other. On face value, the nature of the rights in freehold and leasehold may seem analogous as both are real rights. However, it will be shown that there are tremendous differences between the two. The possibility of introducing a sectional title property regime in terms of the Bill will also be discussed together with the practical land holding system in Lesotho. For purposes of this section a lease shall mean “a right granted or issued under the *Land Act 2010* and the instrument evidencing same.”

#### 3.2 Overview of tenure systems

According to Ryan and Cooper<sup>78</sup> “tenure” derives from the Latin word “*tenere*” which means “holding or possessing”. This would in turn imply that land tenure can be defined as the “terms and conditions on which land is held, used and transacted”. The land tenure system comprises of a bundle of rights that constitute obligations and rights of the holder. As indicated in preceding sections, in Lesotho land cannot be privately owned or administered. In the same way, it cannot be disposed of by an individual without reference to state authority.<sup>79</sup> In effect, this meant no exclusive use for individuals but only use rights. As has been stated above, the *Land Act 1979* was the first piece of legislation to introduce the notion of a leasehold tenure, as well as land revenue by way of assessed ground rent.<sup>80</sup> According to section 77 (4) of the *Land Act 2010*, ground rent is payable based on the size of the land, its use as well as the value of such land. However, in terms of section 77 (5) a citizen of Lesotho is entitled to the lease free of ground rent which he leases and occupies for his own residential use. The *Land Act 2010* brought about many

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78 Ryan and Cooper *Those Who Can Teach* 245.

79 Under the *Land Act 1979* there were urban land allocation committees, the members of which were all nominated by the Minister responsible for Lands. The LPRC of 2000 has however made recommendation that the Ministerial authority should be abolished so that “there is an open land market for leasehold and freehold tenure for ease of land management and control...”

80 However, it was never brought into operation, because it was alleged that it proposed land tenure changes that threatened the authority of traditional chiefs over land, and accordingly they obstructed its implementation.

changes, the most controversial being the introduction of land holding by non-citizens as well as foreign enterprises.<sup>81</sup> It was asserted that the introduction of the free-market system encourages foreign investment;<sup>82</sup> it is for this reason that the state saw it fit to include it in the *Land Act* 2010. However, this inclusion did not come without criticism.<sup>83</sup>

On the other hand, South Africa has a freehold tenure system. Although freehold was introduced as far back as the Dutch settlement in the Cape in 1652, leasehold was introduced alongside freehold in the twentieth century as part of apartheid land law. From 1994, the Government of South Africa has been steadfast on reversing the trends of apartheid as well as its impacts on cities and the lives of citizens. It was through this initiative that a substantial number of programmes and policies have been and are being implemented.<sup>84</sup> Claassens<sup>85</sup> asserts that central to the policy framework is a distinction between ownership and governance. These two concepts were blurry during apartheid, during which times the state was both owner and administrator of land held under leasehold. In 1997 the *White Paper on Land Policy* brought about a new phenomenon by stating that:

... [T]he tenure reform programme will separate these functions, so that ownership can be transferred from the state to the communities and individuals on the land.<sup>86</sup>

She<sup>87</sup> furthermore opines that the 1995 Framework Document<sup>88</sup> enshrined in it many fundamental principles but the principal one being that on “individual freehold tenure”. She is of the opinion that this document gave priority to individual freehold property over other forms of rights in land while at the same time upholding state regulation over its use and division.

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81 S 6 *Land Act* 8 of 2010.

82 While individual non-citizens may not have rights to land, presently foreign companies and partnerships with 20% local shareholding may have rights to land. The Act excludes chiefs as main administrators in land management and administration which authority now vests with the LAA.

83 In the 1980's, after the introduction of the *Land Act* 1979, the World Bank and USAID embarked on a programme to convert customary tenure systems in Lesotho to freehold systems. Basotho leadership resisted these changes, arguing that the poor would not be able to access land through a land market. With the introduction of the *Land Act* 2010 too, “came strong opposition from opposition parties, traditional leaders, some rural communities and non-governmental organizations. The critics feel that the law is designed to steal land from indigenous Basotho people and sell it to foreign investors. [www.osisa.org](http://www.osisa.org).

84 The most important being legislation that was introduced through the three arms of land reform namely; tenure reform, land restitution and land redistribution.

85 Claassens 2000 *Land Rights and Local Decision Making Processes* 132.

86 *White Paper on Land Policy in South Africa* 1997 [www.intranet.ruraldevelopment.gov.za](http://www.intranet.ruraldevelopment.gov.za).

87 Claassens 2000 *Land Rights and Local Decision Making Processes* 133.

88 *White Paper on Land Policy in South Africa* 1997 [www.intranet.ruraldevelopment.gov.za](http://www.intranet.ruraldevelopment.gov.za).



Muinde<sup>89</sup> believes that freehold tenure is necessary not only for social cohesion and political stability but for sound environmental sustainability. Its' advocates contended that individual freehold tenure is bound to have a positive effect on South Africa as a country as well as to its citizens for, individualisation increases tenure security.<sup>90</sup> He also contends that when individuals own land privately they would do their best to ensure that the property is taken care of and this maximises efficiency.

In the preceding paragraphs, the paper has shown the type of tenure systems in both countries. At this point it becomes necessary to illustrate what is meant by these terms freehold and leasehold. The greatest dissimilarities are found in the nature of these systems: hence this will form the bulk of the section. Further, this will show how these concepts work and the rights available to the right holders.

### **3.3 Leasehold system in Lesotho**

Lesotho has statutory leasehold in terms of section 7 of the *Land Act* 2010. Similarly, Bruce,<sup>91</sup> in his *Country Profiles of Land Tenure*, affirms that a leasehold system is a form of land tenure under which someone other than the registered owner holds land under a contractual obligation for a specified period only. For countries that use the leasehold system, land is given out on loan for a season or indefinitely, with the undertaking that rental payments will be made, whether in cash or in kind.<sup>92</sup>

Under a leasehold agreement, the right of reversion of land to the lessor is guaranteed unless otherwise stated. Under normal circumstances, when a lease agreement<sup>93</sup> terminates, for any reason as encapsulated in section 37 of the *Land Act* 2010, the leaseholder must remove all his personal property and leave the property in the condition he or she found it in (normal wear and tear expected). However, section 38(1) gives a leaseholder whose lease agreement has expired, an option of first renewal and (2) provides for compensation of improvements where the lease agreement is terminated at the instance of the state.

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89 Muinde *Assessing the Effects of Land Tenure* 28.

90 Weideman 2004 [www.wits.ac.za](http://www.wits.ac.za)

91 Bruce 1998 *Country Profiles of Land Tenure* 249.

92 S 77 *Land Act* 2010 authorizes the Minister responsible to determine the amount to be paid as ground rent, how it should be paid, how it is determined, and by whom it should be paid.

93 According to section 1 of the *Land Act* 2010, a "lease" means a right granted or issued in terms of the Act and the instrument evidencing the same.

Bruce is of the opinion that in a leasehold system, a leaseholder cannot be evicted from the land during his lifetime, and his children could subsequently inherit the land under the old terms or on new contractual terms.<sup>94</sup> In Lesotho this is what happens in most cases if not all: as shown in the foregoing sections. Usually when the leaseholder dies, his family continues to live on the land, his descendants, and their descendants too. In effect, this means that the land almost never reverts back to the state.<sup>95</sup> Despite this fact, the Minister responsible is empowered by section 37 of the *Land Act* to terminate the lease agreement whenever a leaseholder contravenes any of the conditions set out in section 33 of the *Land Act* 2010.

Accordingly, section 35 of the *Land Act* 2010 prescribes that during the leasehold period, the property can still be bought and sold.<sup>96</sup> The implication is that the leaseholder becomes a “freeholder” until such time when the lease agreement runs its course. Despite the confusion in this reasoning, this is what actually happens in Lesotho. Contrary to the law, individuals still sell their land but as will be shown, in the event of dispute, their claims are not actionable.<sup>97</sup> As a matter of principle, a leaseholder is not entitled to alienate the property since either at the end of the lease, or termination at the instance of either party, the property reverts to the owner.

### 3.3.1 Long term lease

In Lesotho, section 32 of the *Land Act 2010* prescribes the number of years in a lease agreement; this period usually ranges from 60 to 90 years (long term leases). Registration of leases in Lesotho is now the sole responsibility of the LAA which replaced the Deeds Registry offices in 2010. In terms of section 5(2)(a) of the *Land Administration Authority Act*,<sup>98</sup> the authority is responsible for issuing leases, registering them and any other matters coincidental to the land issues. Failure to register the lease in this instance could most likely lead to loss of that property since there would be no proof of title.<sup>99</sup>

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94 Bruce 1998 *Country Profiles of Land Tenure* 221.

95 S 37(7) *Land Act* 2010 provides that land will only revert back to the State if the lessee (deceased) has no successor.

96 As a matter of principle, land is not for sale in Lesotho, but in practice, this happens on a daily basis.

97 According to Bruce 1998 *Country Profiles of Land Tenure*: Despite statutory restrictions, individuals in Lesotho still have access to land through informal markets and inter-family arrangements.

98 46 of 2010.

99 S 21 *Land Act* 2010.

Similarly, section 32 of the *Land Act* makes provision for long leases<sup>100</sup> and reads as follows;

- (1) A lease shall not be granted for a term exceeding –
  - (a) 90 years, where the lease is for –
    - (i) residential purposes;
    - (ii) agricultural purposes;
    - (iii) purposes of exercising a profession or calling; or
    - (iv) any devotional, religious, benevolent, educational, recreational, charitable and medical purposes.

Thus, the *Land Administration Act* and the *Land Act 2010* when read together with the *Sectional Titles Bill 2013*, makes it vivid that the idea of existence of sectional titles in Lesotho is not far-fetched *albeit* based on leasehold and not freehold as in South Africa. Hence, sectional title schemes as well as other communal property schemes are the answer for a rapidly growing city like Maseru. The paper illustrates mostly on sectional titles as it is only in this aspect that Lesotho has initiated policies. It will probably take a while for others to be considered but, little faith in the state might go a long way.

