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Comparative Lessons in Sectional Title Laws: Mitigating Urban Inequality in South Africa

Edward SW Ti  *

Abstract—Urban inequality in South Africa is a formidable problem that is linked to the injustices of its historical apartheid past. This paper identifies sectional titles, a form of property ownership where proprietors wholly own their apartment unit while co-owning the land and common property, as critical to providing more affordable housing. Sectional title schemes mitigate urban inequality by giving a greater proportion of the country the opportunity to own legally secure, well-located dwellings while serving as a platform where communal living could take place. Two suggestions how sectional title legislation can further alleviate aspects of urban inequality are made (1) Permitting a supermajority of sectional owners to terminate a sectional scheme prevents holdout and allows urban land to be redeveloped, providing an increase in housing. (2) Municipalities could consider mandating ethnic integration in sectional schemes to counter the organic formation of mono-racial residential enclaves which remain in present-day South Africa.

Keywords: Property law; sectional titles; urban inequality; apartheid; South Africa; law and regulation.

1. Introduction

Whilst many would say that ... [the Sectional Titles] Bill is technical in nature, in reality the Bill again begins to address the questions of class, race and gender, in that it deals with property rights and the rights of exclusive use, rights of extension and redefines boundaries. All of this with our history and economic location have historically created tension and a conflict of interest.¹

Waldron states that one's interest in property is effectively 'an interest in the political and economic structure of society'.² While the politics and economic

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¹ SA National Assembly, *Hansard* (25 August 2010), Deeds Registries Amendment Bill & Sectional Titles Amendment Bill (HF Matlanyane MP) <https://pmg.org.za/hansard/18108/> accessed 9 June 2022.

² J Waldron, *The Right to Private Property* (OUP 1988) 328.

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of property, I argue that sectional titles aid efforts towards urban democratisation and alleviate some of the deleterious effects of apartheid by providing more housing and a platform to foster integration. Although sectional ownership extends to both residential and commercial property, this article focuses on the former. Indeed, a substantial majority of sectional titles are residential, with Van der Merwe estimating that this constitutes 90% of all schemes.¹⁹

Alexander and Peñalver observe that without access to minimally decent legal housing, the ability for South Africa's black majority to flourish is severely compromised.²⁰ While sectional schemes should be gradually introduced into township areas, sectional titles cannot, at the moment at least, resolve the urgent housing needs of a vast number of non-white South Africans. There are no easy answers to alleviate the dire living conditions of the approximately one-in-four urban residents who live in informal settlements.²¹ Nonetheless, the nature of property rights that sectional ownership brings contributes towards the development of a more ethical urban planning praxis, setting the foundation for future improvements. Through more intense use of urban land, better located housing that is affordable to a larger segment of the population is increased and commuting costs are lowered. As a true form of ownership, sectional titles allow for mortgageable property rights and the accumulation of wealth. The communal aspect of sectional titles also provides the potential to achieve greater integration. Collectively, lowering the economic and spatial barriers to proper housing in urban areas gives a greater proportion of the country the opportunity to flourish. Sectional titles may thus provide an opportunity to contribute towards one of the stated goals of the Mandela government: a significant change in the racial distribution of land ownership for long-term political stability and economic prosperity.²²

Following this introduction, I give an overview of apartheid property law in SA in section 2. In section 3, I provide the legal context within which SA's housing debates are situated and explain why the suggestions made in this article are consistent with constitutional values and the broad objects of the provisions of the Bill of Rights. Section 4 analyses relevant aspects of SA's sectional title framework and explains its legislative history while section 5 outlines its policy rationale. In section 6, I make two suggestions as to how SA's sectional titles legislation could be amended to further the important goal of urban democratisation: (i) a discussion of how (and for what purpose) New South Wales's non-unanimous scheme cancellations can be adopted in SA; and (ii) how sectional titles can foster racial integration, perhaps adopting legislation similar to that found in section 106 of the UK's Town and Country

¹⁹ CG Van der Merwe (ed), *European Condominium Law* (CUP 2015) 65.

²⁰ G Alexander and E Peñalver, 'Properties of Community' (2009) 10 *Theoretical Inquiries in Law* 127, 155.

²¹ The latest data from the World Bank (2018) indicates that 25.6% of SA's urban population live in slums <https://data.worldbank.org/indicator/EN.POP.SLUM.UR.ZS?locations=ZA> accessed 9 June 2022.

²² SA Department of Land Affairs, *Green Paper on South African Land Policy* (February 1996) 5–6.

Planning Act, or by administrative fiat, like the erstwhile colony Singapore. Section 7 concludes.

2. Apartheid Property Law

[A] cluster of statutes ... gave [the] imprimatur to the usurpation and forced removal of black people from land and compelled them to live in racially designated locations ... Residential segregation was the cornerstone of the apartheid policy. This policy was aimed at creating separate 'countries' for Africans within South Africa. Africans were precluded from owning and occupying land outside the areas reserved for them by these statutes ... Differentiation on the basis of race was, accordingly, not only a source of grave assaults on the dignity of black people. It resulted in the creation of large, well-established and affluent white urban areas co-existing, side-by-side, with cramped pockets of impoverished and insecure black ones. The principles of ownership of Roman-Dutch law then gave legitimation in an apparently neutral and impartial way to the consequences of manifestly racist and partial laws and policies.²³

Although the Sectional Titles Act 1971 was promulgated under apartheid rule, its enactment was not to further the separation of the races. Following the abolishment of apartheid, the government has not only retained sectional titles, but has recognised that this form of ownership has the potential to 'enhance social justice through the deracialisation of the residential market'.²⁴ Before considering how this form of property can be part of the solution, it is apposite to first consider the problem—historical apartheid land use planning.²⁵

A principal concern of apartheid was property rights, with the policy having been variously described as 'a shorthand reference of the statutory regulation of property law'²⁶ and a 'major exercise in land use planning'²⁷ meant to achieve the separation of the various peoples in SA. As observed by Madala J, apartheid law 'put in place a system of land use and occupation which was calculated to be legally insecure, racially discriminatory and devised to obliterate investment opportunities for black persons'.²⁸ Njoh observes that, irrespective of which European nation was the colonising power, all the colonial cities in Africa were racially segregated.²⁹ Apartheid was thus the 'generic

²³ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), [9]–[10] (Sachs J)

²⁴ SA National Assembly, *Hansard* (22 February 2011), Sectional Titles Schemes Management Bill & Community Schemes Ombud Service Bill (MG Sexwale, Minister of Human Settlements) <<https://pmg.org.za/hansard/29800>>.

²⁵ No doubt, European-led land takings preceded formalised apartheid. Tembeka Ngcukaitobi, *The Land Is Ours: South Africa's First Black Lawyers and the Birth of the Constitutionalism* (Penguin Books 2018) 24 notes that following the Berlin Conference of 1884–85, the world powers agreed that any European state that could prove 'effective occupation' of African territory was regarded as the owner of that land. Apartheid policy, however, exacerbated the land and housing problem.

²⁶ Hamilton (n 18) 154.

²⁷ AJ Christopher, 'The Inheritance of Apartheid Planning in South Africa' (1986) 3 *Land Use Policy* 330.

²⁸ *DVB Behuising (Pty) Ltd v The North West Provincial Government* 2001 (1) SA 500 (CC) [76].

²⁹ AJ Ngho, 'The Segregated City in British and French Colonial Africa' (2008) 49(4) *Race & Class* 87.

form of the colonial states in Africa'.³⁰ Segregation was a means to create living conditions that approximated those in Europe, and to contain African urban residents in well-delineated districts, where they could be monitored by the European authorities. Psychological insecurity, political domination, social control and belief that separation was needed to protect the colonisers from disease have been proffered as the rationale for segregation,³¹ with racial or cultural superiority underpinning this.³² In SA, apartheid was additionally ignominious because it continued for decades after self-governance, coming to an end only in 1994.

While apartheid became synonymous with the National Party's (NP) 46-year rule, it should be noted that this policy preceded the NP, though that government certainly embraced and proliferated segregation. Apartheid established and maintained an unequal and unjust land-use system according to racial criteria.³³ With arable farmland taken away, economic survival made it necessary³⁴ for many Africans to seek employment in cities, where they were allowed in 'defined areas' solely for domestic employment.³⁵ There, they were legally required to reside in the periphery of urban areas,³⁶ where they still had severely curtailed property rights. In consequence, vast new suburban zones were constructed that were physically separated from the white areas of the town, with empty buffer strips left between the different group areas, even if that meant the demolition of properties in areas that were already built up.³⁷

The Group Areas Act left the central business district and inner suburbs in white hands,³⁸ with blacks seen as guest workers in the urban areas, as their true 'homelands' were conceived of as the Bantu states, which were carved out from within the boundaries of SA.³⁹ A justification for the intended 'impermanence of blacks in the urban area'⁴⁰ rested on the specious argument that urban areas were 'essentially the white man's creation'⁴¹ to begin with. Further underlying the policy of urban segregation was a desire to make it

³⁰ M Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton UP 2018) 8.

