HISTORY ON TRIAL:
A STUDY OF
THE SALEM COMMONAGE LAND CLAIM

A thesis in fulfilment of the requirements for the degree of Doctor of Philosophy

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ABSTRACT

This thesis critically examines the Salem commonage claim, a dispute that has shaken the hamlet of Salem to its core. On ground level it has caused racialized fault lines to reopen, while suspicion and distrust has also grown between the black Africans of the area as well. On a national level, the Constitutional Court judgement has potentially set a precedent with regards to its jurisprudential approach in determining the validity of land claims in South Africa. Its interpretation of the law was determined by the restorative justice jurisprudence enshrined in the Restitution of Land Rights Act 22 of 1994 (the Act). It based its own understanding of the history of the commonage on this jurisprudence. In a bold step towards realising the aims and purposes of the Act, the Constitutional Court found that both the black African claimants as well as the white landowners have equal rights to the land.

One of the reasons why the decision of the Constitutional Court is ground-breaking is that the dispute involves a former commonage – land used for common purpose. The Constitutional Court emphasised that the Act was an "extraordinary piece of legislation" and had to be interpreted in such a way so as to address the injustices of the past. This included provisions of the Act which dealt with how oral testimonies from claimants would be dealt with. Another interesting feature was the heavy reliance by all parties on expert witnesses in the persons of eminent historians, Professors Martin Legassick and Herman Giliomee. This case gave much-needed clarification as to what the appropriate role of an expert historian witness may be in a land claim. The success or failure of land claims often depend on the weight of the evidence supplied by the expert historian witness. But the historian must also take cognisance of the fact that the evidence s/he gives is appropriate according to the scope of law. This case also dismisses the assumption that colonial instruments of land assignation are beyond reproach. These instruments which grant rights to land may also be scrutinised in a court of law, just like when oral testimony is tested for its credibility. This is important to note, especially when balancing land rights of the claimants against those of the landowners.

This thesis agrees with the decision taken by the Constitutional Court in this instance. However, it also cautions that such softly-softly approaches may appear as a suitable compromise on paper, but the feeling on the ground may not be as receptive to

reconciliation as what the courts would have hoped for. To the jurist, this judgement accurately encapsulates the purpose and aims of the Act. However, such a judgement may not seem satisfactory to the people of Salem. The decisions of the Salem commonage case are sure to inform the discourse of land claims in South Africa.

PREFACE

This thesis has taken me three years to complete, but in reality it is the culmination of almost six years of postgraduate studying at Rhodes. During this time I have met many people who have come to influence me in some way or another. It is a pleasure to thank those people. Firstly, the financial assistance from the Oppenheimer Trust as well as Rhodes University, through the tireless and selfless work of the Postgraduate Funding Office (most notably John Gillam and Nichole de Vos) is gratefully acknowledged. Their efforts to obtain finance for this research can never be overstated. I also wish to thank the staff of the Cape Archives and the Cory Library for Historical Research, as well as the Rhodes University Library. Their assistance and overall efficiency were remarkable. In particular, I would like to thank Sandy Shell who I met when I was just starting with this research. She not only encouraged me with kind words and advice all the way from Cape Town but also obtained and sent documents from the archives which I had overlooked. I am so grateful to consider her a friend.

The Rhodes History Department has truly been my academic home for these last few years. I wish to firstly thank Prof Ennocent Msindo who invited me along to meet his neighbour, who had a vested interest in the case. The interview that followed convinced me that this had the potential of being research of value. Dr Nicole Ulrich had been part of my thesis journey since my Masters and she has always been a calming influence to me. I have also been fortunate enough to have my office situated across the corridor from the oracle that is Prof Helena Pohlandt-McCormick. Her unwavering enthusiasm to the discipline is contagious and necessary, especially on days when my research feels like it needs to be put out of its misery. Her hard-hitting questions and passion for justice have caused me to look at my research in a completely different light. I also wish to thank in particular, Dr Janeke Thumbran, a brilliant academic who has given me sound advice with regards to PhD writing. She has been my office neighbour for the past two years but it feels like it has been much longer than that. I am privileged to be able to call her my friend.

The Department has been blessed to have a succession of fantastic administrators this past year. Firstly, I want to thank Ms Annidene Davis for her warm smile and invitation for me to abuse the departmental coffee pot and leftover cake when she saw

I was down. When she left at the beginning of this year, I thought that the Department may be in trouble, but we were blessed with two fantastic administrators. First, Ms Thabisa Twani, who had a short but positive influence on the Department and secondly, Mrs Xolisa Nontyi, who has been appointed as the permanent administrator. Both not only carried on the tradition of letting me devour the leftover cake but also were such a pleasure to work with. To Mam' Cynthia, "Enkosi kakhulu, uMama". I would also like to thank my friend and mentor, Prof Alan Kirkaldy. He has always been in my corner since my undergraduate days and I truly admire him not only as an academic but also as a human being. As Head of Department he has also worked closely with Postgraduate Funding and the Research Department to secure funding for me for this last year. I am eternally grateful to him for believing in me as much as he did.

Speaking of belief, I could not have dreamed of pursuing my postgraduate studies further had it not been for Prof Gary Baines. He has been my supervisor since my Masters, believing in me five years ago and not wavering in that belief since then. He has mentored me in my academic writing as well as playing a key role in my evolution as an academic. He would dutifully question my train of thought and sometimes gleefully so. However, more importantly, he was always available to listen and have a chat. I view him as more than a mentor who has imparted some of his knowledge to me. I see him as my academic father and words cannot truly express my gratitude for what he did for me.

I would like to thank my friends for their continued support and willingness to indulge my sessions where I tend to think out loud and seek a response. Thank you to Dr Craig Paterson, Calvin Jordan and Tarryn Gillit whose soothing words saved me from numerous cataclysmic meltdowns. To all my other friends who I neglected during my five-year long self-imposed exile, I humbly ask your forgiveness but also extend my gratitude for understanding and still sticking it out with me.

Thesis writing is not only a process but also a space of solitude. There is no one who can truly understand your work as much as you do. Not many people understand this and as a result those closest to you often get frustrated. However, I have been in the most fortunate position to have met someone who not only understood but

wholeheartedly encouraged me during the writing phase of my thesis. Rowena Ebel was that person. She was my guiding light to the finishing line and for that I am forever grateful.

I am also indebted to all the interviewees (listed in the Bibliography) who gave their time to talk to me, especially taking into account the sensitivity of this case. In particular, I would like to thank Dave Mullins, Advocate Sive Notshe and Professor Hermann Giliomee. Without their enthusiasm it would have been close to impossible to gain access to the information which I needed for this thesis.

Finally, I would like to thank my family for their support, encouragement and endless love. My maternal grandmother, Ouma Lala, constantly asks me on my progress, while my paternal grandfather, Oupa Calvyn, routinely sends me messages of encouragement. I am truly privileged to have them in my life. My brother Dawie supported me in his own brotherly way. My parents, Johan and Marietjie, are the two main reasons why I managed to complete this thesis. Their weekly “progress reports” and discussions around the dinner table and their general encouragement was absolutely priceless. They provided me with more love and support than I deserve.

I dedicate this thesis to each one of you.

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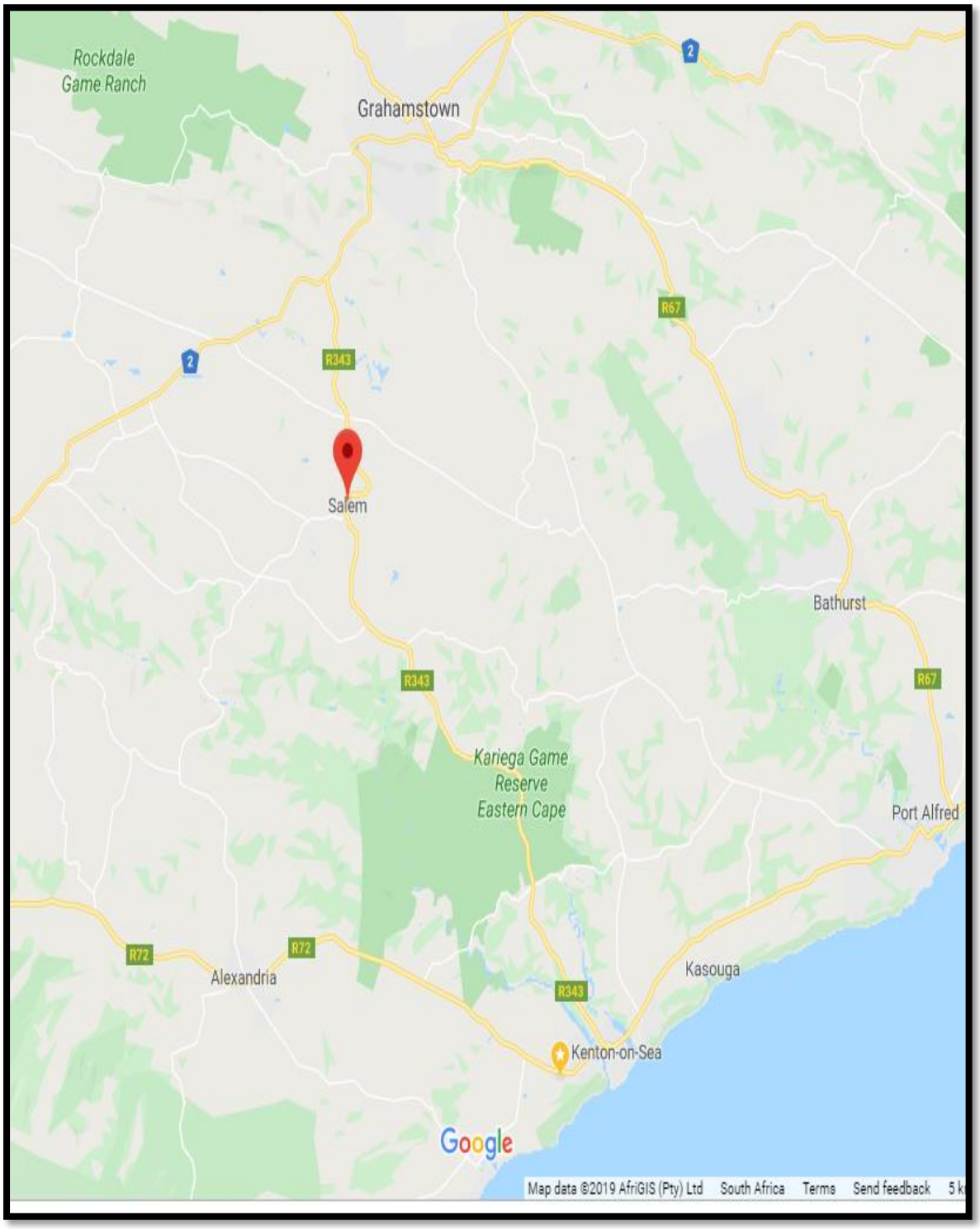


CHAPTER ONE: INTRODUCTION

Locating Salem

Events define places. Some events have a more lasting impact on the people of a place than others. Those events also sometimes stick in popular memory, influencing how the public remembers that place. For example, if one were to ask an adult Massachusetts resident what they associate the place Salem with, they will in all probability mention that witch trials took place there. They may even recommend certain landmarks to visit, such as the so-called Witch House, home of one of the trial judges. However, if you were to ask the same question to a resident of the Eastern Cape, you will in all likelihood get a completely different answer. The place of Salem in the Eastern Cape of South Africa carries with it another significance. Depending on the nature of the representation, Salem has been depicted in public memory in at least two different and even polarised ways.

In 1968 the renowned playwright, Guy Butler was approached by the Cape Performing Arts Board to write a play for production in 1970 to mark the 150th anniversary of the 1820 British settlers arriving in South Africa. Butler chose to write the play about Richard Gush, one of the original Salem settlers and a central figure in its establishment. Gush was the protagonist in one particular episode of preventing a possible amaXhosa attack on the village in 1835, allegedly using non-violent means to de-escalate tensions between settler and Xhosa. Butler was intrigued by the theme, which, according to him, "went to the heart of contemporary South Africa: the response of the individual conscience to racial and other violence".[1] In the play, Gush convinces the amaXhosa force not to attack the village by offering them bread, itself being a symbolic gesture of peace. Once their appetite is satisfied, they leave the area - and Salem - in peace. Gush becomes a figure of conciliation, able to diffuse a potentially violent situation and restore calm to the village. The role of the amaXhosa in the peace negotiation is largely overlooked. The successful outcome is ensured by the actions of Gush, the white male settler, who is the instrumental component to bringing about a peaceful resolution.

[1] G Butler, *Richard Gush of Salem* (Cape Town, 1982) p. viii.

In 1999, thirty years after Butler's play, Salem once again caught the public imagination briefly thanks to JM Coetzee's, award-winning *Disgrace*, a novel that taps into the pulse of white paranoia in response to the changing power dynamics across racial lines following black majority rule.[2] It is at Salem where Coetzee's antihero, Professor David Lurie, comes to visit his daughter, Lucy, following a scandal that all but ends his career. During his stay at Salem, they are violently attacked. Lurie immediately suspects Lucy's black African neighbour and aspirant landowner, Petrus, of orchestrating the attack. Lurie's own brittle whiteness fuels his distrust toward Petrus, even before the attack. He vehemently opposes Lucy's plans to sell her property to Petrus. The idea of his daughter being a tenant on the property of a black African landowner disgusts Lurie and he would rather have his daughter uproot her existence in Salem than remain there at the 'mercy' of Petrus.

The events of *Disgrace* contrast glaringly with those portrayed in *Richard Gush of Salem*. The subtheme in both works relates to the land as a site of contestation. The amaXhosa warriors seek to attack the area because the land was taken from them during European conquest. Of course this is not made explicitly clear in Butler's play, but it is assumed. Similarly, Lurie's suspicions and fears of Petrus are born out of his own racist view that no black African should own land, let alone be a landlord to a vulnerable white woman. But whereas Butler's Gush of Salem is associated with conciliation and passive resolution, Coetzee's image of Salem is bleak. There is no grand gesture of peace by a white male, or by anyone for that matter. In fact, reconciliation is rejected by Lurie, his own brittle whiteness feeding the paranoia that confirms and fuels his racial attitudes. The "Great White Hope" narrative is replaced by a "Great White Hopelessness", powerless to stop the 'menace' that threatens the *status quo* of white supremacy. It is appropriate that Salem is the place where both of these narratives converge.

Notwithstanding its symbolic significance in South African literature, Salem is little more than a hamlet. Driving from what is the heart of the Zuurveld, Makhanda / Grahamstown,[3] to Kenton-on-Sea one turns south on the R343 after approximately

[2] JM Coetzee, *Disgrace* (London, 1999).
[3] The name change was officially gazetted on 29 June 2018.

fifteen kilometres at a farm stall with the misleading name, “Salem Crossroads”. From there the R343 traverses the southern Zuurveld for about fifty kilometres in a south-easterly direction towards the coast. Along the way, on the side of the road an Eastern Cape Tourism sign board signifies that you are now entering “Frontier Country”. The road passes the Thomas Baines Nature Reserve before veering down a long and winding bushy *kloo*f filled with indigenous *thornveld*, crossing a dried up creek-bed before rising once more to a sparse plateau, where the wild *bushveld* is replaced by neatly separated tracts of farmland.

ILLUSTRATION 1.1: Road to Salem – Eastern Cape Tourism Board welcoming visitors to “Frontier Country”

(Credit: GJW Bezuidenhout)

A dilapidated pair of rugby posts on the left-hand side of the road used to represent the failed attempts of a white Afrikaner farmer to create social cohesion among the local isiXhosa-speaking communities through sport. The rugby field has long since

been abandoned for grazing purposes; water troughs and a solar-powered electricity outlet being evidence of this. The road then gradually turns southeast, running parallel with the Assegaai Bos River valley to the right. The valley floor cannot be seen from the road, except for the numerous *koppies* and *kloofs* which outline the landscape. A long straight stretch of road follows after the gradual turn. This stretch is partially lined by two rows of magnificent but out of place bluegum trees.

ILLUSTRATION 1.2: Road to Salem – Bluegum trees mark the north western boundary of the Salem commonage

(Credit: GJW Bezuidenhout)

Bluegums, along with the *Opuntia tuna*, or more commonly known in the area as '*turksvy*' produce the popular prickly-pear fruit, are alien vegetation brought over by European colonists, successfully redefining the countryside of the Zuurveld.[4] These particular bluegums which line the stretch will serve as reference point as the northern border of the land which is the focus of this thesis. The stretch ends with a sharp turn to the right, at which point one can now see other parts of the valley. It is here where especially the seasoned traveller of this road will observe a curious and recent change to the landscape. Ten years ago, the rolling hills were exclusively either used for grazing or ploughed fields. Today small clusters of *rondawels* and shacks of black African farmworkers and residents dot those hills.

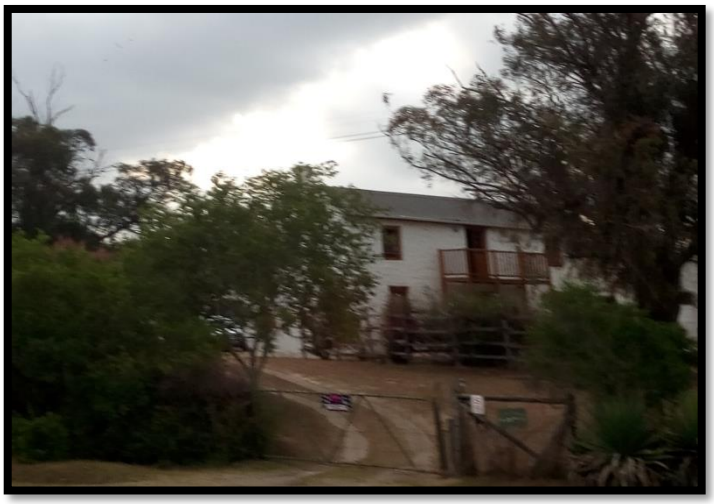
After the sharp turn, the road descends steeply toward the valley floor. Most of the landscape in the valley is cultivated. To the right lie crop-fields interspersed by small pockets of *thornveld*. After about 200 metres the road turns sharply to the left, a few metres above the valley floor. At the turn is a big green sign with gold lettering, signalling an entrance to the farm owned by the Lindale Trust. Following the sharp left-hand turn, one will continue down a more gradual descent, with Cape aloe (*Aloe ferox*), or *amakhala* in isiXhosa, lining the road towards what is the true crossroads of Salem. To the right lies a grand old two-storey farmstead, Georgian-style with whitewashed walls; accompanied by a once beautiful, now neglected garden.[5] To the left are three much smaller one-storey houses, clustered together. These houses, or at least the façades, seem to have long since fallen into disrepair though one can notice the renovation efforts of past and present owners. From here, if one were to cast one's gaze beyond and slightly above the dilapidated dwellings, one will notice a large oval-shaped field, bounded partially by clusters of buildings that seem to be maintained better than the ones closer to the road. Two buildings in particular stick out from the rest, peeking out from behind a row of enormous poplar trees.

[4] See W Beinart and L Wotshela, *Prickly pear: The social history of a plant in the Eastern Cape* (Johannesburg, 2011) and L van Sittert, "'Our irrepressible fellow-colonist': the biological invasion of prickly pear (*Opuntia ficus-indica*) in the Eastern Cape c.1890–c.1910", *Journal of Historical Geography* 28, 3, July 2002, 397-419.
[5] This house is purported to be the former residence of WH Matthews, first schoolmaster of Salem.

ILLUSTRATION 1.3: Road to Salem – Entrance to Salem coming from Makhanda / Grahamstown

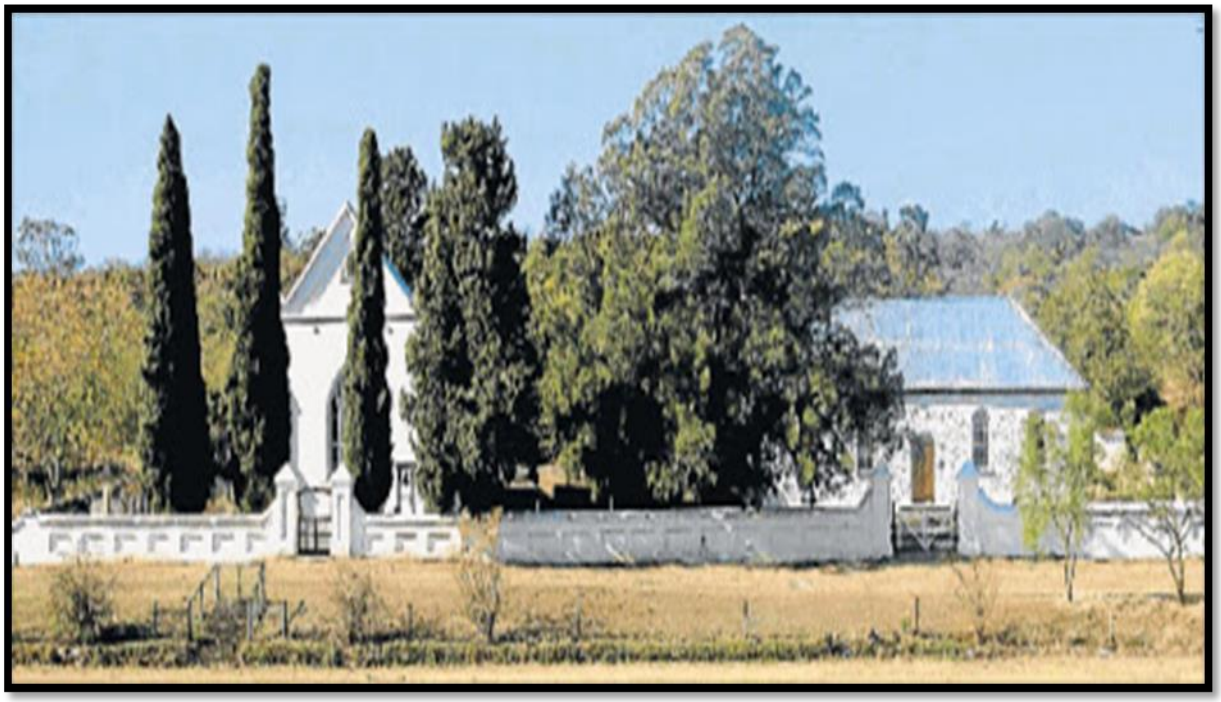
(Credit: GJW Bezuidenhout)

ILLUSTRATION 1.4: Georgian-style farmstead purported to be the former residence of WH Matthews, first



(Credit: GJW Bezuidenhout)

ILLUSTRATION 1.5: The Salem churches – the church on the right is the oldest, built in 1832



(Credit: GJW Bezuidenhout)

Returning momentarily back to the road, it is at this point where one almost unnoticeably crosses what remains of the Assegaai Bos River before coming to a stop at the crossroads. To the right is the old shop, also fallen into disrepair. Ahead the road to Alexandria turns into corrugated iron and gravel, more suited for the vehicle of choice in these parts: the *bakkie* (a light pickup truck). There are a few more dwellings that line that road before it disappears over a slight rise. To the left one finds the turnoff to Kenton-on-Sea, which is, bafflingly, still the R343. Turning left one will find two more homesteads on the right, though seemingly forgotten and overgrown by trees and creepers. Driving on further and turning one's gaze now to the left, one will now get a clearer idea of what the purposes of the oval-shaped field and the accompanying buildings are. The Salem Cricket Club is regarded as one of the oldest cricket clubs in the country, established soon after the arrival of the British settlers to these parts in 1820.[6]

ILLUSTRATION 1.6: The Salem Cricket Club and field. The Cricket Club is regarded as one of the oldest in South Africa

(Credit: GJW Bezuidenhout)

[6] The field itself was made available for cricket almost as soon as the settlers arrived. The club came into existence almost immediately after, arguably making it the second oldest cricket club in South Africa. See *Salem Party Club and Others v Salem Community and Others* [2017] ZACC 46, para. 83.

After the cricket field a dirt track leads past a small cemetery as well as past the two buildings mentioned earlier. At the farthest end of the track is a face-brick structure accompanied by a few swings and a rusty jungle-gym which indicate that this is a school. The other two structures command more attention. Slightly obscured by the row of massive poplars, the middle building, which is also the largest, looks well maintained and stately. A large bronze bell and stained-glass windows at the front immediately reveal that this is a church. The building to the right is more modest, though also well maintained. Under further investigation one will find that this smaller building is also a church. In fact it was the original church, built in 1832 and used as the official place of worship for the settlers in Salem until the 'new' church was built in 1850. A rock pillar, about five feet in height, stands in front of the original church with a plaque commemorating the actions of Richard Gush. It reads:

> *On the hill opposite in Jan 1835 RICHARD GUSH dissuaded the kaffirs* [sic] *from attacking the settlers in Laager at Salem.*[7]

ILLUSTRATION 1.7: The pillar erected in 1959 to commemorate the actions of Richard Gush who thwarted an amaXhosa attack on Salem in 1834

(Credit: GJW Bezuidenhout)

[7] According to the inscription, the pillar and plaque were apparently erected by his descendants in 1959.

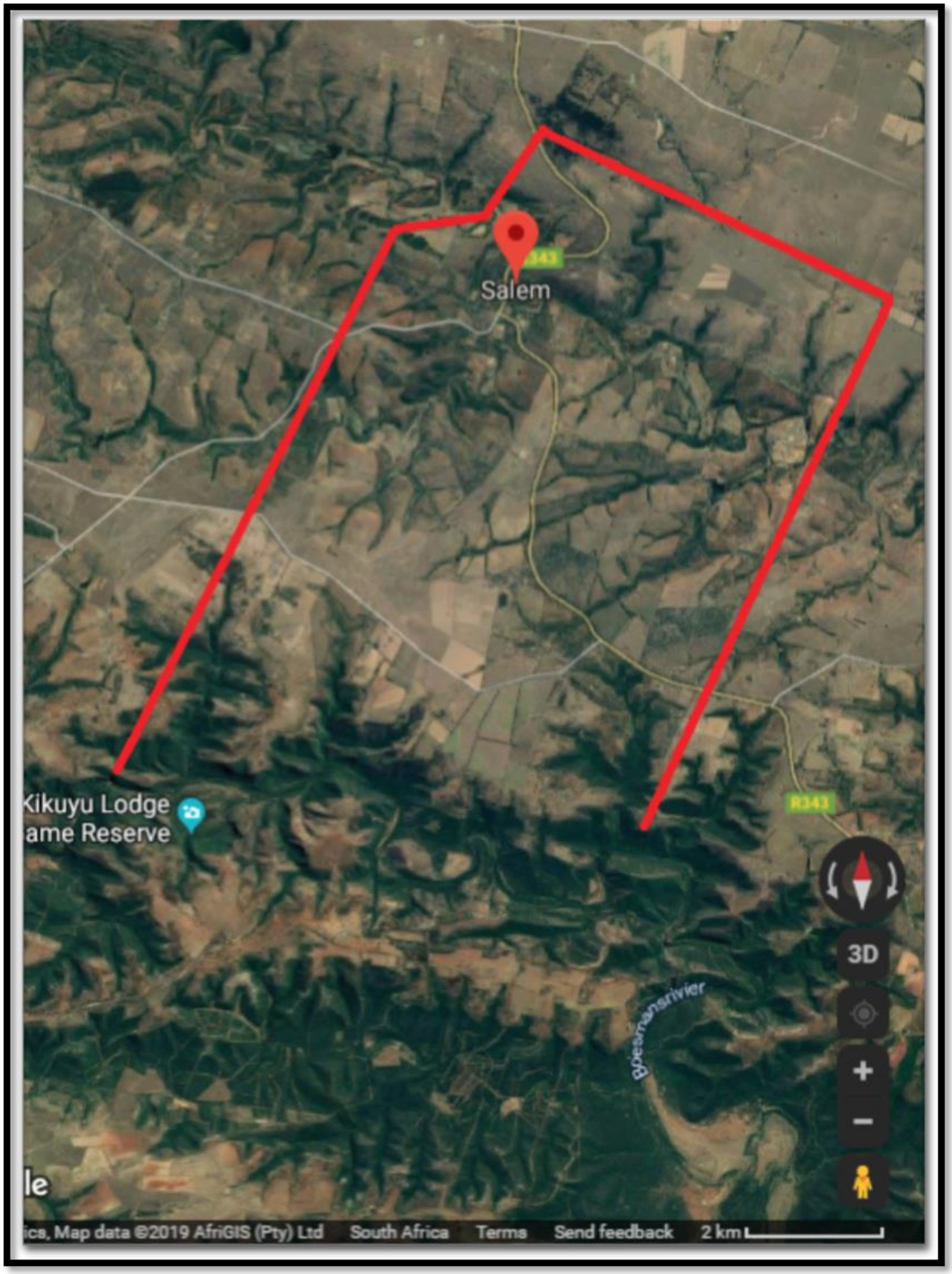
Once back on the R343, continuing in the direction of Kenton-on-Sea, one ascends the hill at which foot the churches, school and cricket pitch are nestled. Now the farmlands spread out once again. Some parts seem to have once been used for growing crops, but they seem derelict. As one ascends the steep hill one notices entrances to farms to the left. A stray cow or two on the road is not an uncommon sight. Goats also often feverishly gnaw at the succulent *turksvy* which grow wildly along the sides of the road. Towards the top of the hill, one notices clusters of more dwellings, lying scattered all the way down to another boundary fence some distance from the road. Over the fence one can once again see signs of formal commercial farming – a milking shed here, a tractor there. On the dwellings' side of the fence are telephone and electricity pylons, offering signs of permanence to what appears to be a hastily built settlement.

As the road reaches the top of the hill, another informal settlement to the right comes into view. Here an attempt at formality has been made by the display of a hand-painted sign at its entrance: "Bongolethu Agri-Village". Each dwelling has a small garden adjacent to it with common grazing land surrounding the village and encroaching onto the road. The road plunges into another dip and out, surrounded once again by dense bush. Further on one can once more see formal fencing, some even electrified, an indicator of game farms. This is the southern boundary of the Salem commonage. At first glance, Salem itself seems small and insignificant compared to a town such as Makhanda / Grahamstown. Some locals like to quip that the glance would have to be a lengthy one in order to see anything. It could never be classified as a town. It is more of a village or a hamlet. But as in the fictional works of Butler and Coetzee, it is the land that has become a site of contestation more than what anyone in Salem could have imagined.

ILLUSTRATION 1.8: View of Salem from on top of hill behind the churches

(Credit: GJW Bezuidenhout)

MAP 1.2: Satellite image showing the Salem commonage. The red line indicates the borders of the commonage. The southern border is the Bushmans River



An "extraordinary application"[8]

The Grahamstown High Court building in High Street of what is today Makhanda / Grahamstown was designed for upholding the law as defined by the authority of the state, more specifically, the judiciary. The sandstone and red face-brick façade certainly does make for a formidable building, but it is the tower which juts out past its rooftop that gives it the appearance of being the seat of authority and power. Below the tower is the main entrance to the building, a large archway complemented by two imposing identical steel doors, about eight feet tall. Once inside, immediately to the left is a flight of steps that leads to Courtroom "A", the only courtroom in the entire building where civil matters are heard. It was here almost eighty years ago that an "extraordinary application" was lodged.

ILLUSTRATION 1.9: The Grahamstown High Court building, Makhanda / Grahamstown

(Credit: GJW Bezuidenhout)

[8] As the application for subdivision was described by Justice PC Gane in his judgement, see *Ex Parte Gardner* 1940 EDL p. 175.

On February 16, 1940 Justice Percival Carleton Gane[9] delivered judgement on an *ex parte* application[10] regarding the proposed division of 7,698 morgen (roughly sixty-six square kilometres) "of commonage attached to the village of Salem".[11] The application was petitioned by a group of about twenty-five erf-holders who sought to divide the commonage into "certain agreed shares". It was alleged by the erf-holders that the commonage was too large for such a small number of erf-holders, the consequence being that stock were often lost or stolen.

The applicant erf-holders were also concerned about their stock mingling with and becoming contaminated by "inferior stock". They thus sought to fence off and cultivate portions of the commonage for their own private use. They formed their own committee and elected Mr. LB Gardner as the chairman. They then drew up a plan to divide the commonage into portions of approximately 153 morgen to each of the 50 original erven or plots. They contended that they were absolute co-owners in undivided shares of the commonage. Their claim is based on two grants; the first dated 16th December, 1836 and the second on the 23rd November, 1847.

Gane was initially not convinced that the nature and language of these grants were necessarily evidence of permitting the settlers to be "co-owners in undivided shares of the land conveyed".[12] He viewed the effect of the first grant to mean that the settlers were given this extent of land in trust for each individual of the Salem Party with a view to a "special purpose". He rationalised that the words "as commonage" are a "limitation of use" and that they were the "very foundation and object" of the grant. A similar term was also used in the second grant with one of the stipulations of use being "common land of the said party".

However, Gane was moved by the "apparently real distresses" of the applicant erf-holders, as well as the "trouble and expense which they have gone to procure the consents of all the twenty-five present erf-holders". Instead of dismissing the

[9] Incidentally, Gane was married to Emma Gladys Caldecott, whose paternal grandparents were both 1820 settlers.
[10] This means that there is no party opposing the application. The applicant merely has to supply the court with sufficient reason to grant the application.
[11] *Ex Parte Gardner* 1940 EDL p. 175.
[12] *Ex Parte Gardner* 1940 EDL pp. 177-178.

proposal completely, the court opted to assist the applicant erf-holders by issuing a rule *nisi*,[13] provided that such a rule would only be made final once the Administrator's consent was given. In summary, the rule effectively authorised the subdivision (shares proportionate to their holdings of erven) of the commonage among the registered owners whose properties were adjacent to it.[14]

This rule was issued with the proviso that all persons concerned who objected to it were required to show cause before August 8, 1940 to why this order should not be made. Gane also ordered that the entire rule be published twice in the *Grocott's Daily Mail* and twice in the *Union Government Gazette* with an interval of not less than six weeks between the two publications. Furthermore, it was to be personally served to the Minister of Lands, The Administrator of the Cape Province, the Registrar of Deeds as well as the Superintendent-General of Education for the Cape Province.

Gane viewed the subdivision with some doubt and apprehension, calling it an "at first sight extraordinary application".[15] But he and the other presiding judicial officer, the Judge President of the Eastern Division of the Supreme Court, CWH Lansdown felt that the Court was in a position to issue a remedy for who they considered were "all parties concerned" by granting this rule to avoid subsequent court cases being heard in the courts. Rather, they wanted the matter to be settled outside of the courts, thus allowing space to do so in accordance with the rule *nisi*.

Following the order, the Native Commissioner made a special visit to Salem. He recommended the disestablishment of a black African location on the land that housed approximately 500 people. He noted that the "native population of the village is about 500, of whom about 50 work as servants. These servants live on the premises of their employers, and on the present Commonage which is privately owned".[16] The Salem Location was officially closed down on 14 November 1941.

[13] A rule *nisi* is a court order to "show cause", meaning that the ruling is absolute unless the party to whom it applies can show cause why it should not apply.
[14] *Ex Parte Gardner* 1940 EDL pp. 183-185.
[15] *Ex Parte Gardner* 1940 EDL p. 175.
[16] *Native Commissioner, Albany, to Secretary for Native Affairs, 15 July 1941*, Record of the Constitutional Court, CCT 26/2017, p. 422.

However, the transfer of the commonage land to the applicant erf-holders was only formalised on 29 December 1947 through deed number 25712. The subdivided plots were distributed amongst the individual landowners of Salem beginning in April 1948.

Fifty years later, in December, 1998, a small community of just over 100 black Africans lodged a claim in terms of the Restitution of Land Rights Act (the Act).[17] According to the Act a valid claim for compensation or restitution of land can only be valid if it meets five requirements, namely that:
(1) the claimants or their ancestors were a community;
(2) that held a right in land;
(3) of which they were dispossessed;
(4) through racially discriminatory laws or practices;
(5) after 19 June 1913.[18]

In many cases the Land Claims Court (LCC) merely had to be satisfied that the claimants or their ancestors were indeed the people dispossessed in that particular claim under colonial or apartheid laws. Generally, the claimant party would claim for land that had been taken from them by the state and not properly distributed.

However, less frequently there are other parties involved who held rights to the claimed land but did not intend to share with the claimants. More often than not in these cases, the LCC judgement could be taken on appeal to the Supreme Court of Appeal (SCA). In rare cases, the appeal can be taken further to the highest judicial authority in the country: the Constitutional Court (CC). The Salem commonage claim was such a case.

In November, 2002, the Salem claim was published in the *Government Gazette*. In June and July of 2003, the local Regional Land Claims Commission's (the Commission) lead investigator conducted interviews with the claimant community and made findings for his research report. The Commission referred the claim to

[17] Act 22 of 1994.
[18] Section 2 of the Restitution of Land Rights Act 22 of 1994.

the LCC in what was then Grahamstown in June 2010. The claimants asserted that their forebears "traditionally occupied the land as far back as the 1800s but the property was later transferred to various members of the White group." The claimants said they constituted the approximately 500 people who occupied the location on the Salem commonage before it was disestablished. The issue before the LCC was restricted to adjudicating whether the claim was valid or not. Ironically, the case was heard in Courtroom "A", the same courtroom where the subdivision of the commonage was decided seventy years before.

The claimants asserted that they had lost ownership, residence, grazing, use of land for agricultural purposes, access to firewood, burial sites, cropping, and use of the commonage land. They called in only two witnesses to testify on the existence of a black African community on the land before the subdivision. The first witness, Mr Msile Nondzube recounted his grandfather's story of arriving in Salem before 1812. The second witness, Mr Mdoyisine Ngqiyaza, was born in the Salem Location and testified how his family was independent subsistence farmers before subdivision, but after subdivision they were forced to seek employment from one of the white farmers in the area.

The Commission called its own witnesses to support the claimant community's claim. They called their lead investigator, Mr Vincent Quba,[19] Professor Martin Legassick as expert historian and Mr Garthford Chandler, an expert in surveys and maps.

In response, the respondent landowners – who were the successors to the original applicant erf-holders - called in numerous witnesses to dispute the claimants' assertions. Two witnesses who grew up in Salem before, during and after subdivision testified that there was no black African community living on the land. The landowners called in their own expert historian, Professor Hermann Giliomee, to counter the evidence proffered by Legassick. In addition, they called a number of former landowners to testify as to the agricultural quality of the land in an attempt

[19] Quba was an employee of the Regional Land Claims Commission in the Eastern Cape. He holds a Bachelor of Arts Honours degree in History and was, at the time of the 2014 judgement, busy with his Masters Degree also in History.

to show the absence of any agricultural activities other than the commercial farming practised by white farmers at the time of subdivision.

On 2nd May, 2014 the LCC delivered its judgement. It held that there was indeed an independent black African community living on the commonage. It also held that the 1940 decision decided in that exact same courtroom, amounted to a racially discriminatory practice as the Court had failed to consider that community when granting the rule *nisi* that authorised subdivision. The LCC therefore granted a declaratory order that a community was dispossessed of a right in land after 19 June 1913 as a result of past discriminatory laws or practices, in terms of the requirements for a valid claim set out in the Act.

The landowners immediately appealed to the SCA, but despite a dissenting minority judgement, the majority of that court upheld the claim. The desperate landowners then sought for leave to appeal in the CC, citing section 25 of the Constitution of South Africa. Section 25(7) entitles "[a] person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices" to either restitution or equitable redress, according to the Act. The interpretation and application of the Act in this case raised constitutional issues which gave the CC jurisdiction over this matter.[20]

The CC granted the landowners leave to appeal but upheld the decisions of both the LCC and the majority of the SCA. In his judgement, Justice Edwin Cameron noted that this case as well as the landowners' resistance to it raised significant issues pertinent to land claims in South Africa in general: "What is our history? How does the Constitution enjoin us to understand it? And how practically do we realise justice in the light of our history?"

From the rural kloofs and valleys of the Zuurveld to the highest court of the country, the Salem commonage claim has been escalated from relative obscurity to centre-stage in the national debate on land. As a result, it caused a re-evaluation (at least in

[20] *Salem Party Club and Others v Salem Community and Others* [2017] ZACC 46, para. 163.

the courts) of how we understand our past and how we should understand our past in light of South Africa's own brand of restorative justice.

This is the story of that 'extraordinary' land claim.

From Legal to Frontier History: A Brief Historiography

Although this thesis relies quite substantially on frontier historiography, it is, first and foremost, a legal history that traces the legal origins and status of the vast portion of land known as the Salem commonage.[21] This particular case is exceptionally complex and demands an intimate understanding of South African law, its genesis, as well as the ever-changing nature of its jurisprudence, specifically regarding property rights in South Africa.

As William Beinart and Peter Delius point out, land dispossession had largely taken place long before the Natives Land Act of 1913[22] where the acquisition of land by Europeans were as a result of conquests between the seventeenth and nineteenth centuries, as settlers and colonial states expanded their authority into the interior. This expansion and consolidation of territory required both violence and legal measures such as annexations, the survey and privatisation of land and a new colonial civil authority. A plethora of work has been written on the various European systems of land ownership introduced in the Cape and later in Natal, Orange Free State and Transvaal by Boer and British administrations.[23]

In his work examining the South African legal system from 1902 to 1936 Martin Chanock contends that the state that was built in the decade leading up to Union in 1910 faced two fundamental challenges: firstly, the government's insistence of forging a political consensus among white people meant that it expended great effort in

[21] According to *Legal Dictionary*, legal history is defined as "a discipline that examines events of the past that pertain to all facets of the law. It includes analysis of particular laws, legal institutions, individuals who operate in the legal system and the effect of law on society" See *Legal Dictionary* at: https://legal-dictionary.thefreedictionary.com/Legal+History. (Accessed 31 October 2019).

[22] See W Beinart and P Delius, "The Historical Context and Legacy of the Natives Land Act of 1913", *Journal of Southern African Studies* 40, 4, (2014), 667-688.

[23] See LC Duly, "The Failure of British Land Policy at the Cape, 1812-1828", *The Journal of African History* 6, 3, 1965, 357-371; A Lester, "The margins of order: strategies of segregation on the eastern Cape frontier, 1806-c. 1850", *Journal of Southern African Studies* 23, 4, 1997, 635-653 and LC Duly, *British Land Policy at the Cape, 1795-1844: A Study of Administrative Procedures in the Empire* (Durham, 1968).

crushing opponents of the new state, if necessary by the most vicious of tactics. Secondly, the state sought to reinforce segregation, disenfranchise black Africans and develop a set of political and social controls over the majority of the population which seemed to stabilise the racist state.[24]

Unlike 'traditional' historical accounts of the development of the South African legal system, Chanock does not locate the history of the formation of South African law in Ancient Rome or Europe.[25] To him the essence of South African common law is neither "ancient nor external to South Africa", but created in the late nineteenth and early twentieth centuries in response to local circumstances, and the needs of the developing state, economy, and ruling classes and race".[26]

The Natives Land Act 27 of 1913 formed the cornerstone of the apartheid land dispossession apparatus but despite its provisions, it has been claimed by some legal historians that it failed to stop black persons from purchasing land.[27] They note that evidence suggests that land ownership increased in certain areas after 1913, questioning the effectiveness of the Land Act. These scholars argue that its impact has been exaggerated as an instrument of land dispossession or agrarian transformation. They insist that the Land Act was unevenly implemented and minimally enforced through the courts. The social processes that it reflected were well under way in some agrarian zones by 1913 but took many decades to realise elsewhere. Nevertheless, they concede that the Land Act, and more particularly its successors, played a key role in providing a long-term basis for areas of ossified traditional leadership and customary law as well as various forms of economic and social disadvantage.

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[24] M Chanock, *The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice* (Cambridge, 2001).

[25] See HR Hahlo and E Kahn, *The Union of South Africa: The Development of its Laws and Constitution* (London, 1960); HR Hahlo and E Kahn, *The South African Legal System and its Background* (Cape Town, 1968).

[26] Chanock, *Making of South African Legal Culture* p. 155. In terms of changing discourse in South Africa's legal system, see also A Sitze, *The Impossible Machine: A Genealogy of South Africa's Truth and Reconciliation Commission* (Ann Arbor, 2013) and, to a lesser extent, P Lalu, *The Deaths of Hintsa: Postapartheid South Africa and the shape of recurring pasts* (Cape Town, 2009).

[27] See HM Feinberg and A Horn, "South African Territorial Segregation: New Data on African Farm Purchases, 1913–1936" *Journal of African History* 50 (2009) 41-60 and W Beinart and P Delius, "The Historical Context and Legacy of the Natives Land Act of 1913", *Journal of Southern African Studies* 40, 4, (2014), 667-688.

In terms of the eastern frontier of the Cape Colony, the arrival of the 1820 settlers and the subsequent establishment of settler villages such as Salem significantly altered the course of history, not only for the people living on both sides of the frontier, but also the history of South Africa. The amaXhosa groups in this area would be forcibly expelled in a systematic clearing operation in 1812, resulting in widespread death, destruction and dispossession. The amaXhosa would enter the territory, with some groups attempting to recapture stolen cattle, other groups attempting to undermine colonial authority, and finally, others seeking employment within the Cape Colony after the subjugation of the amaXhosa. The interactions between European and Xhosa did not necessarily lead to war, but the continuing European expansion to the east, as well as some amaXhosa polities seeking alliances with the Europeans to achieve dominance over their rivals, did exacerbate tensions developing on the eastern frontier of the Cape Colony.

The history of the Cape frontier has been extensively researched and written about most notably by the two eminent historians who feature as central figures of this story – Martin Legassick[28] and Hermann Giliomee.[29]

Legassick's *The Politics of a South African Frontier: The Griquas, the Sotho-Tswana and the Missionaries, 1780-1840* serves as a foundational resource to those attempting to understand the inner-most workings of the frontier zone and its place in South African history. The term 'frontier' is most accurately described as an area "where different cultural traditions come into contact and interact under conditions where no political community is able to establish an unchallenged legitimacy of

[28] Martin Legassick was a South African historian and Marxist activist. He became a Rhodes Scholar at Balliol College, Oxford in 1960. Later, he completed his PhD at the University of California. He then worked at Universities in the United Kingdom and Tanzania, where he became active in the African National Congress and The South African Trade Union in exile. Legassick became involved in the independent left and later helped launch the Marxist Workers Tendency of the ANC. In 1981 he left academia to become a full-time anti-apartheid activist. After the unbanning of the ANC he returned to academia, but still involved himself in activist work. Sadly he died on 1 March 2016.

[29] Hermann Buhr Giliomee is an author of historical and political studies, former Professor of Political Studies at the University of Cape Town, President of the South African Institute of Race Relations and Extraordinary Professor of History at Stellenbosch University. Giliomee also has a more personal connection with the Eastern Cape, having taught at Graeme College in 1962 and having played rugby for the Albany Club, both in Grahamstown.

authority".[30] Legassick assembled vast amounts of information based on archival research for his thesis. His later works reflect this dedication to empirical research.[31]

Giliomee originally came from the "narrowly Rankean" school of the Stellenbosch history department in which the archives were sacred.[32] Here it was thought sufficient to reproduce the source and avoid any speculative interpretation thereof. The nature of these documents and who had written them did not cause Stellenbosch graduates to wonder about the consequences of their historical explanations. Giliomee's MA[33] and PhD[34] rose above the limitations of this tradition. Then at the end of the 1970s, he co-edited *The Shaping of South African Society*, which represented a marriage of the liberal tradition with the 'verligte' (enlightened) Afrikaner tradition, focussing on the seventeenth and eighteenth centuries, and touching on the nineteenth century.[35] Giliomee also contributed a chapter in Lamar and Thompson's *The Frontier in History: North America and Southern Africa Compared*.[36] The chapter is part of a comparative study between the American and southern African frontier zones. Giliomee tries to explain the eastern Cape frontier by contrasting the American West of the nineteenth century with the expansion of the amaXhosa groups between the Mbashe and Sunday rivers. His description of the frontier zones opened up by "Afrikaner settlers" is not that dissimilar to that of Legassick's: "These frontiers were zones where processes of colonization occurred in a situation marked by a weak political authority and quite often by conflicting claims to the land of two or more distinct societies existing there."[37] However, although they might have agreed on the definition of frontier zones, they were clearly poles apart when it came to identifying which warring parties qualified for the possession and use of the land.

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[30] M Legassick, *The Politics of a South African Frontier: The Griqua, the Sotho-Tswana and the Missionaries, 1780-1840* (Basel, 2010), p. 318.
[31] See M Legassick, *The Struggle for the Eastern Cape, 1800-1854; Subjugation and the Roots of South African Democracy* (Johannesburg, 2010) and M Legassick, *Hidden Histories of Gordonia: Land Dispossession and Resistance in the Northern Cape, 1800-1990* (Johannesburg, 2016).
[32] R Ross, "The Wizards of Salem: South African historians, truth-telling and historical justice" *South African Historical Journal* 2019 at https://doi.org/10.1080/02582473.2019.1572779. (Accessed 22 February, 2019).
[33] HB Giliomee, "Die Administrasietydperk van Lord Caledon (1807-1811)", MA Thesis, Stellenbosch University, 1963.
[34] HB Giliomee, *Die Kaap tydens die Eerste Britse Bewind, 1795-1803* (Cape Town, 1975).
[35] See R Elphick and H Giliomee, (eds.), *The Shaping of South African Society, 1652-1835* 2nd ed. (London, 1989).
[36] H Giliomee, "Processes in Development of the Southern African Frontier", in H Lamar and L Thompson, (eds.), *The Frontier in History: North America and Southern Africa Compared* (New Haven, 1981).
[37] Giliomee, "Southern African Frontier", in Lamar and Thompson, (eds.), *Frontier in History* p. 76.

Apart from the contributions of Legassick and Giliomee, eastern Cape frontier historiography has a long genealogy, dating back to the settler traditions of George McCall Theal[38] and Sir George Cory.[39] From the 1960s onwards began a more critical approach towards the impact of the 1820 British settlers in the eastern Cape than found in Theal or Cory.[40]

For the amaXhosa, history has passed down mainly through oral tradition. Stories of amaXhosa heroes were told by chiefs and headmen or other elders in the villages and homesteads. Jeffery Peires began to integrate the amaXhosa historical tradition into the mainstream scholarly canon. Peires' *House of Phalo*[41] traces amaXhosa historiography from oral tradition to historians such as Walter Rubusana, SEK Mqhayi, JH Soga and SM Burns-Ncamashe.[42]

An emphasis on social history during the 1980s and early 1990s resulted in a series of more specialised studies on the Khoe and slavery.[43] A reinterpretation of historical events and policies became a characteristic of works produced during this period. Ben Maclennan's *A Proper Degree of Terror* contributed to a significant reinterpretation of Colonel John Graham's expulsion of the amaXhosa from the Zuurveld in 1812.[44] Maclennan clearly shows that the expulsion of the amaXhosa from the Zuurveld, which Graham ruthlessly carried out at the order of Governor Sir John Cradock, initiated the series of brutal and thorough military conquests by the British of the amaXhosa, breaking their power by 1853.

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[38] See GM Theal, *Compendium of South African History and Geography*, (Lovedale, 1877); *History of South Africa from 1795 to 1872*, Volume 1-5, 5th edition, (London, 1915); *Documents relating to the Kaffir War of 1835* (London, 1912).

[39] GE Cory, *The rise of South Africa*, Volume 1-6, Reprint (Cape Town, 1965).

[40] See B Le Cordeur, "Robert Godlonton as architect of frontier opinion, 1850-1857", *Archives Yearbook for South African History*, 1959, II, (Pretoria, 1959); B Le Cordeur, *The Politics of Eastern Cape Separatism* (Cape Town, 1981); T Kirk, "Self-government and self-defence in South Africa: the interaction of British and Cape politics", PhD Thesis, Oxford University, 1973 and B Le Cordeur and C Saunders *War of the Axe* Johannesburg, 1981), as well as L Thompson, *A History of South Africa* (New Haven, 1990).

[41] JB Peires, *House of Phalo: A History A History of the Xhosa People in the Days of their Independence* (Johannesburg:, 1981).

[42] See Peires, *House of Phalo* pp. 170-180.

[43] See S Newton-King and VC Malherbe, *The Khoikhoi rebellion in the Eastern Cape, 1799-1803* (Cape Town, 1981); N Worden, *Slavery in Dutch South Africa* (Cambridge, 1985); N Worden and C Crais (eds.), *Breaking the Chains: Slavery and its legacy in the nineteenth century Cape Colony* (Johannesburg, 1994)

[44] B Mclennan, *A proper degree of terror: John Graham and the Cape's eastern frontier* (Johannesburg, 1986).

The 1990s saw a series of important contributions by Clifford Crais[45] and Tim Keegan,[46] not to mention Noël Mostert's epic *Frontiers*.[47] The main significance of these works is, as Legassick puts it, is "their attempt to integrate the story of the (partial and ambivalent) liberation of the slaves and Khoi with that of the conquest of the Xhosa".[48] Crais and Keegan insist that the racism of the nineteenth century highlighted the role of British settler leaders in the eastern Cape in promoting a "new discourse of racism", differing from that of the eighteenth century.[49] It would explain the impact the Cape Colony of the nineteenth century would have on the wider formation of South Africa. This thesis critically discusses this brand of racism, placing the interactions between the Salem settlers and their successors with the amaXhosa within the context of the eastern Cape frontier and its role in shaping South Africa.

In recent years, historians have further challenged and undermined the traditional narratives of the role of settlers in colonisation. Setter colonial studies emerged in the last two decades as a subcategory of comparative research. Lorenzo Veracini[50] explores the ways in which settler colonialism as a mode of domination survived the period of decolonisation, including in southern Africa and discusses the ways in which settler colonial studies can help to make sense of the current society we find ourselves in, post-colonial and post-apartheid South Africa. Rather than a thing of the past, Veracini posits that settler colonialism emerges as a crucial feature of the global present. He explores the settler colonial situation and argues that neo-settler or post-settler colonialism does not exist because settler colonialism itself is a "resilient formation" that rarely ends. Therefore rights to the land on which they have settled become unquestionable. If those rights are challenged, the settler feverishly defends his/her claim through the social, economic and political capital s/he has accumulated and inherited from his/her predecessors. Settlers are founders of political orders who

[45] See. C Crais, *White supremacy and black resistance in Pre-Industrial South Africa: The Making of the Colonial Order in the Eastern Cape, 1770-1865* (Cambridge, 1992).
[46] See T Keegan, *Colonial South Africa and the origins of the racial order* (Cape Town, 1996).
[47] See N Mostert, *Frontiers: the epic of South Africa's creation and the tragedy of the Xhosa people* (London, 1992.)
[48] M Legassick, *The Struggle for the Eastern Cape 1800-1854: Subjugation and the roots of South African democracy* (Sandton, 2010) p. 3.
[49] As opposed to other scholars who pinpoint the origins of racism in South Africa to be on the mines or the cities.
[50] See L Veracini, *Settler colonialism: a theoretical overview* (New York, 2010) and L Veracini, *The settler colonial present* (New York, 2015).

carry with them a distinct sovereign capacity. In other words, their intention is to dominate the socio-political landscape where they find themselves. Not all migrants have this sort of capacity; therefore not all migrants can be settlers.

Settler colonialism differs from colonialism in that settlers want indigenous populations to disappear only once that population's labour has been exploited. Sometimes settler colonial forms operate within colonial ones, sometimes they subvert them and sometimes they replace them. But even if settler colonialism and colonialism overlap, they remain separate as they define each other.[51]

The historiography of Salem is slight, with few secondary sources that are available. In the 1970s, following in the wake of the 150th anniversary of the arrival of the British settlers, a number of texts were written by English-speaking South Africans with the purpose of 'preserving' settler heritage and relevance.[52] Salem would feature prominently.

In 1959 Professor Winifred Maxwell, former head of the Department History at Rhodes University, delivered a memorial lecture in Salem itself – "one of the village communities which the Settlers founded and loved".[53] In her lecture, she linked Gush's life and the 1834 event that "defined it" inextricably with the history Salem, commemorating him as "the simplest and greatest" of settlers. Richard Gush, or at least an idealised characterisation of him, has firmly established itself within the settler collective memory. In fact, when conversing with settler descendants today about Salem, two topics of conversation will almost inevitably arise: the Salem commonage court case and Richard Gush of Salem.

[51] See L Veracini, *Settler colonialism: a theoretical overview* (New York, 2010).
[52] With particular relevance to Salem, see AE Makin, *The 1820 Settlers of Salem (Hezekiah Sephton's Party)* (Wynberg, 1971). Other subsequent popular and family histories were written by Salem Settler descendants in an attempt to preserve that heritage. See B Davenport, *A history of the Matthews settler family of Salem and "Woodstock", Alice, South Africa 1820-1950* (Place unknown, 2010).
[53] WA Maxwell, "Settler Memorial Lecture", *Address given at Salem on Settlers' Day 1959* (Cory Library) Pamphlet Box 217.

More recently, Simon Gush, a descendant of Richard Gush, produced a three-part documentary, focussing on the land claim itself.[54] Gush's ability to see past his own history and whiteness, allows for an honest exposé of the claim and its effects on the social landscape of Salem. As such, he is able to navigate across the racial barrier and draw authentic responses from the exclusively black African informants.

In terms of the court case, although there was a plethora of material to work through, including copies and transcripts of the correspondence with various government bodies, the lack of secondary source material on the Salem commonage was glaring. Apart from Legassick's, Giliomee's and Peires's work[55] which were vital in providing context, there were only Fiona Vernal's thesis on the neighbouring Farmerfield community[56] and Margot Winer's research on material culture in Salem[57] which served as useful historical resources for research on the commonage.

In early 2019 Robert Ross published an article about the Salem commonage claim, focussing primarily on Giliomee and Legassick as historians and using the claim as a case study for examining the relationship between historical justice and the law.[58] Ross highlighted the possible reasons why Giliomee and Legassick's testimonies could be so "diametrically opposed" and distinguishing between 'truth' and historical justice and that sometimes the need for the latter is far greater. Ross' article, while well researched and articulated, fails to explain the legal implications of this claim, what it really means to the people of Salem and to the significance of land claims in general. It also falls short of explaining the roles which courts expect the historian witnesses to take in such claims. But the main drawback of this article is that it does

[54] *Land is in the Air*, *Stanley is in the* Tree and Working *the Land*, Dir. Simon Gush (Film, News From Home, 2019).
[55] I was initially surprised to find that Professor Jeffery Peires was not involved as expert historian witness. His knowledge and insight on the amaXhosa historical tradition would have greatly aided the court in understanding this claim. Recently, I managed to contact him *via* e-mail to find out why he was omitted from the claim proceedings. He informed me that he was approached by the lawyers for the Land Claims Commission, but he refused for reasons he did not divulge. He then approached the lawyers for the landowners, offering his services to them. However, they told him that they had already found their expert historian witnesses. (Electronic correspondence with Jeffery Peires, *The Salem commonage claim* (19 November 2019).)
[56] F Vernal, *The Farmerfield Mission: A Christian community in South Africa, 1838-2008* (Oxford, 2012).
[57] MR Winer, "Landscapes of Power: British Material Culture of the Eastern Cape Frontier, South Africa: 1820-1869" PhD Thesis, University of California, 1994.
[58] R Ross, "The Wizards of Salem: South African historians, truth-telling and historical justice", *South African Historical Journa*l 2019 at: https://doi.org/10.1080/02582473.2019.1572779. (Accessed 22 February, 2019).

not explain the bitterness that this case has caused between the parties involved. While the historiographical debate between Legassick and Giliomee is an important aspect of the case, it does not recognise the more important testimonies given by the people of Salem, which the courts considered as being more influential on their judgements than the historian's testimony. That kind of research can only be done by soliciting oral testimony and reading this testimony against the grain of the archival record.