### 3.3.2 Nature of the leasehold right

A leasehold title,<sup>101</sup> according to Hoogstraten,<sup>102</sup> confers upon the holder, a limited real right in respect of the property so leased. Limited real rights are not as comprehensive as those of an owner. Hoogstraten<sup>103</sup> rightly points out that:

The rights of the holder of leasehold title are limited to the use and enjoyment of the land which is the subject matter of the lease for a limited period of time and for which the holder of the rights must pay the owner of the land a rental. Upon the termination of the lease period the holder of the leasehold title must return the land to the owner.

*Albeit* vague, in terms of section 1 of the *Deeds Registry Act*<sup>104</sup> a real right is defined as, “...any right which becomes a real right upon registration”. A limited real right on the other hand, is a right which one person has over another person’s property. Accordingly, limited real rights are a subcategory of real rights but an important distinction is that they are held by a person in relation to someone else's property.<sup>105</sup> In Lesotho, the state leases out the land to the individuals thus the state becomes the lessor while the citizens are lessees.

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100 The Act also makes provision for short leases ranging from 10-30 years (leases of shorter than 10 years cannot be issued). 30 years where the lease is for purposes of sales of petroleum or oil and/or for purposes of wholesale storage of petroleum or oil.

101 Hoogstraten defines a leasehold title as rights of a lessee in terms of a registered long lease.

102 Hoogstraten 2007 [www.bowman.co.za](http://www.bowman.co.za).

103 Hoogstraten 2007 [www.bowman.co.za](http://www.bowman.co.za).

104 12 of 1967.

105 An example of these limited real rights are servitude rights as contained in section 5 *Land Act 2010*.

This is by virtue of section 4 of the *Land Act* 2010 read together with section 107 of the Constitution of Lesotho, 1993.<sup>106</sup> Since one cannot have a complete real right in relation to another person's property, the lessees of state land have limited real rights in respect of such land. The Land Administration Authority acknowledges the existence as well as *modus* of sectional titles since in terms of section 9 (2) of the *Land Act* 2010:

A sectional title shall be enjoyed in a unit within a complex or building without necessarily exclusively holding the title to land on which the complex or building is attached.

Subsection 3 goes even further and provides that a lease or derivative rights relating to a section of a building should be registered by the LAA irrespective of whether the part of a building is attached to the land. Furthermore, subsection 6 provides that upon registration, rights to individual units may be freely transferred in whole or in part. The difference in tenure systems is seen in the *modus operandi* since in South Africa sectional owners co-own the land on which the sectional title scheme is situated whereas sectional owners in Lesotho will be individual owners in respect of their unit<sup>107</sup> but joint leaseholders in respect of the land and common property.<sup>108</sup>

### **3.4 Freehold system in South Africa**

Land law in South Africa has not always been as clear as it seems now. Before 1991, land law in South Africa was based on race.<sup>109</sup> In terms of the *Group Areas Act* 41 of 1950, Whites could own freehold title to land in the white group areas, while blacks could only exercise leasehold tenure in these areas. Despite the dominance of the apartheid laws at that time, blacks were allowed to live and ultimately exercise leasehold land tenure in defined areas of urban land.<sup>110</sup> This, was however a lesser form of land rights compared to ownership (freehold title).<sup>111</sup> It was only in 1991 that the then Nationalist government implemented new land laws through the *White Paper Land Reform*.<sup>112</sup> One of the proposed pieces of legislation that was later turned into law was the *Upgrading of Land Tenure Rights Act* 112 of 1991.<sup>113</sup> According to its preamble, its objectives are to:

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106 See section 2.1 p 8.

107 As will be evidenced by a title deed of each sectional owner.

108 Preamble to the *Sectional Titles Bill* 2013.

109 Badenhorst *et al* *The Law of Property* 484.

110 Carey Miller and Pope *Land Title in South Africa* 38.

111 For example, permission to occupy, right of occupation and other lesser rights in land.

112 *Department of Land Affairs White Paper on Land Policy in South Africa* 1997 GP.

113 Badenhorst *et al* state that this Act abolished leasehold rights, quitrents and deeds of grant titles in land. These are known as schedule 1 rights in terms of the Act. After the promulgation of the

To provide for the upgrading and conversion into ownership of certain rights granted in respect of land; for the transfer of tribal land in full ownership to tribes; and for matters connected therewith.

Contrary to popular belief, Hoogstraten<sup>114</sup> believes that there are still individuals particularly in the governmental or quasi-governmental sectors who prefer leasehold title over freehold. He is certain that this practice has much to do with the fact that upon expiry of the lease, the lessor enjoys all the improvements that are effected on the leased land since the land reverts back to him. However, freehold remains the traditional form of title to land in South Africa.

### 3.4.1 Ownership

Bruce<sup>115</sup> describes freehold as a form of land tenure under which land is held by individual/s free of obligations to the monarchy or state. It is commonly referred to as a private form of land ownership. Thus, the freehold system is defined as various entitlements (rights) to land, including the right of the individual to transfer such land by sale or rental.<sup>116</sup> With freehold property, the freeholder is solely responsible for the upkeep of the property. Subject to legislation, local planning regulations and neighbour law restrictions, a freeholder in theory can do anything he/she wants to, and within the land and the buildings attached to the land.<sup>117</sup>

### 3.4.2 Nature of the freehold right

The only real right recognised in South Africa is the right of ownership. This is where a person has complete title (or control) over a thing or property (*ius in re propria*). Ownership is the most complete real right, as such, an owner has the widest powers in relation to that thing he owns. However, his ownership might at times be burdened with another real right (limited real right) held by a non-owner (*iura in aliena*).<sup>118</sup> According to Badenhorst *et al*,<sup>119</sup> a real right may be defined as a claim of a legal subject to a thing belonging to another person, which is enforceable against the owner by other persons. Therefore, a

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*Upgrading Act*, these rights were automatically converted into freehold subject to a number of conditions. However, for Schedule 2 rights like quitrents, to be converted to ownership the holder of such rights had to submit a certificate of ownership and many other documents to prove title at the Deeds Registry.

114 Hoogstraten 2007 [www.bowman.co.za](http://www.bowman.co.za).

115 Bruce 1998 *Country Profiles of Land Tenure* 8.

116 South African land owners are now in a position to exercise land rights freely, subject to regulations imposed in terms of applicable pieces of legislation, for example, environmental laws.

117 For example, restrictive covenants: a restrictive covenant is a promise not to do certain things with the land or property. An example would be a promise not to run a business from the property.

118 Badenhorst *et al* *The Law of Property* 48.

119 Badenhorst *et al* *The Law of Property* 47.

limited real right is enforceable against the whole world, that is, against the owner of the property, all successors in title and all other persons who have legal claims to the property by virtue of a contract with the owner.<sup>120</sup> Before a right is considered to be a “limited real right” in the context of rights over immovable property, it must be registered against the title deed.<sup>121</sup> The real nature of the right also determines the availability of suitable remedies in law.<sup>122</sup>

In South African law, various rights to property are recognised, of which ownership (as real right) is one. Ownership is therefore a legal relationship between an owner and a thing or things, which implies that the owner can exercise certain entitlements in respect of the thing or things.<sup>123</sup> Badenhorst *et al* are of the opinion that it is very difficult to give a definition of “ownership” as more often than not, definitions do not truly embody the true character of a notion as it functions every day. They continue and say that defining a concept also entails bottling it up in a way that does not accommodate any development of such a concept. However, the court in *Gien v Gien*<sup>124</sup> delineated it as follows:

Eiendomsreg is die mees volledige saaklike reg wat 'n persoon ten opsigte van 'n saak kan hê. Die uitgangspunt is dat 'n persoon, wat 'n onroerende saak aanbetref, met en op sy eiendom kan maak wat hy wil.<sup>125</sup>

Badenhorst *et al*<sup>126</sup> however, assert that as cautioned, this is not entirely accurate since this so-called absolute power may be subject to public law, hence, the ownership is not as unfettered as it is assumed. As such, an owner of land according to the Roman principle of *cuius est solum, eius est usque ad coelum et ad inferos*<sup>127</sup> owns the buildings on it. But as has been shown in the aforementioned section, sectional ownership is a statutory deviation of this principle and this is not applicable in the case of sectional owners. The land on which the buildings stand does not belong to a specific owner in the scheme, but belongs in co-ownership to all the sectional owners. Badenhorst *et al* believe that in the changing social, economic and political conditions that Roman ownership can no longer be justified.<sup>128</sup> They advance the reason that when dealing with private property, a balance

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120 Badenhorst *et al* *The Law of Property* 48.

121 Badenhorst *et al* *The Law of Property* 65.

122 S 63 *Deeds Registry Act* 47 of 1937.

123 Badenhorst *et al* *The Law of Property* 91.

124 *Gien v Gien* 1979 2 SA 1113 (T) at 1120.

125 [English translation: “The right of ownership is the most comprehensive real right that a person can have in respect of a thing. The point of departure is that a person can, in respect of immovable property do with on his property as he pleases.”]

126 Badenhorst *et al* *The Law of Property* 91.

127 See section 4.2 p 27.

128 Badenhorst *et al* *The Law of Property* 93.

must be struck between modern day practices on the one hand and the future needs of individuals on the other.

### **3.5 Concluding remarks**

Despite the differences between real and limited real rights as discussed above, one similar characteristic between the two is that freehold and leasehold titles are both real rights, freehold being the only real right recognised by law and leasehold a limited real right. As such they confer upon the holder the greatest security of title available.<sup>129</sup> Consequently, it becomes clear that *Sectional Titles Act*,<sup>130</sup> *Share Blocks Control Act*,<sup>131</sup> *Property Time Sharing Act*<sup>132</sup> as well as the *Housing Development Schemes for Retired Persons Act*<sup>133</sup> as discussed earlier are a few of the many restrictions on absolute ownership. Nevertheless, title holders under these Acts are owners of property in the modern world.