³¹ AJ Njoh, 'Colonial Philosophies, Urban Space, and Racial Segregation in British and French Colonial Africa' (2008) 38 *Journal of Black Studies* 579, 589–98.

³² *ibid* 582.

³³ AJ Van der Walt, *Constitutional Property Law* (2nd edn, Juta 2005) 414.

³⁴ See D Van der Merwe, 'Not Slavery but a Gentle Stimulus: Labour-Inducing Legislation in the South African Republic' [1989] *Journal of South African Law* 353, 368.

³⁵ G Muller, 'The Legal-Historical Context of Urban Forced Evictions in South Africa' (2013) 19 *Fundamina* 367, 381.

³⁶ *ibid* 376.

³⁷ Christopher (n 27) 332.

³⁸ *ibid* 333.

³⁹ J Dugard, 'South Africa's Independent Homelands: An Exercise in Denationalization' (1980) 10 *Denver Journal of International Law & Policy* 16.

⁴⁰ IOHM Mapena, 'Policy for Urban Blacks in the Republic of South Africa' (Inaugural Lecture, Chair of African Government and Law, University of the North, 15 September 1978) <http://ulspace.ul.ac.za/bitstream/handle/10386/1535/mapena_iohm_1978_ia.pdf?sequence=1&isAllowed=y>.

⁴¹ G Davis, L Melunsky and FB Du Randt, *Urban Native Law* (Grotius Publications 1959) 5.

difficult for blacks to acquire 'a stake in the town', as property ownership and political participation were seen to be synonymous.⁴² Contrary to the policy intent, however, informal settlements became rife from a severe shortage of formal housing;⁴³ some Africans started occupying vacant land and buildings closer to their work because they could not afford the daily commute from the periphery.⁴⁴

Despite progressive policy shifts since 1994, there are remarkable continuities in SA's urban planning outcomes across the apartheid and post-apartheid eras.⁴⁵ Slabbert and others⁴⁶ note that many Africans are simply too poverty-stricken to move out of informal settlements and townships, with wealth and class now replacing race as the determinant of residence.⁴⁷ The issues are more nuanced than simply increasing access to the city. Following the end of apartheid, cities such as Johannesburg became predominantly black as whites increasingly fled city centres and moved into gated suburbs in the north.⁴⁸ As employers followed this 'white flight', Johannesburg's northern neighbourhoods were soon transformed into a new 'edge city', largely independent of the former central city.⁴⁹ Tewolde similarly reports that city centres in Pretoria are now mainly inhabited by black South Africans and African migrants,⁵⁰ with the quality of housing leaving much to be desired. Another unfortunate urban reality is that banks are reluctant to grant loans in inner city areas because of the risk, with overcrowding and inadequate maintenance of buildings.⁵¹ It has been argued that one way to foster integration is to invest more in infrastructural upgrades to make inner cities in SA more attractive to all races.⁵² Sectional schemes, while not a magic bullet to resolve SA's urban disamenities, nevertheless have the potential to be a critical infrastructure improvement and alleviate the situation through the development of more housing, as well as providing a platform to foster integration.

⁴² TRH Davenport and C Saunders, *South Africa—A Modern History* (5th edn, Palgrave Macmillan 2000) 650.

⁴³ *ibid* 367.

⁴⁴ Muller (n 35) 382.

⁴⁵ B Maharaj, 'South African Urban Planning in the Twentieth and Twenty-First Centuries—Continuities between the Apartheid and Democratic Eras?' in RR Thakur and others (eds), *Urban and Regional Planning and Development: 20th Century Forms and 21st Century Transformations* (Springer 2020) 101; AJ Christopher, 'Racial Land Zoning in Urban South Africa' (1997) 14 *Land Use Policy* 311, 320.

⁴⁶ TJC Slabbert and others, 'Poverty among Blacks in the Vaal Triangle' (1996) 26 *Africa Insight* 146.

⁴⁷ Maharaj (n 45) 109.

⁴⁸ J Seekings, 'Race, Class, and Inequality in the South African City' in G Bridge and S Watson (eds), *The New Blackwell Companion to the City* (Wiley-Blackwell 2011) 541.

⁴⁹ *ibid*.

⁵⁰ AI Tewolde, 'Migrating into Segregated Majority-Black Inner Cities: Racialised Settlement Patterns of African Migrants in Pretoria, South Africa' (2021) 113 *Cities* <https://doi.org/10.1016/j.cities.2021.103178> accessed 9 June 2022.

⁵¹ Maharaj (n 45) 110.

⁵² Tewolde (n 50).

3. *The Right to Property and Housing*

There are two sections in SA's constitutional Bill of Rights⁵³ that the article engages with: the property clause under section 25 and the housing clause under section 26. These collectively frame the legal context in which SA's housing debate is situated. It is submitted that the proposal for non-unanimous scheme cancellations aligns with these constitutional values.

A. *Property*

In *First National Bank of South Africa Limited t/a Wesbank v Commissioner for the South African Revenue Services (FNB)*,⁵⁴ Ackermann J explained that the property clause in section 25 of the Constitution 'embodies a negative protection of property and does not guarantee the right to acquire, hold and dispose of property',⁵⁵ with the overriding purpose of the property clause being to strike a 'proportionate balance'⁵⁶ between the protection of existing property rights and the promotion of the public interest. Sectional owners, like owners of other forms of land, thus do not have an unfettered right never to have their property taken away from them. The court also explained that an 'arbitrary deprivation of property', prohibited under subsection (1) of the property clause, is one where the law does not provide a sufficient reason for the particular deprivation or is procedurally unfair.⁵⁷ Where legislation limits property rights, such as non-unanimous scheme cancellations, this can be accommodated within the property clause as the principles governing deprivation are inherently flexible and allow for a balancing of considerations under the *FNB* test.

It is also noted that the *FNB* court explained that subsections (4)–(9) of the property clause 'underline the need for, and aim at redressing one of the most enduring legacies of racial discrimination in the past, namely the grossly unequal distribution of land in South Africa'.⁵⁸ Because non-unanimous scheme cancellations will increase the availability of residential urban land for intensification, such an amendment may not merely be *intra vires* but may even advance the constitutionally stated goals in the property clause. Providing a mechanism to prevent holdout arguably promotes subsection 25(4) of the Constitution, which reads: 'The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.' Non-unanimous scheme cancellations may also be used to provide persons who were deprived of land due to past racial discrimination tenure which is legally secure,

⁵³ Constitution of the Republic of South Africa 1996, ch 2.

⁵⁴ 2002 (4) SA 768 (CC).

⁵⁵ *ibid* [48].

⁵⁶ *ibid* [50].

⁵⁷ *ibid* [100].

⁵⁸ *ibid* [49].

pursuant to subsections (6) and (7) of the property clause. This indirectly supports racial integration as well.

Accordingly, while a private taking administered by a supermajority of sectional owners in a scheme is a deprivation of property through the exercise of statutory rights,⁵⁹ the suggested proposal is justifiable on the basis of urban rejuvenation and increasing the urban housing stock, and thus may be enacted to align with constitutional values and facilitate the realisation of important rights.

B. Housing

The housing clause reads:

26. (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions

In *Government of the Republic of South Africa v Grootboom*, Yacoob J explained that section 26(1) does not provide a right to housing itself, but a right of access to housing.⁶⁰ The constitutional court explained that it is not only the state who is responsible for the provision of houses, but that other agents, including individuals themselves, ‘must be enabled by legislative and other measures to provide housing, and the state must therefore create the conditions for access to adequate housing’.⁶¹

In determining whether the state has satisfied its obligations under section 26(2), the *Grootboom* court held that it would not enquire whether other, more desirable or favourable measures could have been adopted, or whether public money could have been better spent. Rather, the question would be whether the measures that have been adopted are reasonable as ‘a wide range of possible measures could be adopted by the state to meet its obligations’.⁶² It is submitted that facilitating the recycling and intensification of urban land promotes both subsections 26(1) and 26(2). Increasing the redevelopment potential of a site while permitting non-unanimous scheme cancellations is a reasonable response to create the conditions for more housing availability. As Durham observes, sectional titles advance SA’s constitutional goal of

⁵⁹ See *Nhlabathi v Fick* [2003] LCC 42/02, where the property clause was successfully invoked to support a land reform law conferring on tenants a statutory right to bury their relatives on the land on which they are residing.