Methodology

I first came to know of the Salem commonage claim in 2014. I was at a function hosted by my *alma mater* when an old school friend of mine and son of one of the Salem landowners told me with ire about the claim that was "hanging over them like a sword". Being curious and genuinely sympathetic towards my friend, I decided to download the Land Claims Court judgement penned by acting judge, Sardiwalla and read it myself to understand why my friend was so upset. After reading the judgement I was baffled by my friend's reaction. It seemed clear and unambiguous: Sardiwalla held that the oral and documentary evidence was overwhelmingly in favour of the claimants. The court cited various examples where the credibility of the landowners' witnesses was questioned. In contrast, the court accepted the testimonies of the claimants' two witnesses without qualification. The judgement was damning towards the landowners. It methodically and persuasively rebutted their case. Admittedly, this left a bitter taste in the mouth because I knew many of the names on the list of farmers representing the landowners. My partiality drove me to reread the case numerous times over to see if I missed anything. Surely the landowners, though unhappy about the result, would accept that they were beaten fair and square in the face of the overwhelming evidence against them? Finally, I left it there and moved on with my Masters research.

In late January of 2017, I was asked by Professor Enocent Msindo of the Rhodes History Department to accompany him on a visit to a neighbour of his who was on the Salem Cricket Club committee. It was here where I heard that the landowners had appealed unsuccessfully to the Supreme Court of Appeal in Bloemfontein. The committee member was quite concerned about the future of the cricket club given that the claim was one step closer to becoming a reality. He, like my friend, was outraged at the court's decision to uphold the claim. I tried to explain to him that the chances of

success in the SCA were slim given the unfavourable court *a quo* judgement. But this did little to assuage his visible distress. He then asked me if an appeal to the Constitutional Court would be a viable option to take. I responded by saying that I knew too little of the facts of this case to make an educated call. Moreover, the only documentation I had was the LCC judgement, but based on the judgement, I was not optimistic. As soon as I got back to the university, I downloaded the SCA judgement to read out of interest. I immediately noticed that the judgment consisted of a majority and minority decision. This intrigued me and I decided to read the dissenting judgement by Azhar Cachalia first. It was a more than 120-page-long criticism of not only Sardiwalla's judgement but also the decision of his peers on the bench of the SCA. Cachalia lamented the willing acceptance of the testimonies given by the claimants' two witnesses, describing it as "fanciful and demonstrably false". He went on to cite more ambiguities and inaccuracies in the argument of the claimants, going as far calling it a "claim that was still-born". I was fascinated by this unreserved opposition of the claim. His judgement appeared a lot more logical and supported by precedent which was tested in the Constitutional Court (CC). Additionally, he offered a lot more insight as to what the witnesses had said than any of the other two judgements. I approached the people from Salem that I knew to get a better picture of what had transpired in the case. They were friendly but understandably apprehensive to share their knowledge with me and referred me to Giliomee and Legassick. Unfortunately Professor Legassick passed away in March 2016. Initially I, like Ross, was hesitant to approach Professor Giliomee because any interview I might have with him could not be tested against information that an interview with Professor Legassick may have provided. However, in the end I did email Giliomee to request any information he might have had about the case. Thankfully he responded positively to my request and supplied me with transcripts he had acquired during the course of the trial. This proved to be extremely insightful because the transcripts revealed the true intentions of the claimants – at least per instruction to their advocate. The picture was becoming clearer, but I was still missing important archival documentation related to the commonage.

The next step was an extensive search of the Cory Library of any material relating to Salem. Most archival documents from the area as well as books dealing with "Frontier History" are to be found there. The search proved fruitful as I obtained copies of

various memoirs, diaries and marriage registers of residents and visitors to Salem. A brief search of the AJ Kerr Law Library delivered the original 1940 case which authorised the subdivision of the commonage. During this time I was also approached by a colleague who had a contact based at the Constitutional Court. They were busy assessing the Heads of Argument from each of the parties and asked us to do some investigative research on whether the grants of land given by governors D'Urban and Pottinger were actually ratified in any way by the British government, purely as clarification. This was an opportunity to search for further information in the Cape Archives whilst doing so on behalf of the Constitutional Court of South Africa! Time was of the essence and we had precious little to work with. I managed to track down instructions to governors D'Urban and Pottinger as well as the grants, but no proof that the grants were approved or at least ratified by British parliament. I also acquired various map surveys drawn up and compiled by the surveyor-general.

The biggest challenge to this research was undoubtedly the interviews. Although I had already been given ethical clearance by the university through the History Department's Ethics Committee, I knew that because of the sensitive nature of the claim, some people would be suspicious of my motives, especially if they were to find out my connection to Salem. My plan was to approach the lawyers and use them as a screen to show my bona fide intentions. I eventually got hold of the advocate for the claimants and he shared my concerns especially due to the fact that the case was still ongoing. Eventually he told me he would consult with his clients and let me know. Soon thereafter the advocate gave me the phone number for Mr Nondzube, the chairperson of the community committee and the 'star' witness for the claimants. I immediately contacted him and asked him if he was comfortable with speaking to me. He answered in the affirmative. Unfortunately, the rest of the claimants were either uncontactable or unapproachable. It seemed that they had closed ranks since the Supreme Court of Appeal judgement. Though this was unfortunate, I had more than enough primary source material in the form of court records and transcripts to construct an adequate narrative constructed by the claimants.

Similarly, the landowners were cautious in granting me interviews. The information I got from them echoed the testimonies they had given in the LCC. Often times I actually got more from the informal meetings I had with them than the formal interviews.

However, permission was always sought to use what was said on these occasions in my thesis. Sometimes the answer was yes, but most times, due to sensitive nature of the case, it was no.

Scope of Study

This thesis investigates the origins of the Salem commonage and historicises the different concepts of land ownership that existed before and during European settlement in the Zuurveld. This includes the pre-colonial pastoral communities of amaXhosa and Khoe groups who moved through the area in search of grazing, as well as the European system of land ownership that fenced off properties. It will explain the attempted subjugation of the Zuurveld amaXhosa, as well as provide reasons for continued resistance by some amaXhosa polities even after their expulsion in 1812. It will also discuss how the arrival of the 1820 settlers influenced frontier politics and ignited a brand of racism that dismissed the existence of black Africans unless they were of use to them. The focus will particularly be on the arrival of the Salem (Sephton) Party of settlers and how the need for the commonage came about. It will furthermore explain the notion of 'commonage' in a South African context and its legal implications as well as the significance of claiming a commonage in relation to the broader issues of land restitution in South Africa. Moreover, it explores the complexity of the Salem commonage land claim and explains its legal and historiographical significance with regards to approaches adopted by courts in order to determine the credibility and admissibility of oral and expert testimonies.

The study will commence with a background describing the circumstances and context of how Salem came to be established. I will describe the area and who lived there before the arrival of the Salem Party, explaining the circumstances of their removal and/or subjugation. I will also explain the multiple reasons for their return to the Zuurveld and what effect this had on future relations between European settler and Xhosa. The chapter will conclude with a discussion relating to the arrival of the Salem Party of settlers and their struggle to establish their settlement amidst trying climatological as well as economic and socio-political conditions.

Chapter 3 will explain the origins of 'commonage' and its place in South Africa, followed by a discussion of the legal significance of the two grants given by governors

D'Urban and Pottinger for the establishment of the Salem commonage. It will examine the changing nature of the frontier zone and how eventually the European colonizers achieved dominance over their amaXhosa counterparts. It will focus on the initial period when black Africans moved into the Salem area looking for work as labourers and discuss the nature of the "master-servant" relationship that allegedly existed. This will then be followed by a discussion of the role of black Africans on the commonage. Were they merely there at the mercy of the landowners? Or were they an independent community as was claimed? It will also detail the subdivision process, beginning with the appeals to the Salem Village Management Board to allow subdivision to take place and the reasons behind the failure to consult with the black Africans living on the commonage, eventually ending in their dispossession of that land.

The focus of the study will shift in chapter 4 where the Salem claim will be placed into the context of the broader debate surrounding land claims in South Africa. It will look at how the Constitution of South Africa has been utilised to address the injustices of past racially discriminatory laws and practices, most notably with the promulgation of the Restitution of Land Rights Act. Furthermore, it will assess the government's progress in terms of land restitution and land reform and the challenges that stand in the way of such progress. Lastly, I will discuss the significance of the Salem claim and the reasons as to why it is regarded by some legal commentators and politicians alike, as a 'landmark' case in South Africa.

Chapter 5 will deal with the Salem commonage claim itself. It will shed light on the *dramatis personae* of this case: the black African claimant 'community' and the white landowners. It will critique the concept of 'community', especially within the context of the definition provided in the Act. It will also clarify the position of the landowners and try to explain their reaction to the courts' decisions. Furthermore, it will discuss the reasons behind the apparent willing acceptance of oral testimony by the courts in determining the validity of this claim. Finally, it will elaborate on the ideological battle between Legassick and Giliomee in the courtroom and what significance this will have on courts hearing testimonies of expert witnesses.

In the concluding chapter, I will reflect on the Salem commonage story, focusing on the legacy it continues to have on the area today. This chapter aims to contribute to

an understanding of influence of land on current social relations, specifically in Salem, as well as the significance of this claim in the broader nationwide debate of land restitution.

CHAPTER TWO: The Place between the Qhora and Tyelera rivers: Origin of the Salem Commonage

During the course of the court proceedings, the claimants and the landowners called their own respective witnesses to testify on the historical evidence regarding the Salem commonage. The claimants wished to show that groupings of black African people lived in the Salem area long before the arrival of the Sephton settlers. They called two of the claimants, Mr Msile Nondzube and Mr Mdoyisine Ngqiyaza who testified about the history of their people who lived in the place called Tyalera. Nondzube especially gave a vivid account of how his family had come to settle there long before the arrival of the white people. They were eventually driven out of the Zuurveld by colonial forces, but returned some years later and re-established themselves as a 'community'. His evidence was somewhat contradictory at times and under cross-examination, it seemed that factually, Nondzube's testimony would fail. However, for reasons detailed in Chapter 5 of this thesis, his oral account would be accepted by the court.

Professor Martin Legassick, on behalf of the Regional Land Claims Commission (the Commission), mostly agreed with Nondzube and argued through his interpretation of the historical record that though the amaXhosa had been expelled from the Zuurveld by colonial forces in 1812, their rights to the land had not been extinguished. He maintained that they were a cultural and linguistic entity, thus even though politically and militarily defeated, the amaXhosa still saw the Zuurveld as part of their territory. To prove his point, he referred to the multiple returns which amaXhosa forces made from 1819 in an attempt to reclaim territory. After the wars, some returned to the Zuurveld and settled there. He argued that their rights to the land were eventually manifested in the so-called "hut tax" during the 1870s and 1880s. This formed the basis of black Africans establishing rights to the Salem commonage during the late nineteenth and early twentieth centuries.

On behalf of the Salem landowners, Professor Hermann Giliomee vehemently opposed Legassick's and Nondzube's evidence. He offered his own expert account of why Legassick was incorrect in concluding that the amaXhosa still had rights to the Zuurveld after the expulsion. He substantiated his argument by also referring to the historical record, relating that the expulsion all but ended the amaXhosa's dominance

in the Zuurveld. The brutal conquest by the colonialists exterminated any rights to the land which the amaXhosa may have had to the land. When they returned, he reasoned, they returned at the behest of the colonial authority and settlers in a bid to supplement labour in the Zuurveld and elsewhere in the Cape Colony. In terms of the subsequent wars that followed, Giliomee maintained that these were not attempts by the amaXhosa to reclaim the Zuurveld. Rather, they were caused by disputes relating to cattle-raids as well as desperate attempts by some amaXhosa entities to retain the territory they had left. If Giliomee was correct, it would have dire consequences for the claimants' and the Commission's case.[1]

What follows is a description of the Zuurveld amaXhosa who stayed between what are now the Bushmans and Kariega rivers during the latter half of the eighteenth century. Making use of the historical record, this chapter will attempt to trace who exactly came to settle in this area as well as their various claims to the Zuurveld before the expulsion of all black African groups in 1812. It will furthermore discuss the reasons for various attempts of the amaXhosa to return to the Zuurveld and how this influenced the legitimacy of their claims to the land. The chapter will then introduce the Sephton settlers, the party of 1820 British settlers who were deceived into playing a part in the colonial government's scheme of closing the frontier off to the amaXhosa. The account that follows by no means pretends to be factually correct. Indeed some of the 'facts' revealed below might even contradict one another. In providing such a narrative, I hope to show how both narratives from landowner and claimant touched upon facts, creating a sort of grey area where the two narratives met – a common cause. I wish to navigate through that grey area and provide a context which might clarify why some 'facts' were harder for the court to accept than others.

MAP 2.1: Map of the Cape Colony, 1809

[1] Both Legassick's and Giliomee's arguments are dealt with in more depth in Chapter 5.

(Credit: John Pinkerton)

The Zuurveld

Salem is situated in the Zuurveld area[2] of the Eastern Province of South Africa, a pocket of land tucked in between the Sunday's River to the west, the Fish River to the east and north, and the Indian Ocean to the South. It is a unique and peculiar place for a whole host of reasons. Climatologically, it is the convergence point of two regional climates: The Oceanic and Cold Semi-Arid climates. The effect is an unstable and unpredictable weather system. Summer is regarded as rainy season and farmers depend on it for their annual harvest. However, the rains do not always fall, resulting in failed crops and starving livestock. Sometimes it rains too hard for the dry veld to adequately absorb the water. Floods are less frequent than drought, but the fallout can be as disastrous.

MAP 2.2: Map showing the Zuurveld area

(Credit: www.britannica.com)

The unpredictable climate has led to two distinct belts of vegetation within the Zuurveld. The Eastern Province Thornveld in the north provides poor grazing and little

[2] It is the name given to the area between the Sundays and Fish Rivers by the trekboer farmers who settled in the area during the latter half of the eighteenth century. It was later renamed the Albany District of the Eastern Cape Province. Today the area has been divided into two local municipalities: Makana and Ndlambe. Salem falls under the municipal jurisdiction of Makana Municipality.

wood. Moreover it has a scarce water supply, owing to low rainfall and the lack of small streams. The landscape is Karoo-like, desolate and flat. However, about fifty kilometres from the coast, the land drops sharply into the coastal lowlands where the grazing is significantly better due to the large deposits of limestone outcrops. Here the landscape is dissected by a number of rivers, namely, from east to west, the Fish (or Nxuba), Kowie, Kasouga, Kariega (or Tyalera), Bushmans, Boknes (or Buchnas) and Sundays (or Nqweba) rivers. This belt is usually well-watered but the numerous valleys make the terrain rugged and treacherous. The landscape is characterised by the distinct silhouettes of the *amakhala* which flourish under the harsh climates of the Zuurveld. The hard, spiny leaves are used by local amaXhosa communities for medicinal and cosmetic purposes.

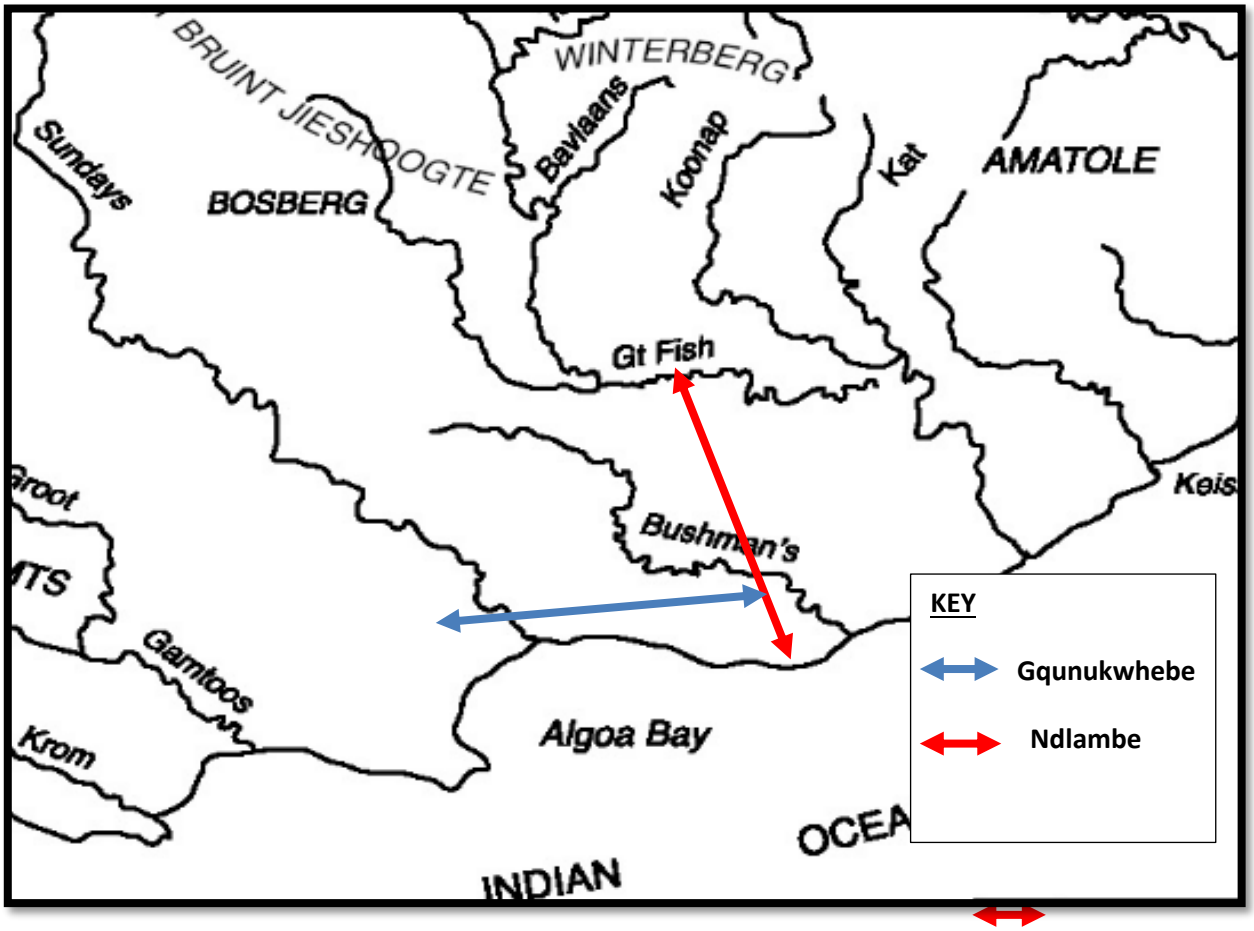
The pasturage in this area is mixed, consisting of both *zoeteveld* (sweetveld) and *zuurveld* (sourveld). The lush sweetveld is optimal for grazing but is sparse compared to the grassland after which the area is named. In winter the fields are dull, the landscape harsh and bare. Harvesting of crops usually starts in mid-April, with ploughing commencing in June. By September, the lands are ready to sow. If the summer rains do fall, the *zuurveld* turns green for the cows to graze upon, which means plenty of milk can be produced.

Historically, the amaXhosa of the Zuurveld moved their cattle according to the seasons. The scarcity of good year-round pasturage meant that they had to move vast distances according to the seasons. Sourveld provided excellent grazing in summer but lost most of its nutritional value after approximately four months. An exclusive diet of sourveld therefore caused botulism[3] and stiff-sickness.[4] The sweetveld remained nutritious throughout the year but apart from being sparse in the Zuurveld, it is also very fragile and, as noted by Peires, an excess of it was believed to cause consumption in cattle.[5] The ideal arrangement was to graze cattle on the sourveld in summer and then the sweetveld in winter. Thus, the transhumance patterns amongst

[3] Botulism is a rapid onset disease, usually fatal for cattle, caused by the botulinum toxin. Symptoms are weakness in the hind limbs, paralysis and eventually death.
[4] Otherwise known as bovine ephemeral fever. It is an insect-transmitted viral disease. Symptoms are usually a high fever, stiffness and reluctance to move around.
[5] JB Peires, *The House of Phalo: A History A History of the Xhosa People in the Days of their Independence* (Johannesburg:, 1981), p. 9.

the amaXhosa of the Zuurveld, namely the Gqunukhwebe and the amaNdlambe, were an annual exercise in migration. The distances which they covered were vast. The Gqunukhwebe regularly moved their cattle towards the Sundays River to the west in summer and then back towards the Bushmans River to the east in winter, a distance of approximately seventy kilometres between the two rivers. Chief Ndlambe generally moved in a south-westerly to north-easterly direction, grazing on the western banks of the Bushmans in summer and crossing it, moving northeast towards the upper reaches of the Fish River, some 100 kilometres away.[6]

MAP 2.3: Transhumance Patterns of Gqunukhwebe and Ndlambe



(Credit: JB Peires)

Tshawe, Phalo and Rharhabe: 'fathers' of 'nations'

The creation of the major political groups of the eastern Cape area, such as the amaXhosa, resulted from the rise of certain sub-groups to a position of dominance over their localities. The extension of their power was slow and tenuous, beginning

[6] Peires, *House of Phalo* p. 8.

long before the creation of the Zulu state and continuing right up to colonial conquest. Gradually, the smaller clans found themselves incorporated into one of their more powerful neighbours.[7] There were minor cultural differences among the larger polities, but clansmen who crossed the boundaries separating those polities to settle found it easy to adopt the customs of their new home. Clans would readily change their customs once absorbed into the amaXhosa.[8] Therefore, the amaXhosa should not be seen as the descendants of a single ancestor, but rather as subjects of the royal Tshawe clan.[9]

The view that the amaXhosa is heterogeneous in origin rather than a genetically defined 'nation' distinct from its neighbours, incorporating neighbouring clans rather than migrating during the process of expansion, has important implications regarding discourses surrounding the western boundary of Xhosaland.[10] European colonisers, in an attempt to mitigate their role in the dispossession of Khoe and San groups during their expansion towards the east, were quick to point out that the amaXhosa had done much of the same. The conclusions of Donald Moodie locating the amaXhosa east of the Keiskamma River before 1775, was meant to prove that they had as little right as the Europeans to the country west of that river since both groups had displaced the original Khoe inhabitants.[11] However, as Peires points out, Moodie's argument fails to mention that Khoe who were defeated by the amaXhosa were incorporated into their society instead of being expelled from their land or relegated to a condition of subservience based on the colour of their skin.[12] The Khoe west of the Keiskamma became amaXhosa, with the full rights of any other Xhosa. All persons who accepted the rule of the Xhosa king thereby became Xhosa.

The amaXhosa think of themselves as being the common descendants of a great hero named Xhosa. Some writers keenly perpetuate the myth by asserting that he was the

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[7] *Ibid*., p. 19.
[8] *Ibid*., pp. 13-19.
[9] *Ibid*., pp. 13-19.
[10] *Ibid*., p. 19.
[11] D Moodie, *The Record: or a series of Official Papers relative to the Conditions and Treatment of the Native Tribes of South Africa* 1840, Reprint edition (Cape Town, 1960) p. 9. Dutch East India Company officials had arbitrarily extended their eastern frontier to the length of the Fish River in 1778, but Dutch colonists and amaXhosa alike ignored this boundary line, see L Switzer, *Power and Resistance in an African Society: The Ciskei Xhosa and the Making of South Africa* (Pietermaritzburg, 1993) p. 46.
[12] Peires, *House of Phalo* p. 19.

son of Mnguni and brother of Swazi and Zulu.[13] However, it is more likely that the word 'Xhosa' is derived from the Khoe word '//kosa' meaning "angry men".[14] It is not unusual for a people to adopt the names given to them by outsiders.[15] It is perfectly acceptable that all peoples related through cultural circumstances believe that they belong to a single genealogy in an attempt to bring order and understanding to their history, rather than fashion it as their history.

The earliest historical occurrence directly affecting the amaXhosa was the installation of the amaTshawe as the royal family of the amaXhosa people. The story of Tshawe is the best-known and most widely spread of all the Xhosa traditions.[16]

Tshawe was a favourite amongst his mother's people on account of his courage. After reaching manhood, Tshawe was granted a considerable number of subordinates who formed the nucleus of his own grouping. As time passed and Tshawe's influence grew, he soon desired to establish his own independent society. He collected all his people and set out to visit his father, Nkosiyamntu. As he proceeded, his numbers swelled as outsiders joined his ranks. He eventually arrived at his father's place only to find that the heir, Cira, was in power. For a time, Tshawe and his followers settled down, with no real opportunity to challenge Cira presenting itself. However, on a certain day a general hunt was proclaimed and all sections of the nation joined in. Tshawe managed to kill an antelope and, following the usual custom, the principal chief, Cira, required that a certain portion of the buck should be reserved for him. Tshawe refused on the basis that the animal was too small to be shared. Cira insisted that the antelope was big enough because it was of age, but Tshawe was adamant in his refusal. Cira then asked for the assistance of Jwara,[17] chief of the Right-Hand House and Jwara obliged.

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[13] For example the genealogical table in J Maclean, *A Compendium of Kafir Laws and Customs* 1858, Reprint edition (Grahamstown, 1906).

[14] Peires, *House of Phalo* p. 13.

[15] *Ibid*., p. 13. The Mpondomise historian, Vete, relates how their name was actually given to them by the amaThembu.

[16] These traditions complicate matters. There are people to this day who still think of themselves as descendants of these *iziziwe*. But, as Peires rightly points out, just as all amaXhosa are not the biological descendants of a man named Xhosa, so too members of an *iziziwe* should not be thought of as biological descendants of the man after whom their clan was named. The version told here is from JH Soga's *The South-Eastern Bantu* (Johannesburg, 1930) which is the first complete history of the amaXhosa ever written down. In Peires, *House of Phalo* pp. 13-15.

[17] Interestingly, the Jwara is the same clan which Msile Nondzube claims to descend from (see p. 232 of this thesis).

Together, Cira and Jwara declared war against Tshawe. However, during the course of the fighting, Tshawe sought assistance from the neighbouring Pondomise, prompting them to send the AmaRudulu clan to help. This gave Tshawe the advantage he needed to defeat his older brothers, Cira and Jwara, usurping the chieftainship of the amaXhosa. Cira accepted defeat and decided to stay under Tshawe's rule, but his authority had all but disappeared. Jwara fled with a small following to seek a new home. Thus, the story of Tshawe tells how Cira and Jwara were conquered by Tshawe and his followers. But more than this, this particular tradition explicitly states how Tshawe abolished the *iziziwe* (clans)[18] who used to rule themselves once Tshawe triumphed over his brothers. The story of Tshawe's conquest is thus one of how he circumscribed the autonomy of those clans.

The story of Tshawe cannot be dated and as such, it is difficult to determine an approximate date for the establishment of Xhosaland.[19] The first definite date available to historians is 1736, by which time Phalo was already an adult and ruling over the amaXhosa.[20]

Phalo remains an elusive historical figure, as almost nothing is known about him, except that he crossed the Kei and settled on the Izeli, a tributary of the Buffalo River. One of the most widely spread traditions in Xhosaland relates to how Phalo was embarrassed one day by the simultaneous arrival at his Great Place of two bridal parties: one from the Mpondo king and the other from the Thembu king. Phalo knew that if he only chose one bride as his Great Wife he would offend the father of the other. An old man called Majeke then advised Phalo to let one wife be the "head wife" and the other be the "wife of the right hand". Gcaleka was born out of the Great House, while Rharhabe was born out of Phalo's Right-Hand House. Thus, according to this tradition, the division between the Great House and the Right-Hand House in Xhosa

[18] These clans were the amaTipa, the amaNgewu, the amaQocwa, the amaCete, the amaNgqosini and the amaNkabane.

[19] Attempts were made to determine the date of Tshawe's reign through multiplying the number of chiefs included in the genealogy by an estimate of the average number of years per reign. But these cannot be accepted because of inevitable inconsistencies with the genealogy and the length of the average reign varies greatly according to the lineage chosen.

[20] The first substantial written account of Xhosaland was by the survivors of the Dutch East India Company ship, *Stavenisse* wrecked off Ifafa Beach, near present-day Port Shepstone in 1686. But this also proved far too inaccurate to be of much use. See GM Theal, *History of South Africa under the Dutch East India Company, vol. 1* (London, 1897) in Peires, *House of Phalo* p. 17.

culture was created. Though this willing acceptance overnight of such a tradition might be met by some amaXhosa commentators with scepticism, it goes a long way to explain how the amaXhosa came to be divided between the Gcaleka and the Rharhabe. This split is regarded as the most significant feature of Xhosa internal politics in the latter half of the eighteenth century.[21]

Phalo died in 1775 and Gcaleka followed three years later. Gcaleka's oldest son, Khawuta reigned from 1778 to 1794. He is described as a weak leader who was "only a shadow of his predecessor".[22] He was unable to assert his authority over the other members of his father's lineage. The weak reign of Khawuta meant that the power of the Xhosa king diminished so significantly, that it left the amaRharhabe to build up their power in the west of the Kei.

The amaRharhabe spearheaded the drive against the Khoe and San peoples. The Khoe chieftainess, Hoho, was forced to cede her land in exchange for tobacco, dagga and dogs.[23] The amaRharhabe also terrorised the San, killing small children and burning down their dwellings. Rharhabe's advance was, however, opposed by the imiDange, who regarded themselves as Phalo's loyal followers in the west. On the other hand, Rharhabe's superiority was recognised by the amaGwali who were sworn enemies of the imiDange. The other important chiefs in the west were of the Gqunukhwebe and the Mbalu, neither of them was subject to Rharhabe.[24]

Rharhabe took advantage of Gcaleka's death in 1778 to attack Khawuta. In the end, the attack failed and Rharhabe was driven off to the north. In 1780, Rharhabe had proposed an alliance between himself and the Boers of the Cape Colony.[25] In exchange for their assistance against the imiDange, Rharhabe offered "friendship and peace".[26] Adriaan van Jaarsveld, the local Boer leader, responded positively, but for unknown reasons, Rharhabe was unable to keep to the arrangement. He and his Great Son, Mlawu, eventually died in battle against the amaThembu, but Rharhabe's

[21] Peires, *House of Phalo* p. 46.
[22] *Ibid.*, p. 47.
[23] *Ibid.*, p. 48.
[24] *Ibid.*, pp. 48-49.
[25] *Ibid.*, pp. 50-51.
[26] *Ibid.*, p. 51.

reputation stands tall among his people.[27] The reason for this was because of Rharhabe's other son, Ndlambe.[28]

Ndlambe

Ndlambe could not rule the amaRharhabe in his own name since his deceased older brother had fathered two sons, namely Ntimbo and Ngqika. Ntimbo was supported by the majority of the councillors, while Ngqika was supported by Ndlambe and his followers. Both factions sought the support of Khawuta. Ndlambe secured it and ruled thereafter as regent for the young Ngqika. Soon, Ndlambe's power in the west was increased with the conquest of numerous chiefdoms. The imiDange were the first to be defeated when the amaRharhabe drove them west across the Fish River into the area north of the Zuurveld, killing their chief. During their retreat, the beleaguered imiDange encroached on the territory of the Boers of Agter Bruintjes Hoogte, who attacked them, together with the amaGwali and the amaNtinde in what would be the First War of Dispossession.[29] Now Ndlambe's chief rivals were the Gqunukhwebe under Tshaka and his son, Chungwa. Ndlambe had defeated them several times, driving them further and further west towards the Coega River. But they were able to recover from each defeat by recruiting some of the Khoe living west of the Fish. Ndlambe was in need of allies and, like his father, found them in the form of the Boers of the Cape Colony.

Ndlambe found an ally in Barend Lindeque, a lieutenant in the local militia.[30] They conducted a joint raid, but unfortunately for Ndlambe, the small party of Boers lost their nerve and withdrew. The rest of the amaXhosa west of the Fish, provoked by the intentions of the Boers, decided to attack and drove them back beyond the Zwartkops River.[31] This forced the colonial authorities into action and they sent out a well-armed commando, triggering the Second War of Dispossession (1793). The hostile amaXhosa attempted to retreat to Khawuta, but Ndlambe cut them off and defeated them, killing the Gqunukhwebe chief, Tshaka and capturing Langa, the chief of the

[27] JH Soga *The South-Eastern Bantu* (Johannesburg, 1930) pp. 128-129.
[28] Peires implies that the legacy of Rharhabe was actually shaped by Ndlambe (see *House of Phalo* p. 50).
[29] *Ibid.,* p. 50.
[30] *Ibid.,* p. 51..
[31] *Ibid.,* p. 51.

Mbalu in the process.[32] Ndlambe offered to hand over Langa to the Landdrost of Graaff-Reinet who declined the offer. Chungwa, Tshaka's son, reached Khawuta, but shortly thereafter returned to west of the Fish River.[33]

As a result of this success, Ndlambe became the most powerful Xhosa chief in the west. But he was unable to build upon this triumph. In 1795, Ngqika unexpectedly rebelled against his uncle. According to the amaNgqika, Ndlambe refused to give up his regency, prompting Ngqika to defend his chiefship. The amaNdlambe maintained that Ngqika launched a premeditated attack after his installation as chief.[34]

Ndlambe appealed in vain to the amaThembu as well as the Boers, but only received help from the Gcaleka regent who had taken over the Xhosa kingship after the death of Khawuta in 1794.[35] Ngqika attacked the amaGcaleka and chased them across the Kei, where they eventually brokered for peace.[3637] The exact terms of the peace are unknown, but shortly thereafter Ngqika began to represent himself as the king of the amaXhosa. However, he let the young king Hintsa escape from his captivity. But Ndlambe was captured, taken prisoner and kept at Ngqika's Great Place.

Ngqika's feud with Ndlambe drew the support of the imiDange who recognised the indisputable superiority of the amaRharhabe while they avenged the losses they had suffered at the hands of Ndlambe. Ngqika also successfully supported Nqeno, Langa's most capable son, against the legitimate heir, thus also gaining the allegiance of the Mbalu.[38] Even the Gqunukwhebe paid tribute to Ngqika. Other support came from autonomous Khoe groups and a motley band of Boer refugees led by Coenraad de Buys.[39] But Ngqika was not dependent on Buys. He had defeated Ndlambe without Buys' aid. He also refused to entertain the anti-British schemes of Buys' followers who

[32] *Ibid*., p. 51.
[33] *Ibid*., p. 51.
[34] NC Mhala, "Ukuvela kwamaNdlambe" in WG Bennie, *Imibengo* (Lovedale, 1935), in Peires *House of Phalo* p. 51.
[35] Peires *House of Phalo* p. 51.
[36] From then on, the king's Great Place would always be situated east of the Kei.
[37] Peires, *House of Phalo* p. 51.
[38] *Ibid*., p. 52.
[39] Buys or 'Khula' (the tall one) as he was known by the amaXhosa, became a strong ally of Ngqika, even living with Ngqika's mother. But a more substantial reason for this alliance was Buys' access to gunpowder.

wanted to invade the Cape Colony and install Buys as its king. Here he opted to listen to his arch-nemesis and uncle, Ndlambe.[40]

But Ngqika was not as strong as he thought he was. In February 1800, Ndlambe and his brothers shrewdly broke out of Ngqika's territories to join Ndlambe's brother, Mnyaluza and the rest of his earlier supporters west of the Fish. This became a watershed moment, opening the frontier up, drawing the Cape Colony into the mainstream of Xhosa politics.[41]

The Gqunukhwebe

By the 1780s, Chungwa and his father, Tshaka were firmly established in the area between the Fish and Sundays rivers.[42] They wanted nothing more than grazing for their cattle and peace for their people. To achieve this they were quite willing to purchase the land they were occupying, or to rent it from the Cape Colony on the same conditions as the Boers did.[43] The cattle were paid, but certain colonial officials took the payment without being able to give Tshaka anything in return. The Gqunukhwebe also offered to help the Boers against the San in the north.[44]

The Boers accepted the Gqunukwhebe's offer and employed many of them as herdsmen to protect the cattle from poaching. Others resorted to stealing themselves, herding their cattle into Boer pastures and trapping 'colonial' game for meat and skins. In retaliation, Boers started shooting and capturing Gqunukhwebe, even taking Chungwa himself prisoner and locking him inside a mill.[45] Periodic meetings between colonial authorities and Tshaka prevented war until Lindeque's disastrous commando of 1793 provoked the Gqunukhwebe and Mbalu to attack the Boers.[46] Ndlambe's rise

[40] Peires, *House of Phalo* p, p. 53.
[41] *Ibid*., p. 53.
[42] *Ibid*., p. 56. According to Ensign August Frederik Beutler, commander of a Dutch East India Company expedition through the Zuurveld, the Hoengeyqua Khoe were already firmly established there by 1752. The Hoengeyqua held this territory until the arrival of the Gqunukhwebe during the 1760s. A prolonged conflict between the two groups followed, resulting in the Hoengeyqua being driven out of the Zuurveld by the Gqunukhwebe. (See S Newton-King, Masters *and Servants on the Eastern Cape Frontier* (Cambridge, 1999) pp. 29-30.)
[43] B Mclennan, *A proper degree of terror: John Graham and the Cape's eastern frontier* (Johannesburg, 1986) p. 46.
[44] By this time, Ndlambe and Langa had also been very successful in taking many of the Boers' cattle.
[45] JS Marais, *Maynier and the First Boer Republic* (Cape Town, 1944) pp. 28-29.
[46] Peires *House of Phalo* p. 57.

to the east cut off Chungwa's retreat, trapping him. When the colonial authorities requested that he cross the Fish, Chungwa refused. Desperately clinging to his autonomy, he coerced the Mbalu chiefs into staying with him by seizing their cattle. In 1799, the British general, Vandeleur, attempted to drive Chungwa across the Fish once again, resulting in the Third War of Dispossession.[47] Chungwa was joined by rebel Khoe forces who feared that the British might abandon them to their former masters, the Boers. The combined forces were surprisingly successful, one group of 150 men defeating a British force approximately 300 strong near the Sundays River.

In October of that same year, Chungwa made peace with Acting Governor Dundas.[48] This allowed him to remain between the Bushmans and Sundays rivers, on condition that he did not interfere with the colonists in that area. This is what he had wanted all along, so he took special care to maintain the peace. When hostilities between Boer and Khoe flared up again in 1801, Chungwa did not join the other more opportunistic amaXhosa chiefs in attacks against the Boers. However, neutrality did not save him from being ordered once more to cross the Fish River together with other "more guilty" chiefs who were implicated in the hostilities.[49] Ngqika's ruthlessness to the east reinforced Chungwa's desire not to cross the river. Added to this, the ever present danger of Ndlambe drove him even further into the colony. Chungwa's dislike of Ndlambe not only originated out of Ndlambe's sarcasm towards the Gqunukhwebe leader after unsuccessfully trying to force him to join in his feud against Ngqika.[50] Ndlambe had also taken over vast tracts of Chungwa's grazing land along the Bushmans River.[51] Chungwa's people had always been familiar to the colonists, driving their herds from their winter pastures near the Bushmans to their summer pastures on the banks of the Sundays or even closer to the Zwartkops.[52]

Chungwa did his best to stay on good terms with the Landdrost of Uitenhage, Major John Glen Cuyler. He assured him that he only wished to live in peace "with the

[47] Maclennan *Proper degree of terror* pp. 46-47.
[48] Peires *House of Phalo* p. 57.
[49] H Lichtenstein, *Travels in Southern Africa in the Years 1803, 1804, 1805 and 1806 vol. 1*, Reprint edition (Cape Town, 1928) pp. 383-386 and Peires *House of Phalo* p. 57.
[50] Peires *House of Phalo* p. 57.
[51] Various records suggest that this was in fact part of the area which would later form part of the Salem commonage.
[52] Peires *House of Phalo* p. 57.

Dutchmen and the English".[53] However, Cuyler interpreted 'peace' differently to what Chungwa intended. Peace for Cuyler meant the complete withdrawal of the Gqunukwhebe across the Fish, which Chungwa never contemplated as it meant the forfeiture of his autonomy as well as his birth-right.[54]

Chungwa continued his seasonal movements through the Zuurveld, even sending Cuyler an ox as "payment for grass".[55] The ox was a gift recognising Cuyler's authority as well as a token of peace. Cuyler rejected it as a bribe. This insulted Chungwa greatly and made him even more resolute to remain on the land. The well-being of his cattle depended on the continuance of transhumance practices, so he and his people returned the following summer with the excuse that he needed to be near a white medical practitioner.[56] During the summer of 1811, he feigned moving early, but soon sent a message saying that he wanted to return as hyenas were attacking his cattle further east.[57] This would be his last excuse. The following summer Chungwa would be shot dead on his sickbed by British troops expelling his people from the Zuurveld.

"A proper degree of terror and respect" – 1811-12 expulsion of the amaXhosa from the Zuurveld

During Cuyler's time on the frontier, there had been sporadic cattle raids inside the colony carried out by amaXhosa, most coming from the imiDange, as well as the occasional killing of slaves or Khoe servants. But generally, the frontier had been so peaceable that Anders Stockenstrom, the Landdrost of Graaff-Reinet remarked in 1807 that "perfect tranquillity, good order and subordination now reigns in this part of the settlement".[58]

However, Ndlambe, Chungwa, Habana and the other independent chiefs of the Zuurveld were not the only amaXhosa west of the Fish. Many amaXhosa men and women were employed by the Boers, with as many as six to eight amaXhosa labourers

[53] Letter from Landdrost JG Cuyler to A Barnard, 26 September 1807, CO 2561.
[54] Peires *House of Phalo* p. 57.
[55] *Ibid*., p. 58.
[56] By this time Chungwa's health had deteriorated considerably. See Maclennan *Proper degree of terror* p. 61 and Peires *House of Phalo* p. 58.
[57] Letter from Landdrost JG Cuyler to Colonial Secretary, 8 January 1811, CO 2575.
[58] In Maclennan, *Proper degree of terror* p. 63.

being employed on a single farm.[59] They were generally paid in beads, brassware and brass plates, and sometimes in clothing. Sometimes they worked to earn cattle, but not always as the trinkets they earned enabled them to purchase cattle more cheaply in Xhosaland.

The governor of the Cape at the time, Du Pré Alexander, 2nd Earl of Caledon, sought to expel all amaXhosa out of the Cape in an attempt to close off the frontier.[60] He did so by re-introducing a set of regulations issued in 1797 which forbade the Boers from receiving amaXhosa labourers into their service at the risk of being fined five hundred rixdollars, also making provision to reward those who recaptured runaway Khoe and slaves.[61] These regulations were communicated to the frontier landdrosts during the course of April 1809. Khoe soldiers began the task of rounding up the amaXhosa labourers and by the end of that year, several thousand men, women and children had been driven across the Sundays River.[62] With these people being unceremoniously dumped in surroundings unfamiliar to them, it was inevitable that problems would arise. However, these 'problems' did not have their source in any campaign to avenge their dispossession, but rather in their attempts to provide food and sustenance for their destitute families. During the latter half of 1809, 935 cattle, fourteen horses and sixty five sheep were taken by the amaXhosa in seventy-seven different incidents. This was the most stock stolen in the Uitenhage District to date.[63]

Cuyler had already in July 1809 urged that "more forcible measures" be taken to "protect the unfortunate colonists".[64] He disagreed with what he regarded as Caledon's softly-softly approach to deal with the amaXhosa chiefs west of the Fish River:

> *The present outrageous conduct of the Kaffirs is what I stated would be the consequence of the present measures of government driving all the vagabond part of that nation who had secreted themselves in among the*

[59] *Ibid*., p. 63.
[60] N Mostert, *Frontiers: the epic of South Africa's creation and the tragedy of the Xhosa people* (London, 1992) pp. 359-361.
[61] Maclennan, *Proper degree of terror* pp. 59-60.
[62] *Ibid*., p. 60.
[63] *Ibid*., p. 63.
[64] *Letter J Cuyler to Colonial Secretary, 4 July 1809* CO 2566.

> *Boers, and together under the chiefs and then suffering them to remain within the colonial bounds thus giving them a right to our soil, and further we are not allowed to shoot them when discovered within the settled part of the colony and such timidity on our part will I much fear prove distructful [sic] to the settlement finally.*[65]

If it were up to Cuyler, he would have simply issued an ultimatum to Ndlambe and Chungwa to either move across the Fish or face the might of the British forces.

In August, Caledon was presented with a plan to carry out the "forcible measures" envisioned by Cuyler. The plan was drawn up by Lieutenant-Colonel Richard Collins, who had been entrusted with suppressing the so-called "system of predatory warfare" which was carried out by the amaXhosa on the frontier.[66] Collins was of the opinion that the only way for peace to be maintained on the eastern frontier was to force the amaXhosa to "withdraw to their own country" and ensure that "insurmountable obstacles" are put in place to ensure that they could never return to the colony.[67] Once the amaXhosa were driven across the Fish, Collins recommended that a buffer strip should be erected along the boundary to prevent raiding, with a European immigrant settlement being established all along the eastern boundary of the Zuurveld as a "formidable barrier". Finally, Collins suggested a drostdy to be established east of Uitenhage to police the eastern frontier.[68]

However, Caledon was not very receptive to the idea of total expulsion of the amaXhosa from the Zuurveld. He had already questioned whether the amaXhosa's claim to the Zuurveld might be better founded than that of the colonists.[69] In addition, Caledon also felt he could not commit such a large military force as recommended by Collins. The war against France had reduced the Cape Town garrison to half of what it was in 1806 and if any of these soldiers were sent to the frontier, the Cape would be defenceless.[70] He was also of the opinion that, financially, the colony could not afford

[65] *Letter: Cuyler to Colonial Secretary, 4 July 1809* CO2566.
[66] In Maclennan, *Proper degree of terror* pp. 64-65.
[67] Mostert, *Frontiers* pp. 372-373.
[68] Maclennan, *Proper degree of terror* p. 65.
[69] Mostert, *Frontiers* p. 373.
[70] Maclennan, *Proper degree of terror* p. 65.

a war, given the pressures from Britain to pay its own way. Finally, Caledon was not convinced that the situation on the eastern frontier was as bad as what Cuyler had described, calling the amaXhosa raids as "some trifling depredations" committed on an "occasional" basis.[71] He summoned Stockenström to Cape Town to discuss Collins' proposals, apparently expressing his doubts as to whether the colony had any right to the Zuurveld at all. It was a pivotal moment. For the first time, a governor of the Cape Colony expressly communicated his concerns over the Zuurveld being seen as part of the colony. In the end Caledon decided that he could not risk the expulsion of the amaXhosa from the Zuurveld "whatever justice there may be" in the colony's claims to it.[72] Caledon's rationale was that the colony should consolidate that territory which it already possessed and dedicate its military forces to the protection of its borders from foreign powers.

However, even though Caledon had dismissed Collins' plans, he still had to placate the demands of Cuyler and Stockenström. He decided to establish a strong military presence on the eastern boundary of the colony. In the first half of 1810 over five hundred soldiers were despatched to the eastern frontier.[73] Caledon made it clear that these troops were not deployed as a punitive measure against the amaXhosa, but rather to encourage the Boers to stay on their farms and to act as a deterrent against further theft. The governor's intention was to scare the amaXhosa into docility with such a massive show of force. In fact, it did quite the opposite. The deployment of soldiers into the area only served to increase tensions. The amaXhosa, understandably, understood this move as a prelude to war and reacted accordingly.[74]

Cattle raids were also becoming more brazen. Instead of rushing stolen stock across the Fish as had been normal practice, raiders were now keeping them at their own kraals, openly defying the colonists who wished to retrieve them. In November, a

[71] *Ibid*., p. 65.
[72] *Ibid*., p. 65.
[73] Mostert, *Frontiers* p. 375.
[74] On one occasion Cuyler was confronted by a force of amaXhosa warriors while returning to Uitenhage after showing a detachment of soldiers their post.[74] The landdrost was so unnerved that he rushed back to the post to demand a military escort. On another occasion Lieutenant Andrew Bogle of the Cape Regiment was near the Coega River when he and his party was met by a 'threatening' amaXhosa force, attempting to surround them and throwing insults at them, coaxing them into a fight. They shouted at him, warning that if he was here to fight, that they were ready and "they would fight until every man's throat was cut" before they would surrender the land. (See Maclennan, *Proper degree of terror* p. 66.)

commando of more than thirty men traced the tracks of fourteen head of stolen cattle to the homestead of one of Ndlambe's subordinate chiefs.[75] There the commando was confronted by heavily armed warriors, causing it to retreat.

Ndlambe himself was undoubtedly concerned about the rising tensions. But although he was anxious to maintain good relations with the colonists, that position became untenable after the arrival of the soldiers. Two years prior, he had tried to reassure Cuyler by telling him that "rogues who steal the Christians' cattle should be shot in the act" because then he could establish to which chief the thief belongs so that no one else could be blamed for the theft.[76] However Ndlambe had now become more withdrawn and indifferent to receiving colonial guests and gifts. In response to his apparent inaction to the retaliations of the Boers against cattle raiders, his people started to leave him and his orders were being ignored.[77]

For the Boers living on the frontier, life was undoubtedly hard. The constant threat of increased taxation coupled with the fear of amaXhosa raids plunged them into a collective feeling of suspicion. There was much justification for this fear. The Boers, but more often their servants, were vulnerable during such raids. However, it is hard to establish whether this fear of the amaXhosa was borne out of real aggression or the mere threat of attack.[78]

Occasionally the amaXhosa raiders would burn the homesteads of their Boer victims once they were vacated. This was a tactic they had supposedly learned from Boers

[75] Maclennan, *Proper degree of terror* pp. 66-67.
[76] In Maclennan, *Proper degree of terror* p. 67.
[77] Maclennan, *Proper degree of terror* p. 67.
[78] For example, in April 1810, virtually every farm east of Uitenhage was abandoned, with its inhabitants fleeing north to Graaff-Reinet in the face of advancing amaXhosa forces. A month later, Captain Evatt, writing from Bruintjies Hoogte, commented on the refusal by the Boers to return to their farms upon hearing accounts of raids committed on an 'hourly' basis. The Boers had decided to abandon their farms and stay away, despite his pleas to reconsider. There were undoubtedly farmers who were indeed facing so much hostility that they were forced to leave their farms, but as is evident in Stockentröm's communication to Caledon in August 1810, sometimes the farmers' fears were unfounded. The flight of the Zuurveld Boers had "obliged those of the nearer districts to remove also [sic]. Thus, those on Bruintjies Hoogte and beyond it, they do not move, as they untruly allege, because they must fly from the Kaffirs". He assured Caledon that though there were some farmers who genuinely did flee in the face of amaXhosa raids, there was no reason whatsoever to expect a fight. In the same communication Stockenström wrote to Caledon stating that no direct hostilities from the amaXhosa against the colonists had been recorded: "The Kaffirs alarm the inhabitants chiefly by indirect messages through individual Kaffirs, Ghona or Hottentots, that in the long nights they will attack the farmers…"

on commando who would burn the huts after raiding for cattle.[79] But in mid-1810, Stockenström and Cuyler felt so confident about the Boer's safety that they actually forbade them to leave their farms, unless they were willing to forfeit their leases. In fact, many Zuurveld Boers did leave the area, not because of amaXhosa aggression, but because of severe drought.[80] It forced many to move north to look for fresh pastures.

However, by the beginning of 1811, the raids were becoming more frequent as well as more aggressive. The troops that were sent to the frontier were there in a defensive capacity only and were thus confined to their posts, rendering them ineffective against the stealthy tactics of the raiders. Stockenström was dismayed at the lack of effectiveness of the soldiers, suggesting that the amaXhosa believed that they were there to actually keep the Boers in line.[81] The cattle raids extended as far west as the Gamtoos River Valley, fast spiralling out of control for the colonial authorities. In January 1810, one Boer on the Bushmans River, near to where the future site of Salem would be established, lost twenty-eight oxen in successive raids on the 7th, 20th and 29th, while the number of cattle stolen in the second quarter of the year rose to 1,077 head.[82]

On 8 March 1811, an elderly and highly respected Boer named Jan Davel was killed together with two of his servants in the Winterhoek field cornetcy.[83] The killers escaped across the Fish with one hundred and twenty head of cattle. On 8 May, two brothers, Petrus and Frans Slabbert were killed in the Swartruggens District. On 23 June, raiding amaXhosa killed a young man at a farm near Van Aardt's Post on the Fish. He was herding cattle when the raiders attacked. His father found his body the next day. Captain Abiathar Hawkes of the 21st Light Dragoons, who was at the scene, wrote to Cuyler and pleaded with him that unless some "decisive and hostile measures" be taken, that the situation would only worsen over time.[84]

[79] Peires, *House of Phalo* pp. 141-142.
[80] Maclennan, *Proper degree of terror* p. 70.
[81] Maclennan, *Proper degree of terror* p. 70.
[82] *Ibid.*, pp. 70-71.
[83] In Maclennan, *Proper degree of terror* p. 70.
[84] In Maclennan, *Proper degree of terror* p. 71.

The irony is that although the young Boer was indeed killed by amaXhosa raiders, the killers of Davel and the Slabbert brothers were in fact a band of mixed Khoe and amaXhosa, under a chief named Gretta and a Khoe leader named Dirk Trompetter. They subsequently sought refuge east of the Fish, in Ngqika's territory. The killers of the young Boer did the same thing.[85]

It seems Cuyler was aware of all of this. Yet he still used these murders to prove to Caledon why the Zuurveld amaXhosa needed to be expelled:

> *When these marauders will cease God only knows. It is now I believe some years since I humbly proposed to your Lordship to be allowed to show a force of seven hundred or eight hundred inhabitants in front of these intruders' kraals, desiring them to remove over the Great Fish River, and if they did not instantly comply, to drive their cattle over before them, when I am almost convinced the Kaffirs would follow without the necessity of firing a shot.*[86]

Cuyler also wrote to the Deputy Colonial Secretary urging the Cape government to reconsider his previous proposal "of showing a sufficient force for the purpose of driving the Kaffirs in awe". At the same time, Stockenström was ordering a general mobilisation of all Boers in his district. He moved soldiers from Camdebo and Voor Sneeuberg to the exposed Zwagershoek area, instructed the field-cornet of Tarka to institute patrols and asked government for more troops. Caledon buckled under the increasing pressure from Cuyler and Stockenström and, unbeknownst to the two landdrosts, he actually authorised the commando they had been demanding while they gathered their men.[87] Collins' and Cuyler's plan was coming to fruition.

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[85] Maclennan, *Proper degree of terror* p. 71.

[86] In Maclennan, *Proper degree of terror* pp. 71-72

[87] Mostert, *Frontiers* p. 375. The commando was to consist of frontier farmers, with reinforcements from Swellendam, Tulbagh and George, all under Cuyler's command and backed by regular soldiers. On Caledon's orders the force was to march to the spot where it was thought that the amaXhosa within the colony are "most numerous". They would then demand the surrender of the murderers of Davel and the Slabberts, the return of all stolen cattle, and the retreat of all amaXhosa across the Fish River. If these demands were not met, the amaXhosa were to be driven out of the colony. If any chief acted with hostility, that chief would be taken prisoner. But Caledon's orders expressly forbade the use of violence unless the amaXhosa commenced an attack. "My purpose" he said, "is to prevent, not to occasion, a state of war."

Caledon wrote his instructions authorising the commando on 22 June, 1811.[88] But they never made it to Cuyler or Stockenström. A feud between Caledon and the Lieutenant-Governor, George Grey, had erupted over the jurisdictions of the military and civil authority on the colony. There had been disagreement when Caledon asserted that he as Governor of the Cape had the right to retain troops at the Cape, while Grey, as commander of the military forces in the colony, believed he could send them off at will. The dispute eventually resulted in Caledon tendering his resignation at the start of 1811.[89]

Grey took over as Acting Governor and got ready for war.[90] But he too never really envisaged the complete expulsion of the Zuurveld amaXhosa. Rather, his intention was to specifically target "a set of wandering vagabonds and marauders".[91] He told Cuyler to make the Zuurveld amaXhosa understand that the colony did not attribute to the amaXhosa, as a people, the acts of "straggling robbers and murderers".[92]
Roughly a month later Cuyler, Stockenström and Lyster met at Riet River, just north of the Zuurberg.[93] They decided that a commando of about six hundred burghers, in three divisions, should perform the actual operation, working its way through the territory inhabited by amaXhosa and then uniting at a central point. The regular soldiers should be deployed along a line of posts from the Baviaans to the Fish in the north and at individual farms in the south, in order to cover the rear of the commando and trap any amaXhosa who might have slipped past the commando. They also proposed that an attempt should be made to take Ndlambe hostage and to hold him until all amaXhosa had been "driven beyond the boundaries, after which we should propose of his being delivered over to Ngqika to be dealt with as Ngqika may think proper".[94] Ngqika was to be informed beforehand of the campaign as "he will no doubt do his best to prevent all the Kaffirs belonging to the Kraals near him from going to the

[88] Mostert, *Frontiers* p. 375.
[89] Caledon subsequently left the Cape on 4 July 1811.
[90] Maclennan, *Proper degree of terror* p. 74.
[91] Mostert, *Frontiers* p. 376 and Maclennan, *Proper degree of terror* p. 74.
[92] In Maclennan, *Proper degree of terror* p. 74.
[93] Giliomee, "The Eastern Frontier" in Elphick and Giliomee (editors), *Shaping of South African Society* pp. 422-423 and Maclennan, *Proper degree of terror* p. 75.
[94] In Mostert, *Frontiers* p. 376.

aid of the Zuurveld Kaffirs". The Cape Government would then acknowledge Ngqika "as the only chief" of the amaXhosa.[95]

Cuyler, Stockenström and Lyster assured Grey that no amaXhosa "shall be shot than will be found absolutely requisite to the attainment of the desired end of exterminating them from the Zuurveld and driving them back into their own country". They then gleefully agreed that "[i]t is absolutely necessary that some few examples should be made of such as prove themselves the worst, and most ready to oppose us".[96] This letter was written on 23 August and addressed to Grey, but he never had the chance to reply to it. On 6 September he handed over governorship to the newly appointed Governor of the Cape: Lieutenant-General Sir John Francis Cradock.[97]

Cradock arrived at the Cape on 5 September and took the oath of office the next morning, not only as Governor of the Cape Colony, but as commander of its forces as well, making him, unlike Caledon, the supreme civil and military authority at the Cape. In his commission as governor, Cradock was also granted full power by the King to employ "all persons whatever residing within the settlement as occasion shall serve to march them from one place to another for the resisting and withstanding of all enemies, pirates, and rebels both at land and at sea…to vanquish, apprehend and take them".

Back on the frontier, Cuyler was waiting anxiously for the go-ahead for his operation. By 6 October 1811 he had still not received any reply from Cape Town to the Riet River proposals. Thinking they had been lost in the post he sent duplicate copies of the proposals as well as an impatient letter to Cape Town:

> *The suspense in which we have been kept in not receiving an answer to this letter is of great moment; should the commando ordered by the late Governor, General Grey, be intended to be followed up by His Excellency*

[95] Mostert, *Frontiers* p. 376.
[96] Maclennan, *Proper degree of terror* pp. 75-76.
[97] Giliomee, "The Eastern Frontier" in Elphick and Giliomee (editors), *Shaping of South African Society* p. 448. Cradock was a strong-willed, dogmatic and ambitious imperialist who was accustomed to command. Before his appointment at the Cape, he had seen service in two military campaigns in the West Indies, been severely wounded in Ireland, had fought in Egypt, had commanded troops in Portugal as well as the Madras garrison in India.

> *Sir John Cradock, I most humbly beg leave to observe that the season best calculated for carrying the same into effect is now so nearly approached as scarcely to allow the requisite time for summoning inhabitants from the distant districts, so as their absence can be spared from their homes without the greatest injury to the approaching harvest.*[98]

It seemed that Cuyler's 'suspense' was unfounded as Cradock had by then already accepted the expulsion plan as proposed by his landdrosts. His final approval was only delayed in order to search for a man who had the right blend of "military skill, organisational ability, and sympathy for the vision of Cradock himself" to command such an operation.[99] When Cuyler was writing his letter, Cradock had already found such a man in lieutenant-colonel John Graham.