Thus, before discussing the introduction of sectional titles in Lesotho, a short exposition of the framework of sectional titles in South Africa will be given in the next section since the Lesotho concept is largely based on South African legislation.

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129 Hoogstraten 2007 [www.bowman.co.za](http://www.bowman.co.za).

130 95 of 1986.

131 59 of 1980.

132 75 of 1983.

133 65 of 1988.

## 4 Development of fragmented property forms in South Africa

### 4.1 Introduction

According to Pienaar,<sup>134</sup> fragmented forms of land holding are introduced by countries for different reasons. In Germany and most of western Europe, for example, fragmented property forms were introduced after the first and second world wars left people homeless.<sup>135</sup> This form of property holding was seen as a means of restructuring cities. Cowen<sup>136</sup> strongly believes that sectional titles have become a characteristic feature of life in modern cities. He<sup>137</sup> also made an observation that:

...the pressure of population growth on the land available in or near big cities, aggravated by the destruction of property in two world wars, has led to a widespread, and it would seem chronic, accommodation shortage.

In the same light, South Africa adopted these forms of property holding as a result of urbanization, industrialization and economic viability of the schemes.

Van der Merwe<sup>138</sup> holds the same view as Cowen and says that:

...the core object for introducing sectional ownership in South Africa was, as in other countries, to provide urgently needed residential accommodation for persons of all income levels within commuting distance from centres of employment.

He buttresses Pienaar's sentiments further that another reason why sectional titles were introduced was because their alternative, share block companies, proved unsatisfactory.<sup>139</sup> Before a comprehensive study of sectional titles is embarked on, it is important to show the history preceding this kind of ownership. A brief history will precede the discussion on each of the property forms to be covered in the section, namely, share block schemes, property time sharing and retirement schemes.

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134 Pienaar *Sectional Titles* 8.

135 Pienaar *Sectional Titles* 8.

136 Cowen 1973 *CILS* 7.

137 Cowen 1973 *CILS* 7.

138 Van der Merwe 2006 *SLR* 168.

139 He raises this point owing to the fact that the purchaser's investment is not protected in the case of the insolvency of the share-block company made this a risky and therefore unpopular alternative.



## 4.2 *Development of fragmented property holding in South Africa*

In his book *Sectional Titles*, Pienaar<sup>140</sup> opines that before sectional titles were introduced, urban property was held by a lease system or shareholding in a share block company. In these forms of property holding, he asserts, the use rights in the building were based on personal rights derived from the lease agreement and by the shareholder against a share block company and use-agreement respectively. For the lease system, there were short and long term leases. Short term leases are those whose term is shorter than ten years while long term leases last for ten years and more. The major difference between the two is that the former are not registerable while the latter is registrable in accordance with the lease agreement.<sup>141</sup> Registration is however, permissible in the case of individualized land only and not in respect of a section of a building on the property. Pienaar is of the opinion that leasing of immovable property was the principal reason why fragmented property holding was introduced in South Africa.

He goes further to proclaim that despite the fact that separate rights to occupy parts of a building are obtained by different sectional owners, the common law principle *cuius est solum* remained unaltered in leasehold and share block system.<sup>142</sup> The *cujus est solum ejus usque ad coelum* principle literally translates to “he who possesses the land possesses all that is above and below it.”<sup>143</sup> Accordingly, this principle clearly has no application to sectional titles, for the owner of a section in the building does not exercise his/her entitlements below or above his/her section. Similarly, the owner of a section of the building does not own all that is below and above his/her section as those belong to other sectional owners.

In the same light, *omne quod inaedificatur solo, solo cedit* which means that everything that is built on land accedes to that land and becomes the property of the owner of the land. This principle in effect, disallows separate ownership of land and parts of a building.<sup>144</sup>

The notion of land ownership was thus altered by the promulgation of the *Sectional Titles Act* of 1971 and modernized further in 1986. According to Van der Merwe and Du

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140 Pienaar *Sectional Titles* 13.

141 Pienaar *Sectional Titles* 14.

142 Pienaar *Sectional Titles* 21.

143 Van der Schyff 2012 NC 133.

144 Van der Merwe 2008 *EJCL* 1.

Plessis<sup>145</sup> the reason behind the creation of these legislative pieces was to accommodate the shortage of housing while also satisfying the social and psychological need for home ownership. The alternative to this mode of home ownership is ownership of shares in a company entitling the holder to use part of a building owned by that company, known as the “share block” system.<sup>146</sup> Share block schemes are regulated by the *Share Blocks Control Act* 59 of 1980. Other alternatives, namely; property time-sharing and retirement schemes will be discussed as the section progresses.

### 4.3 Sectional title schemes

Van der Merwe<sup>147</sup> opines that the idea of sectional titles was first acknowledged in South Africa around the 1950’s. It is around this time that draft bills of 1956, 1957 and 1964 were introduced. Select committees were formed and tasked to come up with legislation to this effect.<sup>148</sup> However, it was only in 1970 that the then Committee deliberated and gave birth to the first *Sectional Titles Act* 66 of 1971<sup>149</sup> (henceforth the 1971 *Sectional Titles Act*). Subsequently, another Act was brought to life in 1986, the *Sectional Titles Act* 95 of 1986,<sup>150</sup> (henceforth the 1986 *Sectional Titles Act*). Although it did not differ substantially from the 1971 *Act*, it brought about some changes to the latter. Van der Merwe<sup>151</sup> is of the opinion that the 1986 *Sectional Titles Act* was only introduced to cater to the modern demands of society.

It is apparent that with the introduction of the *Sectional Titles Act(s)* came changes; the most profound being the move from the common law principles of *cuius est solum* and *superficies solo cedit*. Van der Merwe<sup>152</sup> affirms that South Africa was the most unwelcoming of the sectional ownership legislation as opposed to countries like Sri Lanka and Louisiana. He<sup>153</sup> says that at the time of the promulgation of the first *Sectional Titles Act*, it was argued that:

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145 Van der Merwe and Du Plessis (eds) *Introduction to the Law of South Africa* 222.

146 Van der Merwe and Du Plessis (eds) *Introduction to the Law of South Africa* 222.

147 Van der Merwe 2006 *SLR* 168.

148 The Committee studied the New South Wales’ legislation so the *Sectional Titles Acts* of South Africa owe their roots to the German’s *Wohnungseigentumsgesetz*. The Act was in turn was influenced by the Israeli’s Condominium, hence South Africa’s sectional titles is a mixture of the two systems.

149 66 of 1971.

150 95 of 1986.

151 Van der Merwe 2006 *SLR* 168.

152 Van der Merwe 2008 *SLR* 300.

153 Van der Merwe 2008 *SLR* 300.

...a building is inseparably fused to the land and that its subdivision into various units is an attempt to divide something that is by its very nature indivisible. They warned that the fragmentation of the ownership of a building would ultimately lead to the destruction of an important economic asset.

He,<sup>154</sup> on the other hand, strongly believes that apartment ownership statutes do not envisage physical division of the building, but only juridical demarcation of units for exclusive ownership leaving the building physically intact. He continues to say that the land which forms part of an apartment ownership scheme is not “put into cold storage devoid of any utility under an apartment ownership regime.”<sup>155</sup> If anything, he proclaims that apartment ownership statutes allow exploitation of the land and the building to its full economic potential by an intensified community of apartment owners.<sup>156</sup> This study is going to concentrate on two aspects of sectional titles namely, nature of the rights as well as regulation of the schemes.

#### 4.3.1 Nature of the right in a sectional title unit

In terms of section 1 of the *Sectional Titles Act 1986*:

a “unit” is a section together with its undivided share in the common property apportioned to that section in accordance with the quota of the section.

A section is defined as “a section as shown on a sectional plan.” Nonetheless section 5(3)(d) shed light in this regard and provides that a sectional plan requires that a unit must be defined with reference to its floors, walls and ceilings and distinguished by a separate number on the sectional plan.<sup>157</sup> Common property on the other hand means all the land and the building within the scheme that is not included in any section.<sup>158</sup> Accordingly, a

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154 Van der Merwe 2008 *SLR* 303.

155 Considerations as those that led to the individualization of plots of land on the earth today apply to the subdivision of a building into apartments in order to alleviate the desperate shortage of accommodation and facilitate the extension of home-ownership to a larger sector of the population.

156 Van der Merwe 2008 *SLR* 302.

157 Amidst all the vagueness in the Act Van der Merwe Van der Merwe (2008 *SLR* 300) defines a section as “a cubic entity formed by the walls, ceilings and floors of a residential apartment or business premises, with the median lines of the boundary walls forming the vertical boundaries and the median lines of the floors and ceilings forming the horizontal boundaries of a section.”

158 This is in terms of s 16 of the *Sectional Titles Act 1986*. Thus, the combination of all units together with the common property in turn forms a sectional title scheme. Additionally, s 27 *Sectional Titles Act 1986* defines an exclusive use area in a sectional titles scheme as “a part of the common property of a sectional title scheme which has been reserved for the use of a particular owner to the exclusion of the other owners in the scheme.”

sectional owner has ownership of a section together with an undivided share in the common property of the scheme.<sup>159</sup>

#### 4.3.1.1 Rights of a sectional owner

The *Sectional Titles Act* 1986 provides that a sectional owners' right is a real right, as such are registrable at the Deeds Registry.<sup>160</sup> It follows therefore, that the rights can be transferred<sup>161</sup> and mortgaged<sup>162</sup> to third parties. According to Van der Merwe,<sup>163</sup> a sectional owner has rights of use and enjoyment with regard to his or her apartment as well as more power to alter his or her apartment according to his own taste.<sup>164</sup> In essence, he is an owner in the literal sense but only in respect of the unit he owns. Thus, the normal entitlements and obligations of an owner apply.<sup>165</sup>

#### 4.3.2 Regulation of sectional title schemes

According to Cowen,<sup>166</sup> regulation of sectional titles is necessary because the alternatives that were resorted to in the past are no longer adequate. He says that there is a need to provide security of tenure, legal rights and powers of conventional owners. Similarly, he buttresses that sectional title legislation has to curb developer abuses and protect purchasers and sectional owners against malpractices.