⁶⁰ 2001 (1) SA 46 (CC), [34] (Yacoob J).

⁶¹ *ibid* [35].

⁶² *ibid* [41].

promoting access to adequate housing, especially for previously disadvantaged persons.⁶³

Notably, the *Grootboom* court explained that the right to access to housing under section 26(1) created a negative obligation on the state not to interfere with the right to housing as contained in section 26(3).⁶⁴ In this respect, there is authority suggesting that courts will be hesitant to grant eviction orders in the absence of alternative accommodation.

In *Port Elizabeth*, the constitutional court stated that there is a broad overlap between the property and housing clauses as ‘the stronger the right to land, the greater the prospect of a secure home’,⁶⁵ and further, that

a court should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme.⁶⁶

While this reasoning was not explicitly endorsed on appeal in *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd*, a case where a private owner’s land was occupied by some 40,000 informal occupants, the constitutional court nevertheless held that the state had not only to purchase the ‘illegally invaded’⁶⁷ private land in question, but also to rehouse the occupants before evicting them. To be clear, the constitutional court did not come to its decision through reliance of the housing clause. While the court below did so,⁶⁸ the constitutional court endorsed the decision of the supreme court of appeal but reasoned that the failure of the state to assist with the evictions or to purchase the land threatened the social fabric and was a ‘recipe for anarchy’;⁶⁹ it accordingly decided the matter based on an ‘expansive interpretation’⁷⁰ of the constitutional principle of the rule of law in section 1(c), read with section 34’s right of access to the courts.⁷¹

In respect of rental buildings that are intended to be converted to sectional title, the Sectional Titles Act 1986 allows most incumbent tenants eventually to be evicted, albeit with the provision of generous notice periods. Under section 4(3) of the Sectional Titles Act 1986, a developer must convene a meeting to give all affected tenants the information concerning the proposed

⁶³ CM Durham, ‘Comparative Perspectives on the Role of the Trustees and the Managing Agent as *dramatis personae* in the Governance of Sectional Title Schemes in South Africa’ (LLD thesis, University of Stellenbosch 2016) 2 <http://scholar.sun.ac.za/handle/10019.1/98826> accessed 9 June 2022.

⁶⁴ *Grootboom* (n 60) [34].

⁶⁵ *Port Elizabeth* (n 23) [19] (Sachs J).

⁶⁶ *ibid* [28].

⁶⁷ See *Modderklip Boerdery* 2005 (5) SA 3 (CC) [43], [44], [47] and [48], where Langa ACJ referred to the actions of the occupants’ ‘land invasions’.

⁶⁸ In *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd; President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2004 (6) SA 40 SCA [52], the Supreme Court of Appeal found that the failure of the state either to purchase the property or to find alternative accommodation for the illegal occupiers amounted to a breach of the illegal occupiers rights under s 26(1) of the Constitution.

⁶⁹ *Modderklip Boerdery* (n 67) [44].

⁷⁰ *Constitutional Law of South Africa* (2nd edn), para 55.6 (R 11 June 2013).

⁷¹ *Modderklip Boerdery* (n 67) [68].

scheme, as well as to inform tenants of their right of pre-emption. Under section 10(1) of the Act, the developer must first offer the unit in question to the tenant, who has a 90-day first right of refusal. Should the developer lower its asking price (from that initially communicated to the tenant who rejected it), section 10(2) prevents the developer from selling the unit before again offering the tenant the unit at this reduced price, for a period of 60 days. Additionally, tenants who do not exercise their right of pre-emption are protected against eviction for a further specified period.⁷² The right to housing is further entrenched for financially impecunious seniors, with the Act holding that units occupied by lessees 65 years old or older whose monthly income does not exceed a certain amount can only be sold subject to such tenancies.⁷³ In discussing the inherent tensions between promoting conversions for the benefit of the public and its effect on existing tenants, Van der Merwe and Butler astutely observe that the resulting legislation is a compromise between the conflicting interests 'of the elderly and the poor, landlords, developers and prospective purchasers of units'.⁷⁴ If conversions, which do not generally involve site intensifications, permit evictions, non-unanimous scheme cancellations, with the attendant gains in housing they provide, all the more justify evictions for longer-term, sustainable gains in the housing stock. Notably, the constitutionality of these provisions has not been challenged in the many decades following enactment. Presuming that such conversion-based evictions are not unconstitutional, *a fortiori*, non-unanimous scheme cancellations would similarly be valid, given the underlying policy rationale of intensification and redevelopment. The proposal for non-unanimous scheme cancellations can certainly be drafted in such a way as to advance the constitutional goals of dignity, equality and freedom through the provision of more housing.

4. South Africa's Sectional Title Laws

In 1973, Cowen suggested why SA, despite its immense land size, had introduced sectional title legislation: the high turnover would incentivise developers to produce more housing,⁷⁵ affordability meant home ownership would increase and sectional titles would foster a democratic community of homeowners.⁷⁶ Van der Merwe⁷⁷ notes that the 'scarcity of affordable housing in city centres and the risk involved in buying into share block schemes'⁷⁸ or company title were

⁷² Sectional Titles Act 1986, s 10(3)(b).

⁷³ *ibid* s 10(4).

⁷⁴ CG Van der Merwe and DW Butler, *Sectional Titles, Share Blocks and Time-Sharing* (Butterworths 1985) 130.

⁷⁵ DV Cowen, 'The South African Sectional Titles Act in Historical Perspective: An Analysis and Evaluation' (1973) 6 *Comparative and International Law Journal of Southern Africa* 1, 2.

⁷⁶ *ibid* 4.

⁷⁷ Van der Merwe, *European Condominium Law* (n 19) 46.

⁷⁸ This is another form of co-ownership in SA; see the Share Blocks Control Act 1980, which grants the right of occupation to a specific flat while being a shareholder of the company which owns the building.

also reasons underpinning the legislation. When first enacted in SA, sectional title legislation⁷⁹ would only have impacted an ethnically homogeneous profile of owners, and any egalitarian impulse would not have had much chance of implementation. Quite plausibly, however, proponents of the sectional title scheme very much saw it as a means of facilitating broader access to housing and integration once the apartheid strictures were dismantled. Indeed, several characteristics within the sectional title framework have the potential to enhance urban democratisation and foster integration in post-apartheid SA. This is highly significant, given that ‘sectional titles will become one of the most dominant systems in operations when high-density residential areas become more prevalent in urban areas’.⁸⁰ In 2020, some 30% of all homes sold in South Africa were sectional titles,⁸¹ and with growing urbanisation, this proportion can only be expected to increase. A historical overview of the legislation is first presented.

Sectional titles were first legislated in SA in 1971,⁸² and New South Wales’s Strata Titles Act 1961 (NSW) is often credited as the framework that SA adopted; a commission of enquiry visited Sydney to study the model in 1970, shortly before enactment in SA.⁸³ The NSW Act itself took reference from West Germany’s Wohnungseigentumsgesetz,⁸⁴ which, interestingly, originated from private enterprise. Birch notes that the managing director of Civil and Civic Contractors (Pty) Ltd,⁸⁵ intending to put the conveyance of flats on a sound legal basis, consulted with the NSW Attorney-General and Minister of Justice in the establishment of the Act.⁸⁶ What is common to SA, NSW and Germany is the dualistic nature of a proprietor being a titled owner of her section while concurrently holding an undivided share in the land and common property. As succinctly noted by Ntapane MP, in SA ‘Sectional titles have always been fraught with complexity due to the inherent nature of property rights within sectional titles being partially shared and partially not’.⁸⁷ Conversely, the unitary system, observed in Swiss, Austrian and Hong Kong SAR legislation, being more akin to company title, is simply co-ownership of the whole property.⁸⁸

⁷⁹ Legislative motivations regarding providing for multi-family housing are not unique to SA but are a function of the growing importance of cities globally. See JL Leyser, ‘The Ownership of Flats—a Comparative Study’ (1958) 7 ICLQ 31; C Berger, ‘Condominium: Shelter on a Statutory Foundation’ (1963) 63 Colum L Rev 987, 990.

⁸⁰ SA National Assembly, *Hansard* (22 February 2011), Sectional Titles Schemes Management Bill & Community Schemes Ombud Service Bill (BN Dambuza) <https://pmg.org.za/hansard/29800> accessed 9 June 2022.

