

**OWNERSHIP OF SOUTH AFRICAN STREET ART AND THE PROTECTION OF
CULTURAL HERITAGE RESOURCES**

by

SARAH RUTHERFORD SMITH

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Supervisor: Prof M Wethmar-Lemmer

Co-Supervisor: Prof C Roodt

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STATEMENT

DECLARATION

Name: Sarah Rutherford Smith

Student number: 33737193

Degree: LLD

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I have written Gandalf is here in signs that all can read from Rivendell to the mouths of Anduin.

JRR Tolkien, The Lord of the Rings

Mr Shine. Him diamond.

Terry Pratchett, Thud!

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ABSTRACT

The development of graffiti into an accepted art form, street art, is a cause of concern for South African property owners. The current position in South African property law regarding the original acquisition of ownership suggests that the creation of street art on movable property belonging to another could result in the transfer of ownership. Ownership of the movable may transfer via *accessio* to the street artist provided that the artwork changes the nature of the movable. This would occur even if the street artist does not act in good faith because *bona fides* is not a requirement for the original acquisition of ownership via *accessio*. This anomaly requires that the South African law on accession in the case of *pictura* be developed such that good faith be a requirement for the transfer of ownership in this format.

With the development and growing popularity of the art form the likelihood of this legal anomaly is becoming a greater possibility. Indeed, the popularity of British street artist, Banksy, has provided numerous examples of contested ownership, albeit within English law. Banksy artworks are collectable and financially valuable. Consequently, not only are they desirable but many of his street artworks are considered to be examples of British cultural heritage and as such may be worthy of protection and preservation. These cases highlight the growing need in South Africa to clearly identify who South African street artworks belong to and, to identify any South African street art that warrants cultural heritage protection.

The legislation regarding the protection of South African cultural heritage resources has not yet been extended to any street artworks. Yet there are examples of street art in South Africa that meet the requirements for cultural heritage status or which have the characteristics of cultural heritage resources. The extension of cultural heritage resource status to South African street artworks that are culturally significant could assist in the protection and preservation of these resources. However, the effectiveness of the cultural heritage legislation, in particular the National Heritage Resources Act 25 of 1999, is limited. There are several problematic aspects in this Act. This is of great concern as the issues effect all South Africa's cultural heritage resources (not just street art which may qualify for such

status). However, these issues could be responded to through amendments to the legislation.

Significantly, the National Heritage Resources Act seeks to deprive private owners of their property as it seeks to regulate what owners can do with cultural heritage property which they own. However, as it stands there are far too many challengeable issues in this legislation to justifiably deprive this property in terms of s25 of the Constitution of the Republic of South Africa, 1996. This renders significant portions of the National Heritage Resources Act inoperable. Consequently, the amendment of this legislation is necessary to ensure the purpose of the legislation i.e. to ensure the protection and preservation of the South Africa's cultural heritage resources through the deprivation of property rights or indeed, if necessary, through the expropriation of property.

KEYWORDS

Graffiti, street art, expropriation, deprivation, culture, cultural rights, cultural heritage, cultural heritage property, cultural heritage sites, cultural heritage objects, cultural significance, Grotius, ownership, accession, *accessio*, *specificatio*, resistance art, Banksy, Shepard Fairey, Faith47, South African Heritage Resources Agency, property rights, limitation of rights.

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CHAPTER 1 INTRODUCTION

1.1 *Background*

In 2014 an artwork that came to be known as *Spy Booth* was found on the wall of a privately-owned grade II listed (historic) house in Cheltenham, UK.¹ Acknowledged as the work of world-renowned graffiti artist Banksy, the artwork garnered the interest of the artworld, collectors and the public.² The artwork was valued at £1 million.³ In order to preserve the work *in situ* Cheltenham locals set up a fund dedicated to this cause, local councils took an interest in preserving the artwork, and a foreign collector made an offer on the work (seeking to remove it for their private collection).⁴ Whilst these deliberations were in progress the artwork was defaced with spray paint.⁵ Consequently, the artwork was awarded the same protection as the house by Historic England (England's heritage authority). This was achieved by granting retroactive planning permission for changes to be made to the historic building.⁶ The granting of such status intended to prevent the private property owner from selling the artwork to a private collector (thus ensuring the artwork was publicly viewable), to require the home owner to preserve the artwork

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- ¹ Huws <http://www.catrinfflurhuws.cymru/site/documents/spyfought.pdf> (Date of use: 15 April 2019) 3. For a discussion on the grade listings of historic buildings in the UK and what this entails see Historic England <https://historicengland.org.uk/advice/your-home/owning-historic-property/listed-building/> (Date of use: 15 April 2019). See also Huws <http://www.catrinfflurhuws.cymru/site/documents/spyfought.pdf> (Date of use: 15 April 2019) 3.
- ² Morris <https://www.theguardian.com/artanddesign/2014/jun/10/banksy-creator-spy-booth-wall-art-gchq> (Date of use: 15 April 2019). For information on Banksy see Banksy www.banksy.co.uk (Date of use: 20 December 2018). See also Banksy *Wall and Piece* and Ellsworth-Jones *Banksy*.
- ³ Neuendorf <https://news.artnet.com/art-world/banksy-spy-booth-mural-worthless-460628> (Date of use: 18 April 2019).
- ⁴ Huws <http://www.catrinfflurhuws.cymru/site/documents/spyfought.pdf> (Date of use: 15 April 2019) 3-4.
- ⁵ Huws <http://www.catrinfflurhuws.cymru/site/documents/spyfought.pdf> (Date of use: 15 April 2019) 4.
- ⁶ Historic England <https://historicengland.org.uk/listing/the-list/list-entry/1333239> (Date of use: 24 January 2017). See also BBC News <http://www.bbc.com/news/uk-england-gloucestershire-32252609> (Date of use: 24 January 2017). A grade II listed building in England is a particularly important building of more than special interest.

and to make funding available to assist with this if requested.⁷ However, despite the listed status, the artwork was unintentionally destroyed during house repairs.⁸

In 2014 another Banksy artwork called *Mobile Lovers* was found on a publicly viewable plywood door at a youth club in Bristol, UK. Within 24 hours of its appearance the door was removed, and the artwork placed inside the youth club with a small donation being requested to view the artwork.⁹ The club's manager informed the media that the artwork had been intended as a gift to the club and that the piece would be sold to raise funds for the club. However, the Bristol City Council contested the club's actions and the artwork was relocated to the Bristol Museum where it was put on public display.¹⁰ In order to resolve whether the artwork belonged to the youth club or the people of Bristol (represented by the Bristol Museum and Bristol City Council) the parties appealed to Banksy via the media about his intentions for the piece. Banksy responded indicating that the youth club manager was the intended owner of the artwork.¹¹ Pursuant to this, the artwork was sold to a private collector for £403 000.00, with the proceeds of the sale going to the youth club.¹²

Spy Booth and *Mobile Lovers* exemplify the growing popularity of street art. The artworks are a symbol of changing attitudes towards graffiti and street art and of its acceptance of as a recognised and collectable form of art. They also highlight how important graffiti and street art can be to the communities in which they are located; that they can be a form of cultural heritage. Further, the artworks are indicative of the significant financial values of certain street artworks. Unfortunately, both cases also exemplify some of the risks that culturally significant street art can be exposed

⁷ Hansen 2018 *City* 286.

⁸ BBC News <http://www.bbc.com/news/uk-england-gloucestershire-37153440> (Date of use: 24 January 2017).

⁹ Hansen 2018 *City* 287.

¹⁰ Hansen 2018 *City* 288-289. The display included information about Banksy, the artwork and encouraged donations to the youth club. See also Salib 2015 *The University of Chicago Law Review* 2293-2294.

¹¹ Hansen 2018 *City* 292.

¹² Hansen 2018 *City* 295. Gander <https://www.independent.co.uk/arts-entertainment/art/news/banksy-mobile-lovers-sold-owner-of-youth-club-where-artwork-appeared-in-bristol-received-death-9695327.html> (Date of use: 16 April 2019). The current location of the artwork is unknown.

to. Indeed, *Spy Booth* is lost because it was destroyed by the owner albeit accidentally and *Mobile Lovers*, whilst not lost, is no longer accessible by the local community because it is privately owned.

These cases highlight the contested ground that is street art; contested between the rights of private owners to do what they want with their property and the interest of the state and the public in preserving, protecting cultural heritage resources (in the form of street art) and in ensuring access to those resources. *Spy Booth* and *Mobile Lovers* raise the question of who owns culturally significant street art, or rather who should own culturally significant street art.¹³

Admittedly, both these cases are English and concern English law regarding property and cultural heritage. However, street art is a growing phenomenon and South African street artists are being acknowledged both locally and internationally and their work is becoming if not already valuable. For example, South African street artists Faith47 (see an example of her street art below at Figure 1), Falko One, and Mars are well-known in South Africa and the international street art scene.¹⁴ Consequently, it is beneficial to consider the question of ownership of street art in South Africa so that cases such as these can be resolved. Therefore, culturally significant South African street art can be preserved and protected and public access to these resources can be ensured.

¹³ Huws notes that there are various potential owners of the street art, namely: the street artist, the owners of the properties on which the artworks are located, the city councils for the sites, a private collector who purchases the artwork and the local community. Huws <http://www.catrinflurhuws.cymru/site/documents/spyfought.pdf> (Date of use: 15 April 2019) 5-19.

¹⁴ Jacquet <https://streetart360.net/2019/05/02/25-south-african-street-artists-not-to-be-missed/> (Date of use: 6 May 2020).



Figure 1: Faith47's *All Shall Be Equal Before the Law*

1.2 *The development of street art*

It is difficult to comprehensively define graffiti as it is a form of expression and communication which includes, 'a vast array of media technique, subject, matter, form and meanings.'¹⁵ Moreover, sometimes, graffiti does not fall within the traditional ideas of what constitutes art.¹⁶ Graffiti has always involved drawing or painting, and, after the development of written language, writing. Graffiti can take many forms; from the common spray-painted tag to murals, paste-ups, stickers, mosaic, sculpture, scratching, and etching amongst others.¹⁷ Graffiti may feature on private and public property, and it may also appear in art galleries and museum collections.¹⁸

Human beings have been practising graffiti for thousands of years.¹⁹ The term graffiti derives from the Italian *graffiare* meaning, 'to scratch'.²⁰ This, in turn, probably

¹⁵ Frederick 2009 *Archaeologies* 212.

¹⁶ McAuliffe and Iveson 2011 *Geography Compass* 132.

¹⁷ In general, see Lewisohn *Street Art* 15 – 23.

¹⁸ Gómez 1992-1993 *U Mich JL Reform* 639 – 641.

¹⁹ Howarth *Graffiti* 551.

²⁰ Buckley *Handwriting* 3 and Howarth *Graffiti* 551.

derives from the Greek *graphein* meaning, 'to write'.²¹ Evidence of graffiti has been found on the Pyramid of Khufu in Giza, Egypt (circa 2560 BCE), in the ruins of Pompeii in Italy (circa 700 BCE – 79 BCE); and at the ruins of the ancient Mayan city of Tikal in Guatemala (circa 100 BCE – 700 CE); amongst many other examples of ancient graffiti.²² Many famous people have participated in the creation of graffiti; the English poet Lord Byron tagged his name repeatedly at the Temple of Sunium in Greece (and at many other historical sites), and the German poet Goethe etched his name into the Strasbourg cathedral in Germany, to name just two examples.²³

Graffiti is understood to have developed into an identifiable art form around the 1970s in urban areas of the USA.²⁴ In New York tagging became popular and a proliferation of quickly scrawled tags appeared throughout the city.²⁵ These tags then evolved into different styles of lettering as artists sought to distinguish themselves. These styles include bubble letters, Celtic style, Broadway/Manhattan style, Wild Style, two dimensional and three-dimensional lettering amongst others.²⁶ There was much competition amongst artists and graffiti 'gangs' to create more elaborate and more detailed work.²⁷ As the tags became more intricate, the locations graffiti writers tagged became more daring, perhaps this also helped an artist to stand out from the crowd. New York train cars was a particularly popular location for graffiti writers. Motifs began to be included alongside the tags to

²¹ Rychlicki 2008 *Journal of Intellectual Property Law & Practice* 393.

²² Henley

<https://www.theguardian.com/culture/shortcuts/2014/mar/04/graffiti-leave-mark-on-ancient-monuments> (Date of use: 2 November 2016), Gómez 1992-1993 *U Mich JL Reform* 636; Gleaton *Power to the People* 6-8 and Jim <http://www.historicmysteries.com/ancient-graffiti/> (Date of use: 18 October 2016). See also Peden *Pharaonic Egypt* and Howarth *Graffiti* 551 – 555. For more on the history of graffiti see Reisner *Graffiti*.

²³ Lewisohn *Street Art* 26; Blume *Graffiti* 138.

²⁴ Howarth *Graffiti* 550, 553

²⁵ Howarth *Graffiti* 553, Ferrel *Crimes of Style* 7. Tagging is the writing of the graffiti writer's name, or initials or pseudonym (and can include other details such as the street number of their residence). Tapz is an example of a well-known South African tagger who writes the tag *Tapz* in many areas of South Africa. Further, this phenomenon was not exclusive to New York and occurred in many US cities and other countries, New York has been used as an illustrative example.

²⁶ Howarth *Graffiti* 553 – 554, Ferrel *Crimes of Style* 7-8

²⁷ Lewisohn *Street Art* 30-35. In general, see Cooper and Chalfant *Subway Art* and Chalfant and Prigoff *Spraycan Art* 7-12.

enhance them and, again, to distinguish artists from other train car taggers.²⁸ Then elaborate, designed images began to appear.²⁹ Eventually, some artists succeeded in painting entire train cars.

The art world began to take notice of the developing art form, and graffiti artists began to be represented by art dealers and galleries. For instance, in 1979 an art dealer Claudio Bruni exhibited the works of graffiti artists Lee Quinones and Fab 5 Freddy at the Galleria La Medusa in Rome.³⁰ In the early 1980s, a Dutch art dealer Yoki Kornblit hosted an exhibition of graffiti artwork in Rotterdam. The exhibition included works by Dondi, Rammellzee and Futura2000 to name a few.³¹

By the early 2000s, stencil art became the predominant form of graffiti and this advanced to include a greater diversity of practices and images. With this growth and development, and the experimental attitude of artists, graffiti now includes a vast array of media, including street sculpture, yarn-bombing, cross-stitch street art, digital displays, plant displays, masking tape street art, sand (or beach) and snow art, balloon street art, Lego street art and installation art.³²

Emerging from this period (*circa* 1970 to current) some graffiti artists, such as Jean-Michel Basquiat, Keith Haring, Banksy, Shepard Fairey, David Choe and Mr Brainwash, began to commercialise their work; indeed, David Choe ranks amongst the world's most successful (and wealthiest) artists.³³ The popularity of graffiti has

²⁸ Howarth *Graffiti* 554, Ferrel *Crimes of Style* 7. Indeed, tagging is recognised as an art form in its own rights, similar to calligraphy. Further, some street artists specialise in typography. See Lewisohn *Street Art* 19 – 21, 48- 49, 137 and Peiter *Guerrilla Art* 50 -55.

²⁹ Howarth *Graffiti* 554 – 555, Ferrel *Crimes of Style* 8.

³⁰ Francis *Re-facing Societies* 2 and Fab 5 Freddy <http://fab5freddy.com/back-makin-art/> (Date of use: 19 May 2018).

³¹ Hunt *Popular Culture* 24.

³² Young *Street Art* 4, Lina D <http://www.boredpanda.com/street-art-interacts-with-surroundings/> (Date of use: 8 November 2016), Delana <http://weburbanist.com/2009/11/05/off-the-wall-graffiti-11-artists-making-odd-marks/> (Date of use: 8 November 2016), Gould-Bourne <http://www.boredpanda.com/cross-stitch-street-art-in-spain-by-raquel-rodrigo/> (Date of use: 8 November 2016). For more on this part of the history of street art see Bates *Bombing, Tagging, Writing* 23 – 53.

³³ Widewalls <http://www.widewalls.ch/graffiti-history-10-important-moments/shepard-fairey-obey/> (Date of use: 2 November 2016); Widewalls <http://www.widewalls.ch/richest-artists-in-the-world/david-choe/> (Date of use: 2 November 2016). See also Howarth *Graffiti* 555. Street artists are regularly commissioned to create 'legal' street art, wherein they are provided with a privately owned or state owned, space on which to paint and are remunerated for this. To distinguish this

caught the attention of mainstream media (with graffiti becoming a topic for in-depth articles in various publications, documentary films, music videos and photojournalism) and become a field for academic research.³⁴ Even advertising agencies have begun to use graffiti and urban art as an inventive method to promote their clients; companies such as Nike have run graffiti style campaigns.³⁵

These developments have therefore led to the consideration of certain graffiti as a formal form of art in that, it has recognisable forms and conventions.³⁶ Indeed, some graffiti has many similarities with what is termed, 'high art', in that, it has a strong and identifiable aesthetic concept. As Mann notes,

'As a medium that extends itself to almost every corner of a city for all to see, graffiti has always been (and probably still is) one of the true forms of public art in the country. It is a golden art form that as a result of the aforementioned public acceptance can now exist in gallery spaces as well as lower-income areas, for all to see and appreciate. As Cale, Damn Vandal and Bias collectively explain and agree upon, graffiti has the power to change how people view and interact with art'.³⁷

1.3 *Distinguishing street art from graffiti*

Despite its long, rich, and vibrant history, graffiti is commonly understood to be anti-social behaviour and/or a crime.³⁸ Graffiti is treated as a form of vandalism and a

art from street art (which is not commissioned) it will be referred to as urban art. However, as urban art results from a commission it falls within the law of contract and is not the focus of this study. As an example of how commercial some street artists are, see Sernoffsky <https://www.sfchronicle.com/bayarea/article/Banksy-s-S-F-artwork-draws-a-six-figure-fervor-5568831.php> (Date of use: 18 May 2018).

³⁴ Ferrel *Crimes of Style* 8-11, Young *Street Art* 5, McAuliffe and Iveson 2011 *Geography Compass* 134 – 136.

³⁵ Young *Street Art* 5, McAuliffe and Iveson 2011 *Geography Compass* 134. For more on the commercialization of graffiti see Lombard 2013 *Visual Communication Quarterly* 91.

³⁶ Cooper and Chalfant *Subway Art* 17.

³⁷ Mann <http://10and5.com/2016/02/25/from-tags-to-murals-south-african-graffitis-move-into-the-accepted-public-eye/> (Date of use: 19 September 2016).

³⁸ See for instance Gómez 1992-1993 *U Mich JL Reform* 656-670.

sign of urban decay.³⁹ Graffiti is considered to be the illegal positioning of art on immovable or movable property; it is 'any form of unofficial, unsanctioned application of a medium onto a surface'.⁴⁰ Indeed, in most cities throughout the world, graffiti is determined to be a criminal act and the artists as criminals.⁴¹

The South African approach to graffiti is in line with this international trend. In South Africa, graffiti is criminalised in terms of the common law crime of malicious damage to property, the General Law Further Amendment Act 93 of 1962 (GLFA), and by various municipal by-laws.⁴² In terms of these standards, graffiti is understood to be the defacement or disfiguration of movable or immovable property by, 'placing any placard, poster, writing, word, letter, sign, symbol, drawing or other mark on any property, whether movable or immovable, of any other person or of the State, and thereby defaces or disfigures such property.'⁴³

However, this is a limited perspective of graffiti since it fails to consider graffiti as a form of art. The term street art is applied to this identifiable art form in order to distinguish the 'art', from the graffiti, the 'art', from the vandalism.⁴⁴

The evolution of graffiti to street art,

³⁹ Herron <http://www.herron.iupui.edu/blog/06042012/street-art-vs-graffiti> (Date of use: 28 August 2015).

⁴⁰ Lewisohn *Street Art* 15.

⁴¹ General Law Further Amendment Act 93 of 1962 (hereinafter referred to as the GLFA). McAuliffe and Iveson 2011 *Geography Compass* 128. A distinction is made between street artists and graffiti writers, this distinction will be highlighted further in the discussion on the difference between graffiti and street art. Suffice, to say, at this point, that some graffiti writers do not wish to be perceived as 'artists' and some street artists do not want to denigrate their work to graffiti. Lewisohn *Street Art* 18.

⁴² GLFA s44(1). For examples of municipal by-laws regulating graffiti see City of Johannesburg Metropolitan Municipality Public Open Spaces By-laws 831 of 2004 s17(1)(a) (hereinafter referred to as the JHB Graffiti By-law) and City of Cape Town: Graffiti By-law 2010 s1, s3(1) and s11 (hereinafter referred to as the CPT Graffiti By-law).

⁴³ GLFA s44(1).

⁴⁴ Austin 2010 *City* 35; DeNotto 2014 *College and Research Libraries News* 208 – 209. See also Lewisohn *Street Art* 15 and Schrift and Fabre Design Team <http://schriftfarbe.com/the-difference-between-street-art-and-graffiti> (Date of use: 25 August 2015). The term, 'street art', is not universally used, with some authors still using the term graffiti. In this study, these two terms are used to distinguish between graffiti that can be considered to be art and graffiti that does not hold the artistic value (as street art shares with 'traditional' art) and therefore remains considered as a public nuisance.

'has produced a culturally rich visual history that links artists, city spaces, urban audiences and media technologies across the globe. The art form's collectively sustained duration, its historically complex social and institutional development and its aesthetic sophistication [which] place it among the longest-running, global visual culture movements originating within the 20th century, and perhaps *the most* important of the last decades...'⁴⁵

The significant distinction between street art and graffiti is the intention of the artwork.⁴⁶ Graffiti does not seek to speak to a public audience, rather, it speaks to the artist and/or to other graffiti writers. The graffiti writer is not concerned with having a positive public reputation, they seek to destroy rather than create; to make a mess rather than to improve.⁴⁷ Graffiti has no justification other than its existence.⁴⁸ The aesthetic is not necessarily identifiable, nor is it integral to the work. This, 'form of unofficial, unsanctioned application of a medium onto a surface' is still considered to be a public nuisance and/or vandalism.⁴⁹

In contrast, street art is considered to be the higher art form, wherein the purpose of the artwork is not destruction (as may be the case with graffiti) but rather to invoke an emotional response, to create a conversation and to beautify the urban environment.⁵⁰ Often, street art will relate to external rules of aestheticisation.⁵¹ Indeed, the semantic content of street art, as opposed to graffiti can be more important than the presented visual.⁵²

⁴⁵ Austin 2010 *City* 35.

⁴⁶ Schrift and Farbe <http://schriftfarbe.com/the-difference-between-street-art-and-graffiti> (Date of use: 28 August 2015).

⁴⁷ Lewisohn *Street Art* 18 – 19. These are, obviously generalisations as the two genres have the same origin and often the two genres can be found in the same piece. However, as Lewisohn suggests, 'in strict academic terms, it is necessary to differentiate between them ...'

⁴⁸ Lewisohn *Street Art* 18.

⁴⁹ Lewisohn *Street Art* 15.

⁵⁰ DeNotto 2014 *College and Research Libraries News* 208.

⁵¹ Lewisohn *Street Art* 18.

⁵² Austin 2010 *City* 35.

Gómez suggests that distinguishing between graffiti and street art depends upon the motivation underlying each piece.⁵³ Many different motivations for graffiti exist, such as marking territory, gaining fame/recognition/notoriety, advertisement of skills, political commentary, self-expression and to convey a message amongst many other motivations.⁵⁴ It is rare for graffiti merely to be motivated by its illegality.⁵⁵

‘[Street] artists often use their medium to express their feelings about society and/or to enhance an otherwise bleak urban landscape. Political messages are also sometimes conveyed.’⁵⁶

Street artists may even perceive themselves as a public benefactor; turning the dull, bland walls of a city into art.⁵⁷ After all,

‘...one person’s enjoyment of graffiti does not “use it up” for others; inspiration from graffiti is infinite and non-segmentable. An endless number of people can see graffiti in one location without increasing its cost of production. As well, one can argue that graffiti art is non-excludable. By virtue of its creation and display in public spaces, no one can be excluded from seeing, enjoying or benefitting from it. Unless a wall is built to hide it, or the image is erased, a graffiti image painted on a wall is out there for everyone to view. Graffiti thus fits the definition of a public good.’⁵⁸

Street art has been compared to pop art, conceptual art, New Realism and as generally following the tradition of all modern abstract painting.⁵⁹ Indeed, street art is beginning to be seen by the art world and the public as a tolerable and effective

⁵³ Gómez 1992-1993 *U Mich JL Reform* 633.

⁵⁴ Gómez 1992-1993 *U Mich JL Reform* 644 – 650.

⁵⁵ Gómez 1992-1993 *U Mich JL Reform* 697. For more on the motivation of graffiti writers see Halsey and Young 2006 *Theoretical Criminology* 279 – 289.

⁵⁶ Hype Magazine <http://www.hypemagazine.co.za/2012/07/graffiti-art-or-vandalism/> (Date of use: 19 September 2016).

⁵⁷ Buckley *Handwriting* 139.

⁵⁸ Rizk 2015 *The African Journal of Information and Communication* 50.

⁵⁹ Howarth *Graffiti* 555 – 556. It has also been considered to be a development from the sixteenth-century Italian painters (such as Caravaggio) who rebelled against the confines and limitations of traditional canvas painting.

manner in which to highlight social issues. It is also being seen as a form of self-expression; as well as a form of public art (considering the artwork to be an improvement to property and the urban environment rather than vandalism).⁶⁰ It is a form of urban re-facing rather than defacement (which is identified with graffiti).⁶¹

Thus, street art tends to be concerned with the audience and not with the artist. Further, the public's positive reaction to some street art can call into question the criminalisation of certain pieces.⁶² 'The boundaries of public are becoming more blurred, and different types of art are commissioned for public consumption'.⁶³ In this regard, the location, content and style of a piece can change the public's attitude towards the criminalisation of street art.⁶⁴

With this identification as a unique art form and with acceptance into the art world, street artists are currently being recognised alongside well-known 'traditional' artists.⁶⁵ As previously stated, some street artists rank amongst the world's wealthiest and most respected artists.⁶⁶ For instance, many street artists' work has been exhibited by prominent galleries worldwide, and both the legal (whether urban art or 'traditional' artworks) and illegal artwork of street artists have fetched high sums at auction.⁶⁷ This recognition and the acceptance by the art world has resulted in certain works of street art acquiring significant artistic and financial value. Further,

⁶⁰ Wilson and Healy *Graffiti and Vandalism* 33.

⁶¹ Francis *Refacing Societies* 1.

⁶² Halsey and Young 2002 *The Australian and New Zealand Journal of Criminology* 168.

⁶³ Waddacor as quoted in Mann <http://10and5.com/2016/02/25/from-tags-to-murals-south-african-graffitis-move-into-the-accepted-public-eye/> (Date of use: 19 September 2016).

⁶⁴ Halsey and Young 2002 *The Australian and New Zealand Journal of Criminology* 169.

⁶⁵ Gómez 1992-1993 *U Mich JL Reform* 655 and the sources quoted therein. See also Lachmann 1988 *American Journal of Sociology* 245 – 248.

⁶⁶ DiVirgilio <http://www.therichest.com/rich-list/world/the-worlds-five-richest-artists/> (Date of use: 2 November 2016).

⁶⁷ Lerman 2012 -2013 *NYU J Intell Prop & Ent L* 300, Peiter *Guerrilla Art* 4 – 7 and Howarth *Graffiti* 551, 555. Further, see Rahm <http://www.forbes.com/sites/daniellerahm/2013/10/22/banksy-the-20-million-graffiti-artist-who-doesnt-want-his-art-to-be-worth-anything/> (Date of use: 4 July 2014), Julien's Auctions <http://www.juliensauctions.com/press/2014/street-art-banksy-addl.html> (Date of use: 4 July 2018) and Artnet Auctions 2014 <http://www.artnet.com/auctions/urban-art/> (Date of use: 4 July 2014).

some street artworks are also considered to have cultural value to the communities and countries in which they are situated.⁶⁸

There is no doubt that some street artists have gripped the public's attention and that certain of their legal and illegal artworks are considered to have artistic value, financial value and cultural value.⁶⁹ The street artist Shepard Fairey's work was used in *Hope* posters for the former President of the USA, Barack Obama's presidential campaign.⁷⁰ Moreover, apart from the artistic and cultural significance of his pieces, Shepard Fairey's artwork regularly sells for tens of thousands of dollars. For example, a painting titled *War is Over* sold for \$71 700.⁷¹ Another example of the acceptance of a street artist occurred when the former UK Prime Minister, David Cameron, gifted Barack Obama an artwork by the street artist Eine upon a visit to the White House; the artwork was considered to be an example of UK art and culture and thus, an appropriate gift from the Prime Minister.⁷² Further, many celebrities invest in street art, for instance, Angelina Jolie and Brad Pitt bought several artworks by Banksy, to the value of £1 million.⁷³ Further, the concept of street art has also appeared in an episode of the cartoon series *The Simpsons*, wherein it was

⁶⁸ Lewisohn *Street Art* 9. For an example of a street artwork that is considered to have cultural value see Banksy's *Spy Booth*. BBC "Cheltenham Banksy artwork will stay in town" <https://www.bbc.com/news/uk-england-gloucestershire-31100915> (Date of use: 14 June 2019). This will be discussed in more detail in the next chapter.

⁶⁹ Bengsten 2013 *Journal of Art History* 63 – 80. In general, see Lewisohn *Street Art* and Peiter *Guerrilla Art*. For examples of international street artists whose artworks (both legal and illegal) are highly desirable and valuable see the works of Banksy, Nick Walker, Shepard Fairey and Invader to name a few. Bamberger <http://www.artbusiness.com/osoqfairbank.html> (Date of use: 11 February 2015); Mark <http://www.ukstreetart.co.uk/banksys-rival-nick-walker-sells-750000-pounds-of-street-art/> (Date of use: 8 July 2014); Street Art Bio <http://www.streetartbio.com/#!shepard-fairey/cd7u> (Date of use: 8 July 2014); Invader <http://www.space-invaders.com/about/> (Date of use: 8 July 2014).

⁷⁰ Mettler 2012-2013 *Mich L Rev* 253.

⁷¹ Widewalls <http://www.widewalls.ch/shepard-fairey-art-auctions/> (Date of use: 7 November 2016).

⁷² BBC News <http://www.bbc.com/news/uk-politics-10710074> (Date of use: 28 September 2016).

⁷³ MailOnline <http://www.dailymail.co.uk/tvshowbiz/article-487230/Brangelina-spend-1-million-Banksy-work-contemporary-art-auction-London.html> (Date of use: 7 November 2016). This celebrity duo have collected numerous pieces of street art, see for instance Independent <https://www.independent.ie/woman/celeb-news/art-lover-brad-pitt-buys-graffiti-pics-of-amy-winehouse-and-prince-william-26867656.html> (Date of use: 1 January 2019).

depicted, '[u]rban vandalism is now the hottest art form there is.'⁷⁴ Street art is now part of pop-culture.

The popularity of street art has made it a desirable acquisition for art collectors. There are many and varied reasons as to why people invest in and collect this form of art.⁷⁵ For instance, some collectors acquire street art as a blue-chip investment.⁷⁶ Based on its popularity, there is potential for selected street artists' works to increase in value to the tens of millions of dollars.⁷⁷ Consequently, for art experts, there may be a considerable amount of money to be made from investing in street art which makes it an attractive acquisition for blue-chip investors. In addition, other collectors may acquire street art because of their relationship with the individual artist, or because street art represents their personal brand or for aesthetic reasons.⁷⁸ For example, Hong Kong entrepreneur Kevin Poon began collecting street art in 2005 with the acquisition of a piece by New York street artist Kaws (appreciating the aesthetic quality of the piece).⁷⁹ The American financier Marc Bell collects works by the street artist Monopoly.⁸⁰ Likewise, American art collector and Andy Warhol "Superstar" Jane Holzer's collection includes works by Keith Haring and Jean-

⁷⁴ Almendrala http://www.huffingtonpost.com/2012/03/05/shepard-fairey-on-the-simpsons_n_1321383.html (Date of use: 15 December 2015).

⁷⁵ For a discussion of the reasons and motivations behind street art collectors see Jacobson *The Passionate Economy* 20-41.

⁷⁶ A blue-chip art collector is one who collects the art for the potential of the resale value. The artwork is not acquired for the collector's aesthetic enjoyment, or because it is an important artwork in terms of an institution, artist or history (for examples) but because it is a financial investment. IdeelArt <https://www.ideelart.com/magazine/what-is-a-blue-chip-artist-> (Date of use: 31 December 2018). See also Abrams https://www.artspace.com/magazine/art_101/close_look/how-does-banksy-make-money-or-a-lesson-in-art-market-economics-55352 (Date of use: 31 December 2018).

⁷⁷ Sullivan <https://www.nytimes.com/2016/07/09/your-money/collecting-street-art-have-room-on-your-wall-for-a-wall.html> (Date of use: 31 December 2018).

⁷⁸ Sullivan <https://www.nytimes.com/2016/07/09/your-money/collecting-street-art-have-room-on-your-wall-for-a-wall.html> (Date of use: 31 December 2018).

⁷⁹ Raitt <http://www.larryslist.com/artmarket/the-talks/larrys-list-kevin-poon-from-street-art-to-contemporary-art/> (Date of use: 31 December 2018); Twigg and Mirandilla <https://hk.asiatatler.com/life/art-talk-the-young-collectors-kevin-poon> (Date of use: 31 December 2018), Twigg and Mirandilla <https://hk.asiatatler.com/life/art-talk-the-young-collectors-kevin-poon> (Date of use: 31 December 2018).

⁸⁰ Mun-Delsalle <https://www.forbes.com/sites/yjeanmundelsalle/2015/03/13/alec-monopolys-graffiti-celebrity-portraits-and-monopoly-man-are-a-hit-with-the-rich-and-famous/#7118e9ac1631> (Date of use: 1 January 2019).

Michele Basquiat.⁸¹ Plus, as noted above, street artists are popular amongst celebrity collectors such as Brad Pitt, Angelina Jolie, Russell Simons, Christina Aguilera, Swizz Beatz and Jay-Z, to name a few.⁸² In addition, some collectors are directly involved in the art industry, such as Todd Kramer who is a partner at an art gallery and began collecting Banksy works in 2001.⁸³ Further, some museums, such as the Urban Nation museum in Berlin Germany, have opened for the purpose of collecting street artworks.⁸⁴ Due to the rise in popularity for collecting street artwork, Banksy began an authentication site for his artworks. This site enables collectors to ensure they are acquiring original Banksy works.⁸⁵

The trend, of recognising, valuing and collecting street art alongside traditional art, has also evolved in South Africa and a few South African street artists are garnering international recognition.⁸⁶ Faith47's works are artistically and financially valuable and more importantly, several pieces are significant to South Africa's cultural heritage. Faith47 is an internationally respected artist; her legal artworks (the majority of the work she does now is legal and commissioned) are highly valuable,

⁸¹ Viladas <https://www.nytimes.com/2008/02/24/style/tmagazine/24holzer1.html> (Date of use: 1 January 2019), Complex <https://www.complex.com/style/2011/09/25-celebrities-with-baller-art-collections/6> (Date of use: 1 January 2017). For a discussion on the concept of, and the models/actresses that are deemed, Warhol "Superstars" see Gilbertson 2001 *Art Journal* 24.

⁸² Complex <https://www.complex.com/style/2011/09/25-celebrities-with-baller-art-collections/6> (Date of use: 1 January 2017).

⁸³ Sullivan <https://www.nytimes.com/2016/07/09/your-money/collecting-street-art-have-room-on-your-wall-for-a-wall.html> (Date of use: 31 December 2018).

⁸⁴ Ellis-Petersen <https://www.theguardian.com/artanddesign/2017/sep/20/street-art-goes-home-museum-of-graffiti-opens-in-berlin-urban-nation> (Date of use: 31 December 2018).

⁸⁵ Pest Control <https://www.pestcontroloffice.com/whatispco.html> (Date of use: 31 December 2018). Banksy also uses this service to try to keep his illegal artworks from being removed from public spaces by unscrupulous collectors. He does this by not authenticating those artworks so that should the collector try to sell the artwork the provenance of the artwork will be uncertain. See also Myartbroker <https://www.myartbroker.com/artist/banksy/pest-control-verify-banksy-prints/> (Date of use: 31 December 2018).

⁸⁶ Top South African street (and graffiti) artists include Rasty, Falko, Mak1one, Faith47, and Mars amongst others. See in general Waddacor *Graffiti South Africa*. As an example, see the work of Faith47 who has participated in many international exhibitions and whose legal artwork is sold by respected South African and international galleries. Faith47 <https://faith47.com/> (Date of use: 4 July 2018) and Nurse http://davidkrutprojects.com/exhibitions/2012-11-2_faith-47_proj-js (Date of use: 11 February 2015). Falko has also participated in many international exhibitions and has received commissions from several name brand companies. See his Facebook page for a summary of exhibitions, commissions and awards; Falko One https://www.facebook.com/pages/Falko-one/161187987282182?sk=info&tab=page_info (Date of use: 18 June 2015).

and she has been commissioned to produce several urban art murals and is paid well for such artworks.⁸⁷

South African street artists are in demand and can be very successful in the art world.⁸⁸ Thus, it is not a leap to suggest that these artists' illegal artwork, their street art, also has artistic and financial value, and further, that there are examples of street art that hold cultural significance to South African communities and the country. Consequently, the protection and preservation of these culturally significant artworks is worth investigating.

1.4 *Problem statement: The loss of street art*

Despite its worldwide recognition, the understanding of street art as a crime has been maintained. The aesthetic value and the intention of the work remains ignored, as is the artistic, financial, and cultural value.⁸⁹ As Austin states,

‘Graffiti artists painting and making work in the street and/or on trains have been engaged in law breaking violations of property rather than singular creation of aesthetic commodities and objects of ownership.’⁹⁰

This polemical approach to street art has resulted in the damage and/or destruction of significant artworks. The nature of street art is precarious; street art is at risk of damage and/or destruction from other artists, vandals, the public, and, local authorities because of the failure of the law to adapt to the evolution of graffiti to street art. Street art can be damaged by being painted on, and by parts of the work being removed (especially where the street art is a sculpture, installation art, or mosaic). Street art may also be removed entirely, this occurs where the art is kept intact but is removed from its original position and often the possessor or owner of

⁸⁷ Francis *Re-facing Societies* 8. See this source in general for more on Faith47 as an artist and the impact of her work. For examples of the financial value of Faith47's works see Nelly Duff <https://www.nellyduff.com/artists/faith47> (Date of use: 28 December 2018).

⁸⁸ For more information on the South African street art scene in general and for examples of South African street artists and their artworks see Graffiti South Africa <http://www.graffitisouthafrica.com/> (Date of use: 4 July 2014).

⁸⁹ Gómez 1992-1993 *U Mich JL Reform* 650.

⁹⁰ Austin 2010 *City* 41.

the property on which the art is located removes the artwork with the intention of selling the artwork,

[t]here is something of the Wild West about ownership of street art. The only certainty is that it is not likely to remain in the street for very long. It has simply become too valuable.⁹¹

Further, street art may also be scrubbed by being sandblasted or chemically removed. Scrubbing off artwork may be done by local authorities or private property owners. Finally, pieces may be destroyed by the destruction of the surface on which they are painted.⁹²

The failure to recognise the artistic value of street art and to seek its protection and preservation has resulted in many countries losing valuable artworks by renowned street artists. This failure has also resulted in the loss of well-loved public art and, in some circumstances, arguably, a cultural heritage resource. Many of Banksy's other street artworks have been damaged, removed or destroyed. As a well-respected and prevalent street artist, Banksy's artworks have regularly been the object of damage and destruction and the target of scrubbing by local authorities.⁹³ Despite his popularity, his artwork is still considered to be vandalism and thus, most often, not protected and preserved.⁹⁴ For example, in Melbourne, Australia, an artwork, titled *Little Diver* (circa 2003), was destroyed when paint was poured over the image

⁹¹ Aspden as quoted in Williams <https://itsartlaw.com/2013/03/25/part-i-who-owns-street-art/> (Date of use: 23 January 2017).

⁹² These threats are similar to, if not the same as, the threats faced by cultural heritage objects. Roodt notes that cultural heritage objects face numerous threats: physical threats (which include war and illicit excavations), disintegrative threats (which include environmental threats and threats posed by the commodification of culture), the enormous demand for heritage objects, and threats posed by progress and globalisation. See Roodt *Cultural Heritage* xxiv. Interestingly, she later notes at xxix that the world market for stolen art is one of the largest areas of international crime, only the arms and drug-trafficking markets are larger. See also Palmer *Current Legal Problems* 215 – 254.

⁹³ For a discussion of Banksy's prominence in the street art world see Chao *Getting up* 24 – 35.

⁹⁴ For a successful example of Banksy's street art being given legal protection see Art Law and More <https://artlawandmore.com/2015/02/22/banksy-granted-legal-protection/> (Date of use: 8 November 2016). A few others have also been considered for Heritage Protection, for instance see Brown <http://www.abc.net.au/news/2008-06-23/melbourne-graffiti-considered-for-heritage/2481118> (Date of use: 8 November 2016). Further, whilst Banksy an anonymous artist it is widely presumed that he is male therefore the male pronouns are used to refer to him herein.

despite the attempt by the private property owner to protect the work by covering the piece with Plexiglas. Similarly, Banksy artworks on walls in Palestine, the UK, New Orleans and Los Angeles have been removed (intact) by galleries, collectors, and private property owners, and sold for sums ranging from \$50 000 to \$1 million.⁹⁵ As another example of this type of risk; the Banksy artwork, known as *Slave Labour* (circa 2012), which was situated on the wall of a building in Wood Green, England was (at first) damaged by a member of the public and then removed intact from the wall of the building. The piece eventually went up for sale at auction and was sold for £750 000; intended to become part of someone's private collection and for the owner of the Wood Green building to profit from the artwork.⁹⁶ The removal of the work occurred despite the public's appreciation of the work, as well as the cultural significance of the piece and the political statement it made considering its creation before the Queen of England's Diamond Jubilee and the London Olympics. The removal of the work was described as the ruin of a national treasure.⁹⁷ Therefore, a councillor for Wood Green, upset by the removal of the work from the public sphere, has campaigned to have the work restored.⁹⁸

It should also be noted that the lack of recognition and protection of these types of artworks allows acquirors to export the artworks without complying with any of the national or international laws that limit (or in some cases prohibit) the international trade in cultural heritage objects.⁹⁹ For instance, the Banksy artwork *Kissing Coppers* (circa 2005) that was displayed on a wall in Brighton, England for seven years was removed (to the chagrin of many Brightonians) and sent to the Keszler

⁹⁵ Martin <http://www.forbes.com/sites/guymartin/2015/12/30/banking-on-banksy-how-collectors-can-and-cant-monetize-500000-works-of-art/#553687ec4a79> (Date of use: 7 November 2016). Many of these removed pieces had significant meaning because of where they were located i.e. they were site specific artworks.

⁹⁶ Hansen 2016 *Crime Media Culture* 292.

⁹⁷ Hansen 2016 *Crime Media Culture* 302.

⁹⁸ Young *Street Art* 147 – 150; Hansen 2016 *Crime Media Culture* 289 – 293. Hansen also discusses another of Banky's pieces known as *No Ball Games* herein. This is not the only example of a community working together to save a Banksy artwork for public appreciation. See Sernoffsky <https://www.sfchronicle.com/news/article/Banksy-s-S-F-artwork-draws-a-six-figure-fervor-5568831.php?cmpid=twitter-premium&t=c1f98bd3ff793836fd#/4> (Date of use: 18 May 2018).

⁹⁹ For a discussion on the reasons for limitation of international art trading see Bator 1982 *Stan L Rev* 294-310. See in general Merryman 1998 *NYU J Intl L & Pol* 1.

Art Gallery in New York which subsequently sold the piece.¹⁰⁰ Although this work was arguably an object of English cultural heritage, the lack of recognition of *Kissing Coppers* enabled the removal and export of the artwork.¹⁰¹

The risks that Banksy's artworks face is no different for other street art, or other street artists; they are just better known because of Banksy's fame. In South Africa, street art is also in a precarious position: The City of Cape Town has strict by-laws, prohibit graffiti. These by-laws allow for the prosecution of graffiti writers and provide a method of compensation for the possessor or owner of the property on which the street art is located for the cost of repair. According to the City of Cape Town: Graffiti By-law 2010 any person who fails to comply with the by-law is guilty of an offence, and, if convicted, shall be liable for a fine of up to R15 000 or 3-months imprisonment (for a first offence). The transgressor also has to reimburse the City or the private owner of the damaged property for the costs of removing the graffiti.¹⁰²

In 2016, Johannesburg mayor Herman Mashaba, took a firm stance on graffiti by developing stricter by-laws in an effort to create a more investor-friendly city (inspired by Cape Town's position).¹⁰³ According to the City of Johannesburg Metropolitan Municipality Public Open Spaces By-laws 831 of 2004, a convicted artist may be liable for an unspecified fine or a six-month prison term.¹⁰⁴ Mashaba intended to make these punishments more severe and therefore, deter graffiti writers and street artists from 'defacing the city'. This new approach to graffiti in Johannesburg has already resulted in the Johannesburg Roads Agency removing various graffiti works from the side of Johannesburg roads. None of the works removed were documented, and there were no attempts to preserve any of the

¹⁰⁰ Topping <https://www.theguardian.com/artanddesign/2011/apr/21/banksy-kissing-coppers-sold-america> (Date of use: 1 January 2019).

¹⁰¹ The export of cultural objects from the United Kingdom is controlled by the Export of Objects of Cultural Interest (Control) Order 2003, made under the Export Control Act 2002 s 9(6). See also Department for Culture, Media and Sport *Export Controls*.

¹⁰² CPT Graffiti By-law s11.

¹⁰³ Sosibo <http://mg.co.za/article/2016-11-01-00-graffiti-and-the-legal-bid-to-erase-public-art-histories> (Date of use: 2 November 2016). How removing and preventing graffiti creates a more investor-friendly city is not discussed.

¹⁰⁴ JHB Graffiti By-law s27(1)(a).

work.¹⁰⁵ If this approach is maintained and stricter by-laws are enacted, then Johannesburg may lose important artworks. An example of artwork that is at risk in Braamfontein is the work of the American artist Shepard Fairey (the same artist who designed Barak Obama's presidential campaign poster). The mural (circa 2014) depicts an image of former president Nelson Mandela with the slogan, '[t]he purple shall govern' and was painted in commemoration of the anniversary of the 1989 anti-Apartheid Purple Rain protests.¹⁰⁶ Though the work is covered in a varnish to try to protect it, it remains at risk of damage, removal or scrubbing because it is not recognised as a cultural heritage resource.

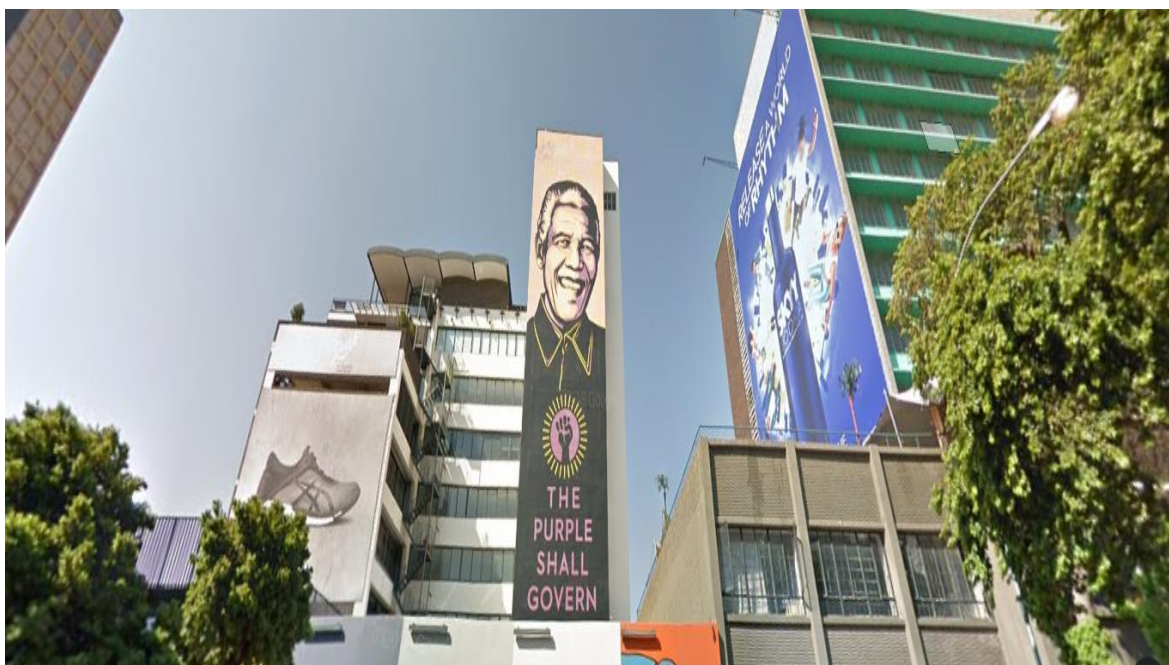


Figure 2: Shepard Fairey's *The Purple Shall Govern*

Another example of Faith47's work, *The People Shall Govern* (circa 2010) (created as part of her *Freedom Charter Project* (circa 2010)) still stands, undamaged but

¹⁰⁵ Whittles <http://mg.co.za/article/2016-10-27-00-writings-on-the-wall-for-joburgs-graffiti-artists> (Date of use: 2 November 2016); Sosibo <http://mg.co.za/article/2016-11-01-00-graffiti-and-the-legal-bid-to-erase-public-art-histories> (Date of use: 2 November 2016). Albeit that it is not known whether these could have been considered as street art or were merely a public nuisance.

¹⁰⁶ Wikipedia https://en.wikipedia.org/wiki/Nelson_Mandela_Mural_by_Shepard_Fairey (Date of use: 3 November 2016) (hereinafter referred to as *The Purple Shall Govern*). This artwork is located on the building 155 Smit Street, in the Johannesburg CBD.

unprotected, in Jeppestown, Johannesburg. The *Freedom Charter* artwork in the same project (painted at Frere street in Observatory, Cape Town) which was an ornate replica of the actual Freedom Charter, has been painted over and is now a plain white wall. How long the rest of the existent works in the project will remain undamaged is not certain if they continue to be considered as the products of crime and, thus, remain unprotected by the law. In addition, the lack of recognition of street art ensures that the laws that limit and prevent (in special cases) the export of South Africa's cultural heritage objects cannot be applied to this form of art.¹⁰⁷

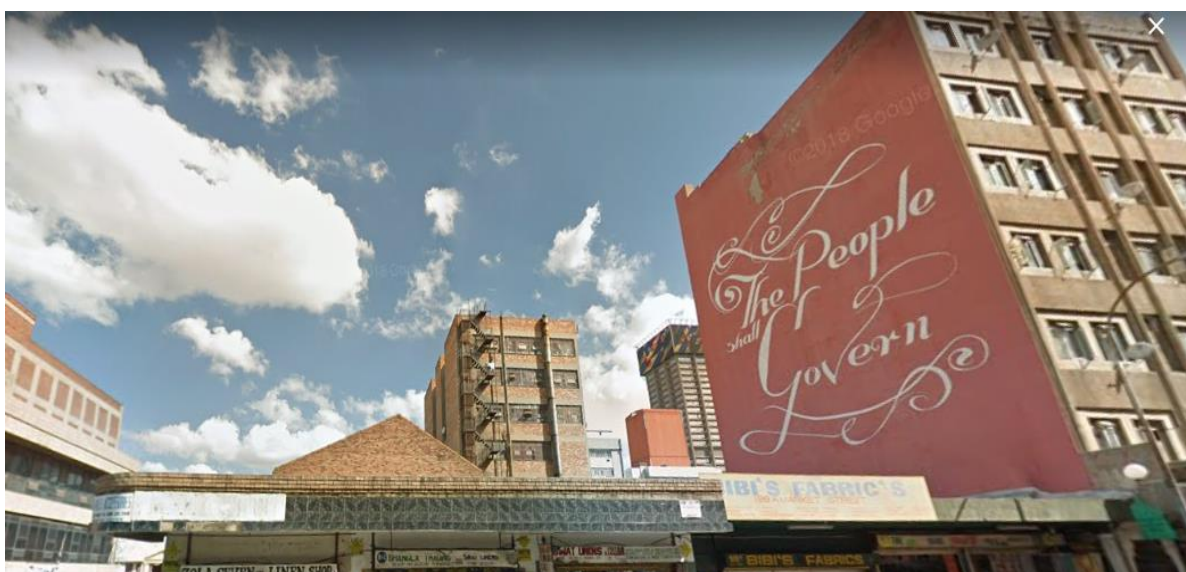


Figure 3: Faith47's *The People Shall Govern*

Before the enactment of the abovementioned by-laws, South Africa had already lost many street artworks because of the failure to recognise them as art. This is evidenced by an unknowable number of graffiti resistance artworks, protesting the Apartheid regime, which no longer exist.¹⁰⁸ The loss of these artworks is a pity since resistance art (and graffiti as an aspect of this category of art) is an important part of South Africa's cultural heritage.

¹⁰⁷ The export of cultural heritage objects is regulated in terms of The National Heritage Resources Act 25 of 1999 (hereinafter referred to as the NHRA) s32(1) and (19)-(32).

¹⁰⁸ NLA Designs and Visual Art <https://nladesignvisual.wordpress.com/2013/04/06/resistance-or-protest-art-in-south-africa-background/> (Date of use: 2 November 2016). For more on protest art see Clark *Protest Art* and Contemporary African Art <https://www.contemporary-african-art.com/resistance-art.html> (Date of use: 16 May 2018).

Graffiti played a significant role (albeit a limited one) in the anti-Apartheid movement.¹⁰⁹ Due to the banning of public protest during the 1985-1986 State of Emergency, graffiti became a method in which the Apartheid government could still be challenged; it became a tool by which anti-Apartheid protestors could still voice their rebellious opinions of the system.¹¹⁰ Graffiti also played a role in the communication between the various liberation movements by providing them with a means of leaving messages for one another.¹¹¹ Graffiti was also an emotional tool in which communities could respond to the oppression of the Apartheid state. An example of such, was painted on a wall in a Cape Town slum by Falko, Wealz and Faith47 in response to the demolition of interracial communities as required by the Group Areas Act.¹¹² Over and above this there was also a poster protest movement which entailed the posting of illegal anti-Apartheid posters in townships where the majority of South Africans could access them.¹¹³ This movement continues in South Africa, specifically by the Burning Museum collective which uses the art form to highlight current social issues by pasting posters onto the walls of public buildings, galleries and museums.¹¹⁴ Sadly, most of this resistance art is lost to history despite its cultural and historical significance to South Africa.¹¹⁵

Admittedly, a significant amount of this graffiti resistance art would have been destroyed by the Apartheid government themselves because the political graffiti contradicted Apartheid law and policies, hence a crime. However, even post-1994,

¹⁰⁹ Kurtz https://www.nonviolent-conflict.org/wp-content/uploads/2016/04/kurtz_south_africa.pdf (Date of use: 7 March 2020) 5.