The 1986 *Sectional Titles Act* prescribes model management and conduct rules in its regulations as well as annexures. Other non-prescribed rules are adopted by either the developers initially or later by the trustees of the body corporate. These rules provide for the control, management, administration, use and enjoyment of the sections and the common property in the scheme. The various different types of rules governing sectional

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159 S 2(b) and (e) of the *Sectional Titles Act* 1986 entitles a sectional owner to ownership of his section and joint ownership of the common property of the scheme.

160 S 2(d) and (e) *Sectional Titles Act*.

161 S 15B *Sectional Titles Act*.

162 S 18 *Sectional Titles Act*.

163 Van der Merwe 2002 *GJICL* 19.

164 The renovations are however subject to neighbour law as well as the rules of the scheme. Most schemes require that the outside walls must not be repainted with a paint colour different from the rest of the apartments in the scheme.

165 The duties of sectional owners are enlisted in ss 44, 45, 68, 69 and the conduct rules as enshrined in the *Sectional Titles Act* of 1986.

166 Cowen 1973 *CILS* 5.

title schemes serve as reasonable regulations in as far as they contribute to a harmonious relationship between the trustees of the body corporate and the sectional owners and occupiers as members of the body corporate as well as between the members of the body corporate *inter se*.<sup>167</sup>

The management provisions of the 1986 *Sectional Titles Act* are two pronged; the one part enshrines the management rules which are rules that regulate the relationship between trustees and the body corporate regarding the administration of the scheme,<sup>168</sup> while the other part contains conduct rules and regulations that govern the relationship between the sectional owners with regard to their individual sections and their share in the common property.<sup>169</sup>

The nature of the rules is explained by Spoelstra J in *Wiljay Investments v Body Corporate Bryanston Crescent*:<sup>170</sup>

The rules set out in Schedule 1 of the *Sectional Titles Act* 66 of 1971 are not intended to define or limit the ownership of individual owners of sections, units, or common property. The rules, read with the provisions of the Act, contain a constitution or the domestic statute of the Body Corporate. In this sense, it could properly be construed as containing the terms of an agreement, between owners *inter se*, and between owners on the one hand, and the Body Corporate on the other hand, providing for the use, enjoyment and maintenance of the property which forms the object of the hybrid rights of ownership created by the Act. Arrangements of this nature have never been considered as servitudes of any nature.

### 4.3.3 Management rules

#### 4.3.3.1 Sectional Titles Schemes Management Act<sup>171</sup>

Van der Merwe<sup>172</sup> is of the opinion that the core objective of the *Sectional Titles Schemes Management Act* 8 of 2011 (hereinafter the *Management Act*), which has not been put into operation yet, was to restructure and simplify the provisions concerned in such a way so as to provide the general public with a readable and easily understandable management manual devoid of all the technical materials dealing with the registration and land survey aspects of sectional titles which are retained in the 1986 *Sectional Titles Act*.

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167 Pienaar *Sectional Titles* 188.

168 Annex 8 rules 4-29 and s 35(2)(a) *Sectional Titles Act*, 1986.

169 Annex 9, s 35(2) (b) of the *Sectional Titles Act* 1986 and in future, s 1 of the *Management Act*.

170 1984 2 SA 722 (T).

171 The Act has not been enforced yet but will be referred to throughout to show the structural management of schemes in South Africa thereunder.

172 Van der Merwe 2012 *TSAR* 614.

Upon enforcement of the *Management Act 2011*, the registration issues as encapsulated in the 1986 *Sectional Titles Act* are to be separated from the management issues: This separation is to be achieved by the Schedule to the *Management Act*; once enforced, it will deal mainly with the amendment of the 1986 *Sectional Titles Act* hence it is to repeal the management provisions in the *Sectional Titles Act* and re-enact them in the *Management Act*. During the deliberations by the consultants, Van der Merwe<sup>173</sup> reports that there was a spat whether to include the establishment of the body corporate as a registration issue or a management issue. In essence the issue was whether to leave the body corporate provision in the Act or include it in the *Management Act*. Consequently, he adds, the body corporate was included as a management issue in the *Management Act*. The reason advanced for this decision was that:

...the body corporate was established by operation of law on the registration of a unit in the name of another person other than the developer and not because of an independent act of registration relating purely to its establishment as is the position under some foreign condominium statutes.

#### 4.3.3.2 The body corporate

Under the *Sectional Titles Act 1986*, the body corporate is established after the opening of the sectional title register when the developer alienates the first unit in terms of section 36 (1) thereof. However, in the *Management Act 2011* a new procedure is to be adopted which will definitely bring about changes to section 36. Sections 36(1), (2) and (3) of the *Sectional Titles Act* that deal with the establishment of body corporate are to be replaced by new subsections. In terms of these subsections the registrar will have to issue a certificate in the prescribed form when a unit is registered in the name of any person other than the developer and to lodge a copy of the certificate with the chief ombudsman<sup>174</sup> It is only then that the certificate can be used as proof that a body corporate for the scheme has been established under the *Sectional Titles Schemes Management Act*.<sup>175</sup>

##### (i) Powers of the body corporate

According to section 4 of the *Management Act* as well as under the 1986 *Sectional Titles Act*, the body corporate is entrusted with particular powers. In terms of this provision, the

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173 Van der Merwe 2012 TSAR 614.

174 In terms of the *Community Schemes Ombudsman Service Act 9* of 2011. This will only come into operation after the *Management Act* has been enforced.

175 Van der Merwe 2012 TSAR 613.

body corporate is entitled to appoint agents or employees should there be such a need, to create common property for the sectional owners, to invest any monies available in the fund, to make available any moveable property for the use of sectional owners.<sup>176</sup>

Of all the powers assigned to the body corporate, subsection (i) seems to be an all-encompassing provision since it allows the body corporate to do anything in the scheme as far as it is necessary for the enforcement of the sectional rules and management of common property. In terms of section 4 (i) of the *Management Act* a body corporate is entitled to:

...do all things reasonably necessary for the enforcement of the rules and for the management and administration of the common property of the scheme.

In avoidance to restrict the control by the body corporate, the legislature added further provision entitled “Additional powers of the body corporate” wherein the body corporate is given the latitude to make any decisions relating to issues such as alienation of common property,<sup>177</sup> extension of schemes,<sup>178</sup> and the purchase of land in the name of the scheme.<sup>179</sup>

The body corporate could only evict an unruly owner if the Act allowed it as was stated in the case of *Body Corporate, Shaftesbury Sectional Title Scheme v Rippert’s Estate and Others*.<sup>180</sup> This position is clearly contrary to section 4 (i) above. It was stated further that should that route fail, the only recourse for body corporate, besides inefficient sanctions, is to launch a court application for a mandatory interdict or to recover fines from the offender on condition that a suitable management or conduct rule authorises this.

#### (ii) Functions of the body corporate

Section 37 and 38 the *Sectional Titles Act* 1986 enlist functions and powers of the body corporate respectively. However, these provisions are to be replaced by sections 3, 4 and 5 of the *Management Act* upon its execution. Technically, the provisions have just been transferred as part and parcel of the ‘management rules’ for, they are similar word for word.

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176 S 4(a)-(h).

177 S 5(1)(a).

178 S 5(1)(b).

179 S 5(2).

180 2003 2 All SA 233 (C).

Functions of all body corporates are enlisted in section 3(1) to (6) of the *Management Act*. In terms of these provisions, the body corporate is responsible for establishing and maintaining a fund from which repair costs, maintenance or any other matters incidental thereto are deducted. Further, it is this fund that pays all taxes, rates, insurance premiums or any other services the body corporate is responsible for.<sup>181</sup> In a nutshell, it is the body corporate that ensures the smooth running of a sectional title scheme, since it ensures that the sectional owners pay into the abovementioned fund.

Every sectional owner is responsible for a *pro rata* levy that is determined by the body corporate through a resolution. In terms of the *Management Act*, a sectional owners' liability for their *pro rata* levy or contribution to the fund is recoverable by the body corporate through an application to the sectional titles schemes ombudsman (to be established).<sup>182</sup> Moreover, in terms of section 3(5), it is the duty of the body corporate to make known to all sectional owners how much the contribution to the fund will be, how such contribution is to be paid, and how much each owner has paid towards the fund.

#### 4.3.4 Conduct rules

Conduct rules are described as the rules between sectional owners *inter se* and they are there to ensure that every owner enjoys the use of his unit as well as the common property in a way that does not prejudice other owners.<sup>183</sup> These rules are contained in Annexure 9 of the *Sectional Titles Act* 1986. Further, conduct rules are regulated by the owners in a sectional title scheme and filed at the Deeds Office. Once the rules are approved by way of special resolution by the owners of the sectional title scheme, they must be initialled on each page by two trustees of the body corporate and a notification page in terms of section 35 must be signed. All rules, whether management or conduct rules, must be reasonable and apply equally to all owners.<sup>184</sup> Likewise, section 10(2) (b) of the upcoming *Community Schemes Ombudsman Service Act* 9 of 2011<sup>185</sup> (hereinafter the *Ombudsman Act*), prescribes that conduct rules of a scheme may be amended, substituted or even repealed by the developer provided that this is done in consultation with the chief ombudsman. This is a new phenomenon that will only be seen as soon *Ombudsman Act* is implemented.

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181 In terms of s 3(1)(a).

182 In terms of s 3(2) *Management Act*.

183 Badenhorst *et al The Law of Property* 445.

184 S10 *Sectional Titles Act* 1986.

185 To be proclaimed only after the implantation of the *Management Act*.



Under the *Sectional Titles Act* 1986, the only role players in sectional titles schemes are the developer, the body corporate and the sectional owners.