⁸¹ C Smith, ‘R45M for a Penthouse? Sectional Title Sales Surge among the Rich and the Not So Rich’ (27 May 2021) www.news24.com/fin24/companies/property/r45m-for-a-penthouse-sectional-title-sales-surge-among-the-rich-and-the-not-so-rich-20210527 accessed 9 June 2022.

⁸² Sectional Titles Act 66 of 1971.

⁸³ Van der Merwe, *European Condominium Law* (n 19).

⁸⁴ Law on Apartment Ownership 1951.

⁸⁵ This was a construction company that was acquired in 1961 by the multinational Lendlease Group.

⁸⁶ HW Birch, ‘A Study of the Conveyancing (Strata Titles) Act 1961 (New South Wales)’ (1964) 81 SALJ 490.

⁸⁷ SA National Assembly, *Hansard* (25 August 2010), Deeds Registries Amendment Bill & Sectional Titles Amendment Bill (SZ Ntapane) <https://pmg.org.za/hansard/18108> accessed 9 June 2022.

⁸⁸ Cowen (n 75) 36–7.

5. accessed 9 June 2022 for *Sectional Titles in South Africa*

Given its tumultuous past, property ownership in SA rates high in the national consciousness. Parliamentarians are acutely aware that sectional title ownership is key to solving the problems of land scarcity and the increased costs of housing in rapidly urbanising SA.⁹³ Speaking in the National Council of Provinces, SA's upper house, Sibande MP stated that sectional titles were not just suitable for the country, 'but [are] in fact the *only* solution for the process of urbanisation taking place in South Africa'.⁹⁴ The delegate explained that being higher-density, sectional titles present a more efficient use of land while providing 'true ownership of housing with all its social and economic benefits to more people at affordable costs'.⁹⁵ Accordingly, sectional titles and their attendant supporting policies have been identified as a legislative priority for the government⁹⁶ as they offer a concrete means to tackle economic growth, poverty and inequality in SA.⁹⁷

In 2010, Matlanyane MP noted that sectional title legislation could help build a 'national democratic society'.⁹⁸ In the same debate, Botha MP described sectional ownership as 'a very encouraging development'⁹⁹ as it gives a title deed to owners, making it possible for banks to lend to individuals who otherwise would have been excluded from the property market. He also observed that sectional titles will open up property ownership 'to more people than ever before'¹⁰⁰ and will serve as a 'major contribution to alleviating the plight of the homeless and historically disadvantaged'.¹⁰¹ Bhoola MP added that sectional title legislation 'speaks to creating wealth and assets for those that have been previously disadvantaged'.¹⁰² The debates on the amendment Bill to the Sectional Titles Act in 2010 thus show strong support of the

⁹³ SA National Assembly, *Hansard* (25 December 2009), Question NW2009 to the Minister of Human Settlements: (Question 948) <https://pmg.org.za/committee-question/3540/> accessed 9 June 2022, BN Dambuza MP asking the minister: 'Whether, with regard to an increased need for urban housing against the demographic trend towards urbanisation and the growing scarcity in and increased cost of urban housing, his department is promoting the regulation and protection of sectional title holder, if not, why not; if so, what are the relevant details?'

⁹⁴ Emphasis added, SA National Council of Provinces, *Hansard* (24 May 2011), Sectional Titles Schemes Management Bill & Community Schemes Ombud Service Bill (Patrick Sibande MP) <<https://pmg.org.za/hansard/29798/>> accessed 9 June 2022 .

⁹⁵ *ibid.*

⁹⁶ SA National Assembly, *Hansard* (18 October 2017), Budgetary Review and Recommendations Report of the Portfolio Committee on Rural Development and Land Reform <https://pmg.org.za/tables-committee-report/3136/> accessed 9 June 2022.

⁹⁷ SA National Assembly, *Hansard* (19 September 2013), Sectional Titles Amendment Bill (HF Matlanyane MP) <<https://pmg.org.za/hansard/18415/>> accessed 9 June 2022 .

⁹⁸ Matlanyane (n 1).

⁹⁹ SA National Assembly, *Hansard* (25 August 2010), Deeds Registries Amendment Bill & Sectional Titles Amendment Bill (Second Reading) (T Botha MP) <https://pmg.org.za/hansard/18108/> accessed 9 June 2022.

¹⁰⁰ *ibid.*

¹⁰¹ *ibid.*

¹⁰² SA National Assembly, *Hansard* (25 August 2010), Deeds Registries Amendment Bill & Sectional Titles Amendment Bill (Second Reading) (RB Bhoola MP) <https://pmg.org.za/hansard/18108/> accessed 9 June 2022.

legislation, with the house expressing the view that sectional ownership has, in particular, the potential to benefit less wealthy individuals.

A year later, when the Sectional Title Schemes Management Bill and the Community Schemes Ombud Service Bill were debated, parliamentarians across the houses again affirmed the importance of sectional ownership to advance important social goals. Steyn MP remarked that sectional titles provide more safety and security to residents and, being more affordable than free-standing homes, are increasingly popular with homeowners.¹⁰³ Mdakane MP stated that community schemes such as sectional titles ‘bring together people from diverse backgrounds, age groups, interests and philosophies’.¹⁰⁴ In the same vein, the Minister of Human Settlements explained that underpinning the two Bills was ‘the creation of a cohesive and integrated society’,¹⁰⁵ which would be particularly important for ‘young people, many of whom have just left a tertiary institution or are starting their first jobs’,¹⁰⁶ and ‘for those ... migrating from slums to property housing, including inner city housing’.¹⁰⁷ Importantly, the minister also stated that the promotion and development of sectional titles ‘invariably assists’ towards a cohesive, integrated community, with the ultimate goal of deracialising the residential market.¹⁰⁸ In affirming the legislation in the upper house, Sibande MP observed that sectional titles require tolerance towards fellow owners whose ‘opinions, practices, race and religion may differ from one another’,¹⁰⁹ while at the same time fostering the ‘capacity to recognise and respect the beliefs and the patience to tolerate the practices of others’.¹¹⁰

Fiscally, sectional titles are also important to SA’s broader development goals. Minister Sexwale intimated that the taxes captured on transfers and bond mortgages play a significant role in funding human settlements across the country.¹¹¹ In 2019, SA’s Department of Rural Development and Land Reform reported that sectional titles have a ‘fundamental impact on the national economy’,¹¹² with the report explaining that the mortgageability of sectional properties following title registration being obtained ‘provides a major contribution to the fiscus of the country’.¹¹³ Apart from broadening the

¹⁰³ SA National Assembly, *Hansard* (22 February 2011), Sectional Titles Schemes Management Bill & Community Schemes Ombud Service Bill (AC Steyn MP) <https://pmg.org.za/hansard/29800/> accessed 9 June 2022.

¹⁰⁴ SA National Assembly, *Hansard* (22 February 2011), Sectional Titles Schemes Management Bill & Community Schemes Ombud Service Bill (MR Mdakane MP) <https://pmg.org.za/hansard/29800/> accessed 9 June 2022.

¹⁰⁵ Sexwale (n 24).

¹⁰⁶ *ibid.*

¹⁰⁷ *ibid.*

¹⁰⁸ *ibid.*

¹⁰⁹ Sibande (n 94).

¹¹⁰ *ibid.*

¹¹¹ Sexwale (n 24).

¹¹² Rural Development and Land Reform Department, ‘Annual Report 2018/2019’ 30 www.gov.za/sites/default/files/gcis_document/201911/rural-dev-and-land-reform-1819-annual-report.pdf accessed 9 June 2022.

¹¹³ *ibid.*

municipal tax base, the management of sectional titles is also said to have ‘a significant catalytic effect on the property market, job creation ... and economy at large’.¹¹⁴

6. *How Sectional Title Legislation Can Further Improve Urban Outcomes*

[A]t the time it was drafted the [Sectional Titles] Act did not affect a large segment of the population, namely the black people of the country, who did not then reside in these areas. With the advent of democracy, they find themselves living in these areas. This has resulted in many challenges coming to the fore and the government has had to respond to them.¹¹⁵

The inherent nature of sectional titles improves both access to and the quality of housing for many South Africans. Because sectional titled properties are multi-owned, the land is used more efficiently, allowing for the cost of land consumption to be spread out over many more occupants, thus increasing affordability. Commuting time for workers also correspondingly decreases as sectional titles are typically built closer to areas of employment. Finally, due to the communal nature of a shared living experience, sectional property also has the potential to foster ethnic and cultural integration. While these are significant benefits positively impacting many South Africans, this article suggests that there are two areas where further potential improvements could be made: (i) increasing the availability of land for intensified sectional title use; and (ii) fostering more integration on the sectional title platform.