¹¹⁰ See Nippard <https://www.dw.com/en/south-african-street-artists-paint-for-the-people/a-14902960> (Date of use: 2 November 2016) for a discussion of the influence of anti-Apartheid graffiti and its influence on Faith47.

¹¹¹ NLA Designs and Visual Art <https://nladesignvisual.wordpress.com/2013/04/06/resistance-or-protest-art-in-south-africa-background/> (Date of use: 2 November 2016). For more on the South African resistance art movement see Williamson *Resistance Art*.

¹¹² Group Areas Act 41 of 1950 (hereinafter referred to as the Group Areas Act). The story of this artwork was included in the graffiti documentary *Bomb It*. See *Bomb It* <http://www.bomb-it-movie.com/> (Date of use: 24 January 2017).

¹¹³ Francis *Re-facing Societies* 6-8.

¹¹⁴ Hewson <https://www.contemporaryand.com/magazines/protest-art-in-south-africa-and-beyond-2/> (Date of use: 16 May 2018). See also Burning Museum <https://burningmuseum.wordpress.com/> (Date of use: 16 May 2018).

¹¹⁵ Graffiti can be viewed as an integral aspect of a resistance movement, this is apparent in many countries which have or are experiencing some form of political revolution such as Egypt and Palestine. See for instance Owens *Egyptian Graffiti and Street Art* chapter 13.

more artwork has been lost because this form of resistance art is still considered to be to graffiti.¹¹⁶ An example of such resistance art used to exist in Observatory, Cape Town. The work, painted by an anonymous artist, read *Free Mandela* (circa unknown, presumed to have been painted during Nelson Mandela's imprisonment 1963-1990).¹¹⁷ Unfortunately, this example of graffiti resistance art was painted over by the City of Cape Town due to the CPT Graffiti By-Law that does not differentiate between graffiti and street art and thus, considers this form of resistance art to be a public nuisance. Local artists, upset by the loss of this piece, petitioned the municipality (unsuccessfully) to repaint the slogan because of the meaning and impact the painting had on that community and South African heritage, albeit that the 'original' work had already been destroyed.¹¹⁸ This street artwork is just one example of protest art that has been scrubbed because of the criminalisation of graffiti and the failure of the law to accommodate street art.¹¹⁹ Very little of this specific form of resistance art was, and is, documented, therefore it is impossible to know what has been lost. Almost none has been preserved for future generations and what graffiti resistance art remains is under threat of damage or destruction because the law treats it as a public nuisance.¹²⁰

The failure to view these street artworks as art, to take into consideration that graffiti may not always be a public nuisance but that some graffiti may be art, has resulted in the loss of important pieces of South African heritage. If this position does not change it could result in the loss of more artworks. Consequently, understanding street art in terms of crime alone is an over-simplification of the art form and the various meanings and styles that it can take. This understanding fails to view street

¹¹⁶ For more on resistance art see Williamson *Resistance Art*, in particular, her focus on graffiti as resistance art at 83 – 98.

¹¹⁷ Mackay http://wiredspace.wits.ac.za/jspui/bitstream/10539/19894/3/T%20Mackay_Research%20Report_Reading%20Rebellion_Oct2015.3.pdf (Date of use: 16 April 2019) 18.

¹¹⁸ Mposo <http://www.iol.co.za/news/south-africa/western-cape/bring-back-free-mandela-graffiti-1563507> (Date of use: 3 November 2016).

¹¹⁹ Most graffiti resistance art may not meet the aesthetic standards of traditional art, however, as already stated, one of the differences between street art and graffiti is the motivation behind the piece. The motivation underlying resistance art has cultural significance (as opposed to vandalism) and thus can be considered as street art.

¹²⁰ What has been preserved is mostly in photographic records such as Williamson *Resistance Art*; the physical artwork has not been preserved.

art as a heterogeneous and complex phenomenon.¹²¹ Bates notes that street art can have historical resonance in that it can be social commentary and it can also provide evidence of the events of a certain time period.¹²² Viewing this form of art as cultural heritage is a method of,

‘sustaining a legacy left not by traditional archival resources, but by marks made on a wall – which still provide insight into the past. The only difference is the physical artefact that is preserved; rather than books or architectural drawings, it is paint on a vertical surface.’¹²³

It seems naïve and outdated to continue to view street art as a public nuisance. Instead, the law needs to develop as the art worlds and the public’s perception of street art has.

1.5 *The purpose of the study*

The purpose of the study is to determine who the owner of South African street art should be: either street art should belong to the owner of the property upon which the artwork is located, the street artist or, where the street art is culturally significant, the South African public (represented by the state and/or the relevant heritage authority).¹²⁴ Consequently, the purpose of the study has two main paths. One, to determine who the owner of street art is in terms of the current SA property law regarding original acquisition of ownership; either the person who owns the property on which the street art is painted or the street artist. Two, to determine whether the answer provided to question one is acceptable for street art that is culturally significant. In other words, can the owner of the street art (as determined by property law) that is culturally significant ensure the protection and preservation of cultural heritage resources.

¹²¹ Halsey and Young 2002 *The Australian and New Zealand Journal of Criminology* 165.

¹²² Bates *Bombing, Tagging, Writing* 87.

¹²³ Bates *Bombing, Tagging, Writing* 88.

¹²⁴ These are original owners, not owners who may acquire ownership through derivative acquisition. See the limitation at 1.5.1 a).

The first aspect of the study requires analysing the ownership of street art from the perspective of South African property law. A significant portion of street art is created on the immovable or movable property belonging to someone other than the artist. South African property law determines ownership of artwork through the common law of *accessio* and in certain circumstances the artist may become the owner of the artwork (and the property on which the art is located) as opposed to the owner of the surface on which it is painted.¹²⁵ Such enquiry will evaluate whether street art belongs to the owner of the property upon which it is located or to the street artist.

Then, as highlighted in the *Spy Booth* and *Mobile Lovers* cases, the public has an interest in preserving, protecting and accessing culturally significant street art. Consequently, South Africa's cultural heritage legislation needs to be examined to determine whether the limitations placed on private ownership of cultural heritage resources can ensure the protection, preservation and accessibility of culturally significant street art.¹²⁶ Should private ownership of culturally significant street art not ensure the protection, preservation and accessibility of such then the state may need to assume ownership. It may be preferable for the state to assume ownership of some culturally significant street art to fulfil its responsibility regarding South Africa's cultural heritage resources as the custodian of South Africa's cultural heritage.

This requires examining the limitations placed on private ownership by South Africa's cultural heritage legislation. These limitations could be a deprivation of an owner's property right.¹²⁷ However, in the instances where private ownership is not guaranteed the protection and preservation of the resource then the expropriation of this form of property needs to be explored.

In view of this, should the ownership of South African street art ever be called into question (which, with the international acclaim of South African street artists is

¹²⁵ Van der Walt and Pienaar *Law of Property* 115-116.

¹²⁶ Gómez 1992-1993 *U Mich JL Reform* 705-706.

¹²⁷ The Constitution s25(1).

becoming a possibility) this study will be informative as to how ownership may be determined. The study also offers guidance to the state (represented by the Department of Arts and Culture (DAC), the South African Heritage Resource Agency, and the National Arts Council) as to whether they should take an interest in the protection and preservation of street art as cultural heritage resources. And, if they do, whether this should be achieved through the deprivation of property or the expropriation of property.

1.6 *The scope of the study*

Admittedly, as already discussed, not all graffiti can or should be viewed as street art.¹²⁸ A distinction between graffiti which qualifies as street art and graffiti which is a public nuisance needs to be made.¹²⁹ As Gomez argues '[v]andalism is a crime; graffiti can be art'.¹³⁰ Only some examples of South African street art may be culturally significant and should not be viewed as a public nuisance. Instead, the value of these selected artworks as cultural heritage resources should be recognised, and should be protected and preserved as such.

A determination will have to be made as to which examples of street art have cultural heritage significance and are thus worthy of the protection provided by the status as a cultural heritage resource. After all, the laws regarding cultural heritage protection can only be enforced once the *res*¹³¹ is recognised as a cultural heritage resource.¹³² Therefore, '[a] key question here would be: at what point does graffiti pass from being a contemporary blight on the landscape to a valued "historical indicator" of socio[-]political events and issues?'¹³³

¹²⁸ See part 1.3.

¹²⁹ Gómez 1992-1993 *U Mich JL Reform* 633.

¹³⁰ Gómez 1992-1993 *U Mich JL Reform* 697.

¹³¹ *Res* is the accepted Latin term used in property law. It is used to mean 'thing', which in turn means, 'a specific category of property, which is defined with reference to its characteristics: a corporeal object outside the human body, and an independent entity capable of being subjected to legal sovereignty by a legal subject for whom it has use and value'. Van der Walt and Pienaar *Law of Property* 9 (see 17-18 for the classification of things).

¹³² Roodt *Cultural Heritage* xxxi. The granting of cultural heritage status is governed by the NHRA to be discussed in detail in chapter 3.

¹³³ Halsey and Young 2002 *The Australian and New Zealand Journal of Criminology* 167.

Albeit, deciding which South African works are merely graffiti, which are street art, and which examples of street art carry cultural heritage significance is not necessary to do in this study; the decision whether an artwork qualifies as a cultural heritage resource will be the responsibility of the South African Heritage Resources Agency.¹³⁴ This study only suggests that there is street art that could warrant this status and should be considered for such. Works such as Shepard Fairey's *The Purple Shall Govern* and the remaining artworks in Faith47's *Freedom Charter Project* are examples of street art that could be considered for cultural heritage resource status.

The motivation, aesthetic, artistic, and potential financial value of the street artwork would be persuasive factors.¹³⁵ Of course, the cultural value the street art has to the community in which it is located, and/or to South Africa, may also affect the outcome of a heritage status application. In this light, it is unlikely that examples of graffiti would warrant the protection provided to cultural heritage resources; as previously discussed, the different motivations for graffiti and street art would probably preclude graffiti from having cultural significance.¹³⁶ As it is street art which is considered to be an identifiable art form, the artistic value of street art is probably higher than graffiti; and, as the intention is often essential to the artwork, street art is more likely to have cultural significance. Therefore, it is more conceivable that street art be considered for cultural heritage resource status.

The South African Heritage Resources Agency has an online application process for the nomination of heritage sites and objects.¹³⁷ The nomination process requires the applicant to provide a reason for the nomination and motivate for the significance of the piece, amongst other necessary information. Importantly, the process also requires the inclusion of consent forms from relevant parties in the application (if applicable) such as the consent of the owner of the property on which the street art

¹³⁴ SAHRA <http://www.sahra.org.za/sahris/about/about-sahra> (Date of use: 15 December 2015).

¹³⁵ The market value of an item may provide some insight into the intrinsic value of the item. Cornu 2006 *Art Antiquity and Law* 162.

¹³⁶ See the discussion in 1.2.

¹³⁷ SAHRA <http://www.sahra.org.za/sahris/sites/default/files/website/articledocs/Site%20and%20object%20nomination%20process.pdf> (Date of use: 19 June 2018).

is located. However, this consent can only be provided for street art if there is an identifiable owner. The owner of street art may not be the person in possession of the *res* on which the art is located.¹³⁸

For these reasons, an application for cultural heritage status is unlikely to be successful (in the case of street art) if consent from the property owner is not included. Accordingly, determining who the owner of a street artwork is will be necessary, before an application for cultural heritage status can be made.

Further, considering that South African street artists' work is gaining international recognition and that their legal artworks sell for substantial amounts, it is worth investigating who owns street art in South Africa because acquiring ownership of such an artwork could result in the acquisition of a valuable asset. In addition, Roodt notes that 'different conceptualizations of property rights and ownership ... may present difficulties', in the protection of cultural heritage objects.¹³⁹

Consequently, this study begins by examining the South African legal position on the original modes of acquisition of ownership of art through *accessio* in so far as it applies to the creation of street art. *Accessio* is the "accepted" original mode of acquisition of ownership used for artworks in South African law.¹⁴⁰ However, two other modes of original acquisition of ownership are also relevant. *Specificatio* will also be studied as a potentially better method for acquisition of ownership of artworks.¹⁴¹ Moreover, the acquisition of *res nullius* will be explored, because street art may be considered abandoned once the artist has completed the work.¹⁴²

Further, because ownership of street art may be acquired by the street artist who acted illegally or by an intervening party, the question of what is just arises. Thus, it will be determined whether the original owner of the *res* on which the street art is located can claim compensation for the loss of his property (and the legal action

¹³⁸ Van der Luit-Drummond <http://jvdl.com/2013/02/24/who-really-owns-public-art/> (Date of use: 16 February 2015).

¹³⁹ Roodt *Cultural Heritage* xxii.

¹⁴⁰ Van der Walt and Pienaar *Law of Property* 115-116.

¹⁴¹ Van der Walt and Pienaar *Law of Property* 124.

¹⁴² Van der Walt and Pienaar *Law of Property* 113.

they could use to do so) or whether any criminal law rules could prevent ownership from transferring. Thus, this study considers the potential owners of street art (the original owner of the *res* on which the art is located,¹⁴³ the artist,¹⁴⁴ or a possible intervening party who acquires ownership of a *res nullius*) and ascertains who has the best claim to these potentially valuable artworks.¹⁴⁵

The common law regarding original acquisition of ownership in the case of *accessio*, *specificatio*, and *res nullius* comes from Roman law. These laws were not developed for the legal demands of contemporary South African society, yet they are still applicable. The rise in the popularity of street art provides a unique opportunity to examine the continued appropriateness of these laws and to explore the potential development of these laws.¹⁴⁶

Determining the ownership question resolves who has rights and duties over the property and may provide guidance as to who is responsible for the protection and preservation of street art. Ownership may be limited and are already limited for various reasons. One of the ways in which ownership can be limited is if the limitation is in the public interest.¹⁴⁷ In fact, ownership is already limited in the public interest by the *sic utere tuo ut alienum non laedas* principle, in the interests of the community (such as nature conservation)¹⁴⁸ in the interests of those disadvantaged by South Africa's colonial and Apartheid history,¹⁴⁹ in the interests of human dignity,¹⁵⁰ and for economic, social and political reasons.¹⁵¹ In fact it is possible that ownership of street art could be limited to an extent that it requires the owners to protect and preserve street art which has cultural heritage value because the

¹⁴³ Barnett 2013 *Chi-Kent J Intell Prop* 208 – 210; Karmel 2011-2012 *Columbia Journal of Law and Social Problems* 353-356.

¹⁴⁴ Barnett 2013 *Chi-Kent J Intell Prop* 205 – 208; Howell <https://wjlta.wordpress.com/2011/05/12/selling-the-writing-on-the-wall-does-copyright-protect-the-work-of-graffiti-artists/> (Date of use: 4 July 2014).

¹⁴⁵ Van der Walt and Pienaar *Property* 113 -114.

¹⁴⁶ Hutchinson and Duncan 2012 *Deakin Law Review* 101. Van Warmelo *The Vicissitudes of Roman-Dutch Law* 2.

¹⁴⁷ Van der Walt and Pienaar *Law of Property* 50.

¹⁴⁸ *Corium (Pty) Ltd v Myburgh Park Langebaan (Pty) Ltd* 1993 (C).

¹⁴⁹ *Diepsloot Residents' and Landowners Association v Administrator Transvaal* 1994 (A).

¹⁵⁰ *Port Elizabeth Municipality v Various Occupiers* 2005 (CC).

¹⁵¹ Van der Walt and Pienaar *Law of Property* 50-53.

protection and preservation of South Africa's cultural heritage resources is in the public interest.

Thus, once the study of *accessio* and *specificatio* has resolved whether the owner of the illegal street art is the artist or the owner of the property on which the artwork is located the study explores whether this determination is appropriate to ensure the protection and preservation of culturally significant street art. Should privately owned street art be identified as a cultural heritage resource would such identification ensure the protection and preservation of the resource. Consequently, this part of the study begins with an exploration of the SA law regarding cultural heritage. The chapter seeks to determine why cultural heritage is important, what types of *res* are considered for cultural heritage status and whether this could include street art. Further, how cultural heritage status is acquired and what protection this may offer for specific examples of street art that could be considered for the status. This aspect of the study also highlights issues with the current legislation regarding cultural heritage resources.¹⁵²

Identifying examples of street art as cultural heritage resources has the potential to limit an owner's property rights. However, the limitation may not guarantee the protection and preservation of the property (and it may place too heavy a burden on private property owners); the duty to protect and preserve street art may be an unjustifiable limitation on property rights. The limitation of this form of property may not ensure the purpose of the deprivation.

In light of these concerns and with regard to the state's responsibility to conserve and manage South Africa's cultural heritage resources, it is suggested that the state could assume the burden to protect and preserve street art which has cultural heritage significance.¹⁵³ Indeed, it may be preferable for these *at risk* heritage resources to be possessed or owned by the state and for the responsibility for the preservation and protection of these resources to be taken on by the state.

¹⁵² Identified during the analysis of the NHRA.

¹⁵³ NHRA, Preamble.

This aspect of the study entails an examination of the South African law regarding expropriation; to understand what type of property and under which circumstances private property can be expropriated, by the state, in the public interest to conserve South African cultural heritage resources.¹⁵⁴ By default this requires an examination of the deprivation of property, because the expropriation of property can be viewed as a form of deprivation.¹⁵⁵

Finally, the study concludes with a summary; a statement on who the owner of a South African street art is and the legal tools that exist to ensure that street art which has cultural heritage value may be protected and preserved for future generations.

1.6.1 Limitations on the scope of the study

The academic study of graffiti and/or street art is relatively new. Consequently, there are many aspects of these art forms and how these art forms function in a legal system that need to be examined. To limit the scope of the study and to highlight issues that may be raised in the study which are not explored, it is necessary to include several limitations:

a) This study examines the original modes of acquisition of *accessio*, *specificatio*, the acquisition of *res nullius* and expropriation. No other original modes of acquisition are considered; nor will any derivative modes of acquisition be considered.

b) In relation to a) it is noted that the study is only concerned with ownership of street art, no other art forms are considered. However, as the discussion of *accessio* and *specificatio* concerns the ownership of *tabula picta*, by default this discussion applies to other forms of painting.

c) Importantly, in limiting the study to street art, the study assumes that rock art is not a form of graffiti. Defining graffiti to the exclusion of rock art is in no way

¹⁵⁴ The Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution) s25(2). Expropriation Act 63 of 1975 (hereinafter referred to as the Expropriation Act).

¹⁵⁵ Van der Walt and Pienaar *Law of Property* 349.

definitive, however in this study rock art is not explored within the definition of graffiti. This limitation is justified because most rock art had or has, 'something to do with ritual, and, therefore, was in part a community-sanctioned pastime'.¹⁵⁶ Thus, the permitted nature of rock art distinguishes it from the illegal nature of graffiti. Regard must also be given to the traditional concept of wall painting or decoration that is native to many South African cultures.¹⁵⁷ However, artists in this style usually paint on their own property or the property of others with permission to do so. Thus, this does not have an illegal nature and is not included in this research.

d) It is noted that street art can be both tangible and intangible cultural heritage, that is, street art can be viewed as both a product of culture and cultural practice.¹⁵⁸ The purpose of this study, the protection and preservation of street art as cultural heritage resources, may interfere with the intangible practice of street art. The protection and preservation of selected street artworks may change the ephemeral nature of those artworks. As Turner notes,

'...[t]he problem of preservation asks, what is risked or lost in the attempt to preserve? It is often remarked that the attempt to preserve culture risk fossilizing it ... much of the value of Culture lies in it being a vibrant part of lived experience ...'¹⁵⁹

The heritagisation of street art raises the question of authenticity. It may be suggested that the ephemeral nature of street art is integral to the art form. Thus, pursuing heritage status for street artworks may interfere with the intangible cultural practice and may go against the purpose of legislative protection for culture and cultural heritage. In other words, protecting and preserving street artworks as cultural heritage resources may interfere with street art culture. Instead of preserving

¹⁵⁶ Lewisohn *Street Art* 26.

¹⁵⁷ Frescura *Culture in the New South Africa* 65-90.

¹⁵⁸ For a discussion of graffiti as intangible cultural heritage see Merrill 2015 *International Journal of Heritage Studies* 380-382.

¹⁵⁹ Turner 2006 *International Journal of Cultural Property* 354-355.

aspects of that culture, preserving street art may change or disrupt the culture.¹⁶⁰ This is a significant issue which warrants its own, dedicated study as such, this issue is not explored in this thesis.¹⁶¹

e) Building on from the above limitation, due to the foundation of this study being based in property law (specifically ownership of physical or corporeal property), the focus is on cultural heritage sites and cultural heritage objects (tangible cultural heritage) and the legislation concerning the promotion and protection of such.¹⁶² To this end, the field of intellectual property law is not examined. Reference may be made to intellectual property, but such area of law does not form the basis for this study.¹⁶³ Instead, the focus of the study is on the real right in the tangible or corporeal thing (artwork) analysing the original modes of acquisition of ownership in property law and the protection of street art as cultural heritage sites and objects.¹⁶⁴ Afterall, '[i]ntellectual property rights do not protect the rights of ownership in the physical object in which the intellectual property is embodied'.¹⁶⁵ The copyright of the artist is distinguished from the rights of ownership in the *res*.¹⁶⁶ Thus, this study only concerns the real rights in the tangible or corporal property upon which the street art is located. The conclusions reached regarding ownership of the *res* do not

¹⁶⁰ See Merrill 2015 *Internal Journal of Heritage Studies* 380 – 385 and the sources therein for a discussion on authenticity. See also Mulcahy and Flessas 2016 *Law, Culture and the Humanities* 13–14.

¹⁶¹ Bates suggests that the ephemeral nature need not exclude graffiti from heritage recognition, noting that there are other art forms such as theatre that are ephemeral but still considered to be part of a country's heritage. Bates *Bombing, tagging, writing* 80-82.

¹⁶² Mulcahy and Flessas 2016 *Law, Culture and the Humanities* 9.

¹⁶³ It is debatable whether a graffiti artist can have the copyright to their illegal artworks as copyright does not arise for works that are *contra bonos mores*. *Goeie Hoop Uitgewers (Edms) Bpk v Central News Agency* 1953 (2) SA 843 (W), Ramsden *Intellectual Property Law* 224. Graffiti is *contra bonos mores* (it is a crime) and this may mean that a graffiti artist would not be able to enforce copyright. For more on this field of study see Ilijadica *Copyright Beyond Law*, Schwender 2007 – 2008 *J Copyright Soc'y USA* 257, Rizk 2015 *The African Journal of Information and Communication* 45, Lerman 2012 – 2013 *NYU J Intel Prop & Ent L* 295, Roundtree 2012-2013 *Cardozo Arts and Ent L J* 959 and Howell <https://wjlta.wordpress.com/2011/05/12/selling-the-writing-on-the-wall-does-copyright-protect-the-work-of-graffiti-artists/> (Date of use: 4 July 2014). For an interesting example of the conflict regarding ownership of art and the intellectual property of the artist see The Telegraph <https://www.telegraph.co.uk/culture/art/10963754/Spot-of-bother-over-Damien-Hirst-wall-art-painting.html> (Date of use: 6 April 2018).

¹⁶⁴ See Ramsden *Intellectual Property Law* 1-2 for a discussion on the difference between real rights and intellectual property rights. See also Adams and Adams *Practitioner's Guide* 1-3.

¹⁶⁵ Ramsden *Intellectual Property Law* 2.

¹⁶⁶ Ramsden *Intellectual Property Law* 55.

affect the intellectual property rights of the artist. The exploration of the effect of intellectual property law on the ownership of street art in South Africa warrants a study on its own. Consequently, it exceeds the scope of this study.

f) Upon deciding who has acquired ownership of the street artwork further questions arise, such as whether the owner will be profiting from the proceeds of a crime should they sell such artwork. Whether any third parties involved in the sale of street art (such as an auction house or art gallery) could also be viewed as profiting from the proceeds of a crime.¹⁶⁷ Further, would cultural heritage law outweigh the criminal law in such cases? If the street art is evidence of a crime or the proceeds of a crime can it be considered for heritage protection?

Despite the importance and value of these questions, they warrant their own investigations. The criminal law aspect of the study will thus be limited to the illegal nature of graffiti.¹⁶⁸

In keeping with this limitation, the study is not a comprehensive survey of the various municipal by-laws criminalising graffiti in South Africa. Instead, two by-laws have been selected as examples, namely; the CPT Graffiti By-law and the JHB Graffiti By-law. The City of Cape Town: Graffiti By-law 2010 is selected as it is the most severe by-law concerning graffiti in the country. The City of Johannesburg Metropolitan Municipality Public Open Spaces By-laws 831 of 2004 chosen for a few reasons: Johannesburg is the economic hub of South Africa, it has the highest

¹⁶⁷ See s 4, 5, 6 and 12 of the Prevention of Organised Crime Act 121 of 1998 (hereinafter referred to as the POCA. As well as the Proceeds of Crime Act 76 of 1996 (hereinafter referred to Proceeds of Crime Act). Companies such as the Sincura Group have specialised in removing street art and preserving it on behalf of a private property owner and consequently profits from the removal and preservation of such art. See Sincura Group <http://www.thesincuragroup.com/> (Date of use: 9 November 2016). And the project run by the Sincura Group which considers the moral and legal issues surrounding the sale of street art, Sincura Arts Ltd “The controversial Banksy Book” <http://banksybook.com/> (Date of use: 14 June 2019). For more on the process to safely remove street artworks from the buildings to which they are attached see Smallman <https://www.independent.co.uk/arts-entertainment/art/features/how-do-you-remove-a-banksy-mural-9142482.html> (Date of use: 6 April 2018) and Tsang <https://www.domain.com.au/news/a-hidden-banksy-artwork-removed-and-restored-to-be-displayed-by-a-london-developer-20170823-gy2u8y/> (Date of use: 2 August 2018).

¹⁶⁸ For more on the criminalisation of street art in South Africa see Smith 2014 SACJ 181.

population (and highest population density) and, like Cape Town before the CPT Graffiti By-law, has a burgeoning street art movement.

In addition, the study touches on various statutes concerning culture / cultural heritage and cultural heritage resources. It is not an exhaustive study of each relevant statute; it only examines the legislation and aspects of that legislation regarding the protection and preservation of street art as a cultural heritage resource. Further, the study is limited predominantly, to national legislation. The provincial, and/or local structure developed to support this framework is not discussed unless relevant for exemplary use.

g) In terms of the South African common law, graffiti falls under the crime of malicious damage to property. However, some South African by-laws include graffiti within the category of public nuisance. Further, in some instances (especially in foreign jurisdictions) graffiti is defined as vandalism. The terms: malicious damage to property, public nuisance and vandalism are used interchangeably throughout the study, merely to avoid repetition. However, it is noted that in South Africa, legally, graffiti falls under the rules concerning malicious damage to property.¹⁶⁹

h) As there are no South African street artworks which are recognised as cultural heritage resources reliance is made to various foreign examples of street art (and/or street artists) that are or were considered culturally significant. Significantly, the artworks of the UK artist Banksy will be predominant.¹⁷⁰ Banksy is a prolific artist, his artwork is popular worldwide, and he is commercially successful. Some of his street artworks have acquired heritage status. However, this study is not a comparative study with the English approach to protecting and preserving Banksy's artwork.¹⁷¹ Rather, his examples are instructive as potential scenarios for South Africa street art.

¹⁶⁹ Burchell *Principles of Criminal Law* 849-852. See also *R v Bowden* 1957 (3) SA 148 (T).

¹⁷⁰ Banksy www.banksy.co.uk (Date of use: 20 December 2018). See also Banksy *Wall and Piece* and Ellsworth-Jones *Banksy*.

¹⁷¹ See for example Hackney Council Graffiti Policy 2013 available at <https://www.hackney.gov.uk/graffiti> (Date of use: 23 January 2017).

However, to justify the argument for protection and preservation of street art and the potential cultural heritage status of certain street artworks, the English experience is informative. England is home to some of the most famous street art and artists. England has also experienced cases of street art being sold by the possessors or owners of property on which the art is located, as well as having examples of street art considered for heritage status. The English law and experience may offer feasible lessons as to how to proceed with assigning ownership of street art and for the protection and preservation of street art because they form part of cultural heritage.¹⁷²

Further, as this study deals with a problem that is currently hypothetical (it has not been tested in South African courts) reference will be made to various foreign case law, artists (including graffiti artists) and useful foreign legislation to justify certain aspects of the study. Indeed, as very few foreign jurisdictions have had to grapple with questions regarding the ownership of street art or the heritagisation of street art, it is necessary to rely on these various examples (and jurisprudence) where relevant, in order to justify the arguments contained in some parts of this study.

This study is also not a comparative study of any other foreign jurisdiction whose examples have been relied upon.¹⁷³ The examples are merely instructive for the development of the law and the approach of heritage bodies to South African street art.

i) This is also not a study of the international law concerning cultural heritage. There is a vast body of international law concerning cultural heritage and many international organisations which are focused on cultural heritage. Indeed, South Africa is represented in many of these organisations and is a signatory to many of

¹⁷² The influence of the English Waverley Criteria on the development of the NHRA should also be recognised. See Maurice and Turner 1992 *IJCP* 276-283 for more on the Waverley Committee of 1952. See also Roodt *Cultural Heritage* 20.

¹⁷³ For a comparative study on the legal aspects of the protection of cultural heritage see Roodt *Cultural Heritage*. See also O'Keefe and Prott *Cultural Heritage Conventions* for a discussion of the international conventions and instruments surrounding cultural heritage.

the international documents.¹⁷⁴ For instance, in 1946 South Africa was one of 20 member states that first signed and ratified the Constitution of the United Nations Educational, Scientific and Cultural Organization.¹⁷⁵ South Africa was also among the state parties to sign and ratify the Convention for the Protection of Cultural Property in the Event of Armed Conflict.¹⁷⁶ South Africa is one of the state parties to the Unidroit Convention on Stolen or Illegally Exported Cultural Objects.¹⁷⁷ South Africa is also a member of the International Council on Monuments and Sites (ICOMOS), the International Council of Museums (ICOM), the International Centre for the Study of the Preservation and Restoration of Cultural Property (ICCROM), amongst others.¹⁷⁸ There is much jurisprudence concerning this international law and consequently this study does not discuss the international law or the various organisations which support it.

j) The study is not a historical study of South Africa's fight against Apartheid and the struggle for self-determination. The term self-determination as used herein encompasses, 'the possibility to live under those political, social and cultural conditions that correspond best with [South Africa's] characteristic singularity, and above all to protect and develop its own identity'.¹⁷⁹

k) Various examples of South African street art are used throughout this study. Whether, these pieces of art have artistic, financial, and cultural value and could be considered for heritage status (and potentially be included within the national estate) remains to be decided by the South African Heritage Resources Agency. The study cannot definitively conclude that these chosen examples hold cultural significance and qualify for cultural heritage resource status. The study uses these examples to

¹⁷⁴ For more on this topic see Forrest *International Law*, Roodt *Cultural Heritage*, O'Keefe and Prout *Cultural Heritage Conventions*, Kotze and Jansen Van Rensburg 2003 *QUTLJJ* 125.

¹⁷⁵ UNESCO <http://www.refworld.org/docid/3ddb73094.html> (Date of use: 27 October 2017).

¹⁷⁶ UNESCO <http://www.refworld.org/docid/40422c914.html> (Date of use: 27 October 2017).

¹⁷⁷ UNIDROIT <https://www.unidroit.org/instruments/cultural-property/1995-convention> (Date of use: 2 January 2019).

¹⁷⁸ ICOMOS <https://www.icomos.org/en/about-icomos/mission-and-vision/mission-and-vision> (Date of use: 20 December 2018); ICOM <https://icom.museum/en/about-us/> (Date of use: 20 December 2018); ICCROM <https://www.iccrom.org/about/overview/what-iccrom> (Date of use: 20 December 2018).

¹⁷⁹ Murswiek *Secession* 38.

highlight examples of street art which may warrant protection and preservation and could be considered for cultural heritage resource status.

l) The budget provided to the Department of Arts and Culture (DAC) (and subsequently to institutions such as the South African Heritage Resources Agency and the National Arts Council) are not discussed in any detail. The intention of this study is to investigate the theoretical and legislative foundations for the protection and conservation of street art, not the practicability of such.¹⁸⁰

m) The new Expropriation Bill is set to be enacted.¹⁸¹ The intention of the new Expropriation Bill is to speed up, increase and better achieve the nation's commitment to land reform, with a focus on expropriation without compensation. The Expropriation Bill was intended to be promulgated in 2013, then in 2015, and again in 2016. However, the Bill still has Constitutional infringements that need to be resolved before enactment.¹⁸² The need to better ensure land reform may also result in changes to section 25 of the Constitution.¹⁸³ Indeed, the National Assembly has agreed to amend s25 in order to make expropriation of land without compensation more explicit.¹⁸⁴ This has resulted in the Constitution Eighteenth Amendment Bill.¹⁸⁵ Both Bills are yet to be passed and it is unclear as to whether s25 will be amended and, if it is, when such amendment may occur. Consequently,

¹⁸⁰ For a short discussion on the capacity of states to protect their cultural heritage see Chirikure 2013 *South African Journal of Science* 17.

¹⁸¹ Expropriation Bill B4 2015 as introduced in the National Assembly (proposed section 76) (hereinafter referred to as the Expropriation Bill. A previous Bill was submitted in GN 440 Government Gazette 30963 of 11 April 2008 however, this Bill was withdrawn.

¹⁸² South African Institute of Race Relations <http://irr.org.za/reports-and-publications/submissions-on-proposed-legislation/irr-full-submission-on-the-expropriation-bill-2013-6-may-2015> (Date of use: 7 December 2015).

¹⁸³ The Constitution, 1996 s25 (hereinafter referred to as s25).

¹⁸⁴ Parliament of the Republic of South Africa <https://www.parliament.gov.za/press-releases/national-assembly-approves-process-amend-section-25-constitution> (Date of use 11 April 2019).

¹⁸⁵ Constitution Eighteenth Amendment Bill (draft) available at https://www.parliament.gov.za/storage/app/media/CommitteeNotices/2019/december/06-12-2019/Draft_advertised.pdf (Date of use: 25 March 2020)

the deprivation and expropriation section is based on the current law, specifically, the Constitution and the Expropriation Act 63 of 1975.¹⁸⁶

n) In light of the above limitation, the study highlights the current method used by the state for calculating compensation for the expropriation of property.¹⁸⁷ However, as this method is likely to change (it may become possible to expropriate cultural heritage sites without having to pay compensation) this aspect of the study is not comprehensively dealt with.

o) The terms 'protect' and 'preserve' are used regularly in the study. These terms are intended to hold their ordinary meanings, protect means to, 'keep safe' and preserve means to, 'maintain in its original or existing state'.

1.7 Research Methodology

Legal research is traditionally doctrinal, '[r]esearch which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future developments'.¹⁸⁸ In line with this tradition this study relies on the authoritative sources of the common law, legislation and case law as well as relevant books, journal articles, and internet sources. These texts are reviewed, analysed and interpreted to understand how the law of property and the legislation concerning cultural heritage can be developed to account for changes and developments in South African society (in this case the recognition of the cultural significance of street art). The study goes further than doctrinal analysis in that, it is reform-orientated - it, 'intensively evaluates the adequacy of existing rules and ... recommends changes to any rules found wanting'.¹⁸⁹

¹⁸⁶ For an example of the debate surrounding the amendment of s25 see Musker <https://www.dailymaverick.co.za/opinionista/2018-08-02-the-real-problem-with-amending-the-constitution/> (Date of use: 20 December 2018).

¹⁸⁷ Department of Land Affairs *Policies and Procedures* at 1.7.1.1.1.

¹⁸⁸ Hutchinson and Duncan 2012 *Deakin Law Review* 85 and 101. For more on legal research methodology see Kroeze 2013 *PER* 36.

¹⁸⁹ Hutchinson and Duncan 2012 *Deakin Law Review* 101. See also Coleshaw <https://uweasclmsupport.wordpress.com/2017/01/18/research-methods-doctrinal-methodology/> (Date of use: 9 April 2019).

The research focuses predominately on two legal disciplines, namely property law and cultural heritage law. However, constitutional law, delict and unjustified enrichment are also considered.

1.8 *Structure of chapters*

The structure of the chapters follows the format followed in the Problem Statement (part 1.4). The study begins with this Introduction chapter. The second chapter concerns the original acquisition of ownership. The chapter explores the original acquisition of street art through *accessio* and *specificatio* and the acquisition of street art as a *res nullius*. This chapter also includes a part on claims for compensation following the loss of ownership, and questions whether the criminal law could prevent ownership from transferring. The third chapter covers cultural heritage resources, namely: the South African legislation on cultural heritage and the bodies tasked with the conservation of South Africa's cultural heritage. As well as the types of property considered for cultural heritage resource status, the process for obtaining cultural heritage resource status, an evaluation of specific examples of South African street art and whether such examples warrant the status of cultural heritage sites or objects and the protection that comes with such status. The fourth chapter considers the limitation of ownership of street art in the public interest (because protecting street art which warrants or has cultural heritage resource status is in the public interest) and whether such a limitation is justifiable. This includes the limitation of ownership through the deprivation or expropriation because such limitation is in the public interest and whether doing so will be justifiable.

The final chapter consists of a summary of what has been presented and a recommendation in respect of whether the protection and preservation of South African street art (which has cultural significance) may be achieved through already existing or amended legislation.

1.9 *The referencing style and the use of old authorities*

The referencing style of the School of Law at the University of South Africa is followed throughout this thesis.

As the author's first language is English most of the research consists of English sources. A few Afrikaans sources have been used as the author is fluent in the language. However, due to the language barrier, the old authorities which have been consulted were the English translations of the original source. For ease of reference, these sources are referred to by the name of the original author as well as the author of the translated work.

Cross-references will refer to *part* of the study instead of section of the study so as not to confuse cross-references with sections of legislation.

CHAPTER 2 ORIGINAL ACQUISITION OF ART THROUGH *ACCESSIO*

2.1 *Introduction*

Street art is created when an artist paints upon the surface of immovable or movable property belonging to someone other than themselves and without the permission of the owner of the surface. As discussed in the previous chapter there are examples of street art that are considered by the art world to hold artistic and financial value. Moreover, there are some South African artists whose legal artworks hold artistic value and financial value (and are respected as artists both nationally and internationally) who are also becoming known for their street art. Thus, as these artists legal artworks hold artistic and financial value acquiring ownership of their street artworks could be a benefit in that they could acquire art which is artistically valuable, but also, importantly, art which will increase their patrimonial wealth.

Consequently, investigating ownership of South African street artworks may assist in future cases, where conflict regarding ownership of such art arises. Afterall, as Van der Walt says,

‘[w]e should be balancing on the very edge of the legal order ... exploring the limits and boundaries of our subject and the extremities of its social function, looking for new answers and new solutions in order to solve new problems.’¹

The South African common law ascribes the original acquisition of ownership of new artworks through *accessio* (original acquisition of ownership).² However, some of the historical sources of South African law (some sources of Roman law and Roman-Dutch law) are less certain as to whether the original acquisition of ownership of artwork should be through *accessio*; instead, both *accessio* and *specificatio* have been suggested by jurists, as the mode of original acquisition.³

¹ Van der Walt 1990 *Stell LR* 47-48.

² Van der Walt and Pienaar *Law of Property* 123.

³ Most of the writers referred to in this chapter recommend that ownership of art be derived through *accessio*. However, in his *Inleidinge* Grotius suggested that ownership of art should be

This chapter concerns the current South African law on *accessio*, the remedies for compensation following *accessio* and whether the current legal approach in South Africa is the appropriate method for the acquisition of ownership of street art. Further, this chapter reflects on whether the option presented by the Roman-Dutch jurist Grotius (that paintings should be not be acquired through *accessio* but rather through *specificatio*) would be a more appropriate legal approach to the growing street art phenomenon.

2.2 Accession

Accessio is the original mode of acquisition of ownership through which the ownership of things which are joined together, such that they cannot be easily separated, is decided. Thus, *accessio* occurs when two or more independent articles are joined into one thing, such that they are identified by one of the original articles.⁴

The current rules for accession developed from South Africa's oldest legal influence; namely Roman law.⁵ Although *accessio* was not included in the Twelve Tables (one of the earliest sources of Roman law), by the time of Justinian's codification of Roman civil law in the *Corpus Iuris Civilis* it was an accepted part of Roman law.⁶ In the *Corpus* are included writings of Gaius on *accessio* (in the *Digesta* and the *Institutiones* which were both in force from 533 CE).⁷

acquired through *specificatio* rather than through *accessio*. Grotius *Inleidinge* 2.8.3 (Herbert *Dutch Jurisprudence* 2.8.3).

⁴ Arnold 1922 *Columbia Law Review* 103. Badenhorst, Pienaar and Mostert recognise that accession can also include the acquisition of ownership of the increase of a thing even though no joining has taken place, such as the offspring of animals and fruits. However, this aspect of *accessio* is not the focus of this study. Badenhorst, Pienaar and Mostert *Silberberg and Schoeman* 199.

⁵ Van der Walt and Pienaar *Law of Property* 5.

⁶ Lewis and Reinhold (eds) *Roman Civilization* 111–112.

⁷ Justinian *Digesta* D41.1 (Watson *The Digest of Justinian* D41.1). Gaius *Institutiones* 1.2.78 (De Zulueta *The Institutes* 1.2.78).

Further, *accessio* was also included in many medieval law writings⁸ and became part of the Roman-Dutch law.⁹ Consequently, *accessio* became part of South African law with the reception of Roman-Dutch law in the Cape and is still recognised as one of the original modes of acquisition of ownership.¹⁰ The operation of *accessio* in South African law is still, essentially, as it was described in the *Corpus Iuris Civilis*.¹¹

The following passage from Van der Walt and Pienaar clarifies the position on the acquisition of ownership of property through accession in current South African (common) law:

‘Accession takes place when two corporeal things or parts of things (usually a principal and an accessory thing) are combined either through human activities or natural processes in such a way that the one thing or part of a thing loses its physical or economic independence and becomes a component of another thing. The thing which remains essentially independent is called the principal thing, while the thing which is merged or combined in such a way that it loses its independence, is called the accessory thing. The owner of the principal thing becomes the owner of the new thing by operation of law without him necessarily being aware of the accession.’¹²

⁸ See the work of Madero *Tabula Picta* in this regard.

⁹ Roman-Dutch jurist Voet described *accessio* as, ‘a method of acquiring ownership by which a thing becomes another’s because it accedes to a more principle thing of that other.’ Gane *The Selective Voet* 41.1.14.

¹⁰ Thomas, Van der Merwe and Stoop *Historical Foundations* 7 – 8. The other legal systems which have affected South African law, namely English law and customary law have not affected *accessio*, thus they will not be discussed in this context. Thomas, Van der Merwe and Stoop *Historical Foundations* 179 – 182; *Aldine Timber Co v Hlatswayo* 1932 TPD 337.

¹¹ Justinian *Digesta* D41.1 (Watson *The Digest of Justinian* D41.1).

¹² Van der Walt and Pienaar *Law of Property* 115-116. For more on accession see du Plessis *Borkowski* 198 – 203 and Olivier, Pienaar and Van der Walt *Property* 101. Further, Lee suggests that accession applies when several things, belonging to many owners, are combined into a single thing; and that the new thing is owned in common (in undivided shares proportional to the value of the things which make up the new thing). Unless one of things is merely an accessory thing, then it accedes to the principal thing which is then owned by the owner of the principle thing. Lee *Property* 14. Badenhorst, Pienaar and Mostert (quoting Voet) describe *accessio* as, ‘a method of acquiring ownership by which a thing becomes another’s because it accedes to a more principal thing of another’. Badenhorst, Pienaar and Mostert *Silberberg and*

Badenhorst, Pienaar and Mostert provide a somewhat more concise definition by stating that;

‘Accession in the law of property literally means an increase of or addition to a thing. Usually, it is said to denote the joinder of two or more separate things in such a way that they henceforth form an entity.’¹³

Therefore, *accessio* applies in circumstances where an immovable has been joined to another immovable (such as the gradual aggregation of earth on the bank of a river), where a movable is joined to an immovable (such as buildings to land) or the attachment of one movable to another movable (such as gemstones to precious metals in the creation of jewellery).¹⁴

2.2.1 Ownership of the joined thing:

According to Voet, ownership:

‘is not adjudged on what is more or less valuable, but on what accedes, that is to say is added for the purpose of adorning the other thing. If this matter is not clear, the greater part attracts to itself the lesser, or the more valuable to the less valuable.’¹⁵

The test to determine who owns the joined thing (created out of separately owned parts) is commonly referred to as the identity test, is predominantly answered by deciding which item loses its independence and has become part of the other thing (the principal thing). In other words, the owner of the principal thing (that which gives

Schoeman 96 (as based on *Voet* 41.1.14). Further, in general definitions of *accessio* tend to exclude descriptions of the acquisition of offspring and fruits, even though these are also forms of accession.

¹³ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman* 199. Interestingly, Badenhorst, Pienaar and Mostert limit *accessio* to the determination of ownership of the increase of the joined thing not to ownership of the *res*.

¹⁴ Van der Walt and Pienaar *Law of Property* 116-123. *Accessio* is not actually an original mode of acquisition of ownership, rather it is process through which the combination of two (or more) things ensures that the accessory thing ceases to exist independently, and the principle thing is increased; however, *accessio* is treated as a mode of original acquisition because accession occurs with or without the co-operation of the previous owner. Carey Miller *The Acquisition and Protection of Ownership* 12. See also Olivier, Pienaar and Van der Walt *Property* 101.

¹⁵ Gane *The Selective Voet* 41.1.14. See also Lee *Property* 14.

the merged item its identity) becomes the owner of the joined thing. Should this factor not be determinate, other factors are then taken into consideration. These factors include, but are not limited to, which thing has greater mass, which thing has greater value and which thing serves simply as decoration.¹⁶

The identity test plays out differently depending on the nature of the property combined; the answer is different for the accession of immovables to immovables, movables to immovables and movables to movables. However, as street art does not concern the accession of an immovable to another immovable this form of *accessio* will not be explored herein. The identity test is only applied to joining of painting (a movable) to immovable property and movable property.¹⁷

2.2.2 The accession of movables to an immovable in the form of *inaedificatio*

For the accession of a movable to an immovable in the form of *inaedificatio* (building) Van der Walt and Pienaar regard the immovable to be the principle thing.¹⁸ In terms of the identity test, it is the immovable (the building/land) which retains its independence and the movable/s (the building material etcetera) which lose its/their identity.¹⁹ Consequently, the owner of the immovable becomes the owner of the composite thing (and in certain circumstances, the owner of the immovable must compensate the owner of the movable).²⁰ This is in line with the common law principle of *superficies solo cedit* which states that the owner of land is also the owner of everything which is permanently attached to the land.²¹

¹⁶ Van der Walt and Pienaar *Law of Property* 116. See also Olivier, Pienaar and Van der Walt *Property* 101.

¹⁷ Maasdorp divides accession into the categories of natural accession (that which occurs through natural causes), artificial or industrial accession (which occurs through a person's labour) and mixed accession (the gathering of fruits). Maasdorp *Maasdorp's Institutes* 35 and 41. See also Silberberg *Property* 200- 218.

¹⁸ Along with *inaedificatio* the accession of movables to immovables also includes planting and sowing. However, this study is only concerned with *inaedificatio*; street art does not concern planting and sowing. Thus, planting and sowing will not be discussed herein. Knobel 2011 *THRHR* 298.

¹⁹ Van der Walt and Pienaar *Law of Property* 122.

²⁰ Van der Walt and Pienaar *Law of Property* 122.

²¹ Van der Walt and Pienaar *Law of Property* 117. See also Olivier, Pienaar and Van der Walt *Property* 105 and Silberberg *Property* 100.

As stated in the previous paragraph, it is the immovable which gives the joined thing its identity. In some cases of accession, it may not always be clear whether a movable has been permanently fixed to an immovable, and determining ownership can be difficult in such instances. In these cases, where the permanence of the attachment is in question, courts have paid regard to the nature and purpose of the attached thing,²² the manner and degree of attachment,²³ and the intention of the annexor to determine whether the accessory is permanently attached to the immovable.²⁴

Where street art has been attached to an immovable it is apparent from the nature and purpose of the attachment, the manner and degree of attachment and the intention of the annexor that the street art is permanently attached to the immovable.²⁵ Thus, the owner of the immovable becomes the owner of the composite thing (the immovable with the artwork). To further enforce this finding, when considering the other factors that are used to determine ownership, it is likely

²² *Standard – Vacuum Refining Co of SA v Durban City Council* 1961 (2) SA 669 (A) (hereafter referred to as *Standard Vacuum*) and *Mpisi v Trebble* 1994 (2) SA 136 (AD).

²³ *Standard Vacuum* 677E-679E.

²⁴ There is some debate regarding the weight that must be given to the intention of the annexor when deciding whether the movable is permanently attached or not. Knobel 2011 *THRHR* 296–304; Freedman 2000 *SALJ* 667–676. See also *Theatre Investments v Butcher Brothers* 1978 (3) SA 682 (A), *Melcorp SA v Joint Municipal Pension Fund (Transvaal)* 1980 (2) SA 214 (W), *Sumatie (Edms) Bpk v Venter* 1990 (1) SA 973 (TPD), *Konstanz Properties (PTY) LTD v WM Spilhaus (WP) BPK* 1996 (3) SA 273 (A), *Senekal v Roodt* 1983 (2) SA 602 (T); Lewis 1979 *SALJ* 94. This issue and case law is also discussed in Olivier, Pienaar and Van der Walt *Property* 105-108 and Badenhorst, Pienaar and Mostert *Silberberg and Schoeman* 207-215.

²⁵ Recognition must be given to the transient nature of street art. Street artists act knowing that their work may be temporary; that their artwork may be painted over by the owner of the surface or by another artist. Thus, the intention of the artist and the permanent nature of the attachment could be questionable. It is suggested though, that this a concern for all artists not just street artists. Artists paint over their own works, or the works of others, art is painted over accidentally, art is vandalised (which can occur in the production of new art), art is damaged in restoration processes, and some artists intend the deterioration and eventual destruction of their works. Further, this is an issue which affects all property covered by *inaedificatio*. For instance, in the case of *Standard Vacuum* 677E-679E oil tanks were considered to be attached to the land because they were too heavy to be moved (and because they were manufactured on the land). The fact that the oil tanks could have been destroyed or taken apart did not affect the decision that they were permanently attached. The ephemeral nature of all art should not affect the ownership of such and, thus, where street art is attached to an immovable it should be considered to be permanently attached. For examples of the ephemeral nature of art see Miklós <http://io9.gizmodo.com/these-secret-artistic-masterpieces-were-hidden-beneath-1626834333> (Date of use: 20 June 2016), Campbell-Dollaghan <http://gizmodo.com/5-lost-images-found-hidden-beneath-famous-paintings-1592796080> (Date of use: 20 June 2016), Entiknap *Film Restoration* 151 – 161 and Healy 2015 *InterventionsJournal*.

that the surface of the immovable has greater mass than the movable, is more valuable than the movable and that the artwork serves merely as decoration. Consequently, regarding the attachment of street art to an immovable, the answer provided by Van der Walt and Pienaar (that the owner of the immovable becomes the owner of the joined thing) is satisfactory. This finding is specifically supported by Badenhorst, Pienaar and Mostert who state that '[i]f, for instance, a painting is effected on the panelling of another's house, it accedes to the latter.'²⁶

In some cases, the application of street art to an immovable can be financially beneficial to the owner of the immovable. Interestingly, in a few select instances, the value of the artwork could be just as valuable, if not more valuable than the immovable. For instance, in 2007 a house in the southwest of England which exhibited a mural, by Banksy, on one external wall was sold through an art gallery as a 'Banksy mural with a house thrown in'.²⁷ Further, another Banksy mural painted on the wall of a privately owned shop was removed and sold for over £1 million.²⁸ If a recognised street artist like Banksy 'bombs' your immovable property it can significantly increase the value, possibly to the extent that it is no longer the immovable which gives the joined thing its identity or is the more valuable.

Despite these anomalous cases, the position of Van der Walt and Pienaar (and Badenhorst, Pienaar and Mostert), that the identity of the joined thing should be determined by the immovable, and consequently that ownership (of the *res*) should devolve to the owner of such, should still be the understanding for the accession of movables to an immovable in the case of street art.

2.2.3 The accession of movables to movables

Ownership can also be acquired, through accession, where one movable is attached to another movable, such that a single thing is formed.²⁹ This is provided that the elements of the composite things are still recognisable, that the composite things

²⁶ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman* 216.

²⁷ Delana <http://weburbanist.com/2008/08/05/the-art-of-banksy-pieces-sold-and-for-sale/> (Date of use: 9 July 2014).

²⁸ HuffPost <http://www.bbc.com/news/uk-england-kent-29886166> (Date of use: 26 August 2015).

²⁹ Van der Walt and Pienaar *Law of Property* 122.

are difficult to separate and that the joined thing does not amount to the formation of a new thing, then ownership can accrue through *accessio*.³⁰ Ownership of the joined thing is still determined using the identity test. In general, the bigger, heavier, more valuable thing, or the part which is not merely decorative, is identified as the principal thing and ownership of the composite thing accrues to the owner of such.³¹ The question of which of the components gives the thing its identity may also be considered.³² In the case of the accession of movables to movables, the identity test is not always applied with the ease in which it is applied to *inaedificatio*.

There are different forms of accession of movables to movables; namely *intextura*, *scriptura*, *pictura*, *ferruminatio* and the adding of wheels to a vehicle.³³ *Intextura* involves the weaving in of materials and the owner of the material becomes the owner of the composite thing.³⁴ *Scriptura* comprises of writing on paper belonging to someone else and the writer becomes the owner.³⁵ With *pictura* the painter of a picture becomes the owner of the painting - provided that the painting is worth more than the surface on which it is painted.³⁶ *Ferruminatio* involves welding and the owner of the biggest or heaviest part of the composite thing becomes the owner of the composite thing, unless the accessory is more valuable.³⁷ When wheels are added to a vehicle the owner of the vehicle becomes the owner of the composite thing.³⁸

As stated in the previous paragraph, in the case of accession (in the form of *pictura*) in most instances, ownership ascribes to the artist; the canvas accedes to the painting. It is only if the surface on which the artwork is painted is more valuable than the painting, that the artwork belongs to the owner of the surface.³⁹ The

³⁰ Van der Walt and Pienaar *Law of Property* 123; Olivier, Pienaar and Van der Walt *Property* 109; Knobel 2011 *THRHR* 296. Knobel discusses the issue of separation in detail at 298.