#### 4.3.4.1 The trustees

Trustees of the body corporate like any other trustees owe a fiduciary duty to their principal (in this case the body corporate). It is for this reason therefore, that typical fiduciary duties of good faith, skill and diligence, avoidance of conflict of interest apply to them.<sup>186</sup> Breach of these fiduciary duties make a trustee liable to the body corporate for either the loss suffered or the economic benefit received by the trustee as a result of the breach.<sup>187</sup>

The *Management Act* makes provision for the control, administration and management of the common property to be vested in the trustees of the body corporate, who are to be responsible for the enforcement of the rules.<sup>188</sup> According to Badenhorst *et al*,<sup>189</sup> the trustees are the day to day people taking care of the affairs of the scheme. Hence, it is the trustees who are supposed to be consulted as to the “do’s and don’ts” of the sectional titles scheme.

#### 4.3.5 Dispute resolution

According to Management Rule 71 (1) and (2) the determination of disputes should be by arbitration;

(1) Any dispute between the body corporate and an owner or between owners arising out of or in connection with or related to the Act, these rules or the conduct rules, save where an interdict or any form of urgent or other relief may be required or obtained from a Court having jurisdiction, shall be determined in terms of these rules.

(2) If such a dispute or complaint arises, the aggrieved party shall notify the other affected party or parties in writing and copies of such notification shall be served on the trustees and the managing agents, if any, and should the dispute or complaint not be resolved within 14 days of such notice, either of the parties may demand that the dispute or complaint be referred to arbitration: ...

Additionally, the principle that a purchaser buying in a sectional title scheme becomes party to the rules that apply to that scheme was espoused in the case of *Body Corporate of the Pinewood Park Scheme v Dellis (Pty) Ltd.*<sup>190</sup> In this case, the issue was whether Management Rule 71 that provides for arbitration as a means of dispute resolution was compulsory on the sectional owners. The court came to the conclusion that a scheme may

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186 S 8(2) *Management Act* is to substitute s 40(1) *Sectional Titles Act*.

187 S 8(3) of the *Management Act* is to replace s 40(3)(a).

188 S 7 *Management Act*.

189 Badenhorst *et al The Law of Property* 436.

190 (498/2011) [2012] ZASCA 105.

substitute and amend its rules or provide for obligatory arbitration. However, in the absence of such provision, a body corporate may refer its disputes to a court for determination. This position is to be altered somewhat with the introduction of section 10 of the *Management Act*, which provides that the chief ombudsman is the one responsible for approving any changes that may be made to the rules and regulations by the body corporate.

On the other hand, the position remains unclear since the Supreme Court of Appeal case of *Body Corporate of Greenacres v Greenacres 17*<sup>191</sup> held that the courts have no jurisdiction and that parties should refer the body corporate's claim to arbitration. The court reiterated further that the whole purpose of rule 71 or arbitration is to provide an expedient and inexpensive method of determining disputes. A massive development to be introduced by the *Ombudsman Act* is the fact that dispute resolution methods have broadened; over and above the *Ombudsman Act* introduces conciliation.<sup>192</sup> Maluleke<sup>193</sup> is of the opinion that the provisions made in *Sectional Titles Amendment Act 44* of 1997 to deal with sectional title disputes had not provided an effective solution, which is why there was a need for this resolution in the *Ombudsman Act*.

#### 4.3.6 Consumer protection

##### 4.3.6.1 *The Community Schemes Ombudsman Services Act* 9 of 2011

Consumers in housing are protected under the *Alienation of Land Act*<sup>194</sup> and the *Housing Consumers Protection Measures Act* 95 of 1998.<sup>195</sup> However, the *Housing Consumers Protection Act*, in the context of sectional titles provides for the regulation of the building industry as well as for the protection of new home owners. Section 1 of the *Alienation of Land Act* instead defines land to include a unit as defined in the *Sectional Titles Act*.

In its preamble, the *Ombudsman Act* states that its objectives are;

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191 2008 1 All SA 421 (SCA).

192 S 47 *Ombudsman Act*.

193 Maluleke 2005 SADJ 3.

194 Act 68 of 1981.

195 Badenhorst *et al The Law of Property* 425.

- to provide for the establishment of the Community Schemes Ombud Service;
- to provide for its mandate and functions; and to provide for a dispute resolution mechanism in community schemes; and
- to provide for matters connected therewith.

Over and above regulation by the above *Acts* together with their rules, in 2005, the Department of Agriculture and Land Affairs invited proposals from suitably qualified persons to act as lead consultants. These consultants were engaged to assist in the creation of new legislation that would deal with the administration and management of sectional titles and also provide appropriate dispute resolution structure(s) for sectional title consumers.<sup>196</sup> This was an attempt by the legislature to protect those consumers not protected by the abovementioned Acts and led to the promulgation of the *Sectional Titles Schemes Management Act* 8 of 2011 and the *Community Schemes Ombudsman Services Act* 9 of 2011. The *Community Schemes Ombud Services Act* although not yet enforced, was created to respond to the problems of the sectional title industry as well as other community schemes. The Act when enforced, will establish the Ombuds office to deal with disputes that arise within the community schemes; whether between members *inter se* or between members and the management of such schemes.<sup>197</sup>

#### **4.4 Share block schemes**

##### *4.4.1 Development of share block schemes in South Africa*

According to Pienaar,<sup>198</sup> before sectional titles came into being, only unregistered long and short term leases,<sup>199</sup> contractual ownership and shareholding rights for the occupation and of use of part of a building existed. He adds that the last-mentioned method of co-shareholding was introduced all over the world not only as a means of restructuring after the World Wars but also because of rapid urbanization in cities.<sup>200</sup> For South Africa, he affirms, share block schemes were prevalent in the 1930s.

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196 Maluleke 2005 *SADJ* 3.

197 Preamble to the *Community Schemes Ombudsman Services Act* 9 of 2011.

198 Pienaar *Sectional Titles* 286.

199 Long leases conferred personal rights enforceable between the parties *inter se* only, unless registered in the Deeds Registry. It was not possible register a long term lease for a part of a building because of the application of the *superficies solo cedit* principle.

200 Pienaar *Sectional Titles* 287.

Furthermore, before the share block schemes could be regulated; there was abuse of the system in that the investors of this industry were defrauded by the developers who maliciously withheld valuable information when marketing share blocks. It was for this reason and many other reasons that the then Commission<sup>201</sup> opted for regulation of share blocks instead of abolishing them altogether.<sup>202</sup> Sonnekus<sup>203</sup> too, asserts that in South Africa, share blocks schemes were introduced as an alternative to flat ownership, which arose according to him as a consequence of the acceptance of the *superficies solo cedit*<sup>204</sup> maxim. He however, states that since the introduction of sectional titles, share blocks have since become unpopular as residential units, thus, they are used mainly for business and commercial purposes.<sup>205</sup>

Carey Miller and Pope<sup>206</sup> also assert that the *Share Blocks Act* made it possible for people to approximate ownership of parts of a building or land before it was otherwise legally possible to acquire individual ownership of those parts. They assert that it is surprising that share block schemes still have a place in South Africa since the introduction of the sectional title schemes.

#### 4.4.2 Nature of the right under the Act

Unlike a sectional title holder who acquires ownership in respect of the section he/she owns, shareholding in a share block scheme only gives the holder a membership interest in the share block company, which in turn entitles the member to an exclusive use of a particular part of the building owned or leased by the company.<sup>207</sup> Rights of a shareholder are thus personal rights hence incapable of registration.<sup>208</sup> In terms of section 4 of the *Share Blocks Control Act*, the right to occupy a part of a building is based on:

- (i) shareholding in the share block company; and
- (ii) the prescribed use agreement between members and the share block company

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201 Commission of Inquiry that came up with the *Development Schemes Bill* of 1978

202 Pienaar *Sectional Titles* 292.

203 Sonnekus *Sectional Titles, Share blocks and Time-sharing* 1-6.

<sup>204</sup> See section 4.3 p 27.

205 Sonnekus *Sectional Titles, Share blocks and Time-sharing* 1-7.

206 Carey Miller and Pope *Land Title in South Africa* 225.

207 S 1 *Share Blocks Control Act*.

208 Du Bois (ed) *Willes principles of SA Law* 586.

The position that rights of a shareholder in a share block company are personal was reiterated by the Supreme Court of Appeal in the case of *Communicare and Others v Khan and Another*<sup>209</sup> where it was held that the rights of members of a company to vote at annual general meetings relating to election of directors were personal rights. Thus, each share block is linked to the right to occupation and voting rights are allocated in proportion to the number of shares held.<sup>210</sup> As such, the use agreement prohibits cession of the rights to third parties. However, cession is only permissible if it is intertwined with the transfer of the shares of that member,<sup>211</sup> in which case the due formalities will follow as per the use agreement.

There has been some controversy whether the use agreement and the memorandum of incorporation constitute a lease. Nonetheless, Sonnekus<sup>212</sup> states that these use rights do not amount to a lease because the shareholders' right to reimburse the company for running expenses through the levy fund is not regarded as a means of paying rent. To him, a shareholder in a share block company is more than a mere tenant. This is because a shareholder can enforce his rights against the company, its management, as well as other members under company law remedies instead of through ordinary statutory protection afforded to ordinary tenants.<sup>213</sup>

#### 4.4.3 *Share Blocks Control Act 59 of 1980*

Sonnekus<sup>214</sup> opines that the *Share Blocks Control Act* (henceforth the *Share Blocks Act*) is only applicable in relation to immovable property. According to him, the purpose of the Act is to control the operation of share block schemes as well as to provide for matters connected therewith. Sonnekus affirms further that in its entirety, the Act is subdivided into three sub-categories namely:

- Firstly, to regulate transfer of shares in the share block company for subscription or sale to protect the investors and enable them to make informed decisions.

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209 (12\ 2012) ZASCA 180.

210 The levy amount for each individual unit is also linked to the number of shares that each shareholder owns.

211 Sonnekus *Sectional Titles, Share blocks and Time-sharing* 2-21

212 Sonnekus *Sectional Titles, Share blocks and Time-sharing* 2-23.

213 Sonnekus *Sectional Titles, Share blocks and Time-sharing* 2-24.

214 Sonnekus *Sectional Titles, Share blocks and Time-sharing* 1-10.

- Secondly, to restrict the capacity and powers of the company and its directors not to engage in any other activities outside of those mandated by the articles and the use agreement.
- Lastly, to allow conversion of share block schemes to sectional titles should there be a need.