The appointment of Graham as Commissioner for the frontier was made official on 30 September 1811, one of Cradock's first official acts as governor. In his instructions to Graham, Cradock justified the expulsion of the Zuurveld amaXhosa as 'necessary' in the face of "repeated aggressions" by the amaXhosa who, he said "have made such continual inroads into our territories, and have to a great extent, after outrages of the most atrocious kind, banished the peaceable inhabitants from their dwellings and property."[100] He then went on to say that the previous "measure of passive conciliation and tolerance have proved ineffectual", an obvious underhanded reference to the failed policies of his predecessor, Caledon.

Once they had been expelled, Graham was to close the frontier, allowing only authorised persons to cross the Fish. Cradock also made it clear to Graham that it was expected that the "greatest mildness and temper from every person under your command" was to be displayed". He asked Graham to exercise restraint during the course of the operation and only use force after "explanation and persuasion" has been used to the "utmost extent".[101] But, almost paradoxically, Cradock reveals his

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[98] In Maclennan, *Proper degree of terror* p. 77 and Giliomee, "The Eastern Frontier" in Elphick and Giliomee (editors), *Shaping of South African Society* p. 448.
[99] *Letter: J Cradock to J Graham, 6 October 1811* in GM Theal (editor), *Records of the Cape Colony* vol. VIII Reprint (Cape Town, 1964) pp. 160-162.
[100] *Letter: Cradock to Graham, 6 October 1811* in Theal (editor), *Records* vol. VIII p. 160.
[101] *Ibid*., p. 161.

true intentions when he writes to Graham in the same letter that in the event of the capture of any amaXhosa, that it is "within your (Graham's) discretion to retain them in your custody till you can receive further instruction; but if all intermediate steps are taken that they have already been inculcated, I am free to declare I do not foresee the grounds upon which a distinction can be formed, and that the last extremity is justified by the principles of self-preservation…"[102] Cradock had given Graham discretion to execute prisoners if he thought it necessary.

Graham arrived in Uitenhage in mid-October and immediately set up his headquarters there. It would be two months after his arrival that the campaign would get underway. But Graham saw the delay as an advantage. By mid-December, the amaXhosa corn would be ready for harvest. In Graham's mind, this was an opportunity to hold the Zuurveld amaXhosa to ransom using hunger as a weapon: "We chose the season of the corn being on the ground in order that if the Kaffirs would not keep their promise of going away that we might severely punish them for their crimes by destroying it…"[103] If they were not going to leave willingly, Graham was determined to use scorched-earth tactics to starve them into submission.
By mid-December the corn began to ripen and the Zuurveld amaXhosa were preparing for the season's festivities. On 20 December, the last detachment of burghers joined the commando west of the Sundays River. On 25 December, Christmas Day, Graham's forces entered the Zuurveld.[104]

[102] Maclennan, *Proper degree of terror* p. 80 and *Letter: Cradock to Graham, 6 October 1811* in GM Theal (editor), *Records* vol. VIII p. 161.
[103] Mostert, *Frontiers* p. 380 and *Letter: J Graham's answer to Gaika (undated)* in Theal (editor), *Records of the Cape Colony* vol. XXI Reprint (Cape Town, 1964) p. 350.
[104] Maclennan, *Proper degree of terror* p. 98.

ILLUSTRATION 2. 1: Painting depicting British soldiers entering the Zuurveld, artist unknown

(Credit: SAHistory)

Upon hearing of the colonial forces crossing the Sundays, Ndlambe deliberately marched his force from his Great Place on the banks of the Bushmans River some fifty kilometres to the east to meet them in the dense Addo bush.[105] Ndlambe hoped that if he could meet the commando in the bush, he would be able to utilise the only advantage he had over the colonists. The proximity of the bush to their homesteads and their familiarity with the game paths gave them refuge and mobility through the thickets.

The commando seemed to find the bush difficult before they even entered it, as Cuyler would discover when he pushed his advance across the Sundays River. His force were still crossing the river when they were met by three spears flying through the air from behind the bush from the opposite bank, one of which finding its mark and wounding a Boer.[106] Despite efforts to locate the throwers, the amaXhosa had long disappeared into the bush.

Cuyler continued on and marched towards Chungwa's Great Place eleven kilometres away. Once there he found the Gqunukhwebe warriors in battledress,

[105] Peires, *House of Phalo* pp. 137 and 142-143.
[106] In Maclennan, *Proper degree of terror* p. 100 and Mostert, *Frontiers* p. 381.

but Chungwa was sick and confined to his sleeping mat, unable to meet him.[107] One of Chungwa's representative communicated to Cuyler a message from the Chungwa which Cuyler interpreted as his 'inclination' to accept Cuyler's 'advice' of "quietly retiring to his own country". Cuyler gave the sickly Gqunukhwebe chief until the following day to contemplate his situation.

Meanwhile, Ndlambe's men were heading towards Chungwa's location. Late on 26 December, the amaXhosa began to outflank Cuyler's force. Cuyler and a detachment of twenty-five men rode to within shouting distance of the main body of the amaXhosa advance. There Cuyler recognised Ndlambe and, through an interpreter warned him to "gather his herds" and leave the Zuurveld. Ndlambe replied by calling out: "Here is no honey; I will eat honey, and to procure it shall cross the rivers Sundays, Coega and Swartkops. This country is mine! I won it in war, and shall keep it!"[108] He then brandished his spear, signalling the two hundred and fifty warriors behind him to rush towards Cuyler and his small band of men.[109] Cuyler retreated swiftly.

Graham, upon receiving this news realised that Cuyler and his force were most probably facing a united amaXhosa force under Ndlambe's control. He believed that if Ndlambe was driven out, then the rest would follow, so he decided to concentrate his forces for an attack against the old chief. Graham gave orders for two companies of soldiers from the Cape Regiment to leave their position at Bruintjies Hoogte and join Stockenström's force that was moving south.[110] The whole force was to cross the Zuurberg and meet Graham on the southern side of the mountain range before engaging with the amaXhosa in the Addo bush. Stockenström, however, was cautious about this new order. He felt that it would expose Bruintjies Hoogte and Graaff-Reinet. He intended to cross the Zuurberg, accompanied only by an escort, to discuss the matter with Graham.

[107] Mostert, *Frontiers* p. 381 and Peires, *House of Phalo* p. 58.
[108] Mostert, *Frontiers* p. 382.
[109] In Maclennan, *Proper degree of terror* p. 101.
[110] Maclennan, *Proper degree of terror* pp. 101-102 and Mostert *Frontiers* p. 383.

The night before Stockenstrom's departure, some of the elder Boers in the camp sitting around the fire spoke with some displeasure at how the colonial forces were not entirely correct in expelling the amaXhosa from the Zuurveld. A few of them firmly maintained that the amaXhosa had purchased the Zuurveld from the Dutch authorities, with some of them swearing oaths that they had seen at least some of the "eight hundred oxen which had been received in the payment".[111] There were others of course who vehemently denied these 'tales'.

This was not the first time that the issue of right to land had been raised by the colonists. Apart from Caledon's reservations earlier that year, Lieutenant-Colonel Collins had remarked in 1810 that there was concern among Zuurveld farmers about Chungwa's alleged delivery of cattle to the former landdrost of Graaff-Reinet, Moritz Hermann Otto Woeke.[112] Collins had heard that the amaXhosa strongly insisted that such a transaction had taken place, but Collins did not believe it himself. Ndlambe told Stockenström's son, Andries, a similar story when the latter came to warn him that he would have to retreat to across the Fish. Andries noted that Ndlambe voiced "great annoyance at being so repeatedly disturbed in the peaceful possession of land, which he again protested he had purchased and paid for".[113] He told Andries that it had cost him "eight hundred oxen", as the Boers around the campfire had alleged. He also went into great detail in describing the oxen's colour and the shape of their horns.[114]

However, Stockenström senior was not willing to believe Ndlambe's claims. Instead he told the Boers around the campfire that should they have any doubts about who claimed what, that they were then to use restraint to avoid bloodshed.[115] The next morning the elderly landdrost rode out with his escort of forty horsemen. It would be the last time Andries would see his father alive.

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[111] A Stockenström, *The Autobiography of the late Sir Andries Stokenström* vol. I edited by CW Hutton (Cape Town, 1964) p. 58.

[112] Maclennan, *Proper degree of terror* p. 103.

[113] Stockenström, *Autobiography* p. 58.

[114] It should be noted that the only European account of such claims seems to come from Andries Stockenstrom in his autobiography. Peires writes about Chungwa being given permission by Acting Governor Dundas in October 1799 (see *House of Phalo* p. 57) to remain between the Bushmans and Fish Rivers. But of Ndlambe's claims to the land there seems to be very little evidence. See Maclennan, *A proper degree of terror* p. 102.

[115] Maclennan, *Proper degree of terror* p. 103.

Stockenström senior and his men were a few kilometres from Graham's position when he and his men spotted imiDange warriors as well as several Khoe.[116] He decided to ride out to the hostile amaXhosa in a form of parley, despite the strong reservations from the rest of his escort. He sought to persuade the amaXhosa to leave the Zuurveld peacefully. The imiDange and Khoe, for their part, gathered around him deciding to listen to what he had to say. The discussion that followed seemed to ease the tension. The Boers dismounted from their saddles and started to mix with the imiDange. Some imiDange who had been hiding in the bush, broke cover to interact with Stockenström and his men. Sitting under a tree, Stockenström was relaxed and apparently confident enough to share a pipe with some of the chiefs.[117] While discussions were underway, an amaXhosa messenger arrived with news that the colonial forces had crossed the Sundays with reports that blood had been shed. The information was relayed to the chiefs who were observing the conference from hidden positions in the bush. They decided, for whatever reason, that Stockenström had to die. Consequently, he was handed a bowl of milk by one of the Khoe who went on to stand behind him. As Stockenström lifted the bowl to drink, the Khoe raised his spear and drove it into his back.[118] This was apparently a sign for the hidden amaXhosa to attack the shocked colonists from all sides.

Those in Stockenström's party who remained at a distance during the conference, decided to retreat and headed for Graham's camp. One of them, a San servant, rushed back towards the Stockenström's main force.[119] He reported to Andries Stockenström and the rest of the Graaff-Reinet commando that the whole party had been slain and that the amaXhosa were mustering a "great force" to attack their camp.[120] The younger Stockenström gathered some men and hurried off to try find any survivors. They arrived at the scene to find some amaXhosa with captured Boer horses and guns. The Boers opened fire and killed a few warriors before they were forced to retreat back to camp.

[116] Mostert, *Frontiers* p. 384.
[117] Maclennan, *Proper degree of terror* p. 104.
[118] *Ibid*. p. 105.
[119] Mostert, *Frontiers* p. 384.
[120] Maclennan, *Proper degree of terror* p. 106.

On 30 December, a detachment of one hundred Boers crossed the Zuurberg on Graham's orders to bring the remainder of the Graaf-Reniet commando to Graham's camp.[121] The Boers were attacked numerous times on their way through the kloofs and hills of the northern Zuurveld. They fought back and killed a few amaXhosa before making it to the young Stockenström's camp. The next day they made their way first to the scene of Anders Stockenström's murder. They paused there to bury their slain comrades in a single grave.

The immediate reaction of the colonial authorities to the massacre of Stockenström and his men was one of "outrage and anger". Newspaper articles set the mood, relating how a "horde of Kaffirs, divested of every good principle of human nature, and solely instigated by a savage thirst of blood" had murdered such a "brave and virtuous magistrate".[122] The scene was set for retribution and violence on an unimagined scale. Cradock, writing to Graham encouraged him to show Ndlambe and the rest of the amaXhosa "that we have the power of punishing treachery and cruelty".[123]

By the end of December, the colonial forces were swarming inside the Zuurveld and the amaXhosa were prepared to face a heavy assault. They were used to the firearms of the colonists and previous wars served as precedent of how wars were to be fought and decided: if the enemy was weak then they would be beaten.[124] If they were strong then they would conquer. The amaXhosa understood and accepted this age-old diktat, whether they were on the side of the victor or the vanquished. However, what they had not been prepared for was the total brutality of what was to follow.

[121] *Ibid*., p. 108.
[122] In Maclennan, *Proper degree of terror* p. 109.
[123] In Maclennan, *Proper degree of terror* p. 109.
[124] See Peires, *House of Phalo* pp. 135-140.

ILLUSTRATION 2.2: "Attack on Stocks Kraall in the Fish River Bush", Thomas Baines

(Credit: Fine Art America)

On New Year's Day 1812, Graham marched his force of eight hundred Boers and soldiers towards the edge of dense bush where Ndlambe and Chungwa had sought refuge, ten miles northeast of the Sundays River mouth.[125] Cuyler and his force was still busy engaging the amaXhosa in the area while Graham was making his way there. Graham's intention was to attack the amaXhosa with such ferocity that he hoped it would "leave a lasting impression on their memories…"[126] He ordered five hundred men to enter the bush and stay there "so long as a Kaffir remains alive".[127] On 3 January, the force entered the bush and spent four days clearing it. The operation was not the success Graham had hoped for as he had underestimated the complications of fighting in the dense bush. He was disappointed with only having killed about a dozen amaXhosa. However, Graham's disappointment would be short-lived. On the first day of the operation colonial forces approached

[125] Mostert, *Frontiers* p. 386.
[126] *Letter: J Graham (no addressee), 2 January 1812* in Theal, *RCC* vol. VIII p. 237.
[127] Graham's orders were to shoot any amaXhosa men, but his adjutant, Robert Hart recorded that the amaXhosa were hunted down and shot indiscriminately, women as well as men, wherever they were found and whether or not they offered any resistance. He did qualify though by saying that the women were killed unintentionally, because the Boers could not distinguish them from the men. So to be on the safe side they shot anything that moved. See Maclennan, *Proper degree of terror* p. 113 and Mostert *Frontiers* p. 387.

Chungwa's Great Place.[128] In a bid to escape, a group of Chungwa's cohorts lifted the sickly Gqunukwhebe chief from his sickbed and carried him off. A group of Boers followed their spoor and tracked them down while they were sleeping. The Boers mercilessly opened fire on the party, killing them all, including chief Chungwa. The colonists lost only one man during this particular operation.[129]

The following week Graham sent some of his men back into the same bush to search and destroy the amaXhosa while other detachments set about cutting off their food supply. The colonists methodically seized the livestock and ravaged the amaXhosa gardens, burning and trampling any crops they could not carry off. [130]

Graham would justify these atrocities by putting the blame squarely on the shoulders of the amaXhosa: "Deeply as I regret the necessity of destroying so many of the savages, it is highly satisfactory to reflect that on every occasion they have listened to the friendly proposals made to them merely with a view to deceive, and in every instance committed the first act of hostility."[131]

Graham was confident that now that a chief was dead and their food source was all but destroyed, the amaXhosa in the Zuurveld would retreat 'undisturbed'. His confidence was justified. Within a few days the Addo bush had been cleared with the exception of a few 'stragglers'.[132]

Graham now turned his attention to capture or kill Ndlambe, but by then Ndlambe had already retreated. Hearing what had happened to Chungwa, the Xhosa leader decided to leave, despite his subordinates urging him on to stay and fight. Ndlambe's rationale was that he feared for the safety of what people and herds he had left and thought it better to withdraw to fight another day. While the colonists were lumbering through the thick bush surrounding the upper reaches of the Bushmans River looking for any more 'stragglers', a mass exodus of amaXhosa men, women and children took place across the Zuurveld and did not stop until they crossed the Fish. The people of the

[128] Mostert, *Frontiers* p. 386.
[129] Maclennan, *Proper degree of terror* p. 113.
[130] *Ibid*., p. 113.
[131] In Maclennan, *Proper degree of terror* p. 113.
[132] Maclennan, *Proper degree of terror* p. 114.

Gqunukhwebe, the imiDange and the Mbalu all followed Ndlambe. Those who were too sick, old and crippled to make the gruelling trek were left behind to hide from the approaching commando. As a result many of them died of hunger or were eaten by carnivorous wildlife.[133]

Upon hearing of Ndlambe's escape, Graham sent a detachment of horsemen to pursue him. The detachment followed the amaXhosa's spoor up until the Kowie and then gave up the chase. Even though Ndlambe had outsmarted Graham in this instance, the overall mission had been completed. Virtually all of the Zuurveld amaXhosa had been eradicated from the Zuurveld.

Cradock, of course, was absolutely delighted with Graham's performance. On 18 January he congratulated Graham on carrying out a successful operation which fit in "altogether with the intentions of Government…"[134] However, back in London, the Secretary of State for the Colonies, Robert Jenkinson 2nd Earl of Liverpool, did not share Cradock's sentiments. He had received Cradock's letter informing him of the commencement of the expulsion and replied on 20 December 1811. In it he agreed that there should be a "distinct boundary" on the eastern frontier of the Cape colony, but disagreed that force should be the only way to achieve it:

> *It must be quite unnecessary for me to point out the impolicy of a systematic warfare with the Kaffir nation, and I am convinced that the general interests of the settlement would be better promoted by taking measures of precaution against the marauders and repelling their intrusions when made than by resorting to general and offensive hostilities…*[135]

Liverpool's reply only reached Cradock in mid-January when Ndlambe had already crossed the Fish.[136] Cradock responded by assuring the Secretary that the objective of the expulsion was nothing other than securing undisturbed possession of land of "His Majesty's subjects".[137]

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[133] *Ibid*. ,p. 114.
[134] *Ibid*., p. 116.
[135] In Mostert, *Frontiers* p. 392.
[136] Maclennan, *Proper degree of terror* p. 116.
[137] Mostert, *Frontiers* p. 392 and Maclennan, *Proper degree of terror* p. 117.

Meanwhile, the operation was entering its final stages. Even though most of the amaXhosa had been driven out with Ndlambe, there were still 'stragglers', while Habana, Xasa, Galata and Gita had retreated into the Zuurberg mountains. Graham turned his attention first towards the stragglers, sending a combined force under Cuyler, Fraser and the younger Stockenström to scour the bush all along the Bushmans River, from north to south.[138] The right flank under Cuyler covered the western bank of the Bushmans, while the centre division marched down the eastern banks and Stockentröm's eastern flank hunted for their amaXhosa prey in the thick bush adjacent to the Kariega, Kowie and Fish. None of the divisions met any resistance. While this was taking place, other divisions were continuing with scorched earth operations to discourage the amaXhosa from returning. Graham's adjutant, Robert Hart recorded some of the atrocities committed by these divisions in his diary. On 19 January he recounted about a party of three hundred men who went out on a routine expedition to destroy gardens and set fire to huts. While passing through a kraal, one of the detachments came across some amaXhosa taking refuge inside. The men shot and killed three and wounded several more, while rounding up three women and four children as 'prisoners'.[139]

On 14 February, the entire force returned to its base in triumph. It had accomplished its mission so well that Graham wrote with delight "that hardly a Kaffir man remains".[140] Hundreds of women and children had been taken prisoner during the entire campaign. More than six hundred head of cattle were captured and all of the Zuurveld amaXhosa crops had been "effectually destroyed". Less than two and a half months after the commencement of the operation, some twenty thousand men, women and children had been forcefully driven from their homes, leaving the Zuurveld virtually devoid of any black African inhabitants.[141] The Fourth War of Dispossession or Fourth Frontier War as it is called today are misleading terms for something that resembled a hunting expedition, rather than a 'war'.

[138] Maclennan, *Proper degree of terror* p. 118 and Mostert, *Frontiers* p. 389.
[139] In Maclennan, *Proper degree of terror* p. 119 and Mostert, *Frontiers* pp. 388 -389.
[140] *Letter: J Graham to J Alexander 30 November 1812* Cape Archives CO 2582.
[141] There were in fact still reports of amaXhosa people in the area. As late as May 1812, a Graaf-Reniet field commandant came upon and captured a community of fifty-nine men, women and children who had been 'overlooked' during the expulsion. However, it suffices to say that an ethnic cleansing of the Zuurveld had taken place.

On 26 February, Graham proudly proclaimed to Cradock in a letter that the "total expulsion of the Kaffir tribes from His Majesty's territories" had been achieved.[142] It was with a sense of relish that Cradock could report to Liverpool on 7 March that "in the course of this service there has not been shed more Kaffir blood than would seem to be necessary to impress on the minds of these savages a proper degree of terror and respect".[143]

For most Zuurveld amaXhosa, crossing the Fish River did not mean an end to their misery. With the onset of winter and no cattle or corn, they were facing starvation. Cradock had authorised Graham to restore the captured cattle and corn to the amaXhosa as an incentive to "settle quietly" and remain east of the Fish. However this was left entirely to Graham's discretion. He did arrange for the amaXhosa to be supplied with seed corn, but this was not the corn his forces had seized from them during the expulsion. That corn had been distributed among the Boers and the troops or was given to the Bethelsdorp mission station.[144] As none was left to return to the amaXhosa, corn had to be specially purchased by the government, inevitably causing delay and more suffering for the desperate amaXhosa.

With regard to the return of cattle, Graham made it known that if the amaXhosa kept to their end of the bargain of staying east of the Fish, the cattle would be restored. However some of the cattle were given to Boers who had been victims of cattle-raids.[145] Other herds were distributed to military barracks along the frontier. Only after receiving reports of widespread hunger happening across the Fish did Graham send five hundred head of cattle into Xhosaland.[146] But this took place approximately six months after the last of the amaXhosa were expelled from the Zuurveld. To add insult to injury, the cattle were not sent to Ndlambe, but rather to Ngqika who was requested to "distribute them amongst those he considered more deserving".[147] Another five hundred head of cattle which had not been claimed by anyone were sold to supplement the coffers of the Uitenhage district, instead of the amaXhosa who needed

[142] In Maclennan, *Proper degree of terror* p. 128.
[143] *Letter: Cradock to Liverpool 7 March 1812* in Theal, *RCC* vol. VIII, p. 354.
[144] Maclennan, *Proper degree of terror* pp. 126-127.
[145] *Ibid*., p. 127.
[146] *Ibid*., p. 127.
[147] In Maclennan, *Proper degree of terror* p. 127.

them more. The remaining five or six hundred head of cattle were held until December as an insurance policy against any amaXhosa raids.[148] These were subsequently sold by public auction. Whether or not these delays were punitive in nature seemed to be irrelevant to Ndlambe's followers who were now landless and starving.

The expulsion failed to instil any sort of order on the frontier, especially because it drove the Zuurveld amaXhosa, including those under Ndlambe, towards Ngqika.[149] This only exacerbated relations between the two chiefs. After the expulsion, government policy remained based on the fabricated premise that the amaXhosa were, by their very nature 'greedy' cattle thieves. They were apparently filled with a fundamental "spirit of depredation [and] thirst for plunder and other savage passions".[150] Thus, there was already the belief in racially-defined behavioural characteristics that would later be classified as scientific racism.[151] Correspondingly, frontier policy was geared towards safeguarding the emerging colonial order from the newly eliminated amaXhosa threat: "It should be our invariable object to establish the separation from them, as intercourse can never subsist to the advantage of one party, or the other".[152] As far as officials were concerned, at this stage there was certainly no scheme for the domination of the amaXhosa; merely their being kept at arm's length. Within the sealed boundaries of the colony, Cradock's scheme of "progressive civilization [and] agricultural improvement" would be protected and nurtured.[153]

The prevailing official strategy was to keep the amaXhosa separated, but despite the cleansing campaign, attempts to keep the amaXhosa east of the Fish had failed.[154] Cattle raiding continued unchecked on the frontier. Lord Charles Somerset, replacing Cradock as governor in 1814, proposed some modifications. His plan consisted of a two-pronged approach. On the one hand he intended protecting the colonial border, consolidating it as the barrier against amaXhosa 'savagery'.[155] But on the other hand,

[148] Maclennan, *Proper degree of terror* p. 127.
[149] Peires, *House of Phalo* pp. 60-61.
[150] A Lester, "The margins of order: strategies of segregation on the eastern Cape frontier, 1806-c. 1850", *Journal of Southern African Studies* 23, 4, 1997, 635-653, p. 641.
[151] Mostert, *Frontiers* p. 390.
[152] Government Proclamation 21 August 1810 in Lester, "Margins of order", *Journal* p. 641.
[153] Lester, "Margins of order", *Journal* p. 641.
[154] *Letter: Somerset to Bathurst* 24 April 1817, CA, GH 23/5.
[155] Lester, "Margins of order", *Journal* p. 642.

in the wake of the expulsion, Somerset hoped that the amaXhosa on the frontier might agree to long term cultural incorporation into the colony.[156] This was significant. As Lester explains, for the first time in official discourse, colonial authorities had the intention to protect and consolidate the colonial order not only by sealing off its margins from amaXhosa attack, but also by neutralising the amaXhosa 'otherness' which was threatening that order.[157] Somerset held:

> *So long as the habits of savages remain unbroken the colony will... be exposed to the changes incident to the fickleness of that character... That the most beneficial result may be expected in due time from [an] attempt at Xhosa civilization, I do not permit myself to doubt, but... this system is not solely to be trusted... it is essential that it should be supported by that prudential strength which shall tend to overawe the restlessness of our hostile and wily neighbours.*[158]

It was thought that a more effective strategy of closing off the frontier would be achieved through a denser colonial settlement of the Zuurveld, abutting the Fish River. It would be filled with what Somerset called “men superior beyond comparison to those savages who have plundered so grievously and rendered their abode there irksome and unprofitable”.[159]

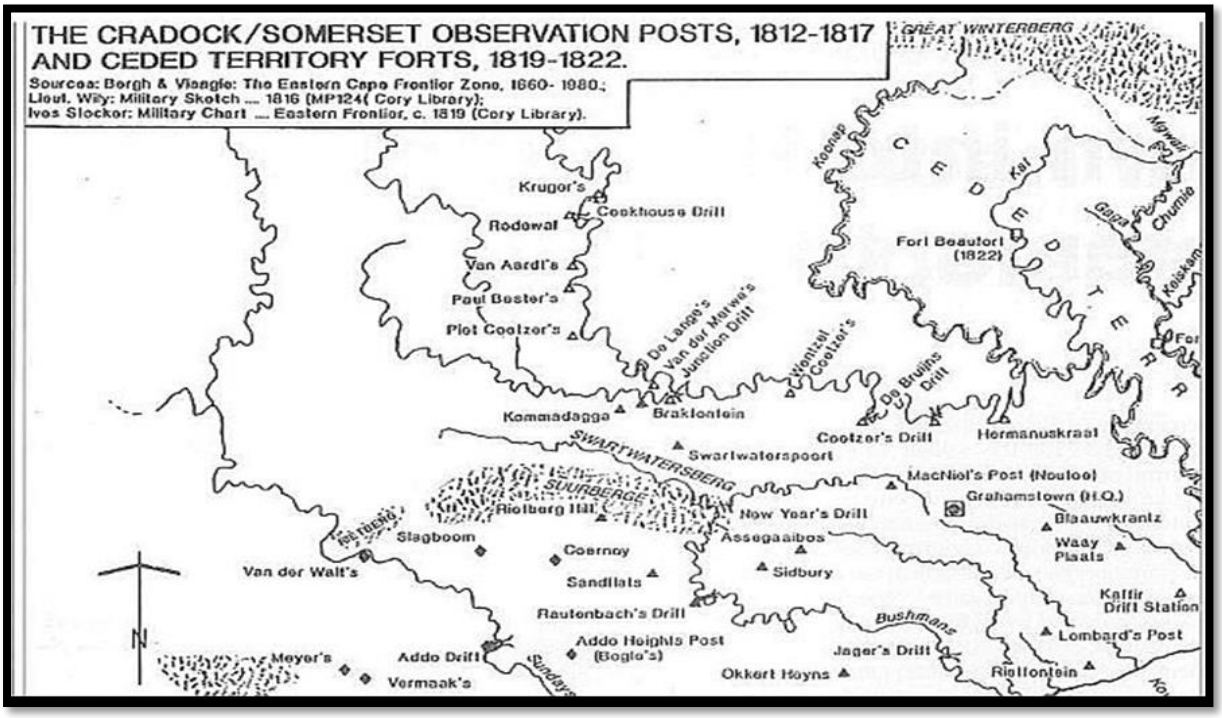
In order to attract such “superior men” to settle on the frontier, the governor attempted to create the notion that the amaXhosa had become more ‘docile’ neighbours after 1812. This was to be achieved, again, by two approaches: First, missionaries were permitted to introduce Cradock’s “agriculture and civilization” to frontier chiefs.[160] Secondly, Ngqika as paramount chief and ally of the Colony, was to be accorded a special status in return for dealing decisively with further amaXhosa 'outrages' against the colonists. As a result, Somerset gave Ngqika and his followers access to the newly

[156] *Ibid*., p. 642.
[157] *Ibid*., p. 642.
[158] *Letter: Somerset to Bathurst* 24 April 1817, CA, GH 23/5.
[159] *Letter: Somerset to Bathurst* 24 April 1817, CA, GH 23/5.
[160] In Lester, “Margins of order”, *Journal* p. 642.

established military garrison of Graham's Town[161] for trade.[162] Somerset hoped that "civilization and its consequences may be introduced into countries hitherto barbarous and unexplored".[163] He also hoped that Ngqika would help in controlling the movements of amaXhosa and keep Ndlambe at bay. However, Somerset would soon find out that control over the frontier amaXhosa from within the colony, was impossible.

MAP 2.4: Cradock / Somerset Observation Posts, 1812-1817 and Ceded Territory Forts, 1819-1822

(Credit: JS Bergh and JC Visagie)



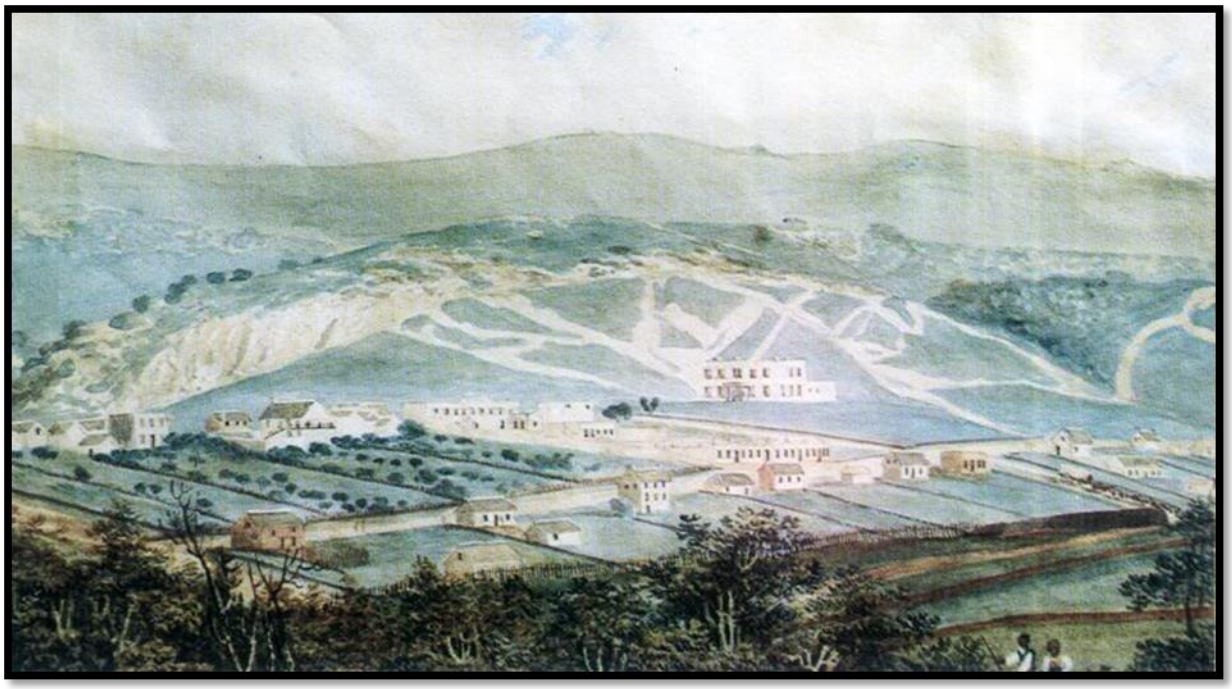
Ndlambe fights back - *Egazini*: "The place of blood"

Grahamstown had been established in 1812 after the expulsion as part of Graham's failed "system of defence" to keep the amaXhosa east of the Fish.[164] Graham was instructed to establish a new military headquarters in the Zuurveld. He took Andries Stockenström along to find a suitable spot. They found a location inside a "bowl" of rising hills, about thirty kilometres from the Fish River, sixty kilometres from the sea

[161] It would later be compressed into one word, "Grahamstown".
[162] Mostert, *Frontiers* p. 391.
[163] In Lester, "Margins of order", *Journal* p. 642.
[164] Maclennan, *Proper degree of terror* p. 131.

and approximately 130 km from Uitenhage .The spot for the military base was on top of a slight rise in the middle of the "bowl", with hills overlooking it.[165]

ILLUSTRATION 2.3: "Grahamstown 1822", artist unknown



(Credit: Albany Museum)

It is widely believed by the amaXhosa that one of Ndlambe's kraals was also on that site before the establishment of the base, though this legend cannot be verified by any other historical source.[166] It was also apparently the site of an abandoned farmhouse belonging to a Boer called Lucas Meyer.[167] Whether or not the kraal had been destroyed to make way for Meyer's farmhouse is unclear. The barracks was established there, with the farmhouse initially being utilised as an officers' mess before a new one was built on the same site. The colonial authorities planned to develop Grahamstown into a civilian settlement, but in the years shortly after its establishment it was not much more than a military garrison with a few civilian contractors to supply it with basic household necessities. By 1819 it was still described as "an apology of a

[165] It is supposedly the same site on which the Grahamstown Cathedral and City Hall is built.
[166] JC Wells, "From Grahamstown to Egazini: Using Art and History to Construct Post Colonial Identity and Healing in the New South Africa", *African Studies* 62, 1, 2003, 79-98, p. 82. This legend also came up in the testimony of Mr Nondzube during the Salem land claim case, see: *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 163.
[167] E Turpin, "Fact and Fiction (Part One)", *Grocott's Mail* (28 January 1969), p. 3.

town" - no more than 30 thatched roof houses along a road running from west to east, the officers' mess, the Wit Rug Kamp (which would later become the site for Fort England Psychiatric Hospital) some distance to the east which was by far the largest building, only accessible by narrow footpaths through the thick bush.[168]

In accordance with Somerset's strategy to position Ngqika between the Colony and Ndlambe, he ordered the paramount chief to speak to the other amaXhosa chiefs in an attempt to cease the capturing of cattle and horses. But it turned out that Ngqika had no real power, thus prompting Somerset to offer military support. When Ngqika was attacked and defeated by Ndlambe at the battle of Amalinde in 1818, the colonial authorities instructed Lieutenant Colonel Brereton to assist Ngqika with a combined force of colonists and soldiers.[169] In December 1818, Brereton crossed the Fish River, and after joining forces with Ngqika's army, they attacked Ndlambe.[170] Instead of retaliating, Ndlambe's warriors retreated into thick bush. Brereton's force destroyed Ndlambe's kraals and seized approximately 23,000 head of cattle. Once Brereton had accumulated about as much cattle his men could seize, he withdrew his army back to Grahamstown where, critically, he disbanded the burgher commando so that they could return to their homes.[171]

For many within the amaXhosa leadership the Brereton raid was a repetition of the 1811-12 expulsion. One of Ndlambe's councillors accused British colonial aurhorities of attacking without provocation: "You sent a commando – you took our last cow – you left only a few calves which died for want… Without milk – our corn destroyed – we saw our wives and children perish – we saw we must ourselves perish; we followed, therefore, the tracks of our cattle into the colony."[172] The deeds of the colonists could no longer go unpunished. A large-scale action was needed.

Meanwhile, Ndlambe was consulting with his advisors about a possible retaliation against the colonists. Among them was a man who had only recently entered the chief's court but had quickly gained the trust of the elderly chief. The man was

[168] Maclennan, *Proper degree of terror* p. 192 and T Couzens, *Battles of South Africa* (Cape Town, 2004), p. 72.
[169] Peires, *House of Phalo* p. 63.
[170] *Ibid*., pp. 61-63.
[171] *Ibid*., p. 143.
[172] In Peires, *House of Phalo* p. 70.

regarded as a mystic by his people and was therefore widely revered. They did not call him by his name, Makhanda.[173] Instead they called him Nxele – the "left-handed".[174]

Nxele grew up in the colony where he picked up Dutch and European customs which enabled him to move seamlessly between the two cultures. While still a child, Nxele began to show the "hysterical symptoms associated with the initial calling of a diviner".[175] However, initially Nxele was heavily influenced by Christianity spending a lot of time with the chaplain of the Cape Regiment in Grahamstown, Mr van der Lingen.[176] Nxele then moved across the Fish River where he was determined to spread the "word of God" and to punish the sins of the people, especially those who would not reject "witchcraft and bloodshed".[177] He caused great consternation when he chastised Ndlambe himself for his polygamy. Ndlambe was not amused and neither were any of the other amaXhosa. Some of them were so disturbed by his persistent attacks on amaXhosa culture that they kidnapped him and brought him before Ndlambe.[178] It was here where the attitudes of both chief and prophet started to change. Ndlambe saw the usefulness of such a man as an instrument with which to destroy Ngqika and drive out the colonists. In turn, Nxele was offered his Great Place and a herd of cattle.[179]

During this time, Nxele's spiritual doctrine underwent subtle but significant changes. He had always preached of one God, Mdalidiphu and his son, Tayi. But now he declared the existence of two gods: Thixo, the god of the white people, and Mdalidiphu, god of the amaXhosa. He preached that the white people had been banished from their own land for killing Thixo's son, becoming citizens of the sea from which they emerged with the sword in one hand and fire in the other.[180] Mdalidiphu, however, was

[173] Over the years, several versions of his name have surfaced. In fact, the municipality under which Makhanda / Grahamstown falls is called Makana. A hill on which sections of Fingo Village lies is called Makana's Kop. For the purposes of this thesis, I will refer to him as Nxele.
[174] Boers directly translated this into Dutch, thus calling him 'Links'. British colonial authorities adopted the Dutch version of the name but erroneously thought it referred to the elusive lynx wildcat.
[175] Peires, *House of Phalo* p. 69.
[176] *Ibid*., p. 69.
[177] Maclennan, *Proper degree of terror* p. 187.
[178] Peires, *House of Phalo* p. 69.
[179] Peires, *House of Phalo* p. 69 and Maclennan, *Proper degree of terror* p. 187.
[180] Peires, *House of Phalo* p. 71.

creator of all things and was even more powerful than Thixo. This was the sort of hope and promise many amaXhosa were looking for after Brereton's raid. The destruction of the white colonists became a recurrent theme in Nxele's prophecies.

One day Nxele told his rapidly growing following that Mdalidiphu had sent him to avenge the amaXhosa people. He was given the power to call up the ancestors to rise from their graves so that they might help defeat the colonists, who would be driven across the Qagqiwa (Swartkops River) and back into the ocean where they came from. Once this had been accomplished, the people would sit down and eat honey.[181]

In addition to his "divine visions", Nxele also had a spy feeding colonial authorities misinformation about amaXhosa movements and numbers. Hendrik Nquka had been acting as interpreter for Ngqika and thus was granted unlimited access to Grahamstown. Nquka had already developed a reputation as someone who was "not entirely to be depended upon" but this did not stop the garrison commander, Lieutenant Colonel Thomas Willshire, from acting on Nquka's intelligence reports.[182]

On 19 April 1819, Nquka told Willshire of an imminent amaXhosa attack. Willshire immediately detached a company to patrol the area to the southeast. This move reduced the Grahamstown garrison from four hundred to less than three hundred European and Khoe soldiers.

Meanwhile, Nxele and Ndlambe's eldest son and commander of his army, Mdushane had gathered a force of between 6,000 and 10,000 men[183] who were waiting in the kloofs of the Fish River Valley, not more than twenty five kilometres to the northeast of Grahamstown. The deception may have worked had Nxele disregarded the amaXhosa ritual of battle of informing his foe of the attack that was about to take place.[184] On 21 April, Nxele sent a runner to Willshire to formally declare war on the colonists. Willshire seemingly dismissed this message as a sign of "insolent

[181] In Xhosa culture, bees are connected to the ancestors. Thus, the availability of honey is a message from the ancestors, a sign of prosperity and fertility.
[182] Maclennan, *Proper degree of terror* p. 190.
[183] While Maclennan puts it at 6,000, Wells and Peires estimates the number of amaXhosa warriors to be closer to 10,000.
[184] Peires, *House of Phalo* p. 136.

bravado".[185] It is possible that he thought that no significant army could pass through Graham's "system of defence" undetected.

The next morning, Willshire was inspecting troops when a report reached him that a posse of amaXhosa had tried to seize cattle belonging to the Cape Corps regiment about a kilometre from Grahamstown. He took twenty-five horsemen and set out to pursue the would-be cattle thieves towards a steep ridge to the east known as Botha's Hill. When he got close to the ridge he noticed two divisions of approximately fifty amaXhosa men each near the summit if the hill. Willshire would soon find out that the two detachments were merely part of a much bigger force when he moved up the slopes of an adjacent hill to get a better look: "When I had done so I was surprised to find we were followed by about five thousand, who gave a horrid yell, rushed down and crossed the river after us. From their numbers I instantly concluded they intended an attack on Grahamstown…"[186] Willshire then hurriedly sent a messenger to warn the garrison and village. He and his horsemen then unsuccessfully tried to harass the force to delay their advance. Realising that they were wasting time themselves, Willshire ordered his cavalry back to Grahamstown where they could be put to better use.

The first amaXhosa warriors appearing on the hills east of Grahamstown did not move down immediately.[187] Instead they waited as their ranks swelled with more and more warriors. Their numbers were supplemented by thousands of women and children to the rear who were waiting with mats and pot, expecting complete victory. They were ready to take possession of the village as soon as the white people had been driven from it. Nxele had promised them that morning that lightning would "fall upon them" and that the ancestors would help them to victory, turning the "bullets in to water".[188]

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[185] Maclennan, *Proper degree of terror* p. 190.
[186] In Maclennan, *Proper degree of terror* p. 191.
[187] Maclennan, *Proper degree of terror* p. 191.
[188] The story of Nxele assuring his people that the power of European weapons is no match for his magic has long been a quick conclusion to jump to for racially bias historians to explain the seemingly absurd behaviour of charging towards an enemy position, completely exposed to their gunfire. Indeed, the amaXhosa believed that magic was present in every human activity, including war. The task of the witchdoctors / prophets was to make the warriors fierce by giving them medicine derived from a fierce animal. Additionally, Nxele purposefully ordered women and children to accompany the warriors to Grahamstown to inspire them with a sense of eventuality. Thus, Nxele's promise must be seen in that context. The promise was not meant to be taken literally. Rather, it was meant to inspire, similar to a war-cry.

Initially it seemed that the amaXhosa would not even need the ancestors' help. They had a force of at least six thousand warriors, some of them armed with firearms. The colonists, in turn, had less than three hundred and fifty men. The amaXhosa were so assured of victory that they took their time, gathering their forces and moving them into position. The main force had been split into three divisions.[189] Two of these divisions, approximately five thousand men strong moved in position to attack the soldiers defending the eastern approach to the village, while the third and smaller division seemed ready to attack the barracks which was defended by only one officer and sixty soldiers. Fortunately for Willshire, the barracks was naturally fortified by a stream which lay between the garrison and the hills from where the amaXhosa were amassing. The stream's high banks provided an obstacle for any force attacking from an easterly direction. It was along this stream that Willshire set up a line of defence.[190]

As the amaXhosa rushed towards the defensive line, the artillery opened up a "devastating fusillade" of grape and canister that exploded above and amongst the ranks of the attacking force, spraying them with hot metal and lead.[191] The warriors threw their first volley of spears, but these were, for the most part, well short and ineffective.[192] Still, they advanced towards the soldiers, many of the warriors in the frontline were seen breaking their last spears to make it short, better suited for close-quarter combat.[193] Some of them actually managed to reach a few of the artillery pieces before being driven back again. But the rest of the force was halted approximately ninety metres from the artillery, and less than thirty metres from the troops.[194] There they remained in stalemate, with the warriors struggling to use the stream's steep banks as cover.

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[189] Peires, *House of Phalo* p. 143.
[190] *Ibid*., p. 192.
[191] *Ibid*., p. 193.
[192] Each amaXhosa warrior would usually carry a bundle of seven or eight "throwing spears" or *inshuntshe*. These spears had a long shaft which quivered and vibrated when properly thrown. However, it was not a particularly accurate throwing spear, thus the need to carry a bundle for every battle. For a full discussion see Peires, *House of Phalo* pp. 135-139.
[193] Traditionally, the last spear was never thrown, but would be retained in case the order "*Phakathi*!" ("Get inside") was given. This order was hardly ever given. Maclennan writes that when the warriors had broken off the shafts at the sounding of the "*Phakathi*" order, they allegedly shouted out the name of Mdalidiphu's son, Tayi, taught to them by Nxele, as a "charm against all manner of evil". (See Maclennan, *Proper degree of evil* p. 193 and Peires, *House of Phalo* p. 135).
[194] Maclennan, *Proper degree of terror* pp. 193-194.

Meanwhile, the civilian inhabitants of Grahamstown fled to the officers' mess when they realised what was going on. However, other residents had a closer encounter.[195] Now, while fighting raged to the east, several parties of warriors were making their way through or around the defensive line. A group of defenders positioned in a few houses managed to repel them from the village.[196]

While the amaXhosa's main force was hammering against Willshire's artillery and troops at the main approach to the village, the third division had reached the Wit Rug barracks and was swarming around them. It was here where the battle was at its most brutal. The amaXhosa, forced their way into the barracks square through sheer numbers, and several warriors had actually made their way into the hospital.[197] It was at this critical moment where the well-known legend of Elizabeth Salt's was born.[198] It was also here where the Khoe leader, Jan Boesak and his 130 hunters allegedly played a crucial part in turning the tide of battle from behind the wall of the barracks.[199] Boesak and his men had just arrived from the Theopolis mission station to the southwest and took their places amongst the British defenders, picking off the amaXhosa frontline commanders causing disorganisation and confusion within their ranks. The combined actions of Elizabeth Salt and the more significant marksmanship of Jan Boesak and his men, boosted the morale of the troops on the parapets of the barracks, causing them to fire with renewed vigour. The tide of battle had turned.

[195] Maclennan relates how at about midday, while the amaXhosa main force was still amassing, a small party of amaXhosa entered a Mr Potgieter's house just as lunch was being served at that residence, prompting Mr Potgieter and family to hastily retreat from their residence.
[196] Maclennan, *Proper degree of terror* p. 194.
[197] *Ibid*., pp. 194-195.
[198] According to a local myth, a saving grace for the Wit Rug Kamp garrison was the smuggling in of much needed gunpowder to their position by a British soldier's wife called Elizabeth Salt (neé Covare) who, according to legend, hid the gunpowder with a shawl and carried it into the defensive position unharmed and without being challenged. If this legend is to be believed then it fits in with the popular "noble savage" narrative of amaXhosa warriors 'honourably' refusing to harm women or children. This seemingly allowed these critical supplies through, gifting the garrison the vital ammunition they needed to help win the day. This popular story of Elizabeth Salt has long been difficult to verify. However, whether or not such a person existed there is no doubt. The *Graham's Town Journal* did note her death in 1850, but the story of her life in her obituary is far different from the legend. According to her obituary, Elizabeth Salt still certainly did help the British forces at the battle of Grahamstown, but did so through encouraging them to go on fighting and by helping bring ammunition up and down the line, possibly reloading weapons for them, rather than sneaking supplies through amaXhosa lines.
[199] Maclennan, *Proper degree of terror* p. 195.

Willshire now ordered his forces to advance on the demoralised amaXhosa who retreated in such haste that Willshire's soldiers could not keep up with them. He decided to bring his vanguard back to the stream in the event that it could be a possible trap to lure them into an ambush. However, the amaXhosa were so exhausted and demoralised that when a small party of Boers, unaware of the battle, passed near them during their retreat, they were not even threatened by such a mass of people.[200]

The total number of amaXhosa who died in the battle differs extensively in the historical record. Willshire himself put the number at one hundred and fifty. Thomas Pringle, a British settler writing a decade later, put the number of dead at 1,400 dead, not including those who would die later from their wounds. Sir George Cory estimates the number to just less than one thousand.[201]

On the colonial side, only two men and two horses died in the battle. However, the amaXhosa had killed five soldiers, as well as one woman and one child who were on their way to Grahamstown before the battle.[202] Only five soldiers were wounded in battle.

The battlefield itself was by all accounts a grim affair. The majority of the amaXhosa dead were found on the banks of the stream, many of them had been shot trying to clamber their way back up the eastern bank in a bid to escape the colonial firepower. The stream would become a place of reverence in Xhosa lore. It became a place where their bid to regain their land ended in humiliating defeat. It became *Egazini*: the place of blood.[203]

But it was more than a military defeat. Ndlambe was determined to strike a telling blow against the white man and Ngqika and drive them out of the land from which he himself had been driven seven years previously. Armed with the knowledge that their ancestors would support them, the amaXhosa amassed the largest army ever seen in Xhosaland. As Maclennan notes, they dictated the time, place and manner in the battle

[200] *Ibid*., p. 195.
[201] In Maclennan, *Proper degree of terror* p. 198.
[202] *Ibid*., p. 198
[203] Wells, "From Grahamstown to Egazini", *African Studies* p. 79.

was to be fought, but still lost.[204] Nxele would surrender himself three months after the battle in an attempt to end the inevitable colonial counter-offensive.[205] He was taken captive and imprisoned on Robben Island. In 1820, the same year the British settlers would arrive in Algoa Bay, Nxele and other inmates attempted to escape by seizing a fishing boat. However, the vessel capsized and Nxele drowned.

The battle of Grahamstown was a significant moment in amaXhosa history. From now on they had to face the fact that they could no longer regain lost territory. The Zuurveld was lost.

Twenty five kilometres to the southwest, a Boer farmer was soon to receive the news that his quitrent farm, which straddled the Assegaai Bos River, was to be expropriated by government.[206] This was part of Somerset's broader settlement plan of placing unsuspecting British immigrants in the Zuurveld "buffer-zone" to keep the amaXhosa at bay from the rest of the colony.

The Sephton Settlers

Though Somerset had asked for British settlers before assuming his governorship position, the initiative for a settlement scheme came from the British government and had British instead of Cape interests in mind. Talk of overpopulation in England was gaining traction as a convenient explanation for the mass unemployment and political turmoil which gripped Britain in the wake of the Napoleonic wars.[207] The Colonial Office had initially suggested Canada as the prime location, but this was eventually dismissed. Unexpectedly, the Chancellor of the Exchequer proposed to grant £50,000 for a settlement scheme in the Cape.[208] The authorities enticed many prospective emigrants with exaggerated notions of fertile lands, leading to more than 90,000 Britons[209] to apply for assistance to leave Britain and settle in the Cape.

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[204] Maclennan, *Ibid*., p. 196.
[205] Peires, *House of Phalo* p. 71.
[206] B Davenport, *A history of the Matthews settler family of Salem and "Woodstock", Alice, South Africa 1820-1950* (Place unknown, 2010) p. 16.
[207] JB Peires, "The British and the Cape 1814-1834" in R Elphick and H Giliomee (eds.), *The Shaping of South African Society, 1652-1840* 2nd edition (London, 1989) p. 474.
[208] Peires, "British and the Cape" in Elphick and Giliomee (eds.), *Shaping of South African Society* p. 474.
[209] Of the 90,000 applications, only about 3,700 people would form part of the settlement scheme.

Originally the settlement scheme was merely a political manoeuvre by the Tory government to demonstrate public concern for the high rate of unemployment in Britain. However the Colonial Office was well aware of the complexities of turning the Cape Colony into a dumping ground for the poor. Cautious of this fact, the Colonial Office framed emigration regulations in such a way that attracted "small agricultural capitalist[s]".[210] For example, applications by single individuals were denied. The Colonial Office also declared that it would negotiate only with the heads of prearranged parties, each of whom having to put down a deposit of £10 per adult male, in turn they would receive allocated land of 100 acres per man.[211] A minimum of 100 families for each party was set by the Colonial Office.

The vast majority of prospective settlers were made up of "respectable individuals" who possessed some financial means but lacked the large capital necessary to support a large group of employees.[212] Such individuals clubbed together to form so-called 'joint-stock' or 'independent' parties under elected leaders who negotiated with the Colonial Office on their behalf. The formation of these parties meant that the prospective immigrants had diverse backgrounds, ranging from urban artisans to farmers and unskilled labourers.

One of these parties was led by a Londoner named Edward Wynne. By August, 1819, he had already signed up 77 families and 19 more by September, almost reaching the required 100 families to constitute a party.[213] On 9 September, at a general meeting of the United Wesleyan Methodist Society, Wynne and the members of his party selected a "minister of our persuasion", a 21-year old reverend by the name of William Shaw, accompanied by his wife, Ann, and child, Margaret. Thus the party was heavily represented by those with Methodist leanings.[214] The group was well motivated to do "God's will", to be "instrumental in the civilisation of this vast wilderness".[215]

[210] Peires, "British and the Cape" in Elphick and Giliomee (eds.), *Shaping of South African Society* p. 474.
[211] AE Makin, *The 1820 Settlers of Salem (Hezekiah Sephton's Party)* (Wynberg, 1971), p. 57.
[212] Peires, "British and the Cape" in Elphick and Giliomee (eds.), *Shaping of South African Society* p. 474.
[213] Makin, *1820 Settlers of Salem* p. 17.
[214] This would explain the strong influence of Methodism in Salem and the neighboring mission station of Farmerfield. This influence is still prevalent especially among the white residents of Salem.
[215] Davenport, *History of the Matthews settler family* p. 6.

However, Edward Wynne would not accompany the party he had put together on the voyage to the Cape. On 11 September Wynne's wife gave birth to a son but she died soon afterwards. Wynne wrote a letter to the Colonial Office expressing his regret that "owing to domestic affliction" he could no longer leave England.[216] Wynne recommended that Thomas Colling, an architect and builder, be put in charge of his party. Colling was not a member of Wynne's party originally, but because his party lacked the minimum number of members, he decided to amalgamate his party with Wynne's. A day after Wynne's formal resignation as leader, Colling wrote to the Colonial Secretary to notify him that the number of people in his party now surpassed 100.[217] However, within three weeks Collings changed his mind and decided to stay in England. Leadership had changed hands twice now, and the ship bound for the Cape Colony had not even left the dock. The members of the party elected a carpenter from London, the forty-three year-old Hezekiah Sephton, as their leader.[218]

The first group of Sephton's Party embarked on the *Aurora* on 5 January, 1820.[219] The ship was not large enough to accommodate the entire party, which now stood at about 344 people. Thirty three of the families had to embark on the *Brilliant* along with the Pringle and Erith parties.[220] Apart from the leaders, everyone else was crammed in below deck. Their possessions remained unpacked, though bed linen and cutlery belonging to settlers had to be used. Provisions and fresh water were distributed at regular intervals. With the Thames River frozen, departure was delayed by two months, making conditions aboard even more uncomfortable. This time of uncertainty caused many people to change their minds and remain behind. Eventually the ships set sail in early February, 1820.[221]

After a long and tedious journey of almost three months the ships arrived in Algoa Bay in mid-May. [222] Finally, on Friday 19 May, the small landing boats came alongside the

[216] Makin, *1820 Settlers of Salem* p. 18.
[217] *Ibid*., p. 18.
[218] *Ibid*., p. 18.
[219] Davenport, *History of the Matthews settler family* p. 7.
[220] Makin, *1820 Settlers of Salem* p. 20.
[221] Davenport, *History of the Matthews settler family* p. 7. For a full account of the voyage see Makin, *1820 Settlers of Salem* pp. 22-24.
[222] Makin, *1820 Settlers of Salem* p. 24.

Aurora, ready to transport the travel-weary settlers to shore. It would take another nine days to complete disembarkation of all *Aurora*'s passengers.

The scene that met the Sephton Party on the beaches of Algoa Bay was chaotic with the "boisterous hilarity of the people who felt their feet on firm ground for the first time after a wearisome voyage".[223] There were lines of men conveying luggage from the boats to the wagons, ready to transport the settlers to their respective locations.

The first contingent of the Sephton Party, which included Hezekiah Sephton and Rev. Shaw, left for the Zuurveld (recently renamed the Albany District) by ox-wagon on 5 June.[224] A second group of sixteen men, ten women and sixteen children followed on 10 June, followed by further contingents in intervals of approximately a week between departures.[225] The settlers carried rations for a month with them: biscuits, flour, rice, soap and candles. Sephton had put James Hancock in charge of administering the affairs of those in the Party who stayed behind, waiting to be transported to their destination.[226] The wagons made their way in a north-easterly direction, crossing the Zwartkops and Sundays rivers and up the Addo Heights, the same area where Cuyler had crossed into the Zuurveld to flush out the amaXhosa almost seven years earlier.[227] They crossed the Bushmans River at Rautenbach Drift, northwest of their final destination at Assegai Bos River. However, instead of stopping at Assegai Bos, they continued onwards across "virgin country", crossing the Kariega River and heading due south, passing the mission station of Theopolis before heading due east and eventually settling at Rietfontein (known today as Barville Park).[228] Even though this had been part of the original plan, approved by Acting Governor of the Cape Sir Rufane Donkin, he had revised the plan after a recent visit to Albany. He had instructed Cuyler to reserve Rietfontein for Major General Charles Campbell's party of settlers.[229]

[223] T Pringle in Makin, *1820 Settlers of Salem* p. 26.
[224] Makin, *1820 Settlers of Salem* p. 28.
[225] *Ibid*., p. 28.
[226] *Ibid*., p. 28.
[227] *Ibid*., p. 28.
[228] *Ibid*., p. 29.
[229] Davenport, *History of the Matthews settler family* p. 11.

The journey was arduous, especially with the heavy wagons on barely recognisable passes, descending steep and precipitous hills and crossing rivers. The Boer wagon-drivers had selected the route to be taken, so the settlers had no idea where they were going or where they were meant to be. The wagons bumped unremittingly over rocks hidden in the long grass, sometimes passing along the edges of high precipices. Many of the settlers from the first contingent preferred to walk beside the wagons rather than endure the discomfort of remaining inside.

Donkin was on his way to Cape Town when he learned of the erroneous placement of settlers on Rietfontein. He immediately wrote to Cuyler on 13 June expressing "deep displeasure" at the mistake and instructing him to move the settlers to their correct location on the banks of the Assegaai Bos River.[230] Donkin was comforted by the belief that the settlers would not have suffered a lot of convenience as a result of the move because they were settled at Rietfontein for too short a duration for them to commence with planting and ploughing. In fact the settlers had already started planting gardens soon after their arrival at Rietfontein and some dissatisfaction was expressed at having to move again.[231]

However, there was also disharmony among the first contingent of the Sephton Party regarding their leader. They were unhappy with Sephton's demands that everyone had to pay him in cash before he handed over their rations.[232] Added to this, he had supposedly lost the draft he had brought with him to draw cash at the nearby village of Bathurst. A group of highly irate settlers marched off to Bathurst to see the acting landdrost of Albany there, Captain Trappes. He agreed to their demands that Sephton be removed as leader of the party.