There are overlaps between the two goals. In the context of the United States, Rothstein suggests that there should be a ban on zoning ordinances that prohibit multifamily housing, or at least on those that require single-family homes to be built on large, minimum lot sizes.¹¹⁶ He reasons that such rules prevent lower-income and middle-class families, of which African Americans constitute a large proportion, from settling in affluent suburbs.¹¹⁷ By lowering the cost of consuming land, intensification alone may thus naturally lead to more integrated communities. There are, however, more direct means to achieve racial integration, for instance performance zoning. The ideas to encourage more intense use of land and encourage more integration are fleshed out in greater detail below. It is hoped that achieving the suggested goals—or, indeed, either one of them—will further alleviate aspects of historical apartheid planning and enhance urban democratisation.

¹¹⁴ Sexwale (n 24).

¹¹⁵ SA National Council of Provinces, *Hansard* (24 May 2011), Sectional Titles Schemes Management Bill & Community Schemes Ombud Service Bill (MP Jacobs) <https://pmg.org.za/hansard/29798/> accessed 9 June 2022.

¹¹⁶ R Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (Liveright Publishing 2017) 204.

¹¹⁷ *ibid.*

have not adopted the uniform law, Washington¹²⁵ and Florida,¹²⁶ as well as Washington DC,¹²⁷ have also enacted legislation to provide for scheme terminations with a four-fifths majority. To these jurisdictions, the benefits in allowing a supermajority of unit owners to have a scheme terminated and redeveloped outweighs unanimous decision making.

(i) SA has the legislative foundation to accommodate majority-led scheme cancellations

While SA took a relatively conservative approach in not following NSW to permit non-unanimous scheme cancellations, there are nevertheless three observations that demonstrate SA's legislative foundation to accommodate majority-led scheme cancellations: (i) the definition of 'unanimous resolution' does not mean that all owners must support the motion or be present at the meeting; (ii) trustees under SA's sectional title legislation are statutorily held to be fiduciaries, so introducing another sub-committee of owners who must act as fiduciaries would not be an unfamiliar concept; and (iii) because of the clear statutory explanations of the participation quota, there is a clear answer as to how proceeds from a cancellation and sale scheme would be distributed.

Unanimous resolutions

Despite multiple amendments to other aspects of sectional legislation over the decades, including as recently as 2020,¹²⁸ the current provision allowing for unanimous owner-led cancellations is six decades old, being virtually identical to the original NSW Act of 1961. SA did not follow NSW's amendments in this aspect in 2016, when NSW first permitted non-unanimous scheme cancellations. Section 19(1) of NSW's Conveyancing (Strata) Titles Act 1961 reads:

For the purposes of this Act the building is destroyed on the happening of the following events—

- (a) when the proprietors by unanimous resolution so resolve; or
- (b) when the court is satisfied that having regard to the rights and interests of the proprietors as a whole it is just and equitable that the building shall be deemed to have been destroyed and makes a declaration to that effect.

The equivalent of section 19(1) of the 1961 NSW Act was originally found in section 48 of SA's Sectional Titles Act 1986 but, following the administrative separation of the registration of sectional ownership with its management in

¹²⁵ Real Property and Conveyances (RCW 64.34.268).

¹²⁶ Fla Stat § 718.17 (2020).

¹²⁷ DC Code § 42-1902.28 (2021 Supp).

¹²⁸ Sectional Titles Amendment Bill 2020 (B31-2020).

2011, it now appears in section 17(1) of the Sectional Titles Schemes Management Act 2011, which reads:

The building comprised in a scheme is, for the purposes of this Act, deemed to be destroyed—

- (a) upon the physical destruction of the building;
- (b) when the owners by unanimous resolution so determine and all holders of registered sectional mortgage bonds and the persons with registered real rights concerned, agree thereto in writing; or
- (c) when the court is satisfied that, having regard to all the circumstances, it is just and equitable that the building must be considered to have been destroyed, and makes an order to that effect.

Absent physical destruction of a scheme building, unit owners need to unanimously deem the building(s) comprised in the sectional scheme as ‘notionally’¹²⁹ destroyed. Once so deemed, the body corporate lodges a notification to the registrar with the relevant resolution.¹³⁰ The individual title deeds to each unit¹³¹ and the sectional plan are then cancelled,¹³² with the land reverting to the land register.¹³³ In exchange, the registrar issues to each owner a certificate of registered title in respect of their undivided share in the land.¹³⁴

The phrase ‘unanimous resolution’ is defined under section 1 of the Sectional Titles Schemes Management Act 2011 as one where at least 80% of the votes are present and all members who cast their votes do so in favour of the resolution—attending members may thus abstain.¹³⁵ Thus, if a scheme consists of 10 equally sized sections, a resolution is passed ‘unanimously’ if eight owners attend the meeting, at least one owner is for the motion and no votes are cast against. Notably, when ‘unanimous resolution’ was defined in the Sectional Titles Act 1986, one qualification was that ‘where the resolution in question adversely affects the proprietary rights or powers of any member as owner, the resolution shall not be regarded as having been passed unless such member consents in writing thereto’.¹³⁶ The fact that this qualifying proviso has been abolished is welcomed as requiring an owner to consent in writing when her ‘proprietary rights or powers as owner’ are affected, and for the body corporate to determine when this is so largely defeats the purpose of the

¹²⁹ *Harbour Terrace Body Corporate (SS401/1998) v Minister of Public Works* [2016] 3 All SA 766 [32].

¹³⁰ Sectional Titles Act 1986, s 49(1).

¹³¹ *ibid* s 49(4)(a).

¹³² *ibid* s 49(5).

¹³³ *ibid* s 49(3)(c).

¹³⁴ *ibid* s 49(4)(b).

¹³⁵ CG Van der Merwe, ‘How Far Are Unanimous Resolutions of a Sectional Title General Meeting in Actual Fact Unanimous: A Critical Analysis of the Provisions of the Sectional Titles Act with Regard to Unanimous Resolutions’ (2016) 79 *Journal for Contemporary Roman–Dutch Law* 177, 183.

¹³⁶ See Sectional Titles Act 1986, s 1(xxxx)(3)(c), prior to the amendments by the Sectional Titles Schemes Management Act 2011.

80% rule, which was to ‘counter the apathy among sectional owners to attend general meetings making it often impossible to obtain a unanimous resolution’.¹³⁷

As Van der Merwe notes, however, this has regrettably¹³⁸ been replaced by section 6(8) of the Sectional Titles Schemes Management Act 2011, which reads: ‘Where the unanimous resolution would have an unfairly adverse effect on any member, the resolution is not effective unless that member consents in writing within seven days from the date of the resolution.’ While this provision still creates uncertainty, it nevertheless represents an improvement over the previous requirement of having an owner consent in writing when her proprietary rights were affected. Thus, where a unanimous resolution is duly passed to cancel a scheme and a decision is made to split the proceeds equally, it is doubtful whether it can be said to have an ‘unfair adverse effect’ on the owner. Under the former definition, however, it is patent that a decision to terminate the scheme would amount to the owner’s proprietary rights being affected, which would have required consent in writing.

In any case, the definition of ‘unanimous resolution’ differs from what the term means under NSW’s 1961 Act:

a resolution unanimously passed at a duly convened meeting of the body corporate at which all persons entitled to exercise the powers of voting conferred by or under this Act are present personally or by proxy at the time of the motion.¹³⁹

The SA position thus mitigates the problem of forming a quorum by not requiring all owners to be present at a meeting.¹⁴⁰

Trustees as fiduciaries

In NSW, while the legislation does not specifically define representatives of the body corporate as fiduciaries, there is case authority supporting that proposition. In *Re Steel and the Conveyancing (Strata Titles) Act 1961*,¹⁴¹ Elsie-Mitchell J held:

Council members are at least in a position analogous to company directors; they may even have a higher fiduciary duty ... [I]t is their duty to manage the affairs of the body corporate for the benefit of all the lot holders ... [T]he exercise of any of their powers in circumstances which might suggest a conflict of interest and duty requires them to justify their conduct ... [T]he onus lies on them to prove affirmatively that they have not acted in their own interests of for their own benefit.¹⁴²

¹³⁷ Van der Merwe (n 135) 181.

¹³⁸ *ibid* 187.

¹³⁹ Conveyancing (Strata Titles) Act 1961 (NSW), s 2.