³¹ Van der Walt and Pienaar *Law of Property* 123; Knobel 2011 *THRHR* 297.

³² *Khan v Minister of Law and Order* 1991 (3) SA 439 (T).

³³ *JL Cohen Motors (SWA) v Alberts* 1985 (2) SA 427 (SWA).

³⁴ Van der Walt and Pienaar *Law of Property* 123.

³⁵ Van der Walt and Pienaar *Law of Property* 123.

³⁶ Van der Walt and Pienaar *Law of Property* 123.

³⁷ Van der Walt and Pienaar *Law of Property* 123.

³⁸ Van der Walt and Pienaar *Law of Property* 123.

³⁹ Van der Walt and Pienaar *Law of Property* 123.

application of the identity test regarding *pictura* is predominantly supported by the historical sources. For instance, focussing on the physical identity of the composite elements, Gaius stated that the tablet (the movable which serves as the surface for the painting) accedes to the painting.⁴⁰ Likewise, Justinian supported the view that the painting accrues to the artist, based on relative value. This is when the painting is worth more than the surface on which it is painted. The following quote illustrates this point accurately:

'If a person has painted on the tablet of another, some think that the tablet accedes to the picture, others that the picture, of whatever quality it may be, accedes to the tablet. It seems to us the better opinion that the tablet should accede to the picture; for it is ridiculous, that a painting of Apelles or Parrhasius should be but the accessory of a thoroughly worthless tablet.'⁴¹

Justinian gave considerable weight to the financial values of the joined things; if the material which was painted on remained the more valuable of the two things, then ownership would fall to the owner of the material, not to the artist and vice versa.⁴² This is still the approach in South African law wherein the artist becomes the owner of the composite movable thing, provided that the artwork is worth more than the material on which it was painted.⁴³

Accordingly, *accessio* in the form of *pictura* can apply to street art painted on the side of a movable, such as a mobile home, a shipping container or a car. Moreover, in the case of *pictura*, it is the artist who becomes the owner of the composite thing, provided that the artwork is worth more than the surface on which it is painted. This interpretation of *accessio*, where the value is given considerable weight, could ensure that in the majority of street art cases the owner of the movable remains the owner of the composite thing; because the value of the artwork won't exceed the

⁴⁰ Gaius *Institutiones* 1.2.78 (De Zulueta *The Institutes* 1.2.78). See also du Plessis *Borkowski* 202. This was also the perspective of Voet. Gane *The Selective Voet* 41.1.26.

⁴¹ Justinian *Digesta* 2.1.34 (Sandars *The Institutes* 2.1.34). See also Du Plessis *Borkowski* 202-203.

⁴² Du Plessis *Borkowski* 202 – 203.

⁴³ Van der Walt and Pienaar *Law of Property* 123.

value of the movable. What about anomaly cases of street art i.e. artworks that are considered to have artistic and, as is the concern for this aspect of the identity test, financial value? Much like the accession of movables to immovables, there are examples where street art has been applied to a movable and the artwork is considerably more valuable than the surface on which it is painted. There are international examples where street art painted on a movable is worth considerably more as an artwork and, thus, the joined thing is significantly more valuable than the surface on which the art is painted. The financial value of Banksy's street artworks has regularly exceeded the value of the movables on which they are placed. To illustrate this, one of Banksy's murals was painted on the side of a mobile home. It is noted that the mural was painted with the owner's permission which would exclude this example from the laws on original acquisition of ownership; instead this example would fall into the field of contract law. Such abode was put up for sale with the price tag of \$1 million; the price of the joined thing (the street art) far exceeding the value of the mobile home.⁴⁴ Another example of Banksy's work, titled, *Gangsta Rat (1)* (circa 2002), was stencilled onto a wheel clamp. This clamp went to auction expecting to sell for between \$20 000 to \$40 000.⁴⁵ Again, the value of the artwork far exceeds the value of the surface on which it is painted.

Not many pieces of street art will exceed the value of the movable on which it is painted, and thus the owner of the movable becomes the owner of the joined thing. However, there are exceptional cases of street art where the artwork does exceed the value of the movable. To reiterate, it is these pieces with which this study is concerned. As discussed in this part, in these cases, according to property law, the

⁴⁴ Delana <http://weburbanist.com/2008/08/05/the-art-of-banksy-pieces-sold-and-for-sale/> (Date of use: 9 July 2014); BBC http://www.bbc.co.uk/norfolk/content/articles/2008/06/03/arts_banksy_20080603_feature.shtml (Date of use: 9 July 2014).

⁴⁵ Aitken <https://www.eveningexpress.co.uk/fp/news/local/banksys-graffitied-wheel-clamp-draws-in-crowds-at-successful-aberdeen-art-festival/> (Date of use: 9 January 2019). Sinha-Roy <https://uk.reuters.com/article/us-art-banksy/five-banksy-stenciled-works-to-be-auctioned-in-los-angeles-idUKBREA300YV20140425> (Date of use: 9 July 2014).

joined thing should accrue to the artist because it is the financial (and artistic value) of the artwork which gives the joined thing its identity.⁴⁶

It may only be a matter of time and exposure, for a South African street artist's work to attain a financial value which exceeds the value of the movable on which the artwork is painted. Therefore, this legal question may need to be handled by the courts to determine the ownership of the movable.

Importantly, the *bona fide* intention of the person doing the attachment and the knowledge of both parties is not a requirement for the acquisition of ownership through *accessio*.⁴⁷ Thus, it is possible that a person acting with *mala fides* could acquire ownership of the property. It is this aspect of *accessio* which makes this investigation so interesting; the function of law could result in a street artist acquiring ownership of the composite thing even though they are acting *mala fides* and even if they know they are breaking the law in the process of affixing the art to movable property belonging to another. The law rewards the criminal (or at least the person acting without *bona fides*) in this situation provided that the artwork is more valuable than the surface on which it is painted.

This outcome is a bizarre solution from our law; it is unpalatable to think that a street artist who paints on another person's movable property and breaks the law in the process should become the owner of such property simply because the artwork is worth more than the movable on which it is painted. The law should not reward such conduct. Consequently, it is necessary to consider if the law can strike a different balance in such cases.

⁴⁶ Van der Walt and Pienaar *Law of Property* 123.

⁴⁷ Carey Miller *The Acquisition and Protection of Ownership* 39; Du Plessis *Borkowski* 198. It is only Badenhorst, Pienaar and Mostert who limit this statement by requiring that the artist act in good faith (they rely on the work of Van Leeuwen in this regard). Van Leeuwen *Rooms-Hollands Recht* 1.2.5.6 (Kotzé *Commentaries I* 1.2.5.6). See also Badenhorst, Pienaar and Mostert *Silberberg and Schoeman* 216. This exception will be discussed in more detail under the part 2.6 on *Grotius' Solution*.

2.3.1 A delictual claim

The law of delict provides remedies by which infringements of legally recognised interests are compensated for, ‘...all damage caused unjustifiably (*iniuria*) is actionable, whether caused intentionally (*dolo*) or by negligence (*culpa*).⁴⁸ South African law recognises delictual claims for patrimonial loss (*damnum iniuria datum*), pain and suffering caused by bodily injury and damages to personality (*inuria*).⁴⁹ Patrimonial loss is claimed through the *actio legis Aquiliae* while personality injuries are satisfied through the *actio iniuriarum*.⁵⁰

To institute a delictual claim, ‘one person...must have caused damage or harm to another...by means of an act or conduct’.⁵¹ Thus, a person who has suffered damage caused by another person who acts voluntarily, with either intention or negligence (fault), and the act is wrongful, has a claim for compensation against such other person.⁵²

As street art concerns damage to property or pure economic loss - both being a diminishment of a plaintiff’s patrimony - and not bodily injury or damages to personality, this part of the study focuses on delictual claims based on the *actio legis Aquiliae* and the elements required to succeed with such a claim. A patrimonial loss

⁴⁸ Van der Merwe and Olivier *Onregmatige daad* 1; Neethling, Potgieter and Visser *Delict* 4. Overall the work of Neethling, Potgieter and Visser *Delict* has guided this part of the study, this is because their requirements for a delictual claim are the most comprehensive. Other authors do not discuss all the requirements that Neethling, Potgieter and Visser discuss. Neethling, Potgieter and Visser require the elements of conduct, wrongfulness, fault, causation and damage. Burchell requires similar elements, namely; voluntary conduct, unlawfulness (or wrongfulness), capacity (which Neethling, Potgieter and Visser deal with under fault), fault, causation and loss. Burchell *Principles of Delict* 23. Van der Walt and Midgley only require wrongfulness, fault, causation and damages. Consequently, the requirements of Neethling, Potgieter and Visser have been followed to ensure that any requirements for a delictual claim have been covered.

⁴⁹ South African law also recognises delictual claims based on strict liability such as the *actio de pauperie*. Neethling, Potgieter and Visser *Delict* 5 and Van der Walt and Midgley *Principles of Delict* 1 and 35 – 36.

⁵⁰ Neethling, Potgieter and Visser *Delict* 5.

⁵¹ Neethling, Potgieter and Visser *Delict* 23 and the sources referred to therein.

⁵² See Neethling, Potgieter and Visser *Delict* damages 195-234, for causation 159 – 194, for voluntariness 23-30 and for intention and negligence see 109-158.

is the reduction of one's estate, thus, the damage suffered must have affected the claimant such that the damage can be quantified in monetary terms.⁵³

To satisfy the element of conduct for a delictual claim, the damage must have been caused by someone who is in control of their actions; in other words, the action taken must be voluntary.⁵⁴ Should the damage be caused by someone who cannot control their conduct, then the basis for the action is unfounded. Examples of such an exclusion can be found where the actor lacks the mental capacity to control their bodily actions (whether this is through exposure to intoxicating substances, hypnosis, and extreme anger amongst others).⁵⁵

The voluntary action must also be wrongful. Wrongfulness does not mean that the person who caused the damage must have acted with intention or negligence (fault is a subsequent requirement). Conduct is considered to be wrongful if it results in the infringement of a plaintiff's legally recognised rights or if the conduct results in a breach of a legal duty owed to the plaintiff. To reiterate, conduct is considered to be wrongful if it impedes on another person's subjective right/s in a manner which is legally improper or if the conduct results in a breach of duty owed by one to another (and such duty is recognised in law for the purposes of liability).⁵⁶ Additionally, the damage must be caused in a legally reprehensible or unreasonable way.⁵⁷ Wrongfulness is determined by reference to the *boni mores* of a community; which is determined by the criterion of reasonableness. If the conduct was unreasonable considering the *boni mores* of the community, then it is wrongful.⁵⁸ It is rarely relevant whether the person acts with *bona fides* or not.⁵⁹ Physical impact on a

⁵³ Van der Walt and Midgley *Principles of Delict* 44. For more on conduct see Burchell *Principles of Delict* 36 – 37.

⁵⁴ Van der Walt and Midgley *Principles of Delict* 64 – 65.

⁵⁵ Van der Walt and Midgley *Principles of Delict* 64 – 65; Neethling, Potgieter and Visser *Delict* 23-30.

⁵⁶ Van der Walt and Midgley *Principles of Delict* 68. As discussed in the case of *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 4 SA 317 (D) (hereinafter referred to as *Coronation Brick*).

⁵⁷ Neethling, Potgieter and Visser *Delict* 33. For more on wrongfulness in general see Burchell *Principles of Delict* 38 – 66 under the topic Unlawfulness.

⁵⁸ Neethling, Potgieter and Visser *Delict* 36– 50. See also Burchell *Principles of Delict* 38.

⁵⁹ Van der Walt and Midgley *Principles of Delict* 71.

person's corporeal property is *prima facie* wrongful and, unless some defence is offered to explain the conduct, it is actionable.⁶⁰

Fault must also be proved to be successful in a delictual claim. Fault can take the form of intention (*dolus*) or negligence (*culpa*). A finding of fault is a subjective decision and, thus, refers to the actor's state of mind at the time that damage is caused. A person who does not have the mental capacity to distinguish between right and wrong cannot be held accountable and, thus, fault would be absent, and the claim would fail.⁶¹ In the case of *accessio*, (specifically where a street artist paints on a movable belonging to another and, thus, acquires ownership through *accessio*) it could be said that fault is apparent in the form of *dolus*, where a street artist does not accidentally apply paint to a movable. 'An accountable person acts intentionally if his will is directed at a result which he causes while conscious of the wrongfulness of his conduct.'⁶² For instance, in the case of *S v Ngubane* Jansen JA stated that if the actor could foresee the damage occurring and still proceeded with their action, then *dolus* is present.⁶³

The element of causation must then be proved to show that the conduct of the defendant must have caused the negative consequences affecting the plaintiff.⁶⁴ This requirement ensures that there is a factual relationship between the conduct and the harm and whether (or how much) the defendant is legally responsible for the harm caused by their action.⁶⁵ The factual test for causation traditionally uses the *sine qua non* test (what is commonly referred to as the, 'but for,' principle). Thus, 'but for', the defendant's conduct, the harm would not have been caused to the plaintiff.⁶⁶ The test for legal causation therefore requires that the wrongful conduct

⁶⁰ Van der Walt and Midgley *Principles of Delict* 68 – 71. See also Neethling, Potgieter and Visser *Delict* 87 – 123 and Burchell *Principles of Delict* 67 – 82 for more on defences which exclude unlawfulness.

⁶¹ Neethling, Potgieter and Visser *Delict* 129 – 132. See also Burchell *Principles of Delict* 83 – 84.

⁶² Neethling, Potgieter and Visser *Delict* 132. For more on intention see Burchell *Principles of Delict* 91 – 100.

⁶³ *S v Ngubane* 1983 (1) SA 381 (A).

⁶⁴ Van der Walt and Midgley *Principles of Delict* 197. For more on causation see Burchell *Principles of Delict* 114 – 124.

⁶⁵ Van der Walt and Midgley *Principles of Delict* 197.

⁶⁶ Van der Walt and Midgley *Principles of Delict* 198 – 199. For more on factual causation see 198-202.

is linked either directly or sufficiently close to the loss; a loss which is considered to be too remote from the action does not satisfy the test for legal causation.⁶⁷ Various tests have been used to determine legal causation; the flexible approach, adequate causation, direct consequences, fault, reasonable foreseeability, *novus actus interveniens*, and the *talem qualem* rule.⁶⁸ The flexible approach is the standard approach followed in South African law; the subsequent tests play a persuasive role (but not definitive) in the determination of causation.⁶⁹

Finally, the applicant must prove that damage has occurred. The applicant must prove that they have suffered a loss in their patrimony.⁷⁰ Damages are intended to put the plaintiff back into the position they would have been had the damage not occurred and no more, because plaintiffs cannot profit from a delictual claim. In other words, the money that is awarded must equate to the patrimonial loss suffered by the plaintiff.⁷¹ When property has been damaged, it causes a reduction in a person's patrimony.⁷² Where such damages occur, the damages may be assessed by ascertaining the market value of the property pre- and post-delict, and/or by the cost of repairs if such repairs would ensure that the property is restored to the pre-delict market value.⁷³ Provided that the plaintiff has proved all the elements required, a claim for damage to property should succeed, and the defendant will have to compensate the plaintiff for their patrimonial loss.

2.3 Claims for compensation for the accession of movables to movables

Claims for compensation, for the accession of movables to movables, are noted, by Van der Walt and Pienaar, in regard to accession via *intextura* and *scriptura*.⁷⁴ However, they do not state if claims for compensation are available for accession

⁶⁷ Van der Walt and Midgley *Principles of Delict* 132. For more on legal causation see 132- 133.

⁶⁸ Neethling, Potgieter and Visser *Delict* 200-220. These tests will be discussed further below at 60-62.

⁶⁹ Neethling, Potgieter and Visser *Delict* 201.

⁷⁰ Burchell *Principles of Delict* 123 – 124.

⁷¹ Van der Walt and Midgley *Principles of Delict* 216 – 217.

⁷² Neethling, Potgieter and Visser *Delict* 231.

⁷³ Van der Walt and Midgley *Principles of Delict* 219 – 220.

⁷⁴ Van der Walt and Pienaar *Law of Property* 123.

via pictura, ferruminatio or the addition of wheels to a vehicle.⁷⁵ This seems to be an omission because the historical sources, on which the South African law of *accessio* is based, included claims for compensation.⁷⁶ However, there is a lack of clarity as to the category of the claim i.e. whether it is based on a delictual action, an enrichment action or a claim arising from a theft.

Several of the historical sources of South African law suggest that a delictual claim is the correct action to claim for compensation following the loss of ownership of property through the function of *accessio*. In *The Institutes* Gaius noted that in the case of *pictura*, the owner of the surface on which the painting is placed can defeat a claim for ownership using the *exceptio doli mali* (a plea for fraud) if the claimant refuses to pay the value of the surface material.⁷⁷ *The Institutes* read further that,

'[i]f the painter is in possession of the picture, it follows that the owner of the tablet is entitled to a *utilis actio* against him; and in this case, if the owner of the tablet does not pay the value of the picture, he may also be repelled by an *exceptio dolus malus*; that is, if the painter obtained possession *bona fide*.'⁷⁸

This implies that there could be a delictual claim for compensation in the event that a graffiti artist acquires property through accession.

⁷⁵ Van der Walt and Pienaar *Law of Property* 123. Carey Miller also does not discuss claims for compensation for the accession of movable to movables. Neither do Badenhorst, Pienaar and Mostert. Carey Miller *The Acquisition and Protection of Ownership* 36-39. Badenhorst, Pienaar and Mostert *Silberberg and Schoeman* 148.

⁷⁶ See for instance Van Warmelo *Roman Civil Law* 90 and the sources referred to therein. There is debate in South African law as to whether the improver of a *movable* does have a claim for compensation. Claims for compensation are recognised for improvements to immovables but the legal situation is less clear regarding movables. In *Reed Bros v Ford* 1923 TPD 150 it was decided that the person who had affected improvements to a movable did not have a claim available to them. In *Wipplinger v Wax* 1933 EDL 60 found that there was such an action based on the older authorities. The argument that there is no claim for compensation for improvements to movables has been continued in the work of Nathan 1974 *THRHR* 101. De Vos has countered this argument finding that there is an enrichment claim for compensation, based on the predominance of the case law on this matter. De Vos 1974 *THRHR* 308 and De Vos *Verrykingsaanspreeklikheid*. See also Leech 1994 *THRHR* 696 – 697 and *Wipplinger v Wax* 1933 EDL 60 albeit that this case does not concern *accessio*, but merely an enrichment claim for improvements to a car (a movable).

⁷⁷ Gaius *Institutiones* 1.2.78 (De Zulueta *The Institutes* 1.2.78).

⁷⁸ Gaius *Institutiones* 1.2.78 (De Zulueta *The Institutes* 2.1.34).

In *The Digest*, Gaius recommends the *actio utilis* as a remedy for the owner of the material (on which the painting is painted) to reclaim such property, provided they pay for the value of the painting.⁷⁹

Furthermore, the Roman law provided the *actio in factum* for claims arising where the joined things cannot be separated, and the *rei vindicatio* cannot be used because ownership has already been transferred. The *rei vindicatio* is an action that can be instituted by an owner so it cannot be used to compensate a person who has lost ownership through the function of accession.⁸⁰

Under Roman-Dutch law, Voet states that:

‘The owner [sic] of that which has acceded to the other thing is granted either an *actio in factum* [under the *lex Aquilia*] or an exception and a right of retention of the main thing if he is in possession of it, with a view to recovery of the value.’⁸¹

While the action Voet is discussing arises from the non-fulfilment of a contractual obligation (not in cases of *accessio*) this would support the argument for a delictual claim being the correct claim.⁸² Groenewegen and Grotius support Voet's stance.⁸³

Notice should also be taken of the South African author Van Warmelo who discusses claims arising from *accessio*. He states that in a situation where the *res* remains in possession of its original owner the new owner (who gains ownership through *accessio*) can use the *rei vindicatio* to claim the property.⁸⁴ However, the original owner of the surface can use the *exceptio doli* to maintain possession until

⁷⁹ Justinian *Digesta* D9.10 (Watson *The Digest of Justinian* D9.10).

⁸⁰ Justinian *Digesta* D6.1.23.5 (Watson *The Digest of Justinian* D6.1.23.5).

⁸¹ Gane *The Selective Voet* 41.1.27, own emphasis.

⁸² Du Plessis *Unjustified Enrichment* 359.

⁸³ Groenewegen *De Legibus Abrogatis* 2.1.29 (as cited in Du Plessis *Unjustified Enrichment* 358) and Grotius *Inleidinge* 2.10.7 (see Herbert *Dutch Jurisprudence* 2.10.7, Lee *Jurisprudence of Holland* 2.10.7).

⁸⁴ Van Warmelo *Roman Civil Law* 90.

the new owner pays compensation.⁸⁵ Van Warmelo also discusses the situation where the new owner not only has ownership but also possession of the *res*. In this situation, the original owner of the surface can use the *actio utilis* against the new owner of the *res* to claim possession. In this instance, the *actio utilis* plays the same role as the *rei vindicatio*. However, if the claimant is not prepared to compensate the new owner for their contribution to the new *res*, then the new owner can use the *exceptio doli* to prevent this, but only the *bona fide* new owner can use the *exceptio doli*.⁸⁶ However, the *exceptio doli* has never been adopted into South African law.⁸⁷ Thus, it doesn't provide a solution for a claim for compensation. Judicial references have been made to *actio doli*, but it is generally accepted that the *actio doli* has been superseded by the *Aquilian* action in South African law.⁸⁸

To add to this, Zimmerman states that:

'The law of delict aims at making good some damage that has occurred. It looks at the position of the plaintiff ... Thus, the law is here concerned with a detrimental deviation from the status quo. The law of unjustified enrichment, in a way, is the mirror image of the law of delict. It deals with a favourable deviation from the status quo. And it is merely concerned with the position of the defendant.'⁸⁹

Unfortunately, this statement does not clarify whether the correct claim for compensation following the loss of ownership through *accessio* should be a delictual claim or an enrichment claim. In this situation, the plaintiff's (original owner) patrimony has decreased, and the defendant's patrimony (new owner) has increased. Moreover, as will be discussed under 2.3.3 on unjustified enrichment claims, the elements of this claim require that the plaintiff should have been impoverished *and* the defendant been enriched. Arguably, as it is the person who has lost ownership of the property (that has become the property of another through

⁸⁵ Hawthorne 2014 *Fundamina* 396. See van Warmelo *Roman Civil Law* 90. For more on this topic see Bauling *Latent Defects* 81.

⁸⁶ Van Warmelo *Roman Civil Law* 90-91.

⁸⁷ *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (AD) 605I and 608 F-G.

⁸⁸ Van der Walt and Midgley *Principles of Delict* 35.

⁸⁹ Zimmerman 1995 *Oxford Journal of Legal Studies* 403 – 404.

accessio) who would be claiming compensation (it is their position that has been diminished), they would be the plaintiff and Zimmerman may be supporting a delictual claim as the correct claim for compensation.

Hence, it would appear from these historical and some more current sources of South African law that compensation arising from the loss of property through the function of *accessio* (in the form of *pictura*) should be claimed as a delict using the *Aquilian* action (to be discussed in more detail in part 2.3.1). However, delictual actions have not been used in South African courts when claiming for compensation following the loss of property through the function of *accessio*.

In the case of *Unimark Distributors v Erf 94 Silvertondale Van de Westhuizen AJ* said the following:

‘If the plaintiff lost ownership of some of the items, e.g. by *accessio*, the requirements of unjustified enrichment have to be applied to the facts in order to determine whether the defendant has been unjustly enriched at the expense of the plaintiff, who must have been impoverished thereby.’⁹⁰

From this *dictum*, it appears that the correct method to claim compensation for the loss of ownership caused by the function of *accessio* would be via a claim for unjustified enrichment.⁹¹ De Vos discusses the claim for compensation following the loss of property through accession in terms of a liability arising

⁹⁰ *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 10. This case concerned an application by the plaintiff for items, he claimed belonged to him, that had been installed on a factory site owned by the defendant and such items were alleged to be in the possession of the defendant. Unjustified enrichment claims have regularly been used as the form of claim for enrichment that is caused by the function of *accessio*. For examples see *Nortje v Pool* 1966 3 SA 96 (A), *Fletcher and Fletcher v Bulawayo Waterworks Company Limited; Bulawayo Waterworks Company Limited v Fletcher and Fletcher* 1915 AD 636, *De Beers Consolidated Mines v London and South African Exploration Company* 1893 (10) SC 359, *Meyer’s Trustee v Malan* 191 TPD 559, *Theatre Investments (Pty) Ltd v Butcher Brothers Ltd* 1978 (3) SA 682 (A), *Melcorp SA (Pty) Ltd v Joint Municipal Pension Fund (Transvaal)* 1980 (2) SA 214 (W), *Sumatie (EDMS) BPK v Venter en ‘n Ander NNO* 1990 (3) All SA 145 (T). Albeit that these cases predominantly concern *inaedificatio*.

⁹¹ Admittedly this *dictum* did not concern *accessio* in the form of *pictura*, however what is important is that unjustified enrichment may also offer a claim for compensation in the case of *accessio* regardless of the specific form of *accessio*. See Du Plessis *Unjustified Enrichment* 359.

from an unjustified enrichment.⁹² This assertion is supported by Van der Merwe and Pope, and Eiselen and Pienaar.⁹³ However, Du Plessis recognises that the same set of facts can give rise to both a delictual claim and a claim for unjustified enrichment and states that there is no resolution on the correct action to take in South African law.⁹⁴ Despite this, Du Plessis acknowledges that De Vos suggested that an enrichment claim is the preferred method. Further, although Du Plessis does not agree with de Vos's reasoning hereto, he also supports an unjustified enrichment claim as the correct claim (or better claim) for compensation.⁹⁵

Despite Van der Walt and Pienaar not specifically addressing whether a claim for compensation exists regarding *pictura*, the fact that a claim for compensation did exist in the Roman law suggests that this omission is just that, an omission. The original owner of the surface on which the painting is located, who loses ownership through the function of *accessio* in the form of *pictura* (and consequently experiences a diminishment in patrimony), should have a claim for compensation in South African law. However, both a delictual action and an unjustified enrichment action may offer solutions.⁹⁶ While case law supports compensation through an unjustified enrichment claim, it is worthwhile to pursue both forms of claims for compensation. What follows is a discussion of the potential claims in the law of delict (the *Aquilian* action) and the law of unjustified enrichment. Further, the common law and statutory crimes which may apply to the defacement of the property will also be considered, along with the Proceeds of Crime Act to consider whether these aspects of law would also assist a plaintiff claiming for compensation.⁹⁷

⁹² De Vos 1960 *Juridical Review* 134 albeit that De Vos is referring to the Roman historical sources of South African law.

⁹³ Van der Merwe and Pope *Property* 496. Eiselen and Pienaar *Unjustified Enrichment Casebook* 7.

⁹⁴ Du Plessis *Unjustified Enrichment* 335 and 360.

⁹⁵ De Vos *Verrykingsaanspreeklikheid* 494, Du Plessis *Unjustified Enrichment* 359.

⁹⁶ For more on the division between a delictual claim and an enrichment claim see Visser and Kleyn *Between Delict and Enrichment* 300.

⁹⁷ It is also worthwhile noting that some crimes can also amount to a delictual claim. Neethling, Potgieter and Visser *Delict* 7 – 8.

2.3.2 The potential success of a delictual claim

When a person's patrimony has been diminished through the loss of property as a result of *accessio* in the form of *picture*, they may have a delictual claim based on damage to property or pure economic loss. Arguably (as discussed below in part 2.3.3) the claim for pure economic loss is the more convincing of the two claims. However, South African courts have adopted a very restricted approach to delictual actions based on pure economic loss, not wishing to extend the reach of the *Aquilian* action. '[C]ourts have been circumspect in allowing a remedy because of the possibility of unlimited liability: the economic consequences of an act may far exceed its physical effect. There is a spectre of limitless liability.'⁹⁸ Consequently, the preponderance of case law concerns damage to property. In light of this, the focus on applying the elements of a delict to street art focuses on damage to property before exploring the potential for a claim based on pure economic loss.⁹⁹

When considering a delictual claim based on damage to property: it seems obvious that the patrimonial loss that occurs due to the loss of ownership of the movable property because of accession (through the application of street art to movable property belonging to another) would qualify for a delictual claim. The street artist has already damaged property belonging to another and such damage results in a patrimonial loss for the original owner of the surface on which the artwork is placed. However, it is submitted that there are several issues that preclude a delictual claim in this instance.

In the scenario with which this study is concerned, the original owner of the movable property, on which street art is placed, suffers a patrimonial loss because their estate is diminished through the function of *accessio*. To satisfy the first element of

⁹⁸ *Viv's Tippers (EDMS) BPK v Pha Phama Services* 2010 26 ZASCA [6] and the case law referred to therein. See also *Bester v Commercial Union Versekeringsmaatskappy van Suis Afrika Bpk* 1973 (1) SA 769 (A) 776-777, *Administrateur Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A) and *Zimbabwe Banking Corporation Ltd v Pyramid Motor Corporation (Pvt) Ltd* 1985 (4) SA 553 (ZS).

⁹⁹ In addition, writers tend to focus on the element of wrongfulness when discussing pure economic loss. Thus, in the interest of completeness it is worth exploring a delictual claim based on damage to property and then one based on pure economic loss. See for example, Neethling, Potgieter and Visser *Delict* 269-274.

a delict, it suffices to say that the act which causes the harm, the loss of property through *accessio* due to the application of paint to a movable belonging to another is the voluntary action of the street artist.¹⁰⁰

Conversely, the element of causation is not so easily satisfied. Causation enquires whether the conduct of the street artist caused the patrimonial loss. Whether there is a causal nexus (factual causation) between the conduct and the harm? Whilst the act of applying paint to the movable property of another which causes damage to such property is the voluntary action of a human being, the harm that this study is concerned with is not patrimonial loss caused by the damage to property. Instead, it is the patrimonial loss that occurs through the function of *accessio*. In this case, the plaintiff has not suffered damage to property (as the property is no longer theirs); rather, their estate has been diminished through the loss of ownership of the property due to the function of law. *Accessio* is a consequence of the law. The action of the street artist invokes *accessio*, but the actual harm (the patrimonial loss) is caused by the operation of law and not by the conduct of a person. On the element of causation, it may be that a delictual claim for damage to property would fail as the street artist does not cause the harm.

In employing, the *sine qua non* test, there does appear to be a causal nexus, but for the conduct of the street artist, *accessio* would not have occurred, and the original owner would not have suffered patrimonial loss. However, could the reasonable street artist have foreseen such loss occurring?¹⁰¹ It is unlikely that street artists know about *accessio*; know that it is possible for them to acquire ownership of the movable property on which they paint. What the street artist foresees is damage to property, not the loss of property.¹⁰² Therefore, it is unclear whether the *sine qua non* test can be satisfied.

The question of legal causation is somewhat more complicated than factual causation. In that, can the consequences of the street artist's act be imputed to the

¹⁰⁰ Neethling, Potgieter and Visser *Delict* 25. Actions such as the *actio de pauperi* are an exception to this rule.

¹⁰¹ This is the test for negligence which can also satisfy the fault test

¹⁰² Neethling, Potgieter and Visser *Delict* 137 – 139.

street artist? Can the street artist be held liable for the additional consequences of their action? In terms of the flexible approach, it must be considered whether there is a close enough relationship between the street artist's conduct and the patrimonial loss caused by *accessio*, such that the street artist can be held liable for the harm.¹⁰³ According to the flexible approach, the street artist's liability cannot exceed the boundaries of reasonableness, fairness and justice.¹⁰⁴ While it would seem relatively simple that the flexible approach would extend to cover the loss of patrimony in this instance, it can also be argued that holding a street artist liable for the consequences that occur due to the operation of law (*accessio*) may well exceed what is reasonable and fair. Some of the subsequent tests appear to support this finding.

According to the fault test, the actor can only be held responsible for the consequences for which they had fault.¹⁰⁵ Fault can be present through intent or negligence.¹⁰⁶ Regarding intent, the street artist can only be held responsible for the consequences covered by their intent.¹⁰⁷ It can be argued that while a street artist has the intent to cause damage to the movable property they do not have the intent to cause the patrimonial loss that occurs through *accessio*. However, it could also be argued that a street artist does not intend to cause damage to property. Instead, they could intend to improve the movable by turning it into art.

Second, the reasonable foreseeability test also highlights this issue.¹⁰⁸ This test requires that the harm caused must have been reasonably foreseeable, but it should not be far-fetched.¹⁰⁹ While the street artist could be said to foresee the damage to property, it is highly questionable whether they would have foreseen the patrimonial

¹⁰³ Neethling, Potgieter and Visser *Delict* 200, as formatted in *S v Mokgethi* 1990 1 SA 32 (A) 40 - 41.

¹⁰⁴ *Smit v Abrahams* 1994 4 (SA) 1 (A) 18.

¹⁰⁵ Neethling, Potgieter and Visser *Delict* 207. It should be noted that the fault test is used to establish legal causation and is separate from the element of fault.

¹⁰⁶ Van der Walt and Olivier follow the fault test for determining causation and thus liability. Neethling, Potgieter and Visser *Delict* 211.

¹⁰⁷ Van der Merwe and Olivier *Onregmagtige Daad* 198.

¹⁰⁸ The reasonable foreseeability test is frequently used in South African case law. Neethling, Potgieter and Visser *Delict* 202 and the sources quoted therein.

¹⁰⁹ Van der Walt and Midgley *Principles of Delict* 175.

loss caused by the operation of *accessio*. It is doubtful that many street artists would be aware of this function of the law.

Third, in terms of the *novus actus interveniens* test, it needs to be asked whether the transfer of ownership through *accessio* is an independent event (a *novus actus interveniens*) which occurs after the street artist's act is complete and whether it is this intervention which causes the patrimonial loss.¹¹⁰ *Accessio* could be a *novus actus interveniens*, and thus there would be no direct link between the street artists conduct and the patrimonial loss.

It would appear from the balance of the above tests that are used to determine legal causation that the conduct of the street artist cannot be said to have legally caused the patrimonial loss. It is likely that a delictual claim arising from the loss of property through *accessio* would fail due to the lack of causation.¹¹¹

It is further debatable whether the element of wrongfulness would be satisfied. It appears that the act is *prima facie* wrongful because it causes damage to someone else's property (resulting in patrimonial loss) and, as already mentioned, 'physical impact on a ... person's corporeal property is *prima facie* wrongful.' Further, 'the wrongfulness of an act is ... always determined with reference to its consequence ... the act is only wrongful in delict when harmful consequences ensue.'¹¹² The harmful consequence is the diminution of the plaintiff's patrimony. The act would also be wrongful because it is unlawful, because graffiti is a crime in terms of the GLFA and various municipal by-laws, and because graffiti is considered to be *contra boni mores*. In addition, the artist would have no ground of justification to excuse the wrongfulness.¹¹³

¹¹⁰ Neethling, Potgieter and Visser *Delict* 216-219.

¹¹¹ This view appears to be supported by Du Plessis' work on unjustified enrichment albeit that he is discussing the situation where a third party is enriched rather than the party doing the joining; '[i]f a person takes another's property and attaches it to the property of a *bona fide* third party, the party is enriched if he becomes owner of the attached property, but without having committed a delict.' Du Plessis *Unjustified Enrichment* 335.

¹¹² Neethling, Potgieter and Visser *Delict* 36.

¹¹³ For defences against wrongfulness see Van der Walt and Midgley *Principles of Delict* 125 – 155.

However, there is a concern with this *prima facie* finding of wrongfulness because the harm is not caused by the conduct of the street artist but rather by the automatic legal process of *accessio*. It is unclear whether the function of the law should be regarded as wrongful and thus, the harm caused may not be wrongful either. Despite this concern, it is likely that the act and the harm caused would be considered to be wrongful.

Ignoring the issues about the element of causation and the doubts about the other elements of a delict, even if a court found that the elements of a delict were present, it should be noted that the claimant can only claim monetary compensation for their patrimonial loss. The claim would restore the injured party to the same financial position they were in before accession took place. Compensation in terms of a delictual claim cannot take the form of the return of the property and restoring to it to its original state because ownership has passed, and the Aquilian action does not cater for the re-transfer of ownership. Thus, even if a delictual claim was successfully proven, the result could still be unsatisfactory. The transfer of the movable property to the street artist cannot be undone by this action, even though the street artist was committing a crime and acting with *mala fides*. Thus, the street artist benefits (possibly substantially) from the crime. Consequently, a delictual claim is an unsatisfactory solution to the loss of ownership through *accessio*.

Another option, and debatably the preferable option, for instituting a delictual claim for patrimonial loss could be for the original owner to claim for pure economic loss.¹¹⁴ In this instance, the *Aquilian* action is extended to include financial loss that resulted from the damage to property but does not involve the claimant's property.¹¹⁵ As Booyesen J stated in *Coronation Brick* 'it seems clear that the fact that the patrimonial loss suffered did not result from physical injury to the corporeal property or person of the plaintiff, but was purely economic, is not a bar to the Aquilian action.'¹¹⁶ A claimant need not have suffered damage to property in order to claim for pure

¹¹⁴ For an example of a delictual claim based on pure economic loss see *Telematrix (Pty) Ltd v ASA* 2006 (1) All SA 6 (SCA).

¹¹⁵ Neethling, Potgieter and Visser *Delict* 296.

¹¹⁶ *Coronation Brick* 335.

economic loss but the claim may be based on a financial loss that arises from damage to property.¹¹⁷

The original owner must still comply with all the requirements of a delict.¹¹⁸ However, the focus is upon the element of wrongfulness.¹¹⁹ In the street art scenario, for pure economic loss, 'wrongfulness lies either in the infringement of a subjective right or in the breach of a legal duty to avoid damage'.¹²⁰ Undoubtedly, there is no general duty to prevent pure economic loss for other persons, however, in cases such as this the court must look at the circumstances of the case by using the criterion of reasonableness or the *boni mores* to decide whether in this specific instance there would be a legal duty to avoid pure economic loss. The following quote from *Coronation Brick* confirms this,

'A defendant's conduct, including an omission, is regarded as unlawful when the circumstances of the case are of such a nature that it not only incites moral indignation but also that the legal convictions of the community demand that it ought to be regarded as unlawful and that the damage suffered by the plaintiff ought to be made good by the defendant ... the Court must ...evaluate ...the social consequences of the imposition of liability in that particular situation'.¹²¹

When considering the *boni mores* the courts have placed importance on the defendant's knowledge; practical steps taken to prevent the loss; professional knowledge or competence; the extent of the risk; the extent of the loss; statutory provisions and miscellaneous factors.¹²²

In relation to street art, the fact that the defendant knew that their conduct would lead to damage the claimant's property (knowledge) would be an integral factor in

¹¹⁷ Neethling, Potgieter and Visser *Delict* 268; Neethling and Van Aswegen 1989 *THRHR* 607-608.

¹¹⁸ *Jowell v Bramwell-Jones* 1998 (1) SA 836 (W) 877.

¹¹⁹ Neethling, Potgieter and Visser *Delict* 269.

¹²⁰ Neethling, Potgieter and Visser *Delict* 297. See also Van der Walt and Midgley *Principles of Delict* 94-95.

¹²¹ *Coronation Brick* 343.

¹²² Neethling, Potgieter and Visser *Delict* 270-273. See Van der Walt and Midgley *Principles of Delict* 94 for a greater list of factors.

determining the *boni mores* and in turn, the wrongfulness of the action.¹²³ The relevant legislation that criminalises graffiti would also be deemed persuasive (statutory provision).¹²⁴ The GLFA and the relevant municipal by-laws which criminalise the conduct of street artists implies that the defendant should have prevented the economic loss suffered by the defendant.¹²⁵ A court may also take in account the common law of theft which by implication prescribes that the defendant must prevent the economic loss, i.e. must not commit the crime that causes the damage. Further considerations such as the fact that the number of potential plaintiffs is limited, that the amount of the loss is limited and that the defendant was responsible for creating the situation which gave rise to the loss will count in favour of the plaintiff.¹²⁶

From this perspective it appears that the defendant should be responsible for the pure economic loss arising from the commission of a crime. Indeed, even if the defendant were not found guilty of theft in a criminal case (as discussed in part 2.4, and the *rei vindicatio*), the plaintiff can still institute and succeed with the civil, delictual action for the pure economic loss arising from theft.¹²⁷

While this may be a more persuasive argument for wrongfulness and therefore increase the likelihood of success of a delictual action, many of the issues which would defeat a delictual claim for damage to property could also affect the claim for pure economic loss. The element of causation remains problematic: did the harm occur due to the conduct of the defendant or due to the operation of law?¹²⁸ Further, despite the *prima facie* wrongfulness of the defendant's conduct is it reasonable and fair to hold the defendant liable for the consequences of the function of law?

¹²³ Neethling, Potgieter and Visser *Delict* 299. The knowledge that the defendant's action would cause harm was one of the deciding factors in *Coronation Brick*. *Coronation Brick* 386.

¹²⁴ Van der Walt and Midgley *Principles of Delict* 94.

¹²⁵ Neethling, Potgieter and Visser *Delict* 273.

¹²⁶ Van der Walt and Midgley *Principles of Delict* 94.

¹²⁷ See for instance *Hohne v Super Stone Mining (Pty) Ltd* 2016 JOL 36993 (SCA) in which Hohne was found liable for patrimonial loss arising from the theft of diamonds despite not having been found guilty of theft in the criminal case (unreported) arising from the same facts.

¹²⁸ *Steenkamp v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA) 163B-C wherein it was held that an action cannot be found wrongful if doing so would compromise legal doctrines and principles in other branches of law.

Moreover, because courts have been reluctant to extend the Aquilian action to different forms of patrimonial loss, they may be hesitant to extend the action for the pure economic loss that occurs due to the function of law.¹²⁹

Over and above this, a claim for pure economic loss will still not ensure the return of the property. As stated in the previous part, damages are intended to put the plaintiff back into the position they would have been, had the damage not occurred. Where the owner has suffered pure economic loss the amount of damages is calculated by calculating,

‘the negative difference between the relevant person’s current patrimonial position (after the event complained of) and his hypothetical patrimonial position that would have been the current position had the event not taken place. Therefore, the calculation entails a comparison of an actual current patrimonial positional sum with a hypothetical current patrimonial sum.’¹³⁰

It would be possible to calculate the patrimonial loss that occurs from the painting of street art on the movable property and the original owner could receive financial compensation if the delictual claim is successful. However, the original owner should not benefit from a delictual claim.¹³¹ The test for quantifying the damage does not provide an adequate answer in the case where the act that caused the loss increased the value of the movable.¹³² If the value of the movable has increased significantly calculating the difference between the plaintiff’s current patrimonial position and the hypothetical patrimonial position they would have been in had the event not taken place would mean that the plaintiff benefitted, and a delictual claim is not the appropriate remedy in such cases.

To conclude, with regard to the delictual claim for compensation based on damage to property, it is submitted that there are far too many questions that arise (as to the

¹²⁹ Van der Walt and Midgley *Principles of Delict* 94.

¹³⁰ Neethling, Potgieter and Visser *Delict* 231-233.

¹³¹ Burchell *Principles of Delict* 123-124.

¹³² This would also be a problem in the case of immovable property where the street art has increased rather than decreased the owner’s property.

claim for compensation following the loss of movable property through *accessio* in the form of *pictura*). It is not certain whether a delictual claim would be successful and even if it was, the result is unsatisfactory. Moreover, while a delictual claim for pure economic loss is more convincing than a delictual claim for a loss that occurs due to damage to property, the street artist still acquires the property and may still benefit from their conduct. As such it is an unsatisfying and still uncertain remedy. The law needs to offer a more definite and acceptable resolution. Thus, the law of delict does not offer an agreeable solution to the diminution of patrimony (by damage to property) through *accessio* in the case of *pictura* where the joiner has acted illegally and/or in bad faith.

2.3.3 An unjustified enrichment claim

The second potential claim for compensation for the loss of movable property through the function of *accessio* (in the form of *pictura*) is a claim for unjustified enrichment. A claim for unjustified enrichment arises when one party receives:

‘an unfounded patrimonial transfer resulting from an obligation created by the increase of one party’s estate at the expense of the estate of another without such cause as the law may regard as conclusive for the transfer to (or maintenance of the value in) the estate of the first party.’¹³³

An unjustified enrichment claim is intended to restore financial profits from the party who, with no legal justification, received such benefits, to the party at whose expense the benefits were obtained.¹³⁴ Thus, an unjustified enrichment claim, ‘gives rise to an obligation to provide restitution.’¹³⁵ Within the field of unjustified enrichment there are several available actions arising from different forms of enrichment. First the *condictiones*, which is enrichment caused by a transfer made to another (gift). Second, the *condictio indebiti* which is enrichment caused by a transfer that failed to fulfil an obligation. Third, *condictio causa data causa non*

¹³³ Sonnekus *Unjustified Enrichment* 1.

¹³⁴ Visser *Unjustified Enrichment* 4.

¹³⁵ Du Plessis *Unjustified Enrichment* 1. This part of the work primarily refers to du Plessis *Unjustified enrichment*, Visser *Unjustified Enrichment* and Sonnekus *Unjustified enrichment* are equally important.

secuta; this is enrichment produced by a transfer that failed to accomplish an impending lawful purpose other than fulfilling an obligation. Fourth, the *condictio ob turpem vel iniustam causam* which is enrichment produced from a transfer made for an illegal or immoral purpose. Fifth, the *condictio sine causa*; enrichment caused by transfer not covered by the previous actions (enrichment resulting from the unauthorised improvement of another's property). Sixth enrichment arising from the unauthorised fulfilment of another's obligation and, seventh, enrichment caused by taking from another or infringement of another's rights.¹³⁶

To institute any of these unjustified enrichment claims four general requirements must be met; the defendant must be enriched, at the plaintiff's expense, such that the plaintiff is impoverished, and the enrichment of the defendant must be unjustified.¹³⁷

To prove that the defendant has been enriched, it must be determined whether they have enjoyed an increase in assets or a decrease in liabilities, or whether they have avoided a decrease in assets, or if the defendant has avoided an increase in liabilities.¹³⁸ In addition, it must be established that the enrichment was patrimonial in nature.¹³⁹ Enrichment is determined by establishing the overall effect on the defendant's patrimony. The net effect of the action must be considered, if, objectively, the actual, overall effect of the action has caused an increase in the

¹³⁶ Du Plessis *Unjustified Enrichment* see specific sections on the *condictiones* 59- 94, the *condictio indebiti* 95-176, the *condictio causa data causa non secuta* 177-194, the *condictio ob turpem vel iniustam causam* 195-213, the *condictio sine causa* 215-252, unauthorised improvement of another's property 267-307, unauthorised fulfilment of another's obligation 309-330 and enrichment by taking from another or infringement of another's rights 331-343. Sonnekus also includes the *condictio furtiva* (enrichment where a thief has acquired possession of property) and the *actio negotiorum gestio contraria* (where enrichment has resulted through the unauthorised administration of another's affairs. Sonnekus *Unjustified Enrichment* 147 – 150 and 151-225. For a discussion of the historical development of the enrichment actions and their reception into South African law see Zimmerman 1985 *CILSA* 1.

¹³⁷ Du Plessis *Unjustified Enrichment* 24 albeit that Du Plessis accidentally confuses the terms plaintiff and defendant. See also *McCarthy Retail Limited v Shortdistance Carriers* (3) SA 482 (SCA) specifically [15] of Schutz JA's judgement and [2] of Harms JA's judgement.

¹³⁸ Du Plessis *Unjustified Enrichment* 25 -27 and sources quoted therein. In general, see Sonnekus *Unjustified Enrichment* 42 – 56 and Visser *Unjustified Enrichment* 158 – 164.

¹³⁹ Du Plessis *Unjustified Enrichment* 27.

defendant's patrimony then they have been enriched.¹⁴⁰ The defendant may be enriched by; acquiring corporeal property (such as through accession), acquiring incorporeal property, attaining property in the form of a claim to money held in a bank account, providing services or doing work (a *factum*), and infringement of another's rights (using another's property).¹⁴¹

Along with the requirement that the defendant be enriched, the plaintiff must also be impoverished through either; a decrease in assets, or the impoverishment caused if assets did not increase as otherwise would have occurred, or an increase in liabilities, or an impoverishment caused if liabilities did not decrease as otherwise would have occurred.¹⁴² Again, this is established by determining the net effect on the plaintiff's patrimony.¹⁴³ Then, it must be determined whether the defendant's enrichment occurred at the plaintiff's expense; the plaintiff must show that there is a sufficient causal link between themselves and the defendant's enrichment in order to be successful with the claim.¹⁴⁴ The element of causation is not well defined in unjustified enrichment law. However, in the South African courts causation is interpreted flexibly.¹⁴⁵ The factual causation test (the *sine qua non* or the 'but for' test) cannot be applied in all cases of enrichment and nor can the direct link test (is the link between the action and the harm too tenuous to be considered directly linked).¹⁴⁶ Du Plessis considers this element by looking at examples of causation that have already been considered by the courts.¹⁴⁷ There are some suggestions that the causal theory is followed in South Africa.¹⁴⁸

¹⁴⁰ Du Plessis *Unjustified Enrichment* 28. The enrichment must be measured objectively; the value of the enrichment must be established according to market value. Further, the enrichment must have occurred; the claim cannot be based on the possibility of future enrichment. See Du Plessis *Unjustified Enrichment* 30 -32 for discussion of these factors.

¹⁴¹ Du Plessis *Unjustified Enrichment* 32 – 40.

¹⁴² Du Plessis *Unjustified Enrichment* 41 – 43.

¹⁴³ Du Plessis *Unjustified Enrichment* 43 – 44. See also Sonnekus *Unjustified Enrichment* 79 – 76.

¹⁴⁴ See Du Plessis *Unjustified Enrichment* 48.

¹⁴⁵ Visser details the need for a causal link in detail, Visser *Unjustified Enrichment* 165 – 171.

¹⁴⁶ See Du Plessis *Unjustified Enrichment* 49.

¹⁴⁷ See Du Plessis *Unjustified Enrichment* 50 – 52. Other legal systems use the *sine qua non* test to determine legal causation just as South African law does for delictual claims. Visser *Unjustified Enrichment* 167.

¹⁴⁸ *Gouws v Jester Pools (Pty) Ltd* 1968 (3) SA 563 (T), *ABSA Bank t/a Bankfin v Stander t/a CAW Peneelkloppers* 1998 (1) SA 939 (C).

The final requirement for a successful unjustified enrichment claim is to prove that there was no legal basis for the defendant's enrichment; in other words, that the enrichment is unjustified. This is done by proving that the plaintiff meets all the requirements for the specific action (which form of unjustified enrichment is being claimed for). The plaintiff must prove both the general elements of an unjustified enrichment claim and the specific elements of the specific action. Thus, if the plaintiff is not able to satisfy the specific actions requirements, then there is considered to be a legal justification for the enrichment, and the claim fails.¹⁴⁹ Further, the plaintiff must prove that there is no ground which would support the enrichment. For instance, if the enrichment occurred due to the fulfilment of a contractual obligation, then the enrichment has a legal ground.¹⁵⁰ In *S Polwarth and Co (Pvt) Ltd v Zanombairi*, it was acknowledged that '[w]hen one person's property comes into the hands of another without lawful justification, the former owner may in general claim that be restored to him.'¹⁵¹ Van der Walt (JC) states in the case, 'enrichment is in principle *sine causa* if there is no obligatory relationship between the enriched and impoverished parties on the basis of which the enriched party could claim the transfer of the benefit'.¹⁵² However, Scott suggests that the definition set out by Van der Walt (JC) is too narrow as it excludes modes of enrichment that are provided for by law, such as the acquisition of property through testate succession, court orders and forms of original acquisition of ownership.¹⁵³

But, even if such a legal ground is absent, it does not automatically mean that the plaintiff can institute an enrichment claim, the plaintiff must still meet the rest of the requirements for the specific action.¹⁵⁴ Therefore, if all the elements of the specific action are present, then the claim is *sine causa*.¹⁵⁵ What forms a legal ground is still

¹⁴⁹ Du Plessis *Unjustified Enrichment* 52 – 53, and the sources quoted therein.

¹⁵⁰ Du Plessis *Unjustified Enrichment* 52 – 53, and the sources quoted therein. For more on the historical basis of this requirement see Du Plessis 2005 *SALJ* 143 – 148.

¹⁵¹ *S Polwarth and Co (Pvt) Ltd v Zanombairi* 1972 (2) SA 688 (R) [692].

¹⁵² Van der Walt 1966 *THRHR* 222.

¹⁵³ Scott *Unjust Enrichment* 7 – 8. Although she bases her argument on De Vos's recognition of this narrow formulation. De Vos *Verrykingsansspreeklikheid* 355.

¹⁵⁴ Du Plessis *Unjustified Enrichment* 54 – 58.

¹⁵⁵ *First National Bank of Southern Africa Ltd v East Coast Design CC* 2000 (4) SA 137 (D). In general, see Visser *Unjustified Enrichment* 171 – 193.

open to debate since; there is no list of acceptable legal grounds that would exclude an unjustified enrichment claim or indeed a list of situations in which a legal ground is absent. Visser suggests that determining where there is a legal ground for retaining enrichment should be decided on a case by case basis.¹⁵⁶

2.3.3.1 The specific enrichment action for accession: enrichment by taking from another

Du Plessis notes that forms of accession such as *inaedificatio*, the accession of movables to movables, the acquisition of fruits and forms of *specificatio*, namely *comixtio et confusio*, are forms of enrichment.¹⁵⁷ However, Du Plessis does not specifically state that these are forms of unjustified enrichment. Despite this lack of clarity, it would appear that this is intended because he also states that:

‘Certain cases of unjustified enrichment involve ‘taking’ or infringement of another’s rights. A simple example is where A builds on his land with B’s materials, and becomes owner of these materials by virtue of the law of accession. A is now enriched by ‘taking’, through depriving B of his right of ownership of the materials. This infringement of B’s rights is the basis of an enrichment claim.’¹⁵⁸

Du Plessis further notes that accession falls into the category of enrichment by taking from another; specifically including *inaedificatio*, *plantatio et satio*, acquisition of fruits and the accession of movable to movables under this type of claim.¹⁵⁹ This compensation for unjustified enrichment caused by accession can be claimed using the specific enrichment action for taking from another.¹⁶⁰ This claim is not based on any traditional action (such as the *condictio sine causa*), and because of this, there are no specific requirements for the action. Thus, for claims of this nature, the focus is placed on the general requirements for an unjustified enrichment claim. This is to

¹⁵⁶ Visser *Unjustified Enrichment* 171 – 193.