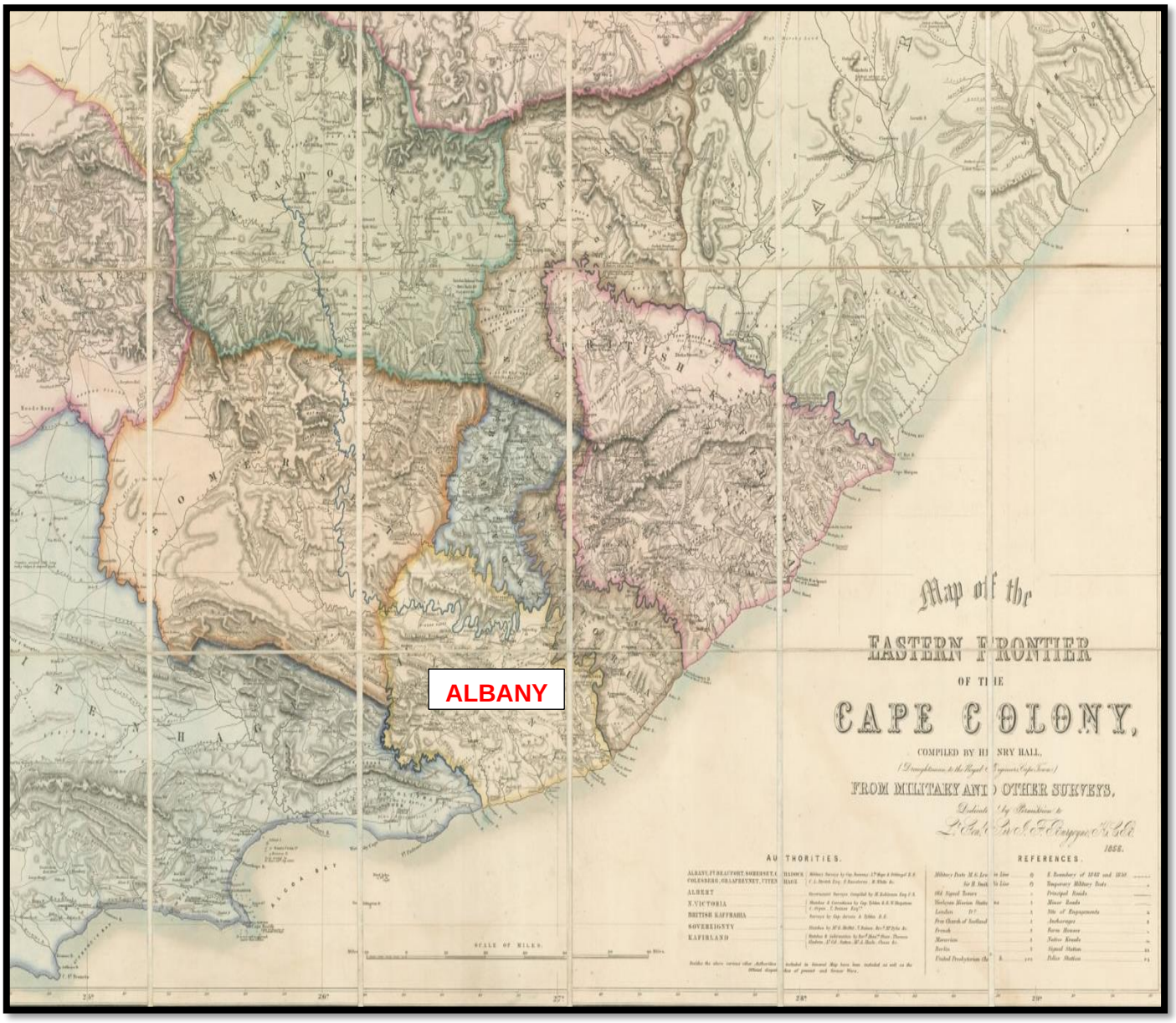
It seems that the circumstances leading up to Sephton's removal were not as clear-cut as alleged by the disgruntled settlers under his care. Evidence suggests that Sephton was told expressly by the commissariat officers in London that all rations and goods bought on credit by any member of his party would be charged against him personally as the approved leader of the party. In fact, entries in Hancock's notebook

[230] In Makin, *1820 Settlers of Salem* p. 29.
[231] Davenport, *History of the Matthews settler family* p. 11 and Makin *1820 Settlers of Salem* p. 29.
[232] Makin *1820 Settlers of Salem* p. 29.

specify that the articles that were purchased on credit at Algoa Bay by settlers from Sephton's Party were "on account of Mr Sephton".[233] It was therefore only natural for him to protect himself by insisting on cash payments for rations and goods supplied. The removal of the first contingent from land on which they had already expended labour and resources only served to aggravate their feelings towards Sephton. He was eventually replaced by a committee elected by the party once all members had been reunited.[234] It seems that Sephton never resumed his position as head, but in official matters, Cape Town continued to deal with him.

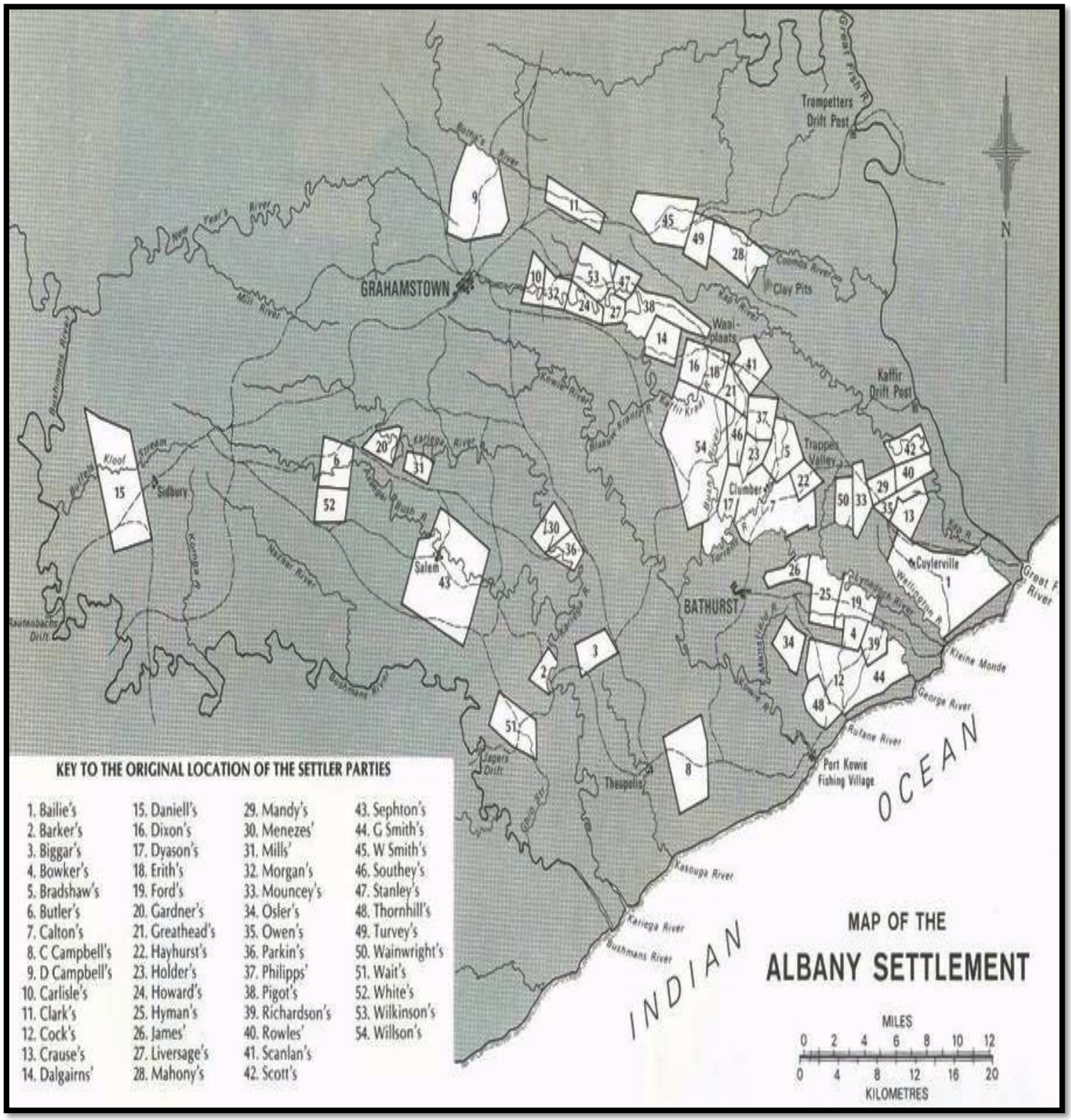
[233] In Makin *1820 Settlers of Salem* p. 30.
[234] *Ibid*., p. 31.

MAP 2.5: Map of the Eastern Frontier of the Cape Colony, showing the renamed district of Albany

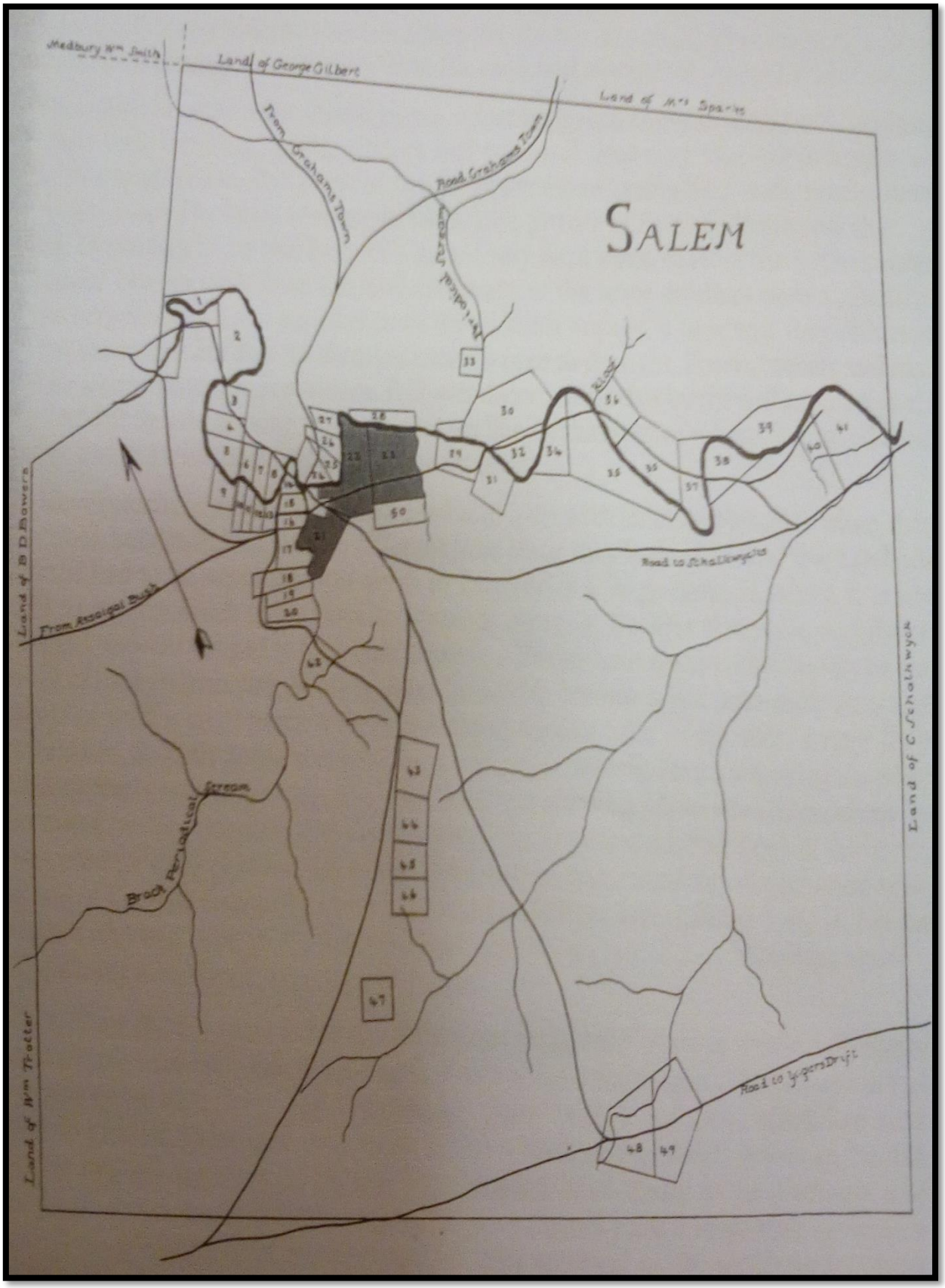


(Credit: UCT Libraries)

MAP 2.6: Map of the Albany Settlement. The Sephton (Salem) Party is listed no. 43



MAP 2.7: Map showing the original Salem settlement with allotment numbers



(Credit: B Davenport)

Salem, the "Place of Peace"

They lived in a village they built for themselves
On the banks of the Assegaai River –
We called it Salem, that means Peace –
Well, did you ever – ever!

– From Scene 1 of the play, *Richard Gush of Salem*.[235]

On 8 July the contingents at Rietfontein came back the way they had gone, past Theopolis, crossing the Kariega once more, eventually arriving at their final destination on 18 July.[236] Meanwhile, the Algoa Bay contingents were making their way straight to this location after the removal of the settlers from Rietfontein. Barend Woest, a Boer whose farm was located in the vicinity, led that wagon train from Algoa Bay, joining the rest of their fellow Sephton Party settlers on 23 July. The moment of arrival at their new destination was recorded by Rev. Shaw:

> *[W]e took our boxes out of the wagon and placed them on the ground; he (the wagon-driver) bade us "goeden dag", or farewell, cracked his long whip and drove away leaving us to our reflections. My wife sat down on one box and I on another. The beautiful blue sky was above us, and the green grass beneath our feet. We looked at each other for a few moments, indulging in some reflections, and perhaps exchanged a few sentences; but it was not time for sentiment and hence were soon engaged in pitching our tent; and when that was accomplished, we removed in to it our trunks, bedding, etc. All the other settlers who had arrived with us were similarly occupied and in a comparatively short time the somewhat extensive valley of that part of the Assagay [sic] Bosch River, which was to be the site of our future village, presented a lively and picturesque appearance.*[237]

However, the initial mood of enthusiasm quickly changed to one of despair and frustration. The flimsy tents which were temporarily loaned by the government were

[235] In G Butler, *Richard Gush of Salem* (Cape Town, 1982) p. 3
[236] Davenport, *History of Matthews settler family* p. 11.
[237] In Makin, *1820 Settlers of Salem* p. 31.

proving poor shelter against the rain and cold. Most settlers took up allotments over ten kilometres along the banks of the Assegaai Bosch River. Others moved into the smaller neighbouring valleys. The two most northerly allotments were occupied by John Talbot and his eldest son, while Sephton himself lived on the southernmost allotment down the river. William Hazell, Samuel Painter, Joseph Short, Thomas Young and the Filmer siblings chose ground along the Mantjes Kraal stream.[238] Charles Thomas Croft, James Witheridge and William Shepherd all lived in close proximity to one another on the southern boundary of the location. The centre of the settlement was also the most densely populated. This was where the Mantjes Kraal stream flowed into the Assegaai Bosch River. At the suggestion of Reverend Shaw, the location was named 'Salem' ("Place of peace") with reference to Psalm 76: "In Salem also is His tabernacle, and His dwelling place in Zion."[239]

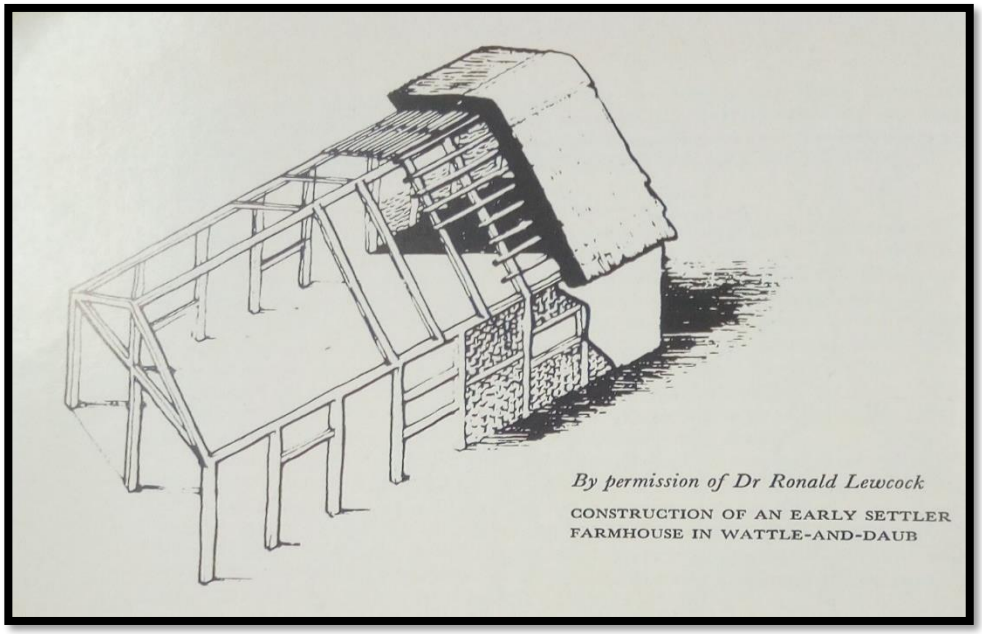
The lack of adequate building materials added to the settlers' frustrations. The settlers were used to living in brick or stone dwellings, but the conditions in Salem placed severe limitations on what could be done. Bricks were simply unavailable and stone was difficult to shape and took too much time. Simpler methods were needed to meet their urgent housing needs. Some employed a technique referred to as "wattle and daub", a quick but fairly permanent building process that originated from northern Europe.[240] Nearly all of the original houses at Salem were built in this way.

Even though stone was rarely used, a few houses, especially the double-storey structures were built from this material. Stone structures were relatively easy to build with Rev. Shaw building his double-storey manse with his own hands. There were also so-called "Devonshire cob" houses, where clay was mixed with gravel and straw before the mixture was rammed into a wooden shuttering to raise the walls.[241] These

[238] Davenport, *History of Matthews settler family* p. 14.
[239] Psalm 76, verse 2, *The Holy Bible* King James Version (KJV).
[240] The method involved marking out the area of the proposed cottage, usually one to three rooms of ten by twelve feet each, and to firmly plant thick poles at the corners and a few points along the sides. Lighter poles were placed at intervals in the spaces between the thicker poles and wall plates were nailed to the top. The gaps were then filled with stripped branches. When this was completed, the walls were plastered, inside and out, with clay mixed with water. This was tempered with the feet in the same way as brick-makers did in England when preparing clay for bricks. The roof consisted of a sufficient number of pole rafters nailed onto the wall plates. Planks were then nailed or tied to them. Thatched reeds were then added to this framework. Those who wanted neatness would use pipe-clay and lime to whitewash the facades of their cottages.
[241] Makin, *1820 Settlers of Salem* p. 33.

houses were especially vulnerable to damage during heavy storms. Some settlers made use of ready-made forms of accommodation. It is said that Richard Gush and his family occupied a large cave on the banks of the Assegaai Bosch River before he built his house.[242] Brick houses would only come much later. Even when they became available, construction using bricks was "prohibitively expensive".[243] No real doors or windows existed in the early Salem structures also due to availability, so often a mat or a rug was hung at the entrance and pieces of white calico were nailed to wooden slats above openings left in the walls to admit light.[244] The floors were almost always made of clay and cooking was either done in another, smaller hut or the single hearth inside the house, which often served as both cooking space as well as space for social interaction.

ILLUSTRATION 2.4: Construction of an Early Settlers Farmhouse in Wattle-and-Daub



(Credit: AE Makin)

During this initial period of building, settlers would roam the surrounding *kloofs* in search of wood to make doorposts and rafters. Wattle and thatch were usually

[242] Another version goes that he excavated a hole in the bank next to the river in order to accommodate his family. See the Introduction to G Butler, *Richard Gush of Salem* (Cape Town, 1982) pp. xv-xvi and Davenport, *History of Matthews settler family* p. 17.
[243] Makin, *1820 Settlers of* Salem p. 33. In 1822 it was valued in Grahamstown as being four times more costly than good stonework. By the middle of 1823 only fifteen houses were built using brick in the entire Albany District due to the cost.
[244] Makin, *1820 Settlers of Salem* pp. 33-34.

obtained closer to the home for the walls and roofs. Even before construction, many settlers had already laid out gardens in the alluvial soil close to the streams and river. Indigenous vegetation was cleared to make way for horticultural activities. The ground was turned by hand before the first seeds were sown. As most of the settlers were city-dwellers and no training programme was in place to educate them in horticulture or agriculture, the lessons they learned were, needless to say, harsh. There are various accounts of settlers from elsewhere in the Albany District where carrot seeds were placed at the bottom of trenches which were a foot deep, or seed potatoes thrown on the ground's surface and expected to grow where it lay, much to the amusement of the neighbouring Boer residents of the district.[245]

The allocated plots for each settler were also far too small for adequate agricultural operations. The land allocation was calculated according to the size and need of each family, though according to the Articles of Agreement, each family head was to receive 100 acres (40.5 hectares). Latecomers were awarded fifty acres (20.25 hectares) and indentured labourers receiving land on their own account.[246] For many settlers 100 acres seemed like a lot of land, and indeed this was considered more than adequate for prospective commercial farmers. However, these considerations were made by English agricultural experts who were used to the farming conditions in Great Britain. In southern Africa 100 acres were not enough to sustain any farming venture other than subsistence farming.[247]

Even when they were able to adapt to local conditions, there was no labour available. Ironically, due to the expulsion of the amaXhosa from the area, the settlers were deprived of an immediate source of cheap labour.[248] Consequently, older children were tasked with helping their families clearing the bush and ploughing the fields. Those families without children depended on their neighbours' goodwill.

[245] Davenport, *History of the Matthews settler family* p. 17 and Makin, *1820 Settlers of Salem* p. 34.
[246] Davenport, *History of the Matthews settler family* p. 16.
[247] *Ibid*., p. 17. Once they overcame their ignorance regarding farming practices in Africa, other dangers threatened their crop. Turf walls, wicker fences or even hedgerows were constructed around the gardens to protect them from wild antelope. As a result, the countryside within and directly adjacent to the village almost immediately took on a distinctly European appearance.
[248] Davenport, *History of the Matthews settler family* p. 17 and Makin, *1820 Settlers of Salem* p. 34.

The land allocated to the Sephton Party had earlier been occupied by a Boer called Barend de Bouwer.[249] His now abandoned homestead was a small wattle and reed building which had become dilapidated in the meantime. It was soon renovated by a few settlers and used as a civic centre. During the week it served as a meeting place and as a storeroom for the party's rations. On Sundays four church services would be held there throughout the day. On 13 August a Sunday school was established. A part of the building would be screened off during the first couple of months for use as a maternity centre. It would be here where the first settler child would be born in Salem in September. The first marriage also took place inside Bouwer's building in August between Benjamin Rudman and Julia Ann Slater.[250]

Until the first harvest could be produced, the settlers could draw rations from the military stores and the cost was charged the balance of their deposits.[251] As a result, the local military officials in Grahamstown and Bathurst had to supply the entire district with food and goods. Meat was supplied in the form of live sheep, while flour, rice, tea, sugar, soap, candles and implements were obtained at cost price. The value of the goods was recorded against the account of the head of each party who, in turn, had to keep his own set of records of the amounts owed by individual settlers. In first couple of months, each Salem settler fetched his own rations from Bathurst, often forced to carry the supplies themselves without adequate vehicles or draught animals. Eventually, with the subsequent acquisition of oxen, small wagons and sledges, they were able to reduce this laborious exercise.

In September, the Salem Party elected James Hancock to be responsible for drawing and distributing rations.[252] At the same time they clubbed together to buy a wagon for

[249] Makin, *1820 Settlers of Salem* p. 35. According to local legend de Bouwer was offered compensation and another farm if he left. He was never compensated despite his protests to authorities. He left reluctantly but not before cursing the village: "Heed my words: this wrong the Government has done me this settlement of yours will suffer for all time! The Justice of the Almighty will never permit that this place, named by you Salem, City of Peace, should ever prosper and become great… Salem will never prosper." He is sometimes erroneously referred to as "Mynheer van Voorst", see Davenport, *History of the Matthews settler family* p. 16. See also Makin, *1820 Settlers of Salem* p. 35 and S Riddin, *Memories of Salem as told by Laurie Amos* (Place unknown, 2000) p. 31.
[250] Makin, *1820 Settlers of Salem* p. 35.
[251] *Ibid*., p. 35. The rations comprised of 12 ounces of flour and 24 ounces of meat a day for the men while women and children were only allowed two-thirds and half a ration respectively.
[252] *Ibid*., p. 36.

general use. William Lee senior was appointed as butcher in the same month and received all the offal as payment for his services. Salem was fast developing into a functioning village; however the elements would conspire to undermine their efforts in becoming an autonomous community.

The story of hardship and failure during the first few years is by no means one limited to the Salem community. Settler communities all over Albany would pay on numerous occasions for the government's inadequate preparation for large-scale settlement of immigrants within the area. The first of these disasters came at the end of 1820 when the wheat crop was attacked by a destructive fungi known as 'rust'.[253] The entire crop was a failure with less wheat being reaped than had been sown. This was a massive setback as the settlers had depended on this harvest to discharge their debts to the commissariat for the rations and goods supplied to them on credit. It also meant that they would have to rely solely on their diminishing resources to see them through until the next harvest season. Months of hard labour had yielded little reward, only a small garden and perhaps the beginnings of a herd of livestock. The settlers were also uncertain of whether the government would allow them to continue drawing rations on credit, particularly as their deposits had now been depleted.[254]

Their saving grace during that initial period came in the form of an intervention by Donkin. He acted on a request from Trappes as to whether further rations could be issued on credit to settlers whose deposits had been almost completely used up. Donkin agreed to further rations but only to those who still remained on their designated locations.[255] The debt had to be secured by mortgages on the land of the settlers concerned. The failure of the first wheat crop therefore imposed a heavy financial burden upon almost every settler across Albany.

Despite the disappointment of the failed harvest, most Salem settlers were still optimistic, believing that crop losses were attributed to late sowing. Morale was also boosted by Donkin's decision to make more rations available on credit, enabling them

[253] Davenport, *History of the Matthews settler family* p. 17 and Unknown author, "Learn how to identify and get rid of rust on plants using proven, organic and natural methods" at https://www.planetnatural.com/pest-problem-solver/plant-disease/common-rust/ (Accessed 18 March, 2019).
[254] Makin, *1820 Settlers of Salem* p. 36.
[255] Makin, *1820 Settlers of Salem* p. 37.

to carry on until the next harvest season. On 14 February 1821, Captain Henry Somerset, the deputy landdrost of Albany paid a visit to Salem to ascertain the state of the situation. He apparently expressed his satisfaction with the appearance of the village and the "industry of its people".[256] In March, the settlers welcomed their first permanent resident doctor in their midst, Dr Peter Campbell.[257] However, his stay would be of short duration. He was not doing well as a general practitioner, often riding and walking vast distances to get to patients for very little payment due to the dire financial situation among the settlers. In November he moved to Grahamstown and soon became acting District Surgeon.

During the course of May, Donkin returned to Albany for another tour of the settlements. He had received reports that the continuation of granting rations on credit was inhibiting the industry of some settlers who were unwilling to offer their services to those who could not afford them. As a result, a labour shortage threatened the economy of Albany. Donkin then met with the new landdrost of Albany, Major James Jones and leaders of the settler parties to discuss the problem.[258] After the meeting, Jones issued a government notice proclaiming the government's intention of constructing a number of buildings in Bathurst and Grahamstown requiring settlers who had experience in the building trade, such as carpenters, masons, handicraftsmen and artificers.[259] The notice went on to say that the settlers who fell within these categories would be given the choice of accepting or refusing employment, but if they refused they could no longer obtain rations on credit. A number of Salem settlers had building backgrounds and this notice would have a direct influence on their futures, with many leaving the settlement to pursue the potential economic benefits of such an initiative.

When Donkin returned to Cape Town, he decided that the Commissariat would continue to issue rations in terms of the Government Notice until 30th September 1821, after which date rations would be reduced to by half for the next three months.[260] By the start of the next year no rations would be issued whatsoever. In other words the

[256] *Ibid*., p. 38.
[257] *Ibid*., p. 38.
[258] *Ibid*., p. 39.
[259] Davenport, *History of the Matthews settler family* p. 17 and Makin, *1820 Settlers of Salem* p. 39.
[260] Makin, *1820 Settlers of Salem* p. 39.

accounts of all the settler parties would be closed on 31st December 1821 and any amounts owing the government at that date were to be secured by mortgages against the relevant allotments of land.

Unsurprisingly, this announcement was met with a great deal of concern by the Salem settlers and a memorial to Donkin was prepared and signed by most of the Salem party. The memorial conveyed their fears that half rations was an unreasonable measure as they were still struggling to derive any sort of produce from their gardens and fields.[261] Reducing their rations would only worsen their already dire situation. They also expressed concern that a repeat of the previous year's failure was a distinct possibility, though they were still optimistic that rations would be unnecessary after the close of the year.

The memorial did very little to change Donkin's mind but he did arrange for the shipment of seventy-six tons of rice from India to be distributed for free during the first quarter of 1822 to any "distressed persons" who still lived on their allotments.[262] This arrangement would prove to be temporary but vital relief for many Salem settlers, while for others it would be too late.

The failure of the wheat crop at the end of 1820 was a signal to some Salem settlers to look elsewhere for means of earning a living. For example, Thomas Wallace left his family at Salem while he and his son set out on foot for Cape Town in May with the intention of seeking employment.[263] However, when he reached George he was arrested for leaving the settlement without official permission, but was allowed to submit an application to Cape Town to remain in George where his labour was required by local residents. Wallace was given approval to stay there for four months. In October he pleaded with the authorities that his pass be extended but this was not granted. Wallace was promptly arrested and sent back to Albany and an uncertain future.

[261] In Makin, *1820 Settlers of Salem* p. 40.
[262] Makin, *1820 Settlers of Salem* p. 40.
[263] *Ibid*., p. 41.

Strictly speaking, the pass laws that applied to Wallace and the rest of the Salem settlers were in fact irrelevant to them but the scope of the regulations had not been clear to the officials who had to apply them.[264] 'Free' settlers were originally not subject to the regulations, but they were later amended on 1 June 1821 to include all settlers in Albany in an attempt to prevent a mass drain of people from the area.[265] A population drain of such nature would have significantly negated Somerset's plan of keeping the settlers between the colony and the amaXhosa. Therefore, put simply, they were in a place where they did not want to be and were forced to stay there.

To make matters worse, the Salem settlers' foreboding of another crop failure came to fruition when the wheat crop was again destroyed by rust by the end of 1821. A sense of dread had now befallen the village, as everyone was uncertain about how they would survive during the following year, especially since rations would no longer be issued then. The year ended with the Salem settlers owing the government over 38,000 Rixdollars.[266] This debt was over three times the total sum deposited by the Sephton Party in London, aggravated by the mortgage registered against 11,000 acres of land at Salem (approximately 4,700 hectares).[267] To add to their difficulties they did not have any ready cash of their own left. It seems that, aside from their immovable properties, the only tangible assets owned collectively by the eighty families left on Salem at this time were 360 head of cattle, 410 sheep and goats, twelve horses and a number of pigs and fowls.[268] In the meantime, life continued for the Salem settlers. To outsiders, this may have been interpreted as cause to be optimistic.[269]

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[264] Peires, "British and the Cape" in Elphick and Giliomee, *Shaping of South African Society* p. 475 and Makin, *1820 Settlers of Salem* p. 41. These regulations had been enacted by the Dutch East India Company Proclamation No. 19 of 1797 as a measure to restrict movement of foreigners who might be spies, as well as a means of apprehending deserters. The regulation had fallen into disuse after 1806, but was revived by Donkin to a certain extent on 14 May 1820 in an attempt to keep settlers who had entered into contracts of service with the leaders of their parties in the Albany District during their service period.

[265] Makin, *1820 Settlers of Salem* p. 41.

[266] *Ibid*., p. 42.

[267] Davenport, *History of the Matthews settler family* p. 16.

[268] Makin, *1820 Settlers of Salem* p. 42.

[269] *Ibid*., p. 49. Reverend Dr John Philip of the London Missionary Society visited Salem in 1821, remarking on the progress which the settlers had made: "I was delighted and astonished at the exertions of the people. The original settlers in the valley amounted, I believe, to eighty-six families, and in little more than eighteen months the people had for the most part erected neat cottages; and there was scarcely a house on the location which was not surrounded with a turf wall and ditch, enclosing gardens and corn land. The neat dwellings, the regular enclosures, the spacious and excellent roads running through the whole line of the valley, the herds of cattle grazing around the village…and the activity and bustle which appeared in every direction, together with decent clothing of the people exhibited an appearance altogether so truly English in its

On New Year's Day 1822, the Salem settlers joined Reverend Shaw in laying the foundation stone of a new and more stable chapel.[270] Approval for the building of such a chapel had been given by the settlers but there was very little to no money left to finance it, so they acquired the building materials themselves and made use of their own labour. Construction commenced under the supervision of Richard Gush, with almost a year passing before the first service could be held there.[271] During this period, Salem would be faced with a mass exodus as many settlers could not bear to stay, dispersing to other parts of Albany in search of a better life.

More misfortune would greet the Salem settlers with the return of Somerset as governor from his two-year hiatus. Somerset had a deep-seated animosity towards Donkin over his political views and so set about to reverse most of Donkin's policies towards the settlers. One of his first acts as governor upon his return to the Cape was to dismiss Jones as landdrost of Albany.[272] This was an unpopular decision for the settlers in general as Jones was well-liked throughout the district. In addition, Somerset decided to move the seat of the magistrate from Bathurst to Grahamstown.[273] Many settlers interpreted these decisions as acts of spite directed towards not only his predecessor but towards them as well.[274]

In May 1822 several leading members of the settler parties from all over Albany called for a public meeting in Grahamstown to discuss the deteriorating conditions in the district.[275] When they arrived in Grahamstown, they were shocked to find large placards put up by the new landdrost forbidding any public gathering without the consent of the governor.[276] A formal request to hold a meeting was submitted to Cape Town but after considerable delay it was turned down on the grounds that the reasons

character, and furnished such a contrast to the state of the country through which I had earlier passed, that the whole scene operated on me in a manner something like enchantment…"

[270] Makin, *1820 Settlers of Salem* p. 43.

[271] Makin, *1820 Settlers of Salem* p. 43 and Davenport, *History of the Matthews settler family* p. 18.

[272] Peires, "British and the Cape" in Elphick and Giliomee, *Shaping of South African Society* p. 477. At the same time he dismissed three settlers from their offices as members of the Heemraden at Grahamstown. These men were all appointees of Donkin.

[273] *Ibid*. p. 477.

[274] Makin, *1820 Settlers of Salem* p. 43 and Peires, "British and the Cape" in Elphick and Giliomee, *Shaping of South African Society* p. 477.

[275] Makin, *1820 Settlers of Salem* p. 44.

[276] The ban was in fact in terms of yet another Dutch East India Company regulation that was still in force in the colony.

for the meeting had not been stated within the request. As a result, any joint effort of the settlers across Albany to find a solution to their distress ended in failure, leaving each individual settler to fend for themselves.

It soon became clear to people living outside of Albany of the harsh conditions confronting the settlers there. In 1820 Captain Moresby of the *HMS Menai* saw the need for additional funds to assist the more needy cases among the settlers while loading them off at Algoa Bay.[277] When he returned to Cape Town, he appealed to his admiral, to Donkin and several other prominent men in Cape society to establish the "Distressed Settlers Fund".[278]

When this Fund became aware of the distress experienced by most of the settlers in Albany in 1822, it decided to redouble its efforts in raising more money to help them. To get the necessary public support the Fund asked that Somerset become patron of the fund, but unsurprisingly he ignored their invitation.[279]

In March 1822 the issue of rice to the settlers was completely stopped, leaving the settlers entirely vulnerable to starvation.[280] From then on the only resources they had would exclusively come from what was produced on the land. Fortunately, those who were in possession of barley, oats and Indian corn which were immune to rust, were able to produce much needed bread.[281] A variety of vegetables were also produced in the gardens, while those with cows had milk and even butter and cheese.

Although there was never a period of real starvation at Salem, living was still at the bare subsistence level. It was seldom that enough was produced to sell at the military stations such as in Grahamstown in order to buy any luxuries such as clothes and

[277] Makin, *1820 Settlers of Salem* p. 44.
[278] *Ibid*., p. 44. The aim of the fund was to give relief in cases of dire need. A sum of 7,000 Rixdollars was collected and made available for distribution by Trappes and Reverend Shaw.
[279] *Ibid*., p. 44. The reason for this was that he had, in fact, created his own fund called the "Fund for the Relief of Distressed Settlers" in June. However, very little help was received from this fund, despite its similar-sounding name.
[280] *Ibid*., p. 45.
[281] Davenport, *History of the Matthews settler family* p. 17 and Makin, *1820 Settlers of Salem* p. 45.

household bedding.[282] Thus, settlers became resourceful and quickly resorted to local techniques of manufacturing clothing.[283]

As mentioned earlier, an employment scheme for settlers with skills in the building trade was devised by Donkin in 1821. This had led to many settlers who had such skills to leave their allotments and seek employment opportunities in Bathurst and Grahamstown. A substantial number of Salem settlers had been induced to take up work as per the stipulations of this scheme. Initially, some of them would have viewed this opportunity as a temporary means of earning ready money with every intention of returning to their allotments. But they would have noticed that there was a great demand for their kind of services in these towns. The wages offered by the contractors were also high compared to the income or prospective income to be derived from their lands. Grahamstown's population was also steadily increasing, leading many settlers to believe that a growing need for shops, transport, shoemakers, tailors and other craftsmen had arisen.[284] The exodus out of Salem caused the new landdrost to report in 1823 that "a large portion of this party consisted of Mechanics, who have not resided on the Location".[285]

For those who remained in Salem, the situation remained precarious. Once their herds of livestock were reaching substantial numbers, the Salem settlers like their counterparts across Albany faced cattle thieves for the first time. Thieving of cattle had increased significantly in 1822 after Somerset reduced military patrols in the area as part of his plan of giving Ngqika more control over the movement of amaXhosa.[286] The settlers were gravely concerned at this attack on their barely fledgling settlements and applied to the landdrost for arms to protect their property. The landdrost proposed a scheme which resembled a militia system in which a portion of the male inhabitants of Albany between the ages of sixteen and seventeen years of age would be enrolled

[282] M Winer, "'The indulgence of the Good Wife's Cravings' – Gender, Commodities, and Domestic Space in a Nineteenth-Century Colonial Settlement", *Draft paper for University of Western Cape conference: Gender and Colonialism* January 1997 p. 4.
[283] Makin, *1820 Settlers of Salem* p. 45. Softened sheepskins took the place of worn-out clothing, while *veldschoens* ("veld shoes") replaced the shoes from Britain. Hats were also made from the leaves of the palmiet reed, straw or even animal skins.
[284] F Vernal, *The Farmerfield Mission: A Christian Community in South Africa, 1838-2008* p. 89.
[285] In Makin, *1820 Settlers of Salem* p. 46.
[286] See p. 78 of this thesis.

and armed. This proposal was adopted by Somerset in October 1822, with the militia, named the Albany Levy, coming into existence in March 1823.[287]

Despite a third wheat crop failure at the end of 1822, those settlers left in Salem managed to persist and eke out a living as best they could. Elsewhere in Albany though, there was mounting dissatisfaction towards the apparent indifference of those in government to their plight. Individual memorials to Somerset had brought no response, with some doubting whether the landdrost was even conveying these letters of distress to the government in Cape Town.[288] In desperation, some rural settlers of Albany decided to take their case directly to Lord Bathurst as Colonial Secretary.[289] This did not affect much change on its own. But there were concerns in England regarding Somerset's administration in the Cape which started to influence public opinion. These concerns were further brought forward in the press as well as parliamentary debates. The demands from the public as well as private organisations such as the Distressed Settlers Fund prompted the British government to send a Commission of Inquiry to the Cape.[290]

This Commission landed in Cape Town in July 1823 but only arrived in Albany in February 1824.[291] The early proceedings of the Commission were characterised by sharp criticism of Somerset's landdrost in Albany. At the insistence of the settlers, the Commission made the landdrost explain the rationale of decisions made during his administration period. The Commission was overwhelmed with pleas from settlers to

[287] Makin, *1820 Settlers of Salem* p.46. The Albany Levy consisted of two troops of horsemen based in Grahamstown and Bathurst and five divisions of infantry militiamen. Approximately half of Salem's men served in the Levy, mainly in the Cariega Division. Each man was issued with a gun and ten rounds of ammunition and was required to attend parades on a periodical basis. However, the Albany Levy was disbanded in 1825, without seeing any combat.

[288] *Ibid*., pp. 46-47.

[289] In a memorial dated 10th March 1823, the settlers pleaded to Bathurst that "it has long, and from the most distressing proofs, become evident to the settlers that the colonial government (situated at the opposite extremity of the colony, where every particular, whether of soil and climate, or the constitution, pursuits and interests of society, is totally different) possess no adequate means of ascertaining their actual wants" The memorial dealt with numerous complaints and no real names are given but it is clear to see that Somerset and 'his' landdrost were, according to the signatories, to blame for their hardship and misfortune. The signatures of 171 settlers were attached to the letter, including nine from Salem. (See Makin, *1820 Settlers of Salem* p. 47.)

[290] Peires, "British and the Cape" in Elphick and Giliomee, *Shaping of South African Society* p. 477. The purpose of the Commission was actually to make detailed recommendations concerning the British Government's acquisitions of the Cape, Mauritius and Ceylon.

[291] Makin, *1820 Settlers of Salem* p. 52.

remove him on the basis of incompetence. Many of these pleas were frustrations actually directed towards Somerset.[292] The landdrost represented to them Somerset's failed administration and therefore they sought immediate change. They would not have to wait long. The landdrost was removed less than a year later in February 1825.

The Salem settlers had faced three wheat failures in their first three years at Salem. Unfortunately for those who had stayed after such catastrophic losses, this would not be the last time nature would strike a terrible blow to their desperate attempts to stay on the land. A severe drought had ravaged the area since they had arrived. However, at the end of September 1823 this drought had been broken by rain.[293] For the first few days, the showers were light much to the delight of the settlers. Then, torrential showers struck the area in a severe thunderstorm, causing James Hancock to make the following entry in his notebook:

> *Sunday, 5th October (1823). Sunday evening the rain came on about the change of the moon and continued at intervals during Monday. Tuesday and Wednesday was a little finer till the evening when it came very heavy indeed for several hours. It cleared up on Thursday but returned in the evening with greater violence than ever and continued until Saturday morning when it abated a little and was fair on the Sunday following. The river rose an alarming height; Gush's roof was washed away as well as the lower part of the fences belonging to my cornfields.*[294]

Hancock recounts how the settlement was struck by a "hurricane with heavy peals of thunder and vivid flashes of lightning with the heaviest rain we have had since we have been in the colony".[295] The river reportedly rose even higher by "about 18 to 20 inches".[296] The heavy rains washed the clay plastering of the wattle and daub houses. It also soaked the thatch of the roofs until they leaked or caused the supporting structures to buckle under the added weight. Some settlers even had their houses collapse or it became too dangerous to live in. The cottages near the river or streams

[292] *Ibid*., p. 47 and p. 53.
[293] *Ibid*., p. 47.
[294] In Makin, *1820 Settlers of Salem* p. 48.
[295] In Makin, *1820 Settlers of Salem* p. 48.
[296] In Makin, *1820 Settlers of Salem* p. 48.

were either flooded or washed away by the floods that followed. The settlers referred to this disaster as the "Great Storm of 1823".

The distressing situation in Salem at the end of 1823 caused Reverend Dr Philip to lament in his second visit:

> *Two-thirds of the former buildings were in ruin, the enclosures about the deserted houses were broken down; the houses and the fences which remained were mostly going to decay, the dress of the people was much altered for the worse by two years' wear; their hope and cheerfulness had fled: - of eighty-six families 32 only remained, and most of these continued upon the ground with reluctance and because they knew not where to go…*[297]

For those who remained in Salem, the future was uncertain. Indeed, the land that had promised them so much four years previously now conspired against them. Relentless natural disasters coupled with antagonistic government officials made a desperate situation worse. In what would be the beginnings of what Lorenzo Veracini refers to as a "population economy", the settlers wished to manage their domain themselves.[298] They resented government interference which prioritised imperial ambitions over settler well-being and prosperity. However, the circumstances in which they were placed necessitated a healthy relationship with authority. When authorities acted contrary to their interests, the settlers took it as an attack against their very existence.[299] This is evidenced in the numerous memorials written and signed by the Salem Party. Although the reactions of the colonial government towards their plight might have seemed harsh to the settlers, it must be understood that the frontier zone was by no means a vibrant, economic hub. The Albany District was costing the colony far more than anticipated, with many in government of the opinion that it was an unviable area to keep.[300] However, for Somerset it was vital as part of his strategy to close off the frontier and keep the colony safe from any future amaXhosa aggression.

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[297] Rev. Dr Philip In Makin, *1820 Settlers of Salem* p. 49.
[298] L Veracini, *Settler colonialism: A theoretical overview* (New York, 2010) pp. 17-20.
[299] Veracini, *Settler colonialism* p. 105.
[300] Lester, "Margins of order", *Journal* p. 639.

The welfare of the settlers was never high up on the list of priorities of the colonial project. But their presence was crucial if this strategy was to succeed. Thus, when the settlers were confronted with the reality of their situation and looked elsewhere for a viable income, the government was quick to dredge up and modify draconian regulations from the previous regime to prevent a mass exodus from the area. The settlers were now forced to either accept failure and move elsewhere in the district for a chance at economic success or stay in Salem. For those who stayed, it would be a bitter and hard struggle to eke out the futures they had hoped for when they boarded the *Aurora* or *Brilliant* back in London in 1820.

Conclusion

When the Salem settlers arrived at their destination, they would not have been aware of any prior black African communities occupying the land they now lived on. In fact the only sign of prior occupation was the old abandoned farmhouse of a Boer who had left unwillingly. But it has been shown that the land between the Tyelera and Qhora rivers had most likely been occupied by at least two amaXhosa groups prior to eastward expansion into the area by European colonists.

The violent expulsion of these groups from the Zuurveld represented a watershed moment in which European dominance over the frontier amaXhosa was achieved through sheer brutal force on an unprecedented scale. The aim of the expulsion was to clear the Zuurveld of all amaXhosa in a bid to close off the frontier in order to protect citizens of the colony. However, it has been shown that the Zuurveld was never really considered by colonial authorities as part of the Cape. In fact, the evidence suggests that there was at least one occasion where Ndlambe entered into a transaction to buy the land from colonial authorities. This is further supported by the fact that there was no real colonial authority in the Zuurveld before 1811. The landdrosts of Uitenhage and Graaff-Reinet were too far away to affect any sort of law and order there.

It is in this light that one must view the decision of Cradock to follow through with plans to drive the amaXhosa out of the Zuurveld. What followed was a calculated and premeditated attack on the amaXhosa on the pretext that it was in retaliation for the continuing attacks on frontier farmers and seizure of cattle. The violence was only

spurred on after the killing of Stockenström, with Graham using it as justification for the war crimes they were about to commit against the Gqunukwhebe and Ndlambe.

This kind of justification evokes the example of the criminal who invades a home and kills the owner, calling it self-defence because the owner had the temerity to try to stop him. The criminal would argue that the homeowner attacked him first and this necessitated him to use lethal force to prevent harm to his person. Such ludicrous justification ignores the circumstances leading up to the killing and, by implication then, ignores the capital offence that has been committed in this instance.

Although the amaXhosa under Ndlambe stood no chance in the face of overwhelming firepower and despite their desperate situation, they were not about to relinquish the land they had fought so hard for. The attack on Grahamstown, Giliomee maintains, is directly attributed to Brereton's raid and seizure of 23,000 heads of cattle. Giliomee is not the only historian to believe this. Indeed, it is true that the raid was the main catalyst of the attack, but it was merely the symptom and not the cause. It has been demonstrated that Ndlambe had always had the intention of returning to the Zuurveld. He singled out Grahamstown because it represented the colonial presence in the Zuurveld. He needed a large enough army to attack and defeat the garrison and settle on the land. For this a figure was needed to unify and inspire the amaXhosa under his control. To them, Nxele represented resistance against the raging colonial machine as well as hope that this machine could be stopped in its tracks. The attack failed and broke the back of Ndlambe's grand plans of returning to the Zuurveld. It also extinguished any sort of realistic chance that the Zuurveld would ever be regained.

On the other hand, Somerset was determined to close off the frontier, using unassuming British immigrants as a stop-gap. Even though the Zuurveld was viewed by the Cape government as part of the colony and administered as such, it still only remained an appendage of it with the sole purpose of preventing future amaXhosa incursions into the Cape. The Salem settlers were situated at the centre of this buffer-zone, and as the next chapter will show, their claim to that land was far from secured.

ILLUSTRATION 2.5: A sketch of Salem, c. 1850

(Credit: AE Makin)

CHAPTER THREE: "TO CAST OUT FEAR" – SETTLERS, SERVANTS AND COMMON LAND

> *If ever a country learned to cast out fear, to rise above it, and look ahead, that country was the Cape, and in particular our Eastern Cape, enshrined for so many people here, in quiet, homely Salem, where we pay our homage to-day.*
>
> - *WA Maxwell, Address given at Salem on Settlers' Day 1959.*

The above is the concluding paragraph of a Settler Memorial Day lecture given by Professor Winifred Maxwell, former head of the History Department at Rhodes University. The lecture was given in Salem itself, commemorating the life of one of the original Salem settlers, Richard Gush, who had passed away 101 years earlier. Gush had played a pivotal role in an incident when he and a Boer, Barend Woest, allegedly went out unarmed and persuaded an armed force of amaXhosa not to attack Salem in 1835 during the Sixth War of Dispossession. This episode was remembered and commemorated not only by Maxwell but also by other white South Africans, including the renowned playwright Guy Butler.[1] In their eyes it showcased settler pluck and a quiet fortitude that commanded the respect of "500 warriors".[2]

It also impressed Maxwell that there seemed to have been some kind of divine moment whereby Gush, by his actions, proclaimed Salem to be absolved from any attack by the amaXhosa for any past transgressions. This happened, according to Maxwell, when Gush suggested during the parley that one of the warriors should go fetch bread from Gush's wife and children. Instead the leader of the amaXhosa forces told Gush that if he fetched it himself, they would go away. Maxwell describes this moment as a "testing point" and asks rhetorically: "Would a frontiersman obey a Kaffir?"[3] Would a settler back down from a fight, diffusing a potentially threatening situation in a

[1] In 1982, Butler's play *Richard Gush of* Salem was published. Two years later it was adapted into a film directed by Vincent G Cox.
[2] WA Maxwell, "Settler Memorial Lecture", *Address given at Salem on Settlers' Day 1959* (Cory Library) Pamphlet Box 217, p. 8. There were no real estimates of how large the amaXhosa *force* was. It is highly probable that Maxwell's estimates were inflated.
[3] Maxwell, "Settler Memorial Lecture", *Address* p. 8.

conscious effort to protect his family and village? According to her version of events, he did obey and in so doing, he earned their respect and Salem was left unscathed.

ILLUSTRATION 3.1: "Richard Gush, c. 1850", artist unknown

(Credit: AE Makin)

Furthermore, this event, to Maxwell, appeared to be symbolic of the legitimate claim which the British settlers had staked in their little corner of Africa. Her conclusions, as well as those of her contemporaries, at best imply that this claim was recognised and accepted by the amaXhosa. At worst, she completely disregards their perspective and counter-claims to the land. Her comments are not surprising as it was less than twenty-years prior to her lecture that the Supreme Court in Grahamstown delivered its judgement in allowing subdivision of common land to take place, ignoring those who were living on that land, and ultimately allowing processes to play out which would lead to the forced removal of those people living there.

What follows is a discussion of how the Salem settlement continued to establish itself as an agricultural settler community in the District. The discussion will start with a brief explanation of the origins of commonage as legal construct in Great Britain before making its way to the Cape Colony. Today, there are two types of commonage in South Africa: "new commonages" are those commonages purchased in terms of the Provision of Land and Assistance Act 126 of 1993, by means of the Department of

Land Affairs (DLA) subsidies for "emerging farmer" use only.[4] The "historical commonages" are those that have always been owned and managed by town or village management boards for the benefit of their citizens.[5] This discussion will focus exclusively on the 'historical' type of commonage where the state partitioned land aside for the exclusive use of the Salem settlers.

It will explain the eventual granting of large tracts of land on two separate occasions from the Cape government to the Salem settlers for the purposes of common use. While this was happening, complete control of the district was still in doubt, putting into question the legitimacy of these grants. The focus will shift to the establishment of the Salem Village Management Board as a measure to regulate property ownership in Salem. The Board played a significant role in the processes leading up to the application for subdivision, especially in its failure to prevent farmers from reducing the commonage into privately-owned subdivided parcels of land. Lastly, an explanation will be given as to how the black Africans were systematically dispossessed of their rights when subdivision was enforced. This chapter should offer some elucidation as to the nature of the commonage and the subsequent forces that played a part in both its establishment and dissolution.

A Common Ground: The Meaning of 'Commonage'

The concept of commonage has its origins in Britain and Europe during the medieval period. It refers to the right of pasturing animals on "common land", in other words, land held in common.[6] In medieval England the common land was an integral part of the manor, the basic feudal unit of tenure, and was therefore part of the estate held by the lord of the manor under a feudal grant from the Crown which owned all land.[7] This manorial system granted rights of land use, called appurtenant commons rights, to different classes.[8] Some rights of common were unconnected with the tenure to that

[4] M Ingle, "Municipal Commonage in South Africa: A Public Good Going Bad?", *Africa Insight* 36, 2, June 2006, 46-55, p. 47. In other words, these tracts of land are reserved by government to aid with the land redistribution project.
[5] Ingle, "Municipal Commonage", *Africa Insight* p. 47.
[6] J Pearsall (editor), *Concise Oxford English Dictionary* Tenth edition (revised), (Oxford, 2002).
[7] P Linebaugh, *The Magna Carta Manifesto: Liberties and Commons for All* (Berkley, 2008) p. 64.
[8] The Free Dictionary at: http://legsl-dictionary.thefreedictionary.com/appurtenant (accessed 22 February, 2019).

land. Most land with appurtenant commons rights were adjacent to the common or surrounded by it.

On most commons, rights of pasture and pannage[9] for each commoner were tightly defined by number and type of animal, as well by the time of year when certain rights could indeed be exercised. For example, the occupant of a particular cottage might be allowed to graze a certain number of cattle, horses and geese, while his neighbour would probably be allowed a different number. On some commons the rights were not limited by numbers, instead a marking fee was paid annually for each animal turned out. However, if excessive use of the commonage was made, such as through overgrazing, it could be stinted, in other words, a limit was put on the number of animals each commoner was allowed to graze. These regulations were responsive to population as well as economic pressure. Therefore, instead of letting the commonage become ruined, measures would be put in place to restrict access.

Traditional rights in common land were ended due to a process of enclosure which was the legal process in England of consolidating (enclosing) small landholdings into larger farms since the thirteenth century.[10] Once enclosed, use of the land became restricted to the owner, and it ceased to be common land for communal use. In England and Wales the term is also used for the process that ended the ancient system of arable farming in open fields. Under enclosure, such land is fenced (enclosed) and deeded or entitled to one or more owners. The process of enclosure began to be a widespread feature of the English agricultural landscape during the sixteenth century. By the nineteenth century, unenclosed commons had become largely restricted to rough pasture in mountainous areas and to relatively small parts of the lowlands.

Enclosure could be accomplished by buying the ground rights and all common rights to accomplish exclusive rights of use, which increased the value of the land. The other method was by passing legislation which would cause or force enclosure, such as the

[9] Also known as 'mast'. It is the right to turn out pigs for a period in autumn to eat mast (beech, acorns and other nuts).
[10] Linebaugh, *Magna Carta* p. 47.

infamous Parliamentary Enclosure Acts.[11] The latter process of enclosure was sometimes accompanied by force, resistance, and bloodshed, and remains among the most controversial areas of agricultural and economic history in England. Marxist historians argue that rich landowners used their control of state processes to appropriate public land for their private benefit. During the Georgian era, the process of enclosure created a landless working class that provided the labour required in the new industries developing in the north of England. For example, EP Thompson notes that "[i]n agriculture the years between 1760 and 1820 are the years of wholesale enclosure in which, in village after village, common rights are lost".[12] This forced that working class to the cities, presenting government with social welfare problems which eventually convinced them to devise an immigration scheme to other territories. It is deeply ironic then that these conditions would cause the disposed proletarians to emigrate to and settle in the Cape where the indigenes were rendered landless themselves.

The enclosure movement may not have been the deciding factor in all cases, but it certainly did, along with the Napoleonic Wars, set the preconditions in Britain for such a scheme. Thompson lamented that "[e]nclosure (when all the sophistications are allowed for) was a plain enough case of class robbery".[13]

Inevitably, the concept of commonage would find a place in southern Africa along with other English land practices being implemented in the Cape at the beginning of the nineteenth century.[14] Towns came into existence all over the colony on already surveyed farmland. As a result, virtually every town was surrounded by farmland for the use of its townsfolk. The inhabitants of these towns, at the time of their founding were dependent on pastoralism and therefore required land on which to graze their cattle, horses, oxen and sheep.

[11] *Ibid*., p. 135. During the eighteenth century, enclosures were regulated by Parliament. Each village that wished to enclose its land required a separate Act of Enclosure. In 1801, Parliament passed a General Enclosure Act which enabled any village, where 75% of the landowners agreed, to enclose its land.
[12] EP Thompson, *The Making of the English Working Class* (New York, 1964) p. 198.
[13] Thompson, *Making of the English Working Class* p. 237.
[14] LC Duly, "The Failure of British Land Policy at the Cape, 1812-1828", *The Journal of African History* 6, 3, 1965, 357-371, pp. 359-361.

Due to the necessity of agriculture for the livelihoods of those living in these towns, it was not uncommon for town councils to supplement their surrounding farmland with the purchase of additional adjoining farms when they became available. The rationale was that it boosted municipal income from commonage fees and licences. At the same time it increased the possibility for a municipality to expand its limits in future. Therefore, the commonage represented a town's potential for future development. For example, the hamlet of McGregor was able to report in the 1911 South African Municipal Year Book, that its 'township' consisted of approximately 150 morgen and its commonage was 1,811 morgen.[15] It also reported that "portions of the commonage were fenced in and leased". Every town had the freedom to devise its own procedures pertaining to the use and maintenance of the commonage, as well as mundane matters such as the daily passage of livestock to and from these pastures. For example, town councils could mete out fines to citizens who rode their horses through the centre of town at excessive speeds.[16] Similarly, if cattle broke out of the commonage and into the town, owners were liable to pay for the offence.[17]

Another crucial feature of the commonage was that it was often reserved for "white residents" only.[18] It became an inexpensive means for white town residents to expand their agricultural activities as these small towns started to increase in size. However, it was not unusual for black African or other 'non-white' labour tenants on neighbouring farms to also use these commonages as grazing land for their livestock.[19] In some cases a commonage was a convenient alternative for an employer to allow his employee to keep livestock, as that livestock could then be separated from his own, thus not contaminating his stock with disease or "inferior breeding". In turn, it allowed the black African labour tenant some economic freedom, as that land could also be used to collect firewood to sell in town or building materials for their homesteads.[20]

[15] *Official South African Municipal Year Book 1911* (Cape Town, 1911) p. 93 in M Ingle, "Municipal Commonage in South Africa: A Public Good Going Bad?" *Africa Insight* 36, 2, June 2006, 46-55, p. 47.
[16] Ingle, "Municipal Commonage", *Africa Insight* p. 47.
[17] *Ibid*., p. 47.
[18] D Atkinson and B Buscher, "Municipal commonage and implications for land reform: A profile of commonage users in Philippolis, Free State, South Africa", *Agrekon* 45, 4, 2006, 437-466, p. 438.
[19] K Luck, "Contested Rights: The Impact of Game Farming on Farm Workers in the Bushman's River Area", MA Thesis, Rhodes University, 2003, pp. 63-66.
[20] Ingle, "Municipal Commonage", *Africa Insight* p. 47.