¹⁴⁰ Notwithstanding, even a single vote cast against deeming the building destroyed vetoes the motion. This stands in contrast to the current position in NSW, where the minimum required level of support to effect a scheme cancellation is 75% of all lots.

¹⁴¹ (1968) 88 WN 467, 470 (Elsie-Mitchell J).

¹⁴² *Re Steel and the Conveyancing (Strata Titles) Act 1961* (1968) 88 WN 467, 470.

Given the close historical nexus between SA's and NSW's sectional title law, it is likely that if SA were to adopt non-unanimous scheme cancellations, then the current NSW Act would provide the blueprint for the new amendments. Under NSW's Strata Schemes Development Act 2015 (SSDA), a strata renewal proposal, suggesting either a collective sale or redevelopment, is presented¹⁴³ to the strata committee, which then decides whether to present the proposal to the owners corporation at a general meeting for further consideration. The purpose of the general meeting is to determine whether the owners want the strata renewal proposal to be considered by another owner-constituted committee called the strata renewal committee (SRC);¹⁴⁴ a simple majority at the general meeting allows for an SRC to be constituted.¹⁴⁵ The SRC is tasked to translate the strata renewal proposal into a strata renewal plan, and it is the latter which gets put to the vote by the owners corporation.¹⁴⁶

As the SRC members inadvertently interact with property agents and developers during the sale process, the NSW Act reminds members to be mindful of potential conflicts of interest. SSDA, section 165 states:

If a member of a strata renewal committee has a pecuniary or other interest in the proposed collective sale or redevelopment under a strata renewal proposal ... the member must, as soon as practicable after becoming aware of the potential conflict, disclose the nature of the interest to a meeting of the strata committee.

It follows that if members of a strata committee owe fiduciary duties, SRC members empowered to sell the strata building will almost certainly be held to owe fiduciary duties in the conduct of gathering support for the collective sale, as well as effecting the sale itself.¹⁴⁷

To the credit of sectional legislation in SA, trustees, who are unit owners elected by the body corporate to manage the scheme, are statutorily regarded as fiduciaries,¹⁴⁸ must act honestly and in good faith,¹⁴⁹ and must avoid material conflicts of interest.¹⁵⁰ The body corporate can sue for any losses suffered from the breach of fiduciary duty or disgorge the trustees' unjust gains.¹⁵¹ As the litigation surrounding non-unanimous scheme cancellations often revolves around the duties expected of sales committee members, the fact that SA's legislation explicitly regards sectional title trustees as fiduciaries

¹⁴³ The person making this written proposal need not be an owner of a strata lot, eg a developer: SSDA 2015 (NSW), s 156(1).

¹⁴⁴ *ibid* s 160(1).

¹⁴⁵ *ibid* s 158(3).

¹⁴⁶ *ibid* s 164.

¹⁴⁷ E Ti, 'Collective Best Interests in Strata Collective Sales' (2019) 93 ALJ 1025, 1032.

¹⁴⁸ Sectional Titles Schemes Management Act 2011, s 8(1).

¹⁴⁹ *ibid* s 8(2)(a).

¹⁵⁰ *ibid* s 8(2)(b).

¹⁵¹ *ibid* s 8(3).

provides a robust foundation should the equivalent of an SRC be introduced to facilitate non-unanimous scheme cancellations.

Participation quotas

Under section 32(1) of the Sectional Titles Act 1986, the participation quota of a residential scheme is the proportional area of that section in relation to the sum of all sections, while section 11(1) of the Sectional Titles Schemes Management Act 2011 states that the participation quota of a section determines the vote of the owner, as well as the undivided share in the common property. Coupled with the certificate of registered title that the registrar issues to each owner in respect of their undivided share in the land should the scheme be cancelled,¹⁵² the existing legislation provides that owners will receive a share of the total sale price of the land in proportion to their quota. While this may appear evident, the way quotas or share values are allocated in some other jurisdictions do not necessarily correspond to how much a proprietor receives should a collective sale take place—such uncertainty may scuttle efforts to have the land collectively sold.¹⁵³

Accordingly, while suggesting for SA to adopt non-unanimous owner-led scheme cancellations as part of sectional reform is novel, the three aspects of SA's legislation highlighted here show that the suggestion is not quite radical. Accordingly, if SA followed NSW in permitting scheme cancellations supported by a supermajority, only moderate adjustments would be needed without drastically affecting the tenor of the legislation.

(ii) *Benefits of non-unanimous scheme cancellations*

Having shown that introducing majority-led scheme cancellations would be contextually feasible, this segment explains why the suggested amendment is predicted to result in more just outcomes. The first thing to note is that by facilitating the development of more sectional title units, this advances the policy goals sought by parliamentarians across partisan lines, which have been highlighted earlier in this article. At the crux of the matter is, of course, the provision of more housing because requiring unanimity in deciding how to use commonly owned property is often inefficient.

Easthope notes that after apartheid came to an end, the sudden and unplanned urbanisation in cities such as Johannesburg meant that the infrastructure could not deal with the sudden increase in the residential population.¹⁵⁴ As business tenants left and buildings became used by informal occupiers, inner-city properties lost up to 80% of their value in the first five years following democratic rule.¹⁵⁵ She also notes that in their current form, sectional title

¹⁵² Sectional Titles Act 1986, s 49(4)(b).

¹⁵³ Ti, 'Towards Fairly Apportioning Sale Proceeds' (n 122).

¹⁵⁴ H Easthope, *The Politics and Practices of Apartment Living* (Edward Elgar Publishing 2019) 144.

¹⁵⁵ *ibid* 145.

buildings, in contrast to single-titled buildings, pose an obstacle to regeneration efforts because of the need to obtain the consent of multiple owners, some of whom may not be contactable.¹⁵⁶ Further, because the court may require the evicted occupants to be rehoused, the costs of doing so may be prohibitive, even if all owners are contactable and agree to the redevelopment. Many sectional buildings thus remain not only illegally occupied but also overcrowded, dilapidated and hazardous to their residents.¹⁵⁷

To some extent, providing for non-unanimous scheme cancellations can resolve some of these problems and ultimately increase the total housing stock. SA's antipodean cousins in the four Australasian jurisdictions permitting non-unanimous plan cancellations have similarly based their decisions to do so on the need to provide more housing and prevent holdouts which curtail urban rejuvenation.¹⁵⁸ For instance, New Zealand's Department of Building and Housing's report to the Select Committee for the Unit Titles Bill 2008 observed that unanimity had been 'cumbersome, time-consuming and impractical', particularly for larger developments, and often led to holdout situations preventing the body corporate acting in the interests of the majority of owners.¹⁵⁹ Van der Merwe rightly observes that 'the veto right of one or more owners may ... thoroughly impede the modernisation of the scheme or sale and redevelopment of the land'.¹⁶⁰ He thus suggests that it might be prudent to lower the unanimity requirement for scheme terminations, with factors such as obsolescence and the structural decay of the building taken into account to determine whether it is just and equitable for the scheme to be terminated.¹⁶¹

Admittedly, owner-led non-unanimous scheme cancellations remain controversial,¹⁶² as a regime that presumes the need for unanimous consent to dissolve strata property creates a different conception of ownership and establishes different social purposes for ownership than one based on supermajority approval.¹⁶³ However, as the SA government has predicted that sectional titles will be vital to housing its rapidly expanding urban population, non-unanimous scheme cancellations may ultimately become inevitable. Thus,

¹⁵⁶ *ibid* 146.

¹⁵⁷ *ibid*.

¹⁵⁸ New Zealand, *Parliamentary Debates*, House of Representatives, 5 March 2009, 1715 (P Heatley, Minister of Housing): 'This ... will make it easier to redevelop a unit title property ... [i]t will also prevent hold-outs.' Northern Territory, *Parliamentary Debates*, Legislative Assembly, 26 November 2014, 5608 (P Chandler, Minister for Lands, Planning and the Environment): 'This legislation is aimed at those who constantly undermine the wishes of the majority of property owners in an old and devalued unit block.' Western Australia, *Parliamentary Debates*, Legislative Assembly, 21 August 2018, 4941 (L Harvey, MLA): 'I live in an area undergoing significant revitalisation, and under the existing legislation if there is not 100 per cent agreement on the termination of the scheme, it cannot progress—and it can just be one person holding out.'

¹⁵⁹ Department of Building and Housing, 'Departmental Report to the Social Services Select Committee on the Unit Titles Bill 2008' (July 2009) 21.

¹⁶⁰ Van der Merwe, *European Condominium Law* (n 19) 532.

¹⁶¹ *ibid*.