¹⁵⁷ Du Plessis *Unjustified Enrichment* 32 – 33.

¹⁵⁸ Du Plessis *Unjustified Enrichment* 331 – 332. This is based on the work of Zimmerman 1995 *CILSA* 1.

¹⁵⁹ Du Plessis *Unjustified Enrichment* 359 – 362.

¹⁶⁰ Du Plessis *Unjustified Enrichment* 33 and 331 – 332.

say that; the plaintiff must prove that the defendant was enriched and they were impoverished, that the enrichment occurred at the expense of their impoverishment and that the enrichment was unfounded (and there is no legal basis preventing restitution).¹⁶¹

However, Du Plessis notes that the civil law is not clear regarding the nature of relief for the accession of movables to movables. He also points out that an original mode of acquisition of ownership may not be a legal ground for retaining enrichment.¹⁶² The absence of legal ground requirement functions similarly to the legal causation requirement for a delictual claim. Thus, as *accessio* is a function of law, one needs to enquire whether this amounts to a legal ground that would exclude an unjustified enrichment claim? The original acquisition of ownership through acquisitive prescription is a sufficient legal ground for retaining ownership and, thus, it is not considered to be unjust enrichment and no claim for compensation can be instituted.¹⁶³ It is unclear why acquisitive prescription is exempt from payments for compensation, or why other forms of original acquisition of ownership are not.¹⁶⁴ Much like acquisitive prescription, it could be argued that *accessio* is a legal ground for retaining enrichment; after all, the purpose of *accessio* is to transfer ownership and thus increase the 'defendant's' assets. In addition, the delictual argument that the defendant's liability cannot exceed the boundaries of reasonableness, fairness, and justice, may also suggest that even in a claim for unjustified enrichment it may be unreasonable, unfair, and unjust to hold the defendant liable for enrichment that occurs through the function of law.¹⁶⁵

Arguably, these questions have been answered by precedent as case law has allowed compensation for loss of ownership via some forms of accession. However, precedent is unclear about compensation for the accession of movables to movables. Most cases regarding unjustified enrichment claims following the loss of

¹⁶¹ Sonnekus *Unjustified Enrichment* 42 – 93.

¹⁶² Du Plessis *Unjustified Enrichment* 334.

¹⁶³ Sonnekus *Unjustified Enrichment* 4. Sonnekus 2011 *TSAR* 79.

¹⁶⁴ Southwood *Compulsory Acquisition* 118.

¹⁶⁵ *Smit v Abrahams* 1994 4 (SA) 1 (A) 18. There is a need for further exploration of this issue, however, for the purposes of this study it will be assumed that the function of law in the accession of movable to movables is not a legal ground excluding an enrichment claim.

property through *accessio* are based on *inaedificatio*. For instance, while *Khan v Minister of Law and Order* involved the accession of vehicle components to the car it does not concern a claim for compensation; rather, the case forms a precedent for the determination of ownership (which is the principle thing).¹⁶⁶ Similarly, *JL Cohen Motors V Alberts* involved the accession of wheels to a vehicle but did not concern an unjustified enrichment claim, rather a determination of ownership.¹⁶⁷ In the case of, *Aldine Timber Co. v Hlatswayo* is about the accession of building materials to a movable house structure, but the case concerns payment of a debt as opposed to an unjustified enrichment claim.¹⁶⁸

Despite these issues, it is likely that the unjustified enrichment claim is the correct claim following the loss of ownership through *accessio* because precedent exists. Furthermore, because courts can extend the enrichment action where it is appropriate, it is likely that the action would be extended to include claims for compensation following the accession of movables to movables.

2.3.3.2 An unjustified enrichment action for the diminution in patrimony following the loss of movable property through the function of *accessio* (in the form of *pictura*)

In the case of street art, it is apparent that the defendant (the artist) is enriched through the acquisition of property (or enrichment through taking from another). Through *accessio* the street artist becomes the owner of movable property previously owned by the plaintiff; the defendant's assets have been increased (the presumption exists that the defendant is enriched through the transfer of property).¹⁶⁹ It is also clear that the plaintiff (the original owner of the movable property on which the street art is painted) has suffered a decrease in assets because the movable property no longer belongs to them; thus the plaintiff is

¹⁶⁶ *Khan v Minister of Law and Order* 1991 (3) SA 439 (T).

¹⁶⁷ *JL Cohen Motors SWA (PTY) Ltd v Alberts* 1985 (2) 427.

¹⁶⁸ *Aldine Timber Co v Hlatswayo* 1932 TPD 337

¹⁶⁹ Du Plessis *Unjustified Enrichment* 25, 32 -34 and 381 – 382.

impoverished.¹⁷⁰ Further, this enrichment occurs at the plaintiff's expense because their ownership is terminated.¹⁷¹

However, assuming that *accessio* would not be considered as a sufficient legal ground to exclude a claim, and a claim for unjustified enrichment could be successful against the street artist, the result would still be unsatisfactory. As with a delictual claim, the unjustified enrichment action is aimed at the plaintiff recovering the value of the lost movable and not the movable itself.¹⁷² An unjustified enrichment claim only allows for the restoration of wealth, not the restoration of assets. Thus, the movable property would still belong to the street artist, and the original owner of the material would still lose their *res* and only be compensated monetarily for the value of the movable.

It is submitted that even monetary compensation for the value of the movable property is unjust where the accession of property occurs through the commission of a crime. Thus, while compensation may be offered by the law of unjustified enrichment, such a solution is an imperfect one, and the law should seek a better, more just, solution for people who are impoverished by the loss of movable property through the operation of *accessio* in the form of *pictura*. Therefore, claims for compensation are inadequate, the law should seek restoration of property, this may be offered by the remedies for common law and specific crimes.

2.4 Common crimes, specific crimes, and the *rei vindicatio*

Unfortunately, the common law crimes and the various legislation (creating specific crimes) concerning graffiti is confusing; there are various legislative approaches.¹⁷³

¹⁷⁰ Du Plessis *Unjustified Enrichment* 41.

¹⁷¹ Du Plessis *Unjustified Enrichment* 48.

¹⁷² Du Plessis *Unjustified Enrichment* 360. The provision of financial restitution instead of the return of property is an exception in the South African legal system (the *rei vindicatio* being the general action) but this exception applies to the loss of ownership through *accessio*. Eiselen and Pienaar *Unjustified Enrichment Casebook* 7.

¹⁷³ A significant amount of this part of the work is based on an article written by the author before commencing with this study. See Smith 2014 *SACJ* 181. Consequently, the common law crimes and statutory crimes will not be explored in detail. Although, the study of the common law crimes relating to street art raises interesting questions and is a topic that warrants further exploration it is not the focus of this study.

Initially, graffiti could be prosecuted in terms of the common law crime of malicious damage to property.¹⁷⁴ Most cases of street art would meet the requirements of such crime; namely, that the perpetrator intentionally commits an act which is unlawful and that act causes damage to another's property.¹⁷⁵ However, this common law method is often unhelpful as prosecution can only be implemented if that damage to the property is not trivial in nature (the *de minimis* principle); graffiti crime may not be considered to be serious enough to warrant prosecution.¹⁷⁶ Graffiti is also criminalised in terms of the GLFA; an obscure piece of legislation the majority of the statute has been repealed and replaced by new (and often more specific) legislation.¹⁷⁷ Section 44(1) of the GLFA states that a person convicted of, 'placing any placard, poster, writing, word, letter, sign, symbol, drawing or other mark on any property, whether movable or immovable, of any other person or of the state, and thereby defaces or disfigures such property', may be sentenced to imprisonment for up to six months (or any other penalty deemed appropriate). Section 44 (2) of the GLFA states that if the person (or state) whose property has been defaced, can apply for compensation in terms of the Criminal Procedure Act.¹⁷⁸ Likewise, s300 of the Criminal Procedure Act allows an injured party or the prosecutor to implement a claim for compensation.¹⁷⁹ Should the victim not claim in terms of this section, the court may also implement a fine equal to the restoration costs of the property or another period of imprisonment not exceeding twelve months.¹⁸⁰ In addition to this specific crime, various municipal by-laws regulate graffiti.¹⁸¹

While these crimes go some way to preventing and punishing graffiti crime, as well as offering compensation to the injured party, they offer limited help and are contentious. For instance, the crime of malicious damage to property can only be instituted for property belonging to another or in which the instituting party has a

¹⁷⁴ Labuschagne 1998 *Obiter* 309.

¹⁷⁵ Burchell and Milton *Principles of Criminal Law* 849 – 852. See also Smith 2014 *SACJ* 181 regarding the potential specific crimes for graffiti.

¹⁷⁶ Labuschagne 1998 *Obiter* 311.

¹⁷⁷ GLFA s44(1).

¹⁷⁸ GLFA s 44(2).

¹⁷⁹ Criminal Procedure Act 51 of 1977 s 300.

¹⁸⁰ It is unclear whether this fine accrues to the State or the injured party.

¹⁸¹ Such as the JHB Graffiti By-law and the CPT Graffiti By-law.

legal interest, and the question arises whether the injured party has a legal interest in property they no longer own. If ownership of the property was transferred to the street artist, then the disposed owner no longer has a legal interest in the property. It is submitted, that despite this concern, at the time the crime is committed the injured party (the original owner of the movable) does have a legal interest in the property, they are still the owner of the property and thus could lay a criminal charge.¹⁸² However, much like the delictual action and the unjustified enrichment action, ownership of the movable still transfers to the street artist *via accessio* and the criminal law solutions can only offer monetary compensation in the form of a fine. The movable property cannot be restored to its previous owner.

In addition to the fact that the criminal law options do not restore ownership of the movable, there are further unhelpful issues. Albeit, in the unique cases with which this study is concerned, the financial and artistic value of the artwork may exclude the *de minimis* principle; it is uncertain whether the financial and artistic value of the artwork would mean that the case would no longer be considered to be too trivial to prosecute.¹⁸³ If graffiti crimes are considered to be too trivial (despite the value of the artwork), then the *de minimis* rule may still prevent a lot of graffiti crimes from being prosecuted.¹⁸⁴ Also, the nature of graffiti crimes can prevent the state from commencing a criminal case; the street artist is anonymous and often not caught in the act. The likelihood of criminal prosecution is limited if there is no one to prosecute. Of course, despite the anonymity of the street artist, ownership of the

¹⁸² This is assuming that ownership only transfers *via accessio* upon completion of the painting. This is, again, an uncertain aspect of the law on *accessio*. At what point has an artist done enough work to result in accession of the movable? There are many paintings by renowned artists that are unfinished and, yet, are still considered to be aesthetically and financially valuable. Referring to the work of Justinian in *The Institutes* he considered it nonsensical that the work of Apelles or Parrhasius would accrue to the owner of the tablet. Justinian *Digesta* 2.1.34 (Sandars *The Institutes* 2.1.34). Thus, even an unfinished doodle by the *right* artist may change the nature of the movable on which it is placed to the extent that it becomes art and ownership passes by *accessio*. Indeed, Cézanne was well known for incomplete works, yet these are still considered to be artworks rather than a canvas with paint. For examples of unfinished artworks see Tames <http://www.artsheaven.com/art-interrupted-the-5-most-famous-unfinished-paintings.html> (Date of use: 5 August 2016). However, the issue of when *accessio* takes place is beyond the scope of this study.

¹⁸³ *Director of Public Prosecutions (Eastern Cape) v Klue* 2003 (1) SACR 389 (E). See Burchell and Milton *Principles of Criminal Law* 355 – 356 for a discussion of cases where the triviality of the case has (and has not) excluded prosecution.

¹⁸⁴ Labuschagne 1998 *Obiter* 311.

movable is still acquired. Admittedly the anonymous nature of street art also means that the new owner of the movable is anonymous and may not actually claim the property, nevertheless, ownership still passes despite the anonymity.

An argument could be raised that the acquisition of ownership through the commission of a crime would amount to theft of property; however, theft occurs where there is unlawful appropriation with intent to steal of property capable of being stolen.¹⁸⁵ Theft of property cannot be proven in these circumstances, because a street artist does not have the required intention to take the property, merely to adorn the property.¹⁸⁶ Thus, charging a street artist for theft of property is unlikely to succeed, even though the street artist acquired the movable through *accessio* because they lack the intent to commit the crime of theft (they do have the intent to commit the crime of malicious damage to property). Therefore, because a charge for theft is not viable, the original owner of the surface cannot use the *condictio furtiva* to recover the value of property lost or damaged after being stolen.¹⁸⁷

The common law remedy of the *rei vindicatio* also does not offer a solution to the diminished party because the *rei vindicatio* can only be implemented by the owner of the property to recover such property. The original owner of the movable property is no longer the owner; therefore, they cannot institute action using the *rei vindicatio*.¹⁸⁸ Ironically, the *rei vindicatio* could be used by the street artist to claim possession of the movable property if such property remains in the control of the original owner.

Despite these issues, it is trite that criminals should not be allowed to retain the proceeds of their crimes.¹⁸⁹ POCA is an attempt to approach (organised) crime from a new perspective; it focusses on racketeering and the assets of crime (confiscation

¹⁸⁵ Burchell and Milton *Principles of Criminal Law* 167 – 168.

¹⁸⁶ As previously stated, it is unlikely that the street artist is aware that they acquire ownership of the movable property through *accessio*.

¹⁸⁷ The *condictio furtiva* is a specific delictual remedy used to recover the value of property which is lost or damaged after being stolen. Van der Walt and Pienaar *Law of Property* 174-175.

¹⁸⁸ Van der Walt and Pienaar *Law of Property* 163-171 and Du Bois (ed) *Wille's Principles* 539 – 541.

¹⁸⁹ *NDPP v Mohamed* 2002 (2) SACR 196 (CC) [15 – 16]. For an overall discussion of organised crime and the statutory framework see Burchell and Milton *Criminal Law* 970 – 1019.

and forfeiture) as opposed to focussing on the perpetrator. Section 6 of POCA criminalises the conduct of a person who acquires, uses or has possession of property that is reasonably suspected to be part of unlawful activities.¹⁹⁰ To assist with the implementation of POCA the National Director of Public Prosecutions created the Asset Forfeiture Unit in 1999. This unit is responsible for recovering assets gained through the commission of a crime. Where there is a victim of a crime and the Asset Forfeiture Unit has recovered the property the Unit returns the asset to the victim and where there is no victim the asset remains in possession of the state.¹⁹¹ The recovery of assets occurs through the issuing of a confiscation order in terms of s18 of POCA.

POCA targets the instruments and proceeds of crime and,

‘shifts the focus of prosecution from the individual and individual criminal events to the entity or enterprise, with the object of eliminating the organisation rather than the traditional objective of stopping the individual from committing additional offences’.¹⁹²

POCA may also assist where the criminal cannot be identified.¹⁹³

While organised crime is commonly understood to refer to crimes committed by criminal syndicates, POCA can assist in the case of individual wrongdoing (and thus POCA can apply to gangs of street artists as well as to individual artists).¹⁹⁴

Thus, POCA offers a legislative method for the recovery of property lost through the commission of a crime. Though, unfortunately, POCA does not expound on what acquires property in s6 actually entails.¹⁹⁵ Nor has this aspect of POCA been subject to academic debate. It is submitted that the legislature did not intend for *acquires* to

¹⁹⁰ Burchell and Milton *Criminal Law* 991.

¹⁹¹ Kruger *Organised Crime* 9.

¹⁹² Kruger *Organised Crime* 1.

¹⁹³ Prevention of Organised Crime Bill 118 of 1998 [2.3] of the Memorandum to the Bill.

¹⁹⁴ *NDPP v Geyser* 2008 ZACSA 15 (25 March 2008). POCA deals with certain crimes specifically such as racketeering, gang crime, terrorism and money laundering. Indeed, the focus and use of POCA has been on such crimes. Despite this the ambit of POCA includes graffiti crime.

¹⁹⁵ POCA s6(a).

include the acquisition of ownership because crime involving property does not usually result in the transfer ownership of such property. Nor can ownership of stolen property (or is the proceeds of a crime) be acquired by a third party; the third party cannot acquire ownership of stolen property even if they do not know that the property is stolen. Usually, only possession of the proceeds of a crime (the property) may be acquired in the commission of a crime. It is unusual for a criminal to acquire ownership (as is the case in this study). It is unlikely that the legislature intended to include the acquisition of ownership (through the function of law) within the term *acquires* when POCA was drafted.

Further, it is debatable whether the movable property with which this study is concerned should even be considered to be the proceeds of crime. It is necessary to remember that *accessio* does not require good faith on the part of the joiner. Ownership still passes via *accessio* in the case where the party acts *mala fide*.¹⁹⁶ *Accessio* is a legal function of the law in that ownership transfers regardless of whether the action involved can be characterised as criminal or not. In the case of street art, the artwork is not the proceeds of crime, rather it is the proceeds of the function of law. Moreover, in the case of accession of movables to movables in the form of *pictura*, the asset transfers to the artist and should not be able to be claimed by the state in terms of POCA.

Further, POCA does not resolve the practical issues that defeat the usefulness of the crimes of malicious damage to property and theft. POCA can only be implemented following prosecution, and graffiti crime is notoriously difficult to prosecute. The criminal may not be known, the state may consider the case to be trivial (the *de minimis* principle) in nature, and the elements of the crime may not be proven. Thus, none of the potential criminal law solutions discussed offer an acceptable solution to this dilemma.

¹⁹⁶ Carey Miller *The Acquisition and Protection of Ownership* 39; Du Plessis *Borkowski* 198.

2.5 A temporary summary

When a street artist paints on the surface of immovable property, ownership of the joined *res* accrues to the owner of the immovable. However, where a street artist paints on movable property ownership accrues to the artist (provided that the value of the painting is worth more than the surface it is painted on) even though the application of paint to the movable involves the commission of a crime. This is because *accessio* in the form of *pictura* does not require the *bona fides* of the person doing the attachment.¹⁹⁷

It is unlikely that compensation can be claimed in terms of the law of delict. The possible claim for compensation through an unjustified enrichment claim is unsatisfactory because it does not restore ownership of the movable to the original owner of the movable. The common law and statutory crimes also do not offer a satisfactory solution to this issue. Further, it is doubtful that the property can be returned using the POCA, as cases of malicious damage to property, or the specific offences, are rarely (if ever) prosecuted.¹⁹⁸

It seems that there is no acceptable solution in the South African law that provides satisfactory compensation (restoration of ownership) for this unique form of acquisition of ownership through the commission of a crime. This outcome is most disturbing because people who commit crimes should not be able to benefit from them because it is *contra boni mores*.¹⁹⁹ A different solution is needed to resolve this issue. Fortunately, the Roman-Dutch jurist Grotius may provide a solution.

¹⁹⁷ As discussed in part 2.2.3

¹⁹⁸ Labuschagne 1998 *Obiter* 311.

¹⁹⁹ The ridiculousness of this aspect of South African law has already been highlighted by Coleman in Coleman 22 *Quaint Cases* 83 – 88, in which Coleman uses the example of an artist who paints upon the motor vehicle of another and consequently becomes the owner of such vehicle.

2.6 Grotius' solution

Grotius suggested that ownership of paintings should not be acquired through *accessio* but rather through *specificatio* (he did recognise that he was digressing from the Roman law on this matter).²⁰⁰

Van der Walt and Pienaar describe *specificatio* as:

'Manufacture [*specificatio*] is the acquisition of ownership in a manufactured thing by a person using the materials or thing of another person, without the owner's permission, to manufacture a completely new thing.'²⁰¹

Thus, *specificatio* is different from *accessio* in that it involves the creation of a new thing, whereas *accessio* concerns a joined thing. In South African law *specificatio* applies to five industrial processes namely; agricultural processes, smithying processes, tailoring, carpentry, and apothecary processes.²⁰²

In order for ownership to pass through *specificatio*, the following requirements must be met; the material used must result in a new thing, and the new thing must be such that the accessory things cannot be returned to their original states.²⁰³ *Specificatio* implies that a person who has performed some form of labour on a thing, such that the economic and/or social function of the thing is changed, may acquire ownership of such thing as a result of their labour.²⁰⁴ Like *accessio*, ownership may only pass to the manufacturer if the new thing was created without the permission of the owner of the material (if the permission of the owner was given this would amount to a contract).

²⁰⁰ Grotius *Inleidinge* 2.8.3 (see Herbert *Dutch Jurisprudence* 2.8.3, Lee *Jurisprudence of Holland* 2.8.3).

²⁰¹ Van der Walt and Pienaar *Law of Property* 124.

²⁰² Van der Merwe 2004 *Roman Legal Tradition* 99. See also 102 – 108 for more on the Roman-Dutch law regarding *specificatio*.

²⁰³ Van der Walt and Pienaar *Law of Property* 124. Again, the historical application of *specificatio* is not consistent see Kaser *Roman Private Law* 26 III 5, 6 and Stoop 1998 *Tijdschrift voor Rechtsgeschiedenis* 5-6.

²⁰⁴ Stoop 1998 *Tijdschrift voor Rechtsgeschiedenis* 3.

Further, the owner of the materials may claim compensation from the owner of the new thing.²⁰⁵ Grotius supported this compensation; he stated that the acquisition of ownership by the artist, through *specificatio*, encouraged the science of painting and that the owner of the material should only have a claim for compensation.²⁰⁶

An argument can be made that original acquisition of ownership of paintings should be decided according to the rules of *specificatio* and not *accessio* in South African law. For one, *accessio* requires that joined things must be difficult to separate but not impossible, whereas *specificatio* requires that the product cannot be changed back into its original form. While paint can be removed from the surface on which it is painted (with varying degrees of success), the paint cannot be returned to its original form. The paint will be destroyed if it is removed from the surface. Thus, because the paint cannot be returned to its original form, the painting could be accepted as a form of manufacture.

Further, in the cases with which this study is concerned, the application of paint to the surface of the movable changes the nature, appearance, and function of the thing, such that it is a new thing. In the case of Banksy's *Gangsta Rat (1)* (circa 2002) it is no longer a wheel clamp; rather, it is a piece of artwork; the application of paint to the surface changes its function. Never again will the surface which is painted upon function as a wheel clamp, instead the new product will be displayed as art; its nature and function are altered – it is a *nova species*. Thus, *specificatio* may be a better approach to the original acquisition of artwork.

Admittedly, changing the original mode of acquisition for paintings may seem to be no more of a solution than that offered by *accessio*. After all, Van der Walt and Pienaar do not require that the manufacturer of the *nova species* be acting with *bona fides* and, as is the case for *specificatio*, ownership devolves on the

²⁰⁵ Van der Walt and Pienaar *Law of Property* 124-125.

²⁰⁶ Grotius *Inleidinge* 2.8.3 (Herbert *Dutch Jurisprudence* 2.8.3 and 4, Lee *Jurisprudence of Holland* 2.8.3 and 4).

manufacturer (in this case the artist).²⁰⁷ Even if ownership of the painting were determined by the rules of *specificatio* ownership would still devolve upon the artist.

However, importantly, Grotius provides a solution to this problem by stating that the rules of *specificatio* only apply to acts that are *bona fides*,

‘Dominium, or right of property, is obtained by the act of the person acquiring (*aquisitoris*), as when anyone acting in good faith gives to the material of another new character (species). ... for instance, if a man brews beer out of another’s malt and corn, or makes mead of another man’s wine and honey, or even partly out of his own and partly out of another man’s, what is thus made becomes his own, if he thought that all the component parts belonged to himself; but if he were aware that the material belonged either wholly or in part to someone else, then the owner of the material would preserve his right, and the party giving it a new character must lose his labour and the material.’²⁰⁸

It is clear that Grotius did not think that ownership should accrue through *specificatio* to a person acting in bad faith. Only where the manufacturer acts in good faith should the rules of *specificatio* be applied to determine ownership.²⁰⁹ Where a manufacturer acts in bad faith, Grotius did not even think that the manufacturer should have a claim for their labour and material. Instead, where a manufacturer does not act in good faith, Grotius thought that the new product should belong to the owner of the material and that no compensation could be claimed by the manufacturer.²¹⁰

²⁰⁷ Van der Walt and Pienaar *Law of Property* 124. Whilst, Van der Walt and Pienaar recognise that the common law required *bona fides* on the part of the manufacturer was required they find that for practical reasons it would be better if *bona fides* was not required and state that the owner of the material can claim compensation for the loss of their material.

²⁰⁸ Grotius *Inleidinge* 2.8.2 (Herbert *Dutch Jurisprudence* 2.8.2, Lee *Jurisprudence of Holland* 2.8.2).

²⁰⁹ Grotius *Inleidinge* 2.8.2 (Herbert *Dutch Jurisprudence* 2.8.2, Lee *Jurisprudence of Holland* 2.8.2).

²¹⁰ Grotius *Inleidinge* 2.8.2 (Herbert *Dutch Jurisprudence* 2.8.2, Lee *Jurisprudence of Holland* 2.8.2).

Grotius' solution is partly supported by Van Leeuwen. While Van Leeuwen included the original acquisition of ownership of paintings under the rules of *accessio*, he agreed with the *bona fides* requirement suggested by Grotius:

'In conclusion it should be observed that where the one person's goods or materials are mixed up with the materials of another, and the commixion has taken place *bona fide*, the party to whom the ownership is given must make reasonable compensation to him who is obliged to part with his property. *Secus* if the commixion has taken place *mala fide*, for then the owner of the materials retains his right, and he who has mixed them together loses his labour and his own materials.'²¹¹

It is this requirement of good faith that should be significant in deciding the ownership of street art. Grotius thought that art should transfer *via specificatio* but only when the artist acts in good faith, 'in honour of the painter's art it is understood that that if a person in good faith has painted upon another's canvas or board he acquires ownership of it'.²¹² Grotius did not think ownership of art should transfer, by any mode of original acquisition, where the artist did not have *bona fides*. This does not mean that ownership should instead accrue through *accessio*, it means that Grotius thought that where painting is concerned, for an original mode of acquisition to apply, (and in his case *specificatio*) the artist must be acting in good faith.

Guidance can also be garnered from the Roman Law on *inaedificatio*. If a builder built on land belonging to another knowing that they did not have permission to do so, then the builder is presumed to have forfeited their materials. Whereas if the builder mistakenly built on land belonging to another, then they do not lose ownership of the materials because 'no-one should gain profit to the detriment and injury to another'.²¹³ If this principle is applied to the

²¹¹ Van Leeuwen *Rooms-Hollands Recht* 1.2.5.6 (Kotzé *Commentaries* I 1.2.5.6).

²¹² Grotius *Inleidinge* 2.8.3 (Herbert *Dutch Jurisprudence* 2.8.3, Lee *Jurisprudence of Holland* 2.8.3).

²¹³ Justinian *Digesta* D50.17.206. (Watson *The Digest of Justinian* D50.17.206.).

accession of *pictura* then there is no problem because the street artist would not benefit from the act.

To acquire ownership of paintings (in the case of Grotius through *specificatio* and for Van Leeuwen through *accessio*), the artist must be acting in good faith. If the artist is not acting in good faith, then ownership does not transfer, and the artist will not have a claim for compensation for their labour and materials.

2.7 *The res derelicta intervention (occupatio)*

An argument could be made that once an artist has completed the artwork (located on movable property) and, ownership transfers to the artist, the artist abandons the property when they 'walk away' from the artwork.²¹⁴ Consequently, the joined thing becomes a *res nullius*, that is, ownership of the joined thing is abandoned and the *res* becomes ownerless.

Property that has purposely been abandoned by the previous owner can be acquired by another. Arguably, a street artist who leaves the movable *res* (on which they have located their street art) abandons the *res* when they 'walk away' from their completed work. Importantly, the person abandoning the property must have the intention to abandon the property, and it is debatable whether the street artist can be said to have this intention, especially if they are not aware that ownership has transferred to them *via accessio*. After all, intention to acquire ownership is not required in the transfer of ownership through *accessio*; the intention required for the accession of property relates to the joining of the movables.²¹⁵ As it is unlikely that a street artist acting in good faith would be aware that the movable property would be transferred to them, then it is likely that the street art does not have the intention to continue owning the property when they 'walk away'.

Admittedly, not having the intention to be the owner and intending to abandon the property are different intentions and it cannot be decisively determined that the

²¹⁴ The phrase 'walk away' is used here to suggest the scenario where the street artist has completed the work and leaves the location whether, simply because they are finished, or because they need to leave the scene of the crime.

²¹⁵ Van der Walt and Pienaar *Law of Property* 120 -121.

street artist abandoned the property. Nevertheless, when a street artist ‘walks away’ from the movable property, and they do not intend to maintain ownership of the property, then the *res* becomes a *res derelicta*.²¹⁶

Ownership of *res derelicta* can be acquired through *occupatio*: the ‘unilateral exercising of control over a corporeal thing that can be owned ... but which is not owned by anyone (*res nullius*) with the intention of becoming the owner.’²¹⁷ This form of acquisition requires that the person acquiring the property has physical control over the property and to show that they intend to take ownership of the property and that the property does not belong to anyone else.²¹⁸ In light of this legal intervention, a third person could become the owner of the property after the ownership has transferred to the street artist.

This intervention would provide a solution to the original owner of the movable property. Provided that the previous owner of the movable property is the next person to gain physical control of the *res derelicta*, and they intend to be the owner, then ownership will transfer back to them. The result will be as if transfer *via accessio* did not occur; the parties will be restored to the positions they were in prior to the creation of the artwork.

However, what if the next person to acquire possession is not the previous owner but a third person? Admittedly, this makes this remote scenario even more remote, but there is a small possibility that once the street artist’s work is completed the third person to possess the movable is not the original owner. The movable could be stolen. Someone else could take physical control; an ambitious street art collector could use this loophole in law to build their collection, to profit from the street art. Appropriation of property *via occupatio* does not require that the physical control of the property be lawful; even if the physical control is a crime ownership can still be acquired by an intervening third party.²¹⁹ Consequently, *occupatio* may also create

²¹⁶ Van der Walt and Pienaar *Law of Property* 115.

²¹⁷ Van der Walt and Pienaar *Law of Property* 113.

²¹⁸ Van der Walt and Pienaar *Law of Property* 113 -114.

²¹⁹ Van der Walt and Pienaar *Law of Property* 113.

an even more bizarre, but lawful manner in which ownership of street art could be acquired.

While this is a very unlikely scenario, it is still a possible method through which street art can be acquired; a method which, like the acquisition of movable property through *accessio*, is unjust. The original owner of the movable still suffers a decrease in their estate due to the illegal activity of another. Thus, requiring good faith in the process of *accessio* would also prevent this from occurring because ownership would not pass from the owner of the movable to the street artist. If ownership does not pass through *accessio*, then the property would not become abandoned property. The good faith requirement offers a 'fix all' solution.

2.8 A conclusion partway

It is submitted that the approach of Grotius and Van Leeuwen to acquiring original ownership of paintings through accession is a better approach than the current approach taken in South African law. While the original mode of acquisition of ownership regarding *pictura* could be either *accessio* or *specificatio* what is important is that the artist should only acquire ownership if they are acting in good faith. Requiring this element for the acquisition of *pictura* is essential. Otherwise, the law allows for the acquisition of property through the commission of a crime which is *contra boni mores*. Consequently, when the original ownership of *pictura* is in question (whether through *accessio* or *specificatio*) the South African law should require the element of *bona fides* (and thus, ownership of the new *res* should accrue to the artist). Moreover, where *bona fides* is not present the ownership of the new *res* should not be in question, it merely belongs to the owner of the material on which the painting was painted, and no compensation for the artist should be allowed. A criminal should not be allowed to benefit from their crimes.

If the South African law follows this approach to *pictura*, then the ownership of movable property will not be questioned when street art is painted on the side of such movable. Whether the value of the street art far exceeds the value of the movable, or whether the street art is considered to be a *nova species*, the property will still belong to the owner of the surface on which it is painted. If *bona fides* is not

incorporated into the requirements for the accession of ownership of paintings, then as South African street artists gain recognition and as their illegal artwork becomes artistically and financially valuable, South African property owners may lose their movable property through the commission of a crime. Moreover, they will have no recourse to restore ownership – only a debatable claim for compensation through the law of unjustified enrichment, which places the burden of proof on the victim (the plaintiff).

Thus, it is submitted that the South African law concerning the original acquisition of paintings (*pictura*) be developed such that there is a requirement that the artist act with *bona fides* for the rules of *accessio* to be applied to determine ownership. Having resolved that street art (whether painted on immovable or movable property) should belong to the owner of the surface on which it is painted (and that the artist should not have a claim for compensation for their labour and materials) it is now necessary to consider whether that finding of ownership is appropriate for culturally significant street artworks.

The public's interest in protecting and preserving street art which is culturally significant may require the limitation of private ownership to ensure this. Or indeed, it may be appropriate for the state to assume ownership of these (potential) cultural heritage resources. After all, individuals hold many different values in relation to cultural heritage resources, and it is possible that the property owner will see the street art as a saleable commodity as opposed to a national icon, or not view the art as valuable in any sense.²²⁰ Therefore, the state may need to intervene to ensure the protection of culturally valuable street art either by limiting an owner's property rights or by expropriating the property.

Consequently, this study will continue with an analysis of the cultural heritage legislation i.e. the legislation regulating the identification of cultural heritage resources and their protection and preservation. This will include what sites and objects can acquire heritage status, why such sites and objects acquire heritage

²²⁰ Roodt *Cultural Heritage* xxiii.

status and what protection heritage status offers. Further, whether selected South African street artworks qualify for such protection.

CHAPTER 3 PROTECTING AND PRESERVING STREET ART THROUGH CULTURAL HERITAGE LEGISLATION

3.1 Introduction

The art that is created by street artists by painting on property belonging to someone else should belong to the owner of the property on which it is painted. Ownership of these artworks includes the entitlements that accrue to such status i.e., physical control, to use and benefit from the property, to encumber the property and to alienate the property.¹ Private ownership of culturally significant street art can be problematic because of these entitlements. For instance, an owner who does not appreciate the art may destroy it, or an owner who recognises the value of the piece may remove the artwork from public view (either for their own enjoyment or for sale as was the case with *Mobile Lovers*). In addition, if an owner does not take steps to protect a piece of street art that holds cultural value, it is at risk of defacement, damage and environmental decay.

Culturally significant street art could be preserved and protected by the limitations placed on the ownership by South Africa's cultural heritage legislation if it were recognised as a cultural heritage resource. However, no South African street art is recognised as a cultural heritage resource. The lack of recognition means that any South African street artworks which are culturally significant are unprotected and are vulnerable to the whim of the owner.

It is only in recent years that street art has come under consideration for heritage status in other countries.² Works, situated in Melbourne, Australia, by Mike Brown and Keith Haring are included in the Australian national heritage register, and in Aachen, Germany street artworks by the street artist Klaus Paier have federal

¹ Van der Walt and Pienaar *Law of Property* 48. These rights are distinguished from the intellectual property rights of the artist. The artist retains the intellectual property right (copyright) to control the reproduction of the work, the publication of the work, and the making of an adaptation of the work inter alia. The artist also maintains the moral rights to the artwork Ramsden *Intellectual Property Law* 7, 34-35, 46-47, 49-50 and 55.

² Merrill 2015 *International Journal of Heritage Studies* 369.

protection.³ In addition, works by Blek le Rat in Leipzig have been considered for heritage protection.⁴ In Hong Kong, China, although not recognised through national heritage legislation, municipal authorities have undertaken to protect and preserve *in situ* examples of the calligraphist Tsang Tsou Choi's work.⁵ Also, the cities M+ Museum (which is a local authority development project) has acquired some of his illicit artworks.⁶

In New York, the non-commissioned street art installation by Arturo Di Modica, known as the *Charging Bull* statue (which originally appeared outside the New York stock exchange in 1989) is not officially recognised as a heritage resource, or as owned by the state. Despite this, public funds have been spent to ensure the protection and preservation of the artwork. State funds were used to move the statue to a temporary site, two blocks away from its original position (the statue is still located at such temporary site) as well as to erect surrounding barriers (when necessary), and to provide for a police guard to protect it. The street art also appears in the online catalogue of Permanent Art and Public Monuments for New York's Parks and Recreation Department. Thus, even though the *Charging Bull* is not a recognised heritage resource, it is treated as one because it is considered worthy of public spending and as a public monument.⁷

In the UK, there has been a varied approach to the protection of street art by the state or local authorities. In some instances, the state has failed, or chosen not to act; as was the case for the *Slave Labour* artwork discussed earlier.⁸ This failure is also seen in the case of Banksy's *No Ball Games* (circa 2006) even though the community considered the piece to be a national treasure.⁹ However, a few local authorities are beginning to take a more informed, pro-active response towards

³ Merrill 2015 *International Journal of Heritage Studies* 375. Regarding the Australian street art see also MacDowall 2006 *Continuum* 471.

⁴ Merrill 2015 *International Journal of Heritage Studies* 375.

⁵ Yip *Conservation of 'graffiti'* 69 – 88.

⁶ Yip *Conservation of 'graffiti'* 99 – 102.

⁷ Yip *Conservation of 'graffiti'* 140 – 148. The catalogue also includes the Carmine Street Pool Mural, a street artwork by Keith Haring, see 153 – 157.

⁸ Hansen 2016 *Crime Media Culture* 292.

⁹ Hansen *Crime Media Culture* 289 – 306.

graffiti. For example, the London Borough of Hackney developed a policy document on graffiti which recognises that:

‘Some public opinion on what constitutes graffiti has changed and that some “Graffiti” is now considered to be “Street Art” and that some members of the community now consider that “Street Art” actually makes a positive contribution to the urban environment.’¹⁰

Through this policy, and provided that the necessary permissions have been acquired and that the artwork is not seen as a blight on the urban environment, the local authority can recognise and support street art. Thus, a private property owner who appreciates an artwork that has been attached to their property can apply to the borough council’s Environmental Enforcement Service for recognition of the artwork. The Environmental Enforcement Service must weigh up several qualities when deciding whether the work can remain. These qualities include: whether the street art can be seen from a public area; whether the street art is offensive, gang-related, racially provoking, insulting or contrary to the public interest; the context of the work in relation to its site placement; the amount of graffiti / street art in the surrounding areas; whether there have been any complaints regarding the artwork; the type of property on which the art is located; amongst other considerations.¹¹

Some authorities in the UK have participated in the restoration of street art, although there is no official policy on this.¹² The UK Heritage Lottery Fund conducted a study to understand how much culture contributes towards to the economy. Included in such study was the fact that a Banksy exhibition held at the Bristol City Museum (funded through public funds) resulted in 50 000 beds in local hotels and guesthouses.¹³ It is apparent that the Heritage Lottery Fund consider this street art

¹⁰ Hackney Council Graffiti Policy 2013 available at <https://www.hackney.gov.uk/graffiti> (Date of use: 23 January 2017). For more on the developing approach of English heritage bodies see Zhang *Heritage Protection*.

¹¹ Hackney Council Graffiti Policy 2013 available at <http://www.hackney.gov.uk/Assets/Documents/Hackney-graffiti-policy.pdf> (Date of use: 23 January 2017).

¹² Yip *Conservation of ‘graffiti’* 171-172.

¹³ Aspden <https://www.ft.com/content/e2860dc2-7d06-11e2-8bd7-00144feabdc0> (Date of use: 25 January 2018).

exhibition to be an element of UK culture and, bearing in mind that it was the Heritage Lottery Fund doing the study, it can be argued that they also viewed this exhibition to be an aspect of cultural heritage.

As discussed in 1.1 Banksy's artwork, *Spy Booth* was recognised as being worthy of protection by Historic England. Retroactive planning permission for changes to be made to the historic building upon which the artwork was located was granted to extend the protection awarded to the house to the artwork.¹⁴

The lack of recognition for the cultural heritage significance of South African street art means that it is unprotected; these artworks are in danger and if they are not protected and preserved, they will be lost to future generations. The significance of the artwork will also be lost. The *Free Nelson Mandela* resistance art piece that was in Observatory, Cape Town is an example of street artwork that should have been preserved because of its cultural significance. Not only because it was one of the few remaining examples of this form of art (Apartheid resistance graffiti) but also because it held social significance and was a landmark for the community of Observatory. The Observatory area has a long history of colonial resistance pre-dating the arrival of Dutch settlers in South Africa and has many connections to the Apartheid resistance movement.¹⁵ Observatory was also one of a few de facto "grey" neighbourhoods in South Africa, in that the Group Areas Act was never fully enforced in the area and people from multiple races and cultures were resident in the neighbourhood during Apartheid. The artwork thus had special meaning and symbolism to the Observatory community; it represented their history of resistance and their unity in Apartheid resistance. The street artwork was also a reminder that Apartheid is over, that the fight for freedom is won and that South Africa is no longer segregated. The loss of that artwork is a loss to a South African culture of unity. This

¹⁴ Historic England <https://historicengland.org.uk/listing/the-list/list-entry/1333239> (Date of use: 24 January 2017). See also BBC News <http://www.bbc.com/news/uk-england-gloucestershire-32252609> (Date of use: 24 January 2017). A grade II listed building in England is a particularly important building of more than special interest.

¹⁵ Mallet <http://www.sahistory.org.za/archive/observatory-steeped-history-and-heritage-patrick-mallet> (Date of use: 8 November 2017).

piece is an example of why the protection of specific pieces of street art, such as this, is important.

Considering these examples, it may be asked whether it is time for certain pieces of South African street art to be recognised as heritage resources, i.e. to recognise the cultural significance of these pieces and to ensure their protection and preservation for future generations. Indeed, when considering that street art can be described as free public art, the protection and conservation of existing street art (which has cultural significance) is one way and, arguably, an easier and cheaper way, to promote the appreciation, understanding and enjoyment of the arts and to provide greater access to the arts.¹⁶

There is potential for the South African legal framework concerning cultural heritage resources to be used (and developed) to protect and preserve selected pieces of street art. Through such frameworks, these artworks could be recognised as South African cultural heritage resources. The foundation of South African cultural heritage legislation are the constitutional rights to culture and cultural communities. Thus, the first part of this chapter highlights the importance of the cultural rights in South Africa. The discussion of the cultural rights will emphasise the potential value of recognising selected street artworks as heritage resources; and how recognising selected pieces of street art fulfils (in part) the constitutional mandate regarding culture. In other words, recognising selected street art objects or sites as cultural heritage resources exemplifies the cultural rights in contemporary South Africa. The chapter continues by examining the relevant legislation concerning cultural heritage and analysing whether street art falls into the ambit of the cultural heritage legislation and therefore receive the care and protection that such legislation is intended to provide.

¹⁶ NHRA, Preamble and the Arts Council Act of 56 of 1997 (hereinafter referred to as the Arts Council Act) s 3(b) and (f). Barnett touches on this argument, albeit in regard to the USA, in Barnett 2013 *Chi-Kent J Intell Prop* 210. See also Bengsten 2013 *Journal of Art History* 63.

3.2 *The constitutional rights to culture*

The right to culture and South Africa's cultural heritage resources form an integral aspect of South African society post-1994 because of our segregated history. During Apartheid, the state (and the relevant supporting bodies) strove to create and support a uniform South African culture based on white supremacy and the western, colonial foundations of Europe, while segregating people/s whose cultures did not represent this ideal. The state policy did not support the advancement and/or protection of such cultures.¹⁷

During Apartheid, most South Africans were denied the ability to decide their political status freely and to pursue economic, social, and cultural development freely.¹⁸ The disregard for indigenous cultures was a significant aspect of Apartheid since a person's or a community's culture contributes towards self-determination. Thus, by denying the indigenous cultures, the Apartheid state denied indigenous peoples the right to self-determination, and this re-enforced the idea of white supremacy and the separation of the races.¹⁹

The desire for self-determination in South Africa (and for South Africans) was the main component of Apartheid resistance and, consequently, in the founding of the South African democracy in 1994.²⁰ The Apartheid conception of culture was, and is, unacceptable in the new, diverse South Africa.²¹ Thus, the recognition of the importance of the role of culture in allowing for and promoting self-determination resulted in, *inter alia*, the inclusion of the cultural rights and protections in the Constitution.²²

¹⁷ Zegeye and Krige *Culture in the New South Africa* 1 – 2. See also Goodsell 2007 *BYU J Pub L* 118 – 124.

¹⁸ For more on this topic see Meskell and Scheermeyer 2008 *Journal of Material Culture* 153. Meskell and Scheermeyer also refer to several resources that expand on the role of culture in the new South Africa. See also Silverman and Ruggles *Cultural Heritage* 3 – 22. See in general Henrard *Minority Protection*.

¹⁹ Klug 1989-1990 *Wis Int'l LJ* 251.

²⁰ Roodt *Cultural Heritage* xxi.

²¹ Roodt *Cultural Heritage* 11, see also 237.

²² The Constitution s30.

The Constitution protects two cultural rights,²³ namely: language and culture in s30:

‘Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights ...’²⁴

and cultural, religious, and linguistic communities in s31:

‘Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community

- a. to enjoy their culture, practise their religion and use their language;
- and
- b. to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.’²⁵

In addition to these rights, the Constitution also enshrines freedom of expression which includes freedom of artistic creativity,²⁶ and the right to the environment, to have the environment protected for the benefit of present and future generations and to take reasonable legislative and other methods to ensure conservation.²⁷ The responsibility for the fulfilment of these rights is then designated to national, provincial, and local governance in schedules four and five.²⁸ The Constitution also sets out the creation of the Commission for the Promotion and Protection of Cultural, Religious and Linguistic Communities.²⁹

²³ For a concise discussion on the inclusion of s30 and s31 in the Constitution and how these rights were worded see Grant 2006 *JAL* 2–10.

²⁴ The Constitution s30.

²⁵ The Constitution s31.

²⁶ The Constitution s16(1)(b).

²⁷ The Constitution s24(2)(b). The environmental right extends to include the built environment. Du Bois and Glazewski *The Environment* 2B4.1. This is also supported by the Department of Environment Affairs publications detailing the list of legislation relating to the environment; not only is there a publication concerning the built environment but also the cultural environment. See Teurlings *Part III* and *Teurlings Part IV*.

²⁸ For a more detailed breakdown of the competencies at national, provincial and local levels see Du Preez 2004 *SAMAB* 37 and Roodt 2006 *Fundamina* 208–212.

²⁹ The Constitution s181, 185 and 186, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act 19 of 2002. For more on this commission see Morrow 2005 *Human Rights Dialogue*.

These constitutional protections reify the role that culture plays in pursuing the values of the South African democracy.³⁰ The cultural rights and protections work towards ensuring the values of the Constitution and South Africa; such as self-determination, acceptance of diversity, reconciliation, black consciousness and decolonising the mind, amongst others. In the case of *MEC for Education: Kwa-Zulu Natal v Pillay* Langa CJ touched on the importance of culture in self-determination and its place in the new South Africa.³¹ He expressed the relevance of *ubuntu* in understanding the individual in African thinking and recognised the importance of the role of culture in promoting self-determination. Langa CJ, 'emphasise[d] the importance of community to individual identity and hence to human dignity' and noted that, '[c]ultural identity is one of the most important parts of a person's identity ...'³²

Further, a generous interpretation of s31 requires the state to take positive measures to ensure cultural pluralism and the survival and advancement of minority cultures.³³ Thus, not only do the cultural rights promote and protect majority cultures such as the IsiZulu (who comprise approximately 22.7 per cent of the South African population) but also serve minority cultures such as the IsiNdebele (who account for approximately 2.1 percent of the population). Likewise, the cultures of South Africans who identify with the European cultures of their forebears such as the Afrikaaners (who comprise approximately 13.5 percent of the population).³⁴

Culture unquestionably contributes towards individual self-determination, it shapes the way in which people think of themselves.³⁵ It also creates and/or reinforces

³⁰ As discussed in the Constitution Preamble and s1. It should be noted, at this point, that these rights (like the rest of the rights in the Constitution) are not absolute and are subject to internal limitation and the s36 limitations clause.

³¹ *MEC for Education: Kwa-Zulu Natal v Pillay* 2008 (1) SA 474 (CC) [53] (hereinafter referred to as *MEC for Education: KZN v Pillay*). See also Roodt *Cultural Heritage* 52, 284. The Constitution notes that self-determination applies to national unity as well as to communities sharing a common cultural and language heritage. The Constitution s235.

³² *MEC for Education: KZN v Pillay* [53]. Human dignity is one of the most important values underlying South Africa's constitutional dispensation and Langa CJ recognises the importance of culture in relation to this value.

³³ Currie and de Waal *Bill of Rights Handbook* 631.

³⁴ StatsSA *Census 2011* 24. These statistics are based on numbers of people who identify themselves as first language speakers of such cultures.

³⁵ Müller 1998 *IJCP* 399.

shared social identities of people who share a common history. O'Regan J has related the cultural rights to human dignity (and, by inference, to self-determination) and has also highlighted how the right is a community orientated right.³⁶ She stated, 'cultural rights are protected in our Constitution in light of a clear constitutional purpose to establish unity and solidarity amongst all who live in our diverse society'.³⁷ The cultural rights seek to build, promote and protect a "new South African" culture - a national identity as the rainbow nation. In addition, the cultural rights promote and protect individual and communities' culture/s as an aspect of autonomy. They function at a national level (in enhancing a South African identity, a national unity) at a community level and, at an individual level (recognising our diversity and encouraging the acceptance and respect of our various individual cultures/identities). Through the practice, participation in, and enjoyment of our individual cultures we build a unified South African cultural identity which celebrates our diversity. Hence the motto on the South African coat of arms in Khoisan: *!ke e: lxarra lke* – which translates to 'diverse people unite' or 'people who are different joining together'.³⁸

In addition to self-determination and enhancing other values and rights that form the basis of the Constitution and the new South Africa, culture and our shared and diverse cultural heritage is part of South Africa's appeal to foreign and domestic tourists. Tourism makes up for roughly 9% of the country's GDP.³⁹ Therefore, not only does South Africa's tourism profile bring in foreign money it also contributes to job creation.⁴⁰ '[Cultural] Heritage is thus seen as a resource, which not only preserves historic memory but if used creatively, can also bring various social and

³⁶ *MEC for Education: KZN v Pillay* [141]–[147] and [150].

³⁷ *MEC for Education: KZN v Pillay* [157].

³⁸ The Department of Arts and Culture

<http://www.dac.gov.za/sites/default/files/NationalSymbols.pdf> (Date of use: 24 October 2017)

³⁹ South African Government <http://www.gov.za/about-sa/tourism> (Date of use: 9 January 2017). For more on this topic see Binns and Nel 2002 *The Geographic Journal* 235; Van der Merwe 2013 *Urban Forum* 574 – 577; Baxter *Heritage Values* 241.

⁴⁰ Roodt *Cultural Heritage* xxxiii.

economic benefits to a variety of stakeholders.⁴¹ Consequently, protecting and promoting culture and cultural heritage is important for South Africa's economy.⁴²

3.2.1 Outlining culture, cultural heritage, and cultural heritage resources

The term culture is extremely difficult to define, and the definition in South Africa, because of the history, is especially complex.⁴³ Despite the importance and value of the cultural rights, the Constitution does not define culture. There is also very little case law concerning the cultural rights. *MEC for Education: Kwa-Zulu Natal v Pillay* is the only landmark Constitutional Court case that deals with culture in depth. O'Regan J stressed in the judgement that the term culture is ineffable.⁴⁴ Further, the basis of the case was the right not to be discriminated against on the grounds of religion and culture in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act and the equality clause.⁴⁵ Therefore, it is uncertain what the cultural rights include. While this study does not seek to definitively determine what these cultural rights mean, and what they include, it is necessary to establish that the rights extend to include cultural heritage resources. Then if selected pieces of

⁴¹ The contribution of cultural heritage resources to tourism is noted in the NHRA s5(5). See also Dümcke C and Gnedovsky M <https://pdfs.semanticscholar.org/3a70/d26f9adf6b277216b8f3acf7909927bf2bc5.pdf> (Date of use: 16 January 2017) at 142. This is in line with the general trend to view cultural heritage as an economic resource. Okamura *Heritage Values* 56. For a detailed discussion of the inherent attributes of cultural resources see Merryman 1989 *CAL LR* 339.

⁴² Despite the focus on these two aspects of culture, cultural heritage and cultural property fulfil many other purposes. See Turner 2006 *International Journal of Cultural Property* 351. It should also be noted that there are downsides to monetizing culture such as damage or crime caused by increased tourism to a heritage site. See for instance Irandu 2004 *Asia Pacific Journal of Tourism Research* 134-135 and Thorpe *Between Rights* 123 and 137 for examples of issues that arise for the heritagisation of sites.

⁴³ Nafziger, Paterson and Renteln *Cultural Law* 64. Benson and Prinsloo highlight the unique issues of defining culture in South Africa in Benson and Prinsloo 2013 *SAMAB* 28. Roodt notes that the literature on South African cultural heritage is not extensive. Roodt *Cultural Heritage* 287. Whilst the literature has expanded since the completion of such thesis the field is still not considerable.

⁴⁴ *MEC for Education: KZN v Pillay* [141].

⁴⁵ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 and the Constitution s9. The right not to be discriminated against on the grounds of culture was touched on in *Hassam v Jacobs NO* CCT83/08, *Bhe v Magistrate Khayelitsha* 2005 (1) BCLR 1 (CC) (hereinafter referred to as *Bhe*), and *Zondi v Member of the Executive Council for Traditional and Local Government Affairs and Others* CCT73/03. However, these cases do not investigate the meaning of the cultural rights. It is noted in *Bhe* [41] that s30 and 31 entrench respect for cultural diversity.

street art can be awarded cultural heritage resource status (as heritage sites or heritage objects), these artworks can be viewed as the embodiment of the cultural rights.⁴⁶

Currie and de Waal promote a two-pronged definition of culture. First, they see culture as the ‘practice of intellectual and artistic activity, and the works that result from this activity’.⁴⁷ This first definition thus includes cultural sites and objects. Second, they define culture as a way of life of an identifiable community, including traditions, customs, civilisation, race, nation, and folkways.⁴⁸ This approach is evidenced in the case of *MEC for Education: Kwa-Zulu Natal v Pillay*, albeit with different terminology.⁴⁹ O’Regan J supported three aspects of culture, namely:

[T]he first is the concept of culture as involving the arts; the second concept is culture in a more plural form including handicraft, popular television, film and radio; and the third is anthropological conception of culture which refers to the way of life of a particular community.⁵⁰

She suggests that s30 and 31 of the Constitution relate to the third conception of culture but may extend to include the first two conceptions. Thus, O’Regan J recognises that culture can include objects (in the form of art, handicrafts, etc.) In the same judgement, Langa CJ stated that ‘culture generally relates to the traditions and beliefs developed by a community’.⁵¹ Further on, he suggested that a restrictive interpretation of a cultural group would be one which is defined by, ‘a combination of religion, language, geographical origin, ethnicity, and artistic tradition’, albeit that he did not recommend a restrictive interpretation of the right/s to culture.⁵²

⁴⁶ For a discussion of the right to culture see Grant 2006 *JAL* 4–10.