Du Bois<sup>215</sup> too, opines that the role of the Act is to protect the public against unscrupulous developers as well as to promote good management and neighbourliness amongst co-shareholders. He agrees with Sonnekus that the regulation in the *Share Blocks Act* is not all-embracing because it only regulates immovable property.<sup>216</sup> In terms of section 1 of the *Share Blocks Control Act* a “share block scheme” is any scheme in terms of which a share, in any manner whatsoever, confers a right to or an interest in the use of immovable property. Whereas sectional title schemes are regulated under the *Sectional Titles Act* alone, share block schemes are regulated by both the *Share Blocks Act* as well as the *Companies Act 71 of 2008*.<sup>217</sup>

#### 4.4.4 Management of the scheme

##### 4.4.4.1 The directors of the share block company

According to Carey Miller and Pope,<sup>218</sup> it is the shareholders of the company who are entitled to elect directors of the share block company. These directors are in turn responsible for the day to day running of the scheme, as the managing agents of the share block company. Members of the company have a duty and a right in terms of section 12 of the *Share Blocks Act*, to appoint director(s) of the share block company.<sup>219</sup> Despite the shareholders not being owners in the legal sense, their shareholding warrants their role in the management of the scheme through a general meeting of shareholders.

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215 Du Bois (ed) *Willes Principles of SA Law* 586.

216 There is movable property owned by the company that the shareholders are entitled to use on the basis of their membership or shareholding. Specifications of such property is usually contained in the Memorandum of Incorporation between the company and its members.

217 Both pieces of legislation require certain minimum information to be disclosed in the sale documents and advertisements, and contain restrictions as to when a purchaser's money can be paid to a developer. In terms of s 7 of the *Property Time-Sharing Control Act*, a developer may not receive any sale consideration unless the accommodation has been completed and a certificate of completion issued by an architect.

218 Carey Miller and Pope *Land Title in South Africa* 236.

219 In terms of s 12(1)(a) and (b).

Nevertheless, like in any company, the directors run the company based on the Memorandum of Incorporation. Different from typical companies is the fact that the directors can only act within the bounds of the abovementioned documents; this is called the *substratum* of the company.<sup>220</sup> The substratum of a share block company is to run the scheme in respect of immovable property owned or leased by it.<sup>221</sup> It is for the reason that any act which falls beyond the object of the company is null and void. This principle is enunciated in sections 7 and 8 of the *Share Blocks Act*. In terms of section 7(1):

The main object and business of any share block company shall be to operate a share block scheme in respect of immovable property owned or leased by it.

In the same way, section 8 provides for incidental matters that are connected to the object of the share block company as encapsulated in section 7.<sup>222</sup> If a share block company goes beyond its substratum, it is said to be acting *ultra vires*. Any action that is not authorized by the company's articles is invalid. This principle was illustrated in the case of *Quadrangle Investments Pty Ltd v Witind Holdings Ltd*<sup>223</sup> where it was held that a dividend declared by the company in contravention of a condition contained in the memorandum of association was not valid nor validated simply because all the shareholders had unanimously assented to it.

The English case *Ashbury Railway Carriage and Iron Co Ltd v Riche*<sup>224</sup> illustrates this principle vividly. Here, a company incorporated under the 1869 *Companies Act* whose objects in terms of clause 3 (similar to section 7 of the *Share Blocks Act*) were to sell, lend or hire railway carriages. In the face of clause 3, the company agreed to give Riche and his brother a loan to build a railway in Belgium. Later, the company refused the agreement. When Riche sued, the company pleaded the action was *ultra vires*. The House of Lords affirming the decision of the court below held that "...if a company pursues objects beyond the scope of the memorandum of association, the company's actions are *ultra vires*."

Furthermore, it is usually advised that over and above the Memorandum of Incorporation, the scheme should adopt further rules (similar to house rules in sectional title schemes) that regulate the "do's and don'ts" of the scheme. The reason advanced for this position is

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220 Pretorius and Delpont (eds) *Hahlo's South African Company Law* 60.

221 Carey Miller and Pope assert that it is in instances like these when the directors will be personally liable to third parties since they were not authorized by the company's Memorandum of Incorporation.

222 Sonnekus *Sectional Titles, Share blocks and Time-sharing*; is of the opinion that the effect of the *Share Blocks Control Act* regarding the powers or capacity of the company is to restrict the company to the operation of a single share block scheme.

223 1975 1 SA 572 (A) at 582.

224 1875 LR 7 HL 653.

that amendment of Memorandum of Incorporation is not as easy as altering a regulation unique to the scheme.<sup>225</sup> The *Share Blocks Act* authorizes the directors to set up a levy fund<sup>226</sup> to which the members of the company shall make monthly payments, to insure the scheme<sup>227</sup> and to do all acts incidental to the running of the scheme.<sup>228</sup>

Finally, for maintenance of the property, the directors of a share block company establish a levy fund to which the shareholders contribute in order for the company to meet its running expenses. This monthly levy is paid by each shareholder to defray the costs of maintenance and administration. These include local authority rates and taxes,<sup>229</sup> payment of staff and insurance premiums<sup>230</sup> on the property.

#### 4.4.5 Enforcement of the rules and dispute resolution

The *Share Blocks Control Act* does not have any management rules or enforcement measures in the event of breach. Therefore, resort must be had to the Memorandum of Incorporation and/or use agreement when there is a breach of the rules of the scheme. In the case of *Body Corporate, Shaftesbury Sectional Title Scheme v Rippert's Estate and Others*,<sup>231</sup> it was held that rules of the scheme must at all times be complied with by the occupiers, failing which the management may deprive them of their right of residence.

Sonnekus<sup>232</sup> opines that if a shareholder does not comply with any (mostly financial) of the rules of the company's constitution, the share block company may institute proceeding against him before a court of competent jurisdiction. However, as an alternative to this measure, that member may be sanctioned in any of the following four ways:

- Firstly, the company may provide for a lien over its shares, to the extent that they cover the amount owing.
- Secondly, the company may reserve the right to cancel the use agreement or suspend the member's right to occupy the flat.
- Thirdly, the directors are entitled to impose penalties.
- Fourthly, that members' voting right can be suspended.

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225 Carey Miller and Pope *Land Title in South Africa* 236.

226 S 13 *Share Blocks Control Act*.

227 S 19 *Share Blocks Control Act*.

228 Subject to ss 7 and 8 *Share Blocks Control Act*.

229 S 13 (1) *Share Blocks Control Act*.

230 S 19 *Share Blocks Control Act*.

231 2003 5 SA 1 (C).

232 Sonnekus *Sectional Titles, Share blocks and Time-sharing* 4-18.



## 4.5 Time-sharing schemes

### 4.5.1 Development of time-sharing schemes in South Africa

According to Visser,<sup>233</sup> time-sharing schemes started in South Africa during the 1970's but only experienced rapid growth around 1980. He says that the principal vehicle for time sharing schemes in South Africa are share block schemes as opposed to America which uses condominiums.<sup>234</sup> Du Bois<sup>235</sup> quashes the idea that property time-sharing schemes are creatures of modern development by emphasizing that owners could utilize a thing on a time basis when no alternative could be found. He<sup>236</sup> adds that the time-share concept involves the successive use by different people of the same property. Further that the period is usually calculated in weeks and recurs annually.<sup>237</sup>

Pandy and Rogerson<sup>238</sup> state that time-share is sometimes referred to as vacation ownership. They however recognize the controversy surrounding the ownership of second homes in South Africa and argue that time-share or vacation ownership is a somewhat recent leisure phenomenon attached to multiple property ownership. Controversies aside, they state that "time-share refers to the practice of dividing accommodation units into weekly increments or intervals and selling them to consumers."<sup>239</sup> Further that, the time during which a time-share holder is entitled to occupy an apartment is determined each year by a method stipulated in the rules of the scheme. Correspondingly, the main idea behind the time-share concept, according to Badenhorst *et al*<sup>240</sup> is to save the resort owners the trouble and costs of recruiting users on an annual basis.

Adoption of this concept was seen in South Africa around the 1970's; not long after its genesis in France around the late 1960's. They endorse that when they were first introduced in Natal, they were operated mainly on the share block basis. Over the years, the time-share schemes in South Africa and the world at large, offer exchange facilities wherein a time-share holder can exchange his occupancy rights in a particular year for

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233 Visser 2003 *UF* 391.

234 Condominiums as South African equivalents of sectional titles would mean that a time-share owner owns a unit in a sectional titles scheme for a designated number of weeks.

235 Du Bois (ed) *Wille's Principles of SA Law* 587.

236 Du Bois (ed) *Wille's Principles of SA Law* 587.

237 Sonnekus 7-3; makes an example that a time share entitles a holder to occupy flat x, in a particular seaside block of flats for the first two weeks of July each year.

238 Pandy and Rogerson 2013 *BG* 98.

239 Pandy and Rogerson 2013 *BG* 99.

240 Badenhorst *et al The Law of Property* 473.

accommodation for another scheme in some other place.<sup>241</sup> Consequently, Visser<sup>242</sup> asserts that the majority of the time-share industry lies in KwaZulu Natal. He states that right about the time they were introduced, almost half a million South Africans owned timeshares. He believes that currently it is difficult to have these kinds of statistics because “the holding of a property relative to others is not included in standard census or household surveys anymore.”

#### 4.5.1.1 Flexy-time

It is not in all instances however, that a time-share interest is linked to a fixed period or to a specific apartment in the scheme, where tractability is permissible. This is called flexitime or floating time.<sup>243</sup> The ownership will only be specific on how many weeks the owner owns and from which weeks the time-share owner may select for his stay. However, the time-share owner is restricted to booking only in the particular class or category of accommodation that she/he owns.<sup>244</sup> On the contrary, the legal basis for flexi-time is usually, share block schemes or clubs since sectional titles subject the owner to an explicit unit in the scheme.<sup>245</sup>

#### 4.5.2 Legal nature of the right

According to Pienaar,<sup>246</sup> time-share schemes confer personal rights on the purchaser except where such schemes are based on sectional titles. In the same light, Visser<sup>247</sup> rightly points out that a time-share entitles a holder to occupy the same apartment at a particular time sharing development for the same week each year. Because this is a commercial concept, Pienaar<sup>248</sup> asserts that the legal title acquired will therefore depend on the legal base used for the scheme to which the time-share relates. In the case of sectional titles schemes, the purchaser obtains sectional ownership whereas in share

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241 Badenhorst *et al The Law of Property* 474.