Thus, while in law the access to this land was restricted to white use only, in practice the situation on the ground was far more fluid.

Over time the patterns of urban life changed drastically. Horse-drawn carriages and ox-wagons were replaced by cars and trucks; dairies and butcheries provided specialised services which rendered the need to maintain one's own cows and sheep redundant.[21] By the mid-twentieth century, town residents tended to lose interest in small-scale agriculture, and commonages were increasingly let to commercial (white) farmers, close to market-related rentals. The land was attractive, because it was located close to town (and facilities such as cattle-dipping tanks and abattoirs).[22]

Added to this, the increasing pace of urban lifestyles meant a growing detachment from direct interaction with the surrounding veld. Apart from farmers and others who still were familiar with the land beneath them, many townsfolk came to forget that such a thing as commonage even existed. It was no longer a part of their urban lives though it still formed part of the urban milieu.[23]

The Salem commonage grants: D'Urban and Pottinger

Upon Somerset's return from leave late in 1821, the restrictions on contact between the settlers and the amaXhosa were tightened in an attempt to better demarcate the colonial boundary. Settlers crossing the Fish River were liable to corporal punishment and trading was restricted. However, the settlement was not successful in sealing the colony's eastern border. As can be seen earlier in the previous chapter, the settler parties soon fragmented, with many settlers turning to profitable but illegal trading with the amaXhosa.

While the settlers, for the most part, remained ignorant of the historical dispossession which embittered the amaXhosa, many settler families still felt the brunt of retaliatory raids by bands of amaXhosa operating from across the Fish River. As a result, the settler rhetoric, just as colonial authorities before, depicted the amaXhosa as

[21] *Ibid*., p. 47.
[22] Atkinson and Buscher, "Municipal commonage and implications", *Agrekon* p. 438.
[23] It must be noted that, although commonage used for grazing appears to be rural agricultural land, it is in fact urban land, and has always been treated as such. Its use, (or abuse) has been determined by urban planners for the supposed benefit of urbanised town dwellers and ratepayers.

"irredeemably savage, violent thieves".[24] Such a description had a lasting impression on most settlers and would irreparably damage any sort of relations with the amaXhosa. It perpetuated conflict which would later evolve into attitudes of superiority over the amaXhosa based along racial lines. Clifford Crais goes further by pointing out that the settlers' aspirations of becoming a South African gentry as well as a rapidly changing colonial situation in which only black Africans performed unpleasant labour, was a probable cause for the constructions of the category of "indigenous people".[25]

However, by 1823 the Salem settlers still had very little contact with black Africans, apart from trading agreements which were concluded further east near the Fish River. The constructions of black Africans in Salem were most probably appropriated by those who had heard rumours from outsiders about cattle-raids closer to the Fish River. Those in Salem were a lot more concerned with their own affairs. They had just gone through three crop failures and a devastating flood that destroyed homes and ruined the crops. The settlers were desperate for some relief from the hardship.

Therefore, it was with a tempered sense of relief that the settlers greeted the news in late 1823 that Somerset had approved title of 700 morgen of land. It was divided into fifty individual erven.[26] This averaged thirty extra acres of land per family. It did not take long for the Salem settlers to realise that even this increase meant very little for the maintenance of a family. The rainfall of the area was unreliable for the regular raising of crops and aside from the non-perennial Assegaai Bos River, there were no real opportunities for irrigation. The solution to the problem lay in the farming of livestock. But the total area granted to the settlers was 11,828 acres, with 6,000 acres being made available for grazing.[27] This was considered by the experienced Boers to be a minimum for the farming of cattle, horses and sheep. These animals required extensive tracts of land for grazing, and sixty-five morgen per family was far too small for pastoral farming.

[24] Lester, "Margins of Order", *Journal* p. 643.
[25] C Crais, *White supremacy and black resistance in Pre-Industrial South Africa: The Making of the Colonial Order in the Eastern Cape, 1770-1865* (Cambridge, 1992) p. 92.
[26] *Salem Party Club and Others v Salem Community and Others* [2017] ZACC 46, para. 125.
[27] Makin, *1820 Settlers of Salem* p. 58.

As the livestock herds and flocks grew at Salem, so did the settlers' needs for more land. Memorials for relief were sent to Somerset but ignored. However, with the arrival of the Commissioners of Inquiry from London in Grahamstown, Somerset had a change of heart regarding matters in the Albany District. Early in 1824 he appointed William Hayward as a special land commissioner, tasking him to investigate all complaints over land and to settle disputes between the settlers over land.[28]

Hayward spent some time in Salem giving careful consideration to all representations made to him and in November 1824 he drew up a document regulating the ownership to allotments and the use of the 'fruits' on 700 morgen of land that had been reserved for communal use.[29] Of the 102 settlers who had received land allotments in 1820, only sixty-four were allowed allotments in 1824 under Hayward's regulations.[30] Four of these held more than one allotment each so that seventy-one of the original allotments came under consideration. Proper provision was also made for a cemetery and for ground put aside for the building of a school. The right of pasturage was restricted to ten head of cattle per hundred acres and a further five sheep for every head of cattle withdrawn. For record purposes, two calves until two years old were considered as one head of cattle.[31]

Additional ground to that which was allocated as agricultural land could be cultivated at the cost of one head of cattle for every five acres tilled. Natural springs were open to use for cooking and cleaning of food. Wood, reeds and thatch growing outside of the boundaries of private allotments were available to all those of the Salem location, on condition that they could only be used or sold within the village. The sale of these commodities outside of Salem was forbidden. If this occurred the money used in the sale was forfeited and used for the general benefit of the party. Finally, access roads were defined and responsibility was placed on certain residents for erecting fences along the roads.

[28] *Ibid*., p. 58.
[29] Makin, *1820 Settlers of Salem* p. 58 and *Salem Party Club and Others v Salem Community and Others* [2017] ZACC 46, para. 125.
[30] Makin, *1820 Settlers of Salem* p. 58.
[31] *Ibid*., p. 58.

The Salem settlers implored Hayward for more land with some submitting applications for personal grants of land. Hayward reported these requests and all other aspects of his investigation to Somerset in early 1825. In July, Somerset decided to award Hezekiah Sephton a personal grant of about 4,000 acres and William Trotter was awarded an extension of 2,000 acres to the land on which he located himself in 1820.[32] Interestingly, Somerset also authorised a land grant to the Salem settlers of a portion of the Rietfontein settlement. Since the advance party had been relocated from there in 1820, there was a feeling amongst some Salem settlers that the land at Rietfontein (later renamed "Reed Fountain") was more fertile than at Salem and that the reservation of the place for Campbell was an injustice to them.[33]

However, it would take another twenty-five years before the title deeds to the allotments at both Salem and Reed Fountain were issued in the names of individuals and registered at the Deeds Office in Cape Town. During this period, many of the allotments changed hands through verbal agreement and without formal documentation. When the government finally decided upon the general registration of the sub-divisions of settlements in Albany through the passing of Ordinance 15 of 1844, the owner of each allotment was required to declare the names of all the previous owners.[34] These declarations were often difficult to verify. Nevertheless, they made it possible to ascertain where most of the Salem settlers located themselves in Salem or Reed Fountain.

By the time the general registration of the allotments at Salem and Reed Fountain took place in the 1840s, some of the original settlers, or their descendants, owned large holdings. At Salem two-thirds of the land rights were held by eight original Salem settlers or settler families.[35] However, war would threaten the newly-found prosperity at Salem.

The Sixth War of Dispossession (1834-1835) broke out as a consequence of Somerset's ill-advised decision to cede land between the Fish and Keiskamma rivers

[32] *Ibid*., pp. 58-59.
[33] Davenport, *History of the Matthews settler family* p. 11 and Makin *1820 Settlers of Salem* p. 29.
[34] Makin, *1820 Settlers of Salem* p. 59.
[35] *Ibid*., p. 62.

belonging to Ngqika. This led to a rise in tensions as various amaXhosa groups were vying for control of the land that was left. Those tensions would reach breaking point, and ultimately it did. In December 1834, the amaXhosa forces under Maqoma invaded the colony, forcing settlers to abandon virtually the entire Albany District, save Grahamstown and Fort Beaufort. Farmhouses were burnt to the ground, colonists were killed and thousands of cattle were seized by the amaXhosa force.[36]

Salem did not escape this onslaught. Two incidents during this war directly affected the Salem settlers. The first occurred shortly after the war commenced, when James Rawlins took the village's cattle out to graze on the commonage recommended by Hayward. Rawlins was accompanied by a man named Carpenter and two Khoe herdsmen.[37] They moved over the crest of a hill, only a few hundred meters from Salem. At the same time, an amaXhosa force was waiting for them on the other side of the hill. They hid themselves in the bush and dry riverbed and lay in wait for an opportune time to strike. They seized the chance when Rawlins and his companions came over the hill. As soon as they were out of sight from the rest of the village, the force attacked, killing Rawlins and Carpenter, and wounding a Khoe herder. The other Khoe herdsman escaped and ran towards Salem to alert the residents and a rescue party was mustered to pursue the amaXhosa. The settlers took too long and by the time they arrived on the scene, the amaXhosa had fled along with approximately 100 head of cattle.[38] The bodies of Rawlins and Carpenter were found with multiple stab wounds, while the wounded Khoe herdsman had managed to escape into a small ravine where he was later discovered by the rescue party.

The second incident occurred a few days later, when presumably another armed group moved towards Salem with the apparent intention of attacking it. After the first attack, many settlers were anxious of another attack and decided to seek refuge in Grahamstown. Those who chose to stay behind gathered in the church hall and schoolroom at the centre of Salem. Richard Gush was one of those who stayed behind. The settler version of this story goes that Gush, upon seeing the armed group on the hill opposite the village, rode out in an attempt to negotiate with the amaXhosa

[36] See Peires, *House of Phalo* p. 145.
[37] Makin, *1820 Settlers of Salem* p. 99.
[38] *Ibid*., p. 99.

not to attack Salem.[39] The field-cornet of the area, Barend Woest elected to accompany Gush, along with two other settlers. When he was within 'earshot', Gush took off his coat to show that he was unarmed and asked if anyone spoke Dutch. Two men came forward. Gush then asked why they threatened to kill his people and burn their homes. They replied that they were not intent on killing the settlers but they were hungry.[40] Gush responded that they had no reason to be hungry due to the cattle all around them seized by the group. The amaXhosa men replied that they were in want of bread, to which Gush agreed that they take as much from the village as they want in return they do not attack Salem. The armed group insisted that Gush fetch the bread himself. He obliged and returned a short while later with "fifteen pounds of bread, ten pounds of tobacco and twenty-five pocket-knives".[41] He then told the group to give these to their chiefs and tell them that these gifts come "from one who would neither steal nor kill his fellow-men".[42] The amaXhosa withdrew and Salem was spared for the duration of the war.

Interestingly, another version of this story was told to the Land Claims Court by Nondzube who claims to have heard this story from his grandfather who lived in Salem.[43] In this version, Gush and the amaXhosa had a 'misunderstanding' in "what they were talking, they were not talking the same thing".[44] Nondzube relates how when Gush met with the armed group, he told them that he did not come to "this country" to fight with them. Instead, Gush said that they (the amaXhosa) have this land and have cows. Nondzube then went on by describing an alleged transaction of seed given by Gush to the group, presumably as a token of peace. Then apparently an argument broke out as to who would reap the fruits borne on this land. He dismissed the story of the group wanting bread as something "the white people in their books they wrote down that the black people said to them". He further pointed out that it was improbable that the armed group could have been in need of bread, because according to him

[39] In Maxwell, "Settler Memorial Lecture", *Address* pp. 8-9.
[40] Interview with Arthur David Mullins (2 February, 2019) and Maxwell, "Settler Memorial Lecture", *Address* p. 8.
[41] G Butler, *Richard Gush of Salem* (Grahamstown, 1982) Appendix A.
[42] Butler, *Richard Gush* Appendix A.
[43] Court transcript of testimony of Msile Nondzube (25 January, 2013), pp. 239-241.
[44] Court transcript of testimony of Msile Nondzube (25 January, 2013), p. 240.

"when they (the settlers) arrived there our grandfathers were cultivating the land" without being employed by the settlers.[45]

There seems to be a fundamental disparity between these versions and this is important in trying to understand the staunch opposition from the claimants' side to (white) settler claims to the land and *vice versa*. The settlers and their descendants believed that they have title to the land because of some sense of sovereignty over and entitlement to the land acquired through years of toil and hardship. The gains they made in land acquisition up to this point were through constant appeals for land grants to a government they believed were in the position to authorise those grants. Besides, when they arrived in Salem, there was no one else in occupation of the land. Aside from the 'abandoned' farmhouse of De Bouwer who occupied the land prior to their arrival, there was no other sign of human habitation in the area. However, their concept of 'occupation' differed significantly from that of the amaXhosa. To them, there were no spatial demarcations, no sealing off of one area from another area. Their transhumance patterns traversed physical borders such as rivers and mountains. As we have seen, sometimes some groups would come into contact with others due to climatological or socio-political factors and this would be sorted out in one way or another. The amaXhosa lived as they moved, so though they had *kraals* all along their routes, they were never stationary. The idea of a town with fixed borders was inconceivable. Thus, Nondzube's version of the Gush episode challenges the settlers' notion that this land was theirs alone to inhabit and settle upon.

Nonetheless, the Salem settlers were ready to protect their rights to the land at any cost. Apart from the Gush episode, there are many other accounts of Salem residents volunteering to fight for the colonists against the amaXhosa. Many of them drove the ox teams and wagons laden with supplies and armaments to be carried to the troops. Others served with the 'frontline' units, such as in the case of Richard Bland. He joined a volunteer regiment called the Albany Sharpshooters and was killed in action during one of the first offensive actions by the colonists. Another was Joseph Hancock, son of Salem settler, James Hancock. He joined the Port Elizabeth Volunteer Corps and

[45] Court transcript of testimony of Msile Nondzube (25 January, 2013), p. 241.

went on patrols towards the Fish River. Hancock gives a sombre account of what he saw whilst on patrol:

> *Many were the burnt homesteads we passed on our journey, finding nothing but desolation in what was formerly a prosperous area. Of the men settled near the frontier many had been killed in the first onrush of the native hordes, although the women and children had been spared to flee to safety, reaching Grahamstown ill clad, starving and distraught at the sight of their menfolk being slaughtered before their eyes.*[46]

The war had significantly shaped the settlers' perceptions towards the amaXhosa. The British military commander at the Cape, Harry Smith, echoed their sentiment when he remarked that it was "evident that Christian principles and rules of conduct which they are taught by their religious instructors are disregarded whenever an opportunity presents itself of indulging in their unconquerable propensity to commit robbery and murder on their neighbours".[47] The war had confronted the settlers with atrocities they had not witnessed before, and this would have a profound effect on their views towards any black African who 'entered' into the colony.

Soon after the conclusion of the war, on 15 December 1836, Governor Benjamin D'Urban made a different and much larger grant than Somerset's 1823 grant.[48] Instead of being divided into individual erven, this grant was to the Salem Party as a whole. It consisted of a portion of 2,333 morgen (approximately twenty square kilometres), granted to the Party as common land on perpetual quitrent.[49]

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[46] In Makin, *1820 Settlers of Salem* p. 100.

[47] Lester, "Margins of Order", *Journal* p. 645

[48] The Deed of Grant: *"By his Excellency Major-General Sir Benjamin D'Urban, Knight Commander of the Most Honourable Military Order of Bath, of the Royal Guelphic Order of Hanover, and of the Royal Portuguese Military Order of the Tower and Sword, Colonel of His Majesty's Fifty First Regiment of Foot, Governor and Commander in Chief of His Majesty's Castle, Town, and Settlement of the Cape of Good Hope, in South Africa, and of the Territories and Dependencies thereof, an ordinary and Vice-Admiral of the same, commanding the forces, etcetera, etcetera, etcetera. I do hereby grant on perpetual quitrent unto the Salem Party of Settlers a piece of two thousand three hundred and thirty-three morgen of land . . . as commonage on condition of paying a named quitrent … and be bound (according to the existing laws of this Settlement) to have the boundaries properly traced out, and the land brought into such a state of cultivation as it is capable of: the land thus granted being further subject to all such duties and regulations, as either are already, or shall in future be, established respecting lands granted under similar tenure."*

[49] Perpetual quitrent was introduced to the Cape Colony in 1813 by Sir John Cradock. It applied to the pastoral interior lands which were remote from the seat of government in Cape Town. The system intended to provide

There is no clear reason as to what influenced D'Urban to authorise the land grant shortly after the conclusion of the war. However, what is clear is that there seems to be no basis for him authorising any grant for the usage of commonage. In the 1833 Instructions to D'Urban, instructions 39 and 40 set out the powers given to the Governor of the Cape with regards to land. The instructions gave D'Urban authority to carry out surveys of "the vacant or waste lands to the belonging" in the Cape Colony. Instruction 39 also enumerated a closed list of purposes for what these kinds of land were to be used for:

> *[T]o cause the persons making such surveys to report to you what particular lands it may be proper to reserve … as the sites of towns, villages, churches, school houses or parsonage houses, or as places for burial of the dead, or as places for the future extension of any existing towns and villages … and you are especially to require persons making such surveys to specify in their reports, and to distinguish in the charts or maps to be thereunto assessed such tracts, pieces, or [parcels] of land within our said settlement as may appear to them best adapted to answer and promote the several purposes before mentioned. And it is our will and we do strictly enjoin and require you that you do not on any pretence whatsoever grant convey or [illegible] to any person or persons any of the lands which may be so specified as fit to be reserved as aforesaid, nor permit any such lands to be occupied by any private person for any private purposes.*[50]

Furthermore, Instruction 40 orders D'Urban not to authorise any grant of land that exceeds 100 acres to "any private person" without an express stipulation that such grant cannot be considered valid until such grant is approved by the British government.[51]

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greater security of tenure and order. The maximum size of a farm under this system was 3,000 morgen and the annual fee was not to exceed 250 riksdollars. But this could be increased at a later date. (See AJ Christopher, *The Crown Lands of British South Africa: 1853-1914* (Ontario, 1984), p. 10.).

[50] *Papers Received from Secretary of State, London: General Despatches. Appointment of Sir B D'Urban as Governor of the Cape Colony* (KAB) GH 1/96.

[51] *Papers Received from Secretary of State, London: General Despatches. Appointment of Sir B D'Urban as Governor of the Cape Colony* (KAB) GH 1/96.

The supplementary Instruction to D'Urban, signed by Secretary of State for the Colonies, Lord Stanley, on 10 November 1833, reads:

> *I was in hopes that I should be enabled to furnish you upon your departure for the Cape with instructions for the guidance of the proceedings of your government in regard to the disposal of crown lands. I allude more particularly to those in the ceded territory, which are understood to be better adapted for cultivation, than the unappropriated lands within the old limits of the Colony.*
>
> *On the one hand humour the strong objections which have been stated to us against the proposal of my predecessor for disposing of the waste lands by sale – and on the other hand the very meagre nature of the information which I have been able to obtain [in] relation to the lands of the ceded territory, compel me to invite your own early and serious attention to the whole of this important subject, in order that you may submit for my consideration such measures as may seem best calculated for bringing the public lands within the scope of private industry without unnecessarily or imprudently sacrificing the interests of the crown.*[52]

From these instructions it is difficult to find any sort of basis upon which D'Urban could have been allowed to grant land as commonage to the Salem Party. This is because, though no definition of "waste lands" appears, the second reference to "vacant or waste lands" in these Instructions, as well as a reference to "waste lands" in the supplementary Instruction to D'Urban, suggests that "waste land" is "unappropriated lands within the old limits of the Colony". In other words, it refers to any unused land as far as the Bushmans River, which excludes Salem, as it is situated to the east of the river. The concluding section of Instruction 39 seems to make a clear distinction between land for public purposes and for private purposes, thus rendering the powers of awarding the commonage outside the authority of the Governor.

[52] *Papers Received from Secretary of State, London: General Despatches. Appointment of Sir B D'Urban as Governor of the Cape Colony* (KAB) GH 1/96.

In 1847, Governor Pottinger made another and even larger grant.[53] This was of an additional 5,365 morgen (approximately forty square kilometres), also as commonage. The grant was in favour of the "present and future proprietors of locations in the Salem Party".[54] The quitrents of both this and the 1836 grant were paid off and converted to freehold title in 1848. The allotment of the commonage to the Salem settlers entitled each owner of an erf to an undivided share in the commonage. Freehold title therefore gave the settlers permanent and absolute tenure over the land with freedom to dispose of their erven and shares in the commonage. Both grants also gave the commonage to "the Salem party of settlers" on specified conditions. These included that the boundaries had to be clearly marked and the land was to be used for grazing purposes only.

Less than a century later, Gane, in judgement relating to the subdivision of the commonage, stated that "both grants were issued under Cape Ordinance 15 of 1844".[55] The second grant also indicated this. He maintained that the Ordinance was enacted retrospectively, thus including the first grant. However, both statements seem to be mistaken. The purpose of the Ordinance was "to provide for the enregisterment in the land registers of the Cape of certain subdivisions of the locations and extensions of the Settlers of 1820".[56] It allowed the Governor by proclamation to publish the names of people entitled to subdivided portions of pre-existing locations and, if no objection was lodged, to grant the subdivisions. Therefore, the purpose of the Ordinance was to allow registration of land in the name of each family of Salem settlers where the land had previously been registered in the name of the head of the party, namely Hezekiah Sephton.

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[53] Pottinger's Deed of Grant: *"In the name and on behalf of Her Majesty Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith. By virtue of the provisions of Ordinance 15 of 1844 granted the commonage to the present and future proprietors of the locations in the Salem Party a piece of land, containing five thousand three hundred and sixty-five morgen, and five hundred and fifty square roods … being the grazing ground or common land of the said part . . . on condition . . . that shares of grazing rights on this land can only be transferred by the sale of a share, or shares, or proportional parts of a share, in the original arable land or homesteads of the Party; and that the said proprietors shall be bound (according to the existing laws of this Settlement) to have . . . the land brought back into such a state of the land thus granted being further subject to all such duties and regulations, as either are already, or shall in future be, established respecting lands granted under Quitrent Tenure."*

[54] See footnote 425.

[55] *Ex Parte Gardner* 1940 EDL p. 177.

[56] *Salem Party Club and Others v Salem Community and Others* [2017] ZACC 46, para. 128.

The Salem Party families applied for 'enregisterment' of their subdivided land portions under the 1844 Ordinance. This was given to them retrospectively. The first proclamation under that Ordinance was made on 27 March 1845.[57] A second proclamation, which appears to incorporate the second grant of the commonage, was made on 24 February 1848.[58] These two proclamations set out the size of the families' independent allotments together with their respective shares in the commonage.[59]

Two conclusions can be drawn from this: Firstly, the Ordinance did not authorise Pottinger's grant of the bulk of the commonage in 1847.[60] Secondly, the Ordinance afforded no retrospective authority for the earlier grant of 1836. There is also nothing in the 1844 Ordinance that authorises any new grants of land after its promulgation. The Ordinance thus does not have the authority to include the 1847 grant either, despite the title deed specifically invoking it.

The assumption seems to be that prerogative power was vested with the governors to authorise such land grants. It may well be that such power for this kind of allocation existed under colonial law. Indeed plenty of examples exist where the Crown had the authority delegate its powers to the governor of a colony.[61] The Governor was often viewed as an extension of the British Crown. Therefore, some autonomy could be allowed to the governor as long as his decisions were in line with his mandate. However, there is no evidence to suggest that such delegating had taken place in this

[57] *Proclamation on Subdivision of Settler Lands, 27 March 1845 in Salem Party Club and Others v Salem Community and Others* [2017] ZACC 46, para. 132.

[58] *Proclamation by His Excellency Lt General Sir Henry George Wakelyn Smith* GN 2204, 24 February 1848.

[59] Some texts such as Makin, *1820 Settlers of Salem* suggest that the initial grant of land in 1823 included a large portion of the commonage. This does not appear from either of the title deeds.

[60] An address to the Cape Legislative Council in 1847 refers to the 1844 Ordinance. The address arises from a complaint to Governor Pottinger made by Rev Shaw and Mr Matthews that the individual settler families had not yet been awarded title in the Salem land. Apart from a concern that the Settlers expected more land than they were initially awarded, the complaint was that the land they had been allocated was still registered only under the name of Hezekiah Sephton, the leader of the Party. The 1844 Ordinance was promulgated specifically to deal with complaints of this kind about allocation of title. The complaint was resolved later in 1847, when the Surveyor-General indicated that individual titles were ready to be signed by the Governor. In 1848, the Surveyor-General published a recommendation in the Government Gazette that the quitrent be remitted and freehold title awarded under the 1844 Ordinance. The subdivision in 1848 included corresponding shares in the Commonage.

[61] See *Lam Yuk Ming v A-G* [1980] HKLR 815. Here the executive government in a ceded colony, through the attorney-general, employed its prerogative power to dismiss a group of government pharmacists protesting against working conditions. The court concluded that "[i]f the Crown has a right to put all the inhabitants to the sword or to exterminate them, then surely it has the right to suspend from office any whom it has spared and put into office in its service. And it has the right to delegate that power to the Governor of this Colony".

instance. If the Crown had intended to vest the Governor of the Cape with specific authority to issue land grants beyond the "old limits of the Colony" it would have been included in the instructions. But the instructions remained unchanged and therefore no real authority was given to the governors to approve those grants.

However, none of this suggests that the Salem settlers did not acquire rights to the commonage. The proclamations of 1845 and 1848 proceeding on the power of the governors' grants vest specific shares in the commonage in named members of the Salem Party. Over the course of more than a century, from the time of the two grants, until the judgment of the Grahamstown Supreme Court in 1940, the Salem settlers and their successors treated the commonage as theirs, because it was written in the title deeds and therefore considered by them to be theirs and theirs alone..

The Salem Village Management Board

From 1820 until about 1877, the communal settlement at Salem was managed by a small committee (the Committee) elected by the owners of the allotments. For the first few years after the establishment of the village the members appeared to have represented groups of about ten families each.[62] But within twenty years after the village's establishment the members of the Committee consisted mainly of the larger landowners.

In the 1860s the revenue controlled by the committee was very small. It came from a levy of two shillings a load of firewood, cut mainly on the banks of the Bushmans River on the land which D'Urban granted as commonage in 1836, or fees for impounded animals and from charges of £1 and nine shillings for all spans of oxen using the outspan on the commonage.[63]

The most important function of the committee was to regulate the relationship between the many residents with land rights. A typical instance occurred in 1856 when Phillip Amm, the proprietor of homestead No. 10 erected buildings on the commonage in

[62] Makin, *1820 Settlers* p. 62.
[63] *Ibid*., p. 63.

violation of the rules already in place.[64] The committee allowed the buildings to remain but notified Amm that it objected to any additional buildings being erected.[65]

After the Sixth War of Dispossession the government specifically discouraged amaXhosa entry in the frontier districts, but welcomed the large numbers of Mfengu, who entered the colony in search of protection and opportunity.[66] The Mfengu were regarded in colonial discourse, in contrast to the amaXhosa, as 'friendly' and "true beneficiaries of European tutelage", as well as much needed labourers.[67]

The Farmerfield Mission Station, which adjoined Salem, was established by the Wesleyans in 1839.[68] Fiona Vernal in her study of that mission, states that the mission's community was a motley group of "ex-slaves, Sotho-Tswana, Xhosa and Mfengu residents".[69] Of the first intake of fifty-four black Africans, thirty-nine of them were Tswanas.[70]

In 1857 the prophetess Nongqawuse is said to have foretold that if amaXhosa killed their cattle and destroyed their food stocks, they would be rewarded with fat new cattle and abundant grain, and would be able to drive the white people into the sea.[71] The result was catastrophic. Approximately 40,000 amaXhosa died of starvation or disease, effectively destroying any sort of significant amaXhosa resistance to colonial rule.[72] Survivors for the first time sought employment from white settlers – including in Salem.

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[64] With regards to the Amm family in Salem, see Chapter 5 of this thesis.
[65] *Ibid*., p. 63.
[66] Lester, "Margins of order", *Journal* p. 645.
[67] *Ibid*., p. 646.
[68] Fiona Vernal, *The Farmerfield Mission: A Christian Community in South Africa* (Oxford, 2012) p. 110.
[69] Vernal, *Farmerfield Mission* p. 43.
[70] *Ibid*., pp. 44-45.
[71] This narrative has been challenged in various respects: for example, it is argued that the consequences of the cattle killing and destruction of crops were severely aggravated by independent environmental factors and that the blame was placed solely on amaXhosa superstition in an attempt to portray them as irrational. However, the resultant devastation remained the same.
[72] See JB Peires, *The Dead Will Arise: Nonqawuse and the Great Cattle-Killing Movement of 1856-7* (Johannesburg, 1989).

It is in and after this period that the claimants say that their ancestors, having been dispossessed of their land fifty years before, moved back to Salem.[73] The white inhabitants of Salem began to employ black people to work on their farms, both seasonally and permanently. Employees lived either in houses constructed on the farmers' properties or on the commonage.

The late 1860s saw the rise of 'squatting' or 'sharecropping'.[74] The discovery of diamonds in Kimberley accelerated economic activity throughout southern Africa and created a new demand for agricultural produce and for labour. To keep their labourers, farmers allowed some of them to keep some stock on the farm.[75]

The most common form of sharecropping was what Charles van Onselen defines as "white landlords entering into verbal agreements to share harvests in proportion to the economic inputs they made to the farm."[76] Not only would black African 'peasants' share part of the crop on the farm where they worked but they would also be allowed to graze stock and live on the land. Squatting could also take the form of black Africans living on Crown land or derelict farmland. These 'squatters' earned an income from what they produced.

A black African peasantry emerged briefly in the Albany district (and other adjoining districts) between 1850 and 1890.[77] A large number of Africans preferred to settle on alienated Crown land or on the farms of absentee landlords and to make a living as labour-tenants or as rent-paying tenants. By the late 1860s share cropping became widespread particularly in the case of land owned by farmers who faced serious financial difficulties. At Assegai Bush (which is approximately ten kilometres from Salem) over 500 black Africans lived with 985 cattle on twenty-one farms, while at

[73] H Gilomee, *Supplementary Expert Report,* p. 41.
[74] H Gilomee, *Supplementary Expert Report,* p. 41 and M Legassick, *Response to supplementary report by Professor Giliomee: In the matter between The Salem community and the defendants (landowners) concerning the remainder and portions 1 to 38 of the farm Salem No 498, District of Albany.* Land Claims Court Case No LCC 217/201, pp. 18-19.
[75] H Giliomee, *Supplementary Expert Report,* p. 41.
[76] C van Onselen, *The Seed is Mine: The Life of Kas Maine, A South African Share-Cropper* (New York, 1996) p.5.
[77] Giliomee, *Supplementary Report* p. 42.

Kariega River (approximately fifteen kilometres from Salem) there were some 2,500 people on thirty-nine farms.[78]

In the case of the surrounding farms of Salem, some farmers were likely to have permitted their labourers to graze their stock on the commonage. But there is no reference to black African farm labourers living there in any capacity other than wage labourers or as labour tenants, who received cattle in the place of, or as supplement to, cash wages. Such labourers were allowed to graze their cattle on Salem.[79]

Some of those black Africans living on the commonage had also relocated from Farmerfield to work on the farms. Giliomee found in Committee Minutes that the inhabitants of Farmerfield would be informed that their livestock were not allowed on the "Salem lands".[80] It seems that the Salem settlers in general were opposed to the idea that livestock of black Africans not employed by them were on the Salem commonage.

Legassick states that the Native Locations Act.6 of 1876 (the Locations Act) and its amendment by Act 8 of 1878 made it possible for black Africans to acquire rights as the "reciprocal side of paying taxes".[81] In fact, as Giliomee rightly argues, the purpose of this Act was the very opposite.[82] As Bundy remarks, the aim of these laws was "to reduce the number of 'idle squatters' (ie tenants who paid rent and acting on their own behalf economically)".[83] From the mid-1880s onwards, the Cape Parliament passed legislation that would "accelerate labour supplies through revised tax laws, pass laws,

[78] *Ibid*., p. 42.
[79] Legassick argued that the residents of the commonage were likely to be among those described by Crais as "resisting full proletarianization (by producing at least part-subsistence) but forced into occasional employment on white farms", a pattern which he maintains "persisted through the remainder of the [19th] century and continues today". See C Crais, *White Supremacy and Black Resistance in Pre-Industrial South Africa: The Making of the Colonial Order in the Eastern Cape, 1770-1865* (Cambridge, 1992), p.218.
[80] Vernal, *Farmerfield Mission* p. 128 and Giliomee, *Supplementary Report* p. 42. The Committee Minutes were part of an evidence bundle (p. 390 of "Core Bundle") which was submitted to the Land Claims Court. As this case is still pending, there is no way of accessing this bundle as an outside party to the proceedings. Although a lot of the documents are available as copies, some of them are inaccessible.
[81] M Legassick, *Response to supplementary report by Professor Giliomee* pp. 17-18.
[82] Giliomee, *Supplementary Report* p. 43.
[83] C Bundy, *The Rise and Fall of the South African Peasantry* (Cape Town, 1979) p.78.

location laws and vagrancy laws".[84] This had the effect of "discouraging potential labourers from making a living as peasants".[85]

There were different reasons for this. The frontier had closed across South Africa and very little cheap land was available. After the discovery of the gold in 1886 an acute labour shortage developed in many parts of the country. In the Eastern Cape farmers shifted to new crops, like pineapples, that required new sources of wage labour at a time when labourers were desperately seeking alternatives. Vernal's study shows that many black Africans and 'coloured' people living on Farmerfield made a living as thatchers, carriers and wagon drivers.[86]

As alluded to earlier, the Native Locations Act 6 of 1876 and its amendment were the initial steps to regulate black African movement into the Cape and to prevent illegal squatting. They applied to the dwellings of 'Natives', defined as "Kafirs [amaXhosa], Fingoes, Basutos, Hottentots, Bushmen and the like such occupants not being in the *bona fide* employment of the owner of the land upon which such huts or dwellings are situated if the said land is private property, and such huts or dwellings not being situated within the limits of any Municipality".[87] In other words, it applied to those black Africans who were not in the employ of the owner of the private property on which the dwellings were erected. An owner of private property could establish a "native location" – defined as exceeding five huts within one square mile – only with the consent of the Governor.[88] An inspector of native locations was to be appointed to "supervise and manage" such locations. The inspector's functions included collection of a hut tax from each occupier in the location. Any livestock in the location had to be registered, and if not, was liable to be impounded.[89]

The Inspector of Native Locations for Salem, Kariega and Assegai Bush meticulously recorded and reported various totals, including his 1877 "Return of Natives, Stock etc."

[84] Bundy, *Rise and Fall* p. 78.
[85] *Ibid*., p. 134.
[86] Vernal, *Farmerfield Mission* p. 186.
[87] Section 13 of Native Locations Act 6 of 1876.
[88] *Ibid*.
[89] *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 52.

showing one hut and three people living on the commonage.[90] For the total three areas under his jurisdiction, the Inspector recorded 115 huts, 53 kraals and 515 inhabitants. By February 1880, nine huts, forty-two people and forty-seven cattle are recorded as being situated on the commonage.[91]

As the need for black African labour as well as its black African influx into the colony increased the Locations Act and its amendment were repealed and replaced by the Native Locations Act 37 of 1884, which provided for the better supervision of these locations and the more efficient collection of hut taxes. The definition of a "Native location" became broader to cover any number of dwellings on any farm occupied by three or more male adults, instead of five dwellings, as its predecessors had provided for.[92] The Governor's consent was still required for the establishment of a 'Native Location'. This statute, therefore, restricted the occupation of land by black Africans on private property, which included common land such as the Salem commonage. It is apparent that any rights the occupants derived from residing in a "Native location" could only be acquired through agreement with the owner of the private property on which the location had been established.

Be that as it may, though the archival materials are open to different interpretations on a few occasions, the weight of evidence establishes that, from 1878, a growing community of black African people was living on the commonage and using the land for habitation, farming, drawing water, grazing of stock, traditional practices and burials.

By June 1884, the Inspector of Native Locations recorded 130 black people living on the commonage.[93] They lived in twenty-four huts, with seventy cattle. Later that year, the Inspector noted that the management of the commonage was no longer his

[90] H Barrel, Inspector of Native Locations Report, *Return of Natives, Stock etc in the district of Lower Albany, in the Division of Albany, with Remarks by the Inspector* January 1878 in H Giliomee, *Supplementary Expert Report,* pp. 50-51. They were situated on what was to become the Salem 'location', a 12 acre portion of land within the commonage.
[91] Giliomee, *Supplementary Report* p. 50 and *Salem Party Club and Others v Salem Community and Others* [2017] ZACC 46, paras. 84-85.
[92] *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 53.
[93] *Salem Party Club and Others v Salem Community and Others* [2017] ZACC 46, para. 18.

concern, and that it was under the jurisdiction of the Board, which had taken over its management.[94]

The Village Management Boards Act 29 of 1881 provided for the establishment of management boards to regulate villages and communities such as in Salem. Section 19 provided for:

> *[T]he management and protection of all common pasture lands and the preservation of all vegetation thereon, and the fixing of the number and description of any live-stock any inhabitant shall be allowed to keep and depasture thereon . . . or . . . the impounding of all animals trespassing on such common lands.*[95]

In accordance with this Act the Board's purpose was to ensure proper control over the commonage. In effect it continued to function as its predecessor, the Committee, had done. By virtue of the power vested in the Board it exercised exclusive control by law over the commonage on behalf of the settlers and their descendants. In other words the management of the commonage, including the collection of hut taxes, was henceforth the responsibility of the Board. It follows that any right that black Africans may have had to reside in a hut on any of the Salem erven or on the commonage could only have been derived through agreement with the landowner or the Board.

There are no records to reveal what occurred on the Salem commonage between 1884 and 1916. However, Vernal gives some indication in her study on neighbouring Farmerfield. She writes that "Farmerfield's tenants faced the same economic woes as other black Africans in the Albany District".[96] Throughout the district, food was scarce and seed was expensive due to several dry seasons.[97] As a result, local work was hard to come by. This, together with pressures on black Africans to support the British

[94] Giliomee, *Supplementary Report* p. 52 and *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 57.
[95] Section 19 of the Village Management Boards Act 29 of 1881.
[96] Vernal *Farmerfield Mission* p. 198.
[97] *Ibid.*, pp. 197-198

after the outbreak of the South African War in 1899 caused thousands to leave the district creating a temporary labour shortage.[98]

Albany already offered few opportunities for economic advancement and no residential options aside from white-owned farms or overcrowded locations. This situation, commented the Civil Commissioner for the Albany District in 1899, "does not lend itself to the improvement of the native who can never become more than a servant or tenant at the pleasure of a landlord".[99] He continued that other than in black African locations on the outskirts of Grahamstown, "there is no place where the native can make himself a permanent home, consequently there is little room for improvement".[100] Vernal writes that due to dispossession of land and being too indigent to purchase any, black Africans sought employment on white farms and entered into sharecropping arrangements as the "only avenue for pursuing an agricultural lifestyle".[101] It is likely that these conditions were generally prevalent in the district.

By the turn of the twentieth century labour requirements of white farmers changed once more and the policy of prohibiting their employees from residing in locations on their properties began to impede them. The Native Locations Act 37 of 1884, which gave effect to that policy, was repealed and replaced by the Private Locations Act 32 of 1909.[102] Although this Act did not apply to the commonage, which was instead administered according to the Village Management Act, its paternalistic tone and policy objectives were to be mirrored in the location regulations promulgated for the commonage a decade later. In addition, it was possible for the Governor to extend the operation of the Private Locations Act to areas such as the commonage, though this never happened.[103]

The Board continued to exercise control over the Commonage under section 19 of the Village Management Act. In 1904 the Board passed regulations that stated that the right to pasture on the commonage belonged "only to the inhabitants", which, judging

[98] *Ibid*., 198
[99] In Vernal, *Farmerfield Mission* p. 198.
[100] In Vernal, *Farmerfield Mission* p. 198.
[101] Vernal, *Farmerfield Mission* p. 198.
[102] *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 60.
[103] Section 15 of the Private Locations Act 32 of 1909.

by the times, could have most probably referred to white residents only.[104] Legassick contended that this 'infringed' the rights of the black African community on the commonage.[105] However, Giliomee argued that if there was an infringement of their rights, any uncertainty as to whether black Africans on Salem enjoyed rights was removed in 1904 with the introduction of regulations by the Board.[106] In support of Giliomee's point, a letter from the Colonial Secretary to the Board on 7 November 1906 pointed out that the right of pasturage belonged only to the 'inhabitants', which both Legassick and Giliomee accepted was a reference to the landowners.[107] Another letter from the Colonial Secretary's Law Department on 19 December 1907 regarding the fencing off of the commonage warned that this would endanger the "commonage rights" of other title holders.[108] In 1910 the Board made regulations pertaining to the presence of dogs on the commonage, demonstrating its active involvement over a range of issues pertaining to the area.[109]

On 19 June 1913, the Natives Land Act 27 of 1913 came into effect. It prohibited black people from acquiring title to land outside 'native' areas, which amounted to less than 13% of the land surface of South Africa. [110] It is this date that the Constitution recognises as the starting point for dispossession that affords entitlement to restitution.[111]

During the mid-1910s regulations were adopted to control grazing rights on the commonage.[112] It seems that these regulations were restricted to the Salem landowners and their lessees.[113] On the basis of these regulations, black Africans

[104] In H Giliomee, *Supplementary Expert Report* p. 53.
[105] In H Giliomee, *Supplementary Expert Report* p. 53.
[106] Giliomee, *Supplementary Report* p. 53.
[107] In *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 62.
[108] In *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 62.
[109] In *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 62.
[110] S Plaatje, *Native Life in South Africa Before and Since the European War and the Boer Rebellion (1916*) (Johannesburg, 1982), p. 21.
[111] Section 25(7) of the Constitution of the Republic of South Africa Act 108 of 1996 states: "A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress."
[112] Regulations Touching Kaffir Beer and Knobkerries under Act 12 of 1893 in *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 63.
[113] Regulation 23, Regulations Touching Kaffir Beer and Knobkerries in *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 63..

could lease grazing rights from a landowner only if they were sole occupiers of an erf or resident in Salem and in the service of a white resident, but the landowner had to give notice to the Board of such intent.[114] Furthermore, no person was entitled to live on the commonage without the Board's permission unless a hut tax was paid for each hut.[115]

In June 1917, the Board promulgated the Salem Village Management Board Location Regulations (Regulations).[116] These enabled any person over 18 seeking to live on the commonage to apply to the superintendent for a permit. Issue of permits was not restricted to only those employed by landowners, though the original regulations provided that every permit-holder "or other resident in the location" was "obliged to satisfy the superintendent of the manner in which he obtains his livelihood".[117] This regulation was amended in 1919 to add the condition that the obligation to satisfy the superintendent existed only "if requested on reasonable grounds to do so."[118] This reduced the superintendent's power to regulate the settlement of black African inhabitants in Salem on the grounds that they were not employed.

The Regulations were restrictive. The residents were required to pay quarterly rent to the Board and could be ejected for failure to do so after three months.[119] The Regulations provided:

[114] Regulation 25, Regulations Touching Kaffir Beer and Knobkerries in *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 63.
[115] *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 63.
[116] Salem Village Management Board Location Regulations, GN 151, 13 June 1917. Also known as "Location, Knobkerry, Kafir Beer and Curfew Regulations", the Regulations were promulgated under the provisions of the Public Health Amendment Act 23 of 1897, section 9(7) which empowered "urban local authorities" to issue regulations or by-laws "[f]or regulating the use of Native Locations and for maintaining good order, cleanliness and sanitation therein, and for preventing overcrowding and the erection or the use of unhealthy or unsuitable huts or dwellings". Cachalia maintains that these regulations were also promulgated under section 147 of the South Africa Act 1909. However, Cameron does not mention this section nor the Act in the Constitutional Court judgment.
[117] Regulation 30, Salem Village Management Board Location Regulations, GN 151, 13 June 1917.
[118] Regulation 30, Salem Village Management Board Location Regulations, GN 454, 28 March 1919 (Amended Regulations).
[119] Regulation 10, Salem Village Management Board Location Regulations, GN 454, 28 March 1919 (Amended Regulations).

> *All dwellings shall be deemed to be the property of the Board, provided that on any holder of a "site permit" being ejected through its cancellation, or leaving the location voluntarily, he shall be paid the then value of the dwelling to be assessed by three arbitrators. . . . No "site permit" shall be transferred except with the permission of the superintendent.*[120]

Although the Regulations permitted 24-hour visits without a permit, visitors had to "report themselves to the superintendent within three hours after arrival".[121]

The white inhabitants of Salem were generally dissatisfied with the use and management of the commonage. Some farmers leased portions of the commonage to outsiders for grazing purposes, and the other owners worried about interbreeding of stock.[122] They also had difficulty dipping their cattle for ticks because of the distance that cattle would travel away from their farms. Minutes supplied to the Constitutional Court note that "the Community have been allowed to graze large herds of stock, free of charge to the Board while others have been charged grazing fees for their *bona fide* Native servants' stock".[123] This is in fact a strong indication that black Africans were using the commonage to graze their cattle.

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[120] Regulation 3, Salem Village Management Board Location Regulations, GN 454, 28 March 1919 (Amended Regulations). The terms "site-rental" and "site-permit" were used instead of "hut tax" due to the special meaning attached to "hut tax" applying to taxation under several statutes, and its use with regards to local payments could cause confusion. Legassick argued that such taxes conferred rights of residence to the black African community on the commonage. See *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 65.

[121] Regulation 4, Salem Village Management Board Location Regulations, GN 454, 28 March 1919 (Amended Regulations).

[122] *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), paras. 70 and 444. This appears from a letter that Mr LB Gardner, an erstwhile member of the Board, wrote to the Cape Provincial Administrator (the Administrator) on 13 November 1920 complaining that the Board was managing the affairs of the commonage "to the detriment of the inhabitants". In particular, he complained that the Board was leasing parts of the commonage without collecting sufficient rental and allowing "squatting natives" to erect huts in the location, graze their cattle and cut firewood on the commonage at a nominal charge. He also complained that the Board permitted some of the lessees to allow sharecroppers to plough the land that had been leased. Gardner asked the Administrator to appoint a commission of enquiry to investigate these matters.

[123] In *Salem Party Club and Others v Salem Community and Others* [2017] ZACC 46, para. 24.

The Regulations prohibited black Africans from grazing animals on the commonage,[124] open-air dancing and assembly[125] or subletting their dwellings without the superintendent's permission.[126] They were furthermore prohibited from carrying 'knobkerries',[127] subjected to curfews under which they were not permitted to be in public spaces between 21h00 and 04h00,[128] or to make "Kafir Beer" without the Board's permission.[129] These were all discriminatory regulations aimed at controlling the movement and activities of black Africans on the commonage.

However, as early as February 1920, the Board had practical difficulties due to the fact that there was only one location on the commonage. This meant that employees (servants and farmworkers) of the landowners would have to live some distance from their places of employment. The Board therefore sought the Cape Provincial Administrator's (the Administrator) permission to amend the location regulations so as to allow the employees to erect huts on the commonage closer to their places of employment and to designate each hut so erected as a location under the express control of the Board.[130] The Administrator responded that because ownership of the commonage is vested in the landowners, and not the government, he had no objection to the regulations being amended. But he advised the Board to seek the advice of the Commissioner of Native Affairs.[131] Accordingly, on 10 May 1920, the Board wrote to the Commissioner of Native Affairs concerning this problem. In addition the letter mentions that sharecroppers occupied some of the huts on the commonage also close to the private erven for the convenience of the landowners.[132] The Board also sought advice on the status of huts that were removed from the location where the location regulations applied and the rest of the commonage, which fell under the Board's

[124] Regulation 7, Salem Village Management Board Location Regulations, GN 454, 28 March 1919 (Amended Regulations).
[125] Regulation 19, Salem Village Management Board Location Regulations, GN 454, 28 March 1919 (Amended Regulations).
[126] Regulation 24, Salem Village Management Board Location Regulations, GN 454, 28 March 1919 (Amended Regulations).
[127] Regulation 29, Salem Village Management Board Location Regulations, GN 454, 28 March 1919 (Amended Regulations).
[128] Regulation 30, Salem Village Management Board Location Regulations, GN 454, 28 March 1919 (Amended Regulations).
[129] Regulation 31, Salem Village Management Board Location Regulations, GN 454, 28 March 1919 (Amended Regulations).
[130] In *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 67.
[131] In *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), paras. 67-68.
[132] In *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 68.

jurisdiction where the regulations did not apply; the huts were now erected on private erven where the "site-rental" for which the regulations provided was not applicable.[133]

On 17 May 1920, the Commissioner responded by reiterating to the Board that section 19 of the Village Management Act gave it authority to deal with huts on the commonage.[134] However, he went on to say that where parts of the commonage (not attached to the location) had been leased for agricultural purposes, the Board had forfeited its control and could not object to a lessee allowing "his native servants" to reside there. He advised that the solution was to "make it a condition of such leases that no native should be permitted to reside on the land leased without the permission of the Board".[135] All of this suggests that black Africans living on the commonage did so at the behest of white landowners. They leased those parts of the commonage which were outside of the location, from the Board for their employees, labour tenants and those with whom they may have had sharecropping arrangements.

However, this sort of arrangement caused unease among other landowners, causing them to write to the Administrator.[136] The Board responded to the complaint in a letter to the Magistrate in Grahamstown dated 21 January 1921.[137] Therein it said that due to the extensive size of the commonage, a portion was set aside and fenced to use at a rental of £2 and six pence per acre.[138] It also confirmed that it was common practice for erf-holders to allow labour tenants to let and cultivate the land, even though it acknowledged that letting parts of the commonage was illegal. However, this practice had begun before the election of the 'current' Board and continued it "as it was advantageous to the erf-holders".[139] Some land had been set aside for servants of the landowners as this was "in the interests of the whole community" whilst no "unemployed native males over the age of 18 were allowed to reside in the location". With regards to cutting wood on the commonage, the Board had no power to prevent

[133] In *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 68.
[134] In *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 69.
[135] In *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 69.
[136] See footnote 477.
[137] In *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 71.
[138] In *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 71. Apparently this had been reduced to one pence per acre as drought had "brought many people in Salem to the verge of starvation".
[139] In *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 71.

any erf-holder or lawful occupier from cutting wood with firewood being charged at £4 six pence per load. There was also nothing to prevent erf-holders or occupiers from allowing their servants to use a portion of the commonage. The Board concluded by admitting that many erf-holders welcomed a scheme of subdividing the commonage "as this would result in better use of the commonage for farming purposes".[140]

During the course of 1921 a location was formally established on the commonage.[141] However, by June 1921, a committee appointed by Salem landowners reported that the location was "a nuisance" and was not being used for the purpose originally intended.[142] In the minutes of a meeting of the Board's Public Finance Committee of June 1921, several complaints allegedly arose regarding the presence of the location. Some of these complaints alluded to "an increasing laxity in collecting revenue from huts and for grazing", inconsistency by the Board in allowing some community members to graze large herds free of charge while others had been charged for their servants' stock, the allowing of "native half-sowers" on the commonage and 'indiscriminate' cutting of wood by "native squatters".[143] The general view taken by the white inhabitants of Salem was that employers should rather house their employees on their individual properties.[144]

Among the remedies suggested to deal with its management problems were that 'masters' were to take responsibility to collect "Native dues" from their own servants and all chopping of wood by "Natives for selling purposes be stopped".[145] Erf-holders were also told to refrain from letting grazing rights to black Africans. However, the Board was never really able to solve these issues.

On 5 August 1921, the Village Management Boards Ordinance 10 of 1921 was promulgated.[146] It repealed the Village Management Act of 1881, which had until then

[140] In *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 71.
[141] S Riddin, *Memories of Salem as told by Laurie Amos* (Place unknown, 2000) p. 25 and *Salem Party Club and Others v Salem Community and Others* [2017] ZACC 46, para. 23.
[142] *Salem Party Club and Others v Salem Community and Others* [2017] ZACC 46, para. 23.
[143] In *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 73.
[144] *Salem Party Club and Others v Salem Community and Others* [2017] ZACC 46, paras. 23 and 24.
[145] In *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 75.
[146] *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 77 and *Salem Party Club and Others v Salem Community and Others* [2017] ZACC 46, para. 139.

regulated the activities of village management boards. Section 61(32) made it possible for the Board to make regulations that would better manage and protect the commonage. The effect of this provision was minimal as such power had already been conferred upon the Board since its inception. Section 61(32) also allowed the Board to control the numbers of livestock that inhabitants were entitled keep on the commonage. An 'inhabitant' was defined as a person who occupies property of a value of not less than £100 within the Board's area, which would by implication exclude black Africans from grazing their cattle on the commonage.[147]

This regulation created difficulties as some erf-holders claimed an entitlement to graze their full quota of livestock, which would include cattle of their employees. In response to a query from the Board as to how to deal with the problem, the Provincial Secretary of the Cape Province (the Provincial Secretary) advised it that section 61(32) permitted the Board to prohibit erf-holders from leasing their grazing rights and empower itself to grant such rights to "non-inhabitants", including black Africans.[148] However, this did not deal with the difficulty of distinguishing between cattle of 'Europeans' and 'Natives'. The Board once again sought the advice of the Provincial Secretary as to whether it would be permissible to insist that 'Natives' branded their cattle so as to distinguish theirs from those of 'Europeans'.[149] On 4 March 1923, the Provincial Secretary advised that any regulation dealing with this matter would have to apply equally to "Natives and Europeans as a regulation", because exempting 'Europeans' would amount to "class legislation and, as such, would be *ultra vires*".[150] In other words, and interestingly enough, the Provincial Secretary cautioned against distinguishing the ownership of cattle on the basis of race as section 61(32) did not allow such action.

When the Natives (Urban Areas) Act[151] came into force it gave municipalities greater powers to segregate housing, to police black African communities and to control their movement through the pass system. Section 23(3)(c) of this Act provided for local authorities, which included village management boards (in terms of section 29) to regulate the management and control of these locations.

[147] Section 61 of Village Management Boards Ordinance 10 of 1921.
[148] In *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 78.
[149] In *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 79.
[150] In *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 79.
[151] Act 21 of 1923.

On 23 July 1926, the Provincial Secretary, on behalf of the Board, sought the advice of the Magistrate of Alexandria as to whether the existing black African location may, with the approval of the Minister of Native Affairs, be established under the Natives (Urban Areas) Act.[152] This request was referred to the Magistrate of Grahamstown because Salem fell within the latter's jurisdiction. After investigating the matter, the Grahamstown Magistrate wrote to the Provincial Secretary recommending that the location not be established under the Natives (Urban Areas) Act due to the fact that the Board neither had the funds nor the desire to establish a location.[153]

By 1926, there were only ten huts with ten black African adults recorded in the location.[154] By 1931, ten families were reported to be living on the commonage, and all were recorded as employees in Salem.[155] After 1933 there seems to be no other written documentation of anyone living in the location.

Meanwhile, subdivision of the commonage remained a topic of discussion among the landowners. On 11 September 1929, the Board wrote to the Provincial Administrator on behalf of the landowners to seek his advice on whether this course of action was permissible.[156] Various legal impediments stood in the way of subdivision, not least of which was a provision in the original 1823 Somerset grant. This condition stated that shares of grazing rights over the commonage could only be transferred by sale of a share or shares in the original arable lands or homestead of the settling party.[157] Yet in some cases, grazing rights were sold off the allotments to which they originally belonged, apparently after the Deeds Office had sanctioned this.[158] It was, therefore, unclear whether the current landowners had the right to subdivide the commonage at all.

[152] In *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 81.
[153] In *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 82.
[154] *Salem Party Club and Others v Salem Community and Others* [2017] ZACC 46, para. 25 and *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 82.
[155] *Salem Party Club and Others v Salem Community and Others* [2017] ZACC 46, para. 25.
[156] *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 83.
[157] In *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 84.
[158] *Ex Parte Gardner* 1940 EDL p. 177.

Two years later, the Assistant Health Officer for King William's Town visited Salem to inspect conditions in Salem on 7 December 1931.[159] Among the observations he made in a report to the Acting Secretary for Public Health was that there were presently only twenty-two families on the fifty allotments, with the total white population being ninety-six people. He noted that ten families resided in the location with each family paying site-rent. He went on to say that he learned that only 'natives' employed in the settlement were allowed to reside in the location, but most of the landowners kept "their native employees" on their own properties.[160] The report made no mention of black Africans residing anywhere else on the commonage.

Six months later an official health report dated 1 July 1932 recorded the white population of Salem being approximately eighty-four, and the estimated 'Native' population of Salem being possibly 300-400, though no exact figure was given.[161] The report also noted that there was a "small native location of some half dozen huts; most natives reside on the owners' private erven".[162] The health report a year later, in June 1933, repeated most of the information in the earlier report (including the estimated numbers for the 'Native' population). By June 1934, the Health Report stated that the "White population was approximately 100" and the 'Native' population was unknown.[163] However, it did record that the "Native Location" had been "done away with".[164] According to the report, the 'Natives' now resided on their employers' land.

These health reports are important because they confirm that apart from the ten black African families who were living in the location at the time, most of the other employees were living on the properties of their employers.

During this time the Board continued to lease parts of the commonage adjoining the landowners' private property in return for which they paid rent to the Board. One such

[159] *Health Officer, King William's Town to Acting Secretary for Public Health, 14 December 1931* Record of the Constitutional Court, CCT 26/2017, pp. 335-336.
[160] In *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 84.
[161] *Salem Village Management Board, Health Report, 1 July 1932* Record of the Constitutional Court, CCT 26/2017, pp. 346-347.
[162] In *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 85.
[163] In *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 86.
[164] In *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), paras. 85 and 86.

example was the leasing of eight acres of land to a Mr Henson, who had erected his dwelling on one acre, had arable land of three acres, two acres for a camp and two acres for "native huts".[165] In this case, therefore, black Africans resided on the portion of the commonage which he had leased by virtue of individual agreements with him.

Mr Jack Hill applied for a five-year lease of 160 morgen of land on the commonage.[166] But because of the large tract of land sought to be leased, there were objections from other landowners. In the face of these objections he agreed that his application be held over pending the Board's investigation into the feasibility of subdividing the commonage proportionately among the erf-holders. On 26 September 1939, the Salem Methodist Church received a letter from Hill requesting the option to purchase the portion of the commonage belonging to the Salem manse (the reverend's residence) in the event of subdivision being approved.[167]

The leasing of parts of the commonage was riddled with problems. A Board member, Mr Hewson, stayed on the commonage, as did his brother. They paid the Board £2 and 6 pence a year.[168] By residing on the commonage, and not on a farm, they evaded the payment of rates and taxes, as the commonage was not taxed as rateable property.[169] It also transpired that Board members had been leasing some of the commonage to people who were not erf-holders, contrary to the regulations. In one case a Mr Hall, who was also a Board member at the time, had leased land even though he was not an erf-holder.[170] It would not be too hard to deduce that because the Board's function was to best serve the interests which erf-holders had in the commonage, only those who shared such an interest were eligible to be Board members.