⁴⁷ Currie and de Waal *Bill of Rights Handbook* 632.

⁴⁸ Currie and de Waal *Bill of Rights Handbook* 632.

⁴⁹ There are a few cases that touch on these rights, however most of these Constitutional Court cases arguments are based on the equality right or customary law. See for instance *Department of Correctional Services and another v Police and Prisons Civil Rights Union and others* 2013 (7) BCLR 629 (SCA) and/or the *Bhe* case.

⁵⁰ *MEC for Education: KZN v Pillay* [149]. O’Regan J relies on the work of O’Keefe. See O’Keefe 1998 *International and Comparative Law Quarterly* 904–923.

⁵¹ *MEC for Education: KZN v Pillay* [47].

⁵² *MEC for Education: KZN v Pillay* [50].

Roodt suggests that in,

‘legal discourse, ‘culture’ may be defined as an all-encompassing and all-determining concept [including] texts, images, talk, codes of behaviour, the narrative structures organising these, law and legal science: all that is created within an ethnical context to ensure survival, adaptation and development.’⁵³

Further, Roodt also suggests that communal practices (within a sociological perspective of culture) can include the conservation of historical objects.⁵⁴ Further, she postulates that cultural objects, ‘distinguish a culture’s expression and possess an identity-giving function’.⁵⁵ Indeed, property can symbolise a culture or community – it is ‘cultural property’.⁵⁶ And, after all, often objects with cultural significance can exist for much longer than one or two generations. Thus, it is cultural objects which, to a degree, ensure the continued existence of a culture.⁵⁷

Du Plessis and Rautenbach explore various definitions of culture put forward by different researchers; they conclude with the formulation offered by Throsby wherein culture is defined in two ways. One, to refer to ‘a set of attitudes, beliefs, *mores*, customs, values and practices which are common to or shared by a group’.⁵⁸ And two, to mean specific activities of people as well as the products of those activities.⁵⁹

⁵³ Roodt *Cultural Heritage* 36-37.

⁵⁴ Roodt *Cultural Heritage* 10.

⁵⁵ Roodt *Cultural Heritage* 15. Roodt also explores different international definitions for cultural heritage see 17 – 39 and the sources consulted therein.

⁵⁶ Smith 2016 *St John’s Law Review* 378. The term cultural property is the preferred term in international law to refer to cultural objects. Beukes 2004 *SAYIL* 236 – 237.

⁵⁷ Pearce *Museums, Objects and Collections* 24.

⁵⁸ Throsby as quoted in Du Plessis and Rautenbach 2010 *PER* 36. Based on Throsby <http://unesdoc.unesco.org/images/0015/001572/157287E.pdf> (Date of use: 19 January 2017) 3-4. See also Hawkes *The Fourth Pillar of Sustainability* 3.

⁵⁹ Throsby as quoted in Du Plessis and Rautenbach 2010 *PER* 36. Based on Throsby <http://unesdoc.unesco.org/images/0015/001572/157287E.pdf> (Date of use: 19 January 2017) 4.

From this overview, it is apparent that the cultural rights, at the least, include rights to culture as a way of life and the activities and practices of that lifestyle, and rights to the objects arising from that way of life.⁶⁰

The term heritage links to the cultural rights because of the link between culture and history (cultural rights assume a relationship with the past).⁶¹ Cultural heritage includes our attitudes and relationship to the past, our reverence for and attachment to certain places, practices and objects which exemplify the history of a culture.⁶² Further, history is central to a human being's self-definition; who you were compliments who you are.⁶³ Heritage is thus an aspect of culture and the cultural rights, hence the term *cultural heritage*; cultural heritage joins people together and develops and supports their current collective identities.⁶⁴

In a paper written at the request of the Department of Arts, Culture, Science and Technology, researchers at the Human Sciences Research Council defined cultural heritage as:

‘any cultural forms (buildings, languages, arts, crafts) that we value as a society. Intangible heritage (symbolism) and living heritage (music, dance, narrative, etc.) form part of our heritage resources. Even natural environments can have significance as part of our heritage.’⁶⁵

Some researchers highlight that cultural heritage falls within Maslow's hierarchy of needs, i.e. the human spiritual needs of self-actualisation.⁶⁶ Thus, they see cultural heritage as being essential to an individual's identity (personal self-determination).

⁶⁰ For more on the function of cultural heritage objects see Müller 1998 *IJCP* 399-400.

⁶¹ Harrison *Heritage* 14.

⁶² Harrison *Heritage* 14.

⁶³ Hunner and Westergren 2011 *Museum International* 121.

⁶⁴ Nafziger, Paterson and Renteln *Cultural Law* 206. Nafziger and Kirkwood detail several examples of cultural heritage, namely: ‘art, architecture, rural and urban landscapes, crafts, music, language, literature, film, documentary and digital records, folklore and oral history, culinary traditions, indigenous medicine, ceremonies and rituals, religion sport and games, dance and other performing arts, and recreational practices such as those involving hunting and fishing ...tangible artefacts’. Nafziger and Paterson *Cultural Heritage Law* 1.

⁶⁵ Deacon, Mngqolo and Prosalendis *Protecting our Cultural Capital* 1.

⁶⁶ Reeves and Plets *Heritage Studies* 204 – 207 and the sources quoted therein. See also Chirikure 2013 *South African Journal of Science* 17 wherein he highlights the low ranking of heritage ranks in the hierarchy in Africa in comparison to more pressing socio-economic needs.

Regarding the spiritual (or psychological and emotional) needs, cultural heritage can act as a form of therapy reminding and reaffirming all South Africans of who we are and how we are all part of the new South Africa.⁶⁷ After all, '[c]laiming value in the past is all about claiming prestige in the present'.⁶⁸ Consequently, cultural heritage plays an important role in the constitutional value of reconciliation – to heal the divisions of the past.⁶⁹ Cultural heritage is, therefore, an aspect of South African nation building.

However, cultural heritage is not only a culture's or a community's connection with the past, but it also develops and changes with human development. Cultural heritage can thus include objects that do not have any age or are not considered to be historical objects. For instance, the Harwell / WITCH computer (the world's first 'modern' computer) can be viewed as an example of the cultural heritage of the UK (and world cultural heritage) even though it only became operational in 1951.⁷⁰ Even the iPhone can be considered as an aspect of cultural heritage.⁷¹ After all,

'[h]eritage is not just about the past. Heritage need not be old or beautiful, though old, beautiful or threatened things may have more appeal or urgency, or might make a more dramatic story; but this is not heritage fully and properly understood.'⁷²

The protection of such heritage, both historical and contemporary, is vital not only to ensure the survival of the physical object but also to ensure its future enjoyment. The protection is necessary to ensure the role the object plays in the stimulation of imagination and human creativity; to preserve the role cultural heritage objects play in mental health and wellbeing and the connection between cultural heritage and human rights protection.⁷³ Thus, the conservation of cultural heritage is a necessary

⁶⁷ Holtorf *Heritage Values* 46. See also; Wienberg 1999 *Current Swedish Archaeology* 183, Meskell *The Nature of Heritage* and Daly and Chan *Heritage Studies* 491.

⁶⁸ Turner 2006 *International Journal of Cultural Property* 356.

⁶⁹ The Constitution, Preamble.

⁷⁰ Hendry 1984 *Business History* 280.

⁷¹ Burgess *The iPhone Moment* 28.

⁷² Evans *Principles of Environmental and Heritage Law* 297.

⁷³ Kotze and Jansen Van Rensburg 2003 *QUTLJJ* 130.

fulfilment of the cultural rights.⁷⁴ And further, the conservation of cultural heritage would allow South Africans to enjoy, participate in, and live their cultural life of choice.⁷⁵ '[O]ne needs to protect the physical manifestation of cultural heritage to protect the intangible element of cultural heritage'.⁷⁶

Overall, these commentators read s30 and 31 of the Constitution as including cultural heritage resources and view their conservation as necessary to fulfil the rights.⁷⁷ This perspective is embodied in the mission of the South African Department of Arts and Culture (as both patron of the arts and as the responsible guardian, ensuring that all citizens have access to, and the right to enjoy their cultural heritage) and in the legislation concerning cultural heritage.

3.3 *The legislative framework*

In 1994, seeking to pursue the constitutional commitment to culture, the then Minister of Arts, Culture, Science and Technology, Dr BS Ngubane, appointed the Arts, Culture Task Group (ACTAG). ACTAG sought and provided recommendations on new policies for the department's portfolio.⁷⁸ The process resulted in the submission of a White Paper on Arts, Culture and Heritage (ACH White Paper) in 1996.⁷⁹ This document had six commitments, namely: funding arrangements and institutional framework creation; ensuring adequate public subsidies for the arts, culture and heritage; achieving the full potential of arts, culture, science and technology for social and economic development (whilst promoting creativity, innovation and South Africa's diverse heritage); recognising the industrial potential of these fields and address any related issues; locating the activities of the Ministry

⁷⁴ Kotze and Jansen Van Rensburg 2003 *QUTLJJ* 130.

⁷⁵ Roodt *Cultural Heritage* xxxv and 220.

⁷⁶ Woodhead 2013 *Art, Antiquity and Law* 3.

⁷⁷ Albeit that s30 and s31 is not the main focus of enquiry for all these writers.

⁷⁸ Zegeye and Krige *Culture in the New South Africa* 3. In this chapter, the term Minister refers to the South African Minister for Arts and Culture, this government department has gone through a name change since 1994, developing from the Ministry for Arts, Culture, Science and Technology to the Ministry for Arts and Culture, as it is currently known. Thus, the term Minister refers to the relevant cabinet member responsible for the ministry, at the relevant period. Currently, the ministry is headed by Emmanuel Nkosinathi "Nathi" Mthethwa.

⁷⁹ DACST White Paper on Arts, Culture and Heritage 4 June 1996 (hereinafter referred to as the ACH White Paper). Such paper was revised in 2013 and again in 2016.

of Arts, Culture, Science and Technology within the framework of reconstruction and development; and setting out the Ministry's vision for arts, culture and heritage.⁸⁰

The need for transformation of the culture and heritage sector was and still is one of the primary concerns of the DAC since native history had been ignored under the Apartheid administration; there was a need (and still is) to recognise that the history which is most important to individuals is their personal history.⁸¹ Thus, the sector needs to reflect the many histories (and cultures) that make up South Africa; and provide special accommodation to those cultures and peoples that had not been included in the past. Further, the ACH White Paper recognised the 'healing and recreational potential of arts and culture in a period of national regeneration and restoration.'⁸²

The ACH White Paper culminated in the development or adaptation of *inter alia*: the Culture Promotion Act, the National Arts Council Act, the Cultural Institutions Act, the National Heritage Council Act, and the National Heritage Resources Act. The National Heritage Council Act in turn creates various bodies tasked with realising, 'the full potential of arts, culture, science and technology, in social and economic development, nurture creativity and innovation, and promote the diverse heritage of our nation'.⁸³

What follows is a chronological study of the cultural heritage legislation which is relevant to the preservation and protection of street art and the associated bodies.⁸⁴

⁸⁰ ACH White Paper, s1 Purpose.

⁸¹ Hunner and Westergren 2011 *Museum International* 121.

⁸² ACH White Paper s2(5) and s7.

⁸³ ACH White Paper s1(3).

⁸⁴ For a complete list of legislation concerning culture see Department of Environment Affairs *Part IV: Guide to Legislation Concerning the Cultural Environment* compiled by Teurlings P.

3.3.1 The Culture Promotion Act

The Culture Promotion Act, passed in 1983, and amended in 1998, intends to work towards the conservation, advancement, fostering and extension of culture in South Africa.⁸⁵

Through this legislation the Minister is empowered to nurture, promote, and develop arts and culture through acquiring, developing and maintaining property and by awarding bursaries/grants for foreign study; developing pilot projects for this purpose in the country; conferring honours; assisting informal community based art projects and; any other services deemed necessary.⁸⁶ It also empowers the Minister to foster educational relationships and, develop and promote cultural relationships internationally, such as through funding for foreign students wishing to study in South Africa; visitors to South Africa; South African exhibitions abroad and foreign exhibitions in South Africa; foreign university programmes or staff with the object being to publicize South African culture; donating South African literature to foreign libraries and institutions or; any other services deemed necessary.⁸⁷ Further, the Culture Promotion Act provides for the creation of regional councils for cultural affairs to fulfil the purpose of this legislation in their designated region.⁸⁸

3.3.2 The National Arts Council Act

The purpose of the National Arts Council Act is to create the National Arts Council (NAC) and set out the Council's powers, duties, and functions. The National Arts Council is established to achieve many goals. The mandate of the Council is:

⁸⁵ The Culture Promotion Amendment Act 59 of 1998 (hereinafter referred to as the Culture Promotion Amendment Act).

⁸⁶ Culture Promotion Act 35 of 1983, s2(1) (a) (hereinafter referred to as the Culture Promotion Act), read with the Culture Promotion Amendment Act, s1. The word Minister will be used in this chapter to refer to the Minister of Arts, Culture, Science and Technology or the Minister of Arts and Culture (as the Department is now known).

⁸⁷ Culture Promotion Act, s2(1)(b), read with the Culture Promotion Amendment Act, s1.

⁸⁸ Culture Promotion Act, s3(1) and (5).

- (a) to provide, and encourage the provision of, opportunities for persons to practise the arts;
- (b) to promote the appreciation, understanding and enjoyment of the arts;
- (c) to promote the general application of the arts in the community;
- (d) to foster the expression of a national identity and consciousness by means of the arts;
- (e) to uphold and promote the right of any person to freedom in the practice of the arts;
- (f) to give the historically disadvantaged such additional help and resources as are required to give them greater access to the arts;
- (g) to address historical imbalances in the provision of infrastructure for the promotion of the arts;
- (h) to promote and facilitate national and international liaison between individuals and institutions in respect of the arts; [and]
- (i) to develop and promote the arts and to encourage excellence in regard to these.⁸⁹

Further, the functions of the council are, amongst others, to investigate and determine the need for support of individuals and organisations and to provide support where appropriate in the form of *inter alia* financial, advice, information; to conduct research into the arts. As well as to, 'purchase or otherwise acquire, or possess, ... or otherwise encumber movable and with the approval of the Minister, granted with the concurrence of the Minister of Finance, immovable property'.⁹⁰

The NAC is authorised in several ways to achieve these objectives; such as: by providing funding, advice, or information; doing research and, generally doing anything which is deemed necessary and appropriate.⁹¹ The NAC recognises the relationship between arts and culture, i.e. that the arts are an expression of culture

⁸⁹ Arts Council Act s 3 (a) – (i).

⁹⁰ Arts Council Act s6(1) (a), (c-d) and (n). Only the functions of the NAC relevant to this study have been included.

⁹¹ Arts Council Act s6(1) and (2).

however, they distinguish their mandate from the mandate of culture.⁹² Domains which the NAC include within their directive are books and press; visual arts; performing arts; audio-visual and multimedia and; arts craft. In addition, the NAC is responsible for: the production or publishing; the dissemination or trade and; the preservation, education and management or regulation of these domains.⁹³

The council specifically excludes film; advertising; architecture; heritage; archives and libraries from their responsibilities.⁹⁴ This means that, where specific art is declared a heritage resource, the responsibility for such property (the responsibility that arises from the heritage status) does not reside with the NAC; unless the NAC (or an institution supported by the NAC) is the owner of such property. Consequently, the NAC will not offer protection to street art that is a declared cultural heritage resource unless they are the owner of the property on which it is located.

3.3.3 The Cultural Institutions Act

The purpose of the Cultural Institutions Act (CInA) is to: provide funding for cultural institutions; to create cultural institutions under the control of councils; to establish a National Museums Division and; to provide for matters connected with such. Through the CInA the DAC Minister is permitted to declare any existing institution to be subject to the conditions of the act and to create institutions which are subject to the act. The Minister may also amalgamate flagship institutions or declare institutions to be flagship institutions; the Iziko Museums and the Ditsong Museums are examples of such flagships.⁹⁵ Such establishments are subject to various

⁹² National Arts Council
<http://www.nac.org.za/wp-content/uploads/2018/11/Strategy-Document-Version-7.pdf> (Date of use: 5 July 2018) at 12.

⁹³ National Arts Council
<http://www.nac.org.za/wp-content/uploads/2018/11/Strategy-Document-Version-7.pdf> (Date of use: 5 July 2018) at 17.

⁹⁴ National Arts Council
<http://www.nac.org.za/wp-content/uploads/2018/11/Strategy-Document-Version-7.pdf> (Date of use: 5 July 2018) at 18.

⁹⁵ Cultural Institutions Act (hereinafter referred to as CInA) s3 as amended by the Cultural Laws Second Amendment Act 69 of 2000 (herein after referred to as the Cultural Laws Amendment Act 2) s1. The Iziko Museums of South Africa (previously called the Southern Flagship) is a collection of 11 national museums in the Eastern cape, such as the South African Museum and the South African National Gallery. Iziko <http://www.iziko.org.za/static/page/governance> (Date of use: 26 October 2017). The Ditsong Museums (previously known as the Northern Flagship)

statutory controls and must have a council through which they function.⁹⁶ Importantly, a declared institution cannot purchase or otherwise acquire immovable property without the permission of the Minister (whose permission is granted after consultation with the Minister of Finance).⁹⁷ However, they may purchase or otherwise acquire movable property without the Ministers' permission.⁹⁸

Further, any movable property which belongs to the state (or has been given or bequeathed to the state) may be placed under the care and management of a declared institution. Thus, the responsibility for the conservation of any part of the national estate can be placed on a declared institution.⁹⁹ Significantly the South African National Gallery is part of and curated by the Iziko Museum. Thus, the Iziko Museum is a role player in the South African art industry and may (or should) take an interest in protecting and preserving street art.

3.3.4 The National Heritage Council Act

This legislation creates the National Heritage Council (NHC). The ACH White Paper envisaged that this council would be involved in the promotion and preservation of South Africa's living heritage: our oral traditions, and the incorporeal aspects of South African culture/s.¹⁰⁰ Thus the NHC is one of the institutions that is tasked to, 'develop, promote and protect the national heritage for present and future generations.'¹⁰¹

Further, the NHC serves as the oversight body for this section of government. The council has several functions, amongst which are: the responsibility to advise the

includes the Museum of Cultural History, the Museum of Military History and the Museum of Natural History (previously the Transvaal Museum) amongst others. CInA s6(1) and (2). CInA also establishes the National Museums Division and sets out the functions of such at s12 and 13.

⁹⁶ CInA s5 as amended by the Cultural Laws Amendment Act 2 s3. The functions of the various councils are compiled at s8, as amended by Cultural Laws Amendment Act 2 s6.

⁹⁷ CInA s4(3)(a).

⁹⁸ CInA s4(5) (b).

⁹⁹ CInA s10(1).

¹⁰⁰ The National Heritage Council Act 11 of 1999 (hereinafter referred to as the Heritage Council Act) s 4(c), (d), (e) and 10(1)(f).

¹⁰¹ Heritage Council Act s4 (a) and (c).

Minister of the DAC on national policies concerning heritage matters and any other matters concerning heritage and; to advise the Minister on the allocation of funding.¹⁰² Further, the NHC must heighten co-operation, consultation and co-ordination on a variety of matters, including the transformation of the heritage sector ... [and] co-ordinate the activities of public institutions involved in heritage management in an integrated manner to ensure optimum use of state resources and consult and liaise with relevant stakeholders ... [and] ... explore repatriation methods which will ensure the return of heritage objects held by foreign states, institutions or individuals.¹⁰³

Despite the NHC being empowered to investigate ways to repatriate property, the National Heritage Council Act does not empower the council to obtain property in support of South Africa's heritage. The NHC may provide funding, to people or institutions, to promote and develop national heritage activities and resources but they cannot do this themselves.¹⁰⁴ Instead, the acquisition of heritage resources (tangibles) is legislated through the NHRA.

3.3.5 The National Heritage Resources Act

Following the National Heritage Council Act is the NHRA. The purpose of the NHRA is to ensure the management of the national estate and to support communities in the development and conservation of cultural heritage resources so that these resources may be preserved for future generations.¹⁰⁵ Benson and Prinsloo state that the Act was created, 'with the aim of developing an integrated framework to facilitate the management, development, participation and access to the national heritage resources'.¹⁰⁶ This legislation recognises that,

¹⁰² Heritage Council Act s10(1) (a) (i – ii) and (b). For the full functions, power and duties of the Council see s10(1) and (2).

¹⁰³ Roodt *Cultural Heritage* 292.

¹⁰⁴ Heritage Council Act, s10(1)(d).

¹⁰⁵ NHRA, Preamble. The national estate is the total amount of heritage resources in South Africa that are deemed worthy of preservation. SAHRA
<http://www.sahra.org.za/sahris/about/heritage-objects> (Date of use: 21 December 2015).

¹⁰⁶ Benson and Prinsloo 2013 *SAMAB* 36.

‘our heritage celebrates our achievements and contributes to redressing past inequities. It educates, it deepens our understanding of society and encourages us to empathise with the experience of others. It facilitates healing and material as well as symbolic restitution...’¹⁰⁷

The Act emphasises the importance of these resources in working towards reconciliation, understanding, and respect, and in developing a unified South African identity.¹⁰⁸ The NHRA highlights the importance of heritage resources to South African communities’ histories and beliefs and that they, in turn, contribute to research, education and tourism.¹⁰⁹ As such, the NHRA recognises the power of the Constitutional cultural rights and the role these rights play in supporting the new South Africa and promoting the underlying values, and in turn how the Act supports these rights. Indeed, one of the general principles of heritage management is to give further content to the fundamental rights.¹¹⁰ The NHRA represents those rights by working towards the conservation of South Africa’s heritage resources so that they can be experienced and enjoyed by current and future generations. This fulfils the requirement of s30 to allow people to participate in the cultural life of their choice and the requirement created by s31(a)’s obligation to allow people to enjoy their culture.

The NHRA begins by determining what property (whether corporeal or incorporeal) can be part of the national estate.¹¹¹ These include: places, buildings, structures and equipment, landscapes and natural features which are of cultural significance ... graves and burial grounds ... movable objects (... objects related to oral history and living heritage, ethnographic art and objects, ... objects of decorative or fine art,

¹⁰⁷ NHRA, Preamble.

¹⁰⁸ Holtorf is one researcher who explores the potential of (cultural) heritage in exploring and promoting the reconciliation of disparate groups of people. See Holtorf 2010 *Museum International* 91.

¹⁰⁹ NHRA, s5(1)(a) – (c), (4) and (5).

¹¹⁰ NHRA s5(3)(c).

¹¹¹ NHRA, s3.

objects of scientific or technological interest, and various media).¹¹² Of relevance to this study are places, buildings, structures and equipment, ethnographic art and objects of decorative or fine art.¹¹³

Determining whether such place or object should become part of the national estate is determined by its cultural significance or other special value. This requires consideration of any of the following:

- The importance of the *res* to a community, or pattern of South Africa's history.
- On condition that the *res* has uncommon, rare or endangered aspects of South Africa's natural or cultural heritage.
- If the *res* provides information relevant to South Africa's natural or cultural heritage.
- The aesthetic characteristics of the *res* considering that a community or cultural group values it.
- Prodigious creative or technical achievement displayed in the *res*.
- On condition that a community or social group has a strong social, cultural, or spiritual association with the *res*.
- If the *res* is an outstanding example of the work of a person, group or community which is of importance to South African history.¹¹⁴

The NHRA then legislates the creation of the South African Heritage Resources Agency (SAHRA) as well as any necessary provincial heritage resource authorities. Moreover, although not specifically stated in the same section of the NHRA, it is apparent in other sections that the creation of local heritage authorities is allowed

¹¹² NHRA, s3(2). In general, cultural heritage objects are considered to be, 'the physical remains of the past, man-made objects that are of archaeological, historical, pre-historical, artistic, scientific, literary or technical interest'. Roodt *Cultural Heritage* 15.

¹¹³ Consequently, the sections of the NHRA dealing with the other types of heritage resources will not be focussed on herein.

¹¹⁴ NHRA s3(3)(a) – (h).

(or intended).¹¹⁵ SAHRA is charged with managing the national estate, and awarding heritage status to new (or previously unrecognised) sites and objects.¹¹⁶

In addition to SAHRA, the NHRA also legislates the creation of the SAHRA Council.¹¹⁷ The SAHRA Council is the managing body for SAHRA. Such body advises and reports to the Minister and provides the Minister with any required information; takes accountability for the functioning of SAHRA; provides advice and assistance to SAHRA and; supports the organisation of policy creation and planning for the national estate at both national and provincial levels.¹¹⁸

The NHRA requires bodies such as SAHRA to recognise the unique value of heritage resources because they are finite, non-renewable, and irreplaceable and thus, require careful management to ensure preservation for future generations.¹¹⁹

SAHRA and provincial and local heritage authorities provide protection to sites or objects by declaring them to have national heritage status.¹²⁰ This protection works towards ensuring that sites cannot be damaged or demolished; it also controls the export of movable heritage objects (although it does not prevent the sale or ownership of such objects).¹²¹ It also allows the heritage authority and the owner to agree on the conditions of care for the resource.

Heritage resources are either listed as a grade I, II or III resources. A grade I resource is one that has exceptional qualities to the extent that it is of national significance,¹²² and such a resource is identified and managed (including protection and preservation) by SAHRA i.e. at the national level.¹²³ This means that a grade I

¹¹⁵ The NHRA refers to local authorities numerous times, for instance s8(1) states, '[t]here is a three-tier system for heritage resources management, in which ... local level functions are the responsibility of local authorities.'

¹¹⁶ NHRA s4 (d). For more on the functions of SAHRA see Roodt *Cultural Heritage* 296 – 297 and SAHRA <https://www.sahra.org.za/publications/information-booklets/> (Date of use 11 January 2017)

¹¹⁷ NHRA s14.

¹¹⁸ NHRA s16.

¹¹⁹ NHRA s5(1)(a).

¹²⁰ NHRA s7.

¹²¹ SAHRA <http://www.sahra.org.za/sahris/about/about-sahra> (Date of use: 15 December 2015).

¹²² NHRA s7(1) (a).

¹²³ NHRA s8(2).

listed resource must have outstanding significance in terms of any of the characteristics set out in s3(3) of the NHRA (some of which were discussed above). The resource must also be authentic in terms of its design, materials, craftsmanship or setting, and must hold significant universal value and symbolism such that it contributes towards human understanding and nation-building. Further, the loss of such a resource would considerably reduce South Africa's national heritage.¹²⁴

A grade II resource is one which is considered to have qualities which make the resource significant to specific province or region, displays any of the characteristics listed in s3(3) of the NHRA and contributes to the understanding cultural, historical, social and scientific development in the province or region (but must still fulfil the criteria for grade I classification).¹²⁵ Grade II resources are identified and managed by a provincial heritage resources authority.¹²⁶

Then, grade III listed heritage resources are other resources that are deemed worthy of conservation.¹²⁷ They must also hold any of the characteristics listed in s3(3) of the NHRA and, in the case of a site, contribute towards the environmental or cultural significance of an area (which also satisfies one of the s3(3) criteria) but does not qualify for grade II status.¹²⁸ These resources are identified and managed by a local authority such as a Metropolitan Municipality.¹²⁹

Interestingly, in detailing the responsibility of SAHRA for grade I resources the NHRA specifically refers to the management of the national estate.¹³⁰ Grade II resources are also considered to fall within the national estate and thus the management of SAHRA.¹³¹ But it is not clear whether SAHRA is responsible for the

¹²⁴ Government Gazette No. 24893 of 30 May 2003 (hereinafter referred to as GG 24893) s43(1). This gazetted notice is entitled National Heritage Resources Act 25 of 1999 Grading System and Heritage Resources Assessment Criteria (section 7(1) of the National Heritage Resources Act).

¹²⁵ NHRA s7(1)(b) and GG 24893 s43(2).

¹²⁶ NHRA s8(3).

¹²⁷ NHRA s7(1)(c).

¹²⁸ NHRA s8(4) and GG 24893 s43(3).

¹²⁹ NHRA s8(4).

¹³⁰ NHRA s8(2).

¹³¹ Nafziger and Paterson *Cultural Heritage Law* 358.

management of grade III listed resources. However, Kotze and Jansen Van Rensburg suggest that the national estate is intended to, 'encompass everything, whether movable or immovable, tangible or non-tangible, privately or publicly which is regarded and valued as the cultural heritage of South Africa'.¹³² This view of the national estate is supported by Ndoro who sees the national estate as including, 'any property movable or otherwise, which by virtue of its importance to the heritage of the country, remains the property of the people, held in trust and controlled by heritage authorities.'¹³³ It is submitted that national estate is a hold-all term which includes all heritage resources regardless of grade listing and that the purpose of grade listing is to identify who is responsible for the management of the different types of resources.

3.3.5.1 Heritage sites and protected areas

SAHRA is responsible for identifying and protecting heritage sites of national importance (grade I) while provincial heritage sites are responsible for identifying and protecting heritage sites within a province or region (grade II).¹³⁴ Anybody can nominate a site for consideration to SAHRA or the provincial authority.¹³⁵ No provisions are made in this section of the NHRA for identification, management and protection of local heritage sites (grade III). It is uncertain whether the protection guaranteed by these clauses extends to include the preservation of local heritage sites.

The NHRA safeguards declared heritage sites by stating that no one is permitted to destroy, destruct, damage, disfigure, excavate, alter, subdivide or make any changes to the planning status of the site without a permit which may be issued by the relevant heritage authority upon application for permission.¹³⁶ Further, if necessary, the relevant heritage authority may, with consent from the owner, develop regulations pertaining to individual sites to ensure these safeguards as well

¹³² Kotze and Jansen Van Rensburg 2003 *QUTLJJ* 136.

¹³³ Ndoro *Legal Definitions* 31.

¹³⁴ NHRA s27(1) and (15) for grade I and s27(2) and (16) for grade II. A site is defined in s2(xiii) as any area of land, including that covered by water, and structures or objects thereon.

¹³⁵ NHRA s27(3).

¹³⁶ NHRA s27(18). Hereinafter these safeguards will be referred to as the destruction limitations.

as to regulate the conditions of use and the admission of members of the public to the site.¹³⁷ The relevant heritage authority may also, with the consent of the owner, take steps to ensure the conservation or improvement of a site. This may include constructing fences, walls or gates, along with the possible acquisition, to ensure access to the site, and to erect signage at the site.¹³⁸ A heritage site can be identified with a badge indicating its heritage status where it is appropriate to do so.¹³⁹ Significantly, the owner is involved in negotiations to stipulate the conditions under which the status is granted, i.e. what responsibilities the owner has and how the heritage authority may use the resource.¹⁴⁰ Any limitations of the owner's property right are created through the agreement between the two parties.

SAHRA and provincial heritage bodies can also designate the area surrounding a heritage site as a protected area to ensure the protection of the site better, promote the enjoyment of the site or protect the view of and from the site.¹⁴¹ Again, local authorities or local heritage sites are not authorised to declare protected areas. Local authorities are authorised to designate an area as a heritage area (distinguished from a protected area) and must provide protection for a heritage area.¹⁴² However, it is unclear what the difference between a heritage site and a heritage area is. The term 'area' is not defined in the NHRA, and confusingly the definition of site includes, 'any area of land'.¹⁴³ In addition, s27(1) and (2) on heritage sites refers to the identification of *places* of cultural significance and places is defined in the Act as a 'site, area or region' thus, s27 can be applied to heritage areas, and the need for s28 is questionable.¹⁴⁴ Further, none of the items which are listed as the types of immovable property that may be included in the national estate include area(s) nor do any of the characteristics of heritage resources.¹⁴⁵ Thus, there is no clarity as to what characteristics would qualify an area as a heritage area,

¹³⁷ NHRA s27(19).

¹³⁸ NHRA s 27(21).

¹³⁹ NHRA s27(17).

¹⁴⁰ NHRA s27(8)(d).

¹⁴¹ NHRA s28.

¹⁴² NHRA s31(5) and (7).

¹⁴³ NHRA s2(xiii).

¹⁴⁴ NHRA s 2(xxxii).

¹⁴⁵ NHRA s3(2) and (3).

other than that it surrounds a heritage site, and whether this section of the Act could be used to protect local heritage sites because they are not included in s27 of the NHRA on heritage sites. Admittedly, the Act states that local authorities are responsible for the identification and management of grade III resources, but it is concerning that grade III sites are not specifically provided for as heritage sites.¹⁴⁶

Interestingly, if a heritage site is owned by the state or a state-supported body the site must be maintained to an agreed minimum standard.¹⁴⁷ Private owners of heritage sites are not subjected to a minimum standard of maintenance. Nor is maintenance listed as one of the safeguards for heritage sites. Therefore, the NHRA does not require private owners to take any positive action regarding heritage site, it only limits what they may do at a heritage site.

Finally, it is up to the provincial heritage authorities to keep a heritage register of the heritage resources that have been identified in terms of the NHRA.¹⁴⁸ Whilst this section of the NHRA refers to heritage resources and not specifically to heritage sites or protected areas, it is assumed that it is these forms of heritage resources which must be included in this register (kept by provincial heritage authorities) as a separate register is kept for heritage objects. In other words, it is assumed that the heritage register referred to in s30 of the NHRA is a register of heritage sites and protected areas not heritage objects. A register of heritage objects must be compiled and kept by SAHRA as opposed to a provincial heritage authority.¹⁴⁹

3.3.5.2 Heritage objects

According to Lesley,

‘All artefacts carry messages about cultural heritage. These are embedded in the choices that people make about the style in which they are made. When these objects, for secular or religious reasons,

¹⁴⁶ NHRA s8(3).

¹⁴⁷ NHRA s27(20).

¹⁴⁸ NHRA s30. In NHRA s2 (xv) a heritage register is defined as a list of heritage resources in a province.

¹⁴⁹ NHRA s32(7). The register for heritage objects will be discussed in more detail below.

come to embody or represent aspects of our heritage that are very important to us we may wish to protect them and bequeath them to future generations.¹⁵⁰

The NHRA also makes provision for the protection of heritage objects. The protection of heritage objects is similar to that of heritage sites in that no person may damage, destroy, disfigure, or alter any heritage objects without a permit issued by SAHRA.¹⁵¹ The heritage status of the object may be indicated by a certificate or badge.¹⁵² The NHRA also limits the exportation of such objects unless a permit from SAHRA is acquired and, in the case of certain objects an export permit may never be granted due to the nature and significance of the object.¹⁵³ The NHRA places the responsibility for protection and preservation of the heritage object on the owner (or custodian). Thus, unlike heritage sites, owners of heritage objects are required to maintain them. SAHRA may assist with funding for restoration or repair work on the object.¹⁵⁴ SAHRA is responsible for keeping a register of heritage objects (listed by type in part I of the register), specific heritage objects kept in public museums or other secure conditions (as part II A) and other specific heritage objects (as part II B).¹⁵⁵

Overall, SAHRA is responsible for keeping an inventory of the national estate.¹⁵⁶

3.3.5.3 The process for acquiring heritage status

The NHRA details the process for applying for heritage status for sites, areas, and objects. This process is set out to ensure that the declaration of property as a resource qualifies as a fair administrative action in terms of the Promotion of

¹⁵⁰ Lesley 2001 *SAMAB* 9.

¹⁵¹ NHRA s32(13).

¹⁵² NHRA s32(11).

¹⁵³ NHRA s32(19)-(31). For more on the control and protection of cultural heritage objects detailed in the NHRA see Beukes *South Africa* 354, specifically 361-371.

¹⁵⁴ NHRA s32(15) and (18).

¹⁵⁵ NHRA s32(7)(a).

¹⁵⁶ NHRA s39.

Administrative Justice Act (PAJA).¹⁵⁷ PAJA requires that an institution (SAHRA) which exercises a public function (declaring the property as a heritage resource) in terms of legislation which adversely affects a person must be procedurally fair.¹⁵⁸ In order for such action to be fair, the person affected must be given adequate notice of the nature and purpose of such, the opportunity to make representations, a clear statement of the administrative action, notice of a right of review or internal appeal and notice of the right to request reasons for the action.¹⁵⁹ This provision is fleshed out in s4 and s5 of the NHRA and the specific requirements for the declaration of heritage sites in s27 and heritage objects in s32.

For heritage sites, any person may apply with a written motivation to SAHRA or the relevant provincial authority requesting for a site to be granted heritage status.¹⁶⁰ It is not specified in the Act who may nominate objects for heritage status; the Act only refers to SAHRA. However, the process designed by SAHRA to nominate an object for heritage status allows anyone to submit an application, so it is assumed that the NHRA intends for anyone to nominate an object.¹⁶¹ SAHRA processes an application for heritage status through the online South African Heritage Resources Information System (SAHRIS). SAHRIS is a 'free open-source, web-based heritage management system'.¹⁶² The system allows for the online processing of permits, impact assessments, surveys, grading and declarations. It also acts as a national heritage resources repository (digital inventory system), a collections management system (descriptions, photos etc.) and the permit process governing the movement, conservation and, treatment of heritage resources.¹⁶³

¹⁵⁷ Promotion of Administrative Justice Act 3 of 2000 (hereinafter referred to as PAJA).

¹⁵⁸ PAJA s1(i)(a)(ii) and s3(1) read together with the Constitution s239 "organ of state".

¹⁵⁹ PAJA s3(2).

¹⁶⁰ NHRA s27(3) and (4).

¹⁶¹ NHRA s32(1). SAHRA
<http://www.sahra.org.za/sahris/sites/default/files/website/articledocs/Site%20and%20object%20nomination%20process.pdf> (Date of use: 19 June 2018).

¹⁶² Smuts 2015 *ISPRS* 398.

¹⁶³ Smuts 2015 *ISPRS* 398, albeit that Smuts refers to heritage sites not heritage resources. As of March 2003, SAHRA stopped accepting paper and non-digital applications. Wiltshire
<http://www.sahra.org.za/sahris/sites/default/files/website/articledocs/SAHRIS%20CIPA%202013%20Final%20N%20Wiltshire.pdf> (Date of use: 11 January 2017) at 2.1.

Amongst other requirements that must be fulfilled, the nominee (applicant) must: register on SAHRIS, submit a/the name for/of the heritage resource, designate the appropriate heritage authority (i.e. the national authority would be SAHRA or a provincial authority such as the Provincial Resources Authority Gauteng), provide a summary of the reasons for the nomination and a full statement of significance, provide images, and upload any consent letters (such as consent from the owner of the property).¹⁶⁴ In addition to the online application process, but before a declaration regarding the heritage status can be made, the NHRA requires further steps to be taken; these requirements differ depending on the type of heritage resource.

3.3.5.4 Heritage sites application process

SAHRA is permitted to declare a site as a heritage site by placing a notice in the Government Gazette, and a provincial authority may do so by publishing a notice in the Provincial Gazette.¹⁶⁵ However, before this can be done, the heritage authority must notify owner of the site and/or, mortgage holder, occupier, or other party with a registered interest in the property, and/or a conservation body that has registered their interest in the property to allow such parties to make submissions regarding the application.¹⁶⁶ Such notification begins a sixty-day period in which these parties may make submissions regarding the declaration and for the owner to propose conditions upon which the declaration is acceptable.¹⁶⁷ The notice also begins a six-month provisional protection period so that the site is protected as if it were a declared site until a final decision is made regarding the declaration.¹⁶⁸ During this time the owner (or another interested party) may object to the proposed declaration or propose conditions to the declaration; should SAHRA consider the proposals to be unacceptable, they can get an extension of a further six months, in order to provide for the protection of the site until contestations to the declaration are resolved. However, if an acceptable compromise cannot be reached within the

¹⁶⁴ SAHRA *Site and Object Nomination Process*.

¹⁶⁵ NHRA s27(5) and (6).

¹⁶⁶ NHRA s27(8). A conservation body registers their interest in the area in terms of s25(1)(b).

¹⁶⁷ NHRA 27(7).

¹⁶⁸ NHRA s27(10).

extended time, SAHRA can declare the site as a heritage resource (SAHRA has unilateral authority to ensure the protection of sites deemed worthy of heritage status).¹⁶⁹ If the owner of the property is the state, a local authority or supported body, they can object to the declaration if the site does not meet the criteria for grade I or II listing, or if such declaration would jeopardise state security, or if they have offered to transfer ownership to the relevant heritage authority, and such offer has been refused.¹⁷⁰

Thus, while there is a negotiation process from the time of the submission of the application through SAHRIS, SAHRA has a veto-like power to declare a privately-owned site as a heritage resource. This means that SAHRA has the autonomous authority to limit an owner's rights over immovable property. However, as there is no minimum standards clause or maintenance clause for heritage sites the unilateral action only prevents the owner from taking actions such as building on the site. It however does not place the responsibility on the owner to protect or maintain the site. SAHRA may, with the agreement of the owner, make regulations preventing harm to the site, to regulate the use of the site and potential development of the site, and to regulate admission to the site.¹⁷¹ Further, SAHRA may also undertake work at the site to protect and preserve the site with agreement from the owner.¹⁷² But an owner who has objected to the declaration is unlikely to assent to any regulations or work being performed on the site once SAHRA has unilaterally declared the heritage status of the site. SAHRA should be empowered to undertake any reasonable actions they deem necessary to ensure the protection and preservation of the site where an owner is not cooperating. Otherwise, in these instances, the heritage status will do little to achieve what it is intended to do.

¹⁶⁹ NHRA s27(11).

¹⁷⁰ NHRA s27(12).

¹⁷¹ NHRA s27(19).

¹⁷² NHRA s27(21).

3.3.5.5 Heritage objects application process

Like heritage sites, the NHRA empowers SAHRA to declare objects as heritage objects.¹⁷³ Unlike heritage sites, this duty is not designated to provincial heritage authorities. The wording of s32(1) is perplexing as only objects that are part of the national estate may be declared to be heritage objects. This suggests that a decision on the cultural significance of an object must already have been taken before consideration of the declared heritage status can occur. It is uncertain whether there are objects which are not declared heritage objects but still form part of the national estate. This is ineffectual because the cultural significance of an object can only be considered if an application for declared heritage object status is submitted.¹⁷⁴

Before a declaration is made, SAHRA may provide the owner of the object with reasonable time to make any recommendations or submissions regarding the declaration (unless the circumstances would work against this).¹⁷⁵ There is a significant difference between a heritage site declaration where parties *must* be given notice and a heritage object declaration where SAHRA *may* give notice. This is reiterated in s32(4) where it is stated that SAHRA *may* (with the approval of the Minister) declare an object/collection/type of object/list of objects, to have heritage status by placing a notice in the Government Gazette.

However, in s32(5)(a) of the NHRA it is stated that SAHRA *may not* exercise the power to declare a specific object or collection as a heritage resource *unless* the owner of the object or collection is given a sixty-day notice period to allow them to make submissions, or to suggest reasonable care and safety conditions regarding the deceleration of heritage status for the object or collection. In addition, regarding a type of object, SAHRA *must* publish a provisional notice in the Government

¹⁷³ NHRA s32(1).

¹⁷⁴ It is possible that the sections that regulate the export of objects intend to control the export of objects that are part of the national estate but are not yet declared as heritage objects. Thus, an application for permission to export an object would provide SAHRA with the opportunity to consider whether the object should be declared as a heritage object. For more on export control see International Trade Administration Commission of South Africa www.itac.org.za/pages/services/import-export-control/export-control (Date of use: 9 April 2019).

¹⁷⁵ NHRA s32(3).

Gazette, make a public advertisement regarding the declaration and its purpose and effect, notify any interested party such that they have sixty days to provide submissions or objections regarding the declaration, and SAHRA must take such submissions, conditions, and objections into consideration.¹⁷⁶

The terminology used in s32(3) and (4) appears to conflict with s32(5)(a). In s32(3) and (4) SAHRA is not required to give notice of the declaration. The use of *may* suggests that the notification is optional, and this is re-emphasised by the statement '[n]othing herein shall oblige SAHRA to give such prior opportunity if circumstances militate against this'. But s32(5)(a) states that, for specific objects or collections SAHRA may only make the declaration if they have given the owner notice and allowed time for submissions and objections regarding the heritage status. The wording in s32(3) and (4) also seems to conflict with s32(5)(b) because on the one hand SAHRA has the authority to act independently but on the other hand, it has to publish the Government Gazette notice, the advertisement and notify all interested parties.

Section 32(6) confuses the process further. The specific wording of the clause reads as follows:

‘An *object* or *collection* shall be deemed to be protected as a heritage object for six months from the date of service or *publication of a notice* under subsection (5)(a) or (5)(b)(i), or until such notice is withdrawn or the *object* or *collection* or *type of objects* is declared to be a heritage object, whichever is the shorter period.’ (Own emphasis).

Thus, an *object* or *collection* is deemed to be protected for six months beginning at the service of the notice (s32(5)(a)) or publication of a notice (s32(5)(b)(i)). Otherwise, an *object*, *collection* or *type of object* is deemed to be protected for six months if declared as a heritage object. This emphasises the lack of clarity over whether SAHRA has the unilateral declaration authority that it has for heritage sites. Then as the first part of the clause only applies to objects and collections, it is

¹⁷⁶ NHRA s32(5)(b).

unclear whether *type of objects* has this provisional protection period. The use of *publication of a notice* suggests that it also applies to *type of objects*, but this does not explain the exclusion of these resources from the first part of the clause. The clause also makes no mention of listed objects. Thus, it is unclear whether SAHRA has the veto-like authority to declare heritage objects as they do for heritage sites and/or whether they must give notice of the declaration.

However, considering the requirements in s27(8) of the NHRA on the procedure for heritage sites, in conjunction with the wording of s32(5), it is suggested that SAHRA must give due notice to relevant parties, allowing time for any submissions, suggested conditions or objections to be presented, and that SAHRA must take such into consideration before making a declaration on a heritage object. It is only when the circumstances surrounding the safety or condition of the object (or any other relevant factor) make this impractical, or where the negotiations with the owner for the declaration of the property have failed, that SAHRA is empowered to declare an object as a heritage object without making such concessions. Even in such as circumstances, the declaration can only be made with the approval of the Minister. Thus SAHRA would have to inform the Minister of the situation and explain the urgency of the situation and the risk it poses to the object, to obtain the required approval for a heritage status declaration. This process ensures that, for potential heritage objects, SAHRA is empowered to act in precarious situations, but such power is fettered by requiring approval from the Minister.

3.3.5.6 Penalties for offences and non-compliance

If a heritage resource has been allowed to fall into disrepair (such that the resource no longer holds value and the destruction or demolition of the resource becomes a possibility, or enables development of the designated land or adjoining land) SAHRA can serve an order for repair or maintenance on the owner. SAHRA may also serve a repair or maintenance order if the resource has been neglected (such that the potential for conservation is hindered). And, should that order not be complied with,

SAHRA can take on responsibility for the work and claim compensation from the owner for the costs of repair/restoration/rehabilitation.¹⁷⁷

In addition, the NHRA legislates a number of offences and the punishments for such negligence. First, any person who contravenes the sections dedicated to the protection and preservation of heritage resources may be liable to a fine and/or imprisonment, or in the case of vandalism community service.¹⁷⁸ Second, the Minister may also prescribe a fine (of up to R10 000.00) or imprisonment (not exceeding six months) for any contravention or failure to comply with any regulation set by a heritage resource authority or local authority by-laws.¹⁷⁹ Third, the Minister can authorise district magistrates to implement an admission of guilt fee (up to R10 000.00) for contravening any clause of the NHRA or a daily fine of R50.00 (to a maximum 365 days) for as long as the contravention continues.¹⁸⁰ Fourth, there are also offences for failing to provide relevant information, providing false information (when seeking a permit), failing to comply with or contravening any orders, in terms of the NHRA, from a heritage authority, obstructing the holder of a permit, damages or receives any badge/sign/display or other property erected by a heritage authority, or any other; unlawful act, contravention, or failure to comply with orders in terms of the act (or guiding someone to do so).¹⁸¹ Fifth, the Minister may require that the convicted offender put right in a specified manner the result of their action, or pay an amount of money equal to the costs of such restoration.¹⁸² Sixth, the Minister may issue an order preventing a convicted owner from developing a heritage site or area for ten years, unless such work is to restore the property.¹⁸³ And, finally, the Minister may order forfeiture, of an asset which was involved in the committing of the offence, to SAHRA.¹⁸⁴

¹⁷⁷ NHRA s45.

¹⁷⁸ NHRA s51(1) and (13)

¹⁷⁹ NHRA s51(2), Government Gazette No. 21051 of 31 March s8.

¹⁸⁰ NHRA s51(3).

¹⁸¹ NHRA s51(5).

¹⁸² NHRA s51(8).

¹⁸³ NHRA s51(9).

¹⁸⁴ NHRA s51(14).

Other than those already specified, and depending on which section of the NHRA is contravened, the period of imprisonment may vary from three months to five years.¹⁸⁵ For instance, damaging a heritage site will result in a class one penalty (fine and/or imprisonment for up to five years). Damaging a heritage object could result in a class six penalty (fine and/or imprisonment not exceeding 3 months). Desecrating a burial site/grave could result in both a class two and class five penalty (fine and/or imprisonment not exceeding 3 years for class 2 or not exceeding six months for class 5).¹⁸⁶

In sum, there are various penalties which may be implemented for the damage or destruction of a heritage resource. It is all but clear as to why the penalty for an offence concerning a heritage site is more severe than the penalty for an offence concerning a heritage object or why desecrating a burial ground or grave is subject to two different penalties.

3.3.5.7 Purchasing heritage resources

To acquire ownership of cultural heritage resources, SAHRA is empowered to purchase property in various sections of the NHRA. Section 21(5)(b) empowers SAHRA (with approval from the council) to purchase any property. No ministerial approval is required in this clause.

Section 32(24)-(31) requires that SAHRA must purchase a heritage object when the owner has applied for permission to export the object permanently, and such permission has been refused.¹⁸⁷ Section 32(26)(b) states that SAHRA must 'offer to purchase the object either by immediate cash payment or by payment of compensation in such manner as the Minister in consultation with the Minister of Finance may determine'. Here, the Ministers' approval is not required for cash payments but is required for other forms of compensation. This may be because this only applies to a limited number of heritage objects and/or that heritage authorities

¹⁸⁵ NHRA Schedule.

¹⁸⁶ NHRA s51(1)(a), (b), (e) and (f), in conjunction with the Schedule.

¹⁸⁷ These objects must be of outstanding significance and their loss would diminish South Africa's heritage. NHRA s32(24) read with s32(7)(a)(i).

may not have sufficient funds at their disposal so that the only heritage objects they can purchase without the Ministers' approval will not be a substantial cost.

3.3.5.8 Heritage agreements

SAHRA or a provincial heritage authority may, with the consent of the owner, enter into a heritage agreement (in the form of a binding contract) with a provincial authority, local authority conservation body, person or community to provide for the conservation, improvement or presentation of a specific resource provided that the owner has consented.¹⁸⁸ The specific terminology of 'conservation, improvement or presentation' suggests that heritage agreements may not extend to include the purchasing of resources i.e., that the legislation did not intend for the relevant heritage authority to conclude a heritage agreement to purchase the property. Therefore, it appears that heritage agreements can only be concluded for the purpose of protecting and preserving the heritage resource. However, it is possible that purchasing could be read into the clause because the definition of conservation includes management, and SAHRA is responsible for the management of heritage resources is empowered to make purchases in terms of s26(1)(a).

It is odd that a heritage agreement cannot be concluded with the owner of the property. The specific listing of whom the heritage authority can enter into an agreement with (which does not include the owner) and the requirement that the owner's consent must be acquired suggests that the section on heritage agreements does not extend to include owners. It would be beneficial to include an owner should a heritage agreement need to be concluded to change the conditions agreed to upon the declaration of the heritage status of the resource. This would also be beneficial for any other purpose necessary to ensure protection and preservation or management of the resource.

¹⁸⁸ NHRA s42(1).

3.3.5.9 Expropriation of heritage resources under the NHRA

Section 46(1)(a) and (b) of the NHRA empowers the Minister for Arts and Culture (with the agreement of the Minister of Finance) to purchase or expropriate (subject to compensation), any property for conservation or any other purpose contained in the NHRA provided that it is in the public interest or for the public benefit.¹⁸⁹ It is unclear why 'purchase' is included under the section on expropriation because a purchase is not an expropriation. It is also interesting that the public interest/public benefit requirements are not included in the other sections authorising purchases. Why is the Minister only empowered to purchase property in the public interest or the public benefit, but the same standard is not a requirement for when SAHRA makes purchases? It is probably assumed that SAHRA is working in the public interest/public benefit and that these requirements are infused in the principles of heritage management. The expropriation of cultural heritage resources will be analysed further in the following chapter.

3.3.5.10 Concerns regarding the protection and preservation of heritage sites and objects in the NHRA

Other than those already identified, there are other inconsistencies and unclear or confusing sections in the NHRA. The following identified issues with this legislation may have an impact on the protection of street art as a cultural heritage resource (although the impact extends to all forms of cultural heritage resources regardless of the type).

To begin, s25(e) of the NHRA requires a heritage authority, such as SAHRA, to make arrangements for the protection of all heritage resources, and s27(15) places a duty on SAHRA to protect national heritage sites. While SAHRA is permitted to make arrangements regarding the protection of heritage resources, what these arrangements may include and to what extent the protection may limit an owner's property rights over a heritage resource is unclear.¹⁹⁰ Further, the term 'protection'

¹⁸⁹ NHRA s46(1)(a) and (b). It is noted the s46 is not essential as expropriation of property is empowered through the Constitution and the Expropriation Act.

¹⁹⁰ NHRA s25(1)(e).

is not defined in the NHRA. The act is unclear as to the extent to which property rights may be interfered with in the interest of protection. This lack of clarity could be significant if the declaration of a person's property as a heritage object was subjected to a constitutional enquiry, i.e. if the declaration was challenged by the owner as an unjustifiable limitation of their Constitutional property right.¹⁹¹

Admittedly it is not uncommon for protection to be undefined in heritage legislation. For instance, the World Heritage Convention does not define protection.¹⁹² Nor do the UNESCO Operational Guidelines which use the word interchangeably with conservation, preservation and safeguarding.¹⁹³ Some guidance could be garnered from the terms conservation, preservation and safeguarding if they were defined in the Convention or the Operational Guidelines but they are not; each definition notes that the terms are used interchangeably without defining any one of them. Further, the NHRA does not define preservation or safeguard and defines conservation as including the 'protection, maintenance and sustainable use of places or objects so as to safeguard their cultural significance'.¹⁹⁴ The interchangeable use of these terms is discordant, and it is unclear what is actually meant by protection (or preservation and safeguarding).