242 Visser 2003 *UF* 392.

243 Pienaar *Sectional Titles* 431.

244 Pienaar *Sectional Titles* 431.

245 Pienaar *Sectional Titles* 432.

246 Pinaar *Sectional Titles* 415. He adds on that on general terms, the concept of time-share can be applied to the use of all immovable property which is shared on a time basis, South Africa only restricts it to the shared use of accommodation for holidays purposes.

247 Visser 2003 *UF* 382.

248 Pienaar *Sectional Titles* 415.

block schemes the purchaser (as a shareholder in the company) only gets a contractual right to occupy and use amenities offered by the scheme.

Badenhorst *et al* warn, however, that these different legal vehicles are the very reasons why it is not easily determinable, the exact nature of time sharing. Despite the difference in legal construction of the time-share schemes, all of them are regulated nationally by the *Property Time-Sharing Control Act* (hereinafter the *Time-Share Act*) as well as the rules set up by individual schemes.

Alternatively, Sonnekus<sup>249</sup> describes time-sharing as the fourth dimension of ownership as it introduces ownership based on time, but Pienaar<sup>250</sup> disagrees. According to Sonnekus,<sup>251</sup> traditional ownership as we know it was two dimensional as it was measured in terms of length and width. However, with the introduction of sectional titles came the three dimensional ownership as it introduced a new phenomenon of “height.”

Nonetheless all are agreeable on a number of facts;

- the main characteristic of time-share concept is the holder’s exclusive right to occupy accommodation for a designated period of time;
- the legal nature of time-sharing is determined by the legal vehicles used, whether sectional titles or share block schemes; and
- time-sharing is a commercial concept associated with holiday accommodation.

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249 Sonnekus *Sectional Titles, Share blocks and Time-sharing* 7-3.

250 Sonnekus asserts that time-sharing concept envisages ownership of time since time becomes a divisible element which can be owned or possessed. Pienaar however thinks this is preposterous, he says that;

(i) Firstly, time is an abstract concept that cannot be owned hence cannot be described in property law terms.

(ii) Secondly, he argues that some time-share rights are not inextricably linked to ownership of immovable property, for example, those that use share block schemes as a legal vehicle, which are based on personal rights and not ownership.

(ii) Lastly, he says that a time- share holder remains an undivided co-owner of a unit throughout the year (where sectional titles are used) but his use rights are divided on the basis of time. For example, if X has time-share rights to occupy a flat for only two weeks in a year (52 weeks), he remains a co-owner of that unit throughout the year but is only entitled to occupy it for that designated period of time; hence he is a 1\52 co-owner. Likewise a shareholder in a share block company managing a time-sharing scheme remains a shareholder for the whole year, but only exercises his/her occupation rights at a specific time of the year.

251 Sonnekus *Sectional Titles, Share blocks and Time-sharing* 7-3.

#### 4.5.3 Property Time-sharing Control Act 75 of 1983

Sonnekus<sup>252</sup> emphasizes that the concept of time-sharing can be used in a vast number of accommodation and recreational activities, but, the *Time-sharing Act* like the *Share Blocks Control Act* is only applicable to immovable property. According to the preamble of the Act, it was enacted for the principal reason that the government and other stakeholders realized that there was a need to regulate the alienation of time-sharing interests pursuant to property timesharing schemes. The *Time-sharing Act* is not as comprehensive as the *Sectional Titles Act* and the *Share Blocks Control Act* as it is a norm to have time-sharing interest in property that is established under the last-mentioned Acts. Pienaar<sup>253</sup> asserts further that the principal object of the *Time-sharing Act* is to protect the purchaser of the time-sharing interest. The protection is said to depend on the nature of the time-sharing scheme which will ultimately imply whether protection is to be sought under the *Sectional Titles Act* or the *Time-sharing Act*.<sup>254</sup>

#### 4.5.4 Management of the scheme

Whenever a time-sharing scheme is not based on sectional titles or share blocks, the management of the scheme is based on regulations to the *Time-Share Act*. In terms of regulation 5 of the *Time-Share Act*, time-sharing schemes that use the sectional title or share block method are exempt from the management regulations, the reason advanced for this position is that the existing sectional title and share block legislation ensures that time-sharing schemes using these methods have an effective management structure.<sup>255</sup> On the other hand, Sonnekus<sup>256</sup> holds a different view; he argues that the hurdles that the sectional title industry is experiencing on the management issues are impacting on time-share schemes that use sectional title as a vehicle. He, however, asserts that when the *Management Act* comes into operation, it is believed that it will rid the industry of these

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252 Sonnekus *Sectional Titles, Share blocks and Time-sharing* 7-3.

253 Pienaar *Sectional Titles* 414.

254 The *Time-sharing Act* prescribes a wide range of protective measure including, following a procedure when alienating a time-sharing interests, disclosing information to the purchasers and ways of managing a scheme.

255 Similarly, in terms of s 12(1)(d) the Minister of Trade and Industry is empowered to make regulations regarding the management of time-sharing schemes and regarding any matter which is considered necessary or expedient to achieve the objects of the Act. Ss (d) particularly deals with those regulations regarding or incidental to the management of the scheme.

256 Sonnekus *Sectional Titles, Share blocks and Time-sharing* 8 – 56.

problems.<sup>257</sup> He also advises that regulation of time-sharing schemes should be compiled into one instrument for uniform regulation since the different regulation tools could prove to be precarious.<sup>258</sup>

#### 4.5.4.1 The management association

In terms of Regulation 7, a management association is deemed to be in existence once anyone other than the developer acquires a time-sharing interest. In turn, a managing agent is a person engaged by either the developer or the managing association to manage a property time-sharing scheme pursuant to a written management contract.<sup>259</sup> Moreover, time-sharing schemes that use sectional titles and share block schemes place no obligation on the developer to appoint a managing agent.<sup>260</sup> The developers together with the new purchaser are members of the association. The Act defines the management association as an association consisting of representatives of a developer and purchasers of time sharing interests.

Albeit not as comprehensive, the duties of the management association are similar to the managing bodies of other schemes. For example, the managing association is responsible for the payment of insurance,<sup>261</sup> ensuring that the levies are paid by the buyers of time sharing interests,<sup>262</sup> controlling and managing common property of the scheme.<sup>263</sup> Similarly, their powers are set out in the Regulations namely, to establish the levy fund,<sup>264</sup> to raise contributions<sup>265</sup> and to enforce rules of the scheme.<sup>266</sup> Despite the non-registration of the association, it is believed that it acquires separate juristic personality apart from its members, just like the body corporate of a sectional title scheme.<sup>267</sup> In conclusion, any contractual disputes or otherwise, may be brought before a competent court in terms of section 8 of the *Property Time-sharing Act*.

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257 Objectives of the *Management Act* in terms of the preamble are as follows: To provide for the establishment of bodies corporate to manage and regulate sections and common property in sectional titles schemes and for that purpose to apply rules applicable to such schemes; to establish a sectional titles schemes management advisory council; and to provide for matters connected therewith.

258 Sonnekus *Sectional Titles, Share blocks and Time-sharing* 8- 58.

259 According to Sonnekus, a managing agent is only responsible to the developer before the managing association is formed. As soon as the management association comes into being, he is answerable to it.

260 Sonnekus *Sectional Titles, Share blocks and Time-sharing* 8- 58(10).

261 Regulation 8(1).

262 Regulation 9(1).

263 Regulation 8(1)(e) and (h).

264 Regulation 9(1)(a).

265 Regulation 9(1)(b) and (c).

266 Regulation 9(1)(n).

267 Sonnekus *Sectional Titles, Share blocks and Time-sharing* 8-60, see also *Wimbledon Lodge (Pty) Ltd v Gore* NO 2003 5 SA 315 (SCA) at para 21.

## 4.6 Retirement schemes

### 4.6.1 Introduction

Butler<sup>268</sup> defines a retirement scheme as:

... [a] scheme in which a person of not less than 50 years of age may acquire exclusive occupancy rights for an indefinite period to residential accommodation in consideration for a substantial lump sum payment or investment, and where the scheme is intended for occupation only by such persons.

Pienaar<sup>269</sup> is of the opinion that elderly people need safe and comfortable housing, but because their homes are often too large and expensive to maintain, retirement schemes remain the viable option. Badenhorst *et al*<sup>270</sup> aver that over and above the need for security of tenure, investors opt for retirement schemes for on-premises medical care, maintenance and garden services, accessible social services and other convenient facilities. Naturally, investors bear the maintenance and administrative costs.

### 4.6.2 Legal nature of the right

The South African system recognizes only three methods of establishing retirement schemes by means of sectional titles,<sup>271</sup> share blocks<sup>272</sup> and 'life rights'.<sup>273</sup> Retirement schemes based on sectional titles and share blocks are governed by sectional titles and share blocks legislation respectively. In terms of a life right agreement, the occupancy right of the investor is connected to his life span, which suggests that upon death of the investor, the right reverts back to the developer. Butler<sup>274</sup> holds a different view in this regard, and says that before the commencement of the retirement schemes legislation, there was no legislation protecting participants in such schemes and that before the commencement of section 4A,<sup>275</sup> participants of the scheme only acquired personal rights. Nonetheless, after the commencement of section 4A, they acquire real rights to the extent that developers persist with new life rights schemes. The life right of the retired person

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268 Butler 1992 *TSAR* 14.