It is unsurprising then under this climate of corruption relations between Board members and the rest of the Salem landowners were fraught. Board meetings were

[165] In *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 88.
[166] *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 89.
[167] Z Vena, *Notes on Salem Commonage – Extracted from MS 15 875: Minutes of the Salem Circuit. Quarterly Meetings* (7 June 2011).
[168] *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 91.
[169] *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 91.
[170] *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 91.

often marred by threats of violence issued against Board members. Laurie Amos relates how the continued threat by Salem residents to use firearms at these meetings prompted one particular chairman to request the police for protection at the next meeting.[171] On another occasion, one Board member ridiculed the Borough Ranger (the black African superintendent of the location) with such insulting language that it caused one Salem resident attending the meeting to stand up and try to defuse the situation.[172] These kinds of episodes seem to paint a picture of the Board as an entity whose authority was repeatedly challenged by the landowners.

Moreover, the irregularities over the leasing of parts of the commonage only served as further motivation to the proposal of subdividing the land among landowners. The Board rationalised this on the basis that the whole commonage would then become alienable property, which sat well with the landowners.[173]

A few years passed before the erf-holders began to press the subdivision issue again. On 14 January 1936 the Board's attorneys wrote to the Provincial Secretary to motivate their case.[174] The letter stated that the Board had limited funds to combat the growth of "noxious weeds" on the commonage, which had also become a breeding ground for jackals to the intense annoyance of the farmers. It further stated that there was dissatisfaction because it had become impossible to farm communally on the commonage, as their stock got mixed, inter-bred and often became lost to the owners.[175] The letter stated that the erf-holders, who owned rights to the commonage, had been trying to gain approval to subdivide the land so that each owner could fence, clean and cultivate the land for "his own benefit". However, they had not been able to do so because one of the owners, an Annie Scheepers (*neé* Andrews),[176] had objected to the scheme. As a testament to the times with regards to attitudes towards women, the landowners were scathing towards this individual, describing her as "sufficiently cantankerous to disagree although she makes very little use of the Commonage

[171] Riddin, *Memories* p. 21.
[172] *Ibid*., p. 20.
[173] *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 92.
[174] *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 94.
[175] In *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 94 and *Ex Parte Gardner* 1940 EDL p. 177.
[176] *Ex Parte Gardner* 1940 EDL p. 185.

herself".[177] Once again the Administrator's assistance was sought to resolve this dilemma by introducing legislation to allow for subdivision despite the opposition of an erf-holder. In a letter dated 29 February 1936, the erf-holders' attorneys requested that the proviso to section 49 of the Village Management Boards Ordinance 10 of 1921 be repealed so as to enable the Administrator to grant consent to the Board for this purpose.[178]

The Provincial Secretary replied to the Board's attorneys on 2 April 1936.[179] He considered it not possible for the matter to be dealt with by way of the proposed repealing as, in his view, this would allow local authorities to interfere with ownership rights of erf-holders. His advice was that the matter should be dealt with by obtaining a court order to transfer an equitable portion of the area to each owner. This had been the course adopted by the Bradshaw Party of settlers, who had obtained a court order in its favour on 18 May 1928.[180] However, the Administrator refused its request to amend section 49 of the Village Management Boards Ordinance.[181]

By 1940, the landowners of Salem had formed a committee under the chairmanship of Mr LB Gardiner.[182] Its sole objective was to subdivide the commonage. On 16 January 1940 Mr Gardiner applied to the Grahamstown Supreme Court to have the two portions of commonage granted in 1836 and 1847 consolidated and subdivided amongst the Salem 'settlers'. The factual basis for the relief sought, according to the judgement is as follows:

> *[T]he commonage is too large for the small number of erf-holders, with the consequence that stock are often lost or stolen; that the Village Management Board has not the means so to adequately control it as to keep strangers' stock from trespassing or to keep down the growth of noxious weeds and the extension of erosion; that jackals and other vermin breed on the commonage, and that there is no means of eliminating them;*

[177] In *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 95.
[178] In *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 95.
[179] In *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 96.
[180] *Ex parte Bradfield & Three Others* (EDL) unreported case (18 May 1928).
[181] In *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 96.
[182] Also spelt "Gardner".

that erf-holders cannot keep good stock owing to their own stock mingling with and becoming contaminated by inferior stock; and that erf-holders are unable to fence off and cultivate portions of the commonage for their private use.[183]

On 8 August 1940, the Court granted a rule *nisi* order confirming that, with the Administrator's consent having been obtained, the commonage could be subdivided. The entire rule reads as follows:

1. *That the present registered owners of erven in the Village of Salem, together with the person and set of persons claiming derelict erven in terms of paragraph 5 hereof (but exclusive of Henry William Kirby, Charles Thomas Croft, Philip Amm and the Trustees of the Salem Public School) are declared entitled, in the share proportionate to their holdings of erven in the village…to ownership in the Salem Commonage described in the deeds of grant thereof as follows:*

a.) *A piece of land measuring 2,333 morgen, situate in the District of Albany on the Bushmans River, granted as commonage to the Salem Party of Settlers on 15th December, 1836; and*

b.) *A piece of land containing 5,365 morgen 555 square roods, situate in the District of Albany, granted to the present and future proprietors of Locations in the Salem Party on 23rd November, 1847, being the grazing and or common land of the said Party.*

2. *That the High Sheriff be directed to make applications to the registrar of Deeds, and to sign all documents necessary for the issue by the said registrar of a certificate of consolidated title to the two pieces of land above described, the conditions affecting the said title to be those set forth in the grant of 23rd November, 1847, aforesaid.*
3. *That the High Sheriff thereupon be directed (and is authorised to sign all documents required) to pass transfer on payment of such transfer duty…of the said registered owners of erven in the Village of Salem of his or her share in and to the said common land, as represented by the land allotted*

[183] *Ex Parte Gardner* 1940 EDL p. 176.

to him (or her) upon the plan attached to the petition…joint owners of any erf or erven to have transfer passed to them jointly in undivided shares in proportion to their holdings of erven in the village. Such surveyor to be Mr. W. R. Piers, who is hereby given such discretionary power as is required to enable him to carry out the terms of this section of this order.

4. *That each owner shall, before receiving transfer of his confined share of common land, produce to the Registrar of Deeds:*

a.) *The title deed of his (or her) erf or erven in the Village of Salem, in order that an endorsement may be made thereon that a separate deed of transfer has been issued in respect of his (or her) rights in the common land; and further that an endorsement may be made both upon the title of such erf and upon such separate deed of transfer of a condition that in future no such erf or portion thereof, and no such share of the hitherto common land or portion thereof shall be alienated or sold except in conjunction with an equal share in the corresponding share of hitherto common land or in the corresponding erf respectively;*

b.) *The mortgage bond (if any) registered against the title deed of his (or her) erf (or erven) in the Village…pass a fresh bond for the amount of the existing bond in his favour upon the erf (or erven) in the Village, as well as upon the owner's defined share in the common land.*

5. *That the Registrar of Deeds be authorised under the Titles Registration and Derelict Lands Act 28 of 1861, to issue title deed:*

a.) *In favour of Annie Scheepers (born Andrews) widow, Elliot Andrews and Tommy Andrews in equal undivided shares of Allotment No. 37 (with one share in the common land) situate in the Village of Salem, measuring 14 morgen 246 roods, at present registered in the name of the late Philip Amm (the younger) by deed of transfer No. 449, dated 31st March, 1874.*

In favour of Sidney Gilbert Hill of Allotment No. 12 (with one share of common land) situate in the village of Salem, measuring 2 morgen 410 square roods, granted to the late Charles Thomas Croft by deed of grant dated 23rd November, 1848.[184]

[184] *Ex Parte Gardner* 1940 EDL pp. 184-185.

At this point, there were approximately 500 black African people living on the commonage.[185]

On 15 February 1943 the Board informed the Administrator that the Board would cease to function once the land was surveyed and the subdivision was completed.[186] It had in the meantime stopped exercising its right of control over the commonage and no longer issued permits for wood or other materials, or leased the commonage for grazing. The subdivision of the commonage was finalised some time in 1943. Thereafter, the Board ceased to exist.

Subdivision and Dispossession of the Salem commonage

When the landowners brought the application to the Grahamstown Supreme Court, judges Gane and Lansdown concluded that the grants "did not make the settlers co-owners in undivided shares of the land".[187] If they were then they would have been able to approach the Registrar of Deeds to partition the land.[188]

The grants, according to the Court, contemplated the permanent settlement of settlers at Salem.[189] The intention for the commonage was to provide grazing land to the Salem Party of erf-holders to be held communally, and if a person ceased to be an erf-holder, he ceased to have any right in the commonage.[190] Of particular interest was that the Court compared the rights of erf-holders over the commonage to "native law" which also recognised that land held under "tribal tenure" belongs to the "tribe, and not the individuals who constitute it".[191] Gane was therefore, among other reasons, hesitant to order in favour of the landowners' application.

However, given the difficulties faced by the erf-holders alluded to above, the Court decided to leave the matter in the hands of the Administrator to exercise his discretion

[185] *Salem Party Club and Others v Salem Community and Others* [2017] ZACC 46, paras. 26-27.
[186] In *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 109.
[187] *Ex Parte Gardner* 1940 EDL p. 177.
[188] In terms of section 26 of Act 47 of 1937.
[189] *Ex Parte Gardner* 1940 EDL p. 175.
[190] *Ex Parte Gardner* 1940 EDL p. 178.
[191] *Ex Parte Gardner* 1940 EDL p. 180.

regarding the subdivision. The Court accordingly gave a rule *nisi*[192] order on 29 February 1940 calling on all interested parties to show cause why the Administrator should not consent to the subdivision.[193] It was ordered that the rule *nisi* was to be published twice in the *Daily Mail*, and twice in the *Union Government Gazette*, with an interval of not less than six weeks between the two publications.[194] It was also to be served upon the Minister of Lands for the Union of South Africa and upon the Administrator, the Registrar of Deeds, and the Department of Education, because of its possible interest in the school existent on the commonage.[195]

During this period, there was no intention by the Board or the landowners to notify those black Africans staying on the commonage of their intent to subdivide. The probability of black Africans reading the *Daily Mail* or the *Government Gazette*, given the literacy levels of black Africans during the first half of the twentieth century, was virtually zero. Therefore, the first indication they got that their rights to the land were about to come to an end was when the landowners started to move them off the land.

On behalf of the Administrator, the Provincial Secretary wrote to the Magistrate of Grahamstown to express an opinion on the matter of subdivision. After investigating the matter the Magistrate wrote to the Administrator on 8 May 1940 recommending the subdivision. He expressed his reasons as follows:

> *[T]he only persons who can claim to make use of the Commonage now, would not suffer in any way if the Commonage were subdivided . . . .*
> *The only persons who might feel annoyed would be those who have been making a profit out of grazing the animals of friends and Natives on the Commonage.*
>
> *The position would now appear to be that the Commonage is now used by persons, some of whom have a good class of stock and others only scrub animals. There are unending squabbles in consequence, and certain*

[192] A rule *nisi* is an order "to show cause". In other words, that the ruling of the court is absolute unless the party to whom it applies can show cause why it should not apply.
[193] *Ex Parte Gardner* 1940 EDL p. 176.
[194] *Ex Parte Gardner* 1940 EDL p. 185.
[195] *Ex Parte Gardner* 1940 EDL p. 186.

owners quite rightly take strong exception to the subletting of grazing rights to certain undesirable persons who are not erf-holders.

Certain of the erf-holders could make very good use of the portion of the ground for agricultural purposes or gardening or both, and are prevented from making a fair living out of their property . . . . Also, as long as the present state of affairs exists this very large Commonage must be used <u>*solely*</u> (my emphasis) *for grazing, and the difficulty of collecting stock for dipping, and the consequent increase in the difficulty in keeping down tick-borne diseases, make the duties of the cattle cleansing officers almost impossible of satisfactory performance.*[196]

After consent was secured from the Administrator, the court granted a final order on 8 August 1940.[197] Following the final order for subdivision of the commonage, the Native Commissioner recommended the disestablishment of the location on 15 July 1941.[198] He had visited the location prior to his recommendation where he discovered that there was only one dilapidated and uninhabited hut where the location had previously existed. That hut had allegedly been occupied by the Borough Ranger. He estimated the location to be fifteen acres in extent at that point,[199] but it was never properly defined by any resolution of the Board. However, a portion of the commonage was set aside for use as a location. A superintendent was also never appointed as envisaged by the location regulations, because these regulations were never really put into operation.[200]

In addition, the Native Commissioner advised that the division would have to be done through the 'ordinary' law by which village management boards were authorised to dispose of their common land.[201] But he did note that such subdivision was "most

[196] In *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 101.
[197] *Salem Party Club and Others v Salem Community and Others* [2017] ZACC 46, para. 139.
[198] *Native Commissioner, Albany, to Secretary for Native Affairs, 15 July 1941*, Record of the Constitutional Court, CCT 26/2017, p. 422.
[199] *Native Commissioner*, p. 422.
[200] In *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 103.
[201] Section 49 of Ordinance 10 of 1921.

unusual", since it meant that the Board would "be left with no common land".[202] Regarding the population size he reported the following:

> *The European population of the village is between 90 and 100 with 25 families, while the Native population is about 500, of whom about 50 work as servants. These servants live on the premises of their employers, and on the present Commonage which is privately owned. I am given to understand that certain Europeans have permitted squatting in the past, but I am asking the local District Commandant to investigate the matter.*[203]

The report made clear that the estimated fifty servants resided on both the premises of their employers, as well as on the commonage. It concluded that even if the labour requirements on the farms increased in the future "there would be ample room on each farm for these Natives to live as each farm will range in extent from 150 to 600 morgen". Therefore he recommended that the location be disestablished on the basis that it served no proper function.

However, the report did not mention where the other estimated 450 black Africans reside. It is clear that they could not have stayed in the location as no one was living there. They also were not employed by any of the landowners. So where else could they have settled? Indeed, the purpose of the Commissioner's report was concerned with the disestablishment of the location. It was neither a recommendation of what to do with those black Africans in the event they were compelled to relocate, nor was it a population census. Perhaps the figure of 500 black Africans was inaccurate, given the number of dwellings in Salem at the time? Be that as it may, there was still a group of people, who were not in the employment of the landowners, of enough significance that the Commissioner made a note of them in his report. Who were these people and where else could they live?

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[202] *Native Commissioner,* p. 422. The Constitutional Court mentions a similar passage from a document titled *Salem Village Management Board: Remarks of Judge Regarding advisability of subdivision of Commonage*. It says: "[i]t is a most unusual thing for the members of a local authority deliberately to hand over all their right of commonage to private owners."

[203] *Ibid.,* p. 422.

According to Nondzube the black Africans living there called the area Tyelera but they settled in different locations, pointed out by him to be on the commonage.[204] They used the land for grazing, driving their livestock as far as the Qora River (Bushmans River). There was a forest on either side of the river where cattle were taken during times of drought. This would provide lush grazing for their cattle. Nondzube said that his grandfather would tell him that when they returned from the forest, the cattle looked like "shiny cattle".[205]

His grandfather and those who stayed on the land before him were, according to Nondzube, "not employed" by white people.[206] There were other black African families also residing on the land, such as the Ngqiyaza, Marwanqana, Dyakala, Siyaphi, Mginywa, Noqayi, Ngantweni, Dokwana, Mxube and Madinda families, to name only a few. Presumably, they were also not employed by the landowners. These families lived on various locations spread across the commonage. Apart from Lokishi, Nondzube also spoke of Nkotyo, Ntyuweni, Magolomini and Mantyi, where the chief lived.

The black Africans also had numerous burial sites, because at every settlement there would be land allocated by the chief for them to bury their family members. Apart from Lokishi, there were Nongqoaenele as well as Soxhenxa, where members of the Londzobe family lie buried under a *Mqwashu* tree.[207] Nondzube also pointed out a further gravesite called *Emqwashin* where his grandfather was buried.

The people also knew where to get water in times of drought. Nondzube related that when the river ran dry, his people would go to a spring ("water that did not end"). This spring is situated to the east of the village, "when you stand next to the church there is a mountain there, when you go down the mountain there is a spring there where the people, before you reached the river … where Salem people could fetch water from".[208] But when subdivision took place, the spring was fenced off, effectively privatising the resource for private use only.

[204] Court transcript of testimony of Msile Nondzube (25 January, 2013), p. 233.
[205] Court transcript of testimony of Msile Nondzube (25 January, 2013), p. 255.
[206] Court transcript of testimony of Msile Nondzube (25 January, 2013), p. 241.
[207] Court transcript of testimony of Msile Nondzube (25 January, 2013), p. 242.
[208] Court transcript of testimony of Msile Nondzube (25 January, 2013), pp. 243-244.

Another place pointed out by Nondzube was where there was clay that was used by his people for numerous purposes. People smeared it on their faces to cure illnesses or used to smear a candidate for initiation. The clay was also used by *amagqira* ('witchdoctors') in training or had the "illness of Intwasa".[209] The clay was further used for decorative purposes for a dwelling after it was completed.

[209] Court transcript of testimony of Msile Nondzube (25 January, 2013), p. 245 and *Report of an Archaeological Survey of Land in the Albany District, Eastern Cape that formed the Salem Commonage* Record of the Constitutional Court, pp. 810-829.

MAP 3.1: Satellite image showing some of the key landmarks in and around Salem

Nondzube's family left their homes when his ancestor, Phuphana, became the community leader.[210] They settled on another part of the commonage where the Mzuma and Rhwentella families lived. This portion of the commonage would, according to Nondzube, be later taken over by Mr Jack Hill as part of the subdivision.[211]

Contrary to Nondzube's narrative, Mrs Ethell Phyllis Page and her brother, Mr Albert Alexander van Rensburg testified that as children growing up during the time of subdivision, they did not recall any black Africans living on the commonage.[212] Page did tell the court that she did remember a few black Africans being present but that they lived on the properties of their employers. Both siblings recalled that their family employed two black Africans but neither specified whether these employees resided on the commonage.[213] Van Rensburg told the court that his father allowed his employees to keep some cattle and they grazed their cattle on the commonage along with his father's herds. However, he denied seeing any huts or homes on the commonage.

There are various explanations as to why the landowners insisted upon the absence of black Africans on the commonage, ranging from wilful ignorance to blatant perjury in the witness box. However, Justice Cameron in his Constitutional Court judgement noted that there was no reason to think that either sibling fabricated their accounts. On the contrary, "both appear to have been entirely sincere in what they recalled".[214] The historian, Lorenzo Veracini,[215] borrowing and expanding on Nur Masalha's understanding of 'transfer',[216] ascribes this to what he refers to as "perception transfers".[217] This is when indigenous people are denied in various ways and that their actual presence is not registered. These sorts of transfers can happen, for example

[210] Court transcript of testimony of Msile Nondzube (25 January, 2013), p. 253.
[211] Court transcript of testimony of Msile Nondzube (25 January, 2013), p. 253.
[212] *Salem Community v Salem Party Club* [LCC 217/2009] 2 May 2014, paras. 46-48.
[213] *Salem Community v Salem Party Club* [LCC 217/2009] 2 May 2014, paras. 46-48.
[214] *Salem Party Club and Others v Salem Community and Others* [2017] ZACC 46, para. 96.
[215] Veracini is Associate Professor in history and politics at Swinebune University of Technology's Institute for Social Research.
[216] See N Masalha, *Expulsion of the Palestinians: The Concept of 'Transfer' in Zionist Political Thought 1882-1948* (Washington, 1992). 'Transfer' is the foundational category in Zionist thought that all settler projects are fundamentally premised on "fantasies of ultimately 'cleansing' the settler body politic of its indigenous (and exogenous) alterities". See L Veracini, *Settler colonialism: a theoretical overview* (New York, 2010) p. 33.
[217] L Veracini, *Settler colonialism: a theoretical overview* (New York, 2010) p. 37.

when “indigenous people are understood as part of the landscape”.[218] In other words, it is the tendency to ‘empty’ the landscape of its original inhabitants. The indigenous people are “never seen, they lurk in the thickets”. Perception transfer is a crucial prerequisite to other forms of transfer. For example, Veracini explains that perception transfer allows for the activation of transfer by conceptual displacement – when indigenous people are not considered indigenous to the land and are therefore perceived as exogenous others, entering the settler space, preferably after the arrival of the settler collective.[219] One of the consequences of perception transfer is that when existing indigenous people enter the settlers’ perception, they are deemed to have entered a settler space and therefore considered to be exogenous others.[220] The indigenous people remain invisible and are transferred away.[221]

As Cameron noted in his judgement, the siblings’ recollections of having seen no black Africans on the commonage “is a matter for justified inference as to the impact of an upbringing, like too many of us had, that foregrounded the virtues and visibility of white people to the exclusion – the disappearance, the evaporation, the virtual non-existence – of all others”.[222]

By the 1940s, this perception towards black Africans was at its peak. Therefore the decision to dismantle the location was an easy one. Following the Commissioner’s recommendation, the Minister of Native Affairs formally disestablished the location on 14 November 1941 under section 2 of the Natives (Urban Areas) Act.

Once the location was disestablished, those black African employees living on the commonage were permitted to reside on the farms of their employers. Aerial photographs taken in 1942 show forty-eight “traditional dwellings in the greater Salem area” of which twenty-two were on “the original farms” and twenty-six were situated on the commonage “around the Assegaai River adjacent to the farms”.[223] There were

[218] Veracini, *Settler colonialism* p. 37.
[219] *Ibid*., p. 37.
[220] *Ibid*., p. 35.
[221] L Veracini, *The settler colonial present* (New York, 2015) pp. 74-76 and L Veracini *Settler colonialism: a theoretical overview* (New York, 2010) pp. 103-104.
[222] *Salem Party Club and Others v Salem Community and Others* [2017] ZACC 46, para. 97.
[223] *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 108.

pathways from the twenty-six dwellings on the commonage which led to the farms, suggesting that those living on the commonage had some sort of relationship with the neighbouring farmers.

The transfer of the commonage to the Salem landowners through deed number 25712 on 29 December 1947 officially effected subdivision.[224] Thereafter, the black African population on the commonage was dispersed. Some stayed with their families on the properties of their employers while those who were not employed in Salem were forced to eke out an existence elsewhere.[225] Those people were no longer able to produce from the land and were forced to sell their livestock. The subdivided plots were distributed amongst the individual landowners of Salem beginning in April 1948. The claimants identify 29 December 1947 as the beginning of their dispossession of rights in land. However, it has been shown that the dispossession took place seven years earlier with the court decision to allow subdivision. The deed merely made the dispossession a reality.

Conclusion

When the commonage was 'granted' to the Salem settlers in 1824, 1836 and 1847 respectively, none of the settlers could have imagined that this land, their land, could ever be in dispute. Their sovereignty over it was protected by them during the numerous wars which were fought not too far from where they lived. In fact, sometimes the wars would even be fought literally on their doorstep. These wars, along with official constructions of the amaXhosa, heavily influenced the racial attitudes of the settlers towards black Africans. The brutal nature in which these wars were fought shaped an attitude of irreconcilability between settler and amaXhosa. The only way to forge out a peaceful existence in this "new world" was to destroy or subjugate the indigenous people. For the settlers, the black Africans became objects rather than peers, providing manpower to supplement their labour needs.

These attitudes would manifest themselves in legislation, where provisions were made for the perpetual subjugation of black Africans, obliterating their land rights and

[224] *Salem Party Club and Others v Salem Community and Others* [2017] ZACC 46, para. 28.
[225] *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 114.

consigning them to choosing between a life of servitude or vagrancy. This legislation was grounded in a jurisprudence where the law was dictated by the settler colonial project. White landownership was paramount over indigenous land and legal processes were aimed at continuing and preserving that domination. The fear of an indigenous threat to settler sovereignty to the land had been “cast out”.

Therefore, by the time of the Grahamstown Supreme Court’s decision to approve subdivision, the claims of black African ownership to land at Salem and elsewhere in South Africa had effectively been silenced, apart from that provided in the Natives Land Act. Their existence was recognised in government reports, but even there, they were described as nameless and faceless units, better described as being a part of one amorphous entity than as individuals. This denial of their humanity filtered down to “ground level” perceptions which white Salem inhabitants had towards their black African neighbours. If they did not serve a purpose in maintaining the settler colonial project, then they were conscientiously excluded, ‘eviscerated’ from white people’s memory.

With the commonage being subdivided, the Board proved that they did not have any real authority over the commonage. Neither did the courts. The real authority lay in land rights of the landowners. Their rights extended to the commonage based on rights granted to their predecessors, notwithstanding the fact that the legality of these rights was suspect to say the least. Although the intention of the commonage was to be inclusive of all Salem settlers, in practice a certain group of landowners made it exclusive. They extended their rights to their employees, but that is where their benevolence in terms of the commonage ended. Soon they put pressure on the Board to keep the commonage sanitised of undipped cattle. Fears arose that their commercial developments would be adversely affected by intermixing between livestock on the commonage. The decision to subdivide was motivated purely by commercial aims. But the consequences of the act dispossessed a people of rights to the only land they could use and reside on.

These consequences did not end with dispossession. More than forty years later, the winds of change blew forcefully over the political and social landscape of South Africa. As a result, the jurisprudence regarding land ownership also underwent a paradigm

shift. Legal mechanisms now made it possible for the formerly dispossessed to be recompensed for the injustices they or their forebears went through. These mechanisms would have a far-reaching effect on the people of Salem, those who were already there as well as those who would return.

CHAPTER FOUR – INTERLUDE: PLACING SALEM IN THE CONTEXT OF BROADER LAND DEBATE IN SOUTH AFRICA

> *[T]he position we believe we occupy in this case, in Xhosa they call it Mthlakazi [sic] M'Lord. We would believe … that in law on the facts of this case we are a mere sideshow in this trial although the Court will say that we are cited as Plaintiffs. We are cited as Plaintiffs merely because the Act says so but on proper reading of the Act the Court will find that we are a sideshow. We are a sideshow because we are the claimants … and the claim is not against the landowners … the claim is against the Government. Government has accepted our claim; the Government has made the decision … our claim is valid and therefore Judge and learned assessor … [if] there is no dispute between us and the Government then where does it place us in the trial, this trial?*[1]
>
> - *Viwe Notshe, Land Claims Court, Grahamstown, 25 January 2013.*

When Advocate Viwe Notshe made this opening statement to the Land Claims Court, the claimants had spent twelve years trying to get restitution proceedings underway. Their claim was nothing less than sixty-six square kilometres of land, formerly known as the Salem commonage. The claim was met with the full spectrum of reactions, from delight and excitement among family members and supporters of the claimants, to shock and suspicion among Salem landowners. For some it meant that the wheels of justice were finally turning after more than seven decades of prejudice and dispossession. For others, the claim was laughable at best as there was no factual basis for such a claim. In fact, Azhar Cachalia, in his minority judgement of this claim in the Supreme Court of Appeal described the claim as being 'still-born'.[2]

The claim polarised the entire Salem populace, even neighbouring communities, in many instances reawakening longstanding feuds. These feuds were not always positioned along racial lines, as disputes between claimant and 'non-claimant' families

[1] Court transcript of testimony of Msile Nondzube (25 January, 2013), p. 226.
[2] *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 396.

also became apparent during the trial. However, that discussion will take place in the chapter dealing with the claim itself.

This chapter will deal with the legal instruments that enabled such a claim to be brought to court. It will discuss the jurisprudential change that took place after the promulgation of a new and inclusive national constitution in 1993, producing legislation which would endorse a shift from the tenacious protection of property rights, to land reform and restitution. In addition, this chapter will attempt to briefly explain the inefficiency of South African government land reform and restitution strategies. This inadequacy has placed the ruling party in a political quagmire, forcing it to reconsider its present policies in the face of more radical suggestions from not only opposition political parties but also from within the ruling party. In addition, even once land claims have succeeded, claimants are often frustrated at the sluggish pace which government takes to finalise these claims.

In the Salem claim, both of these scenarios are playing out. On the one hand, there are already a few farms which have been settled outside of court and where the claimants have already taken possession and control. However, due to the nature of the restitution process, the state still has ownership rights in those farms. On the other hand, the claimants who are still in the process of their claim find it difficult to know if government is on their side or not. The quote above is indicative of how the claimants are well aware that their claim is not against the current landowners at Salem. Their claim is against the government, whose function it is to act in the best interests of all its citizens. Whether or not the government acts in those interests depends on the approach it takes.

“An extraordinary piece of legislation”: The purpose and aims of the Restitution of Land Rights Act

The Republic of South Africa is one of the youngest democracies, recently emerging from a period of almost 350 years of discriminatory policy and practice systematically designed and maintained, in various ways, including legislation and violence, to racially and economically advantage, exclusively, European and British colonists, at

the expense of black Africans[3] who had been living on the land prior to that. This systematic policy and practice, which included land reservation and segregation, formed the fundamental basis for colonial rule and later, apartheid in South Africa. The Natives Land Act 27 of 1913 formed the cornerstone of the apartheid land dispossession apparatus. It attempted to freeze patterns of landholding based on racial lines and made new sharecropping tenancies illegal.[4] It also froze all land transactions between "Natives and other Persons", making any such attempted transactions criminally punishable with a fine of £100 or six months imprisonment.[5] Whilst sharecropping fell within the definition of leasing and hiring of land and thus a transaction in land rights, labour tenancies did not. Such arrangements fell under the definition of "farm labourer", defined as a black African who lived on a farm and was "bona fide, but not necessarily continuously" employed in domestic service or farming. "Bona fide employment", according to section 10 of the Land Act, required that such a person worked for at least ninety days per year and that no rent would be paid, other than the service given. In other words, the Land Act effectively codified and regulated the master-servant relationship between European landowners and black African labour tenants. The Eastern Cape did not escape the grip of the Land Act and the black African people who lived in this region were, at some point in time, dispossessed of their land.

During preparations to establish a new democratic government in 1994, the history of dispossession of land and the need for remedial action was recognised, and, upon the adoption of the interim Constitution (Act 200 of 1993) in 1994, provision was made for steps to be taken by government to restore the rights in land to those so dispossessed, or to their descendants.[6] In so doing, the Restitution of Land Rights Act 22 of 1994

[3] This includes the Khoe and San people of southern Africa.

[4] M Chanock, *The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice* (Cambridge, 2001), pp. 362-363. Despite the provisions of the Land Act, Harvey Feinberg and André Horn show that it failed to stop black persons from purchasing land. They note that evidence suggests that land ownership increased in certain areas after 1913, questioning the effectiveness of the Land Act. (See HM Feinberg and A Horn, "South African Territorial Segregation: New Data on African Farm Purchases, 1913–1936" *Journal of African History* 50 (2009) 41-60).

[5] Chanock, *South African Legal Culture* p. 363.

[6] The Interim Constitution of the Republic of South Africa (Act 200 of 1993) contained positive rights for the restitution of land rights in sections 28 and 121 to 123, from which flowed the Restitution of Land Rights Act 22 of 1994, which was enacted shortly after the transition to democracy, and has remained in force, although subject to several amendments, under the final Constitution, 1996. The drafters of the final Constitution, 1996

(the Act) was passed by Parliament. The Act must be read with section 25(7) of the Constitution of the Republic of South Africa, Act 108 of 1996 (the Constitution) which provides that a person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to "equitable redress". Former Deputy Chief Justice Dikgang Ernest Moseneke said in his Constitutional Court judgement of *Department of Land Affairs & others v Goedgelegen Tropical Fruits (Pty) Ltd*: "[R]estitution of land rights and land reform are constitutional issues. They sit in the heartland of the protective, restitutionary and land reform design of s 25 of the Constitution." He stressed that the Act must be understood "purposively because it is remedial legislation umbilically linked to the Constitution".[7]

Thus the Act forms part of the constitutional framework for land reform aimed at redressing past injustices of dispossession in this country. It is steeped in a challenging constitutional context in which the public interest imperative of land reform is pitted against constitutional protection of private property rights.[8] Against this background the legislature used specific language in the Act, as a tool to achieve land reform in the country and to remedy the injustices which flow from the dispossession.[9] The Act requires "historically determined justice" and the application of the principles of "equity and fairness".[10] So the Act clearly implores the courts to lean towards granting rights in land where it would be "just and equitable" to do so within the context of the provisions of the Act.[11]

The history against which land reform and claims are set plays a pivotal role in the determination of justice.[12] It is clear from the provisions of the Act that the Legislature recognised that some of the history of land occupation and ownership in this country would not be easy to establish. Accordingly the Act specifically contains certain

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also inserted section 25(7) and (8) to place beyond doubt, a positive land reform restitutionary justice provision within the Bill of Rights.

[7] *Department of Land Affairs & others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para. 53.

[8] Section 22(1)(cA) of the Act. See also subsections 25(4), (6) and (7) of the Constitution.

[9] See section 2(1) of the Act setting out the requirements for a claim, as interpreted with authority in *Alexkor Ltd & another v The Richtersveld Community & others* 2004 (5) SA 460 (CC) para. 6.

[10] See section 25(7) of the Constitution, which refers to "equitable redress".

[11] *Alexkor Ltd & another v The Richtersveld Community & others* 2004 (5) SA 460 (CC) para. 98.

[12] *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 416.

peculiar features which are intended to grant to the specialised Land Claims Court (LCC), when adjudicating land claims, latitude to admit all relevant evidence in order to determine such history. The Act is therefore an "extraordinary piece of legislation" which engenders processes and approaches not normally associated with normal litigation and rules of practice. It is therefore important to examine some of those special provisions which give structure and effect to the land claims processes.

Section 2(1) of the Act provides that:

> *A person shall be entitled to restitution of a right in land if:*
>
> a.) *he or she is a person dispossessed of a right in land after 19 June 1913 as a result of past discriminatory laws or practices; or*
>
> b.) *it is a deceased estate dispossessed of a right in land after 19 June 1913 as a result of past discriminatory laws or practices; or*
>
> c.) *he or she is a direct descendant of a person referred in paragraph (a) who has died without lodging a claim and has no ascendant who-*
>
> *i) is a direct descendant of a person referred to in paragraph (a); and*
>
> *ii) has lodged a claim for the restitution of a right in land; or*
>
> d.) *it is a community or part of a community dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; and*
>
> e.) *the claim for such restitution is lodged not later than 31 December 1998.*[13]

In terms of section 1 of the Act "restitution of a right in land" either means "the restoration of a right in land" or "equitable redress". A "right in land" refers to "any right in land whether registered or unregistered, and may include the interest of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and continuous beneficial occupation for a period of not less than 10 years prior to the dispossession in question".[14] "Racially discriminatory practices" mean "racially discriminatory practices, acts or omissions, direct or indirect, by (a) any

[13] Subsection 2(1)(e) of the Act has since been substituted by section 1 of the Restitution of Land Rights Amendment Act 15 of 2014 , which sought to change the time for lodging claims to 30 June 2019. This Act has been declared unconstitutional in the matter of *Land Access Movement of South Africa & others v Chairperson of the National Council of Provinces & others* 2016 (5) SA 635 (CC).

[14] Section 1 of the Act.

department of State or administration in the national, provincial or local sphere of government; (b) any other functionary or institution which exercised public power or performed a public function in terms of any legislation".[15]

Furthermore, the Act provides a possibility for prospective claimants to reclaim rights in land dispossessed after 19 June 1913, the date of commencement of the abhorrent Land Act.[16] One of the most heated debates on restitution in South Africa relates to this date. Notwithstanding divergent views on land restitution within the government and the ruling party, it was agreed that 19 June 1913 would be the cut-off date for land claims in South Africa.[17]

Five points were made to defend this cut-off date. First, it was argued that 19 June 1913 represents the date on which the Natives Land Act was promulgated. Second, it was the date on which territorial segregation and apartheid land policy received the "official seal".[18] Third, it was contended that while dispossession took place prior to 1913 through wars, conquest and misguided treaties, these injustices could not reasonably be dealt with by the LCC. Fourthly, it was feared that pre-1913 historical claims on ancestral land would be impossible to unravel, and would serve to awaken and/or prolong destructive ethnic and racial politics.[19] The fifth point was that land restitution should be settled as soon as possible in order to achieve political and economic stability. In other words, pre-1913 land claims would delay this stability to the detriment of the country. This is also the reason why the final deadline for submitting land claims was 31 December 1998.[20] The government used these two dates to set the target for the lodgement of claims in three years, for finalizing all claims in five years, and for implementing all court orders within ten years.

Charles Simkins, Senior Researcher at the Helen Suzman Foundation, argues that the cut-off date must be retained, asserting that the state conceptualization and

[15] *Alexkor Ltd & another v The Richtersveld Community & others* 2004 (5) SA 460 (CC) para. 6.
[16] See long title and section 2 of the Act.
[17] M Ramutsindela, N Davis and I Sinthumule, *Diagnostic Report on Land Reform in South Africa: Land Restitution* (September 2016) p. 8.
[18] Ramutsindela, Davis and Sinthumule, *Diagnostic Report* p. 8.
[19] *Ibid*., p. 8.
[20] Section 2(1)(e) of the Act.

legislation in force immediately prior to the Land Act "forms the basis for working out what is meant by the restitution of property in the post-1994 period".[21] Conceptual development and legislation were undertaken by "colonial and republican" governments with the capacity to develop law through common law, by statute and precedent.[22] This, he argues, can still be studied using documentary evidence. Contrastingly, the understanding of property by black African people depended on "orally transmitted custom".[23] He postulates that this can only be "reconstructed with a considerable degree of uncertainty".

Simkins argues that even if one could get past these difficulties, a slippery slope would emerge. For example, he uses King Goodwill Zwelithini's intention in 2014, along with other members of the Ingonyana Trust to claim land which was formerly under amaZulu control in 1838.[24] In his opinion, if the cut-off date were to be removed, the Commission would then be obliged to consider not only that claim, but also the claims of those whose ancestors were dispossessed by Zulu expansion at the time of Shaka and Dingane. Similarly, land claims in the Eastern Cape would have to be reviewed on the basis of earlier groups, such as the Khoe and the San, being dispossessed of their land through conquest. More specifically, the Hoengeyqua Khoe had been occupying the Zuurvled since at least the early 1750s, approximately fifteen years prior to the arrival of the Gqunkwhebe.[25] Therefore their claim to the land is stronger than that of the Zuurveld amaXhosa. Restitution of land would, at least for large swathes of land, be impracticable and so the question of other equitable redress would have to be considered.

[21] C Simkins, "Why 1913 should be kept as the cut-off date for land claims", *PoliticsWeb* (7 October 2014) at: https://www.politicsweb.co.za/news-and-analysis/why-1913-should-be-kept-as-the-cutoff-date-for-lan. (Accessed 16 October, 2018).
[22] Simkins, "Why 1913", *PoliticsWeb* at: https://www.politicsweb.co.za/news-and-analysis/why-1913-should-be-kept-as-the-cutoff-date-for-lan. (Accessed: 16 October 2018).
[23] *Ibid*.
[24] *Ibid*.
[25] S Newton-King, *Masters and Servants on the Eastern Cape Frontier* (Cambridge, 1999) p. 29. An expedition under the command of Ensign August Frederik Beutler first encountered the Hoengeyqua in 1752. They were a "motley band" of Gonaqua Khoe and San people, that later became a distinctive people under the leadership of Ruiter. Ruiter had allegedly escaped as a fugitive from the Roggeveld. The Hoengeyqua appear to have held control of this area until the Gqunukwhebe, led by Tshaka, crossed the Fish River.

On the other hand, the 1913 cut-off date has been criticised on the following bases. First, it was argued that, as land dispossession pre-dates 1913, the success of land restitution depends on the government's ability to transfer much of this land. To exclude such land from the restitution process compromises the goal of restitution.[26] It was also suggested that there have been waves of dispossession that cover the pre- and post-1913 timelines. For example, in 2016 then President Jacob Zuma addressed the National House of Traditional Leaders' annual parliamentary sitting, in which he said that while the majority of the country's people were formally dispossessed by the Land Act, greater losses were suffered during the 1800s: "I believe as a son of a black man, being black, that we need to shift that cut-off date. But you need to find a reasonable way of addressing the issue within the Constitution".[27] Zuma went on to state that lack of access to land is the basis for poverty, unemployment and inequality endured by mostly black people today. He also criticised land reform legislation that, ironically enough, his own party brought to Parliament and that he helped sign into law.

Apart from a clear cut-off period, the Act also provides for the establishment of an investigative commission to deal specifically with land claims, the Commission on Restitution of Land Rights (the Commission). The purpose of the Commission is to assist and facilitate the land claims processes.[28] It operates as an important "first adjudication point" that is set up in such a way that a wholehearted attempt is made from the outset to solve each land claim in a "non-adversarial manner".[29] Only if that process does not succeed is a claim referred for 'adjudication'.[30] As part of its facilitative role, the Commission is empowered and obliged to give assistance to claimants in the preparation, submission and prosecution of their land claims.[31]

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[26] Ramutsindela, Davis and Sinthumule, *Diagnostic Report* p. 9.
[27] G Davis, "'1913 cut-off date for land claims should be pushed back'", *Eyewitness News* (3 March 2016) at: https://ewn.co.za/2016/03/03/1913-cut-off-date-for-land-claims-should-be-pushed-back. (Accessed: 16 October 2018).
[28] Section 6 of the Act.
[29] *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 419.
[30] *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 419.
[31] Section 6(1)*(b)-(eA)* of the Act. See also rules 5 and 6 of the Act: Rules regarding procedure of Commission, GN R703, *GG* 16407.

The Act also provides for the establishment of the LCC for the consideration of land claim disputes.[32] The LCC is a specialist court though it usually presides in the buildings of the High Court. When the Commission refers the matter to the LCC it must request the Minister of Land Affairs to issue a certificate as to whether or not restitution is feasible.[33] Land claims should therefore be put through an intricate investigative, administrative and quasi-adjudicative process before they are referred for adjudication to the LCC. Of significance, in relation to its functioning, section 33 of the Act instructs the LCC to 'commit' itself to allowing restitution of rights in land to persons or communities dispossessed as a result of racially discriminatory laws or practices. The LCC must also take note of the need to remedy past violations of human rights, requirements of equity and justice, and the need to avoid major social disruption.[34] One of the special features of the Act is the 'unqualified' provision for a court, at the hearing of an appeal, to hear further evidence.[35]

A further significant attribute is the similarly uncircumscribed provision for admission of "any evidence", including expert reports, archival records and hearsay evidence,[36] whether or not such evidence would be admissible in any other court of law. Section 30 relaxes the normal rules relating to the admission of among other things, hearsay evidence before the LCC. These, and other distinct attributes in the Act, imply that the courts should liberally lean towards the realisation of the objectives of the Act when considering disputed land claims.[37] This is important when attempting to understand the wilful acceptance of oral evidence by the two witnesses of the Salem claimants by the LCC, even though such evidence was regarded by at least one of the judicial officials as dubious testimonies.[38]

Finally, the Act's purpose is never punitive or retributive. It is there not to punish those who benefitted from past injustices, but rather, to restore those injustices. In his

[32] Section 22 of the Act.
[33] Section 15 of the Act.
[34] Section 33(a), (b), (c), and (d) of the Act. See also *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para. 53.
[35] Section 28N.
[36] Section 30(1) and 30(2)(a) of the Act. See also *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para. 57.
[37] Sections 28N, 30 and 33 of the Act.
[38] The testimonies of Msile Nondzube and Mndoyisine Ngqiyaza will be discussed more fully in the next chapter.

Constitutional Court judgement, Cameron emphasised that the Act is not a "victor's charter, intent at whatever cost or with whatever means on depriving those who have of what they have".[39] Instead he described it as a "nuanced and generous framework for restoring rights and dignity to those dispossessed of their land after 1913, while affording compensation to those who are affected by successfully proven claims".[40] The Salem commonage claim is supposed to be a prime example of how the Act's balance of justice operates. It should recognise the claimants' rights, while not discarding the entitlements of the presently possessed. But this is not always realised. The Act's framework is only as good as the efficiency of its implementation by the state. What follows is a brief analysis of state policies geared towards fulfilling its obligations as per the Constitution and the Act since its inception until now.

Land Reform in South Africa: expectation versus reality

In 1994, the government's early vision of land reform emphasized its multiple objectives, namely: addressing dispossession and injustice, creating a more equitable distribution of land, reducing poverty and assisting economic growth, providing security of tenure, establishing competent land administration and contributing to national reconciliation. The rural poor (seen as comprising victims of land dispossession, small-scale farmers, farm workers, labour tenants, communal area residents, women and youth) were to be the primary beneficiaries.

Progress was slow in the first five years of land reform, and most targets were not met (e.g. redistribution was nowhere near the target of 30% of commercial farmland within five years).[41] Pilot schemes were soon fast-tracked into policy, arguably missing an opportunity for better planning.[42] Although land reform projects were exempt from restrictions of subdivision, in practice large groups of people were expected to operate farms as unitary commercial enterprises. Restitution was transformed from a cumbersome, courts-driven process into one with considerable administrative leeway,

[39] *Salem Party Club and Others v Salem Community and Others* [2017] ZACC 46, para. 73.
[40] *Salem Party Club and Others v Salem Community and Others* [2017] ZACC 46, para. 73.
[41] C Walker, *Landmarked: Land Claims and Land Restitution in South Africa* (Johannesburg, 2008) p. 64 and E Lahiff, "'Willing Buyer, Willing Seller': South Africa's failed experiment in market-led agrarian reform", *Third World Quarterly*, 28, 8, 2007, 1577-1597, p. 1581.
[42] B Cousins, "Land reform in South Africa. Can it be saved?", *Land, Law and Leadership: a provocation commissioned by the Nelson Mandela Foundation* Paper 2, (2017) p. 3.

but relatively few land claims were settled.[43] The Land Claims Commission (the Commission) found it challenging to provide effective post-settlement support.

A host of new land laws were passed aimed mainly at securing land rights.[44] Farmworkers and dwellers were protected from arbitrary evictions. The occupation and use rights of labour tenants were protected, but tenants or former tenants could also apply for ownership of the land they occupied.[45] Communal Property Associations (CPAs) allowed groups to hold restored and redistributed land.[46] However, communal tenure was highly politicized as a result of the lobbying power of traditional leaders, and progress in developing a policy framework was slow and incomplete.[47]

Agricultural policies were separated from land policies, and both were separated from water policies and initially focused on deregulation and liberalisation. Subsidies for credit, inputs and exports were abolished and the single channel marketing system, with fixed prices, was dismantled.[48] These measures were portrayed as progressive because they removed state support for privileged white farmers. But large-scale programmes of support for small-scale black farmers and land reform beneficiaries, despite being identified as a key need, were excluded.

In 1999 policy priorities shifted from meeting the needs of the poor to servicing a group of aspirant black commercial farmers. Market efficiency and the de-racialisation of commercial farming received renewed emphasis. The Land Redistribution for Agricultural Development (LRAD) programme replaced earlier policy frameworks and was complemented by a "comprehensive agricultural support programme".[49]

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[43] E Lahiff, "'Willing Buyer, Willing Seller': South Africa's failed experiment in market-led agrarian reform", *Third World Quarterly*, 28, 8, 2007, 1577 – 1597, p. 1582.

[44] These include The Land Reform (Labour Tenants) Act 3 of 1996, Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA), Extension of Security of Tenure Act 62 of 1997 (ESTA) and Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE).

[45] Cousins, "Land reform in SA", *Land, Law and Leadership* p. 3.

[46] *Ibid*., p. 3.

[47] E Lahiff, "'Willing Buyer, Willing Seller': South Africa's failed experiment in market-led agrarian reform", *Third World Quarterly*, 28, 8, 2007, 1577-1597, p. 1589 and R Hall, "A Political economy of land reform in South Africa", *Review of African Political Economy* 31, 100, 2004, 213-227, pp. 218-219.

[48] C Mather and S Greenberg, "Market Liberalisation in Post-Apartheid South Africa: The Restructuring of Citrus Exports after 'Deregulation'", *Journal of Southern African Studies* 29, 2 (June, 2003), 393-412, pp. 399-400.

[49] R Hall, "A Political economy of land reform in South Africa", *Review of African Political Economy* 31, 100, 2004, 213-227, p. 216 and B Cousins, "Land reform in South Africa. Can it be saved?", *Land, Law and Leadership: a provocation commissioned by the Nelson Mandela Foundation* Paper 2, (2017) pp. 3-4.

Following criticism of a means test which applicants had to go through, the requirement of a minimum cash contribution of R5,000 had to be discarded.[50] In addition, many of the problems experienced in the first five years of land reform resurfaced. Official processes remained slow and cumbersome, beset with poor coordination between different departments and spheres of government. Group projects saw beneficiaries continuing to pool their grants to purchase large farms, but they were not allowed to subdivide these.[51]

The large-scale commercial farming model continued to dominate planning and thinking about post-settlement support. Cousins points out that consultants based in the large-farm sector remained the main source of expertise for processes of farm business planning, and there was often a large gap between business plans and the needs, desires and capacities of beneficiaries.[52]

Project failures contributed to a public perception that land reform was in trouble. A National Land Summit held in 2005 agreed on a review of "willing buyer, willing seller", the expanded use of expropriation and a proactive role for the state.[53] The following year saw several new policy thrusts: area-based planning, a proactive land acquisition strategy, a draft Expropriation Bill, and reports on foreign land ownership, land ceilings and land taxes.[54] The ANC's National Conference in Polokwane in 2007 emphasized the need for an "integrated programme of rural development, land reform and agrarian change".[55]

Little came of these new directions in terms of implementation strategies. Area-based planning was consultant-driven and unfocussed, and proactive land acquisition was reduced to the state purchasing farms and leasing them to redistribution applicants for

[50] R Hall, "A Political economy of land reform in South Africa", *Review of African Political Economy* 31, 100, 2004, 213-227, p. 216.
[51] Lahiff, "Willing Buyer, Willing Seller", *Third World* p. 1581.
[52] Cousins, "Land reform in SA", *Land, Law and Leadership* p. 4.
[53] Lahiff, "Willing Buyer, Willing Seller", *Third World* p. 1582.
[54] Cousins, "Land reform in SA", *Land, Law and Leadership* p. 4.
[55] Unknown author, "Diagnostic Report on Land Reform in South Africa", *Institute for Poverty, Land and Agrarian Studies University of the Western Cape* September 2016, p. 12.

three years.[56] Rhetoric about land reform for smallholders disguised the complete neglect of small-scale producers, with funds for comprehensive agricultural support largely directed to a minority of large-scale producers. Land restitution continued to move slowly, hindered by a small budget, capacity problems and inadequate funds for post-settlement support.[57]

Tenure reform was largely overlooked with the Department devoting few resources to implementing the Land Reform (Labour Tenants) Act of 1996 or the Extension of Security of Tenure Act 62 of 1997 (ESTA), and CPAs and land-holding trusts were mostly neglected. As a result, evictions of workers from commercial farms continued, pre-emptively and in response to competitive pressures, indicating the weakness of the legal system. The Communal Land Rights Act was passed in 2004, premised on transferring ownership of land from the state to traditional councils under chiefs. It was never implemented, struck down by the Constitutional Court on procedural grounds in 2010.[58]

After 2009, rural development, food security and land reform were identified as priorities of the Zuma government and the Department of Rural Development and Land Reform (DRDLR) was created.[59] A number of policy statements have appeared over the past nine years, some highly controversial, but practical measures to implement them have been slow to materialise.

One new direction was a Comprehensive Rural Development Programme (CRDP) aimed at creating "vibrant, equitable and sustainable rural communities".[60] The CRDP targeted wards where poverty is deep, and involves "para-development specialists" training community members to be usefully employed in a range of micro-projects.[61] The DRDLR sees itself as playing a coordinating role in partnership with other

[56] S Greenberg, *Status Report on Land and Agricultural Policy in South Africa, 2010* (Capet Town, 2010) p. 5.
[57] Cousins, "Land reform in SA", *Land, Law and Leadership* p. 4.
[58] M Clark and N Luwaya, "Communal Land Tenure 1994-2017", *Commissioned Report for High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa* (June 2017) p. 11.
[59] Cousins, "Land reform in SA", *Land, Law and Leadership* p. 5.
[60] Ministry of Rural Development and Land Reform, *The Comprehensive Rural Development Framework* (28 July, 2009) p. 3 at: http://www.ruraldevelopment.gov.za/phocadownload/Documents/crdp_version1-28july09.pdf. (Accessed 13 October, 2018).
[61] Rural Development and Land Reform, *CRDP Framework* p. 4.

government departments and local government bodies.[62] A recent evaluation of the CRDP commissioned by the Presidency identified multiple problems, including tensions with other departments, and only short-term job creation through infrastructural development. In essence, the CRDP constitutes a Bantustan-era approach to 'development', in that it does nothing to address structural realities.

A Green Paper on Land Reform was published in August 2011, but was only eleven pages and contained only general statements of principle.[63] The main focus of the Green Paper is on a "four tier" tenure system comprising leasehold on state land, freehold "with limited extent" implying restrictions on land size, 'precarious' freehold for foreign owners (i.e. with obligations and restrictions), and communal tenure.[64]

The Restitution of Land Rights Amendment Act of 2014 attempted to open up land claims for another five years, until 2019. This could have jeopardized thousands of existing claims that have not been settled, as well as another 20,000 that are settled but not yet implemented. New claims lodged since 2014, which already numbered over 120,000 in 2016, would have swamped the processes of already existing claims. In addition, government sought to open up the claims process to traditional leaders. It is unlikely that the hundreds of billions of rand required to settle an estimated 397,000 claims will ever be available. The Amendment Act was recently challenged in court, on both substantive and procedural grounds and was found to be unconstitutional.[65]
The State Land Lease and Disposal Policy (SLLDP) of 2013 applies on farms acquired through the proactive land acquisition strategy. It identifies four categories of beneficiaries: households with no or limited access to land, small-scale farmers subsistence farmers, medium-scale farmers already farming commercially but

[62] According to their website, the DRDLR's mission is to "initiate, facilitate, coordinate, catalyse and implement an integrated rural development programme".Department: Rural Development and Land Reform (DRDLR) at: https://nationalgovernment.co.za/units/view/35/department-rural-development-and-land-reform-drdlr. (Accessed 13 October, 2018).
[63] Department of Rural Development and Land Reform, *Green Paper on Land Reform, 2011* at: https://www.gov.za/sites/default/files/gcis_document/201409/landreformgreenpaper.pdf. (Accessed 13 October, 2018).
[64] DRDLR, *Green Paper, 2011* pp. 4-6.
[65] See *Land Access Movement of South Africa and others v Chairperson of the National Council of Provinces and Others* 2016 (10) BCLR 1277 (CC). This judgement was followed by *Speaker of the National Assembly v Land Access Movement of South Africa* [2019] ZACC 10, 19 March 2019 (unreported). In that case, the Speaker sought of the period of 24 months in order to enable Parliament to finalise the process of enacting the new Amendment Act.

constrained by insufficient land and large-scale commercial farmers with potential to grow but disadvantaged by location and farm size.[66]

Cousins asserts that this policy is biased towards medium-scale and large black commercial farmers.[67] It assumes that there will only be one lessee per farm, and no mention is made of subdividing large farms. Categories 1 and 2 include labour tenants and farmworkers, who will be leased state land without any option to purchase.[68] But it is unclear that there are any projects that actually involve those categories. Categories 3 and 4 are leased state land for thirty years, with leases renewable for another twenty years, and will then have an option to purchase. The first five years of the initial lease is treated as a probation period, and no rental is paid in this period. Thereafter the rental is calculated as 5% of projected net income.[69]

The Recapitalisation and Development Programme (RADP) of 2014 replaced all previous forms of funding for land reform, including settlement support grants for restitution beneficiaries.[70] Business plans written by private sector partners or officials will be used to guide decision-making. Funding is for a maximum of five years. Beneficiaries must have business partners recruited from the private sector, as mentors or 'co-managers', or within share-equity schemes, or through contract farming.[71]

The Presidency commissioned a mid-term evaluation of RADP in 2013 that revealed its elite bias.[72] Its core aim is 'commercialisation' of land reform projects. Large amounts of money are spent on relatively few beneficiaries with few jobs having been created and access to markets for produce remaining limited. In the six provinces covered in the assessment, an average of around R3.5 million was spent per project,

[66] State Land Lease and Disposal Policy, 2013, p. 13 at: http://www.ruraldevelopment.gov.za/about-us/268-latest-news/492-state-land-lease-and-disposal-policy-25-july-2013. (Accessed 13 October, 2018).
[67] Cousins, "Land reform in SA", *Land, Law and Leadership* p. 6.
[68] State Land Lease and Disposal Policy, 2013, p. 14.
[69] *Ibid*., p. 19.
[70] Cousins, "Land reform in SA", *Land, Law and Leadership* pp. 6-7.
[71] Recapitalisation and Development Programme (RADP) at: http://www.ruraldevelopment.gov.za/services/358-land-redistribution-and-development/922-recapitalisation-and-development. (Accessed 13 October, 2018).
[72] Cousins, "Land reform in SA", *Land, Law and Leadership* p. 7.

around R520,000 per beneficiary, and job creation cost R645,000 per job.[73] Some mentors and partners are milking projects, and pay little attention to skills transfer.

The Agricultural Landholding Policy Framework of 2013 proposes that the government designate maximum and minimum landholding sizes in every district.[74] District land reform committees will determine floors and ceilings by assessing a wide range of variables.[75] However, it seems unlikely that many officials will have the necessary expertise. Holdings in excess of the ceiling will be trimmed down through "necessary legislative and other measures", possibly by giving the state the right of first refusal on land offered for sale or expropriation.[76] But a review of experience in India, Egypt, Mexico, the Philippines and Taiwan revealed that land ceilings have "not lived up to expectations".[77] In March 2017, the Draft Regulation of Agricultural land Holdings Bill was published based on the 2013 recommendations.[78] However, that process has not yet been completed.

A 2014 policy document on "Strengthening the Relative Rights of People Working the Land", also known as the "50/50 policy", has not yet been approved.[79] According to this policy each landowner would retain 50% ownership of the farm, ceding the other 50% to workers, whose shares in the farm will depend upon their length of "disciplined service".[80] While couched in 'radical' language, this offers workers very little, except promising landowners a massive dividend.[81] It is also unclear whether the scheme is to be compulsory or voluntary.

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[73] *Ibid.,* p. 7.
[74] Agricultural Landholding Policy Framework, 1 August, 2013 at: http://www.ruraldevelopment.gov.za/legislation-and-policies/file/2052-agricultural-landing-policy-framework. (Accessed 13 October, 2018).
[75] These include climate, soil, water, production output, economies of scale, capital requirements, numbers of farmworkers, distance to markets, infrastructure, technology and price margins.
[76] Agricultural Landholding Policy Framework, 1 August, 2013, p. 11
[77] *Ibid*., pp. 12-16.
[78] *Regulation of Agricultural and Land Holdings Bill: Draft* (17 March, 2017) at: https://www.gov.za/documents/regulation-agricultural-land-holdings-bill-draft-17-mar-2017-0000. (Accessed 4 March, 2020).
[79] Cousins, "Land reform in SA", *Land, Law and Leadership* p. 7.
[80] Final Policy Proposals on "Strengthening the Relative Rights of People Working the Land", (Version 2) 21 February, 2014, pp. 8-9 at: http://www.ruraldevelopment.gov.za/publications/land-reform-indaba-2015/file/3397-final-policy-proposals-on-strengthening-the-relative-rights-of-people-working-the-land. (Accessed 10 April, 2018).
[81] Cousins, "Land reform in SA", *Land, Law and Leadership* p. 7.

In 2009 a moratorium was placed on farm equity schemes, based on a government study never made publicly available.[82] The Minister indicated that "of the 88 FES (farm equity share) projects implemented between 1996 and 2008, only nine have declared dividends".[83] The policy is illogical, costly and liable to benefit farm owners rather than workers.