Next, there is significant confusion regarding the management of heritage objects in the NHRA. In terms of s12 of the NHRA, '[t]he object of SAHRA is to co-ordinate the management of the national estate' and s13(1)(c) declares that '[t]he general functions of SAHRA are to – (c) identify, record and manage nationally significant heritage resources'. Both these clauses are problematic due to a lack of clarity on the terminology used. The term 'management' (which is used in both these clauses)

¹⁹¹ This will be discussed in more detail in chapter 4.

¹⁹² UNESCO <http://whc.unesco.org/archive/convention-en.pdf> (Date of use: 2 November 2017).

¹⁹³ UNESCO <http://whc.unesco.org/archive/gloss96.htm> (Date of use: 25 May 2018) 'Protection', 'Conservation', 'Preservation' and 'Safeguarding'. The glossary does refer to the definition of conservation as presented in the UNESCO "Nara Document on Authenticity" <https://whc.unesco.org/archive/nara94.htm> (Date of use: 25 May 2017) namely, 'all operations designed to understand a property, know its history and meaning, ensure its material safeguard and, if required, its restoration and enhancement'. South Africa's World Heritage Convention Act 49 of 1999 (which incorporates the world heritage convention into South African law also does not define the terms.

¹⁹⁴ NHRA s2(iii).

is defined in the NHRA as including the conservation, presentation, and improvement of a *place* protected in terms of this Act.¹⁹⁵ In turn, the definition of conservation includes the ‘protection, maintenance, preservation and sustainable use of *places or objects* so as to safeguard their cultural significance’.¹⁹⁶

The definition of the term improvement includes, ‘the restoration, repair and rehabilitation of a *place*’.¹⁹⁷ Presentation is described as the exhibition and display of, access and guidance to, the provision, publication or display of information about, and performance and oral presentations related to heritage resources.¹⁹⁸ Therefore, there is a lack of consistency in the terminology in regard to heritage places and heritage objects. It is unclear why heritage objects are not included in the definitions of management and improvement but are included in the definition of conservation.

In addition, as previously noted, s32 on heritage objects does not include a similar SAHRA protection clause as is provided for heritage sites. The lack of protection clause and the lack of inclusion in the terminology suggest that cultural heritage objects do not fall under the management of SAHRA and therefore, that SAHRA does not have the authority to interfere with the property rights of cultural heritage objects, nor do they hold any responsibility for the improvement of heritage objects. However, heritage objects still form part of the national estate, and as stated in s8(1)-(4) of the NHRA, SAHRA (or other relevant heritage authority) is responsible for the management of heritage resources.¹⁹⁹ As heritage resources include objects, this part of the legislation read together with the definitions of conservation and presentation (which are included in the definition of management) suggest that heritage objects do fall within the management of SAHRA. Nevertheless, if this is the correct reading of the legislation, SAHRA’s management of heritage objects is a hollow responsibility because there is no protection clause.

¹⁹⁵ NHRA s2(xxiii). Place is itself defined in s2(xxii) but does not include objects.

¹⁹⁶ NHRA s2(iii).

¹⁹⁷ NHRA s2(xix).

¹⁹⁸ NHRA s2(xxvi).

¹⁹⁹ NHRA s3(2)(i).

There is a lack of conformity between the sections for heritage sites and heritage objects. There is no minimum standard/maintenance clause for heritage sites yet, this is required for heritage objects.²⁰⁰ Similarly, there is a lack of uniformity regarding whether SAHRA has the unilateral authority to declare heritage objects without consulting the owner, compared to the requirement that the owner must be consulted before their property is declared as a heritage site. The added emphasis that, '[n]othing herein contained shall oblige SAHRA to give such prior opportunity if the circumstances militate against this' suggest that SAHRA has more power regarding heritage objects than it does for heritage sites.²⁰¹ It is also uncertain why SAHRA and provincial heritage authorities may declare on the status of/investigate the potential of/protect sites whereas it is only SAHRA who is empowered to do this for heritage objects. Plus, the veto-like authority of SAHRA to declare sites as heritage resources does not require any positive action to be taken by the owner for the protection and preservation of these sites. And it is unlikely, having used the veto-like authority, that the owner will agree to any conditions or responsibilities regarding the property or to letting SAHRA undertake any work on the property. The veto-like authority for heritage sites only enforces the destruction limitations.

Further, while the definition of presentation is unproblematic, s44 of the NHRA which deals with the presentation of heritage resources is problematic. Section 44 empowers a heritage resources authority to coordinate and promote the presentation of places of cultural significance and heritage resources which form part of the national estate; this includes placing explanatory plaques, training guides, holding exhibitions, erecting memorials, and, 'any other means necessary for the effective presentation of the national estate'.²⁰² 'Any other means necessary' is far too wide authority to be acceptable, it could be interpreted to allow public access to privately owned houses because the house is a culturally significant building or because a cultural heritage resource is located inside the house, or it could mean taking possession of a cultural heritage resource to present it. The power provided

²⁰⁰ NHRA s32(15).

²⁰¹ NHRA s32(3). This suggests that private ownership of immovable property is stronger (and therefore less likely to be interfered with) than private ownership of movables.

²⁰² NHRA s44(1).

to heritage authorities by this clause is too vague and needs to be expounded upon in order to limit the acceptable steps that may be taken to present a resource.

The lack of guidelines regarding what form of limitations can be placed on the owner, what form of protection the owner may be required to provide and/or what steps the owner is required to take to preserve and maintain the property (albeit there is only a maintenance clause for heritage objects) is concerning where SAHRA exercises their veto-like authority to declare on the heritage status of property. If the owner and the heritage authority agree on the conditions of the declaration, this is not problematic. However, the unilateral authority to enforce limitations on the property when an agreement cannot be reached may be challenging in terms of the constitutional property right.²⁰³

Indeed, because there is no negotiating process as to what is required of the owner (what steps the owner must take to protect and preserve the property) SAHRA may unilaterally enforce severe limitations on an owner. To protect themselves SAHRA should develop guidelines on what limitations may be enforced when exercising the veto-like authority. Further, while SAHRA may suggest conditions for the protection and preservation of the resource in the negotiation process, the negotiation process may fail and SAHRA may declare the property as a heritage resource unilaterally. In this instance, there is no provision that requires SAHRA to serve the owner with a notice on the conditions for protection and preservation

Section 45 which deals with the compulsory repair order is also concerning. This provision allows a heritage authority which is responsible for a heritage site to serve the owner of the site with a compulsory repair order if they consider that the site,

- ‘(a) has been allowed to fall into disrepair for the purpose of—
- (i) effecting or enabling its destruction or demolition;
- (ii) enabling the development of the designated land; or
- (iii) enabling the development of any land adjoining the designated land; or

²⁰³ This will be discussed further in chapter 4.

(b) is neglected to such an extent that it will lose its potential for conservation'²⁰⁴

This clause conflicts with the lack of a maintenance clause or minimum standards clause in s27. It is unfair to require an owner to effect repairs when they were never required to maintain the site in the first place. The heritage authority must specify the work which in its opinion is necessary to prevent further deterioration to the site, and the repairs must be completed to the satisfaction of the heritage authority. Should the owner not comply with the order, the heritage authority may complete the repairs themselves and recover the costs from the owner.²⁰⁵ It is unclear how the heritage authority will determine disrepair or to what extent the heritage authority can require repairs, the repairs may be extensive and costly, potentially beyond the means of the owner. It is also unclear how the heritage authorities will determine whether the disrepair was intentional or what qualifies as neglect. For instance, a heritage site may be damaged in a natural disaster and should the owner fail to repair the damage would that failure be considered to be neglect? The clause also allows the heritage authority to effect repairs themselves at the owner's cost, even if the owner did not agree to the repairs or think them necessary. Consequently, the power given to heritage authorities in s45 is again too far-reaching.

Further, the interaction between the s45 compulsory repair order and the penalties listed in s51 is confusing. A compulsory repair order places a financial burden on the owner, and if found guilty of an offence in terms of the NHRA they may also have to pay a fine. Thus, an owner may be required to financially compensate the state twice for the same action or failure to act (paying the fine and either restoring the property or repaying the state for the costs of restoration).

It is also unclear why s45 does not apply to heritage objects. Section 32(15) requires that an owner keep a heritage object in good condition and in a secure place, and the heritage object cannot be repaired or restored without the permission of SAHRA. However, SAHRA is not empowered to order the repair or restoration of a heritage

²⁰⁴ NHRA s45(1).

²⁰⁵ NHRA s45(2)-(3).

object. The only recourse a heritage authority has for heritage objects are the relevant penalties contained in s51, and these penalties can only be enforced once the person who causes the harm to the object has been found guilty of contravening the relevant section of the NHRA. This means that the repair and restoration of heritage objects is subject to the functioning of South Africa's criminal justice system; which could be time-consuming (during which time the object could deteriorate further, potentially to the extent that it can no longer be repaired), costly and unsuccessful. Moreover, should the criminal case prove unsuccessful, a heritage authority has no recourse to ensure protection and preservation of the object. For this reason, the exclusion of heritage objects from s45 on compulsory repair orders is a failure of the Department of Arts and Culture to ensure the protection and preservation of heritage objects. Again, the lack of uniformity between the responsibilities for heritage sites versus objects is highlighted; site owners are not required to maintain a site but can be issued with a repair order whereas object owners are required to maintain the object, but SAHRA is not empowered to issue a repair order if the owner does not live up to this responsibility.

Finally, it is confusing to include the word 'purchase' in s46 on expropriation. As noted, an expropriation is not a purchase.

There are many problematic areas of the NHRA, and it is clear that amendments to the legislation need to be effected. The following recommendations are suggested to improve the functioning of the legislation and ultimately to better ensure the protection and preservation of South Africa's heritage resources.

- The NHRA should define what is meant by protection and preservation. In addition, the terms protection, preservation, conservation and safeguarding should not be used interchangeably, nor should they be used to define each other (such as when conservation is defined as including protection). It is also recommended the Act be amended to limit the use of these words to protect and preserve. This would ensure uniformity and resolve the many issues regarding the definitions and their applications.

- SAHRA must develop guidelines on the type of limitations that may be enforced when exercising their veto authority. SAHRA needs to prescribe the extent of their authority in these circumstances. There needs to be greater detail regarding the basic types of interventions the heritage authorities can implement in the fulfilment of their management task; this could be done either in the NHRA or with the publication of regulations. For example, if the declaration of a person's property requires an owner to secure the property, then regulations need to contain the ways in which an owner could be required to secure the property, this could include: erecting protective fencing, installing an alarm/electronic security system, hiring a security company and may extend to requiring the owner to have adequate insurance over the property. This suggestion does need not be a comprehensive list of interventions as different resources will require different interventions, but it will provide greater clarity as to the heritage authority's power to limit an individual's property right, the responsibilities of the heritage authority and the responsibilities of the owner. It is especially recommended that financial limits be provided so that an owner is aware of the financial implications of having their property declared as a cultural heritage resource as well as limiting the financial impact that the declaration may have on an owner.
- It must be clarified whether s27 only intends for SAHRA or the relevant heritage authority to preserve heritage sites or whether the bodies are only responsible for the protection of heritage sites.
- Local sites should be included in s27 while not falling under the responsibility of SAHRA. Thus, a new clause similar to s27(1) and (2) for the identification of local sites should be included along with a clause confirming who is responsible for the protection of local sites as s27 (15) and (16) do for national sites and provincial sites.
- It needs to be clarified whether the intention of s27 is only to provide protection for heritage sites or whether both protection and preservation are intended. Protecting a heritage site which is not preserved is pointless thus

the wording in s27 (10), (11), (15), (16), (18) and (23) should include the words “preserve” or “preservation”.

- It may be beneficial to include a minimum standards clause for heritage sites such that the site is at least maintained at the same standard as it was upon declaration. Including a minimum standards clause would at least ensure the preservation of the site in its current state.
- It needs to be clarified whether upon the unilateral declaration of a heritage site, the heritage authority can enforce any regulations regarding the site or undertake any work on the site. Currently, these require the consent of the owner no matter how the heritage status was achieved.²⁰⁶ However, it might be productive to provide the heritage authority with the power to enforce certain regulations and allow certain work. Again, the publishing of guidelines as to the types of limitations and responsibilities regarding heritage sites that can be implemented would be beneficial. Admittedly, a minimum standards clause would partially fulfil this role, but, certain sites may require more interventions than the destruction limitations and maintenance to a minimum standard, and the heritage authority needs to be empowered to act in these cases without the consent of the owner. However, the types of limitations and responsibilities placed on an owner in these circumstances must be curtailed. The heritage authority must be limited to the actions they can take or enforce, and this will likely be significantly less than the potential interventions allowed for in s27 (19) and (21).
- The distinction between heritage sites and heritage areas must be clarified. This would mean redefining the term site in the NHRA so that it does not include “area” and defining what an area is and what it includes. Alternatively, it could be considered whether s31 on heritage areas is necessary. The use of the term place (which includes sites and areas) in s27(1) and (2) means that areas are included within the scope of s27, and this may be sufficient;

²⁰⁶ NHRA s27(19) and (21).

s31 may be superfluous and only adds to the significant confusion created by the lack of definitive terminology and the interchangeability of terminology. Indeed, the use of the term heritage place could replace both heritage sites and heritage areas, since the definition of place includes sites and areas.

- The confusion whether heritage objects are included in management and improvement needs to be resolved so that the heritage resources which fall under the management of the various heritage authorities is apparent. This would require the redefinition of the terms: management and improvement so that they include heritage objects within their ambit.
- The nomination process for heritage objects must be clarified, to make it clear who may nominate an object as a heritage object. It is suggested that, like heritage sites, any person should be able to nominate an object for consideration and the wording of s32(1) be amended accordingly.
- The nomination process for heritage objects should also clarify that any object which is thought to be culturally significant can be nominated for consideration. An object should not already have to have been identified as part of the national estate.
- More clarity needs to be provided on the consultation process with the owner of heritage objects. SAHRA must be required to notify the owner and allow the owner to make submissions regarding the declaration unless this would impede the protection and preservation of the object due to the urgency of the situation. This would require the term *may* in s32 (3)-(5) be changed to *must*.
- The confusion regarding the publishing of a provisional notice in a Government Gazette and advertisement must be clarified over which heritage objects require such and which ones only require the notification of the owner (and therefore what forms of objects are protected for sixty days while the declaration process is pursued). To clarify for a specific object or a collection only the owner needs to be notified but types of objects and lists of

objects require a provisional notice in the Government Gazette and public advertisement. Plus, all forms of heritage objects should be protected for sixty days from the date of notice.

- A clause needs to be included in s27 for heritage sites and s32 for heritage objects that requires SAHRA to present an owner with a notice of the terms for the protection and preservation of the resource when SAHRA acts unilaterally i.e. what steps an owner is required to take (or not to take), the standard at which the resource must be maintained and so forth. These stipulations will probably be the same conditions that SAHRA suggested in the negotiating process.
- Heritage objects also need to be included in s45 on compulsory repair orders. This would better ensure that the purpose of the NHRA can be fulfilled for heritage objects. There also needs to be more clarity on the process for declaring objects as heritage objects; the owner's participation in the process should be necessary as it is for heritage sites. In addition, the unilateral power to declare property as a heritage resource without the consent of the owner needs to be amended; perhaps by including an independent third-party at the end of an unsuccessful negotiation process. This would ensure that SAHRA may only use the unilateral authority where it has been independently assessed that it is necessary to do so.
- Section 45 also needs to be amended so that it is clear that the issuing of a compulsory repair order happens prior to pursuing criminal action. Thus, it is only when an owner fails to comply with the repair order, that the heritage authority can pursue criminal sanctions against an owner. In other words, there needs to be a distinct separation between the compulsory repair order and the penalties. An owner cannot be responsible for the costs of repair and the financial penalty. Further, the extent to which a heritage authority can require repair needs to be limited. At the least, regulations should be established to limit the amount of repair and restoration costs which an owner can be held responsible for.

The fines payable for contravening the NHRA may offer some guidance as to the amounts that an owner can be held responsible. For instance, the admission of guilt fine is limited to R10 000.00 and the fine payable for contravening a provision in the Act is limited to R18 250.00.²⁰⁷ Therefore the criminal penalties could offer guidance as to the financial limits that an owner can be held responsible for.

Alternatively, the regulations would have to include different limits for sites and objects, and different limits for intentional damage and accidental damage. It may be preferential to hold an owner responsible for repairs amounting to a percentage of the value of the property (possibly on a sliding scale as the value of the property increases). The percentage of repairs to which an owner can be held responsible could be different for accidental or unintentional damage and intentional damage. This suggestion would clarify the extent to which the state can interfere in property rights by placing limited financial burdens on an owner and provide guidance on the responsibility of the state in maintaining cultural heritage resources.²⁰⁸ It would also highlight the responsibility that comes with owning a cultural heritage resource.

- Owners should be included within the list of people and organisations with whom a heritage agreement may be concluded.²⁰⁹
- The word 'purchase' needs to be removed from s46 on expropriation. As noted, an expropriation is not a purchase. Whilst this is not an impediment to the expropriation of cultural heritage resources it is beneficial for legal certainty not to include purchase within s46. Rather, 'purchase' should be included in s42(1) on heritage agreements and that this clause be extended to include agreements with the owner of the resource.

²⁰⁷ NHRA s51(3)(a)-(b). The contravention of a specific provision fine is calculated at R50.00 per day for a maximum of 365 days.

²⁰⁸ This recommendation highlights that the criminal fines may be inadequate. An owner should not be faced with a choice between complying with law (and incurring a greater expense) and breaking the law (and paying the lesser amount of the fine).

²⁰⁹ NHRA s42(1)(a).

- To ensure consistency, the public interest or public benefit requirements should be included for purchases made by SAHRA, as well as for the conclusion of heritage agreements.
- In addition, regulations should be published to specify the financial limits at which higher levels of approval are required for making purchases. The regulations would permit SAHRA to conclude agreements independently up to amount A. However, where the costs to purchase property exceed amount A the approval of the SAHRA council is required up to amount B. Where the costs to purchase the property exceed amount B the approval of the Minister is required up to amount C. And where the costs will exceed amount C the approval of the Minister of Finance is required. These regulations could be amended periodically to allow for inflation and budget allocations.²¹⁰

Implementing these recommendations ensure that the NHRA functions better and that the intention of the Act can be better pursued and achieved.

3.3.6 *Independent South African cultural heritage organisations*

There are many independent South African organisations concerned with cultural heritage. Below is a selection of organisations that support cultural heritage in the contemporary, urban and street art genres.

The Zeitz Museum of Contemporary Art Africa (Zeitz MOCCA) is a registered public benefit organisation.²¹¹ The museum opened in 2017 and is the first significant museum dedicated to collecting, preserving, researching, and exhibiting 21st century African art.²¹² The gallery collects and exhibits the works of artists from Africa and its diaspora, but, does not yet possess examples of South African street art or exhibit the works of known South African street artists. Despite this, the Zeitz MOCCA is

²¹⁰ These recommendations need not affect the compulsory purchase of heritage objects when export permission has been denied.

²¹¹ A public benefit organisation is a non-profit company (which purpose is to perform public benefit activities that are altruistic or philanthropic) registered in terms of the Income Tax Act 58 of 1962 s30 for tax benefits.

²¹² Zeitz MOCCA <https://zeitzmocaa.museum/about-us/> (Date of use: 16 May 2018).

an example of a museum that views contemporary art forms as worthy of preservation and protection, as expressions of a developing South African cultural heritage. As well as functioning as a gallery the Zeitz MOCCA intends to start a school education program. The Museum also runs a curatorial training program which provides graduates and professionals with the opportunity to work at the museum and gain practical curatorial experience and skills over the course of a year.

AwethuArt is an artist collective founded in 2015. The group focusses on making art accessible, affordable and relevant to South African communities.²¹³ In 2015 they held a Graffiti Day in Newtown, Johannesburg. The day included a presentation by Cale Waddacor (a photographer of and author on graffiti in South Africa), a tour of street art sites in Newtown, as well as a collaborative stencil making and painting of a graffiti wall project for attendees.²¹⁴ AwethuArt like other graffiti artists, street artists and collectives, recognises that street art makes art available to everyone, that it does not cost on the viewer and that it breaks down class barriers.²¹⁵

Grayscale Art and Concept Store is a Johannesburg based retailer focussed on the urban art market. Whilst Grayscale sells graffiti equipment, they also have a gallery that represents alternative artists, specifically those that would not be represented in traditional 'high art' galleries. The gallery sells art but also works to inspire youth to explore different forms of self-expression and educates the public about the positive features of urban art.²¹⁶ In addition, Grayscale have co-sponsored the City of Gold Urban Art festival held in Johannesburg. The festival included an exhibition, a mural project, film-screenings and street art tours.²¹⁷

²¹³ AwethuArt <https://awethuart.wordpress.com/about/> (Date of use: 16 May 2018).

²¹⁴ AwethuArt <https://awethuart.wordpress.com/2016/11/25/wanna-banksy-with-us/> (Date of use: 16 May 2018). See also Morrissey 9-12-2015 *The Star* 6.

²¹⁵ Francis *Re-facing Societies* 8. Albeit that Francis is discussing the art of Faith47.

²¹⁶ Grayscale <http://grayscalestore.co.za/#about> (Date of use: 16 May 2018).

²¹⁷ City of Gold Urban Arts Festival <https://www.cityofgoldfestival.co.za/node/5> (Date of use: 16 May 2018).

Similarly, the WorldArt gallery in Cape Town exhibits and represents numerous artists who began as graffiti artists.²¹⁸ The gallery has also participated in international contemporary art festivals such as the Stroke Art Fair held in Munich, Germany.

3.4 *Overview of the South African heritage industry*

The South African heritage industry is vast with many pieces of legislation, statutory bodies, and independent South African and international stakeholders. The sheer density of the legislation and the number of role players in this industry underscores the importance of cultural heritage to South Africa and to South African people. The government and the South African people view cultural heritage and cultural heritage resources as an essential aspect of South Africa's rebuilding and reconciliation project and as essential to Constitutional values.

Against this backdrop, it is noted that, no street art is listed as a cultural heritage resource in South Africa. What is it about sites and objects that acquire heritage status that makes them deserve the protection and preservation that such status is intended to provide? Also, could any South African street art be considered a cultural heritage resource?

3.5 *Understanding cultural significance*

Neither the NHRA nor SAHRA provide detailed criteria for the assessment of heritage resources, other than those detailed in s3(3) of the NHRA. It is unfortunate that SAHRA has not developed their own guidelines as, 'a distinctive culture test is a helpful way to bring implicit biases out into the open so that they can be challenged and changed, and so that a fair and systematic guide to the assessment of cultural claims can be developed.'²¹⁹ However, until such guidelines are developed, South African heritage authorities rely on the Australian *Burra Charter* for guidance.²²⁰

²¹⁸ WorldArt <http://www.worldart.co.za/artists> (Date of use: 16 May 2018).

²¹⁹ Eisenberg 2005 *Human Rights Dialogue* 27.

²²⁰ Kotze and Jansen Van Rensburg 2003 *QUTLJJ* 138 – 134.

The *Burra Charter* is popular amongst the international heritage community.²²¹ The *Burra Charter* uses the concept of "cultural significance" to determine the heritage status of a site, i.e. a site which has cultural significance is valued (and thus protected and preserved) as a heritage site. This concept refers to the 'aesthetic, historic, scientific, social or spiritual value for past, present or future generations.'²²² The *Burra Charter* is specific to *places* of cultural significance. However, the definition of place is a geographic area but may include related objects (these are objects which contribute to the cultural significance of a place but are not at that place).²²³ It is recommended in the *Burra Charter* that related objects which contribute to the cultural significance of a place should remain at such place unless removal is necessary for the protection and preservation (or temporary exhibition) of the objects (or places).²²⁴ Consequently, while the *Burra Charter* is best suited to the determination of the heritage status of sites, it can be adapted to assess the cultural significance of heritage objects.

The *Burra Charter* proposes a three-stage process for the conservation and management of cultural heritage places. The first of which is understanding the cultural significance of a place. The *Burra Charter* requires that studies of the place be conducted in order to understand the cultural significance of the place.²²⁵ Then, written statements about the cultural significance and management of the place should be prepared.²²⁶ Groups and individuals who have connections to the place should be allowed to contribute to the understanding of a place's cultural significance as well as to contribute to the management of such place.²²⁷ If

²²¹ Zancheti *et al* 2009 *City & Time* 48.

²²² *Burra Charter* Art 1.2.

²²³ *Burra Charter* Art 1.1 and 1.14. Australia uses the term cultural heritage for buildings, sites, structures, ruins, archaeology, industrial archaeology, movable objects and shipwrecks. Brooks 1992 *Places* 86.

²²⁴ *Burra Charter* Art 10 and 11.

²²⁵ *Burra Charter* Art 26.1.

²²⁶ *Burra Charter* Art 26.2.

²²⁷ *Burra Charter* Art 26.3.

appropriate the statements of cultural significance should be reviewed to ensure continued appropriateness and efficiency.²²⁸

The *Practice Note: Understanding and assessing cultural significance* elaborates the ideals set out in the *Burra Charter*. It details the first step in management and conservation of cultural heritage places, i.e. understanding and determining the cultural significance.²²⁹ Both experts (such as art historians and archaeologists) and other stakeholders (the community, businesses, the tourism industry, etc.) should contribute to the determination of cultural significance.²³⁰

Regarding the aesthetic value, the *Practice Note* requires six considerations. The first, considers whether the place has, 'special compositional or uncommonly attractive qualities involving combinations of colour, textures, spaces, massing, detail, movement, unity, sounds, scents'.²³¹ Two, whether the place is distinctive in its location or whether it is a prominent visual landmark. Three, it must be considered whether the place has inspirational qualities or whether it evokes strong emotions or distinct meanings. Four, the value of its symbolic status should be noted, i.e. has the place inspired artistic or cultural responses; is it represented in various forms of media such as art, photography, and literature? Five, does the place display characteristics of an identifiable style or fashion? And six, does the place display a high degree of creative or technical achievement?²³² Again, while the *Burra Charter* is referring to sites it is easy to see how these considerations may be used to value the aesthetic significance of a movable object.

The historic value can mean any historic values of the place. This may include aesthetic history, scientific history and so forth; such that the historic value may reinforce or underscore the other values associated with cultural significance. A place

²²⁸ *Burra Charter* Art 26.4.

²²⁹ ICOMOS Australia (*Practice Note*) (hereinafter referred to as the *Practice Note*). As previously stated, cultural significance is determined by the aesthetic, historical, scientific, social, and spiritual value of a place.

²³⁰ De la Torre and Mason *Introduction* 3.

²³¹ *Practice Note* 3.

²³² *Practice Note* 3.

may have historic value because it is associated with an historic event or theme. It may have historic value because it shows the historical development of a community, or a region, or a country, or of the world. Alternatively, the historic value of a place may result from the high degree of creative or technical achievement during a specific time. Alternatively, the place may be connected to a specific individual or community that has historic meaning.²³³

A place may have scientific value if it is worthy of investigation and examination, and if doing such would result in the acquisition of new or more information about the past. The value in this instance may depend on the quality of the information, its rarity, importance, representativeness, and the potential to increase information regarding the place, people, processes, or practices.²³⁴

A place may have social value if it has social or cultural meanings for a community or group, as a marker of identity and it may have developed meaning to a group or community over time.²³⁵ Further, a place may have social value because the spiritual meaning of the place contributes to recollection or understanding of a community's or individual's relationship with the metaphysical realm. Another consideration is whether the spiritual values of a place are expressed in cultural practices, human-made structures, or artwork.²³⁶

Finally, a place may be culturally significant because of its spiritual value. There are many considerations for determining spiritual value. Among these being that a place may enhance a community's spiritual identity or beliefs, and may contain traditional knowledge, artwork, or lore relating to a spiritual practice of a community.²³⁷

While the *Practice Note*, like the *Burra Charter*, is focussed on places it is easy to see how these considerations can be applied to objects. The aesthetic value of an

²³³ *Practice Note 3.*

²³⁴ *Practice Note 3–4.*

²³⁵ *Practice Note 4.*

²³⁶ *Practice Note 3.*

²³⁷ *Practice Note 4.*

object may be culturally significant for the same reasons that a site may be, and this is evidenced in examples of fine art, sculpture and so forth. A movable object can hold historical value, such as an aircraft from the Battle of Britain. The Rosetta Stone is an example of a movable object that has scientific value. Objects such as traditional clothing can hold social significance. For many people, spiritual value can be held in objects, such as a crucifix. So, the *Burra Charter* and *Practice Note* may also be used by SAHRA to determine the cultural significance of objects.

Zancheti *et al.* highlight that understanding the cultural significance of a place is a contested issue. Value may be inherent in a site, and if so, the value can be objectively determined. Alternatively, value may be attributed to places by individuals and communities. Thus, value is not inherent in the object, and the determination of its value is not objective. Rather, it is the subjective interpretation of the individuals and communities. Further, the value of a place may be different for different people and may change and develop with time.²³⁸

An example of the difficulty in the interpretation of cultural significance can be seen in the Voortrekker monument in Pretoria. The monument may have inherent value, from an architectural and historical perspective. However, there are various subjective interpretations of the cultural significance of the monument. To some the Voortrekker monument is a symbol of victory over adversity; it is a symbol of human achievement. To others, the monument is a symbol of pride for the Afrikaaner people. Another interpretation is as a symbol of Apartheid. Moreover, the monument has re-interpreted value; with its inclusion in the Freedom Park campus it has been re-interpreted as a symbol of reconciliation and/or as a symbol of the repositioning of the Afrikaaner identity in post-Apartheid South Africa.²³⁹

²³⁸ Zancheti *et al* 2009 *City & Time* 50.

²³⁹ Grundlingh 2001 *Radical History Review* 95; Meskell and Scheermeyer 2008 *Journal of Material Culture* 153; Mare 2007 *SAJAH* 36; Autry 2012 *Theory, Culture and Society* 146, Durbach *Cultural Heritage as Transformation* 217.

A heritage resource may exhibit only one or a few of these values, or a resource may be multivalent.²⁴⁰ Mason argues that there are so many different types of values that it is necessary to define a typology (classification according to general type) of values to determine cultural significance effectively and fairly.²⁴¹ Mason divides values into two categories: sociocultural and economic. The sociocultural values are similar to those used in the *Burra Charter*; namely historical; cultural/symbolic; social; spiritual/religious and aesthetic values.²⁴² Economic values, while they may overlap with sociocultural values, are distinct because they are seen through the eyes of a consumer (it is a valuation of utility) and are most often expressed in financial value.²⁴³ Economic value can include the value of the thing itself, as well as the economic impact of the resources (how much money is invested in the resource and what economic gain the investment has led to, such as through job creation). Economic value may also be found in the hedonic value of a resource (such as how the value of properties has increased due to their proximity to the resource) and travel cost gain (the economic gain associated with the costs of travel to see the resource; this includes transport and accommodation amongst others).²⁴⁴ While economic values do not replace or subvert sociocultural values, they can promote heritage conservation and development.²⁴⁵

Thus, when determining cultural heritage resource status, and in line with the requirements of s3(3) of the NHRA, SAHRA should consider the aesthetic, historical, scientific, social, and spiritual values of the resource and take into consideration the economic value of the resource.

²⁴⁰ Mason *Assessing Values* 8.

²⁴¹ Mason *Assessing Values* 9.

²⁴² Mason *Assessing Values* 11–12.

²⁴³ Mason *Assessing Values* 12. Mason spends some time reflecting on economic value that cannot be expressed in terms of a price, however for this study the contribution of economic values as expressed in financial terms is sufficient. See also Mourato and Mazzanti *Economic Valuation* 51 for more on non-use economic value.

²⁴⁴ Mason *Assessing Values* 22.

²⁴⁵ Mourato and Mazzanti *Economic Valuation* 68.

3.6 Street art as cultural heritage resources

As can be seen from the discussion so far, there is no exhaustive definition of cultural heritage resources. Just as heritage can be ubiquitous, so can cultural heritage resources; more and different objects, places and practices are being deemed to be heritage resources.²⁴⁶ It is recognised that '[h]eritage is a living entity. It is constantly renewing itself and taking on different forms and modes'.²⁴⁷ Notably, '[a]rt constitutes one of the primary manifestations of culture: one the state has a particularly close relationship with'.²⁴⁸ There is no question that certain artworks can be part of a country's heritage. Indeed, several artworks are already listed as heritage objects by SAHRA; these include works by South African artists: Irma Stern, Jakob Hendrik Pierneef, Maggie Laubser, Gerard Sekoto, Vladimir Griegorovitch Tretchikoff, amongst many others.²⁴⁹

While heritage resources in the form of art may be thought of in a more traditional sense, that concept can be expanded to include new and different forms of art. For instance, various dance forms are identified as cultural heritage resources such as capoeira in Brazil. Admittedly, this is a form of intangible cultural heritage but, since it is possible to copyright choreography, there is potential for a video recording or a notation of a capoeira piece to be awarded heritage status as a cultural heritage object.

In this line, post-1994 the Iziko National Gallery decided to take a transformative approach to their collection, to begin to collect and preserve African art, and for the national art collection to reflect our diverse cultures.²⁵⁰ This transformation quest has also been adopted by South African museums, particularly because many black South Africans were not visiting museums as they did not think that the museums

²⁴⁶ Harrison *Heritage* 3, 5 – 7.

²⁴⁷ Al Naboodah 2011 *Museum International* 70. Holtorf discusses the issue of how much heritage should be preserved, suggesting that when too much is preserved the significance it devalued. Holtorf 2007 *IJCP* 37. In another article Holtorf discusses the reason why some heritage may not or should not be preserved. Holtorf and Kristensen 2015 *IJHS* 313.

²⁴⁸ Roodt *Cultural Heritage* 16.

²⁴⁹ These can be explored on the register maintained by SAHRIS at <https://sahris.sahra.org.za/> (Date of use: 2 May 2020).

²⁵⁰ Kaufmann 2014 *SAMAB* 15.

represented their past.²⁵¹ Despite this new outlook, presently recognised cultural heritage objects still tend to represent, 'old, traditional, colonial and/or rare forms of 'high culture'.²⁵² However, the Zeitz MOCCA as a recent member of the South African heritage industry has and is developing what types of art and what artworks South Africans consider to have cultural value. While an independent organisation the museum has received support from the Public Investment Corporation (a government-owned investment management company). Thus, while no street artists are represented in the national gallery, the indirect state funding to the Zeitz MOCCA demonstrates state support for contemporary art.

As South African heritage bodies seek to diversify and transform cultural heritage resources, it is possible that street art, whether located on immovable or movable property, could be considered as a heritage object. Indeed, Holtorf suggests that destruction and damage can be part of heritage; noting that, '[v]aluable heritage often emerges out of destructive conditions.'²⁵³ Holtorf specifically refers to street art as an example of this form of heritage creation.²⁵⁴ Merrill also supports this idea by stating that,

'the notion stands that some graffiti ... represents heritage that is culturally significant for its artistic value and also for the socio-political commentary it offers about the world we live in today and others will strive to understand in the future.'²⁵⁵

Moreover, this would follow the international trend of recognising the cultural value of some street art as discussed in 3.1.

'As Banksy and other similar artists have demonstrated, street art has become an important artistic mode, and has achieved critical recognition and praise by fine art critics and the public alike. Like

²⁵¹ Nomvuso Tembe (once public relations officer at the National Cultural History Museum in Pretoria) as quoted in Barnabus 2016 *IJHS* 698.

²⁵² Deacon, Mngqolo and Prosalendis 2003 *SAMB* 34.

²⁵³ Holtorf and Kristensen 2015 *IJHS* 315.

²⁵⁴ Holtorf and Kristensen 2015 *IJHS* 316.

²⁵⁵ Merrill 2011 *Time and Mind* 67.

historically significant works of architecture or cultural artefacts, street art deserves consideration as cultural property. Without such additional protection, important works of art may be lost to future generations.²⁵⁶

Like any potential heritage resource, an application for consideration of a street artwork must follow the procedure set out in the NHRA. This includes the consideration of whether the artwork has the cultural value required to be a declared heritage resource. The application for heritage status must be accompanied by a written motivation detailing how the site or object meets the standards set out in s3(3) of the NHRA i.e., the importance to a community or pattern of South Africa's history, its uncommon, rare or endangered aspects of South Africa's cultural heritage, whether it provides information relevant to South Africa's heritage, its aesthetic characteristic, the level of creative achievement, the community or social group's association with the work and who the artist is.²⁵⁷

Further, to ensure the success of an application, it would be worthwhile to include the cultural significance of the street art as explained in the *Burra Charter* and *Practice Note* (rather than limiting it to the consideration in s3(3) of the NHRA). The sociocultural values (aesthetic, historical, scientific, social, spiritual) of the artwork should be detailed in the motivation. A statement on the economic value (both the value of the artwork itself and the hedonic value of the artwork) would be a recommended inclusion in the motivation.

In addition, whether located on private or publicly owned property, street art can become a landmark of a neighbourhood. This can occur due to the age of the work, the history of the work, its popularity or fame, the notoriety of the artist, through an event such as being used in a film or being the site for an event such as demonstration or march.²⁵⁸ This type of artwork can become symbolic of and for a

²⁵⁶ Barnett 2013 *Chi-Kent J Intell Prop* 216.

²⁵⁷ NHRA s3(3)(a)-(h).

²⁵⁸ Smith 2016 *St John's Law Review* 370 and 380-381. Smith limits her comment to art which is affixed to property with express or implied permission, so she excludes illegal art, however the comment still applies because both legal and illegal public art can have such meaning for the public.

community, it can define the group's culture and identity, it can define the social relationships and sustain the social rules of that community, as well as their social values.²⁵⁹ This perspective of street art highlights the accessibility and the democratic and egalitarian nature of street art; a viewer does not have to visit a gallery, have an understanding of art history, pay a fee, or even travel to view the work.²⁶⁰

It is submitted that there are South African street artworks that should be considered as cultural heritage resources. There are street artworks that meet the qualifications set out in s3(3) of the NHRA and extend to exemplify the values set out in the *Burra Charter* and *Practice Note*.

Artwork such as Faith47's *Freedom Charter Project* could be considered to fall within this category. Following the comprehensive structure set out in the *Practice Note* there are several motivations to be made for the existing artworks in this project. First, Faith47's artwork is considered to have aesthetic value; the existing pieces of the project comprise calligraphic writing and, in some, images.²⁶¹ The aesthetic value is also justified by her multiple national and international art exhibitions, and because well-known galleries represent her, such as David Krut Projects. Her work is respected within the art industry and considered to be collectable. Further many of the pieces are distinctive in their locations. They are landmarks for the communities in which they are sited. The artwork *The People Shall Share in the Country's Wealth* (circa 2010) is located at one of the entrance roads to Khayelitsha in the Eastern Cape. This area was one of the last townships created in terms of the Group Areas Act, and many of the first residents were forcibly removed from their homes and relocated to Khayelitsha. Thus, the meaning of the artwork in its location is significant as a reminder of the separation of the races especially, the financial inequality of the races (Khayelitsha remains one of the Cape's poorest communities), and the promise of equality and opportunity of the

²⁵⁹ Smith 2016 *St John's Law Review* 383.

²⁶⁰ McCormick *et al Trespass* 11. See also Hansen 2016 *Crime Media Culture* 289 on the accessibility of street art.

²⁶¹ Francis *Re-facing Societies* 12.

new South Africa.²⁶² Thus, from an aesthetic perspective not only is the work culturally significant because of the typography and Faith47's stature, it also meets the qualifications because it is distinctive in its location, its prominence as a visual landmark because it is inspiring, emotive and symbolic.



Figure 4: Faith 47's *The People Shall Share in the Country's Wealth*

Second, the *Freedom Charter Project* holds historical value. The artworks in the project are representative of a specific time in South Africa's history, the signing of the Freedom Charter which was adopted by the African National Congress in 1955, as well as being representative of the forming of the South African democracy in 1994 and the development of the South African Constitution (completed in 1996) which was influenced by the declarations contained in the Freedom Charter. Francis describes her work as a,

‘campaign against political babouresness that still lingers in post-Apartheid South Africa, she tackles the repressive politics of space

²⁶² Nippard <http://www.dw.com/en/south-african-street-artists-paint-for-the-people/a-14902960> (Date of use: 24 November 2015).

used by nationalist Afrikaaners by claiming said space. By converting these spaces of deprivation into territories of inclusion and beauty through art, Faith47 reclaims the space for the populace. This function of art as a way of bridging the cultural gaps of human experience is what I believe makes Faith47 a leader in this new construct. She not only restores the hope for change through her art, she goes (*sic*) a step further and actively mends the wounds still bleeding from Apartheid...Faith47's Freedom Charter series ... encompasses the goal of South Africa's 1955 system to give all South Africans equal rights.²⁶³

Consequently, the artworks are a record of South Africa's historical development.

Third, the artworks may have scientific significance because there is educational value in the pieces; it contributes to the understanding of this period of South Africa's history. Admittedly, it is not increasing our knowledge, but it does provide a fresh perspective. Francis highlights that,

'Faith47 brings the still active battle for equality to the forefront of society. By going back in history, Faith47 brings the past back to life and by doing so places herself and her viewer into an enlightened understanding of the issues still at hand.'²⁶⁴

Fourth, the project also has social significance. As suggested *The People Shall Share in the Country's Wealth* has special significance to the Khayelitsha community where it is located. The artwork represents the community's identity as one which has been historically disadvantaged and for whom the Freedom Charter was an imperative part of many (if not most) of the resident's history. Moreover, it may also be argued that the artwork holds social significance for South African

²⁶³ Francis *Re-facing Societies* 10-11. Francis is referring to Faith47's work in general not the *Freedom Charter Project* specifically, but this quote is especially applicable to this project.

²⁶⁴ Francis *Re-facing Societies* 12-13.

identity in that South Africa is a country that seeks economic transformation and economic equality.

An argument is not submitted herein for the spiritual value of the project however it is not necessary to argue for all the value that may give a resource cultural significance. Sufficient evidence of a single value would be satisfactory.

Whereas neither s3(3) of the NHRA or the *Burra Charter* require economic value, a consideration of such will further motivate the cultural value of the *Freedom Charter Project*. Faith47's project holds economic value, not just because the artworks may have value in and of themselves, but also because they contribute to the South African economy in many ways, such as through tourism and creating employment through such tourism. For instance, some tourist operators host graffiti walking tours which include some Faith47 works.²⁶⁵

A strong motivation could be presented for declaring any of the artworks in the *Freedom Charter Project* as heritage resources or even for declaring the project as a collection as a heritage resource. The artworks and the project satisfy many of the values required in s3(3) of the NHRA (as guided by the *Burra Charter* and the *Practice Note*).

When considering the grade listing of South African heritage resources, it is somewhat more difficult to see where such a project (or artwork within the collection) could be categorised. As previously discussed, a grade I listed resource must have outstanding significance in terms of any of the characteristics set out in s3(3) of the NHRA. The project could be considered to be, 'an outstanding example of the work of a person, group of community which is of importance to South African history'.²⁶⁶ It is also authentic in regard to design and is symbolic (such that it contributes

²⁶⁵ See for example, Past Experiences http://pastexperiences.co.za/?page_id=815 (Date of use: 16 May 2018) and Anima Tours <http://www.animatours.co.za/activities/woodstock-street-art-tour/> (Date of use: 16 May 2018).

²⁶⁶ NHRA s3(3)(h).

towards human understanding and nation-building). Further, the international reputation of Faith47 could substantiate the requirement that the resource is of universal value.²⁶⁷ In terms of a grade II listing, none of the artworks in the project are significant to specific province or region (unless region can be defined as a community); rather they are symbolic of the country.²⁶⁸ However, in terms of grade III listing the artworks in the project could be deemed worthy of conservation.²⁶⁹ For grade III listing the projects and/or artworks fulfil many of the qualifications in s3(3) of the NHRA. They can also be viewed as contributing towards the cultural significance of an area. Plus, the argument that they are outstanding examples of Faith47's work and are historically relevant may also justify grade III listing.²⁷⁰

Admittedly, the wording of the Heritage Resources Act and s3(3) in particular is quite limiting, and this may be why heritage authorities have turned to the *Burra Charter* for guidance as to the characteristics of culturally significant resources. Thus, when including the cultural significance detailed in the *Burra Charter* the *Freedom Charter Project* can be considered as aesthetically, historically, socially, and arguably scientifically valuable. And, of course, there is also the economic value of the various pieces (although economic value is not among the considerations listed in the NHRA). In a sense, the *Freedom Charter Project* is an embodiment of the cultural rights, and thus the artworks that comprise the Freedom Charter Project are culturally significant. When looking at both the considerations of the NHRA and the *Burra Charter*, the *Freedom Charter Project* should be considered for acknowledgement as a cultural heritage site or object (depending on whether the individual artworks would best be preserved *in situ* or within a museum or gallery collection) with at least a grade III listing.

Similar arguments can be made for Shepard Fairey's *The Purple Shall Govern*. Shepard Fairey's work remains popular in the art world. He had a distinct and easily

²⁶⁷ GG 24893 s43(1).

²⁶⁸ NHRA s7(1) (b) and GG 24893 s43(2).

²⁶⁹ NHRA s7(1) (c).

²⁷⁰ NHRA s8(4) and GG 24893 s43(3).

recognisable style.²⁷¹ The artwork represents an important, although lesser known, anti-Apartheid protest. There is no doubt that the artwork is an outstanding example of the work of a person, a group, or community which is of importance to South African history, and because Shepard Fairey is one of the most internationally renowned street artists, there is also universal value in the piece.²⁷²

The piece also holds considerable educational value. It highlights an anti-Apartheid protest of which many South Africans may be unaware. The artwork also holds world educational value because Shepard Fairey designed Barack Obama's campaign poster, so it can serve to educate and inform audiences with regards South African and American history and has particular significance for black history. The artwork depicts South Africa's first black president, and it links (through Shepard Fairey) to America's first black president. This links South Africa's anti-Apartheid history to the fight for emancipation and civil rights in the USA. It also links South Africa's protest history to other countries where coloured dye has been used to deter protestors and identify participants.²⁷³ Because of the educational potential of the piece, it can be said to 'provide[s] information relevant to South Africa's natural or cultural heritage'.²⁷⁴ Further, the artwork is also representative of resistance graffiti art and thus, 'holds importance to a community or pattern of South Africa's history'.²⁷⁵

It may also be argued that because Shepard Fairey is American the piece constitutes an 'uncommon, rare or endangered aspects of South Africa's natural or cultural heritage'.²⁷⁶ There may be no new South African Shepard Fairey works, and there are a limited number of his works that still exist, and because of the

²⁷¹ NHRA s3(3)(d).

²⁷² NHRA s3(3)(a)-(h).

²⁷³ Friedman

<http://foreignpolicy.com/2012/01/24/why-do-police-douse-protesters-with-colored-water/> (Date of use: 8 November 2017). Indeed, the used of water cannons with coloured dye was so common during the American civil rights protests in the 1960's that the tactic is rarely used in the USA today because of the connotations of such practice. Leibenluft
http://www.slate.com/articles/news_and_politics/explainer/2008/06/purple_water_cannons.html (Date of use: 8 November 2016).

²⁷⁴ NHRA s3(3)(c).

²⁷⁵ NHRA s3(3)(a). Archer and Stent 2011 *Visual Communication* 125-126.

²⁷⁶ NHRA s3(3)(b).

unprotected nature of street art, these pieces are endangered. Further, the artwork is a landmark for Johannesburg CBD, and this suggests ‘that a community or social group has a strong social, cultural ... association’ with the piece.²⁷⁷

The artwork has aesthetic, historical and social value, as well as inherent and hedonic economic value. *The Purple Shall Govern* is an artwork by an internationally renowned artist, and, like the Faith 47 pieces, it has the potential to make a scientifically valuable contribution to the knowledge of Apartheid resistance and the process towards democracy in South Africa. It also contributes to knowledge by drawing parallels between the South African and American civil rights campaigns, and potentially, links to other civil rights campaigns.

Due to the vast cultural significance of this artwork and that it holds both national and international value a motivation for grade I listing should be made. *The Purple Shall Govern* should be afforded the protection and preservation *in situ* that comes with such status.

To summarise, it is possible that certain examples of South African street art could be considered as heritage resources. It is argued herein that, the existing works in the *Freedom Charter Project* by Faith47 (or the project as a collection) and *The Purple Shall Govern* artwork by Shepard Fairey should be awarded the status of cultural heritage resources and receive the protection and preservation that is intended to be provided with such status. Further, the lack of protection of these artworks presents a threat to South African cultural heritage. These and other potentially culturally valuable South African street artworks need to be evaluated to determine if they meet the qualifications for cultural significance and warrant heritage status. Doing so fulfils the purpose of several of the statutes relating to culture; the Culture Promotion Act, the National Arts Council Act, National heritage

²⁷⁷ NHRA s3(3)(h).

Council Act and the NHRA. These, in turn, contribute towards the constitutional commitment to culture.

However, heritage status comes with responsibilities. The sites and objects that are recognised as heritage resources need to be preserved for future generations. The owner of a heritage site or object is responsible for the protection and preservation of the resource, and this places a burden on private and legal persons who own cultural heritage sites and objects.

The following chapter considers the limitations placed on private ownership by the declaration of a site or object as a heritage resource. The next chapter considers whether these limitations are too burdensome on private owners, or whether these limitations cannot ensure the protection and preservation of street art heritage resources. Further, if the limitations placed on private ownership are too burdensome or if the limitations cannot achieve the purpose, then perhaps private ownership of these forms of cultural heritage resources may not be preferable. Instead the state may be the preferred owner of these resources and it should expropriate the property in order to ensure their protection and preservation.

CHAPTER 4 LIMITING PROPERTY RIGHTS FOR CULTURAL HERITAGE RESOURCES

4.1 Introduction

The private ownership of street art heritage resources can be problematic because private ownership entitles one to control, to use and benefit from, to encumber and to alienate their property.¹ Indeed, private ownership can be problematic for cultural heritage resources regardless of the form they take because they are not ordinary private property.² As Sax puts it, 'some objects are so intrinsically linked to the community that they merit special consideration.'³ Owning property that has been declared as a cultural heritage resource requires a duty of care. Unlike ownership of other forms of property, owning a cultural heritage resource carries an additional responsibility to protect and preserve the resource on behalf on the South African public. The abovementioned entitlements of ownership cannot be exercised as fully for heritage resources as they can for other forms of property. Unfortunately, not all owners are responsible heritage resource caretakers.

An interesting, although perhaps macabre, example of the authority to control what happens to culturally significant heritage objects can be found in their burial with their deceased owners. Notably, the president of the United States of America John F Kennedy was buried with a piece of scrimshaw, engraved with the presidential seal by the artist Milton Delano. The actor Bela Lugosi was buried in the Dracula costume from his famous portrayal of Count Dracula in the 1931 film, and reggae artist Bob Marley was buried with his Gibson Les Paul guitar (these are arguably cultural heritage objects).⁴

In as much as property owners can do what they wish with their property they may not appreciate and respect the cultural heritage value of their property. For instance, below are several examples of cultural heritage resources that were destroyed,

¹ Van der Walt and Pienaar *Law of Property* 48.

² Sax 1990 *Cal L Rev* 1557.

³ Sax 1990 *Cal L Rev* 1558.

⁴ Daugherty <http://www.smithsonianmag.com/arts-culture/nine-famous-people-and-what-theyre-buried-180953186/> (Date of use: 13 February 2017).

damaged or lost because the owners did not appreciate their heritage status. For instance, Van Gogh's *Portrait of Dr Gachet* was lost; upon the owner's death, the painting could not be located.⁵ Likewise, the painting named *Return from the Conference* by Courbet was destroyed when it was bought by a Catholic who was offended by the paintings anticlericalism connotations.⁶ Diego Riviera's mural in the Rockefeller building was destroyed due to its communist sentiments.⁷ This issue was again highlighted when Chinese artist Ai Weiwei painted the Coca-Cola logo on a Han dynasty vase and created a photographic triptych of himself dropping another Han dynasty vase.⁸ All of these examples of cultural heritage resources have been lost to future generations because the owners did not appreciate or respect the heritage value of their property; they did not fulfil the role of caretaker that is required for this form of property.

Like other art forms, street art is also subject to the whim of their owner. For example, the famous graffiti site in New York known as 5Pointz was destroyed because the owner demolished his factory building to build residential property on the land.⁹ A Banksy mural in Calais, France titled *The Raft of Medusa* (circa 2015) was painted over by the owner because he felt it looked shabby and neither local authorities nor interested parties had stepped in to help preserve the artwork.¹⁰

⁵ Wilkes 2000-2001 *Colum-VLA JL & Arts* 179.

⁶ Wilkes 2000-2001 *Colum-VLA JL & Arts* 186.

⁷ Sax *Playing Darts with Rembrandt* 13-15.

⁸ Chin-Chin 2012 *artasiapacific* 80-81. The artworks and artist were criticised because it resulted in the destruction of the vases which were Chinese cultural antiques dating from as far back as 206BCE. Hypothetically, in applying South African law to the case, since Weiwei owned the vases he had the right to destroy the property but had the vases been expropriated by the state prior to the creation of the artwork they would have been saved, and arguably since Weiwei intended to destroy the vases compensation would not be necessary. Perhaps, an argument could be made that Weiwei lost potential earnings from the art that would have been created and that this should be compensated for, but it would be very difficult to prove the amount and that such earnings would have occurred.

⁹ *Cohen v. G & M Realty L.P.* Case Nos. 13-CV-05612 & 15-CV-3230, 2017 WL 1208416 (E.D.N.Y. Mar. 31, 2017). See Lukas <https://www.grossmanllp.com/judge-awards-damages-in-connection-with-graffiti/> (Date of use: 15 May 2018) for a discussion of this case that arose from the destruction of the building.

¹⁰ Samuel <https://www.telegraph.co.uk/news/2017/09/11/banksy-mural-calais-painted-walls-owner-found-shabby/> (Date of use: 18 May 2017).