269 Pienaar *Sectional Titles* 463.

270 Badenhorst *et al The Law of Property* 475.

271 In which case the purchaser acquires sectional ownership.

272 The purchaser acquires the contractual right to occupy a particular section of the building.

273 Badenhorst *et al The Law of Property* 476.

274 Butler 1992 *South African Journal of Law* 316.

275 In term of s 4A *Amendment Act*, the holder of an occupancy right based on a personal right has the same rights as those conferred on a lessee in terms of the long term lease (registered in the Deeds Office).

gives him the right of occupancy in a unit for his lifespan as well as protection of that person's spouse in the event of death of the acquirer.<sup>276</sup>

In the case of *Boland Bank Bpk v Engelbrecht*<sup>277</sup> it was enunciated that life rights were not intended by the legislature to be capable of cancellation through a unilateral act of the developer or owner, but only goes towards strengthening the position of the life right holder. Further, that the life right holder's right under section 4A is based on the authorisation of the title deed of the land to the effect that a retirement scheme is conducted on that property. Thus, the right will only be established when the authorisation has been registered.

Regulations 7- 14 of the regulations to the *Retired Persons Act* provide for the setting up and functioning of the management and governing structures for retirement schemes.<sup>278</sup> Regulation 7 provides that the management association consisting of the developer and all purchasers is created as soon as the first housing interest is alienated by the developer to the purchaser. The managing association is responsible, among other things, for the formulation and the enforcement of the rules and for the control, administration and management of the scheme, the housing units, the common property, the facilities and services, for the benefit of all the members.<sup>279</sup>

#### 4.6.3 *The Housing Development Schemes for Retired Persons Act 65 of 1988*

In South Africa, the retirement industry is regulated by the *Housing Development Schemes for Retired Persons Act*,<sup>280</sup> (hereinafter the *Retired Persons Act*). In terms of its preamble, the *Retirement Act* was implemented to regulate the alienation of certain interests in housing development schemes for retired persons as well as to regulate any matters incidental thereto. Pienaar adds that the *Retired Persons Act* provides security of tenure, prevents abuse of funds invested by retired persons and sets standards for proper management of the scheme's facilities and services.<sup>281</sup> The Supreme Court of Appeal in *Eden Village v Edwards*<sup>282</sup> held that the object of the Act is to protect the elderly and retired persons investing their savings in a housing development scheme from possible

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276 *CSARS v Brummeria Renaissance (Pty) Ltd and others* 2007 (4) All SA 1338 (SCA).

277 1996 3 SA 537 (A).

278 In terms of regulation 2, regulations 7- 14 do not apply to retirement schemes created on sectional titles as well as share block schemes basis.

279 Kilburn 2008 *LPLD* 6.

280 Act 65 of 1988.

281 Pienaar *Sectional Titles* 464.

282 1995 4 SA 31 at 44 A.

exploitation by the developer. Du Bois<sup>283</sup> too, affirms that the *Retired Persons Act* was introduced to protect retired persons who acquire housing interests in the schemes development under the auspices of *Act*.

#### 4.6.4 *Management of the scheme*

##### 4.6.4.1 The managing agent

A managing agent is a person engaged by the developer or management association to manage the retirement scheme subject to a written management agreement.<sup>284</sup> Managing agents are appointed by the developer before sale of the first housing interest in accordance with regulation 6. However, the managing agent is answerable to the developer before the managing association is established, from which moment the agent answers to the association. The *Retired Persons Act* is silent on the powers and duties of the managing agent hence the managing agreement must set these out to avoid acts *ultra vires*.

##### 4.6.4.2 The managing association

As is the role of the body corporate in sectional title schemes, the shareholders in the share block schemes, and the managing association in the property time sharing schemes, retirement schemes too are run by the managing association. The association is responsible for the control and management of the scheme<sup>285</sup> as well as the common property on behalf of the purchasers.<sup>286</sup> Also, it is the association that is responsible for payment of insurance,<sup>287</sup> establishment of the levy fund<sup>288</sup> and enforcing the rules of the association.<sup>289</sup>

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283 Du Bois (ed) *Wille's Principle of SA Law* 587.

284 Pienaar *Sectional Titles Act* 483.

285 Regulation 8 (1)(f).

286 Regulation 8 (1)(c).

287 Regulation 8 (1)(a) and (b).

288 Regulation 9 (1)(a).

289 Regulation 16.



#### **4.7 Conclusion**

In conclusion, it has been shown that there are different property dispensations in Lesotho and South Africa, namely, leasehold *vis-a-vis* freehold. As a reminder, it was pointed out earlier that the leasehold tenure refers to landholding wherein the citizens of a country lease the land from the state or its sovereign, whereas freehold tenure simply refers to ownership of land by individuals free of obligations to the monarchy or state. This is the major theoretical difference. Practically however, it has been elucidated in the preceding sections that this difference is only but a facade; since the kind of title in land plays no significant role in the running of communal property schemes. A foundation has been laid, to show how these schemes will be managed, by whom and how disputes are settled both internal and with third parties. All these in an effort to ensure that right holders in these schemes are afforded secure title in property and the comfort of home ownership. Accordingly a summary, conclusion and recommendations will follow in the next section.

## **5 Summary, conclusion and recommendations**

### **5.1 Introduction**

In this final section, a summary, recommendations and conclusion will be given in connection with the authorities that have been cited in the body of the research. Thus, at this point it will be suggested how such recommendations should be implemented to ensure proper regulation of this “new” market. As has been shown in sections 2 and 3, the different tenure systems between South Africa and Lesotho pose no obstacle to the introduction of fragmented property holding in Lesotho. Accordingly, it is in this light that the section is focused.

### **5.2 Summary**

There is no housing policy in Lesotho: As such the absence of a housing policy implies that there is an informal or no regulation in the housing sector, if at all. However, the promulgation of the *Sectional Titles Bill of 2013* has brought hope that it is not absurd to expect more of this kind of regulation in the near future. Thus section 1 of the study gave an introduction and background of this problem statement. Similarly, the succeeding section shows some sort of informal regulation in the housing sector currently, while section 3 goes towards showing the differences in immovable property holding in the urban areas of both study areas. However, one might perhaps assume this objective will be impossible or hard to achieve given the difference in land tenure systems between Lesotho and South Africa. However, it has been elucidated in Section 3 that this difference is only but a facade. In effect, the difference poses no impediment to the implementation of communal property schemes. It has also been made known that most of the legislation in Lesotho has been adopted from South Africa’s as has the *Sectional Title Bill*. The penultimate section has shown the regulatory framework of fragmented property form in South Africa in an attempt to “pave a way” for the proposed regulation in Lesotho.

### 5.3 Conclusion

This conclusion is presented in line with the research question and objectives as shown above. As will be recalled, the primary objectives of this study are two-fold; first it is to determine if non-regulation in the housing sector can be curbed with the introduction of fragmented property holding in Lesotho. Second, it is to determine if the housing development for low and middle income groups can be achieved for, in fragmented property holding implies lower construction costs and smaller land units that are used by a number of people. Regarding the first objective, it has been established that despite not an entire coverage of the housing sector in Lesotho, there is currently a Bill awaiting parliamentary approval.

In terms of the Bill, if enforced, a “new” form of property holding in the country will be introduced: That is, a piece of land (that would otherwise be leaseheld by an individual) which has a building(s) on it and is registered in line with the Bill/Act, will be jointly held by a number of individuals. Such individuals are called sectional owners and exercise full ownership rights in respect of his/her unit as well as co-ownership of the common property of the scheme.

Secondly, based on the co-leaseholding nature of fragmented property schemes, this naturally implies affordability. Rakoena<sup>290</sup> rightly points out that there have been efforts put in place to curtail the problem of housing shortage in Lesotho but emphasizes that these efforts have proved to be unsuccessful.<sup>291</sup> According to him, this is a matter of affordability or lack thereof. He describes affordability by stating that the core of the housing problem for low incomes is that they do not have enough money, “...but are endowed with many other things such as the stamina and experience to do with little and that they are often willing to pay for something better.”<sup>292</sup> Therefore, to save on building costs, for the betterment of Basotho, this research encourages the Lesotho Government to adopt joint title in property.

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290 Rakoena *Investigating the Possibilities of Linking Progressive Housing Investment with Bank Housing Finance* 4.

291 Around 1970's the Government of Lesotho implemented “civil servant housing subsidy” for middle and low income groups but this was in vain: Since the introduction of this programme, it ran for a very short period of time until it was decided that it was not meeting its intended purpose.

292 Nonetheless, because of poverty they have no proper security to pledge for mortgage loans and as such they have less chances of improving their housing situation.

#### **5.4 Recommendations**

Based on the abovementioned observations, it is proposed that sectional titles as well as the other communal property schemes be adopted in Lesotho by their governing legislation, in this way, the problem of land shortage, overcrowding and high building costs can successfully be abridged. At the risk of reverberation, adoption of fragmented property schemes does not only spare the much needed land in the urban areas, it also ensures security of title to copious individuals who are joint leaseholders of the property.

In the same vein, the LAA as a land authority as well as other stakeholders saw the need to address issues such as land shortages, provision of security of tenure allowing credit undertakings, attraction of foreign investment<sup>293</sup> as well as provision of affordable accommodation. In light of these issues coupled with the objectives of this study, the primary objective in the *Sectional Titles Bill* is stressed as preservation of already scarce land. Thus, it is exactly for the same reasons that more of these fragmented property forms are encouraged by the researcher as has been shown that indeed this form of property holding will meet the desired outcomes.

These recommendation(s) serve as a directory to the concerned parties as shown above, thus, over and above sectional titles, share block schemes, time-sharing schemes and retirement schemes play a similar role. Accordingly, section 4 has enunciated what these schemes are, how they are managed and in what ways they are similar or different. From the abovementioned analysis, it is up to these parties to opt for schemes that will best suit not only their needs but also the needs of Basotho who will partake in them.

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293 Countries that incentivize by providing for full or co-ownership of property (land) have been shown to have more foreign direct investment than those that do not. This is in line with statement 3.1 “*Statement of Objects and Reasons of the Land Act, 2010.*”

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