Tenure reform remains neglected. Farmworkers and farm dwellers continue to be vulnerable to eviction, and only superficial and inappropriate amendments to ESTA have been proposed. Thousands of labour tenant claims have been ignored, and only recent court action has forced the department to commitment itself to resolving them. Communal tenure reform policy, although not yet embodied in law, continues to be focused on the transfer of land ownership to traditional leadership structures, with community members offered only "statutory use rights".[84]

In twenty-five years, land reform has barely altered the agrarian structure of South Africa, and has had only minor impacts on rural livelihoods. Only around 8 to 9% of farmland has been transferred through restitution and redistribution, and many settled restitution claims have not been fully implemented.[85] The great majority of 69,000 urban restitution claims have been settled through cash compensation.

No systematic data on impacts are available but case studies suggest that around 50% of rural land reform projects have brought improvements in the livelihoods of beneficiaries, but these are often quite limited.[86] It is unclear how many recorded 'beneficiaries' still reside on or use the transferred land, or benefit from land reform in any way.[87] Institutions such as CPAs remain poorly supported and as a result, are often dysfunctional. Joint ventures between claimant communities and private sector partners have experienced major problems.

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[82] Department of Rural Development and Land Reform, *Media statement: The lifting of moratorium on Farm Equity Schemes* (12 March 2011) at: http://www.ruraldevelopment.gov.za/news-room/media-statements/file/548. (Accessed 16 October 2018).
[83] R Hall and A du Toit, *Position papers for National Land Tenure Summit, Johannesburg 4-6 September, 2014* (Cape Town, 2014) p. 2.
[84] Cousins, "Land reform in SA", *Land, Law and Leadership* p. 8.
[85] *Ibid*., p. 8.
[86] B Cousins and A Dubb, "Many Land Reform Projects Improve Beneficiary Livelihoods", *PLAAS Land Reform Fact Sheet 4* (Cape Town, 2013).
[87] Cousins, "Land reform in SA", *Land, Law and Leadership* p. 8.

Tenure reform has also largely failed. Landowners have worked out how to evict unwanted workers within the parameters of ESTA, or to "buy out" their rights, and have done so in large numbers.[88] In communal areas, the only legislation that secures the land rights of residents is the Interim Protection of Informal Land Rights Act 31 of 1996, which has had to be renewed every year.[89] There are increasing reports of corruption by traditional leaders in areas with minerals. Some traditional leaders attempted to extend territories under their control through restitution claims lodged under the 2014 amendment.[90]

So what has led to the overall failure of land reform policies up until now? Firstly, the aims and objectives of land reform remain largely unclear, and the categories of people intended to benefit from it are not specified clearly enough. This is partly because it has not been conceived of as part of a broader process of agrarian reform aimed at restructuring classes of the rural economy. As a result, agricultural and land policies are not clearly interconnected. Furthermore, no real support for black African smallholder farmers has been on offer, and no land reform farms have been officially sub-divided.[91] Informal agricultural markets are ignored. Spatial targeting of land and beneficiaries in zones of "opportunity and need" (eg farms located on the edges of densely settled former Bantustans, and on urban edges) has been absent, and local government has barely been involved in planning and implementation.[92] Water reform and land reform have hardly ever been viewed as crucial to each other's success, and urban land has been dealt with separately from rural land.[93]

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[88] M Cowling, D Hornby and L Oettlé, "Research Report on the Tenure Security of Labour Tenants and Former Labour Tenants in South Africa", *Association For Rural Advancement* (June, 2017) pp. 13-14.
[89] Government Notice No. 1384 of 2018 at https://www.greengazette.co.za/notices/interim-protection-of-informal-land-rights-act-31-1996-extension-of-the-application-of-the-provisions-of-the-act_20181214-GGN-42111-01384-01.pdf. (Accessed 27 July, 2018).
[90] Unknown Author, "King Goodwill wants his kingdom back", *News24* (6 July, 2014) at: https://www.news24.com/Archives/City-Press/King-Goodwill-wants-his-kingdom-back-20150429. (Accessed 16 October, 2018).
[91] Cousins, "Land reform in SA", *Land, Law and Leadership* p. 9.
[92] B Cousins and I Scoones, "Contested paradigms of 'viability' in redistributive land reform: perspectives from southern Africa", *The Journal of Peasant Studies* 37, 1, (January, 2010) 31-66, p. 36.
[93] Cousins and Scoones, "Contested paradigms", *Peasant Studies* pp. 49 and 57.

Secondly, there remain misguided assumptions by government which undercut effective policy implementation. For example, the assumption that the large-scale commercial farm model informs assessments of 'viability' hinders attempts to support smallholder farming.[94] The rural poor and smallholder farmers are often seen as homogeneous groupings, but are in fact socially differentiated. As a result, targeting those communities is ineffective. Also, measures to promote the informal economy, including markets for food, are absent, due to assumptions that only formal markets count and that small-scale producers can easily be integrated into them. Land reform furthermore focuses mainly on rural areas but urbanisation and growth of informal settlements means that key needs and opportunities are missed. Planning processes also see people as passive 'beneficiaries' rather than active participants in co-planning, which lead to inappropriate project design.

Thirdly, private ownership is seen by government as the most desirable form of tenure but is an inappropriate system for most South Africans at present.[95] In 2011 some 60% of South Africans occupied land or housing without their rights being recorded in official systems such as the Deeds Registry.[96] This includes 17 million people in communal areas, 2 million on commercial farms, 3.3 million in informal settlements, 1.9 million in backyard shacks, 5 million in RDP[97] houses without title deeds, and 1.5 million in RDP houses with inaccurate title deeds.[98] On land reform farms, beneficiaries often lack clearly specified rights to the land they hold through the CPAs and trusts.

Fourthly, it is evident that land reform has been captured by elites. The most powerful voices are those of 'emerging' black capitalist farmers, traditional leaders, large-scale white commercial farmers and agribusiness corporates, who are all benefitting more than the poor.[99] This could be due to the current ineffectiveness of civil society,

[94] *Ibid*., p. 32.
[95] This is itself a contentious issue and requires further discussion, given its importance. However, as it does not form part of the main study not too much discussion is made here. Instead, the reader is referred to *Daniels v Scribante* 2017 8 BCLR 949 (CC), where the changing role of ownership in South Africa is set out.
[96] Cousins, "Land reform in SA", *Land, Law and Leadership* p. 9.
[97] Government housing projects, colloquially called "RDP houses", named after the original Reconstruction Development Programme (RDP).
[98] Cousins, "Land reform in SA", *Land, Law and Leadership* pp. 9-10.
[99] *Ibid*., p. 11.

farmworkers being weakly unionised and small-scale farmers not having their interests adequately represented within organisations such as the African Farmers Association of South Africa (AFASA).[100] For example, the farmworker's strike in the Western Cape in 2012/2013 managed to increase the minimum wage by 50%, but this has neither stopped mechanisation nor evictions on commercial farms.[101] Workers' demands for land of their own were ignored by government.

Communal area residents have few forums in which they can make their voices heard, although in areas where deals have been struck between traditional leaders and mining companies, they have begun to defend their land rights. Therefore it is unsurprising that the then DRDLR Deputy Minister Mcebisi Skwatsha was able to announce government's intention to "recreate" a class of black commercial farmers, or that traditional leaders would receive government blessing to privately own communal land.[102]

Fifthly, land reform is politically misdirected. Many South Africans view land as giving them a sense of belonging.[103] The loss of land serves as a powerful reminder of oppression and dispossession. Forced removals are not only familiar to families living in rural areas. Many urban dwellers are also familiar with forced dispossession as integral to family histories. It is no surprise then that political parties often invoke land dispossession and the need for redress in attempts to mobilise support. Political rhetoric draws on a narrative in which white farmers and foreigners are depicted as 'villains', black South Africans are the 'victims', and government (or an opposition party) are 'heroes' rising to the rescue.[104] A political imaginary centred on race tends to dominate the land discourse.

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[100] *Ibid*., p. 11.
[101] R Davis, "Western Cape farm strikes, one year on, still a political football", *Daily Maverick* (28 October, 2013) at: https://www.dailymaverick.co.za/article/2013-10-28-western-cape-farm-strikes-one-year-on-still-a-political-football/amp/. (Accessed 16 October, 2018).
[102] M Skwatsha, "Our intention is to recreate the black commercial farming class – Mcebisi Skwatsha", *Politicsweb* (8 May, 2015) at: https://www.politicsweb.co.za/politics/our-intention-is-to-recreate-the-black-commercial-. (Accessed 15 October, 2018).
[103] J Gerber, "'We are hungry, we want our land back': Expropriation without compensation is officially back on Parliament's agenda", *News24* (25 July, 2019) at: https://www.news24.com/SouthAfrica/News/we-are-hungry-we-want-our-land-back-expropriation-without-compensation-is-officially-back-on-parliaments-agenda-20190725. (Accessed 26 July, 2019).
[104] Cousins, "Land reform in SA", *Land, Law and Leadership* p. 12.

In this context, the ruling party is being challenged by the Economic Freedom Fighters, which calls for confiscatory land reform without compensation. The ANC reacts by issuing radical-sounding policy statements that disguise the elite bias of current policies.[105] Vote catching is a key consideration, and probably explains the 2014 decision to extend the period for lodging of new restitution claims and the 2017 announcement by the ANC of their intentions to revise the Constitution, particularly section 25.

Another key problem is that "state capacity" is inadequate. Land reform is necessarily complex and time-consuming, therefore state capacity is crucial, and requires strong leadership and management, adequate budgets, appropriate policies, sound institutional structures, efficient procedures and an effective system for monitoring and evaluation. All of these have been problematic, and DRDLR is known as one of the weakest of government departments.[106] Monitoring and evaluation is critically important if mistakes and false starts are learned from. But in relation to land reform it has been highly ineffective. The lack of adequate data on the rural economy provided by Stats SA compounds the problem.[107] One inadequate national survey of small-scale agriculture has been undertaken since 1994, and the census does not collect data on farm size.

Finally, the constitutional framework is perceived by the ruling party and certain opposition parties as a limitation to land reform. However, the property clause (section 25 of the Constitution), which currently requires compensation to be paid for land acquired by the state, is not a fundamental constraint.[108] Acquiring farms at prices below market value is possible, given that compensation only has to be "just and equitable", but land reform would probably slow down considerably due to refusal by current landowners to sell their property at that value and due to the subsequent court

[105] Gerber, "'We are hungry", *News24* at: https://www.news24.com/SouthAfrica/News/we-are-hungry-we-want-our-land-back-expropriation-without-compensation-is-officially-back-on-parliaments-agenda-20190725.
[106] Cousins, "Land reform in SA", *Land, Law and Leadership* p. 13.
[107] *Ibid*., p. 13.
[108] The latest development (as of 4 March 2020) is an amendment bill that was published on 9 December 2019, setting out the envisaged formulation of the property clause so as to provide specifically for expropriation with nil compensation.

action that will follow. However, if the budget for land reform increased from its present level of 0.4% of the national total budget, to even 2% for example, then land purchase would be a lot more affordable.[109] Incompetent political will is more of a limitation than the Constitution.

In other respects the Constitution is actually enabling land reform efforts, rather than disabling them. In particular, Section 25(6), which requires that the state secure the land rights of black South Africans, is of key significance.[110] All forms of property are protected, not only private property. Given evidence of attempts at state capture by private elements, and the woeful human rights record of mining operations in communal areas, measures to protect the poor from current dispossession are urgently required.[111] Litigation and other connected struggles continue to attempt to compel the state to meet its constitutional obligations to secure tenure, without requiring private ownership.

Land reform needs to make a clean break from its present course, starting with a clear vision of how it can contribute to addressing structural inequality and poverty. This vision should be tempered with some pragmatism. Land and agrarian reform by itself is unlikely to reduce the poverty of most of the rural population. The creation of jobs and vast improvement of the primary and secondary education systems for the majority of the population in both urban and rural areas, should be the issue at the centre of national politics. However, a reinvigorated and well-researched programme of land reform, together with the creation of new irrigation schemes, could make a substantial difference for many households.[112]

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[109] B Cousins, "Land reform in South Africa. Can it be saved?", *Land, Law and Leadership: a provocation commissioned by the Nelson Mandela Foundation* Paper 2, (2017) p. 13 and T Corrigan, "Budget reveals government's real position on land reform", *News24* (22 February, 2019) at: https://www.news24.com/Columnists/GuestColumn/budget-reveals-governments-real-position-on-land-reform-20190221. (Accessed 23 February, 2019). All spending on land, agriculture and rural development is put at R30.7 billion out of a Consolodiated Government Expenditure of R1.83 trillion (1,7%).

[110] Section 25(6) reads: "A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress."

[111] Cousins, "Land reform in SA", *Land, Law and Leadership* p. 13.

[112] National Planning Commission, *National Development Plan: Vision for 2030* (Pretoria, 2012).

It seems that government has taken heed and has resolved to adopt such a vision, at least in part. In May 2019, the Presidential Advisory Panel on Land Reform and Agriculture Report[113] was published highlighting the need for a "shared vision for land reform" which would benefit the poor. It admitted that the state needed to look introspectively and cease with its elitist tendencies. The report also urges government to commit to implementation of land reform once it is capable of curbing the corruption within. It also calls for active participation, not only between government and affected communities, but also with the private sector, allaying fears by managing the social and economic risks in a responsible manner.

With that in mind, structural realities such as the monopolisation of agricultural production in a small, productive core of capitalist farming enterprises should be taken into account. In 2002 only 5,370 farming enterprises (only 12% of the total of 45,800 farming units) contributed around 62% of total turnover.[114] Today the proportion of value produced by the top 20% of farm enterprises is likely to be even higher, estimated to be as high as 80%.[115]

This concentration of production has been driven by integration into global markets, increased competition, mechanisation and specialisation. These have been accompanied by a drastic reduction of farmworkers employed. As of 2017, the formal sector employment on farms stands only at around 400,000 workers.[116] In communal areas, approximately 2 million households engage in some form of agricultural production, producing crops as a main or extra source of food. A minority of small-scale black African farmers, numbering around 200,000, sell farm produce to markets as a main or extra source of income.[117] These "loose value chains" are poorly documented and largely ignored by policy-makers.

[113] *Final Report of the Presidential Advisory Panel on Land Reform and Agriculture* (4 May 2019) at: https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000. (Accessed 4 March, 2020).
[114] Cousins, "Land reform in SA"*, Land, Law and Leadership* p. 14.
[115] *Ibid*., p. 14.
[116] *Ibid*., p. 14.
[117] *Ibid*., p. 14.

Radically reconfiguring the country's agrarian structure should be the main focus of land and agricultural policy, and this will clarify who should be the key beneficiaries of reform. However, securing tenure rights should remain a key objective of land reform and focus on legal recognition of social tenures rather than on private title. This will assist in poverty reduction efforts more generally.

It is important to ensure that land rights connect in practical ways to production, employment and livelihoods. Land rights involve much more than just the law, and rights must be able to be realised in practice. Local political struggles are often required, such as those engaged in by women challenging patriarchal power relations. Land and agrarian reform must thus include rights-based approaches and support for such local political struggles.

Solving the "Land Question" in the post-apartheid period also means addressing the intertwined oppressions of race, class and gender. The student movements of "Rhodes Must Fall" and "Fees Must Fall" have recently put intersectionality on the agenda of social transformation, forcing South Africans to consider the interconnected nature of oppression in general.[118] Land reform should aim to address race, class and gender simultaneously. As Henry Bernstein states, "class relations are universal but not exclusive 'determinations' of social practices in capitalism. They intersect and combine with other social differences and divisions…"[119] Changes in class and gender relations must thus also be present at the core of redistributive programmes that address racial inequality. But changing class realities should be seen as central to land reform, grounding struggles against other kinds of oppression in its attempts to open up space for new kinds of livelihood opportunities.[120]

"A landmark case" – Significance of the Salem commonage claim

[118] *Ibid*., p. 19.
[119] H Bernstein, *Class dynamics of agrarian change* (Halifax, 2010) p. 115. For a more detailed discussion on the South African land reform programme, see JM Pienaar, "Reflections on the South African land reform programme: characteristics, dichotomies and tensions (Part 1)", *TSAR* 2014 (3), 425-446 and JM Pienaar, "Reflections on the South African land reform programme: characteristics, dichotomies and tensions (Part 2)", *TSAR* 2014 (4) 689-705.
[120] Cousins, "Land reform in SA", *Land, Law and Leadership* p. 19.

When acting judge Cassim Mahomed Sardiwalla of the Land Claims Court found that the Salem claimants' descendants were dispossessed of their right to land due to past racially discriminatory laws and practices the claimant 'community' was initially confused with the ruling as they did not know what the implications were. The judgement was sixty-four pages long and took Sardiwalla almost the whole day to read, but at the end of it his order was simply: "1) The Salem Community was dispossessed of a right in land after 19 June 1913, as a result of past racially discriminatory laws and practices in terms of section 2 of the Restitution of Land Rights Act 22 of 1994" and "2) No order as to costs."[121] The lawyers for the 'community' informed them that their claim had succeeded. They celebrated the judgement as a victory, hoping that this process which was twelve years in the making was finally over.[122] Mava Mlola of the state attorney's office, representing the Eastern Cape Regional Land Claims Commission, described it as a "landmark case": "Everyone has been waiting for this judgment. I think this judgment will affect the cases that the Eastern Cape Regional Claims Commission is handling."[123]

The judgement was regarded as a unilateral victory for the claimants. Mlola himself would say, "The judgment was in our favour."[124] The claimants as well as the Regional Land Claims Commission (the Commission) regarded the judgement to be an affirmation that the Salem commonage was now, at last, exclusively theirs.

However, the feelings of jubilation and hope turned to feelings of anguish and confusion three years later when the Constitutional Court (CC) delivered its judgement on 11 December, 2017.[125] In a unanimous decision the CC ruled that all parties involved should share the land and that neither the landowners nor the claimant community have exclusive rights to the land. On the face of it, the judgement seemed to confirm the LCC's 2014 judgement as well as the Supreme Court of Appeal's

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[121] *Salem Community v The Government of the Republic of South Africa and others* LCC 217/2009 [2 May 2014] (Unreported), para. 162.

[122] K Roux, "Landmark judgment in Salem land claim", *Grocotts' Mail* (2 May, 2014) at: https://www.grocotts.co.za/2014/05/02/landmark-judgment-in-salem-land-claim/. (Accessed 16 October, 2018).

[123] Roux, "Landmark judgment", *Grocotts* at: https://www.grocotts.co.za/2014/05/02/landmark-judgment-in-salem-land-claim/. (Accessed 16 October, 2018).

[124] *Ibid*.

[125] M Ngqina, "Salem land claim ruling sparks mixed views", *SABC News Online* (13 December 2017) at: http://www.sabcnews.com/sabcnews/salem-land-claim-ruling-sparks-mixed-views/. (Accessed 16 October, 2018).

subsequent judgment. But the CC's finding that the Salem settlers had, over more than a century, also developed some rights to the land complicated the next part of the LCC's inquiry, which is restitution.

ILLUSTRATION 4.1: The Constitutional Court of South Africa

(Credit: SABC News)

The nuanced judgement of Justice Edwin Cameron, explicitly states that the claimants are entitled to a measure of restitution "which does not necessarily include the landowners' entire farms".[126] He explained, "The applicant Community has established rights, but not exclusive rights to the Commonage. Both the Community and the Salem Settlers exercised rights of usage over the Commonage".[127]

The claimant 'community' already owned five farms of the forty-two farms in Salem after agreements were reached outside of court between the owners of those farms and the Commission.[128] But the claimants sought exclusive ownership over all of them. Msile Nondzube, the first witness for the claimants and its chairperson told reporters: "I feel so good and happy for the community of Salem. But I'm not happy about the fact that we should divide because to me that land belongs to our forefathers."[129]

[126] *Salem Party Club and Others v Salem Community and Others* [2017] ZACC 46, para. 160.
[127] *Salem Party Club and Others v Salem Community and Others* [2017] ZACC 46, para. 161.
[128] Mgqina, "Salem land claim", *SABC* at: http://www.sabcnews.com/sabcnews/salem-land-claim-ruling-sparks-mixed-views/. (Accessed 16 October, 2018).
[129] *Ibid*.

Justice Cameron found the suggestion contained in the LCC's judgment that the community was entitled to the return of the commonage "as a whole" was neither right nor just. He cautioned that the final order of the LCC must reflect an accommodation of both groups' 'entitlements'.[130]

The attorney for the landowners, Bertus van der Merwe said that although there were no winners, it presented both parties with viable options and should be seen as a 'win-win' solution in which the issue of restitution could be settled without further litigation: "The constitutional court has now expressly held that the claimants have never occupied the land under claim to the exclusion of the landowners who are primarily the descents [sic] of the 1820 Settlers. The court now has given written submission to the rights of 1820 Settlers and the current landowners."[131] He added: "We hope that the communities can now live together in peace and harmony."[132] Nationally, the CC judgement was generally welcomed by legal commentators as a suitable clarification and implementation of the Restitution of Land Rights Act, perfectly balancing the rights of the previously dispossessed with the rights of the current landowners. Claire Martens of the Legal Resources Centre (LRC) wrote in a statement following the court ruling that the Centre welcomed the judgment "as an interpretation of the Restitution of Land Rights Act that is just and fair".[133]

However, many were concerned about the practicalities of white landowners and black African claimants sharing the rights to the commonage, especially after a bitter and drawn-out legal battle such as this one. Cynics went as far as to denunciate the judgement as forcing the issue of land redistribution at whatever cost and with 'dubious' oral evidence supporting the claim.

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[130] *Salem Party Club and Others v Salem Community and Others* [2017] ZACC 46, para. 161.
[131] A Carlisle, "Salem to 'live in peace together'", *Daily Dispatch* (12 December 2017) at: https://www.dispatchlive.co.za/news/2017-12-12-salem-to-live-in-peace-together/. (Accessed 13 December, 2017).
[132] Carlisle, "Salem to 'live in peace together'", *Daily Dispatch* at: https://www.dispatchlive.co.za/news/2017-12-12-salem-to-live-in-peace-together/. (Accessed 13 December, 2017).
[133] T Petersen, "Dispossessed Salem Community has rights to land – ConCourt", *News24* (12 December 2017) at: https://www.news24.com/SouthAfrica/News/dispossessed-salem-community-has-rights-to-land-concourt-20171211. (Accessed 12 December, 2017).

The LCC's reliance on and willing acceptance of the claimants' oral evidence was also criticised by some legal pundits who referred to local precedent elucidating the limits of use for oral evidence.[134] They argued that a liberal interpretation was contrary to the intentions of the Act, because it could potentially create a slippery slope where even the most tenuous oral evidence is to be accepted in land claims. Contrarily, other commentators pointed out that such an interpretation was needed as the Restitution of Land Rights Act was a peculiar piece of legislation where processes of evidence-gathering differed from the normal court rules regarding the law of evidence. Martens explains:

> *[T]he Restitution of Land Rights Act permits hearsay or oral evidence when it is interpreted through Constitutional principles. Land claims are a class of their own and, when adjudicating on their outcomes, should have oral evidence permitted as a form of evidence gathering.*[135]

Another significant feature of the Salem commonage claim is its scale. The claimed area in its entirety amounts to sixty-six square kilometres. To put this into context, the largest farm accessibly advertised for sale in the Eastern Cape as of 2017 was a game farm of 25 square kilometres. The largest agricultural farm was only 5.24 square kilometres.[136] While this claim is by no means the single largest successful claim of land ever instituted in South Africa,[137] it has changed the physical as well as social landscape of Salem. Large commercial farms have already been subdivided into smaller subsistence farms or 'agri-villages'. Other Salem claimants have decided to continue with commercial agricultural activities of their predecessors. However, they find it difficult to break into a market where white farmers have long dominated.[138]

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[134] See *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), paras. 295-298.
[135] Petersen, "Dispossessed Salem Community", *News24* at: https://www.news24.com/SouthAfrica/News/dispossessed-salem-community-has-rights-to-land-concourt-20171211. (Accessed 12 December, 2017). The matter has since been referred back to the Land Claim Court to determine a remedy on what the landowners are entitled to.
[136] *Salem Party Club and Others v Salem Community and Others* [2017] ZACC 46, fn. 4.
[137] Associated France-Presse, "'Our dignity has been restored': farmers prove land reform can work", *Times Live* (2 August, 2017) at: https://www.timeslive.co.za/news/south-africa/2017-08-02-our-dignity-has-been-restored-farmers-prove-land-reform-can-work/. (Accessed 16 October, 2018). The Moletele community of Limpopo, comprising of 1,615 families, successfully claimed an area of 70,000 hectares in 2007.
[138] S Gush interview with L Mandinda in *Working the Land*, Dir. Simon Gush (Film, News From Home, 2019).

Attempts by black African farmers at attaining membership at local farmers' associations have allegedly been stalled by their white neighbours. White farmers view the claimants with suspicion, fearing that by allowing them within their networking circles would only draw unwanted attention to their own land security.[139] The fear of the white farmers has, in turn, also filtered through to their black labourers who view the claimants as a threat to their job security. This has only served to increase tensions between the claimants and the rest of Salem.

Another significant aspect of this claim is the potential role that commonages could play in land redistribution and reform ambitions of the government. Since 1994 there have been calls for commonage to be regarded as a key part of land reform. Megan Anderson and Kevin Pienaar argue that:

> *Commonage provides a relatively inexpensive and potentially very effective option for land reform. The municipal government system means that the necessary regulatory framework for rights administration and land management is already in place. Municipal legislation both empowers local authorities to act as agents of development and ensures that management is devolved to the lowest possible level. The municipality as the land holding entity is not a top-down, absentee landlord, but a key agent of local economic development.*[140]

There are quite a few advantages to commonage being an important aspect of land reform. Firstly, commonage land is often the only natural resource available for poor urban communities, particularly in land-locked areas without access to fisheries.[141] Commonage is readily accessible to the poor, because it is located close to residential

[139] Interview with Arthur David Mullins (2 February, 2019).
[140] M Anderson and K Pienaar, "Municipal commonage", *PLAAS Occasional Paper on Evaluating Land and Agrarian Reform, No 5* (2003) p. 25 at: http://repository.uwc.ac.za/xmlui/handle/10566/18/browse?value=Anderson%2C+Megan&type=author. (Accessed 2 November, 2017). See also JM Pienaar, *Land Reform* (Cape Town, 2014).
[141] Directorate: Redistribution Policy and Procedures, "Municipal Commonage: Policy and Procedures", *Land Reform Policy Committee* (12 June 1997).

areas, and does not require much capital to develop. It should therefore be a first-line strategy for supporting household food production.[142]

Secondly, commonage development has great potential for spin-off economic development, such as local markets, local capital accumulation, local skills training, and linkages between farms and non-farm activities. Non-farm activities are important to the welfare of farm households in sub-Saharan Africa, for immediate food security through providing money to buy food, to buy farm inputs, and to provide outlets for production.[143]

Thirdly, it offers a valuable opportunity for experience and learning in collaborative or co-operative social institutions such as commonage committees, farmers' associations, banks and co-operatives. These institutions are typically located in the small towns. Commonage is therefore a valuable "school for economic citizenship" for people who have been marginalised and disempowered for almost all their lives. It can also help in creating a new generation of young farmers, and thereby restore the image of agriculture as an attractive career option.[144]

The Salem commonage, because of the vast area that it covers, is thus regarded as an ideal vehicle to advocate commonage land as a key component to land reform.[145] However, the Salem commonage has legally not been common land for nearly eighty years. Since the Grahamstown Supreme Court judgement in 1940, the commonage has been subdivided and privatised by the white landowners. The LCC's decision and the subsequent affirmation of it by the SCA and CC has, vitally, de-privatised the commonage once more, by implying that the land should be shared between the landowners and claimants. It is hoped then, that the status quo of the commonage would return. It will be interesting to see how the LCC and the relevant parties wish to achieve this in practical terms when the matter reverts to the LCC to determine restitution.

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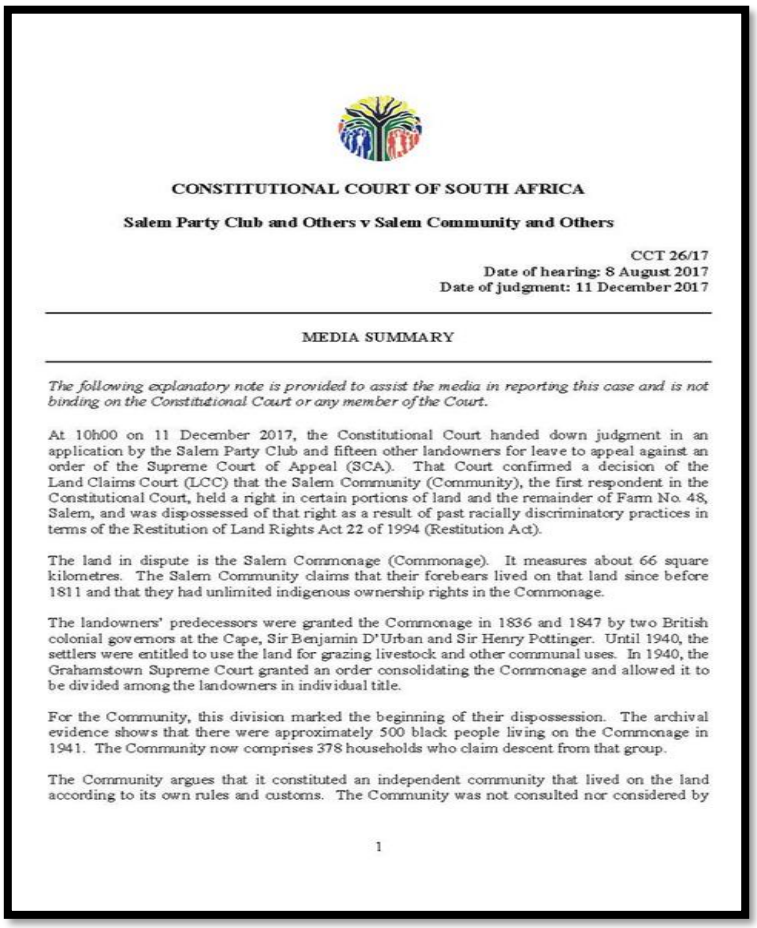
[142] D Atkinson and B Büscher, "Municipal commonage and implications for land reform: A profile of commonage users in Philippolis, Free State, South Africa", *Agrekon* 45, 4, (December 2006) p. 441.
[143] Atkinson and Büscher, "Municipal commonage and implications for land reform", *Agrekon* p. 441.
[144] *Ibid.*, p. 441.
[145] Roux, "Landmark judgment", *Grocotts* at: https://www.grocotts.co.za/2014/05/02/landmark-judgment-in-salem-land-claim/. (Accessed 16 October 2018).

ILLUSTRATION 4.2: Media Summary of the Constitutional Court Judgement

(Credit: Twitter.com)



CONSTITUTIONAL COURT OF SOUTH AFRICA

Salem Party Club and Others v Salem Community and Others

CCT 26/17
Date of hearing: 8 August 2017
Date of judgment: 11 December 2017

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

At 10h00 on 11 December 2017, the Constitutional Court handed down judgment in an application by the Salem Party Club and fifteen other landowners for leave to appeal against an order of the Supreme Court of Appeal (SCA). That Court confirmed a decision of the Land Claims Court (LCC) that the Salem Community (Community), the first respondent in the Constitutional Court, held a right in certain portions of land and the remainder of Farm No. 48, Salem, and was dispossessed of that right as a result of past racially discriminatory practices in terms of the Restitution of Land Rights Act 22 of 1994 (Restitution Act).

The land in dispute is the Salem Commonage (Commonage). It measures about 66 square kilometres. The Salem Community claims that their forebears lived on that land since before 1811 and that they had unlimited indigenous ownership rights in the Commonage.

The landowners' predecessors were granted the Commonage in 1836 and 1847 by two British colonial governors at the Cape, Sir Benjamin D'Urban and Sir Henry Pottinger. Until 1940, the settlers were entitled to use the land for grazing livestock and other communal uses. In 1940, the Grahamstown Supreme Court granted an order consolidating the Commonage and allowed it to be divided among the landowners in individual title.

For the Community, this division marked the beginning of their dispossession. The archival evidence shows that there were approximately 500 black people living on the Commonage in 1941. The Community now comprises 378 households who claim descent from that group.

The Community argues that it constituted an independent community that lived on the land according to its own rules and customs. The Community was not consulted nor considered by

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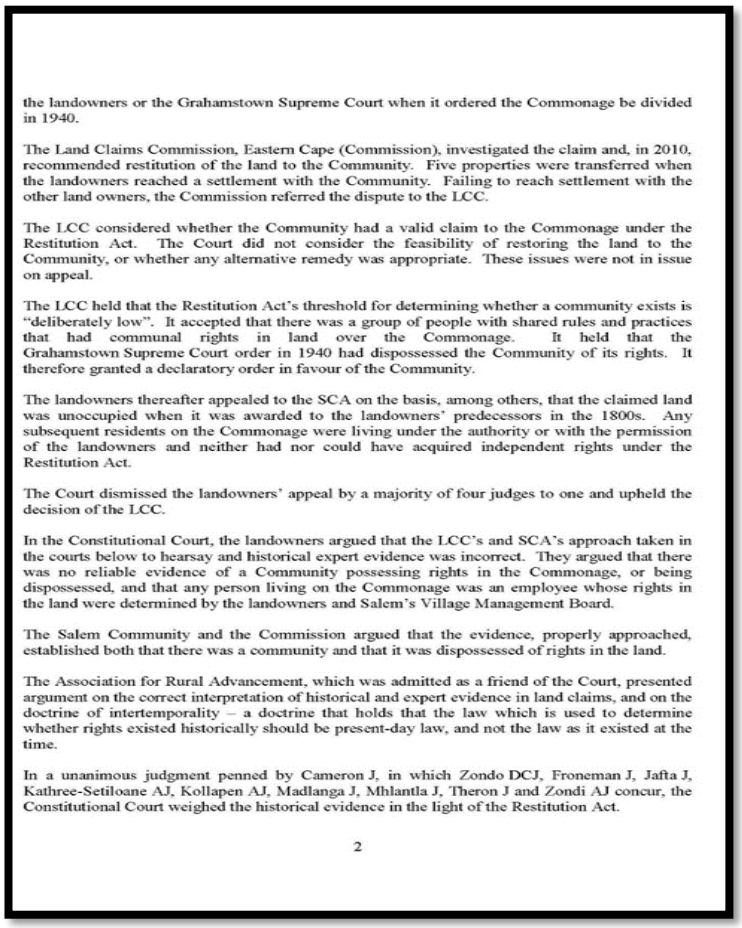

the landowners or the Grahamstown Supreme Court when it ordered the Commonage be divided in 1940.

The Land Claims Commission, Eastern Cape (Commission), investigated the claim and, in 2010, recommended restitution of the land to the Community. Five properties were transferred when the landowners reached a settlement with the Community. Failing to reach settlement with the other land owners, the Commission referred the dispute to the LCC.

The LCC considered whether the Community had a valid claim to the Commonage under the Restitution Act. The Court did not consider the feasibility of restoring the land to the Community, or whether any alternative remedy was appropriate. These issues were not in issue on appeal.

The LCC held that the Restitution Act's threshold for determining whether a community exists is "deliberately low". It accepted that there was a group of people with shared rules and practices that had communal rights in land over the Commonage. It held that the Grahamstown Supreme Court order in 1940 had dispossessed the Community of its rights. It therefore granted a declaratory order in favour of the Community.

The landowners thereafter appealed to the SCA on the basis, among others, that the claimed land was unoccupied when it was awarded to the landowners' predecessors in the 1800s. Any subsequent residents on the Commonage were living under the authority or with the permission of the landowners and neither had nor could have acquired independent rights under the Restitution Act.

The Court dismissed the landowners' appeal by a majority of four judges to one and upheld the decision of the LCC.

In the Constitutional Court, the landowners argued that the LCC's and SCA's approach taken in the courts below to hearsay and historical expert evidence was incorrect. They argued that there was no reliable evidence of a Community possessing rights in the Commonage, or being dispossessed, and that any person living on the Commonage was an employee whose rights in the land were determined by the landowners and Salem's Village Management Board.

The Salem Community and the Commission argued that the evidence, properly approached, established both that there was a community and that it was dispossessed of rights in the land.

The Association for Rural Advancement, which was admitted as a friend of the Court, presented argument on the correct interpretation of historical and expert evidence in land claims, and on the doctrine of intertemporality – a doctrine that holds that the law which is used to determine whether rights existed historically should be present-day law, and not the law as it existed at the time.

In a unanimous judgment penned by Cameron J, in which Zondo DCJ, Froneman J, Jafta J, Kathree-Setiloane AJ, Kollapen AJ, Madlanga J, Mhlantla J, Theron J and Zondi AJ concur, the Constitutional Court weighed the historical evidence in the light of the Restitution Act.

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Conclusion

The history against which land reform and claims are set plays a pivotal role in the determination of justice. It is clear from the provisions of the Restitution of Land Rights Act that the Legislature recognised that some of the history of land occupation and ownership in South Africa would not be easy to establish. Accordingly, the Act specifically contains certain peculiar features which are intended to grant to the specialised LCC latitude when adjudicating land claims to admit all relevant evidence in order to determine such history. The Act is therefore an extraordinary piece of legislation, which initiates processes and approaches not normally associated with normal litigation. It has been shown that the Act contains a particular purpose and the Executive as well as the Judiciary has a constitutional obligation to carry out and implement that which is envisioned in the Act.

However, the government has been far from successful in implementing and achieving realistic targets for land reform and redistribution. In 1994, the government proclaimed that its goal was to redistribute and 'return' 30% of farmland to those people who were dispossessed since 1913 by 1999. Various policies were introduced to implement rapid land restitution, but all these policies failed. By 2012 less than 8% had been redistributed as a result of land restitution and redistribution. Presently (2019), approximately 8-9% of the land has been redistributed. The process has been painfully slow.

In 2014, in a vain attempt to reach the 30% target, parliament passed the Restitution of Land Rights Amendment Act, with the intention of extending the period in which land claims can be submitted for another five years. This Amendment Act raised fears that it could jeopardise thousands of existing claims that had not been settled, as well as another 20,000 claims that are settled but not yet implemented, despite then Minister Gugile Nkwinti's assurance that those claims instituted before 1998 would be prioritised. However, judging by what minute percentage land reform constitutes in terms of the national budget, it would have been unlikely that the DRDLR would have the hundreds of billions of Rand available to settle outstanding claims. Fortunately, the Amendment Act was found by the Constitutional Court to be unconstitutional.

But with the ruling party under increasing pressure from its constituents to speed up land reform, it is resorting to populist politics in reaction to calls to nationalise farms across South Africa. It is even contemplating amending the Constitution to indulge the majority of South Africans. But as has been shown, it is not necessarily the highest law of the land that stands in the way of effective land reform. Incompetent policy frameworks, elitism and political grandstanding have caused more damage to land reform than the Constitution ever will.

This being said, the government may feel that it scored a significant victory with the Constitutional Court vindicating their decision that the Salem commonage claim was valid. The physical size of the commonage has attracted the attention of government officials who are quick to use it as an example that land reform is making headway. However, the CC judgement made it clear that the purpose of the Act does not

necessarily favour the claimants over the landowners. Instead, it strikes a balance between the rights of the claimants as well as the rights of those presently owning the land. In this way, the courts can determine that the claimants' rights to land outweigh the landowners' rights, or even vice versa. Either way, the courts are to determine the validity of each claim by scrutinising the facts and listening to the testimonies of both sides. The Act makes provision for courts to accept oral testimony as it is often the only evidence that claimants can supply given the history of inequality in South Africa. The courts should be weary of the heavy favour archival evidence was given in the past. Thus, the courts' function is to find the balance between the archive and oral testimony. This is something that will be looked at in more detail in the next chapter.

In this case, because the land was formerly commonage, the rights of those who were denied access to it after years of occupation and use, were now restored. Those who had inherited the existing rights of that land similarly retain those rights. In other words, the function of the commonage should be restored to how it was before subdivision. In an ideal world this can potentially do wonders for race relations and reconciliation in Salem. The commonage also only includes parts of farms, so the farmers will still have full ownership of the land which is not part of the claim. This should also make it relatively cheaper for government to purchase the land.

However, the LCC, in deciding on how to best restore the commonage as it was, must bear in mind the tensions which this claim has caused. The claims were misinformed by their legal counsel that they were entitled to 100% of the land, only to find out that they still have to share with the white people whose predecessors had dispossessed them of their rights to that land. On the other hand, those white landowners are livid at the idea that this claim was ever supported by the government in the first place. Therefore, the ideal of a harmonious relationship of co-ownership seems, at the moment at least, like a pipe dream.

CHAPTER FIVE – THE SALEM COMMONAGE LAND CLAIM

Twenty-five years after the advent of democracy, South Africa is still emerging from 350 years of discriminatory policy and practice, systematically designed to advantage white people over the rest of the populace. This systematic policy and practice formed the fundamental basis for colonial rule and later, apartheid.

With the adoption of the interim Constitution in 1994 (and the final one in 1996), provision was made for steps to be taken by government to restore the rights to land to those so dispossessed, or to their descendants. The Restitution of Land Rights Act[146] (the Act) is intended to be read with section 25(7) of the Constitution which provides that a person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

As has been pointed out in the previous chapter, the Act forms part of the constitutional framework for land reform aimed at redressing the past injustices of dispossession in this country. It is embedded in a challenging constitutional context in which the public interest imperative of land reform is pitted against constitutional protection of private property rights. Against this background the Legislature has used specific language in the Act as a tool to achieve land reform and to remedy the injustices which flow from dispossession. The Act requires historically determined justice and the application of the principles of "equity and fairness". So it clearly implores the courts to lean towards granting rights to land where it would be 'just' and 'equitable' to do so within the context of the provisions of the Act.

On 13 December 2016, the Supreme Court of Appeal (SCA) of South Africa delivered judgment on the Salem commonage. The appeal was lodged by a group of Salem landowners whose portions of land were successfully claimed by 152 members of the Salem 'community'[147] who alleged they had been forcefully dispossessed during the 1940s by racially discriminatory legislation. An interesting feature of this case was the heavy reliance by all parties on expert witnesses in the persons of eminent historians, Professors Herman Giliomee and Martin Legassick. The SCA dismissed the appeal in a majority decision of four to one. However, in the minority judgement the dissenting judge, Azhar Cachalia, delivered a scathing report criticising the willing acceptance of

[146] Act 22 of 1994.

[147] The term 'community' with reference to the claimants is intentionally placed in quotation marks. The reason for this is that, although they embrace the term, it would be quite inaccurate and problematic to identify them as a community when they have very little in common other than the claim. The term 'community' will be unpacked later in this chapter.

so-called ‘unreliable’ oral testimonies of the claimants’ witnesses to be admitted by the courts.[148] The landowners, apparently inspired by this minority judgement, applied for leave to appeal in the highest court of South Africa, the Constitutional Court (CC).

A year after the SCA judgement the CC delivered its ruling. We have seen in the previous chapter that the CC held that there was a valid claim to the land by the claimant ‘community’, but their rights to the land did not exceed those of the landowners. Thus, the court confirmed the LCC’s findings that there was a discriminatory practice that led to the dispossession of the black Africans living on the commonage. But this did not mean that the successful claim extinguished the landowners’ rights to that piece of land.

However, the purpose of this chapter is not to analyse the rationale of the CC in arriving at its decision. Rather, its purpose is to critique the tendency of all three courts’ approach to the historical record and evidence of historians to determine whether a land claim should succeed or not, focussing on the testimonies of the ‘community’s’ chairman, Mr Msile Nondzube, the lead investigator for the Regional Land Claims Commission (the Commission), Mr Vincent Paul Quba, as well as those of Legassick and Giliomee. By analysing the approach(es) of the court, we can try to better understand the procedures of the court regarding land claims. This is important especially for historians who may be called upon to testify in future court cases as to what should be expected from them should they be called upon to provide expert evidence. Additionally, this chapter addresses the response of the Constitutional Court to the apparent uncertainty created by the lower courts’ decisions in this particular case.

The claimant ‘community’[149]

From 2001 to 2002, Kelly Luck conducted an anthropological study of the Salem area as part of her Masters Degree. Her thesis was an investigation into the impact of commercial game farming on former farmworkers in the Bushmans River area, adjacent to the claimed area. Luck concluded that the farmworkers were highly

[148] The claimants called two witnesses to testify: Mr Msile Nondzube and Ndoyisile Ngqiyaza. At one point in his judgement, Cachalia described Nondzube’s evidence as “fanciful and demonstrably false”.

[149] A community is defined in Section 1 of the Act and as a group of persons whose rights in land are derived from shared rules determining access to land held in common by such group and includes part of such group.

distrustful of commercial game farms and commercial farms in general due to the associated threats of unemployment and eviction.[150] She briefly refers to "a claimant community" originally from Salem, who lodged the claim for the commonage in 1998.[151]

Most of the 152 claimants are men and some had been farmworkers on the farms that fall under the claim.[152] They maintain that their forebears were dispossessed of the land when it was subdivided and sold to individual white farmers. The land claim has caused a number of divisions not only between the black African residents of Salem but also between Salem black Africans and the neighbouring black African community of Hope Fountain.[153] Families are divided, disagreeing as to the validity of the claim. People who have been neighbours for years have levelled accusations at one another surrounding a lack of support for the claim.[154] The committee acting on behalf of the claimants, the Salem Community Property Association canvassed large sections of Salem and the surrounding areas of Farmerfield and Hope Fountain to try and encourage resident farmworkers to join the claim. The donation of land to farmworkers by a nearby game farm in the Hope Fountain area only caused further conflict due to the belief that any other development will jeopardise the validity of the claim.[155]

The Salem Community Property Association is a body that was formed by the claimants shortly after they had lodged their claim in 1998. Its function is currently to coordinate the land claim of the Salem commonage and to inform the rest of the claimants of their rights to the land. Mr Msile Nondzube testified that he is the chairperson of the Association,[156] though other members such as Mr Douglas Wilfred Mlungisi Rwentla have been prominent in informing claimants of the case's progress.[157]

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[150] K Luck, "Contested Rights: The Impact of Game Farming on Farm Workers in the Bushman's River Area", MA Thesis, Rhodes University, 2003, p. 151.
[151] Luck, "Contested Rights", MA Thesis, p. 63.
[152] Court transcript of testimony of Msile Nondzube (25 January, 2013), pp. 230-231.
[153] Luck, "Contested Rights", MA Thesis, p. 63.
[154] *Ibid*.., pp. 63-64.
[155] *Ibid*., p. 64.
[156] Court transcript of testimony of Msile Nondzube (25 January, 2013), pp. 231.
[157] *Working the Land*, Dir. Simon Gush (Film, News From Home, 2019). Rwentla did not testify during the court proceedings.

In 1998, a Mr Mzukisi Madlavu, on behalf of the claimant 'community' lodged the claim to the Regional Land Claims Commission (the Commission).[158] The synopsis of their evidence is as follows:

i.) The claimants are a community of black African families whose forebears traditionally occupied the entire Commonage from the 1800s.

ii.) They acquired owner, residential and grazing rights as well as the right to use the land for agricultural purposes, access to firewood, burial sites and the "use of land as commonage" for the whole community.

iii.) The 'community' occupied the commonage beneficially for more than ten years.

iv.) All these rights were acquired from the last known chief of the 'community', Chief Dayine,[159] and were exercised in accordance with shared rules of usage under traditional law and so-called "location rules".

v.) The Natives Land Act 27 of 1913 was passed to prohibit black Africans from owning land outside of scheduled areas, and the commonage was not a scheduled area.

vi.) In 1926 they were 'herded' into a location on the commonage and placed under the control of a "native superintendent".

vii.) The subdivision of the commonage was facilitated through the implementation of section 49 of Ordinance 10 of 1921 and the Natives (Urban Areas) Act 21 of 1923, which entitled the Native Commissioner to restrict and control the rights of the black 'community';

viii.) In 1940 the Village Management Board, which represented the landowners, who owned the adjoining farms in the village of Salem, applied to the Supreme Court in Grahamstown to subdivide the Commonage and have it transferred into the names of the individual landowners.

ix.) The court granted the application against the background of the racially discriminatory legislation then in existence, which formed the basis of the dispossession of the community's rights over the commonage. Most of the

[158] *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 394. The Salem 'community' comprises of families represented by Mzukisi Madlavu, Lingani William Nondzube, Mtututozeli Gladman Madinda, Douglas Wilfred Mlungisi Rwentela, Msile De Villers Nondzube and Ndoyise Ngqiyaza.

[159] Also referred to as Dayile.

land was bought by white farmers under the Native Trust and Land Act 18 of 1936.

x.) As a result of the court granting the application, the location, which housed 500 residents, was disestablished in 1941.

xi.) The dispossession of the community's rights began in 1947 and continued until the 1980s.

The claimants call themselves and their dependants a 'community', though they have very little in common except for this claim and tenuous family connections. Thembela Kepe argues that the use of the term 'community' in South Africa's land reform programme has both positive and negative effects on the beneficiaries.[160] The effects are positive when they help focus policy on the needs of poor people, but negative when they force conflicting groups together in a manner which results in the rights of a weaker group being trampled on by the actions of a more powerful group, such as traditional leadership or the state.[161]

The definition of 'community' remains "highly elusive", with various competing interpretations, yet it is one of the most commonly used terms in developmental circles.[162] Probably the most common characteristic of 'community' is a group of people who share a common geographical location.[163] However, there is a view that distinguishes between the phrase "the community" and 'community.[164] It argues that "the community" is more appropriately linked to people in a particular geographical location than the term 'community'. According to this view, the phrase 'community' places a lot more emphasis on common (ancestral) ties and social interaction components, than the term "the community".[165] In reality, however, policy makers and planners generally neglect to make such a distinction, and often use a range of terminologies such as 'community', "the community", "community of place" and "local

[160] T Kepe, "The problem of defining 'community': Challenges for the land reform programme in rural South Africa", *Development Southern Africa* 16, 3, (1999), 415-433.
[161] Kepe, "The problem of defining 'community'", *Development Southern Africa* pp. 428-430.
[162] *Ibid*., p. 418.
[163] See P Selznick, "In search of community", In W Vitek and W Jackson (eds.), *Rooted in the land: essays on community and place* (New Haven, 1996).
[164] See J Bernard, *The sociology of community* (Glenview, Illinois, 1973).
[165] Kepe, "The problem of defining 'community'", *Development Southern Africa* p. 419.

community" to refer to people in a common locality.[166] Whatever term is used, the spatial unit approach has been the dominant one in development planning in South Africa's rural areas. Since a focus on this facet of 'community' in the development process tends to draw attention away from the other characteristics, Kepe maintains that it should never be used in isolation as a basis for planning.[167] Many studies have shown that a range of social relations and dynamics transcend the spatial boundaries of communities.[168]

A second way of defining a 'community' is as an economic unit. Economic relationships where different social actors share common interests, control particular resources or practise similar economic activities to make their livelihoods, can result in these people being seen as a 'community'. They do not necessarily have to reside in one locality or have any other social ties. In the former homelands of South Africa, for example, people who come from different villages or localities frequently shared resources such as rivers, large dams, forests, the coast and grazing land. This sharing of resources may be characterised by conflict over access and control, but in the eyes of outsiders and, to a lesser extent, some locals, common economic goals may be important enough for these people to be regarded as a 'community'. Another point about these shared resources is that they more often than not 'legally' belong to somebody else, more particularly, the state.[169] There is often a very long history of common use by the different groups involved.

The question is whether these first two characteristics ('community' as a spatial unit and 'community' as an economic unit) can be reconciled. In land restitution cases, where both historical ownership and long-term use are important for deciding land rights, this is crucial. When different 'communities' (spatial or economic units) exist within or claim rights to a geographical area, conflict management becomes very important before any land reform programme can be effectively implemented. Matters

[166] *Ibid*., p. 419.
[167] *Ibid*., p. 419.
[168] See M Leach, R Mearns and I Scoones, (eds.), "Community-based sustainable development: consensus or conflict?" *IDS Bulletin*, 28, 4, (1997), 1-95.
[169] Kepe, "The problem of defining 'community'", *Development Southern Africa* p. 420.

could be complicated further by the third definition of a community, namely as "a web of kinship, social and cultural relations".[170]

People who share a history, knowledge, beliefs, morals and customs, and who have ties of kinship and marriage are often viewed as a 'community'. These people may or may not occupy the same locality or belong to the same economic interest group. The strength of this community identity depends on how strong the social relationships are.[171] Again, if this third characteristic of 'community' happens to identify individuals or groups who fall outside the locality or the common economic grouping, then there are potential complications for land reform. In land restitution cases, for instance, individuals can claim rights to any compensation that may be received by a particular 'community', basing their claim to "community membership" on these social ties. In land reform as a whole, labour migrants who remain in touch with their rural roots while they are somewhat settled in the areas where they are working, also raise potential problems. In this case, consensus of other members of the beneficiary group is important in deciding whether or not these migrants should be included. In some areas beneficiaries become divided, with some preferring to maintain the legal and 'technical' definition of beneficiaries contained in the Act, while others argue that these definitions do not make sense socially as they could potentially exclude people who have strong social ties with the group[172].

In all three characteristics of 'community', what is of particular relevance to the land reform programme is an understanding of who is acknowledged as belonging to the 'community' for each geographic area in question.[173] There are often conflicting notions of who belongs to which group, with disagreements arising both among local social actors, as well as between them and outsiders who act as agents of change, usually Department of Rural Development and Land Reform officials. There are several aspects in which such competing notions can come into conflict.

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[170] *Ibid*., p. 421.
[171] *Ibid*., p. 421.
[172] Kepe, "The problem of defining 'community'", *Development Southern Africa* p. 421. See also B Cousins and D Cousins, "Lessons from Riemvasmaak for land reform policies and programmes in South Africa. Vol 1", *PLAAS and Farm Africa Workshop proceedings. Research Report No 2.* (Cape Town, 1998).
[173] Kepe, "The problem of defining 'community'", *Development Southern Africa* p. 421.

First, there is the question of groups within larger groups, as in the case of 'tribal' authority boundaries within which a range of subgroups are locatedt. There are known cases where the traditional authority has appointed itself owner of the land which many small groups have occupied over a very long time.[174] This becomes compounded in cases where annexation of territories during the nineteenth century resulted in chiefdom boundaries being redrawn, thus imposing chieftaincies on groups which were previously not subject to these authorities. In reality, while these smaller groups may have stronger claims to the land they occupy, the often influential voice of traditional authority could give outsiders a distorted view of the real situation.[175] A situation where a community has strong claims to land rights, but a weak political voice, emerges. In such cases it is important that appropriate criteria be used to ascertain and confirm the land rights of the legitimate claimants.[176]

The second aspect of membership of a 'community', which is more relevant to the Salem claim, is where a relatively small spatial community, which has occupied the land for many decades, has been invaded by other groups as a consequence of colonial- or apartheid-era forced removals and evictions from white-owned farms. This results in a classic situation of overlapping rights to land. For example, in Salem before 1913 there was a community of amaXhosa who lived in the Salem area prior to the arrival of the Salem Settlers in 1820. When these people were expelled from the area, the first fragmentation of a community took place. Then, gradually other groups entered the territory and settled there. By 1940, a black African 'community' as per the definition of the Act had formed there. They were not necessarily descendants of the people who had lived there in 1812, or even necessarily amaXhosa. But since the late 1870s this group existed as a spatial and economic unit that developed social and cultural kinship. When that community's rights were dispossessed in the 1940s, another fragmentation of community took place.

The question here is whether the descendants of these people can be called a 'community'. They have no spatial connection as most of the claimants were scattered all over the district since dispossession. As a result, their economic and social and

[174] *Ibid.,* p. 421.
[175] *Ibid.,* p. 421.
[176] *Ibid.,* p. 421.

cultural relationships ceased to exist, and over time, new community relationships were established elsewhere with other groups.

One can argue that the cultural practices of the Salem community have stayed alive through oral traditions. Indeed, some of the older claimants regale their families with stories that their forebears told them of customs that were performed on the Salem commonage.[177] The physical connection with the land may have been broken through dispossession, but through the descendants of the community that had lived there prior to 1940, life on Salem before dispossession has been remembered. In the absence of any sort of archival evidence of their rights to the land, the oral tradition is utilised as a tool to substantiate those claims.

Of course, it can also be used to establish a hierarchy of claims to the land. Some members of the 'community' feel that they have privileged rights to the land more than anyone else, due to the position of their forebears in the community.[178] Without the existence of any other evidence to support those claims, whether through the archive or corroborative oral evidence, the credibility of such claims to superior rights are questioned not only by the other claimants, but also those who reside in Salem but are not part of the claimant party.

In addition, the hierarchy of claims was also used to include a finite group, excluding others who had worked the land for decades. For example, when one of the landowners, Arthur David Mullins agreed to sell his farm to the DRDLR, he was surprised to learn that his employees were not part of the claimant party: "Most of my … old staff are still in their homes and they only are there because we caught wind of the fact that the claimants were going to kick them off…"[179] He recounts that he only agreed on the final sale of the farm once his staff's names were added to the list of claimants.

[177] Court transcript of testimony of Msile Nondzube (25 January, 2013), pp. 232-239.
[178] Luck, "Contested Rights", MA Thesis, p. 64.
[179] Interview with Arthur David Mullins (2 February, 2019).

Many studies have shown that conflict characterises life in rural areas, ranging from that relating to "natural resource use" to conflict that is institutional by nature.[180] Thus this local internal conflict could easily distort local perceptions of who belongs to their community. It is much harder, however, to untangle imposed external notions of 'community' if they are found to be problematic, than to get locals to be a part of resolving the problem. Besides, perceptions of 'community' that are exclusively external and are immediately followed by implementation of government-led projects can fuel internal conflicts rather than help resolve them.[181] Thus, it was more than likely that such a conflict would erupt among the Salem claimants, as well as between the claimants and neighbouring residents.

ILLUSTRATION 5.1: Bongolethu Agri-Village, one of the settlements that have been established since the claim was instituted

(Credit: GJW Bezuidenhout)

The landowners

The landowners originally consisted of one communal property association, one trust, three companies (including at least one game lodge) and eighteen individual farmers. However, the number of individual farmers have since 2004 been reduced to twelve. Farmers such as Mullins have decided to sell their properties to the DRDLR rather

[180] See B Cousins, "Conflict management for multiple resource users in pastoralist and agro-pastoralist contexts", *IDS Bulletin*, 27, 3, (1996), 41-54, K Crehan, *The fractured community: landscapes of power and gender in rural Zambia* (Berkeley, 1997).
[181] Kepe, "The problem of defining 'community'", *Development Southern Africa* p. 422.

than defend their rights to the land in court. Mullins, whose farm produced queen pineapples, negotiated with the DRDLR for four years until they made him an offer he was willing to accept, which was "still not in line with the valuation that I had for the farm".[182] He has gone back to his farm since the sale but was appalled at what he found when he last visited it at the end of 2018:

> *My farm is absolutely derelict. Absolutely derelict. There's not a pineapple field left on it, most of my pineapple lands, and I had 180 hectares of the pineapple, is reverting back to bush, the majority of the fences have been stolen, the boreholes don't work anymore, the farm is absolutely derelict, it is just basically free-range grazing for I don't know how many cattle there are, maybe 100 to 150 cattle.*[183]

On the other side of Salem from Mullins' former farm lies Hopelee Farm which forms part of the north-western edge of the commonage. This piece of land, approximately ninety hectares in size, currently belongs to the Lindale Trust. Hopelee Farm is the neighbouring farm of the historic Lindale Farm and Private Game Reserve, also owned by the Trust.[184] The Amm family have been custodians of Lindale for seven generations and still occupy the land, with Simon Amm being the youngest generation to work on the farm.[185] Amm is a Professional Hunter and currently a guide on Lindale, taking guests out on game drives and safaris.[186] Recently, Lindale has been restored and converted into a game farm after numerous other agricultural ventures by previous owners which included tobacco, ostriches, pineapples and dairy amongst others.[187] Lindale, including Hopelee, is approximately 2,752 hectares (6,800 acres).[188]

ILLUSTRATION 5.2: Lindale Farm

[182] Interview with Arthur David Mullins (2 February, 2019).
[183] *Ibid*.
[184] Lindale Private Game Reserve at: https://lindale.co.za. (Accessed 25 October 2018).
[185] The Amm family started farming Lindale in 1854 when Philip Amm married the widow of George Wedderburn, after they had both lost their respective spouses.
[186] Lindale Private Game Reserve at: https://lindale.co.za. (Accessed 25 October 2018).
[187] *Ibid*.
[188] *Ibid*.