Further, owners may not take adequate steps to protect the cultural heritage resources they own.¹¹ There are several examples of Banksy street art which have been defaced or damaged or destroyed because the owners of the property on which they were located did not take adequate steps to ensure their protection or were negligent in the care of the property. For instance, one of Banksy's earliest works titled *The Mild Mild West* (circa 1999) is accessible by the public, and there are no barriers or protective covering for the artwork. Consequently, it has been defaced twice and this led to further damage caused in the restoration process.¹² Another image of Banksy's *Gangsta Rat (2)* (circa 2004) painted on the side of a warehouse was destroyed because the owners employed an inexperienced builder to remove it unmonitored (intending to remove the image intact so that it could be sold).¹³

Furthermore, owners may also not be aware of the cultural significance of the street art and destroy or damage the artwork because of this ignorance. This was the case for Banksy's work, *Gorilla in a Pink Mask* (circa 2007) which was painted over by the owner of the building on which it was located. The owner was unaware of Banksy and his fame and thought the artwork was worthless vandalism.¹⁴

Often, cultural resources are owned by people who are not experts in the field that the property represents. An owner may have a culturally significant artwork but not have expertise in the preservation and/or restoration of artworks. When a person acquires an artwork, it does not come with a service plan, and art restoration and preservation experts cannot be found as easily as a motor service centre can.

¹¹ Caprio 2006 *IJCP* 287.

¹² Revolv
<https://www.revolv.com/main/index.php?s=Works%20by%20Banksy%20that%20have%20been%20damaged%20or%20destroyed> (Date of use: 15 May 2018).

¹³ Evans
https://www.vice.com/en_us/article/qbzyjd/i-destroyed-banksys-rat-58477f096a07b201e0f2671f (Date of use: 18 May 2018).

¹⁴ Bates <https://www.theguardian.com/artanddesign/2011/jul/15/banksy-gorilla-mask-painted-over> (Date of use: 15 May 2018). In another example, the owner of a garage on which Banksy's artwork *Little Snowflake* is situated was unaware that the artwork was a Banksy or of Banksy's popularity until after the artwork gained popularity and Banksy acknowledged that the artwork was his. Davies
<https://www.telegraph.co.uk/news/2018/12/19/banksy-claims-port-talbot-mural-latest-work/> (Date of use: 9 April 2019).

Understanding what is required to maintain the property requires knowledge in specific fields that an owner of a cultural resource may not have.

The lack of recognition for culturally significant street art can also result in the national loss of the art through export. This was the case for Banksy's *Kissing Coppers* mentioned earlier.¹⁵ Awarding heritage status to such artwork may have ensured that it was retained for the benefit of British cultural heritage because it would have been subject to export controls.

Another problematic aspect of private ownership of cultural heritage resources is access.¹⁶ When these forms of property are privately owned, they are often not accessible to the public, and the owner can decide who may have access to the resource. This defeats an aspect of the purpose of the Department of Arts and Culture with respect to heritage resources (as well as many of the statutes enacted to fulfil this purpose) namely, to make culture and the resources that represent culture accessible to all South Africans.¹⁷ After all, the management of heritage resources as set out in the NHRA includes the presentation of heritage resources, which requires access to heritage resources.¹⁸ This issue also limits the purpose of the constitutional rights to culture because, to an extent, culture cannot be enjoyed or participated in if people cannot access the objects of such culture. Further, it undermines the purpose of the cultural rights in the process of self-determination; being able to access cultural objects assists in developing an individual's sense of self, in knowing where they come from and the culture of which they are a part.¹⁹

¹⁵ Topping <https://www.theguardian.com/artanddesign/2011/apr/21/banksy-kissing-coppers-sold-america> (Date of use: 1 January 2019).

¹⁶ Wilkes 2000-2001 *Colum-VLA JL & Arts* 187.

¹⁷ Benson and Prinsloo 2013 *SAMAB* 36.

¹⁸ NHRA s2(xxxvi).

¹⁹ This is not an argument against the private ownership of cultural heritage resources. It is only raised to highlight one of the many issues that arises from the private ownership of cultural heritage resources. The Banksy artwork *Season's Greetings* which was located on a garage in Port Talbot is intended to be relocated to a street art museum in the town where it should be displayed for three years. However, after this period, the continued public display of the artwork is uncertain. It is unknown what the private owner (who purchased the artwork from the owner of the garage for a six-figure sum) will do with the artwork even though he has acknowledged that Banksy, 'gave it to the people of the town'. Morris <https://www.theguardian.com/artanddesign/2019/apr/03/port-talbot-banksy-moved-new-street-art-museum-south-wales> (Date of use: 23 October 2019).

An example of this issue can be found in the Campbell Smith Collection. This privately-owned art collection contains artworks dating from the 1920s to present. The collection includes works by black artists who were not valued, respected or represented due to Apartheid. The collection is described as, 'this country's most comprehensive, coherent and valuable database of artists that suffered from systematic neglect during the Apartheid era.'²⁰ While there has been an exhibition of some of the Campbell Smith artworks at the Iziko National Gallery the collection remains private and is physically inaccessible to the public.²¹

This conflict surrounding private ownership versus public access to cultural heritage resources is a worldwide concern. A particularly well-known example of this conflict is found in the now famous *Republic of Austria v Altmann* case concerning the Nazi spoliated artwork of the Austrian artist Gustav Klimt.²² The case revolved around six artworks which had belonged to the uncle of Maria Altmann, Ferdinand Bloch-Bauer. The artworks had been given to the Bloch-Bauer family by Klimt himself as the wife of Ferdinand Bloch-Bauer, Adele, was the subject depicted in the paintings. The artworks were seized by a German collector shortly before the outbreak of the Second World War, and after the war were in possession of, and on public display by, the Belvedere gallery in Vienna (the Austrian national gallery).²³ In the court case, Maria Altmann successfully claimed the paintings from the Belvedere gallery. After the *Altmann* case was concluded the paintings were returned to the ownership of Maria Altmann who then sold them at auction in 2006. One of the artworks titled *Adele Bloch-Bauer II* was bought by TV mogul Oprah Winfrey and was only displayed publicly again at the Museum of Modern Art in New York in 2014. In 2016,

²⁰ Van Robbroeck <http://www.revisions.co.za/> (Date of use: 26 March 2018). Digital reproductions of the collection are accessible on this site.

²¹ The exhibition resulted in a publication that details the collection and the meaning and impact of the collection. Proud *Revisions*. For an example of a private property owner limiting access to street art see Grieg <http://www.dailymail.co.uk/news/article-2468174/Building-owner-installs-plexiglass-metal-shutters-security-guard-protect-1-million-Banksy-work-property-Williamsburg-imposes-viewing-times.html> (Date of use: 26 November 2015). Access to many cultural heritage sites is also limited because these sites are located on privately owned land; for instance, the various archaeological sites that are now part of the Mapungubwe National Park were located on privately owned farmland (prior to being incorporated into the national park). Carruthers 2006 *Koedoe* 2 and 6.

²² *Republic of Austria v Altmann* 541 US 677 (hereinafter referred to as the *Altmann* case).

²³ See in general Murray 2004 *Colum JL and Arts* 301.

the painting was sold to an unidentified buyer who lent it to the Neue Galerie in New York for a Klimt exhibition. However, in 2017 the painting was returned to the private purchaser's possession and is no longer publicly accessible. While there has been much controversy regarding the ownership of these paintings and the ethical issues surrounding Nazi spoliated art, it is an example of a famous Austrian painter's work, a piece of Austrian and global cultural heritage, which is no longer publicly accessible.²⁴ The finding of the court in the *Altmann* case, whilst legally correct and arguably morally correct, has resulted in this situation. Private ownership outweighed the importance of this artwork as an example of Austrian culture.²⁵ Like the Banksy examples mentioned earlier in the Problem Statement (part 1.4), such as *Kissing Coppers*, *Slave Labour*, and *No Ball Games* private ownership of artworks can result in the public being prevented from accessing artworks of culture heritage.

Consequently, there is a need to balance private property rights against the public's interest in cultural heritage resources.

'[A] property owner should not have the absolute right to destroy a community's heritage, so should a community not have the absolute right to permanently preserve all public art without regard to whether it constitutes a part of the community's cultural heritage worthy of protection. Indeed, there are inherent problems with forcing a property owner to become a permanent curator of art'.²⁶

The precarity of heritage resources is especially overt for street art. This includes, the lack of recognition for street art and its artists. As well as the criminality of the artform (that it is a public nuisance/vandalism/anti-social behaviour). In addition, the location of street art is often accessible or public land, which may be derelict. Plus,

²⁴ Jayme includes an anecdote about how one Austrian viewed the restitution of art to be a permanent public loss. Jayme 2005 *Vand J Transnat'l L* 942.

²⁵ For more discussion on balancing the interests of heirs and the public in Nazi spoliated art cases see Skinner 2013 *Vand J Ent & Tech L* 697-702, Thompson 2011 *Hastings Comm and Ent L J* 407, The Central Registry of Information on Looted Cultural Property 1933-1945 <http://www.lootedart.com/NFVA1Y581441> (Date of use: 4 April 2018).

²⁶ Smith 2016 *St John's Law Review* 408.

the transient nature of street art amongst other aspects all increase the likelihood of damage or destruction of the pieces of street art that are culturally significant. Street artists are often anonymous, and they exist on the fringes of the art industry, many owners would not be aware of the significance of an image located on their property. That, graffiti and street art is considered to be a public nuisance and that the art form has been viewed from a criminal framework for centuries means that an owner is likely to view a street artwork as defacement of their property. Consequently, an owner may damage or destroy a culturally significant artwork in the process of restoring their property.

Recognising street artworks that are culturally significant as heritage resources is important because of the potential protection that such status can bring. A simple declaratory plaque (or blue plaque as is used in Britain) would have prevented *Gorilla in a Pink Mask* from being painted over by the owner. The resources and potential protection that cultural heritage resource status can provide for those identified pieces of street art such as the remaining works in the *Freedom Charter Project* and the *Purple Shall Govern* could guarantee the preservation of these artworks for South Africans.

4.2 Limitation of ownership through the NHRA

Admittedly, where cultural heritage property is concerned, the law already limits private rights in property in the public interest.²⁷ The interest of the South African community limits the entitlements of the owner of a cultural heritage resource to a greater degree than many other forms of property; the private owner has the role of responsible steward.²⁸ The general principles for heritage resource management require that people (who have power over heritage resources such as owners) must

²⁷ Evans *Principles of Environmental and Heritage Law* 17.

²⁸ Van der Walt and Pienaar *Law of Property* 50, Smith 2016 *St John's Law Review* 379 and Sax 1990 *Cal L Rev* 1554. Sax describes this type of property as, 'patrimonial property that in some respects "belongs" to the nation and to posterity.' Sax 1990 *Cal L Rev* 1545. See also Sax 1989-1990 *Mich L Rev* 1142. For more on the clash between private owners and the public interest see Sax *Playing Darts with Rembrandt. Hall Powers and Obligations* 73.

recognise that heritage resources should be carefully managed in order to ensure their survival.²⁹

The NHRA limits private property rights for property that is declared to be a cultural heritage resource in many ways. For instance, first SAHRA is responsible for the management of the national estate which includes any sites and objects (if amended) which form part of such (grade I and grade II and potentially grade III resources), thus when property is declared a cultural heritage resource it immediately falls under the management of SAHRA.³⁰ The management of heritage resources includes the conservation, presentation and improvement of a resource.³¹ Second, no one is allowed to *inter alia* destroy, damage, deface or alter heritage sites, or destroy, damage, disfigure or alter a heritage object without a permit (which is issued by SAHRA or the relevant heritage authority).³² Third, a heritage authority may regulate the conditions of use and regulate the admission of the public to a heritage site.³³ Fourth, the NHRA requires that owners or custodians of resources, listed in part 2 of the SAHRA register, keep the resource in good condition and secure.³⁴ Fifth, an owner or custodian can be issued with a compulsory repair order for heritage sites.³⁵ Sixth, the Minister of Arts and Culture (having consulted with the Minister of Finance) can expropriate heritage resources provided the owner is compensated for the loss.³⁶ Seventh, the governing heritage resources authority can issue a repair order for heritage sites and, with the amendment, heritage objects.³⁷ Eighth, the export of cultural heritage objects is limited; an object can only be exported when SAHRA has granted a permit to do so, and in the case of heritage objects which are of outstanding significance or are especially important to South

²⁹ NHRA s5(1)(a).

³⁰ NHRA s46(5)(d).

³¹ NHRA s(xxiii).

³² NHRA s27(18) and 32(13).

³³ NHRA s27(19)(b)-(c).

³⁴ NHRA s32(15) read with s32(7)(a). These resources include objects listed in the inventories of public museums, or those displayed or kept in secure conditions and other specific heritage objects (although it is unclear what, 'other specific heritage objects' are).

³⁵ NHRA s45.

³⁶ NHRA s46(1).

³⁷ NHRA s45.

Africa the export of the object may not be allowed.³⁸ Should SAHRA consider the object to be so significant because of its association to South African history or culture, its aesthetic qualities, or its value in terms of the arts and sciences they can refuse to grant a permit and thus, prevent the export of the object. SAHRA may also prevent the export of a heritage object should it be of such a degree of national importance that its loss would significantly diminish South Africa's cultural heritage.³⁹ The impact of this is that it prevents the owner from accessing the international art market and thus diminishes the economic value of the object.⁴⁰ Although, SAHRA is required to purchase the object from the owner, the owner cannot be prevented from exporting the object and be expected to maintain the status quo.⁴¹ Finally, there are the penalties implemented for offences and non-compliance with the NHRA as discussed above.

While the intention of the NHRA is to preserve and protect South Africa's heritage resources,

'[i]n South Africa it is difficult for a heritage authority to require an owner adequately to manage property and the legislation instead focusses on the requirement that the state set an example in the maintenance of its own heritage properties. A large part of section 9 of the NHRA deals with the setting of minimum standards for maintenance of properties that are owned by Public Works Departments.'⁴²

As such, it may be a good idea for the state to assume ownership of culturally significant street art sites in order to set an example for private owners of such subsequently identified resources. After all, the SAHRA council must have, 'among them qualifications or special experience or interest in fields relevant to heritage resources'.⁴³ These include architecture, history, town and regional planning,

³⁸ NHRA s32(19)-(31).

³⁹ NHRA s24.

⁴⁰ De Clippele and Lambrecht 2015 *IJCP* 260.

⁴¹ NHRA s32(21)-(31).

⁴² Hall *Powers and Obligations* 73.

⁴³ NHRA s14(2)(a).

archaeology, anthropology, palaeontology, indigenous knowledge systems and geology.⁴⁴ This suggests that SAHRA is better equipped than an ordinary property owner (as opposed to an owner who has the resources and knowledge to fulfil the requisite duty of care) in understanding the responsibilities of protecting and preserving these heritage resources and, thus are better able to fulfil this duty.

Further, as noted, there is no minimum standards clause for heritage sites. The responsibility for the preservation of heritage sites is not placed on a heritage authority or the owner, and there are no provisions that require owners to take specific action to protect a heritage object. A private owner (who does not follow the general principles) can let a heritage resource degrade to such an extent that the damage becomes permanent. The owner may do this intentionally or because they are negligent in their duty of care or because they simply cannot afford to fulfil the responsibility.⁴⁵ In addition, many people are ignorant of the law regarding cultural heritage resources whilst others choose to ignore the law. Moreover, in some instances, it is very easy to evade the requirements, and there is a general lack of capacity amongst relevant authorities to enforce the law.⁴⁶

Normally, the protection and preservation of heritage resources can be achieved through the cooperation of the heritage authority and the owner by agreeing to the conditions of the declaration of heritage status. However, in instances where cultural resources are only accessible to the owners there is little point to these resources being identified as cultural heritage resources. This is also true when SAHRA or the relevant heritage authority have been unable to come to an agreement regarding the protection and preservation of the resource, or the conditions of the declaration are not being fulfilled. In these cases, the intention of the NHRA cannot be fulfilled, and thus the utility of these resources as cultural heritage is limited.⁴⁷ Thus, again,

⁴⁴ SAHRA <http://www.sahra.org.za/about-us/council/> (Date of use: 15 June 2018).

⁴⁵ See as an example Henley <https://www.theguardian.com/artanddesign/2008/jul/08/heritage.britishidentity> (Date of use: 19 May 2017). Hills and Worthing also touch on this idea in relation to listed buildings. Hills and Worthing 2006 *Journal of Housing and the Built Environment* 203. See also Lesley 2001 *SAMAB* 13 and Wilkes 2000-2001 *Colum-VLA JL & Arts* 178.

⁴⁶ Lesley 2001 *SAMAB* 13.

⁴⁷ Wilkes 2000-2001 *Colum-VLA JL & Arts* 180-181.

to protect, preserve and ensure access to cultural heritage resources, it may be preferable for these resources to belong to the state or to be in possession of the state. After all,

‘the state is responsible to the population for making qualitative judgements about what does and does not constitute cultural patrimony as well as for providing widespread access to the works that do qualify...’⁴⁸

Even if SAHRA unilaterally declares the heritage status of a site or object, this may not guarantee the protection and preservation of the resource. An owner will most likely disagree with the unilateral declaration and, as discussed, it is unlikely that an agreement regarding any conditions for the protection and preservation of the resources will be agreed to, post the declaration. Further, in the case of heritage sites, it is unlikely that an owner will consent to any work being conducted on the site. Plus, expecting private owners to take on the responsibility and cost of ensuring the protection and preservation of cultural heritage resources and/or limiting what the owner can do with their property, may interfere with their property rights to an unfair extent.⁴⁹ Consequently, the owner may challenge the decision as an unfair administrative action and an unjustifiable limitation of their property rights, which may warrant a constitutional enquiry. There are situations in which SAHRA and the NHRA cannot ensure the protection and preservation of the resource and, state ownership may be more appropriate in achieving this goal.

The failure of a state to use its powers to acquire cultural heritage property can have unfortunate results. This is evidenced in the auction of André Breton’s collection of surrealist art in Paris to private buyers; wherein the French public’s interest in the collection as an example of French culture was superseded by private ownership.⁵⁰ It also serves as an example of a state incurring increased costs in order to ensure the protection of cultural heritage resources because they failed (or in this case

⁴⁸ Bivar 2006 *IJCP* 269.

⁴⁹ Holtorf 2007 *IJCP* 35.

⁵⁰ The Code du Patrimoine is the French heritage legislation wherein resources which are declared as national treasures are protected.

refused because the French government declined to declare the collection as a cultural heritage resource) to use state powers to protect cultural heritage resources prior to those resources being offered for sale at public auction.

André Breton was, arguably, the most influential actor in the surrealist movement. He died in 1966 leaving a collection of surrealist art which was valued at over £20 million prior to the auction in 2003. The collection, described as a 'virtual museum of the international surrealist movement', was located in the 42 rue Fontaine Paris apartment that Breton rented (upon his death the rental was taken over by his widow and then daughter). The collection included works by Man Ray, Arp and Dali, amongst others. Apart from the collection being that of the leader of the Surrealist movement, many of the artworks were the work of French artists and artists who had worked in France, and also included artefacts of French history, particularly French colonialist history.⁵¹ The collection was undeniably significant to French culture. 'Breton's apartment was a work of art in and of itself, whose value lay in its unexpected juxtapositions, its ingenious disorder, and its unique spirit ... [its] worth as a collection far exceeded the sum of its parts'.⁵²

Despite the importance of the collection as a whole, the individual pieces that comprised the collection were put up for sale at private auction. The costs of maintaining the collection and keeping the apartment were beyond the means of Breton's heirs, plus the organisation and administrative responsibilities for the collection had become too burdensome. Although, there were attempts to keep the collection together as well as an anti-sale petition and protests at the auction, all were unsuccessful.⁵³ Only the collection from one wall of the apartment was donated

⁵¹ Conley 2015 *South Central Review* 8-9. For more on surrealist collections representation of colonialism see Tythacott *Surrealism and the Exotic*.

⁵² DuPuis at quoted in Israël 2012 *Art Antiquity and Law* 100. See also Bivar 2006 *IJCP* 265-267.

⁵³ McMillan 2003 *Umbrella* 77. Breton was himself against the commercial trade in cultural objects, seeing his collection as, 'an act of rescue from certain neglect and destruction and as a noble act of protection of such things from the capitalist market where they would be traded for financial advantage only, and not their poetic value'. Conley 2015 *South Central review* 18. A record of Breton's collection can be found at Association Atelier André Breton <http://www.andrebretton.fr/en/> (Date of use: 14 February 2018).

to the Centre Georges Pompidou where it is preserved and displayed as it was in the apartment.⁵⁴

Whilst the French government did not opt to protect the collection by declaring it to be a national treasure, they did exercise the right of pre-emption to acquire some of the artworks sold at the auction to prevent the dispersal of French cultural heritage objects. The French right of pre-emption allows the state to 'pre-book' any artworks sold at auction; once an auction of a lot is concluded, the state replaces (pre-empts) the purchaser and pays the amount of the winning bid.⁵⁵ At the Breton auction, artworks sold far above the estimated prices, partly because the French minister of culture had announced their interest in the artworks. Although the state is not supposed to reveal their interest in an auction (their intention to pre-empt any sales) in practice this is unlikely to happen, and consequently their interest in the artworks drove up the prices as it confirmed the cultural value of the objects.⁵⁶ The total amount of all the items sold amounted to 50% more than the estimated value of €20 million. Therefore, the state spent €13 million pre-empting lots that were sold at the auction. This was more than double the department's yearly budget for acquisitions (although only €7 million short of the pre-auction valuation). Of the 6 249 lots at the sale, the French state acquired 335 items.⁵⁷ Had the state exercised their right to declare the apartment as a national treasure and expropriated the property (thus preventing the auction in the first place) the resulting costs may have been less than what was spent at the auction because Breton's heirs had been willing to negotiate with the state to keep the collection intact. Alternatively, the state could have acquired significantly more items for the same amount they ended up spending.⁵⁸

⁵⁴ Bivar 2006 *IJCP* 266.

⁵⁵ Cornu 2006 *Art Antiquity and Law* 158-159.

⁵⁶ Israël 2012 *Art Antiquity and Law* 92,100. Code du Patrimoine 1921 L123-1.

⁵⁷ McMillan 2003 *Umbrella* 78, Israël 2012 *Art Antiquity and Law* 100, Bivar 2006 *IJCP* 260.

⁵⁸ Bivar 2006 *IJCP* 260–263, 274. It should be noted that the state considered the costs of maintaining the apartment as a museum to be prohibitive; although it is thought that doing so would promote commercial development in the 9th *arrondissement* where the apartment was located (at 268). The potential for authentic reconstruction of the apartment was also in doubt (at 273). The expropriation of property is controlled by the *Code de l'expropriation pour cause d'utilité publique*.

Alternatively, had the state negotiated with the heirs, it could have reached an agreement on an amount between what was spent and the pre-auction estimate.

By not declaring Breton's apartment to be a national treasure or expropriating the property, the French state ignored the egalitarian call of cultural property. Instead of ensuring that the collection was accessible to all French nationals and the global public, the collection has largely become accessible to the rich only because the bulk of it is now privately owned.⁵⁹

Perhaps learning from this experience, in 2017 the French state declared some lots due to be sold at auction to be national treasures; these included the Marquis de Sade's *120 days of Sodom*, along with four items of Breton's collection including his 1924 manuscript of the *Surrealist Manifesto*. Doing so prevented the items from being sold at auction, and the then French Ministry of Culture then committed to buying these items at market rates, thus, avoiding the inflated auction prices as it occurred at the 2003 Breton auction.⁶⁰

Consequently, in order to ensure the protection and preservation of South Africa's cultural heritage resources (in the instances where it is necessary for the state to step in) it is necessary to explore when the unilateral limitation on private property ownership is acceptable. Further, whether such a limitation can achieve the protection of a heritage object and whether it would be more appropriate for the state to acquire ownership of heritage resources to ensure their best protection.

For site-specific street art, it needs to be considered whether the unilateral deprivation of property could be an acceptable approach to the protection and preservation of the piece. The location of street art is rarely arbitrary, instead locations are chosen to suit the work. For instance: a political piece should be

⁵⁹ Bivar 2006 *IJCP* 271 and 271. Further as the artworks were not declared to be national treasures, they are not subject to trade and export restrictions and thus need not be kept in France. Jayme 2005 *Vand J Transnat'l L* 934.

⁶⁰ Stillman February 2018 *Rare Book Monthly*, Samuel <http://www.telegraph.co.uk/news/2017/12/18/france-declares-marquis-de-sades-sex-filled-120-days-sodom-national/> (Date of use: 20 February 2018), Thomasine <https://www.theguardian.com/world/2017/dec/18/120-days-de-sodom-made-national-treasure-by-french-government> (Date of use: 20 February 2018).

located such that it is visible to many people and the buildings surrounding it (such as government buildings) may increase the poignancy of the work.⁶¹ Indeed, Young considers the site of the artwork to be essential in understanding street artwork in that, the location affects the work, the viewing of the work and the intention of the artist.⁶² Consequently, protecting and preserving these artworks *in situ* is integral to preserving the authenticity of the works.

And as noted above, it is important to consider whether the property should be expropriated such that ownership vests in the state and the responsibility for the management of such site would fall upon the relevant national, provincial or local body.⁶³ For street art objects it needs to be considered whether the unilateral deprivation may be acceptable, or if the expropriation of the object would better ensure the protection and preservation of the object, and whether such action would be justifiable.

Consequently, this study continues with an exploration of the limitation of property rights in heritage resources through deprivation and expropriation.⁶⁴

4.3 *The constitutional right to property*

In South Africa, private property ownership is protected by s25 of the Constitution, but the clause also allows the state to deprive private owners of their property or to expropriate such property in specific circumstances. The property clause is a combination of the protection of private property rights and the recognition of the public's interest in transforming and reforming the property regime.⁶⁵ In 1988, Didcott J envisioned that the soon-to-be Bill of rights should not, 'protect private property with such zeal that it entrenches privilege'.⁶⁶ However, '[w]hat we can't do

⁶¹ Halsey and Young 2002 *The Australian and New Zealand Journal of Criminology* 171 – 172.

⁶² Young *Street Art* 8.

⁶³ Daly argues that a strategy aimed at protecting graffiti is prone to failure due to the ephemeral nature of graffiti. Daly 2012 *Planning News* 8. This suggests that it may be impractical to attempt to protect street art *in situ*; that to ensure the preservation of the artwork it may have to be removed or new methods of protecting street art *in situ* will have to be explored.

⁶⁴ These will be discussed further at The difference between deprivation and expropriation of property.

⁶⁵ Van der Walt *The Constitutional Property Clause* 8 and 16.

⁶⁶ As quoted in Ntsebeza *Land Redistribution* 118.

is to confiscate because by confiscating we shall be depriving certain people of their rights as reflected in the Constitution'.⁶⁷ The property clause thus ensures that, when the state does interfere with private property rights, they do so in accordance with the law.⁶⁸

Section 25 (1) is phrased negatively, as follows:

'No one may be deprived of property except in terms of a law of general application, and no law may permit, and no law may permit the arbitrary deprivation of property.'⁶⁹

Such negative phrasing ensures that private property rights are not absolute; the clause legitimises the deprivation of property whilst providing that such modification must be effected fairly and with due process.⁷⁰ Further, s25 (2) and (3) state that property may be expropriated in terms of a law of general application for a public purpose, or in the public interest, and that the expropriation of property must be compensated for.⁷¹ The inclusion of the expropriation clause in the Constitution is a balance between the desire to retain and protect private property ownership and the need to transform property (and the ownership of property) in democratic South Africa.⁷²

These clauses make the deprivation of privately-owned cultural heritage resources, as well as the transfer of ownership of those resources from private owners to the state, a possibility. This would allow the state to acquire possession (but not

⁶⁷ Ntsebeza *Land Redistribution* 120 quoting Thomas G from the proceedings of the Land Tribunal held in Port Elizabeth in 2003.

⁶⁸ Van der Walt and Pienaar *Property Law* 347.

⁶⁹ The Constitution s25(1).

⁷⁰ Van der Walt *The Constitutional Property Clause* 18.

⁷¹ The Constitution s25 (2) (albeit that this section may soon be amended). Parliament of the Republic of South Africa
<https://www.parliament.gov.za/press-releases/national-assembly-approves-process-amend-section-25-constitution> (Date of use 11 April 2019).

⁷² Interestingly, the late Prof Van der Walt argued against the inclusion of a property right in the constitution because, he felt, doing so would prevent or at least hamper the transformation, 'to a new land law that is characterised by social justice'.⁷² Van der Walt 1990 *De Jure* 43. See also Chaskalson 1993 *SAJHR* 388 in this regard. Indeed, the protection of private property rights in a state with a history of racial disposition risks the entrenchment of past privileges. Claassens 1993 *SAJHR* 423, see 424 for an example of such dispossession.

ownership) through a deprivation when the private owner is not fulfilling the duty of care towards the resource and/or is not willing to provide access to the resource. Alternatively, the state could take ownership of the cultural heritage resource through expropriation. It would also provide a recourse where the resource is of such importance to cultural heritage that state ownership would be more appropriate than private ownership, and the private owner has not been willing to part with the object.

The deprivation of property by acquiring possession, or the expropriation of cultural heritage resources could be a way of ensuring that South Africa's cultural heritage resources can be accessed by all South Africans and that examples of South Africa's cultural heritage do not remain or become the property of the rich and privileged. Considering South Africa's segregated past and the remaining wealth inequality, the role of the Department of Arts and Culture in ensuring that all South Africans have access to our cultural heritage is crucial to South Africa's transformation project.

As was highlighted in the Breton auction, there is the risk of cultural heritage resources being sold at auction (or even through private sales) for inflated values. Should the state not exercise its right to expropriate cultural heritage resources at market value, and the resource is sold at public auction or private sale, the market value of the property may increase (more than the rate of inflation). Should a heritage authority then wish to acquire the property they will need to spend more (taxpayers) money to do so. Thus, the deprivation or expropriation of heritage resources could ensure more egalitarian access to these resources and better ensure their protection and preservation than the current limitations achieve.

However, 'ownership is the strongest and most complete real right one can acquire or hold', and, in South Africa is often treated by the courts as if it is, 'absolute, complete and inviolate in principle'.⁷³ The result of this tendency to give considerable weight to private ownership means that any interference with private ownership

⁷³ Van der Walt 2002 *Stell LR* 405 and 414 respectively, see also 408 and 410, and Van der Walt 2008 *Stell LR* 345.

needs to be substantially justified. Further, even though s25 is not limited to land, much of the jurisprudence on deprivation, expropriation and the need for the transformation of South Africa's property regime concerns land (as opposed to other forms of property).⁷⁴ Thus, the existing jurisprudence on deprivation and expropriation needs to be interpreted such that it also applies to movable property.⁷⁵ Moreover, the limitation on property rights due to the recognition of cultural heritage status has not been scrutinised from the perspective of a constitutional infringement. Consequently, investigating the justifiability of such limitation is worthwhile.

4.4 The difference between deprivation and expropriation of property

The deprivation of property does not involve the acquisition of property by the state (or any other party), rather it restricts the manner in which the property can be used. Furthermore, deprivation does not require payment of compensation by the state.⁷⁶ Thus, rather than the transfer of property rights, a deprivation is an interference in the exercise of another's property right; it is a limitation on the entitlements of ownership.⁷⁷ Van der Walt describes deprivation of property as the, 'non-acquisitive regulatory controls over the use and exploitation of property'.⁷⁸

In contrast, expropriation means that the expropriator (usually the state) acquires the property either for its own estate or to transfer to another party.⁷⁹ In addition, the expropriation of property must (currently) be compensated for. In *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Service* (2001) Conradie J stated that, '[t]he effect of expropriation is to vest ownership (of land) in the government.'⁸⁰ Van der Walt initially disagreed and amended this statement by noting that expropriation was not restricted to land, nor was it restricted

⁷⁴ See for instance Lewis 1992 *SAJHR* 389. The impending change in the legislation regarding expropriation without compensation may change this.

⁷⁵ The Constitution s25(4)(b)

⁷⁶ Currie and de Waal *Constitutional and Administrative Law* 393.

⁷⁷ Van der Walt and Pienaar *Law of Property* 349, Van der Walt *The Constitutional Property Clause* 102.

⁷⁸ Van der Walt *The Constitutional Property Clause* 103.

⁷⁹ Currie and de Waal *Constitutional and Administrative Law* 393.

⁸⁰ *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Service and Another* 2001 (7) BCLR 715 (C) 732 (hereinafter referred to as *FNB 2001*). See also Van der Walt and Pienaar *Law of Property* 350.

to ownership (limited real rights and mineral rights may also be expropriated); he further suggested that an expropriation need not transfer ownership to the state.⁸¹ However, Van der Walt later recognised that expropriation is only, ‘those deprivations that amount to expropriation or forced sale of the property’ and that it is, ‘characterised by state acquisition of the property’.⁸²

In some cases, the line between deprivation and expropriation can be difficult to determine; the imposition placed on a property owner by a deprivation may be so excessive that it amounts to expropriation, that is the interference with the private property owner’s right is such that they cannot exercise any of the entitlements of ownership.⁸³ Pienaar and Mostert describe these constructive expropriations as, ‘actions [that] ... effectively destroy the economic viability of the property or a core element of the property right, whilst (additionally) affording no direct benefit to the authority affecting the imposition on the property.’⁸⁴ A constructive expropriation focuses on the practical effect of the infringement; not on the intention of the deprivation.⁸⁵ The concept of constructive deprivation was discussed in *Steinberg v South Peninsular Municipality*.⁸⁶ In this case the SCA debated whether deprivations which, ‘had gone too far’, should be subject to the requirements of s25(2) for expropriations, especially the obligation to compensate the owner of the property.⁸⁷ Whilst Cloete AJA recognised that there is a clear distinction between s25(1) and 25(2), (as put forward in *Harksen v Lane*) he submitted that there may be a need to develop the concept of constructive expropriation in South Africa,

‘particularly where a public body utilises a regulatory power in a manner which, taken in isolation, can be categorised as a deprivation

⁸¹ Van der Walt 2001 *SAJHR* 104. Van der Walt also argues that ownership need transfer to the government upon expropriation treating a state department, a minister, the state and government as separate entities; or ownership may not invest in anyone (when the effect of the expropriation is to destroy the property). See also Pienaar 2015 *PER* 1480.

⁸² Van der Walt and Pienaar *Law of Property* 354. See also *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC).

⁸³ Mostert 2003 *SAJHR* 569.

⁸⁴ Pienaar and Mostert 2005 *SALJ* 657.

⁸⁵ Pienaar and Mostert 2005 *SALJ* 657.

⁸⁶ *Steinberg v South Peninsular Municipality* 2001 ZASCA 93 (hereinafter referred to as *Steinberg*).

⁸⁷ *Steinberg* [6].

of property rights and not an expropriation, but which has the effect, albeit indirectly, of transferring those rights to the public body...'⁸⁸

Despite these *obiter dicta*, the court in *Steinberg v South Peninsular Municipality* did not venture into interpreting the property rights clause to include constructive expropriation.⁸⁹

Recognising the concept of constructive expropriations could prove beneficial to the property owner by ensuring compensation. Alternatively, it could potentially allow courts to declare a deprivation (which amounts to a constructive expropriation) as invalid because the limitation is too extensive to be fair.⁹⁰

There have been different approaches by the courts in interpreting the requirements for a justifiable deprivation or expropriation. The first approach requires a strict separation between deprivations and expropriations. With a strict separation an infringement is either a deprivation (and need only meet the requirements of a law of general application and non-arbitrariness) or an expropriation (and need only meet the requirements of public purpose or public interest as well as compensation). With the strict separation approach, a deprivation which amounts to a constructive expropriation is an unjustifiable limitation. This strictly separated understanding of the two clauses was the approach taken in *Harksen v Lane*.⁹¹ In this case, the Constitutional Court determined that the difference between a deprivation and an expropriation is the duration of the transfer of the property to the state. Where the transfer is permanent it is an expropriation, where it is temporary it is a deprivation.⁹²

However, Van der Walt questions this understanding because it favours the property owner; it supports the tradition of protecting property rights and requiring strong

⁸⁸ *Steinberg* [8].

⁸⁹ In the *Steinberg* case the appellant argued that the intention of the respondent to build a road across her land (as part of an approved provincial road scheme) amounted to the constructive expropriation of the property and that she should be compensated for such (as opposed to not being compensated because the road scheme amounted to a deprivation of the property). The claim failed on the facts of the case. The court found that the infringements were not significant and therefore there was no need to investigate the concept of constructive expropriation.

⁹⁰ Mostert 2003 SAJHR 569.

⁹¹ *Harksen v Lane* NO 1998 (1) SA 300 (CC) (hereinafter referred to as *Harksen*).

⁹² *Harksen* [36] – [37]. Van der Walt 2004 SALJ 862- 863, Chaskalson 1994 SAJHR 136.

justifications for an infringement of such and potentially limits the development and transformation of property as envisaged in the Constitution.⁹³ Another consequence of this strict difference between deprivation and expropriation is that a claimant can only bring a case under one or the other; if a claimant argues for unlawful expropriation and fails, they have no recourse to a claim for unlawful deprivation even if this would have been successful.⁹⁴

The second approach to the two clauses views expropriations as a form of deprivation i.e. they are read as two parts of the same clause instead of separately. This is the approach favoured by Van der Walt,

‘The simplest solution is to assume that every restriction on property, no matter how small or insubstantial, constitutes a deprivation in terms of s25(1) and is therefore subject to its requirements.’⁹⁵

And,

‘[a] good idea is to see all state interferences with private property as deprivations, and to regard deprivations that place a very unfair burden on one person as expropriations.’⁹⁶

In the second approach, the deprivation and expropriation clauses interact with each other. An expropriation is an extensive deprivation and therefore a *de facto* expropriation must meet the requirements of a law of general application and non-arbitrariness as well as the public interest/public purpose and compensation requirements.

In *First National Bank v Commissioner for the South African Revenue Services (FNB 2002)* the Constitutional Court discussed expropriation as a form of deprivation, in that s25(1) includes *all* deprivations and expropriations, and as a form of deprivation,

⁹³ Van der Walt 2002 *Stell LR* 409.

⁹⁴ Van der Walt 2004 *SALJ* 862- 863, Chaskalson 1994 *SAJHR* 136.

⁹⁵ Van der Walt 2005 *SALJ* 80.

⁹⁶ Van der Walt and Pienaar *Law of Property* 349.

must also satisfy the requirements of this clause.⁹⁷ Thus, both deprivations and expropriations would require that any interference with the rights of the private property owner must arise from a law of general application. A law of general application cannot be unequal or arbitrary in application, the law cannot be focused on individuals instead it must be drafted such that it is, 'generally applicable, non-arbitrary, specific and accessible'.⁹⁸ The court viewed a deprivation that *de facto* amounted to an expropriation to be arbitrary. The deprivation was unjustifiable because the infringement affected too many elements of ownership, it was not specific enough and therefore arbitrary.⁹⁹ Further, any benefits that occur from such law should affect the general public equally.¹⁰⁰ This decision ensures that constructive expropriations will (most likely) not succeed because they fail the non-arbitrariness requirement as required in s25(1) and a court will not consider the possibility of the deprivation actually being an expropriation (and the requirements for such).

FNB 2002 is one of a few cases where the interpretation of s25 has concerned forms of property other than land. The court in *FNB 2002* decided that an enquiry for both deprivations and expropriations should start by determining whether the limitation is arbitrary; like a deprivation, an expropriation cannot be arbitrary.¹⁰¹ This interactive approach to the two clauses was followed by the Land Claims Court in the *Nhlabathi and Others v Fick* case.¹⁰² However, this interactive interpretation of the property clause does not necessarily conflict with the strict approach taken in *Harksen*, since it is still possible to distinguish between the two clauses by applying the additional public purpose and compensation requirements for an expropriation.¹⁰³ Therefore,

⁹⁷ *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another: First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (7) BCLR 702 (CC) (hereinafter referred to as *FNB 2002*) [57] – [59].

⁹⁸ Van der Walt *The Constitutional Property Clause* 106.

⁹⁹ *FNB 2002* [114]

¹⁰⁰ Currie and de Waal *Constitutional and Administrative Law* 340, Van der Walt and Pienaar *Property Law* 349.

¹⁰¹ *FNB 2002* [58] – [60]. See also Pienaar and Mostert 2005 *SALJ* 656 – 659 and Van der Walt 2001 *SAJHR* 86 – 87.

¹⁰² *Nhlabathi and Others v Fick* 2003 (7) BCLR 806 (LCC) (hereinafter referred to as *Nhlabathi*).

¹⁰³ Van der Walt 2004 *SALJ* 867. Although this does not contradict *Harksen* it does allow a claimant to pursue a claim based on both deprivation and expropriation.

both deprivations and expropriations are subject to s25(1), that the limitation is in terms of a law of general application hence cannot be arbitrary. Only expropriations are subject to the requirements of s25(2), a deprivation which is a *de facto* expropriation will fail because it is arbitrary.

It is submitted that the two-stage approach used in *FNB 2002* and *Nhlabathi* cases and supported by Van der Walt is the preferred approach because it is the most comprehensive reading of the two clauses requiring that the more extreme interference with property rights (expropriation) passes the strictest requirements.

4.4.1 The test for arbitrariness

In the cases where the heritage authority and the owner cannot reach an agreement concerning the declaration of a resource (regarding the automatic limitations that NHRA imposes with such status and/or specific conditions) and SAHRA deems the resource to be worthy of heritage status, then they may advise the Minister to pursue a deprivation or expropriation of the property.¹⁰⁴ If the owner of the property believes the action to be unfair, they may challenge the deprivation or expropriation in court. In addition, if SAHRA has exercised their veto power regarding the property, an owner could challenge this as an unjustifiable deprivation or expropriation.

To determine whether the action taken by either the Minister or SAHRA is an arbitrary infringement of property, a court may consider whether 'there is a lack of criteria governing the exercise of a deprivation', and whether there is an 'absence of a rational connection between the interference with property and its purpose'.¹⁰⁵ In the *FNB 2002* case, this meant that deprivation was arbitrary because the law of

¹⁰⁴ During the process for declaring heritage status an owner may make representations regarding the declaration. NHRA s27(8)(d) and s32(3). The process for enacting an expropriation (from notification to the payment for compensation) is set out in s7-s11 of the Expropriation Act. There is no specific legislation detailing how a deprivation occurs i.e. when notice must be served, how the possession is physically acquired etc. However, the Expropriation Act also refers to, 'take the right to use temporarily' and thus the process for expropriations could be followed in so far as they can be applied to deprivations.

¹⁰⁵ Mostert 2003 *SAJHR* 586 – 587.

general application was procedurally unfair or it did not provide sufficient reason (substantive unfairness) for the deprivation.¹⁰⁶

Regarding procedural unfairness, Van der Walt states that if the deprivation occurs due to an administrative action, then the fairness of such must be adjudicated in terms of the PAJA as this would circumvent the need for a s25(1) enquiry.¹⁰⁷ Whereas, if the deprivation is imposed by legislation, then a s25(1) enquiry is required. However, such an enquiry should still use the principle of procedural fairness developed in administrative law.¹⁰⁸

Regarding substantive unfairness, the court in *FNB 2002* deliberated on what would amount to sufficient reason for a deprivation. The court considered: whether the means used achieves the purpose (the means-end test), the relationship between the purpose of the deprivation and the person whose property is affected, the relationship between the purpose and the type of property, and the extent of the limitation.¹⁰⁹ Further, the depth of this investigation depends on the effect of the deprivation on the owner, the more significant the deprivation, the stricter the scrutiny.¹¹⁰ The court also stressed that the justification for the purpose of the deprivation would need to be especially convincing for land and corporeal movables. Since the traditional view of ownership is such a strongly held and enforced perspective in South African law, any attempt to limit the property right is going to need to provide substantial justification and courts have taken a very conservative approach.¹¹¹ The converse of this is that, it is possible that the justification of a deprivation may not be subjected to such scrutiny if the purpose aligns with South Africa's transformation goals such as protecting, promoting, and benefiting minority groups or previously disadvantaged groups.¹¹²

¹⁰⁶ *FNB 2002* [100]. See also Van der Walt 2012 *Stell LR* 88.

¹⁰⁷ For a definition of administrative action and the requirements of procedural fairness see PAJA s1(i) and s3 respectively). Van der Walt 2012 *Stell LR* 89, 91.

¹⁰⁸ Van der Walt 2012 *Stell LR* 91-93.

¹⁰⁹ *FNB 2002* [100]. Pienaar and Mostert 2005 *SALJ* 648, Van der Walt 2005 *SALJ* 78.

¹¹⁰ Van der Walt 2005 *SALJ* 82.

¹¹¹ *FNB 2002* [100]. Pienaar and Mostert 2005 *SALJ* 648, Van der Walt 2002 *Stell LR* 409.

¹¹² Van der Walt 2002 *Stell LR* 406.

‘Depending on such interplay between variable ends and means, the nature of the property in question and the extent of its deprivation, there may be circumstance where sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality analysis closer to that required by s36(1) of the Constitution.’¹¹³

The meaning of arbitrary is not constant and must be examined on a case by case basis; some deprivations will only require, “no more than a mere rational relationship between means and ends’, whilst in other circumstances it will call for a full-blown proportionality review similar to s36(1) of the Constitution’.¹¹⁴

Section 36(1) of the Constitution requires that the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relationship between the limitation and the purpose, and whether the purpose could be achieved through less restrictive means, all be considered to determine whether a limitation of a right is justifiable or not. These factors are very similar to the substantive fairness requirements set out in *FNB 2002*.¹¹⁵

The outcome of this is that, where a limitation of a property right is extensive, or the property is land or corporeal, the non-arbitrariness requirement of s25(1) (which includes s36(1)-like considerations) must be satisfied. The limitation of a property right is thus a two-part process; the ambit and internal modifiers of s25 are considered in a limitation enquiry, and a s36(1)-like analysis is used to test the proportionality of the burden.¹¹⁶ This means that the justification for and the rationality of the limitation will be assessed and the interests of the two parties (property owner and the state) balanced on the basis of the specific requirements of s36(1)(a)–(e).¹¹⁷

¹¹³ *FNB 2002* [100(g)].

¹¹⁴ Pienaar and Mostert 2005 *SALJ* 648 quoting Ackermann J *FNB 2002* [65].

¹¹⁵ *FNB 2002* [100].

¹¹⁶ Mostert 2003 *SAJHR* 586.

¹¹⁷ Pienaar and Mostert 2005 *SALJ* 648.

Once a property owner has proved that the infringement is a deprivation, and that the deprivation is unconstitutional (due to arbitrariness or for not arising from a law of general application), the state may still have recourse to s36(1) to prove that the limitation is justifiable.¹¹⁸

This was the approach followed in the *FNB 2002* case wherein Ackermann J noted that if the property owner proves that the deprivation is arbitrary, a limitation-like enquiry is required to ensure that the deprivation cannot be justified in terms of s36(1).¹¹⁹

‘A limitation analysis can only take place once it has been established that there is a constitutionally protected right at stake and that an infringement of that right has taken place. In the context of the property clause this means that a limitation analysis ... can only take place once it has been established that a property right had been infringed in conflict with the requirements in s25(1) and 25(2).’¹²⁰

Roux and Davis point out that this test for arbitrariness conflates s25(1) and (2) with s36(1).¹²¹ Admittedly, Van der Walt notes that ‘it is difficult to conceive of instances where an infringement which falls foul of s25 will pass the justification test under s36.’¹²² So, it is unclear as to what circumstances would extend to a limitation enquiry for a deprivation and expropriation.

The arbitrariness investigation was also examined in *Mkontwana v Nelson Mandela Metropolitan Municipality*, wherein it was stated that

‘[t]he nature of the relationship between means and ends that must exist to satisfy the section 25(1) rationality requirement depends on

¹¹⁸ Van der Walt 2002 *Stell LR* 411. This part of this process is problematic because it lays the burden of proof on the property owner.

¹¹⁹ *FNB 2002* [70].

¹²⁰ Van der Walt 2002 *Stell LR* 410-411.

¹²¹ Roux and Davis *Property* 20-8.

¹²² Van der Walt 2005 *SALJ* 78 and the sources quoted therein. Van der Walt notes that this remains a concern with the interpretation used in the *FNB 2002* case, however, he submits that at this point it is the best interpretation available (at 877). See also Van der Walt 2002 *Stell LR* 411.

the nature of the property and the extent of the deprivation. A mere rational connection between means and ends could be sufficient reason for a minimal deprivation. However, the greater the extent of the deprivation the more compelling the purpose and the closer the relationship between means and ends must be'.¹²³

Further on, Yacoob J summarised the test for arbitrariness,

'there would be sufficient reason for the deprivation if the government purpose was both legitimate and compelling and if it would, in the circumstances, not be unreasonable to expect the owner to take the risk of non-payment'.¹²⁴

For expropriation, the deprivation requirements must also be met since all infringements on property should be viewed as a deprivation, then the requirements of s25(2) must be complied with. If the property owner proves that either of these requirements have not been satisfied the state can still rely on s36(1) to justify the limitation of the property right (although as already pointed out as the non-arbitrariness requirement includes a proportionality test a s36(1) inquiry is practically obsolete for a property right limitation).¹²⁵

The requirement of s25(2)(a) that the infringement be for a public purpose or in the public interest may also be subsumed in the s25(1) analysis. A law of general application that regulates property, inherently is for a public purpose or in the public interest.¹²⁶ As Van der Walt points out, there is a propensity in foreign law to require that a deprivation should be for a public purpose or in the public interest. Thus, it is unlikely that an expropriation which is not arbitrary would fail a s25(2)(a) analysis.

¹²³ *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government and Housing, Gauteng* 2005 (1) SA 530 (CC) (hereinafter referred to as *Mkontwana*) [35]. See also Van der Walt 2005 SALJ 87-89.

¹²⁴ *Mkontwana* [51].

¹²⁵ Pienaar and Mostert 2005 SALJ 656.

¹²⁶ Van der Walt 2005 SALJ 81.

4.4.2 Public purpose and public interest

None of the cases discussed in this chapter deal with expropriation in depth. For instance, the *FNB 2002* process determines whether there has been a justifiable deprivation but does not expand into the realm of expropriation. Consequently, the concepts of public purpose and public interest have not been discussed in significant detail in any of the cases.

Whilst the terms public purpose and public benefit are broad, the Constitution does clarify that an expropriation is for a public purpose or for the public benefit where the expropriation serves the, 'nation's commitment to land reform', or it is intended to, 'bring about equitable access to all South Africa's natural resources'.¹²⁷ However, these categories are not exclusive, and expropriation can still occur for other purposes.¹²⁸ Unfortunately, there is no accepted definition of a public purpose or the public interest in South African law.¹²⁹ The Expropriation Act states that 'public purpose includes any purpose connected with the administration of the provisions of any law by an organ of state.'¹³⁰ In *White Rocks Farm v Minister for Community Development*, public purpose was described as, 'things whereby the whole population or the local public are affected and not only matters pertaining to the State or Government'.¹³¹ However, other than this (and the few guidelines provided in the Constitution) legislation does not make it clear what a public purpose is and how this differs to the public interest.

Slade suggests that public purpose refers to government purposes (such as road building or railway building amongst many others) whilst public interest refers to

¹²⁷ The Constitution s25(4). See also Van der Walt and Pienaar *Law of Property* 356. Expropriation is also governed by the Expropriation Act.

¹²⁸ Van der Walt and Pienaar *Law of Property* 356.

¹²⁹ Cote and Van Garderen 2011 *SAJHR* 178. Cote and Van Garderen attempt to explain what the public interest is at 178 – 182. However, instead of attempting to define public interest they discuss what a public interest action is, who can bring such a case to court, and the factors that affect NGO's in determining whether to take on a public interest case. Badwaza also sets out to define what the public interest is but also discusses public interest litigation. Badwaza *Public interest litigation* 6 – 11. See also Kathree 2002 *Advocate* 32 – 40.

¹³⁰ Expropriation Act s1.

¹³¹ *White Rocks Farm (Pty) Ltd v Minister for Community Development* 1984 3 SA 785 (N) 793I.

purposes that benefit the public.¹³² He argues that, in the case of expropriation, the two terms can be used interchangeably.¹³³ The meaning of public purpose may be broad or narrow depending on the circumstances of the case. In the broad sense, a public purpose must have a connection to the entire population or to a community. With a narrow meaning, public purpose refers to things with which the state is concerned. But in both definitions, it can refer to government purposes.¹³⁴ The term is vague.¹³⁵

The term public interest is used in a significant number of contexts, and no single definition applies in all situations.¹³⁶ Unfortunately, despite being a constitutional requirement for fair expropriation, the Expropriation Act does not define public interest. Public interest litigation has covered vast areas of the law, and there does not appear to be a limit as to what may fall within the realm of the public interest.¹³⁷ Marcus and Budlender highlight that litigation in the public interest issues occurs when ‘the assertion of fundamental rights is being used to redress unfairness and inequality rather than perpetuate it and that there are countless real people being affected on a daily basis.’¹³⁸ Although South African courts have not clearly distinguished between public purpose and public interest, it is generally considered that the public interest is broader category than a public purpose.¹³⁹

Internationally, cultural heritage legislation is a long-established justification for the limitation of property rights, i.e. the limitation of property rights for cultural heritage

¹³² Slade 2014 *PER* 187. Slade discusses the South African legislative and case history, dealing with the differences between public purpose and public interest, to arrive at this conclusion at 174 – 188.

¹³³ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 567. Van der Walt also supports this stance. See Van der Walt *Constitutional Property Law* 462.

¹³⁴ *Slabbert v Minister van Lande* 1963 (4) ALL SA 109 (T) 111.

¹³⁵ *Rondebosch Municipal Council v Western Province Agricultural Society* 1910-1911 (4) Buch AC 461 (Cape) 467.

¹³⁶ Corruption Watch <http://www.corruptionwatch.org.za/what-constitutes-public-interest-2/> (Date of use: 8 December 2015).

¹³⁷ See, for example, the range of public interest topics in the article contained in Klaaren, Dugard and Handmaker (eds) 2011 *SAJHR* 1 – 205. See also Marcus and Budlender *A Strategic Evaluation* 8 -15.

¹³⁸ Marcus and Budlender *A Strategic Evaluation* 138.

¹³⁹ *Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd* 2009 (5) SA 661 (SE). Slade 2014 *PER* 171.

purposes is an acceptable limitation because it is for the public benefit.¹⁴⁰ Arguably the NHRA is enacted to fulfil a public purpose because it aims to protect and preserve South Africa's cultural heritage for current and future generations. However, it will remain a judicial responsibility to determine when and if an expropriation effected for the purpose of preserving cultural heritage resources is for the public benefit or is in the public interest on a case-by-case basis.