¹⁶² Ti, 'Collective Best Interests in Strata Collective Sales' (n 147) 1026.

¹⁶³ D Harris, 'Owning and Dissolving Strata Property' (2017) 50 UBC Law Rev 935, 944.

like many other jurisdictions, allowing a supermajority of owners to decide to cancel their scheme and have the land sold will provide SA with the means to replenish its urban land banks and facilitate the development of more housing, without the cost of state expropriation. Municipalities may even benefit if they are able to charge a betterment levy for enhancing the development potential of the site. Indeed, facilitating urban renewal and intensification of land is particularly important for SA because many sectional title schemes are not green-field projects but conversions of existing rental buildings.¹⁶⁴ While lauded for reversing decentralisation and revitalising the physical condition of deteriorating rental buildings,¹⁶⁵ conversions encompass at most repairs and are unlikely to provide the most efficient use of land. With the passage of time, these already aged buildings experience further obsolescence and, without legislation to support intensifying and redeveloping such buildings, the multitude of owners may easily experience a ‘tragedy of the commons’¹⁶⁶ as the requirement of unanimity in decision making would likely scuttle plans to use the site in the overall best interest of the owners or of society at large.

Allowing for non-unanimous scheme cancellations organically recycles urban land, which can be used more efficiently while allowing owners to profit from their scheme’s redevelopment potential. Elsewhere, the gains enjoyed by unit owners in other jurisdictions as a result of land intensification have been substantial. In Vancouver, the strata complex Twelve Oaks was offered to be collectively purchased by a developer for C\$21.5M, almost twice the cumulative assessed value of the 30 strata lots.¹⁶⁷ In Epping, NSW, a parliamentarian highlighted that eight strata owners received A\$3.75M each via a collective sale; their apartments would have sold individually for about A\$1.2M.¹⁶⁸ This occurs because the maximally allowed built-density of a scheme building likely increases through the years in line with planning policy. Denoon-Stevens and Nel recently observe that in Cape Town and Johannesburg, city planners have unilaterally increased height restrictions and offered density bonuses to facilitate more efficient use of land.¹⁶⁹ Combining such measures with majority-led scheme cancellations would result in even better policy outcomes. As an owner-led plan cancellation essentially results in developers sharing part of their development profits with unit owners, this may also be said to promote wealth redistribution.

There may also be ancillary benefits other than pure housing gains that non-unanimous scheme cancellations can bring about. Berger notes that ‘a sense of group-belonging ... security ... and the striking vistas that high-rise

¹⁶⁴ Van der Merwe and Butler (n 74) 129 observe that 75% of all existing sectional title schemes are conversions from rental buildings.

¹⁶⁵ *ibid* 130.

¹⁶⁶ See G Hardin, ‘The Tragedy of the Commons’ [1968] *Science* 162.

¹⁶⁷ *The Owners, Strata Plan VR140 v Harrison* (14 December 2016), Vancouver, BCSC S-1611558, 7.

¹⁶⁸ NSW Legislative Assembly, *Strata Schemes Development Bill 2015* (14 October 2015) (V Dominello).

¹⁶⁹ SP Denoon-Stevens and V Nel, ‘Towards an Understanding of Proactive Upzoning Globally and in South Africa’ (2020) 97 *Land Use Policy* <<https://doi.org/10.1016/j.landusepol.2020.104708>>.

buildings often provide', together with the convenience of only 'latching of a door when leaving', are some of the psychological and aesthetic benefits of apartment living.¹⁷⁰ Majority-led scheme cancellations coupled with intensification allow for a greater number of residents to partake in these intangible benefits.

B. Countering Segregation with Integration

Post-apartheid SA remains ethnically segregated.¹⁷¹ There is evidence to suggest that this phenomenon may be borne less on racial grounds and more on wealth differentials. Many black South Africans remain poor, and continued migration into informal settlements appears to render the need to allocate houses to the community a ceaseless endeavour.¹⁷² Seekings further explains that a large proportion of segregated cities in SA comprise neighbourhoods that did not exist when statutory segregation was abolished during the transition to democracy.¹⁷³ Deracialisation is therefore limited to the upper classes residing in high-income neighbourhoods, while the overwhelming majority live in monoracial areas.¹⁷⁴

It is also important to consider whether the typology of sectional titles can be used to foster greater integration, beyond the well-heeled. In Delft South, Oldfield reports that the state managed to create a mixed community in a low-income neighbourhood by allocating new houses to both people of colour and blacks on a greenfield site.¹⁷⁵ Notably, physical relocation did not lead to a lessening of the importance of racial identities, and it is difficult to determine to what extent physical desegregation results in racial integration.¹⁷⁶ However, Oldfield finds that being in the same neighbourhood brings residents together because of a shared identity and common interests in respect of housing politics and preventing criminality.¹⁷⁷ In other words, there may be non-ethnic reasons to bind residents living in the same community. The houses built in Delft South comprised single-storey dwelling units and it is encouraging to think that a multi-ethnic, multi-level sectional scheme, with co-ownership of the common property, would foster even stronger feelings of commonality.

Here, two ways of enabling racial integration in the context of sectional title schemes are raised: compulsory integration via planning permission and via administrative fiat. Given the underlying motivation of ethnic integration, it is

¹⁷⁰ Berger (n 79) 990.

¹⁷¹ Tewolde (n 50).

¹⁷² Seekings (n 48) 542.

¹⁷³ *ibid.*

¹⁷⁴ *ibid* 539.

¹⁷⁵ S Oldfield, 'Urban Networks, Community Organising and Race: An Analysis of Racial Integration in a Desegregated South African Neighbourhood' (2004) 35 *Geoforum* 189.

¹⁷⁶ *ibid.*

¹⁷⁷ *ibid* 190.

believed that these concepts are broadly in line with constitutional values and rights. Notwithstanding, the extent to which these suggestions would withstand constitutional scrutiny depend on exactly how these policy goals are framed or enacted.

(i) *Compulsory integration via planning permission*

Integration is important to prevent interracial tensions, foster trust, reduce racial stigmatisation and reverse the concentration of poverty, exclusion and disadvantage.¹⁷⁸ Neighbourhoods are microcosms of the state, and there is value to encouraging sectional schemes, which are conceived as vital to housing the middle-class population, to have a more ethnically heterogeneous makeup.

Could legislation compel physical desegregation to take place? The idea of 'anti-apartheid' compulsory integration has been canvassed previously. Nelson writes that white integration into black areas will not occur unless substantial incentives are given to both developers and potential integrators. Adopting performance zoning, whereby developers are held by the planning authorities to achieve certain measurable performance standards that embody desirable characteristics of a community as the paradigm, she suggests that integration can be effectively legislated for. Examples she gives include 'twenty percent of all new housing must be leased or sold to persons who previously lived in historically white areas'¹⁷⁹ or, if the housing is built in an area that is more than 20% white, it must be affordable to the average South African based on the mean national per capita income.¹⁸⁰ Residential segregation is thus treated as a 'nuisance' that can be regulated.¹⁸¹ Although Nelson did not specify what type of housing the 'performance zoning' suggestion should apply to, her compelling argument would be more effectively applied to sectional schemes rather than single dwelling units, due to price differentials. How could SA implement this? Performance zoning is conceptually similar to what is called a 'section 106 planning obligation' in the UK, pursuant to the Town and Country Planning Act 1990. Section 106 obligations typically involve a developer building public amenities, such as a library, a childcare centre or affordable homes, in exchange for planning permission, but in principle the state can correlate any reasonable planning goal with the grant of the permission. Section 106(1) of the UK Act reads:

Any person interested in land in the area of a local planning authority may, by agreement or otherwise, enter into an obligation (referred to in this section ... as 'a planning obligation')

¹⁷⁸ E Anderson, 'Racial Integration as a Compelling Interest' (2004) 21 Constitutional Commentary 15, 17–22: 'segregation breeds racial ignorance, distrust and discomfort'.

¹⁷⁹ J Nelson, 'Residential Zoning Regulations and the Perpetuation of Apartheid' (1996) 43 UCLA L Rev 1689, 1721.

¹⁸⁰ *ibid.*

¹⁸¹ *ibid.* 1722.

...
(c) requiring the land to be used in any specified way; or

While there is no nationwide equivalent of section 106 in SA, planning regulation in the Johannesburg municipality has, since February 2019, required developers building 20 or more dwellings to dedicate at least 30% of the total units for 'inclusionary housing', which is meant to benefit low- and low- to middle-income households.¹⁸² It is therefore possible for the equivalent of section 106(1)(c), if adopted in SA, to provide for physical integration in sectional schemes, using the type of performance indicators suggested by Nelson.