(Credit: www.lindale.co.za/gallery)

Lindale straddles the Assegaai River which flows through the length of the farm, which enabled the Trust to construct two large dams that hold a vast expanse of water to which have been attracted numerous species of birds – including pairs of African fish eagles, crowned eagles, Cape clawless otters and waterfowl. This provides a popular attraction to overseas as well as local guests.[189] Other wildlife includes buffalo, kudu, zebra, giraffe, sable antelope, eland, oribi, bontebok, blue duiker, impala and nyala. These kinds of wildlife require vast spaces for grazing. Hopelee is utilised for this reason.

Simon Amm's father, Peter Anthony Amm, runs the day-to-day operations of the farm. In fact, during their application to the Constitutional Court (CC) to appeal the claim, the Trust authorised Amm to institute the appeal application.[190] The Lindale Trust is also the successor in title to one of the farmers, Phillip Geoffrey Amm.[191] Simon Amm was also given authorisation by the three companies as well as the communal property association, the Salem Party Club, to represent them in the appeal applications.

[189] *Ibid*.
[190] P Amm, *Second Applicant's Founding Affidavit in the matter of Salem Party Club and Others v Salem Community and Others*, Case no: /2017, p. 4.
[191] Amm, *Second Applicant's Founding Affidavit* p. 4.

The Salem Party Club is a voluntary association with legal capacity that governs the recreational facilities in Salem, including the tennis club, cricket club, two churches and a community hall.[192] They consist of concerned shareholders, custodians and club members belonging to the aforementioned facilities. The Salem Party Club has been described by Salem residents as being quite similar in function to the Salem Village Management Board (SVMB) which has already been discussed extensively in Chapter 3. However, whereas the SVMB's sole function was to exercise control over and regulate access to the commonage, the Salem Party Club has played a different role. Instead, it represents a collection of institutional bodies that currently own properties that fall within the claimed area.

The landowners officially first heard about the claim in October 2002, when it was published in the Government Gazette. Their reaction, according to Mullins, was "[u]tter disbelief".[193] He recalls the landowners coming together shortly after they learned about the claim and all of them arriving at the conclusion that it must be "a fictitious claim". However, even before the notice in the Gazette, the landowners had heard rumours from their employees that the Madinda family as well as Nondzube were claiming that their ancestors had lived on the commonage.[194] But, according to Mullins they claimed that their ancestor's dwellings had been on the banks of the Assegaai River on the farm Sunnyside, owned by a Mr Maritz in the 1950s and 1960s. The landowners were of the opinion that only Martiz's farmworkers were allowed to live down there. In addition, the landowners were initially confused by Nondzube's claim that this piece of land was part of the commonage. According to their knowledge, that farm was "allotment 29", one of the original allotments allocated to the Salem settlers in 1820.[195] The landowners dismissed the claim as ludicrous but when they were notified of the true extent of the claim by the notice in the Government Gazette, some of them foresaw a protracted and costly legal battle and decided that settling with the DRDLR would be a more cost-effective route to take.

[192] The landowners own portions 1-3, 7-8, 13-17, 19-33, 36, and 38 of farm Salem No. 498, District of Albany. The Salem Party Club owns the remaining extent of farm Salem No. 498.
[193] Interview with Arthur David Mullins (2 February, 2019).
[194] *Ibid*.
[195] *Ibid*.

However, the majority of the landowners, confident that the courts would adjudicate in their favour, decided to stay and fight. They responded to the claimants' pleadings with the following defence (summarised briefly):

i.) The commonage was part of the area known as the Zuurveld, where large pieces of land were allotted to several groups, which in total consisted of between 4,000 and 5,000 British settlers by the British Colonial Government in the first half of the nineteenth century.

ii.) One of these groups was led by Hezekiah Sephton (the Septhon Party, later called the Salem Party). They settled in Salem and established farms in and around the area, using the commonage for common benefit. In 1848 they were granted freehold title over the commonage. Their descendants and successors in titles retained this right and held the land collectively until it was subdivided between them in 1941.

iii.) When they arrived in Salem, there were no other people occupying the land.

iv.) The commonage was strictly limited to the grazing of their livestock. No cultivation of crops or residential accommodation was allowed.

v.) The landowners protected their collective interest in the commonage, which in effect meant that each settler owned his allotted erven as well as an undivided share in the commonage.

vi.) In time the landowners began employing labourers. Later, some of these labourers and their families were permitted to occupy a small portion of the commonage during the time they were employed by the landowners. In return the labourers had to pay a rental fee to the SVMB. In some instances the landowners permitted their employees to graze their own cattle as part of the owner's quota of grazing cattle.

vii.) Therefore the employees never acquired any right in land over the commonage, whether traditional or otherwise. Nor did they constitute a 'community' that had any right to the land.

viii.) In 1940 the landowners sought a court order to subdivide the commonage because of disputes between themselves over its usage. Its effect was to end the joint ownership of the commonage and to vest individual ownership of the commonage in each landowner.

ix.) Thus the order was not sought or granted as a result of any racial discriminatory law or practice.

As has been established, the courts did not agree with the landowners' argument that the claim was 'fictitious'. Apart from the minority judgement in the Supreme Court of Appeal, all the other presiding judges, including the entire panel of judges in the Constitutional Court, deemed that on the facts of the case, the claimants did have rights to the land in terms of the Act.

It is here where the behaviour of the landowners needs to be further scrutinised. Already tasting defeat in the LCC, the landowners should have probably reassessed their chances at successfully defending their sole ownership rights against the claimants. However, they were determined at proving that what they had believed a decade prior to the LCC was still true: the claim was unfounded.

The landowners suffered another bitter defeat in the SCA when the majority of the court dismissed their appeal. However, they were given hope by the minority judgment of Azhar Cachalia, who accused the claimants of "shifting the goalposts" on numerous occasions in terms of whether or not a black African 'community' existed on the commonage. In that judgement he asserted that the claims of 'community' were "vague, confusing and contradictory".[196] The landowners saw this judgement as enough indication that their case had sufficient merit to succeed in the highest court of the land. In fact, they relied heavily on Cachalia's judgment in their affidavits in applying for leave to appeal in the CC, quoting it extensively throughout to substantiate their application.

The landowners' reaction to Cameron's judgement was far more tempered. The nature of the order was such that neither side could claim victory nor defeat, so some landowners were, to some degree, relieved at the outcome. They felt that their rights to the land were a whole lot more secure than what they had been before the judgement. They were optimistic at the prospects of the case now reverting to the LCC

[196] *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 283.

where it would determine how the commonage is to be shared between them and the claimants.

However, most of the landowners view the judgement as unrealistic. They feel that such an arrangement might seem attractive on paper but will fail in reality due to the antagonistic relationships which have developed between them and the claimants. The case has deepened racial division in Salem, adding fuel to the landowners' suspicions and paranoia. Farmers in the area attribute the perceived rising levels of crime in Salem with the increase in the black African population following the success of the claim. For example, in Simon Gush's three-part documentary of the Salem commonage claim, he relates an episode where, during the course of filming landscape shots of the commonage, they are confronted by a driver passing by who saw them from the road.[197] Gush's colleague, who is "of colour",[198] happened to be the only one visible to the driver. The driver, thinking that they were trespassing, yelled at Gush's colleague and threatened them with eviction. When Gush made himself visible to the farmer and tried to allay the driver's suspicions that they were not busy with any criminal activity, the driver still insisted that they leave. He told Gush and his colleague that he was on his way to a local farmers' meeting to discuss the rise of criminal activity in Salem. The black African farmers on the newly restituted farms were not invited.[199]

This sort of paranoia is indicative of how the claim has sown seeds of distrust and suspicion in the minds of the Salem landowners. On the surface, their fear is based on the fact that now that the claim is successful, it has made them and their dependants vulnerable to the onslaught by the claimants which, in their minds, is sure to follow. Land seizure by vengeful black Africans has been a longstanding fear among white South Africans. The idea that the subjugated native should rise up and seize complete control of the modes of production has always been the nightmare scenario

[197] *Working the Land*, Dir. Simon Gush (Film, News From Home, 2019).
[198] Normally, I find this term abhorrent because of its derogatory connotation historically. It infers that the category of 'white' is the "default race" and that those people belonging to other race categories are deemed to be offshoots or mutations of the white race. However, in his narration Gush refers to his colleague as such and his race is never revealed. Therefore, I shall use this term in this instance only.
[199] It is unclear on whether or not they have obtained the title deeds from the state. But they are in possession of those farms.

in settler colonialist discourse. This discourse unsurprisingly still dominates discussions of land and land reform among landowners in the area, an area which, even now is still proudly referred to as “Frontier Country”.[200]

But more than this, the landowners refuse to confront and engage with their own privilege. They feel that their entitlement to the land is ironclad as it is documented in the archive, whereas the claimants’ evidence is viewed as ‘fictitious’ and this ‘attack’ on their rights to the land should not have taken place in the first place. To them, sharing the land with the black African claimants is an outrageous notion as it is viewed as relinquishing their control over the land which they and their forebears had for as long as they can remember. This is a deep-seated issue, one which only served to widen the chasm of understanding between them and the claimants.

Oral testimony and its place in land claims

On 28 January, 2013, Advocate Viwe Notshe, representing the claimant community, was busy with his examination in chief of Mr Msile Nondzube, whom Notshe called his “star witness”.[201] Nondzube gave evidence pertaining to the history of the land on which he was born. He testified how his grandfather, Landonda, had arrived at the place currently known as Salem, long before the arrival of the white settlers. His family were originally from the area known as the Transkei and they were moving around to seek new grazing for their cows.[202] They settled in Dikeni (present day Alice) before moving again, passing by the alleged spot where Grahamstown would be established a few years later. They eventually arrived and settled in “this place called Tyelera”.[203]

He went on to recite the clan names of his grandfather’s people for the court: “Nondzube, Mtika, Mazaneni, Tiyo, Jotela, Soga.” “Collectively”, he claimed, “they were called the Jwara”.[204] Nondzube then described the leadership structures of the Tyelera settlement, stating that a chief of non-royal blood administered the area as a

[200] In fact, official signboards next to the roads with this title inscribed on them welcome visitors to the Makana Municipal District.
[201] Interview with Advocate Viwe Notshe (SC), (16 October 2018).
[202] Court transcript of testimony of Msile Nondzube (25 January, 2013), p. 232.
[203] Court transcript of testimony of Msile Nondzube (25 January, 2013), p. 226.
[204] Testimony of Msile Nondzube (28 January 2013), p. 232. While there is also a Jwara clan within the Mfengu people, it is more probable that this Jwara clan belonged under the banner of the amaXhosa, see Peires, *House of Phalo* pp. 189 and 74.

proxy for the 'Chief' of his people. Though he did not recall the name of this 'Chief', he claimed that such a person was situated in the Transkei, and "sent smaller chiefs to oversee this place…"[205] The "smaller chief" of Tyelera was Dayine, grandfather of Landonda and Nonzube's great-grandfather. Dayine was not of royal blood but was 'appointed' by the "Chief from the Transkei" as a community leader.[206] He was from the Mantakwenda clan according to Nondzube. Dayine's role was to guard over the people's allotted areas, making sure that grazing and cultivation was done according to the rules of the community. He was also invested with powers to allot land to community members as he saw fit. Lastly, if there was trouble or misunderstandings between community members, this would be resolved at the "great place" – where Dayine and his successors stayed. Nondzube was adamant that these men were 'elected' as leaders of the community living in the claimed area. When asked by his counsel whether each community member had their own allotted piece of land for grazing and cultivation, Nondzube responded that all the animals were "grazing in one place and the boys [herders] would look after them in one common place".

Nondzube's evidence was startling. If true, it would mean that not only were there black Africans living on the commonage long before the arrival of the settlers to the area, it would also mean that these people were part of an established political entity controlled by the Jwara clan whose traditional territory was almost five hundred kilometres to the east. Furthermore, it would create a legal quagmire for the landowners claiming they had sole legitimate rights to the commonage after the grants awarded to the settlers by governors D'Urban and Pottinger. According to Nondzube, it was never the governors' land to give if a black African community was already living on that land.

Naturally, the landowners were more than sceptical of Mr Nondzube's version. They called in one witness after the other in an attempt to disprove Nondzube's narrative. They called in Professor Giliomee as expert witness to help construct a counter-narrative which made exclusive use of the historical record. This narrative punctured the oral testimony full of holes, challenging Mr Nondzube's credibility as a witness.

[205] *Ibid.,* p. 234.
[206] There seems to be no other record proving the existence of such a 'chief', except for Nondzube's oral testimony.

Added to this, residents of Salem and some of the landowners themselves were also called in to testify that no black African community could have lived on the commonage and if they did, it was purely at the behest of the white landowners. It soon became apparent that Mr Nondzube's evidence was fraught with contradictions and inconsistencies.

Similarly to Premesh Lalu's protagonist, Nicholas Gcaleka,[207] Nondzube found himself being ridiculed and even laughed at by the audience in the court gallery.[208] It seemed that the historical record of the archive would triumph over the oral interpretations of a community leader who wished historical justice for himself and his people.

Mr Vincent Paul Quba was appointed as investigator for the Regional Land Claims Commission (the Commission) in this case.[209] According to Quba's testimony the forebears of the "native community" occupied the commonage "as far back as the 1800s".[210] The community had "ownership rights, residential rights, grazing rights and the right to use land for agricultural activities, access to firewood and the use of the land for burying the dead". They also practised sharecropping with white people and combined their cattle for ploughing. In 1880 there were nine huts, forty-two people and forty-seven cattle on the commonage, which proves that there were 'natives' living there.[211] A location was established on the commonage in 1926. Thereafter, the landowners decided to divide up the commonage among themselves, without consulting the black African people.

He went on to testify that the amaXhosa 'community' was dispossessed of these rights with the implementation of section 49[212] of Ordinance 10 of 1921 through the court order subdividing the commonage, and the disestablishment of the location under the

[207] P Lalu, *The Deaths of Hintsa: Postapartheid South Africa and the shape of recurring pasts* (Cape Town, 2009).
[208] Court transcript of testimony of Msile Nondzube (28 January 2013), p. 226 and Interview with Arthur David Mullins (2 February 2019).
[209] The role of the Regional Land Claims Commission (the Commission) is to ascertain whether or not a claim has any validity in terms of the Restitution of Land Rights Act 22 of 1994. An investigation is conducted and if the investigator finds any merit to the claim, the issue will then be taken to the Land Claims Court where the Commission will present its own evidence as to why the claim should succeed.
[210] *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 113.
[211] *Ibid*., para. 113.
[212] In his evidence Quba kept referring to it erroneously as section 47 of that Ordinance.

Native (Urban Areas) Act 21 of 1923. The dispossession began around 1947 and dragged on until the 1980s. amaXhosa people, who were living on the commonage, numbering some 450 people, were, after they were dispossessed, permitted to "squat by their families" on the farms of the landowners, while others left to live in Grahamstown. The 'community' was no longer able to produce from the land and were forced to sell their livestock.

When asked as to how the amaXhosa 'community' had decided where its members were permitted to plough or to graze their cattle, he testified that he was told that the families of the claimants combined their oxen and ploughed collectively.[213] No specific areas were allotted for this purpose because the land belonged to the whole 'community'. Their kraals and huts were scattered over the commonage. The cattle belonged to the whole 'community'. He was told that they produced enough for everyone in the 'community' and the surplus was sold. No one else was allowed to use that land. The 'community' had no written rules but had their own traditional way of doing things.

Quba also alluded to a letter dated 4 March 1923, which indicated that the amaXhosa 'community' in Salem had a right to own and graze cattle as the Board was informed that branding of cattle had to be applied equally to "both Europeans and Natives". Quba also testified that the payment of "hut tax" was indicative of the fact that black Africans had a right to be present in Salem. His conclusion from that correspondence was that a location existed at the time and so the 'community' had existing rights to the land post-1913.[214]

According to the LCC judgement, the "key issue in his report was that there was dispossession" of the amaXhosa in Salem as a result of the Native Urban Areas Act of 1923.[215] Whilst he was aware that the claimants' rights to land dated to before the 1800s by virtue of occupation by their forebears this was not an aspect on which he focused given the limitations of restitution legislation.

[213] *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 115.
[214] *Ibid*., para. 115.
[215] *Salem Community v Government of the Republic of South Africa* (217/2009) LCC (Unreported), para. 23.

Under cross-examination, Quba conceded that the Salem settlers had title deeds and rights to the commonage. He also conceded that the Board had the power in terms of legislation to regulate and control the commonage. He admitted that a number of documents presented by the landowners had not been included in his report but he qualified this with the fact that his focus was on the period after 1913.[216]

The LCC and the majority SCA accepted his evidence as it mainly "consisted of conclusions drawn from the archival records".[217] The SCA majority felt that the criticism lodged against Quba was, for the most part, unfair – especially his opinion that the land claim is founded on "traditional and indigenous rights" because the claimants' ancestors were the original occupiers of the land. The majority court also seemed to concentrate on a certain section of Quba's report which revealed the intent of some of the landowners to relinquish ownership to portions of the claimed land.[218] However settlement negotiations with the then landowners failed as the parties could not agree on the compensation figure. This was apparently regarded by the majority court to be an admission on the part of the landowners that the claims of the 'community' had some merit.

As can be seen, there were fundamental disputes regarding the credibility of the claims made by factual witnesses and their reliability. Usually, to resolve such disputes the courts will follow a procedure formulated by another appeal judge, Nienaber JA, in *Stellenbosch Farmers' Winery Group & another v Martell et Cie*.[219] The procedure is, briefly, as follows:

To come to a conclusion on the disputed issues a court must make findings on:

a.) the credibility of the various factual witnesses
b.) their reliability
c.) the probabilities that their versions are factually accurate.

[216] *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), paras. 121-124.
[217] *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 469.
[218] *Ibid*., para. 470.
[219] [2002] ZASCA 98; 2003 (1) SA 11 (SCA) para. 5.

As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors such as:

(i) the witness's candour and demeanour in the witness-box
(ii) his/her latent or blatant bias
(iii) internal contradictions in his/her evidence
(iv) external contradictions with what was pleaded or put on his/her behalf, or with established fact or with his/her own statements or actions
(v) the probability or improbability of particular aspects of his/her version
(vi) the calibre and cogency of his/her performance compared to that of other witnesses testifying about the same incident or events.

As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on:

(i) the opportunities s/he had to experience or observe the event in question and
(ii) the quality, integrity and independence of his/her recall thereof.

As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues.

In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it.

According to sections 30(1)-(2) of the Restitution of Land Act, parties are entitled to present both hearsay and expert evidence that may be "relevant and cogent", even if it would not ordinarily be admissible. However, the court has the discretion as to whether to admit such evidence.

In the Salem case, Cachalia, in his minority judgement, warned that a court must be aware of the 'dangers' posed by the admission of hearsay evidence.[220] Some evidence may be unreliable and can be discarded completely, while other evidence will be given some weight but discounted. However, none may be completely ignored. Cachalia insists that all evidence must be sifted, weighed and evaluated in light of other evidence in order to give each piece of evidence the weight to which it is entitled. The process of fact-finding in this way must be underpinned by clear legal reasoning. It must be understood that Cachalia's rationale was dictated by well-established principles and precedent based on Western legal concepts regarding evidence to prove a right in land. These principles are still in force in South African law today but the Salem case highlights how these precedents can come into conflict with modern South African jurisprudence.

Cameron was cognisant of Cachalia's warning. He also expressed his concerns about the quality of evidence if the courts expected and accepted accounts which did not quite add up. By the same token, Cameron contemplated the fairness aspect: Would it be fair in terms of the Constitution and the Act to dismiss those accounts out of hand? The CC held that oral history is not only concerned with historical facts, but also the values and convictions of the community it recollects.[221] Cameron agreed with the notion that the laws of evidence must be adapted so that this type of evidence can be accommodated and placed on an "equal footing" with historical documents. He therefore held that while it is still the discretion of the court to admit or dismiss this type of evidence, it must be guided by the Constitution and the Act. In this instance, the CC held that such oral testimony should be admitted as evidence.

Legassick v Giliomee: Expert testimonies

Professor Martin Legassick was called as the Commission's key expert historian witness.[222] He described the Zuurveld as part of a "frontier zone" where the amaXhosa and white Dutch and English settlers were occupants.[223] Legassick contended that the

[220] *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 296.
[221] *Salem Party Club and Others v Salem Community and Others* [2017] ZACC 46, para. 65.
[222] *Ibid*., para. 15. Legassick obtained his PhD from the University of Los Angeles. His doctoral thesis focussed on the Griquas in the Northern Cape.
[223] *Salem Party Club v Salem Community* CCT 26-17 (11 December 2017), para. 39.

amaXhosa was, at the time, a cultural and linguistic entity and therefore had rights of occupation to the entire area. The amaXhosa preceded the white settlers in the Zuurveld, but for decades there was fighting between them with no clear authority dictating the law of the land. The claim of the landowners that the land was vacant when the British Settlers arrived was only possible due to the brutal expulsion of the amaXhosa by British military authorities in 1812 during the Fourth War of Dispossession.[224]

After the expulsion and six more 'wars', the amaXhosa people returned to the area between 1878 and 1884. This, he argued, indicated that the habitation of the commonage by the 'natives' was "officially recognised". Therefore they had "rights to occupy the land", and "rights to graze cattle on it".[225] Because they had occupied the land for a long time before the dispossession they would have established explicit or implicit rules of behaviour, including those determining access to land such as grazing livestock, where to plough, collect wood and bury their dead. They thus constituted a "partly self-sufficient community". He also found that the population figures from June 1884 to July 1941 showed that a substantial black African population had lived outside of the location and these "could not all have been servants".[226] So he concluded that they probably lived on the commonage. And finally, because they had not been consulted by state officials concerning the subdivision of the commonage, or of the disestablishment of the location, this constituted a racially discriminatory practice, which "violated their right of occupation and dispossessed them".[227]

In his evidence in chief he testified that the amaXhosa never accepted their expulsion, because they attacked Grahamstown in 1819 to "remove this alien town from the Zuurveld and recover their land".[228] But he admitted that they had been unsuccessful in achieving this. Nevertheless, after the settlers arrived in 1820, he maintained that there was no reason to suppose that the amaXhosa would not have returned to their land between 1820 and 1870.

[224] This was carried out under the leadership of Colonel John Graham, after whom Grahamstown is named.
[225] *Ibid*., para. 131.
[226] *Ibid*., para. 131.
[227] *Ibid*., para. 131.
[228] *Salem Community v Government of the Republic of South Africa* (217/2009) LCC (Unreported), para. 25.

Regarding the period after 1878 he was of the view that because black Africans living on the commonage and elsewhere were required to pay a "hut tax", this necessarily implied that they had had a right to occupy this land. The reports of the Native Commissioner in 1883 to the effect that black Africans living in those huts appeared to be "of a better class" whose huts "are larger and cleaner" were indicative of people "subsisting for themselves", and not having resided there as farm labourers.[229] He testified that the establishment of the Board under Act 29 of 1881, and the promulgation of regulations in 1906 to manage communal areas on behalf of the landowners "ignored and infringed" on the existing rights of black Africans residing on the commonage.

The reference in the Board records to 'squatters' on the commonage, he said, was probably a reference to "people who were living on the commonage, ploughing the land and grazing cattle, but also possibly to supplement their subsistence by working for the farmers".

With regards to the claimants' assertion that the Board's location regulations recognised the amaXhosa as inhabitants, and implied that all the inhabitants had lived in the location, Legassick conceded that he had inadvertently misrepresented this because of the pressure of time when he was compiling his report. He testified that the true position was that there was a small population inside the location and there was a larger population outside. Those outside the location were referred to as 'squatters' because they were not recognised by the Board, and those inside the location had rights under the regulations. But the regulations were never put into operation because the Board was never properly in control of the location or the commonage. The 'community' conducted their affairs on the basis of unwritten rules.

With reference to a report by the Grahamstown magistrate in July 1941, estimating that there had been 500 black Africans of whom fifty were servants living with the farmers, he testified that the remaining 450 were therefore not employees and had lived on the commonage. The correspondence on cattle branding also indicated that the provincial authorities were aware of the existence of black Africans on the

[229] *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 133.

commonage. He agreed with Quba's evidence that the 'community' had combined their oxen for ploughing purposes and that they had cattle that grazed on the commonage.

He concluded, in his evidence in chief, that those amaXhosa who lived on the commonage "may well have been connected to amaXhosa people who lived there in the eighteenth century, in one way or another who had established rights through the Cape Colony and their registration as hut tax payers in the 1870s and 1880s".[230] They lived there until the 1940s and were dispossessed by the judgement of the court, the actions of the Administrator and the disestablishment of the location in 1941. Because the court failed to consult with the amaXhosa residents, those actions, in Professor Legassick's opinion, were discriminatory.

In response to Legassick, the landowners relied on the testimony of Professor Herman Giliomee.[231] His mandate was to give an opinion on Legassick's views regarding the land rights of the claimants, its factual basis, conduct his own research on the issue as well as supply a report on his findings.

In summary, his opinion was that the amaXhosa existed as a political entity in the eighteenth century – not a cultural or linguistic entity as Legassick suggests. Its borders were defined by the extent of the land occupied by chieftains subject to the ruling Tshawe clan. Land occupied by a chief would have been claimed as amaXhosa territory, unless the king denied any such claim as Ngqika did in respect of the Zuurveld.[232] Any claims to land made by the amaXhosa as a cultural and linguistic entity as it is considered today would be inconsistent with the political claims that were then made by amaXhosa groups on the grounds of prior occupation.[233]

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[230] *Ibid*., para. 138.

[231] His MA-thesis was "Die administrasie tydperk van Lord Caledon 1807-1811". Therein he dealt with the history of the amaXhosa.

[232] As discussed in Chapter 2, in 1797, Ngqika became Paramount Chief of the Xhosa. Both Ngqika and Ndlambe, the Regent for the amaXhosa, were aware that the Cape Colony considered the Fish River to be the boundary dividing it from Xhosa territory further to the east. Ngqika respected that boundary and undertook to prevent his followers from crossing it. There is also evidence of Ndlambe having urged minor chiefs to withdraw across the Fish River to maintain peace with the Colony. Ndlambe would later rebel against Ngqika, who had moved west of the Fish River, and claim part of the Zuurveld.

[233] By 1808, Ndlambe, who was no longer a Regent, claimed the Zuurveld on two grounds: he bought it from the Boers and he won it in war - not on the basis of prior occupation.

The Gqunukhwebe group[234] did claim the right to live in the Zuurveld on the basis of prior occupation, but were expelled in 1811-1812 after the Fourth War of Dispossession and never returned as a collective entity.[235] According to Giliomee there were three waves of new immigrants to the area after the settlers arrived. The first were Tswana-speaking, the second the Mfengu and the third were amaXhosa – but not the Gqunukwhebe – who fled to the Albany district after the cattle killing in 1856. Giliomee therefore concluded that it is "highly unlikely" that anyone claiming to be a descendant of the Gqunukwhebe, who lived in the Zuurveld during that period would have lived in Salem 100 years later.[236] Any other amaXhosa group claiming indigenous rights on the basis of the Gqunukwhebe occupation would have been in an even weaker position to assert any right to the commonage based on indigenous title.

Once white dominance had been established over the Zuurveld, Giliomee reckoned that the relationship between masters and servants would have evolved towards an unequal and exploitative one.[237] This would have made it unlikely that the British settlers and their descendants would have allowed their labourers or other Africans living on the commonage to establish rights.

Legislation passed by the Cape Parliament shows that black Africans could not have maintained sufficient autonomy to "build up" rights as a 'community', as Legassick suggested they did. With reference to Legassick's contention that the acquisition of rights to the commonage was "the reciprocal side of paying taxes", Giliomee pointed out that the purpose of the Native Location Act 6 of 1876 was the opposite. In other words the purpose of those rights was "to reduce the number of idle squatters" (namely, tenants economically acting on their own behalf).

[234] The Gqunukhwebe was a Xhosa group that was firmly established in the Zuurveld area from about 1760, first under Tshaka, then under his son, Chungwa.
[235] H Giliomee, "Notes on Court Proceedings 21-22 January, 2013", cited with permission from Professor Hermann Giliomee, 27 February, 2017.
[236] *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 156.
[237] *Ibid*, para. 158 and Giliomee, "Notes on Court Proceedings 21-22 January, 2013".

In Giliomee's opinion, Legassick's formulation of the claim is one which is made by a 'community' or people as descendants of the amaXhosa to the Zuurveld without any borders or reference to the disputed land. Giliomee maintains that such a claim is extraordinary because all "frontier conflicts" over land were between political authorities over contested boundaries. In his opinion, there was no evidence of the existence of a 'community' as contemplated in the Restitution of Land Rights Act.
Giliomee refuted Legassick's contention that the amaXhosa attack on Grahamstown in 1819, led by Nxele, was to recover land lost in the expulsion, as not based on any factual or documentary evidence. And he points out that all writers on the frontier have commented that the attack by Nxele was to recover cattle seized from the amaXhosa by Lieutenant Colonel Brereton.[238]

With regard to whether an autonomous 'community' of black African farmers – an "African peasantry" – emerged in the Albany and adjoining districts, and Salem in particular, during the latter part of the nineteenth century, Giliomee pointed out that a large number of black Africans settled on alienated Crown land or the farms of absentee landlords making a living as labour-tenants or as rent-paying tenants.[239] So, in the vicinity of Salem, the farmers were likely to have permitted their labourers to graze their stock on the commonage. But there is no reference to black African farmers living there in any capacity other than as wage labourers and labour tenants, who received cattle as a supplement to, or in lieu of, wages. Such labourers were allowed to graze their cattle on the commonage, but it is unlikely that they would have "built up" rights as Legassick contends they did.[240] The documentary evidence, Giliomee maintained, suggests the contrary.

Giliomee also cast his doubts on the claimants' first witness, Msile Nondzube's evidence that his great-grandfather trekked past a kraal that existed where the Grahamstown Cathedral (established in 1824) *en route* to the commonage before

[238] Giliomee, "Notes on Court Proceedings 21-22 January, 2013". Some writers contend that the attack may have additionally been precipitated by a devastating drought which forced the amaXhosa to raid the Zuurveld area. See J Hodgson, "A Study of the Prohpet Nxele (Part II)", *Religion in Southern Africa* 7, 1, January, 1986, 3-23 and R Marshall, "A Social and Cultural History of Grahamstown, 1812 to c1845", MA Thesis, Rhodes University, 2008.
[239] Giliomee, "Notes on Court Proceedings 21-22 January, 2013".
[240] *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 162. See the discussion of Nxele in chapter 2.

1811. This is because if there was a kraal at that spot there would probably have been reports indicating this in district documents. Giliomee was also quite sceptical of Nondzube's account as a whole. He reasoned that given Nondzube's age at the time of the hearing[241] which was 68, it was unlikely that he would have had a great-grandfather over 100 years of age who would have been a young man at the dawn of the nineteenth century as he claimed.

Furthermore, Giliomee explained the purpose of a "hut tax" – that it was "imposed on indigenous people throughout British colonies to force them into wage labour, and to inject more cash into the economy; they were not aimed at white people at all. If a farmer in Salem did not want an African to live in a hut, or if the tax was not paid, he could simply terminate the employment and evict him from the property".[242] So, black Africans living anywhere in Salem did so at the behest of the owner.

After Giliomee's evidence, Legassick submitted a supplementary report in response. In it he asserted that to prove indigenous rights, "it is merely necessary to show that Salem was within the bounds of amaXhosa territory at the time that European settlers established officially-titled farms in the Zuurveld".[243] The implication for this approach would obviously be that anyone showing some sort of affiliation with the amaXhosa would be entitled to assert a claim over the entire territory. Under cross-examination, when he was asked whether this was what he had meant, he insisted that it was.[244]

With regards to expert evidence, section 30(2) of the Act makes provision for such evidence to assist the court to establish "historical facts relevant to a particular claim". The courts view expert historical testimony as a vital component of evidence when determining whether a claim is valid or not. The historian is regarded as a person with "specialised knowledge" who could potentially aid a court in determining the facts of a

[241] The LCC judgement was delivered in 2013.
[242] *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 164.
[243] M. Legassick, "Response to supplementary report by Professor Giliomee: In the matter between The Salem Community and the defendants (landowners) concerning the remainder and portions 1 to 38 of the farm Salem No 498, District of Albany. Land Claims Court Case No LCC 217/2010", (Date Unknown), cited with permission from Professor Hermann Giliomee, 27 February, 2017.
[244] As far as I understand it and as the minority judgement also pointed out, Legassick was not qualified to answer such a question of law, nor is such a type of claim recognised in the Restitution of Land Act. Nonetheless, the LCC admitted his opinion into evidence.

case. For example, a historian could help to identify, gauge the reliability of, and interpret evidence that would otherwise "elude, mislead, or remain opaque to a layperson".[245]

The courts must, in turn, approach such evidence as it would any other expert testimony.[246] But courts are also cautious of the pitfalls of expert evidence. Arguments are sometimes put forward on the basis of untested and seemingly neutral facts. Conclusions are then often drawn to confirm those theories. A court will therefore look for the same qualities in historians as it would in other expert witnesses: appropriate specialisation, thorough research, and conclusions that are well supported by the record.[247]

With regard to establishing "historical facts", Cachalia stressed that fact finding – even of historical facts – is the responsibility of the courts, not the historian.[248] The historian may give his/her opinion on the facts established from historical texts and documents and provide his/her reasons for these conclusions. This may aid the court, but it cannot displace the court's duty to establish the facts. He therefore warns that a court must be alert to the dangers of such testimony particularly when it is directed towards supporting partisan causes, as in the Salem case. In addition, and very importantly, the expert historian's opinion as to what the law is or what a document means is generally not admissible as that falls outside the ambit of the historian's expertise. However, if the courts are uncertain about the meaning of a certain provision, it will admit the historian's interpretation but will not necessarily rely on it. Cameron agreed with Cachalia that fact finding is the sole responsibility of the courts. He also emphasised that limitations to the capacity of determining a fact with sufficient certainty on the basis of opposing experts' views do exist. But the interpretation of history is particularly difficult, especially in the context of rights in land. Cameron is

[245] *Marvel Characters Inc v Kirby* 726 F.3d 119 (2d Cir. 2013) at pp. 16-17 in *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 299.
[246] *Menday v Protea Assurance Co Ltd* 1976 (1) SA 565 (E) p. 569B-C.
[247] JA Neuenschwander "Historians as Expert Witnesses: The View from the Bench" available at https://archives.iupui.edu/handle/2450/6017.
[248] *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016), para. 302.

adamant that the law is obliged to provide finality in the interpretation of historical events "where finality, according to the professional historian, is not possible".[249]

Cameron pointed out that the "often acrid" conflicts between Professor Legassick and Professor Giliomee illustrates the deep division in determining how history should be understood. Both were prominent, accomplished and distinguished professional historians. Their approaches to the same historical materials differed radically. Giliomee suggested that Legassick approached the sources with a view to attaining a particular goal or outcome. But this seemed true also of Giliomee's evidence.

Giliomee himself pointed out that "no historian is free from a particular theoretical and ideological approach".[250] His own testimony was laden with the assertion that the claimants could not and did not acquire rights in or over the commonage. That deduction, as Cameron puts it, was "a normative conclusion – one inescapably requiring the attribution of value or judgment – for the Court, and not the experts, to draw from the established historical facts in the light of the Constitution and the Restitution Act".[251]

Justice Cameron asserts that there is no objective way of understanding, interpreting, or writing history that can be understood, interpreted or written, outside one's own time, material circumstances or social allegiances. That is true of court judgements as well. It does not mean that history should become a "free-for-all" of subjective interpretation. He reiterates that it merely serves to direct scrupulous care in acknowledging one's own ideological positioning within the "disciplinary constraints and commitments of one's craft". So understanding history is a necessarily value-laden task. But the courts are guided by the Act, as well as the usual techniques available to any court in assessing expert evidence, mentioned above.

The Act requires courts to "admit any evidence" they consider relevant and cogent to the matter even if it is not admissible in any other court of law.[252] This specifically

[249] *Salem Party Club v Salem Community* CCT 26-17, para. 63.
[250] *Salem Party Club v Salem Community* CCT 26-17, para. 67.
[251] *Salem Party Club v Salem Community* CCT 26-17, para. 67.
[252] Section 30(1) of the Restitution in Land Rights Act 22 of 1994.

includes historical expert evidence, which is necessary to assist in establishing the facts to support land rights or dispossession, or otherwise. Therefore, courts are obliged to interpret the Act to afford claimants the fullest possible protection to advance the true purpose of the Act, which is to provide restitution and equitable redress to as many victims of racial dispossession of land rights after 1913 as possible.[253]

The Act should be viewed as "an extraordinary piece of legislation" which generates processes and approaches not normally associated with normal rules of litigation. The Act implores the courts to lean towards granting rights in land where it would be just and equitable to do so.

As mentioned in the previous chapter, Cameron emphasised that the Act is not a victor's charter, intent at "whatever cost" on depriving those who have of what they have. It is a "nuanced and generous" framework for restoring rights and dignity to those dispossessed of their land after 1913, while affording compensation to those who are affected by successfully proven claims. The Salem case and the rationale of the courts here, is a clear example of how the Act's just balance operates, in recognising claimants' entitlements while not denying the rights of the presently possessed, and provided that it is interpreted by informed judges.

Conclusion

The Constitutional Court agreed with the LCC and the majority of the SCA that the Salem Community was dispossessed of a right in land after 19 June 1913, as a result of past racially discriminatory laws and practices. Both the claimants as well as the landowners understood this ruling to have a significant impact on the *status quo* in Salem. The Commission erroneously understood the LCC's order to imply that the claimant 'community' was entitled to the return of the commonage as a whole. The CC held that such an inference would not be right or just.

[253] *Salem Party Club v Salem Community* CCT 26-17, para. 26.

The CC found that the Salem Party did not possess exclusive rights in the commonage before 1940. Equally, it also found that the rights which the 'community' exercised over the commonage did not exclude the landowners from possessing and exercising their rights in the commonage. Both groups used and exercised rights over the commonage. The Salem Party had to apply to the Grahamstown High Court in 1940 for the right to subdivide and alienate the land, a right they did not possess before the court order. Their rights were awarded through dubious original grants and confirmed through proclamation, but they were never sufficient to exclude the development of parallel rights by the 'community'.

Since the 'community's' rights never excluded the Salem Party's rights in the commonage, they could not alienate any part nor all of the commonage. Nor could they exclude the landowners from the commonage. The system of registered title precluded that. So too, the 'community's' rights could not preclude the Salem Party from grazing their cattle there. Until dispossession, neither party's rights amounted to exclusive ownership.

The landowners contended that the dispossession of the rights which the 'community' exercised over the commonage could not justify expropriation of the landowners' entire farms. Cameron found that there was merit in this argument. He recommended that the 'community' should be entitled to a measure of restitution which does not necessarily include the landowners' entire farms. It would be up to the LCC to consider this when it comes to the remedy phase of these proceedings.[254] It is clear that the property comprising of the church and the cricket field is distinctive and should not fall within the claimed area. Control was effectively exercised over these portions of the commonage by the landowners.[255] But, further, the history of the commonage reveals a richness and complexity in which both the black 'community' and the white landowners enjoyed a living functional relationship. Whether this functionality will continue is a matter of concern.

[254] At the time of writing, the LCC had not yet decided on the type of remedial action to be taken in this case.
[255] *Salem Party Club and Others v Salem Community and Others* [2017] ZACC 46, para. 159.

Currently the situation in Salem remains tense. Generally speaking, neither the landowners nor the 'community' see the CC's recommendation as a viable option. The broader political tensions around the issue of land are also not helping matters. Instead of there being the potential of reconciliation and functionality, there is now suspicion embedded along racial lines. It is therefore hoped that the LCC, in deciding how the land is to be redistributed will seriously consider the reconciliatory approach of Cameron in his judgement. Perhaps in doing so, it will set a promising jurisprudential precedent which could go a long way in diffusing the antagonism surrounding the national land debate.

CHAPTER SIX: Conclusion

On 12 December 2017, a day after Justice Cameron's Constitutional Court judgement, I was contacted by two local Eastern Cape farmers, eagerly wanting to know what the judgement meant for the landowners at Salem. Both men had ties to Salem, either through family or friends. They also had friends who were members of the Salem Cricket Club and were quite concerned about its future as well as that of the field. When I informed one of them that the cricket field and club fell outside of the scope of the claim, he predictably replied: "Well at least the cricket field is safe!" However,

during the course of the conversations I sensed that their concern did not necessarily stem from their sympathy for the Salem landowners, though they definitely commiserated with them. Rather, their main reason for calling me seemed to lie in the fact that they were uncertain of what this decision meant for them, for their farms, situated elsewhere in the Eastern Cape. It was evident that they were alarmed to learn that a place such as Salem, known for its settler heritage, including the historical cricket field, could become the subject of a claim, despite being regarded as ludicrous by their Salem friends. What kind of precedent would this set for other claims where the landowners' rights to the land were not as strong as those at Salem?

At the time, I tried to explain to them that in my opinion, the CC's decision was the best possible outcome for the Salem landowners. Justice Cameron's judgement carefully weighed up all of the evidence available to the court, a monumental task, given the plethora of archival information and expert reports, as well as oral testimonies that needed to be assessed for it to come to a well-informed conclusion in a complex case.

As has been shown, the CC concluded that, on a balance of probabilities, the Land Claims Court was correct in deciding that a dispossession of a 'community' as a result of a past discriminatory act or practice had taken place on the Salem commonage after 19 June 1913, thus fulfilling the requirements for a valid claim in terms of the Restitution of Land Rights Act. It was held by the Land Claims Court, the Supreme Court of Appeal as well as the Constitutional Court, that the 'community' were black African people who had moved into the area and had settled there from about 1878. They had developed rights to use the Salem commonage as they saw fit, mostly for grazing land for their cattle and for ritual purposes. They exercised their rights alongside the rights of white erf-holders, successors-in-title to the settlers who arrived at Salem in 1820.

The black Africans could have been, but were not necessarily descendants of those Zuurveld amaXhosa who had lived in the area for almost two centuries, most notably the Gqunukhwebe and those under Ndlambe. It has been demonstrated through the historical record that these groups had multiple claims to the land, even paying for it repeatedly to successive colonial authorities. In an attempt to close off the frontier zone and claim sole authority over the Zuurveld, the British colonial forces provoked

a war and expelled these groups from the area in 1812. Although this expulsion was an attempt to assume control over the Zuurveld, no such control was exerted. The various failed attempts of colonial administrators to contain and regulate the amaXhosa's movements into the Cape are clear indicators of this. In addition, there were numerous attempts by some amaXhosa groups to regain control of the Zuurveld, most notably Ndlambe's ill-fated attack on Grahamstown. The Zuurveld was relatively well secured, but this did not necessarily mean that the amaXhosa were permanently removed.

The introduction of a white British settlement in the area attempted to limit amaXhosa access and influence. The Salem settlers were among those who arrived in the Zuurveld, unaware of the conditions that awaited them. They struggled to establish their settlement in the face of adverse socio-political and economic factors, often caused by their own government. Soon a growing sentiment among the settlers was that they had been abandoned by the colonial authorities, even being impeded in their attempts to leave the area so as to eke out an existence elsewhere in the colony. They craved autonomy but at the same time they depended on the state to survive. The frontier zone was caught up in turmoil; economic collapse seemed to constantly loom over the settlement, while conflict with the amaXhosa would frequently threaten to spill over into war. Salem itself would feature briefly in one of these wars, but the actions of Richard Gush in averting a battle there would be immortalised in settler lore.

The racial attitudes of the settlers towards black Africans would be fuelled by these wars as well as the state-sponsored policies that perpetuated separation which in turn minimised contact between settler and Xhosa. This particular brand of racism would later morph into the denial of black Africans by white settlers, unless they could be of use to them. But generally, their actual presence was not registered. Instead, the black Africans were regarded as "part of the landscape", thereby 'emptying' it of its original inhabitants. This perception made it possible for white landowners to justify their position as masters over those black Africans who settled there in the latter half of the nineteenth century. This is an important theme of this story, as such justification informed the landowners' defence in this case. It was argued by the landowners that there was no sign of a black African community on Salem, outside of the tenant labourers who resided and made use of the commonage. Thus, the black Africans

who lived there did so at the mercy of their employers. According to this contention, the only land rights that these people possessed, were those allowed to them by the landowners. However, this begs the question: “How strong were the foundations of the landowners’ claims to the land?”

The colonial state seemed to control the assignation of land through the mechanism of land grants, yet it did not have complete control over the land. Even when it did have control, there were certain legal procedures to abide by as detailed in the instructions given to each governor at the start of their term. While the initial grant of 1823 to the Salem settlers was legitimate in terms of colonial practices, it has been shown that the grants by both governors D’Urban and Pottinger were not. Both governors acted outside of their jurisdiction of their office by awarding the Salem settlers the two grants of land to be used as the village commonage, a legal concept that had its origins in Great Britain before being transplanted in the Cape Colony.

The landowners assumed that the two governors were vested with prerogative power delegated by the British Crown to authorise these grants. However, no evidence exists suggesting that such delegating of powers ever took place in this instance. If the Crown had intended to vest the Governor of the Cape with specific authority to issue land grants beyond the area described in the instructions it should have been included therein. But the instructions remained unchanged and therefore no real authority was given to the governors to approve those grants. With the passing of time, the land grants were assumed to be legitimate, which even misled the Grahamstown Supreme Court a century later in 1940.

In his judgement granting the application made by twenty-five erf-holders to subdivide the land for their exclusive use, Gane was initially reluctant to grant the application on the basis that the nature and language of the grants did not permit the settlers to be co-owners in undivided shares. He viewed both grants to mean that the settlers were given those portions of land to be used for the common benefit of all of the Salem settlers.

However, this was not enough for the court to dismiss the application. Gane felt compelled to find a remedy for the applicant erf-holders. The court opted to assist

the erf-holders by issuing the rule *nisi*, effectively authorising the subdivision (shares proportionate to their holdings of erven) of the commonage among the registered owners whose properties were adjacent to it.[256] This rule was issued with the proviso that all persons concerned who objected to it were required to show cause before August 8, 1940 to why this order should not be made. The entire rule was published twice in the *Grocott's Daily Mail* and twice in the *Union Government Gazette*.

The court was most probably under the mistaken impression that because this was an *ex parte* application there were no other parties with a vested interest in the commonage. The publishing of the rule in the newspapers and the gazette was merely a precautionary measure to cover all eventualities. However, despite overwhelming evidence that a black African community lived on the commonage, the court failed to consult them. As a sign of the racial attitudes towards black Africans at the time, their views and rights were marginalised and ignored by the court. Eventually, as a result of the success of the application their rights to the commonage would be arbitrarily removed. This was the racially discriminatory practice that dispossessed them of their rights to the land. It resulted in the forced removal and relocation of hundreds of black Africans from the commonage for the benefit of twenty-five white farmers.

Because these black Africans were dispossessed of their rights in the 1940s, the requirement that dispossession had to take place after 19 June 1913 had also been met. Yet this case raised serious questions about this cut-off date as a requirement in assessing which claims should succeed and which should not. As we have seen, the first dispossession, namely the expulsion of the amaXhosa from the Zuurveld by colonial forces was also the most violent. The claimants argued that this dispossession was far worse as it cleared the Zuurveld of any black African influence, making it possible for white settlers such as the Salem Party to establish their villages and farms and assert their autonomy over the land. In other words, had the amaXhosa not been brutally cleared from the Zuurveld, the claimants contended that perhaps then the Salem Party's rights to the land would not have been as strong as what it was. For despite the dubious circumstances under which the D'Urban and Pottinger land grants were made to the Salem Party, their rights, and the rights of their successors,

[256] *Ex Parte Gardner* 1940 EDL pp. 183-185.

strengthened over time as their use of the commonage became permanent. Without those rights the landowners' case would have been severely compromised.

However, despite these compelling reasons for doing away with the 1913 cut-off, there are those that argue that, 'relaxing' the cut-off date may give rise to a slippery slope. Removing it altogether may lead to an incongruous situation where pre-1913 historical claims on ancestral land would be impossible to unravel, and would serve to awaken and/or prolong destructive ethnic and racial politics. In addition, even if it is possible to get past the legislative obstacles, a flood of pre-1913 claims would cause a massive backlog for claims that have already been lodged.

Land restitution should be settled as soon as possible in order to achieve political and economic stability. However, as has been evidenced in this thesis, successive failures in land policies by government since 1994 have severely undermined and stalled land reform and restitution. Even though there have been some notable strides made in addressing land reform issues, the excruciatingly slow pace at which this is happening is alarming. Even once claimants succeed in getting land back, the process of attaining ownership rights is generally slowed up by government bureaucracy or inaction. As a result, these frustrations tend to boil over, feeding into the populist rhetoric of opposition parties as well as the ruling party with regards to radical transformation policies. This rhetoric is worrying especially given the volatile political climate that South Africa finds itself in. The failed land reform measures fuel this rhetoric because they are never accompanied by realistic policy. This only serves to flare up racial and ethnic tension, causing political and economic uncertainty.

The Salem case serves as a microcosm of these tensions. The claimants are a closed group of applicants, alleging that they are descendants of the black African community that was dispossessed of its rights to the Salem commonage. As a consequence, the claimants believe themselves to be a 'community'. However, they have very little in common except for this claim and tenuous family connections. Such tenuous connections may have the effect of forcing conflicting groups together in a manner which results in the rights of a weaker group being trampled on by the actions of a more powerful group. In addition, the closed nature of the group has also caused a number of divisions not only between the black African residents of Salem but also

between Salem black Africans and the neighbouring black African community of Hope Fountain. Families are divided, disagreeing as to the validity of the claim. People who have been neighbours for years have levelled accusations at one another surrounding a lack of support for the claim. Those who were excluded from the group or who were not approached by the claimants to join their claim question the validity of the claim. The claimants in turn close ranks, suspecting that those excluded from the claim may want to undermine it. Similarly, those claimants who have already taken over farms as part of out-of-court negotiations, suspect white landowners of subverting their access to farmer co-operations in and around Salem by not inviting them to meetings.

On the other hand, the white landowners, is a collection of diverse individuals, natural as well as legal persons, each having a vested interest in the sixty-six square kilometres that is the claimed area. They oppose the claim, still dismissing it as spurious, despite all three court judgements going against them. They suspect that the claim succeeded for political rather than legal reasons, pointing out the speed at which infrastructure such as power-lines were being erected by ESKOM on parts of the commonage despite the claim still being ongoing. The white landowners also seem to draw a direct inference that rising crime levels in Salem are directly attributed to the claim. This kind of paranoia indicates the high levels of distrust and suspicion prevalent in the minds of the Salem landowners. Their fear is based on the misperception that now that the claim is successful, it has made them and their dependants vulnerable to the black African onslaught. In addition, the landowners refuse to confront and engage with their own privilege. They still feel that their entitlement to the land is ironclad as it is documented in the archive, whereas the claimants' evidence is viewed as spurious and that this 'attack' on their rights to the land should not have taken place in the first place. To them, sharing the land with black Africans is an outrageous notion as it is viewed as relinquishing their control over the land which they and their forebears had worked on for almost two centuries. This is a deep-seated issue, one which only served to widen the chasm of understanding between them and the claimants.

The Salem claim has also shed much-needed light on the appropriate responses by courts with regards to the acceptance or dismissal of oral and expert testimony in land claims cases. This thesis has demonstrated the correct processes which the courts are obliged to take when adjudicating such evidence. Due to the nature of the Act, the

outcomes reached by the court may be starkly different when compared to normal civil cases. The balance of probabilities are still there - and rightfully so. But thanks to the restorative justice component adduced by the Act as well as the Constitution, a substantial weight is placed on the evidence given by witnesses from the claimants' side. Due to the injustices of the past in South Africa, the histories of black Africans have largely been marginalised. Their stories would rarely be recorded and if they were recorded, they would be dismissed. The drafters of the Act took this historical imbalance into account and thus gave more credence to oral evidence provided by the claimants' witnesses than any other civil claim. The oral testimony given by the Salem claimants' two witnesses, especially that of Mr Msile Nondzube, may have been seen as questionable and unconvincing by the landowners, but this is not enough for it to be dismissed out of hand. This case demonstrates the kind of lenience the courts are willing to allow in the interests of justice. However, the oral testimony is only considered strong when it is corroborated by expert evidence.

The Land Claims Commission depended on the expert historian testimony of historian, Martin Legassick. The landowners relied on the expert historian evidence given by Hermann Giliomee. Both were prominent, accomplished and distinguished professional historians. Both were expected by their respective parties to give an historical but partisan account of the Zuurveld, and more particularly, Salem. Their approaches to the same historical evidence differed radically. Giliomee suggested that Legassick approached the sources with a view to attaining a particular goal or outcome. But this seemed true also of Giliomee's evidence. The bitter conflict between Legassick and Giliomee in their testimonies illustrates the deep division in determining how historical evidence should be understood.

In its judgement, the CC recognised that there is no objective way of understanding, interpreting, or writing history that can be understood, interpreted or written, outside one's own time, material circumstances or social allegiances. This does not mean that it must be abused in order to further a particular party or cause. The CC agreed that it merely serves to direct care in acknowledging one's own ideological positioning within the "disciplinary constraints and commitments of one's craft". This suggests a mature understanding of the need for historians to state their positionality and be self-

reflective about their practices. Understanding the practice of history is a necessarily demanding but valuable requirement to the courts.

But the courts are guided by the Act, as well as the usual techniques available to any court in assessing expert evidence. It should be viewed as “an extraordinary piece of legislation” which generates its own processes and approaches not normally associated with normal rules of litigation. The Act directs the courts to lean towards granting rights in land where it would be just and equitable to do so.

As we have seen, the Act does make provision for expert evidence to assist a court in finding “historical facts” which are relevant to the particular claim. The courts view expert historical testimony as a vital component of evidence when determining whether a claim is valid or not. The courts regard the historian as a person with “specialised knowledge” who could potentially aid a court in determining the facts of a case. In turn, the role of the courts is to approach such evidence as it would any other expert testimony. At the same time they must also be careful of hypotheses which are given credibility by the expert witness. The courts should therefore look for the following qualities in historians as expert witnesses: appropriate specialisation, thorough research, and conclusions that are well supported by the record.

With regard to establishing “historical facts”, fact finding – even of historical facts – is the sovereign domain of the courts, not the historian. As has been demonstrated, the historian may give his/her opinion on the facts established from historical texts and documents and provide his/her reasons for these conclusions. This may aid the court, but it cannot displace the court’s duty to establish the facts. In addition, and very importantly, the expert historian’s opinion as to what the law is or what a document means is generally not admissible as that falls outside the ambit of the historian’s expertise. However, if the courts are uncertain about the meaning of a certain provision, it will admit the historian’s interpretation but will not necessarily rely on it.

As with the admissibility of oral accounts, the courts are obliged to interpret the Act to afford claimants the fullest possible protection to advance the true purpose of the Act, which is to provide restitution and equitable redress to as many victims of racial dispossession of land rights after 1913 as possible. However, the purpose of the Act

is not to seek redress of the past at the expense of the current landowners. It is a "nuanced and generous" framework for restoring rights and dignity to those dispossessed of their land, while affording compensation to those who are affected by these claims.[257] The Salem case clearly demonstrates how the Act's just balance operates, recognising the claimants' entitlements while not denying the rights of the presently possessed, and provided that it is interpreted by informed judges.

By deciding that both sides have equal rights to the Salem commonage is the fairest judgement to make in terms of the Act. But what does this mean for the people of Salem? On the surface, the judgment is a piece of jurisprudential mastery, sowing the seeds of conciliation by concluding that the landowners and claimants have exactly the same rights and thus there is an opportunity to share the land. For some, this is the best possible outcome. Nobody wins and nobody loses. For the landowners, it should come as tremendous relief that, although their rights to the land have halved, at least they are still entitled to part it, as directed by the LCC. The claimants should be overjoyed as their claim to the land has succeeded, and perhaps it is a valuable opportunity for them to learn from their neighbours on how to manage modern farms if that is the avenue they choose to pursue. Perhaps, in the future, the landowners may choose to sell their rights to the claimants who, by then, should be well-skilled to take over the farms in their totality.

Unfortunately, very few of the landowners and even fewer claimants possess the optimism to envision such a future at Salem. The claimants feel that they were dispossessed of all their rights from the entire commonage and thus should be returned those rights for their sole and exclusive use. This was what they were promised and this was what they went to court for, nothing more and nothing less. The landowners feel that by giving the claimants rights, the state is depriving them of their sole and exclusive use of land that they developed over generations. As a result, the value of the land has increased substantially thanks to the investment of time and capital by their forebears and themselves. Now they are being ordered to share that land with people against whom they have fought a legal battle for almost two decades. To say that this is an emotive issue for both parties is an understatement.

[257] See also in this regard *Florence v Government of the Republic of South Africa* 2014 (10) BCLR 1137 (CC).

This brings me back to the conversations I had with the two farmers a day after the judgement. The Salem claim and the subsequent judgement of the Constitutional Court has changed the legal landscape of land claims in South Africa. It has shed much needed light on how the new jurisprudential approaches envisioned in the Act should be effected. Instead of retribution, the courts should opt for reconciliation. However, this is too idealistic for some politicians and researchers within the Department of Rural Development and Land Reform (DRDLR) who still do not seem understand the aims and objectives of the Act. They see the Salem claim as a political battleground, attempting to showcase it as a victory for black South Africans as well as current land reform policy. The precedent set by Salem with regards to the relative ease of proving a legitimate claim has potentially opened the door for the success of exceptionally large claims, which will undoubtedly be supported by the DRDLR. This in effect means that farms throughout South Africa are liable to invite claims on the condition that the historical record vaguely corresponds with the prospective claimants' pleadings. Thus, a responsible approach by the DRDLR, as well as cognisance of the factors listed in the Act,[258] is needed when investigating claims, ensuring that the process does not become the arbitrary dispossession of current landowners from claimed land. However, in the face of growing pressure from within and outside the ruling party to implement far more radical land reform and redistribution strategies, the ramifications of the Salem claim will be unknown still for years to come.

At present, the future for both the claimants and landowners is uncertain. At the time of writing, the LCC had still not come to a decision of how the order of the CC should be implemented. More and more informal houses are being erected all over the commonage, only feeding the paranoia of the remaining white landowners of Salem. With the extensive drought that has plagued the region for years, arable land is becoming scarce. Less land and the overburdening of rural land to sustain growing human populations will almost certainly breed conflict. Salem will not escape this unless drastic intervention is made either by the state or by the parties themselves. The peace that the name "Salem" suggests is unlikely to be realised in the current climate of uncertainty. History was put on trial during the course of the Salem

[258] Section 33 of the Restitution of Land Rights Act 22 of 1994.

commonage claim. Only the passing of time will ultimately determine whether or not the verdict was correct.

ILLUSTRATION 6.1: View of the Salem commonage

(Credit: GJW Bezuidenhout)

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