4.4.3 Case law

As noted, the deprivation (by acquiring possession) or expropriation of cultural heritage resources may be a good solution for the Department of Arts and Culture in fulfilling their mandate to promote South African arts and culture. As well as fulfilling the legislative responsibilities to *inter alia* develop arts and culture through acquiring and maintaining property, to protect national heritage, and to promote access to cultural heritage resources.¹⁴¹ Deprivations may be particularly attractive to the state considering budget limitations. Through deprivation, the state can acquire possession (not ownership) of cultural heritage resources and can do so whilst still requiring the owner to cover the costs of maintenance. For instance, a deprivation could limit a private property owner's possession of an artwork by requiring that such artwork be kept in a state gallery or museum for protection and preservation as well as for presentation. This would be a limitation on the owners right to physically control the property, to benefit from or encumber the property and could be extended to prevent the transfer of ownership of the property. However, the individual still owns the artwork and could still be held responsible for the costs of its maintenance. Further, this possession can be viewed as temporary as the artwork can be returned to the owner at any time.¹⁴²

Thus, from the perspective of *Harksen v Lane*, the state can acquire possession by deprivation (which may practically amount to ownership) without having to incur the

¹⁴⁰ Smith 2016 *St John's Law Review* 377.

¹⁴¹ Culture Promotion Act s2(1) (a), read with the Culture Promotion Amendment Act, s1. National Heritage Council Act s4(a) and (c). Benson and Prinsloo 2013 *SAMAB* 36.

¹⁴² This was important in *Harksen v Lane* where it was viewed that the state did not take away property, they merely took temporary control of the property.

costs of purchasing or expropriating the artwork or the responsibilities arising from ownership.¹⁴³

Taking possession of heritage resources through deprivation could go some way to circumvent some of the issues with private ownership of heritage resources highlighted in the previous chapter. Issues such as preservation, security and access can be better managed if the resource is in possession of a relevant heritage authority whose purpose is, amongst others, to fulfil these functions. However, would such limitation be justifiable deprivations in terms of s25(1) because they practically destroy a core element (use) of the property right?¹⁴⁴

Unfortunately, there is no South African case law where an owner has challenged the infringement of their property rights over a cultural heritage resource due to the NHRA. There is also limited case law where a property right has been infringed by the cultural rights. However, the few cases that have balanced the property rights against the cultural rights do offer some guidance.

In the *Oudekraal Estates (Pty) Ltd v The City of Cape Town* 2002, *Oudekraal Estates (Pty) Ltd v The City of Cape Town* 2004, *The City of Cape Town v Oudekraal Estates (Pty) Ltd* and *Oudekraal Estates (Pty) Ltd v The City of Cape Town* 2009 cases a private property owner was significantly affected by a limitation of their property rights because of the cultural rights of the Cape Islamic community (amongst other reasons).¹⁴⁵ The cases revolved around an application to develop a township on a portion of the Oudekraal land which had been granted in 1962. In 1996 the owners submitted civil engineering services plans to the City of Cape Town in order to proceed with the development and announced the development of the

¹⁴³ *Harksen* [36] – [37].

¹⁴⁴ Pienaar and Mostert 2005 SALJ 657.

¹⁴⁵ *Oudekraal Estates (Pty) Ltd v The City of Cape Town* 2002 (6) SA 573, *Oudekraal Estates (Pty) Ltd v The City of Cape Town* 2004 (4) SA 222, *The City of Cape Town v Oudekraal Estates (Pty) Ltd* 2007 JOL 20887 (C) and *Oudekraal Estates (Pty) Ltd v The City of Cape Town* 2009 ZASCA 85 (hereinafter referred to as *Oudekraal 1*, *Oudekraal 2*, *Oudekraal 3*, and *Oudekraal 4* respectively). See Beukes 2009 *IJCP* 67 for a detailed discussion of the first 3 cases. The cases all revolve around the same facts, and in *Oudekraal 4* Navsa JA details the case law leading up to his judgement. Consequently, *Oudekraal 4* as the final decision provides the main foundation for the sources. However, where a judge has dealt with an issue in more detail or stated an issue with greater clarity the previous cases will be referred to.

township to the media.¹⁴⁶ As the site is located in Camps Bay on the Western Cape peninsula, there was potential for significant financial gain for the property owners. As it stood the land had a value of R20 million but if development of a township on the property were allowed the value would have increased to R570 million (this value is only the value of the land with development rights, the value of the land after subdivision and development would have been significantly more substantial).¹⁴⁷ Public outcry concerning the development led the City of Cape Town to investigate the original application, and concluding that the 1962 application had lapsed and thus, the development could not begin.¹⁴⁸

Consequently, the owners applied to the Cape High Court for declaratory relief to the effect that the original application had been lawfully granted.¹⁴⁹ In order to support the refusal to proceed with development the City of Cape Town (as first respondent) highlighted *inter alia* that Islamic gravesites and shrines were located on the land, and the development of the land would infringe the cultural rights of the Cape Islamic community, and, if development was allowed, it could result in the destruction of South African cultural heritage resources. SAHRA was the third respondent in the cases because of its potential interest in the site (as the site included places of cultural significance, historical graves, and sites of importance to South Africa's slave history) despite the site not being a declared heritage site.¹⁵⁰ The property owner countered that the denial of the development rights was an extensive limitation of their property rights, was extremely prejudicial, and amounted to an expropriation of the property. However, the courts did not consider this argument or explore the possibility of expropriation deciding that the case did not concern expropriation.¹⁵¹ The owner also suggested a compromise (which amounted to a deprivation of the property) in that development would be permitted, but the development would have to be suitable and careful so that the cultural sites could be protected (and accessed) *in situ*. The courts did not consider this argument

¹⁴⁶ *Oudekraal 4* [16]-[18].

¹⁴⁷ *Oudekraal 4* [43] and [61].

¹⁴⁸ *Oudekraal 4* [19]-[21].

¹⁴⁹ *Oudekraal 4* [24].

¹⁵⁰ *Oudekraal 2* [10].

¹⁵¹ *Oudekraal 1* 27 and *Oudekraal 4* [43] and [68].

to be genuine, thought it was too vague and therefore did not explore the possibility of such a compromise.

To summarise the decisions of the courts, in *Oudekraal 1* the property owners' request for declaratory relief was denied due to procedural errors in the original development grant.¹⁵² In *Oudekraal 2* the property owner appealed the previous decision but was again denied because the existence of shrines and graves on the land was not disclosed in the application for development.¹⁵³ In *Oudekraal 3* the City of Cape Town requested an order declaring the original planning permission invalid; the court found for the City and granted the order as requested.¹⁵⁴ In *Oudekraal 4* (an appeal against the decision in *Oudekraal 3*) Navsa JA upheld the previous judgement agreeing with the reasons for that decision but also noted that the decision promoted, 'the spirit, purport and objects of the Bill of Rights.'¹⁵⁵ There were other reasons provided by the courts for not allowing the development to proceed, such as environmental conservation and further procedural issues.¹⁵⁶

In all four of the *Oudekraal* cases, the courts paid attention to:

'The right to freedom of religion and culture of members of the Muslim community, as well as the right of the broader community to have a heritage and environmental area of high significance preserved.'¹⁵⁷

Over and above this, in *Oudekraal 4* Navsa JA stated that:

'It had to be borne in mind that the overwhelming majority of Muslims were previously politically, socially and economically disadvantaged because of ... Apartheid policies ... To refuse the order sought would be to keep intact an invalid decision, the implementation of which

¹⁵² *Oudekraal 4* [27].

¹⁵³ *Oudekraal 4* [28]-[29].

¹⁵⁴ *Oudekraal 4* [49].

¹⁵⁵ *Oudekraal 4* [82].

¹⁵⁶ *Oudekraal 4* [67].

¹⁵⁷ *Oudekraal 4* [39].

would violate the Muslim community's fundamental rights and offend against present-day conservation principles.¹⁵⁸

Although the courts in the *Oudekraal* cases did not expand on the deprivation or expropriation of property issue, what is important from the judgements, is that the court did limit property rights to fulfil the purpose of the cultural rights. Thus, because the NHRA is legislation that embodies the cultural rights, it recognised that the protection and preservation of cultural heritage is a justifiable limitation of the property right.

The limitation of a property right due to a cultural belief and practice was again discussed in *Nhlabathi*, and in this case, the court did consider the possibility of the limitation being an expropriation.¹⁵⁹ The appellants requested a court order permitting them to bury a deceased relative, in a family graveyard, on a farm which belonged to the respondent because the respondent had refused the appellants' request to continue this practice. Bam P and Gildenhuys J concurred that allowing the appellants to bury the deceased on the respondent's land would deprive the landowner of their property.¹⁶⁰ The judges noted that the appropriation was brought about by a law of general application (in this case s6(2)(dA) of the Extension of Security of Tenure Act¹⁶¹) and relied on the guidance of the *FNB 2002* case to determine whether the infringement was arbitrary.¹⁶² The court found that the infringement was not arbitrary based on: weighing up the right to appropriate a grave against the respondent's property right, the fact that there was an established practice of burying the appellant's family members on the land and that the infringement was a minor disturbance to the respondent's property right. Further, the court found that the purpose s6(2)(dA) of the ESTA fulfilled a legitimate

¹⁵⁸ *Oudekraal 4* [48].

¹⁵⁹ *Nhlabathi* [16], [25] and [30].

¹⁶⁰ *Nhlabathi* [29].

¹⁶¹ Extension of Security of Tenure Act 62 of 1997.

¹⁶² *Nhlabathi* [29]–[31]. Extension of Security of Tenure Act 62 of 1997 (hereinafter referred to as the ESTA). The judges do not use the term deprivation rather they refer to the appropriation of the property; it is submitted that the word deprivation would have been more appropriate, and that case should be read as if the judges used deprivation instead of appropriation.

government purpose.¹⁶³ The respondent also argued that the infringement amounted to an expropriation of his property and that he was entitled to compensation as guaranteed in s25(2)(b) of the Constitution.¹⁶⁴ The court noted that if the implication of a statutory clause was to result in the expropriation of property, it could imply that compensation should be paid.¹⁶⁵ However, the court concluded that, in this case, even if the infringement amounted to an expropriation without compensation it would be justifiable. One of the reasons provided to substantiate this finding was that the infringement allowed the appellants to comply with a religious or cultural belief, and that giving recognition to that belief aligned with the constitutional mandate to institute land reform measures.¹⁶⁶

Thus, even if the infringement did amount to expropriation without compensation, the infringement of the respondent's property right was a justifiable limitation. Therefore, the *Nhlabathi* case recognised that a deprivation or expropriation of property might be justifiable to allow a person/s to practice and enjoy their cultural rights.¹⁶⁷ But, as the case also concerned graves, and the infringement was considered to be insubstantial, *Nhlabathi* does not provide much guidance for other or different limitations of property rights due to the cultural rights or for the limitation of property rights for different types of property.¹⁶⁸

Nhlabathi used the process set out in the *FNB 2002* case and provided an example of how to apply the *FNB 2002* process where culture is a concern. Thus, to determine whether the deprivation of a heritage resource by acquiring possession or the expropriation of the property is a justifiable limitation of the property right it is necessary to follow the enquiry set out in the *FNB 2002* case. It is also beneficial to use this process to highlight the seriousness of the issues with the NHRA pointed out in the previous chapter.

¹⁶³ *Nhlabathi* [31].

¹⁶⁴ *Nhlabathi* [32].

¹⁶⁵ *Nhlabathi* [33], Van der Walt 2008 *Stell LR* 343.

¹⁶⁶ *Nhlabathi* [35].

¹⁶⁷ *Nhlabathi* [16] and 35[a].

¹⁶⁸ See *Nhlabathi* [30]-[33] for the process.

4.4.4 Applying the *FNB 2002* process to cultural heritage resources

In the first stage of the enquiry, it is patent that the NHRA, as national legislation, is a law of general application. Whilst the effect of the act may be the infringement of an individual's property rights (a limitation will affect the individual who owns the cultural heritage resource) what is intended is that the statute which allows for the limitation be of general application i.e., not the effect. The NHRA does not specify individuals or classes of people to be affected by the limitation; rather it applies to any member of the public who owns a cultural heritage resource. Thus, an infringement of a person's property right in a cultural heritage resource would pass the first stage of a constitutional enquiry – it is a law of general application.

The second aspect is to determine whether the limitation is arbitrary. This requires that there are criteria governing the exercise of the limitation and that there is a rational connection between the effect of the limitation and the purpose of the limitation. The NHRA sets out criteria governing the exercise of a limitation. The types of property that may be identified as cultural heritage resources are detailed in s3 and s7. SAHRA and its functions and duties are detailed in s13 and s25, and the creation of provincial heritage authorities (who can also implement a limitation) and their functions and duties are detailed in s24 and s25. Further, the identification and process for declaration for heritage sites is set out in s27 and for heritage objects in s32. Thus, the rational criteria requirement of the test is complied with.

It might be argued that a deprivation for acquiring possession may fail a constitutional challenge because there are no specific guidelines for acquiring possession of a heritage resource, there is no differentiation between circumstances that would require acquiring possession or circumstances that warrant lesser infringements (such as maintenance). Though SAHRA is empowered to acquire possession, a court may find that there are insufficient criteria governing the exercise of this form of deprivation, especially since the use of property is a core element of the property right. It is submitted, for the purpose of this investigation, that there are sufficient criteria for the acquisition of possession. However, it may be worthwhile for the NHRA to provide guidelines as to the circumstances in which

acquiring possession is necessary, possibly also the circumstances in which expropriation would be the appropriate action.

The second part of the test for arbitrariness requires a consideration of whether there is a rational connection between the limitation of a property right (as envisaged in the NHRA) and the purpose of the limitation. For a deprivation or expropriation to be fair, to be rationally connected to the purpose of the limitation, it must be established that the limitation followed due process (procedural fairness) and that the limitation is substantively fair.¹⁶⁹ For procedural fairness, the action needs to be fair administrative action. The NHRA details the requirements for fair administrative action in several different sections. Essentially, provided that the heritage association implementing the limitation follows the process set out in s27 (for heritage sites) or the process set out in s32 (for heritage objects) as well as the requirements of the Expropriation Act then, due process will have been complied with. The limitation will be procedurally fair.

Substantive fairness is more complex. As previously stated, in *FNB 2002* the court considered: whether the means used (the limitation) achieves the purpose (the means-end test), the relationship between the purpose of the deprivation and the person whose property is affected, the relationship between the purpose and the type of property, and the extent of the limitation.¹⁷⁰ Further, where the limitation is extensive these considerations will be strictly scrutinised; is the infringement on the property excessive?¹⁷¹ And since the infringement will affect land (heritage sites) or corporeal property (heritage objects) the justification for the limitation will have to be substantially justified.¹⁷²

It is difficult to assess these considerations in general because an investigation may differ depending on the type of cultural heritage resource and the type of infringement; an infringement caused by a clause of the NHRA regarding heritage sites will be different to an infringement caused by those for heritage objects. As

¹⁶⁹ Mostert 2003 *SAJHR* 586 – 587.

¹⁷⁰ *FNB 2002* [100]. Pienaar and Mostert 2005 *SALJ* 648, Van der Walt 2005 *SALJ* 78.

¹⁷¹ Pienaar and Mostert 2005 *SALJ* 658, Van der Walt 2005 *SALJ* 82.

¹⁷² *FNB 2002* [100]. Pienaar and Mostert 2005 *SALJ* 648.

would an infringement caused by acquiring possession versus the infringements caused by the declaration as a heritage resource.

In a hypothetical enquiry, regarding the means-ends test, the infringements are intended to preserve and protect South Africa's heritage resources as well as to allow the public to access these resources, to promote research, education, and tourism and so forth.¹⁷³ The means used ensures the end; the various infringements embody the purpose of the NHRA. '[I]t may be legitimate for a state to take 'measures designed to facilitate in the most effective way wide public access to [the works of this artist], in the interest of universal culture.'¹⁷⁴ Both the acquisition of possession or, for instance, the requirement to look after and secure a cultural heritage resource and expropriation may ensure the protection and preservation of the resource for future generations.¹⁷⁵ Thus, it appears *prima facie* that an infringement effected in terms of the NHRA is intended to achieve the purpose of the Act, and therefore the means are justified by the ends.

The relationship between the purpose and the owner will be satisfied where the person is the owner of a cultural heritage resource.¹⁷⁶ The purpose is to ensure that the owner preserves and protects the cultural heritage resource belonging to them or that the owner of the cultural heritage resource is affected by the limitation(s). Consequently, it must be established that the person concerned is the legal owner of the property, and then this aspect of the test is satisfied (hence establishing who should be the owner of street art in chapter 2 was essential to this process).¹⁷⁷

The relationship between the purpose and the type of property is determined by the type of resource. As the purpose of the limitation is to protect and preserve the property, the limitation will be easier to justify for a grade I resource which is of

¹⁷³ NHRA s5(5).

¹⁷⁴ de Clippele and Lambrecht 2015 *IJCP* 272 quoting *Beyeler v Italy* 2001 (33) EHRR 52 [113].

¹⁷⁵ de Clippele and Lambrecht 2015 *IJCP* 271-272. In the European Court of Human Rights the purpose of the limitation of private property rights over cultural heritage resources is assumed to be legitimate and the owner must prove that the limitation is unjustifiable

¹⁷⁶ A custodian of the property could also be affected; however, this study is concerned with the effect on private owners.

¹⁷⁷ See part 2.2.

national importance. An equal or more substantial justification would have to be presented for grade II and III resources; as these resources are of provincial or local significance, a court may require more evidence proving the need of the limitation (justifying the interference in the property rights) as to resources of national significance.¹⁷⁸

The investigation into the extent of the limitation also depends on the type of infringement. The power to physically control, and to use and benefit from the property may be affected, if access to the resource is limited or if the resource is removed from the owner's possession and/or because the owner may not do what they wish with the property because they are burdened with the duty to preserve and protect the property. And the extent of the limitation is total where an expropriation is pursued.

The responsibility placed on the owner to preserve, protect and secure a resource may be minimal or especially burdensome. For example, the responsibility to preserve an artwork (a heritage object) may be a substantial responsibility, requiring a temperature-controlled environment and so forth. The maintenance of the artwork may also be burdensome and, depending on the qualities of the artwork, it may require considerable security. Indeed, the responsibility on a homeowner to maintain a heritage house (a heritage site) can be significantly onerous, requiring maintenance by service providers knowledgeable and skilled in the craftsmanship of the particular period in which the house was built. However, the responsibility of an owner to not paint over a street artwork is not onerous. The ability to encumber or alienate the property may also be affected. For instance, s32(13) of the NHRA prevents an owner from dispersing a grade II collection without a permit issued by SAHRA. Section 32(14) allows SAHRA to make regulations concerning the trade in heritage objects. Likewise, s32(19) prevents the export of heritage objects without a permit to do so. The acquisition of possession could be interpreted to be an excessive limitation and require substantial justification, as will the justification for expropriation. Consequently, the extent of the limitation needs to be assessed on a

¹⁷⁸ Refer to the discussion on grade of cultural heritage resources in 3.1.

case-by-case basis. Thus, it would depend on the type of resource and the form of the limitation as to whether the extent of the limitation is justifiable.

However, the problems with the NHRA highlighted in the chapter 3 may mean that a deprivation may fail the substantive fairness enquiry. An owner may present some of the problems highlighted to a court as a reason for why the deprivation or expropriation is not fair. For instance, an owner of a heritage object could challenge the infringement because their property is not covered by the NHRA. This argument would rely on the confusion regarding whether or not heritage objects fall under the management of SAHRA; if SAHRA is not responsible for the management of heritage objects, it is debatable whether they can perform any action regarding such. Admittedly, this may be viewed as a highly restrictive reading of the NHRA. However, an owner may also suggest that the confusion regarding management as well as the inconsistencies in the definitions could be interpreted to be insufficient criteria governing the exercise of the limitation. A private property owner challenging the deprivation of their property could argue that their property is not covered by the act because it is not included in the definitions or because it does not fall under the management of SAHRA.

Further, the power to declare a site or object to be a heritage resource without the consent of the owner may also suggest a lack of governing criteria. Indeed, in the case of heritage objects, SAHRA is not even required to provide the owner with the opportunity to make representations regarding the declaration. The NHRA only states that SAHRA may provide the owner with the opportunity to make submissions and emphasises that there is no obligation for SAHRA to do so in urgent situations.¹⁷⁹ What qualifies as an urgent situation is not defined, and thus a property owner could argue that there are not sufficient criteria governing the limitation for it to be justifiable. Further, this issue may also mean that the limitations caused by such unilateral declaration would be arbitrary because this power is too extensive.

¹⁷⁹ NHRA s32(3).

If the deprivation is to allow for the presentation of a resource, this may also be arbitrary because empowering SAHRA to use 'any means necessary' to ensure the effective presentation of a resource may be too extensive and/or not specific enough.¹⁸⁰ What does 'any means necessary' include? Could SAHRA interpret this clause to include the use of force? And when is it appropriate to use 'any means necessary'?

There is confusion about which resources are covered by 'management' and a lack of clarity as to what 'management' means. In addition to this confusion, the extensive powers of heritage authorities to interfere with a heritage resource may mean that the limitation of a property right over a cultural heritage resource may be found to be substantively unfair and arbitrary.

This finding is extremely problematic as it renders significant portions of the NHRA ineffective, if not the entire purpose of the Act. Thus, for SAHRA to ensure the protection and preservation of cultural heritage resources, particularly cultural heritage objects, these resources either need to be protected by the conclusion of a heritage agreement or the legislation needs to be amended as per the recommendations included herein.¹⁸¹

The NHRA does allow expropriation of cultural heritage resources for a public purpose or in the public interest and notes that the Expropriation Act applies to expropriations under the NHRA.¹⁸² Section 46 is not strictly necessary because expropriations are covered by s25 of the Constitution as well as the Expropriation Act. Essentially, the section is re-enforcing that cultural heritage resources fall within the forms of property that can be expropriated. However, even with the inclusion of the expropriation section, a limitation of a person's property rights of a cultural heritage resource (in the form of an expropriation) may still fail for the same reasons as a deprivation. The inclusion of the section on expropriation does not supersede the constitutional requirements for a justifiable expropriation.

¹⁸⁰ NHRA s44(1)(e).

¹⁸¹ See part 3.3.5.10.

¹⁸² NHRA s46(1)-(2).

Therefore, unless changes are made to the NHRA, the limitation of property rights caused by the declaration of property as a cultural heritage resource may fail because the declaration is an unjustifiable limitation on the grounds of substantive unfairness.

4.5 A National Arts Council Act intervention

The National Arts Council (NAC) is empowered to,

‘purchase or otherwise acquire, or possess, ... or otherwise, encumber movable and with the approval of the Minister, granted with the concurrence of the Minister of Finance, immovable property’.¹⁸³

This clause is much simpler than those in the NHRA because there are no contradicting definitions.¹⁸⁴

The clause provides the NAC with the authority to deprive (included within, ‘encumber’) and to expropriate (included within, ‘otherwise acquire’) property. Further, whilst the National Arts Council Act does not delineate the types of property this may include, it could include cultural heritage resources which are art, or which promote the arts and so forth. This would likely include many cultural heritage objects as they are often artistic expressions of culture such as *inter alia* paintings, pottery and beadwork. It can also be extended to immovable property (heritage sites) that falls within the realm of art, such as sites containing rock art or sites displaying street art.¹⁸⁵

The National Arts Council Act does not set out any guidelines on what types of property fall within the ambit of the clause, nor does it provide any processes or criteria as to how the property should be encumbered or otherwise acquired. Nor has the Department of Arts and Culture issued any regulations or guidelines in this regard. The NAC may rely on the Expropriation Act in order to acquire property, but

¹⁸³ Arts Council Act s6(n).

¹⁸⁴ Indeed, there are no definitions provided for the words used in this clause in the National Arts Council Act

¹⁸⁵ There are also many heritage resources that could not be included such as national parks, botanical gardens or objects like historical mining machinery.

it would be beneficial for the NAC to provide criteria governing the exercise of a deprivation or expropriation.¹⁸⁶

These regulations would be similar to those of the NHRA such that the specific instances when private property rights may be limited are delineated, the appropriate limitation for the purpose is set out, and there is a system of due process to be followed in order to effect the limitation. This will ensure that a limitation of private property rights caused by the National Arts Council Act will not fail the constitutional enquiry. Thus, should the Department of Arts and Culture / the NAC produce regulations for the limitation of property as enabled by s6(1)(n) of the National Arts Council Act, there remains the possibility that certain types of cultural heritage resources, including examples of street art, could be protected and preserved.

Indeed, the National Arts Council Act is, perhaps, the more appropriate legislation for the management of significant street art pieces because it is a form of art. And, the Act with the regulations may also provide a route for the protection and preservation of street art which does not qualify as a cultural heritage resource, but the NAC still deems worthy of protection. It could offer a first, or backup solution for the protection and preservation of selected pieces of street art through deprivation or expropriation.

4.6 Limiting property rights for street art through national legislation

Provided that the recommended amendments are made to the NHRA and regulations are published to this effect, and/or regulations for the limitation of property in terms of the authority of the NAC, are produced then there is potential for the protection of street art through the limitation of property rights using either piece of legislation. However, there may still be occurrences where the resource authority and the owner have not managed to come to terms, and the heritage authority may have to supersede the owner. This will be achieved either by using

¹⁸⁶ FNB 2002 [100], Mostert 2003 SAJHR 586 – 587.

their veto-like authority enforcing the deprivation of the property or by pursuing the expropriation of the property.

Having discussed that there are potential street artworks that should be considered as cultural heritage resources (or which are forms of art worthy of protection in the case of the National Arts Council Act) it can now be considered whether the limitation of the property rights in such artworks is a justifiable deprivation.¹⁸⁷ Further, whether the expropriation of such property is a possibility, and, if so, is the owner compensated for the loss of their property? In other words, if the owner of the property disagrees with the enforced deprivation or the expropriation of their property, they can challenge the action in court.

4.6.1 Cultural heritage sites

For the purpose of this investigation, Shepard Fairey's piece *The Purple Shall Govern* will be considered as a cultural heritage site.

The artwork *The Purple Shall Govern* is located on the north external wall of a high-rise building in Braamfontein, Johannesburg. Thus, the potential heritage site is a building (because the artwork accedes to the building).¹⁸⁸ The Braamfontein area has been subject to considerable development over the past two decades, and as a growing business hub, there will most likely be further development.¹⁸⁹ The artwork is visible from the road and could be accessible to anyone with access to the building or with access to some of the surrounding buildings. As such, it is at risk of defacement, and, due to exposure, deterioration. It may also be at risk of destruction should the property owner decide to develop the property further or alter the property (such as putting in windows on that wall). This artwork has cultural significance, and, as previously argued, should be preserved by being declared as

¹⁸⁷ This investigation will be based on an application made in terms of a hypothetical amended NHRA or the Arts Council Act.

¹⁸⁸ This is important to clarify because, with the accession of the artwork to the building it is the building which is the heritage site.

¹⁸⁹ Johannesburg Development Agency "Braamfontein" <https://www.jda.org.za/braamfontein/> (Date of use: 14 June 2019)).

a cultural heritage site to avert these risks. But would doing so be a justifiable limitation on the owner?

Again, following the process set out in *FNB 2002*, the owner must first prove that their right has been infringed. This may be proved through a notice of declaration of heritage status or through a notice of expropriation or the listing of a site in a heritage register.

As previously noted, the identification of a site as cultural heritage resource is governed by the NHRA which is a law of general application. It is not unusual for buildings to be cultural heritage resources. There are various reasons why a building may be declared as a heritage site: the style of architecture, the notability of the architect, the age of the building and so forth and in this case the building is identified as a cultural heritage site because it displays a significant piece of street art.¹⁹⁰

In the situation where SAHRA has unilaterally declared the property to be a heritage site (a deprivation), the court should consider the form of the limitation. For instance, the infringement may limit the owner's entitlement to use the property, and/or the authority to alienate the property. Therefore, in this instance, ownership could be limited by amending the title deed such that the north wall of the property cannot be changed. Alternatively, the entitlement to use the property could be interfered with by requiring the owner to secure the artwork by ensuring that the artwork is not easily accessed by the public (so that the artwork cannot be damaged or defaced). Otherwise, the owner could be required to protect the artwork by maintaining the existing protective varnish and/or covering the image in Perspex (thus reducing the risk of defacement and reducing deterioration due to exposure). As suggested, in part 3.3.5.10 SAHRA could be restricted in relation to the limitations they can enforce in these situations, including a financial limit to the costs that the owner can be held responsible for, thus limiting the extent of the infringement. Further, when using the veto-like authority, SAHRA should present the owner with the conditions

¹⁹⁰ See part 3.6.

for the maintenance of the resource. This could ensure that there are criteria governing the unilateral authority of SAHRA.

Thus, the limitation will be enacted by a law of general application. Further, there are criteria governing the exercise of the application (which will become more detailed if the recommendations are implemented). Additionally, provided all the steps required by s27 have been complied with (i.e. followed the criteria for declaring heritage status) then limitation will not be arbitrary due to procedural unfairness provided due process is followed. What remains is the substantive fairness enquiry.

First, will the limitation achieve the purpose; the preservation and protection of the site? The limitations requiring the owner to secure the artwork and protect it will achieve the purpose, as will an expropriation of the property. Both ensure that the artwork is protected and preserved since there is a clear relationship between the means and the ends.

The purpose of the limitation affects the owner of the property which is correct; there is a direct relationship between the purpose and the owner. It may be argued that because the building is used as office space, there is also an indirect relationship between the purpose of the limitation and the occupiers. However, the considerations set out in *FNB 2002* specifically state, 'the relationship between the purpose and the person whose property is effected'.¹⁹¹ This wording suggests that the judges intended for the person affected to be the owner because it is not the property of an occupier which is affected since they do not own the property. Therefore, their property is not affected.¹⁹²

¹⁹¹ *FNB 2002* [100].

¹⁹² The limitation may also affect the owners of the buildings surrounding this site. They may also be affected if they are unable to develop their properties because such development would impede the view or would physically impact on the artwork. However, these considerations would have to be noted in the request for planning permission to develop the buildings and the owner of the artwork and/or the heritage authority may object to the development or suggest work arounds that will not impact the artwork.

There is a clear relationship between the purpose and the type of property. If the property has been identified as a potential cultural heritage site or is a significant artwork, then it is the type of property that the limitation was designed for.

The extent of the limitation is more concerning. The limitation may have an extensive effect on the owner especially, if the owner intends to develop the property. As previously recommended, the regulations need to include the stated interventions that are required to be fulfilled by the owner and the financial limit to which the owner can be held responsible. In the case of *The Purple Shall Govern* artwork, the limitations would mean that development cannot affect one wall of the building which, depending on the type of development, may have a marginal or significant effect. Thus, if the owner intends to develop the property, the court would have to look at the scope of the potential development and how extensively the deprivation limitations would affect those plans. If the limitation extends to amending the title deed to the property, then the limitation could be viewed as extensive. As noted in the case of *Harksen*, a deprivation is intended to be temporary whereas amending the title deeds is permanent. However, amending the title deed would not amount to such a significant limitation that the deprivation would amount to an expropriation. Implementing the recommendations on including specific forms of interventions and limiting the costs an owner can incur, could go some way to ensuring that a deprivation of the cultural heritage resource is not unfairly extensive.

Alternatively, if SAHRA is pursuing an expropriation, the effect of the limitation is total. The court would have to consider whether the expropriation is a necessary limitation of the property right and whether the purpose could have been achieved through less invasive means. There is no single solution in these types of cases. In any event, it is debatable whether expropriation is the appropriate method for protecting street art attached to immovable property. The sheer scale of some works, such as *The Purple Shall Govern*, and the fact that these works accede to the building, would probably make the expropriation an impossibility for the state as it would be too costly to acquire ownership. Further, expropriation of these large-scale artworks may not ensure their protection and preservation any more than the deprivation limitations would. This is because the state would only be able to protect

the artwork to the same degree as an owner. Due to the size of these pieces, there are limited methods available of protecting and preserving them; it may be impossible to remove largescale street artworks without damaging them. Plus, the site-specific nature of many of these artworks would make removal questionable, the artwork may lose significant meaning if it was displayed in a different context. Therefore, in these cases, it is likely that an expropriation would be an unjustifiable limitation because there are less invasive means (via deprivation) to achieve the purpose.

Thus, the deprivation of these forms of cultural heritage resources is more appropriate, and this comes with the added benefit of the state not having to compensate the owner although the owner may apply to SAHRA for funds to pursue maintenance work.¹⁹³

There are, of course, examples of street art where it cannot be preserved in its original location, or where the street art is not site-specific, and where it is possible to remove the artwork without damage. In these cases, it may be preferable to remove the artwork to protect and preserve the work better. The artwork could then be included in the National Gallery Collection (or any other state-owned collection as a heritage object). Here, the deprivation would involve removal of a portion of the wall which will probably have a significant impact on the owner both temporarily affecting the owner's use of the property and affecting the owner financially if SAHRA does not take on the cost.¹⁹⁴ Therefore, it is important to have guidelines about the form that a limitation can take and limit the financial responsibility of the owner. If there is no monetary ceiling, it is impossible to determine whether the deprivation would be excessive.

With the accession of *The Purple Shall Govern* artwork, the building has become a representation of the cultural rights, it has become a cultural heritage site reflecting

¹⁹³ NHRA s32(18) for funding for heritage objects.

¹⁹⁴ It is noted that the fact that a street artwork can be removed does not affect the finding in part 2.2.2 that the artwork accedes to the building. With the accession of movables to immovables the manner and degree of attachment should be permanent. However, this does not mean that the accessory thing cannot be removed, just that the removal will cause damage. Van der Walt and Pienaar *Property Law* 120. See also *Standard Vacuum* 677E-679E.

a significant piece of South African art. This public art has become connected to the Braamfontein community's identity as well as South Africa's identity, and this loss would be a loss of heritage. The purpose of the deprivation limitations (which protect and preserve the artwork *in situ*) outweigh the concerns regarding the effect of the deprivation on the owner. Plus, whilst the identification of the building as a cultural heritage site and the limitations that come with that identification may be burdensome on the property owner, the identification of the artwork as a cultural heritage resource could potentially add financial value to the property. Thus, it could benefit the property owner should they sell the property. Consequently, it is submitted that should SAHRA have to act unilaterally to declare the heritage status of this site on which *The Purple Shall Govern* is located, the deprivation that comes with such identification is not arbitrary and therefore, the declaration of the building to be a cultural heritage site and the imposition of conditions regarding the protection and preservation of the site are a justifiable deprivation of the owner's property.

4.6.2 Cultural heritage objects

It is difficult to identify a specific South African piece of street art which qualifies as a cultural heritage object. There are currently no examples similar to Banksy's *Gangsta Rat (1)*.¹⁹⁵ Whilst Faith47 has created some works that would qualify as movable property, such as work painted scrap metal, plywood, and unused concrete drainage pipes. However, these pieces may not be culturally significant. Plus, it is unknown which, if any, of these pieces, still exist.

However, considering the argument made in favour of street art heritage sites, it is likely that the deprivation of such resources would offer avenues for the protection and preservation of street art objects. Therefore, if amended the NHRA's unilateral declaration of identified street artworks located on movable property as cultural heritage objects could create justifiable limitations on the private property rights over such object. It would be a justifiable limitation provided that the correct processes are followed. Namely, that the form of the limitation is specified, that the limitation

¹⁹⁵ See discussion of this artwork at 2.2.3.

may ensure the protection and preservation of the object (the purpose) and that the limitation is not excessive (the purpose cannot be achieved by lesser means) or where it is excessive it is necessarily so. This could extend to removing the object from the possession of the owner to the possession of a heritage authority so that it may be better protected and/or displayed to the public.

There is perhaps more scope for expropriation to apply to cultural heritage street art objects than deprivation. Especially in instances where the deprivations limit the owner's right to use and enjoy the property, and when their possession of the property has been affected. In this event, the possibility of expropriation and the payment of compensation could be explored. And, in the cases where the expropriation of the object is necessary to ensure the preservation and protection of the resource (and this cannot be achieved through lesser interference) and where the nature of the resource is extremely significant to cultural heritage then an expropriation is likely to be justifiable.

Admittedly, calculating the amount of compensation that would be appropriate in the case of heritage objects is difficult. The Constitution requires that the current use of the property, the history of the acquisition and use of the property, the market value of the property, state investment and/or subsidies applied to the property and the purpose of the expropriation be considered when calculating compensation.¹⁹⁶ The existing jurisprudence on compensation for expropriation does not provide much guidance because the cases concern compensation for land expropriation. Therefore, determining the amount of compensation for a heritage object will have to draw on this jurisprudence and develop it.¹⁹⁷

The state uses a variation of the Gildenhuis formula to determine compensation for the expropriation of land.¹⁹⁸ The Gildenhuis formula considers the market value of the property and takes into account any past state subsidies or investments.¹⁹⁹ The

¹⁹⁶ The Constitution s25(3).

¹⁹⁷ It should be noted that compensation can be calculated before or after the expropriation has taken place. *Haffejee NO and others v eThekweni Municipality and others* 2011 (6) SA 134 (CC), Boggempoel 2012 SALJ 620.

¹⁹⁸ Department of Land Affairs *Policies and Procedures* at 1.7.1.1.

¹⁹⁹ Department of Land Affairs *Policies and Procedures* at 1.7.1.1.1.

variation used by the state starts with the current market value of the property but adjusts that value by deducting the increase in value due to inflation of the value of the property from the time of acquisition.²⁰⁰ Then, further deductions are made due to historical infrastructure and interest rate subsidies and the corresponding inflation for these subsidies.²⁰¹

For these reasons this calculation needs to be adapted for the expropriation of cultural heritage objects using the guidelines set out in s25(3) of the Constitution. First, an independent assessor knowledgeable in street art would need to determine the current market value of the artwork. Then the current use of the property (which considers the extent of development of the property) will be considered. In the case of land which is underutilised the amount of compensation will likely be lower than productive land.²⁰² Although it is unlikely that heritage sites will be expropriated, for heritage objects, this suggests that an object which is not used by the private owner (for instance art that is not displayed but rather kept in storage) or is owned with the intention to sell at a profit (due to the potential increase of, say, an artist's desirability or popularity resulting in increased value) will be compensated, upon expropriation, for less than an object that is used and enjoyed and is owned for its intrinsic qualities.

How the property was acquired may also be taken into consideration. In the case of land, the fact that the land may have been acquired during colonial or Apartheid rule to the detriment of black South Africans who were disposed of that land, could result in lower compensation.²⁰³ Regarding heritage objects, there may be, for example, tribal artefacts that were acquired by colonialists, some simply stolen or looted and others acquired at a price far below the actual value.²⁰⁴ In the case of street art

²⁰⁰ This value is calculated by comparing the market value of the property at the time of acquisition and the actual price paid at that time

²⁰¹ For an example of this formula in practice see Department of Land Affairs *Policies and Procedures* at 1.7.1.1.1. This formula is also included in the Expropriation Bill.

²⁰² Zimmerman 2005 *SALJ* 408, Badenhorst 199 *De Jure* 261.

²⁰³ Zimmerman 2005 *SALJ* 408 – 409. As the transition from the Apartheid government to a democratic one approached many state-owned resources were transferred from state ownership to private white owners, thus becoming the private property of the privileged. Chaskalson 1993 *SAJHR* 408.

²⁰⁴ This is not just a South African issue or a national issue for countries. For instance, the British Museum knowingly possesses many artefacts which were looted from other countries. The British Museum possesses over 6 000 South African artefacts, and whilst the circumstances

heritage objects the acquisition of ownership will be considered, i.e. did the current owner acquire ownership through the common law of original acquisition or did the current owner acquire the property from a previous legal owner. If the provenance of the object cannot be traced, then the amount of compensation is likely to be lower. Thus, it is likely that compensation for the expropriation of culturally significant street artworks painted on movable property will be lower because the owner did not intentionally acquire the property they were just lucky enough to have the right street artist paint their property which made it a heritage resource.

The amount of compensation may also be affected by the number of state subsidies and state investment in the property. For land, this is a concern, but it is probably less of a concern for heritage objects other than where the state has provided funding for maintenance and repair work.²⁰⁵

Then the purpose of the expropriation is considered. If, on balance, the public interest or public purpose of the expropriation is significant this may result in less compensation.²⁰⁶ Further, the resources the state has available to effect transformation regarding property may also be considered. If the state's resources are limited then the amount available for compensation will be limited. For land, the lack of resources cannot impede the state's responsibility for land reform, and thus the amount of compensation paid will be influenced by the state's resources.²⁰⁷ Consequently the Department of Arts and Culture's budget and the amount reserved for acquisitions will be a consideration in determining the amount of compensation for heritage objects.

surrounding the acquisition of these artefacts are unknown it is not impossible that some of these artefacts were acquired dubiously. See for example *Her Majesty's Attorney-General v The Trustees of the British Museum* [2005] EWHC (Ch) 1089 (Eng). See for instance Reppas 2007-2008 *Denv.J.Int'l&Pol'y* 93.

²⁰⁵ Zimmerman 2005 *SALJ* 409.

²⁰⁶ See discussion in part 3.6.

²⁰⁷ Zimmerman 2005 *SALJ* 410.

Thus, the variation of the Gildenhuis formula would need to be developed to calculate the amount of compensation payable for the expropriation of cultural heritage objects.

4.7 Summary

In the instances where SAHRA and an owner cannot agree to terms concerning the declaration of a heritage resource and SAHRA proceeds with the declaration, this results in the deprivation of an owner's property. In other cases where state ownership of a resource would best ensure the protection and preservation of the resource then SAHRA can pursue the expropriation of the property. There is potential with the recommended amendments to the NHRA and the publication of guidelines that the deprivation/expropriation could be justifiable should an owner challenge these interferences with their property right.

However, it is unlikely that expropriations of heritage sites will be practicable. Further, if the protection and preservation of the resource can be achieved through lesser means (deprivation), then the expropriation of the *res* will be unjustified. Consequently, SAHRA should pursue the deprivation of heritage sites (through the unilateral declaration of the status) particularly in instances when an agreement with the owner cannot be reached.

For heritage objects, both deprivation and expropriation offer potential routes to protecting and preserving these resources. Whilst deprivation is less of an interference with an owner's property rights, in the situations where the resource is at serious risk of loss or destruction, then the expropriation of the street art is a more appropriate strategy for the state to ensure the protection and preservation of the piece.

CHAPTER 5 CONCLUSION

This study was inspired by the artwork of Banksy and the conflict between the private owners of the property upon which his artworks are situated and the public who have an interest in preserving the artworks as public art. Several of Banksy's artworks have been at the centre of this conflict. In the cases of *Spy Booth*, *Mobile Lovers*, *Slave Labour*, *Kissing Coppers*, *No Ball Games*, *The Raft of Medusa*, and *Gangsta Rat (2)* amongst others, the public has lost these artworks. The artworks have either been defaced, or destroyed by the owners of the property on which they were situated, or they have been sold to private collectors and are no longer publicly visible. Several of these artworks were part of British culture and yet they are no longer accessible by the British public.

The public's loss of these artworks as well as others that have been destroyed (such as *Little Diver* and *Gorilla in a Pink Mask*) may have been prevented if the relevant cultural heritage authority had recognised the cultural significance of the artworks and taken steps to protect and preserve the artwork.

The loss of these British artworks highlights the potential threats that could face South African street art especially those which have cultural significance. The study has focussed on the remaining works in Faith47's *Freedom Charter Project* (such as *The People Shall Govern* and *The People Shall Share in the Country's Wealth*) and the Shepard Fairey piece *The Purple Shall Govern* which are at risk of damage, defacement and destruction.

Faith47's Freedom Charter project is an artistic expression of the anti-Apartheid movement. It is a commemoration of the Freedom Charter itself, it is a testimonial of the South African Congress Alliance¹ and the history of the attending parties and it is a memento of the 1955 Congress of the People where the Charter was adopted. Further, it is a memorial to the South African anti-Apartheid icons such as Nelson Mandela, Ruth First and ZK Mathews. Her artwork has become an artistic

¹ Consisting of the African National Congress, the South African Indian Congress, the South African Congress of Democrats and the Coloured People's Congress.

expression of South Africa's post-1994 democracy; it is a reminder of the ideals we seek to achieve, and of the values of our constitutional state. It is also the personal expression of one South African artist's beliefs, which represents the beliefs of many South Africans.

The existing artworks from this project need to be preserved as part of South Africa's cultural heritage resources to ensure the continuation of this egalitarian expression of this cultural heritage. To protect the artwork for future generations, for whom South Africa's Apartheid history may not be as poignant as it is now.

Shepard Fairey's *The Purple Shall Govern* also speaks to these expressions of South Africa's cultural heritage. However, it also holds international value as a heritage resource because he is a world known and respected graffiti artist. These artworks are a reaffirmation of the democratic and revolutionary ideals on which democratic South Africa was founded.² They are examples of South Africa's cultural heritage and deserve to be protected and preserved as cultural heritage resources.

5.1 *The purpose of the study*

The purpose of this study was to determine who should own South African street art. However, this question devolved into two parts. First, the study analysed who owns South African street art from the perspective of property law. Second, the study analysed whether this determination of ownership was preferable for culturally significant street art from the perspective of South Africa's cultural heritage legislation. In instances where the street art is a cultural heritage resource, the study considered what protection such status affords the property (as detailed in the NHRA). Further, whether the deprivation of privately-owned property through such declaration is a justifiable limitation of an owner's property right. Finally, in the few instances where the deprivation of property through the NHRA would not or could not ensure the protection and preservation of the property the study considered whether the state could expropriate the property.

² Bivar 2006 *IJCP* 271.

5.1.1 The original acquisition of ownership investigation

The popularity of street artists and the significant aesthetic, financial and cultural values of some street artworks is a phenomenon. The Roman law regarding the original acquisition of ownership of *pictura* could not have foreseen this development. Yet, *accessio* is still the law that governs the original acquisition of ownership of paintings in South Africa.

Admittedly, this phenomenon may not negatively affect the ownership of street art attached to immovable property. The accession of the street art to immovable property does not change the nature of the immovable property. Ownership of the artwork transfers to the owner of the immovable. However, the consequences for the owners of movable property is *contra boni mores*. The function of *accessio* as it is currently applied, will result in ownership of the new *res* and will as a result transfer from the owner of the movable property to the artist. The street artist who is committing a crime benefits from it.

Thus, it is necessary to develop the common law so that good faith is required for the transfer of property via *accessio* in the case of *pictura*. Grotius already recognised this in 1631 albeit that he thought that original acquisition of ownership of paintings should ascribe via *specificatio*. Should the requirement of *bona fides* be included for the original acquisition of movable property via *accessio* then movable property which has been painted on by a street artist (without good faith) will remain the property of the owner of the movable.

Ownership of street art attached to immovable property belongs to the owner of such property, whereas there is the possibility of ownership of street art which is attached to movable property being transferred via *accessio* from the owner of the movable property to the artist. However, it has been argued that the common law be developed so that good faith is required for the transfer of property via *accessio*

in the case of *pictura* and thus movable property which has been painted on by a street artist without good faith will remain the property of the owner of the movable.³

Consequently, in response to the question of who owns South African street art in terms of property law, it is the owner of the property on which the street art is located, regardless of whether that property is immovable or movable.

5.1.2 The cultural heritage law investigation

The result of this finding is that street art belongs to the private owners of the property on which it is painted (not the artist) and as such the owner is entitled to control physically, use, benefit from, encumber, alienate, and vindicate such property.⁴ Importantly, the entitlements of ownership allow the owner to change, destroy or sell (alienate) the property – to change, destroy or sell the street art.

These aspects of ownership are problematic where the street art is an example of South Africa's cultural heritage (as either a cultural heritage site or a cultural heritage object).

The examination of the selected artworks such as Faith47's *Freedom Charter Project* and Shepard Fairey's *The Purple Shall Govern* recommends that there are street artworks that should be declared as cultural heritage resources. That these pieces deserve the protection that heritage status affords.

The NHRA is intended to ensure the protection and preservation of cultural heritage resources by limiting the entitlements of ownership but, as discussed, it is difficult to monitor how these resources are being used, protected and preserved by their owners. Private owners may not be aware of the law and their duties arising from the NHRA regarding cultural heritage resources. They may even choose to ignore the law. Or perhaps an owner may not be able to afford to fulfil the responsibility or

³ See part 2.2.3.

⁴ Van der Walt and Pienaar *Law of Property* 48.

is unable to, for various other reasons. Additionally, private property ownership can limit public access to cultural heritage resources.

Further, whilst the intention of the NHRA is to ensure the protection and preservation of South Africa's cultural heritage resources, there are several concerns with this piece of legislation. The recommendations made in chapter 3 could assist in ensuring that the NHRA functions better and that the intention of the Act is more likely to be achieved.

5.1.3 The deprivation and expropriation investigation

The NHRA intends to achieve the protection and preservation of cultural heritage resources through the deprivation of property; by placing limitations on the entitlements of ownership. However, even with the recommended changes to the NHRA there are many risks and problems with private ownership of these resources which the NHRA cannot control. It may be better for certain cultural heritage resources to belong to the state i.e. where the protection and preservation of a resource cannot be achieved through the deprivation of property. Consequently, this study looked at the potential for the expropriation of property to achieve this aim. In exploring the expropriation of cultural heritage resources, it was first necessary to explore whether the deprivation of property (via the NHRA) is a justifiable limitation of the property right.

This investigation highlighted that the concerns regarding the NHRA highlighted in chapter 3 could mean that, should a deprivation of such property ever face a legal challenge such challenge will likely succeed. As it currently stands, the limitations on property that arise with the declaration of property as a cultural heritage resource are unjustified because it is substantively unfair. Thus, if a deprivation is unjustifiable an expropriation will also be unjustifiable (as the requirements for expropriation are more strenuous than deprivation).

As it currently stands, there are too many challengeable aspects to the deprivation or expropriation of cultural heritage resource property (via the NHRA) to be confident that the legislation can achieve the purpose of protection and preservation. SAHRA and the state need to ensure that the purpose of the NHRA is fulfilled in disputed

cases. Consequently, the recommended changes are essential in preventing future legal disputes from succeeding.

This is true for street art but will also affect other forms of heritage resources, should an owner dispute the heritage status of their property or should the state need to expropriate the property.

5.2 Closure

The protection and preservation of cultural heritage resources is an honourable ideal. All cultural resources suffer from the ravages of time, and they all carry the risk of damage or destruction (whether accidental or intentional). The NHRA is merely an attempt to do the best that can be done, to try to protect these resources as much and for as long as possible. The unique nature of street art accentuates the risks which the NHRA attempts to reduce. These risks are also increased by the generally unacknowledged value of street art. Consequently, the application of an amended NHRA to street artworks that are identified as having cultural heritage value, or the conclusion of heritage agreements between the relevant heritage authority and the owner of the street artwork is critical.

This study has contributed to the jurisprudence on South African law in a few ways. First, the study has recommended that the common law of *accessio* be developed to include *bona fides* for the original acquisition of *pictura*. Second, the study has made several recommendations to improve the functioning of the NHRA (and thereby better ensure the preservation and protection of all South African heritage resources). Third, the study has recommended the recognition of selected South Africa street art as cultural heritage resources; namely the remaining works in Faith47's *Freedom Charter Project* and Shepard Fairey's *The Purple Shall Govern*. Fourth, the study has shown that in the event of the heritage status of a site or object being challenged by the owner, or in the need to expropriate a heritage resource, the law as it currently stands is ineffectual. An owner has several grounds on which they can challenge the deprivation or expropriation. Therefore, the recommendations to the NHRA need to be implemented to ensure the legislation can achieve its purpose in challenged cases.

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6.3 Images

Figure 1

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Figure 2

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Figure 3

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Figure 4

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6.7 Newspaper articles

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LIST OF ABBREVIATIONS

ACH White Paper	White Paper on Arts, Culture and Heritage
ACTAG	Arts, Culture Task Group
AD	Reports of the Appellate Division of the Supreme Court of South Africa
ALL ER	All England Law Reports
All SA	All South African Law Reports
BCLR	Butterworths Constitutional Law Reports
BYU J Pub L	Brigham Young University Journal of Public Law
Buch AC	Buchanan's Reports of Appeal Court
C	Cape Provincial Decision
Cal L Rev	California Law Review
CC	Constitutional Court
CILSA	The Comparative and International Journal of Southern Africa
Col-VLA JL & Arts	Columbia Journal of Law-VLA and the Arts
CRL Act	Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act 19 of 2002
CRL Rights Commission	The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities
CInA	Cultural Institutions Act
CPD	Reports of the Cape Provincial Division
DAC	Department of Arts and Culture
Denv.J.Int'lL&Pol'y	Denver Journal of International Law and Policy
EHRR	European Human Rights Reports
Hastings Comm and Ent L J	Hastings Communications and Entertainment Law Journal
IJCP	International Journal of Cultural Property
ICCROM	International Centre for the Study of the Preservation and Restoration of Cultural

	Property
ICOM	International Council of Museums
ICOMOS	International Council on Monuments and Sites
ICOMOS SA	International Council on Monuments and Sites South Africa
IJHS	International Journal of Heritage Studies
ISPRS	International Archives of Photogrammetry, Remote Sensing and Spatial Information Sciences.
J Copyright Soc'y USA	Journal of the Copyright Society of the U.S.A
J Crim L	The Journal of Criminal Law
J Intell Prop L	Journal of Intellectual Property Law
JAL	Journal of African Law
JOL	Judgements Online
JPL	Journal of Planning & Environment Law
KZP	KwaZulu Natal High Court, Pietermaritzburg
LCC	Land Claims Court
Mich L Rev	Michigan Law Review
NAC	National Arts Council
NHC	National Heritage Council
NHRA	National Heritage Resources Act
NYU J Intell Prop & Ent L	New York University Journal of Intellectual Property and Entertainment Law
NYU J Intl L & Pol	New York University Journal of International Law and Politics
O	Orange Free State Provincial Division
PAJA	Promotion of Administrative Justice Act 3 2000
PER	Potchefstroom Electronic Law Journal
QUTLJJ	Queensland University of Technology Law and Justice Journal
SCA	Supreme Court of Appeal
SACJ	South African Journal of Criminal Justice

SAHRA	South African Heritage Resources Agency
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SAMAB	South African Museums Association Bulletin
SAYIL	South African Yearbook of International Law
Stan L Rev	Stanford Law Review
Stell LR	Stellenbosch Law Review
T	Transvaal Provincial Division
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal of Contemporary Roman-Dutch Law)
TPD	Reports of the Transvaal Provincial Division
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
UK	United Kingdom of Great Britain and Ireland
U Mich JL	University of Michigan Journal of Law Reform
UNESCO	United Nations Educational, Scientific and Cultural Organization
Vand J Transnat'l L	Vanderbilt University Journal of Transnational Law
Wis Intl LJ	Wisconsin International Law Journal
ZAGPPHC	South Africa Gauteng Province Pretoria High Court