(ii) *Singapore's ethnic integration policy*

There are clear signs that racial congregations are re-emerging. Although the problem has not reached crisis proportions, the experience in other multi-racial societies such as the United States shows that while racial groupings start slowly, once a critical point is passed, racial groupings accelerate suddenly ... We must therefore introduce open and clear policies early, to stop these trends. In the late 50's and early 60's, various sections of our population were gathered in different pockets, distinguishable by their race or dialect groups ... To allow them to regroup now will be to go back to the pre-1965 period when conditions bred distrust and misunderstanding among the various races and when there were even racial riots. We will, therefore, set limits on the maximum proportions of each racial group allowed in each Housing Development Board (HDB) neighbourhood.¹⁸³

Singapore has successfully implemented compulsory integration, albeit by administrative fiat rather than via legislation.¹⁸⁴ In respect of public housing, where some 80% of Singapore's residents live,¹⁸⁵ the government has implemented an 'ethnic integration policy' (EIP) so that the ethnic makeup of each block of high-rise flats and each neighbourhood (~ 4000–6000 units) reflects, within a narrow band of allowance, the national proportion of each ethnicity.¹⁸⁶ A brief history of how this came about may be of interest. As in other colonies, the British segregated the various ethnic enclaves in Singapore.¹⁸⁷ This did not foster a true national identity, with distrust high and conflicts common between the various factions. Singapore was granted self-governance in 1958, and in 1960 the Housing Development Board (HDB) was formed to

¹⁸² Inclusionary Housing Incentives, Regulations and Mechanisms 2019, r 4 (City of Johannesburg).

¹⁸³ *Singapore Parliamentary Debates, Official Report* (16 February 1989) vol 52 (S Dhanabalan, Minister for National Development). Singapore's public housing are called HDB flats.

¹⁸⁴ There is no statute or regulation underlying Singapore's ethnic integration policy (EIP). Rather, the Housing Development Board implements and enforces the EIP as a matter of administrative practice.

¹⁸⁵ 'Estimated Singapore Resident Population Living in HDB Flats' (2 January 2020) https://data.gov.sg/dataset/estimated-resident-population-living-in-hdb-flats?resource_id=a7d9516f-b193-4f9b-8bbf-9c85a4c9b61b accessed 9 June 2022.

¹⁸⁶ Singapore's residents comprise approximately 76% of Chinese descent, 15% of Malay descent and 8% of Indian descent. See www.gov.sg/article/what-are-the-racial-proportions-among-singapore-citizens accessed 9 June 2022.

¹⁸⁷ CK Lai, *Singapore Chronicles: Architecture* (Institute of Policy Studies 2018) 19.

build high-rise public flats, necessary due to the country's extremely small land size (~700 km²) and burgeoning but impoverished population. In the 1960s, a number of race-related riots plagued Singapore (particularly in 1964 and 1969), with several fatal casualties. This led to national curfews imposed under emergency law.¹⁸⁸

While the underlying racial tensions which manifested in the 1960s did not immediately result in the EIP, the riots were part of the narrative that eventually led to the EIP in 1989. The government thus adopted the EIP to prevent racial enclaves from forming and to promote multiracial integration; the state was concerned that the steady increase in racial concentration in some neighbourhoods which had formed since the 1950s would breed distrust and rekindle conflict. The intention was thus to ensure public housing would have a 'balanced mix of households of different ethnic groups in each HDB block'.¹⁸⁹ Singapore's deputy prime minister has described the EIP as 'the most intrusive policy in Singapore but also the most important'.¹⁹⁰ Since its inception in 1989 to the present day, the policy enjoys near-unanimous support in the legislature and is implemented 'vigorously'.¹⁹¹ Parliamentarians have variously remarked that without the EIP, residents of different races, especially school-going children in their formative years, would not have a common platform to interact with one another,¹⁹² and that without purposeful intervention, ethnic-based ghettos would have formed in the country.¹⁹³ One member has candidly observed that the compulsory nature of the EIP is important because 'it is natural for residents to feel comfortable with their own kind',¹⁹⁴ while the deputy speaker said that the policy 'maintains social stability ... and keeps Singapore safe, secure and prosperous for all races'.¹⁹⁵

Singapore's bold move in compelling physical integration in some 80% of its population has not gone unnoticed. Tang notes that the EIP demonstrates how closely the ideology of multiculturalism via home ownership is embraced by the Singapore government.¹⁹⁶ Chih has criticised the policy for not being sufficiently supported by evidence and being too blunt a policy tool.¹⁹⁷ Research by Lai suggests that some flat owners believe that the EIP reinforces

¹⁸⁸ A Low, 'The Past in the Present: Memories of the 1964 "Racial Riots" in Singapore' (2001) 29 *Asian Journal of Social Science* 431.

¹⁸⁹ MB Tan, Minister for National Development, 'Lecture: Public Housing: Homes, Communities, Nation' (Lee Kuan Yew School of Public Policy, 17 August 2006) www.nas.gov.sg/archivesonline/data/pdfdoc/20060817994.htm accessed 9 June 2022.

¹⁹⁰ T Shanmugaratnam, DPM, 'Singapore Forum 2015' (11 April 2015) www.mof.gov.sg/news-publications/speeches/Dialogue-with-Mr-Tharman-Shanmugaratnam-Deputy-Prime-Minister-and-Minister-for-Finance-mod-erated-by-Mr-Ho-Kwon-Ping-Executive-Chairman-of-Banyan-Tree- accessed 9 June 2022.

¹⁹¹ *Singapore Parliamentary Debates, Official Report* (5 March 2010) vol 86 (HG Choo MP).

¹⁹² *Singapore Parliamentary Debates, Official Report* (8 November 2016) vol 94 (E Tong MP).

¹⁹³ *Singapore Parliamentary Debates, Official Report* (7 November 2016) vol 94 (PL Tin MP).

¹⁹⁴ *Singapore Parliamentary Debates, Official Report* (5 March 2010) vol 86 (C De Souza MP).

¹⁹⁵ *Singapore Parliamentary Debates, Official Report* (3 March 2006) vol 81 (HC Chew MP, Deputy Speaker).

¹⁹⁶ HW Tang, 'The Legal Representation of the Singaporean Home and the Influence of the Common Law' (2007) 37 *HKLJ* 81, 97.

¹⁹⁷ HS Chih, 'The Quest for a Balanced Ethnic Mix: Singapore's Ethnic Quota Policy Examined' (2002) 39 *Urban Studies* 1347, 1371.

a study of zoning guidelines as well as a compelling case study from Singapore.

Sectional title legislation is, of course, no panacea. *Breaking New Ground*, a SA housing policy paper, placed great importance on social housing, or ‘medium-density’ housing, in enhancing mobility and promoting urban integration.²⁰² Such housing includes multi-level flat or apartment options for higher income groups, cooperative group housing, transitional housing for destitute households, communal housing with a combination of family and single-room accommodation with shared facilities and hostels.²⁰³ Even if the state adopts sectional ownership for social housing projects, because these are reserved for persons who meet certain criteria (such as having a job), the ‘poorest of the poor’ will continue to be forced to the urban periphery.²⁰⁴ Further, even the receipt of subsidised housing has not always resulted in poverty alleviation and may even result in deepening poverty and debt, as beneficiaries have to pay for municipal services and increased transport costs.²⁰⁵

Notwithstanding, SA’s long-ruling party has recognised that sectional titles are an important part of the solution—Matlanyane MP has stated that sectional titles must be seen against the ‘broader transformation programme’²⁰⁶ of land and property rights that the government is seeking to reform. What can be said is that improving access to urban areas closer to jobs by lowering the cost of housing while fostering racial integration is important and certainly valuable to the millions who form SA’s rapidly growing middle classes.²⁰⁷

²⁰² Department of Housing, *Breaking New Ground: The Comprehensive Plan for the Creation of Sustainable Settlements* (2004) 18.

²⁰³ *ibid* 4.

²⁰⁴ *Constitutional Law of South Africa* (2nd edn) para 55.4 (R 11 June 2013).

²⁰⁵ A Gilbert ‘Helping the Poor through Housing Subsidies: Lessons from Chile, Colombia and South Africa’ (2004) 28 *Habitat International* 13, 31–2.

²⁰⁶ Matlanyane (n 1).

²⁰⁷ S Schotte and others, ‘A Poverty Dynamics Approach to Social Stratification: The South African Case’ (2018) 110 *World Development* 88, 102 regard 24% of all South Africans to be ‘stably middle class or elite’.