Property Law in Namibia

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PREFACE

Following the imposition of South African Administration on South West Africa, after the granting of the League of Nations Mandate over the territory to South Africa, one obvious historical fact was the extension of the application of the South African legal system to the territory. One basic characteristic of the South African legal system is the element of Roman-Dutch law constituting, as it were, the nucleus of South African law and hence the common law of South Africa. In so far as South West Africa (Namibia) was concerned, Roman Dutch law was formally introduced as the common law of the territory by Proclamation 21 of 1919 (S.W.A. Gazette, No 25 of 1919) which provided inter alia that Roman-Dutch law was to be applied in the territory as existing and applied in the Province of the Cape of Good Hope and the proclamation remained the legal basis for the application of the common law of the Cape as a source of law of South West Africa (Namibia) until the promulgation of the Namibian Constitution.

The Namibian Independence Constitution came into force on the eve of independence as the supreme law of the land and therefore the ultimate source of law in Namibia. Article 140 of the Constitution provides that all laws that were in force immediately before the date of independence shall remain in force until repealed or amended by an Act of Parliament or until they are declared unconstitutional by a competent court. By virtue of this provision, the sources of law in Namibia comprise the laws that were in force on the eve of independence and after independence. With respect to the common law, Article 66(1) specifically stipulates that the common law of Namibia in force on the date of independence shall remain valid to the extent to which such common law does not conflict with the Constitution.

A component of the legislative sources of Namibian law was the legislation introduced by South Africa. In 1925, the South African Parliament was given full power of legislation over South West Africa (Namibia). Consequently, some of the South African statutes were extended to South West Africa by proclamation. The legislative authority over the territory, however, was not vested in the South African Union government alone. The local legislature, which comprised the Legislative Assembly of South West Africa and the local Administrator-General of South West Africa, had residuary legislative functions subject to the superior legislative functions vested in the Union Parliament. The former exercised its legislative functions in the form of ordinances whereas the latter was in the form of proclamations. The head of the Union of South Africa also had the power to legislate for the territory by proclamations, (section 38(1) of the South West Africa Constitution Act 39 of 1968 as amended by section 1 of the South West Africa Constitution Amendment Act 95 of 1977 and the case of *Binga v Administrator-General, South West Africa and Others*)[1] but after 1978 South African legislation did not automatically apply to Namibia. This only applied to the extent that it had been declared so by proclamation by the Administrator-General of South West Africa (Namibia). After the promulgation of the Namibian Constitution, however, full legislative power was vested in the National Assembly 'with the power to pass laws with the assent of the President'. Current legislative functions therefore vest in the National Assembly but the legislative sources of Namibian law have more components than the enactments passed by the National Assembly of Namibia.

In the context of property law, the current sources of property law in Namibia comprise the Namibian Constitution, legislation, Roman-Dutch law and international conventions. The Constitution has two pertinent provisions relating to property rights and property relations in Namibia which have been used as the legal basis of land reform in Namibia. The common law has substantially remained basic Roman-Dutch law principles and as developed by precedents of the South African courts. Legislative sources are both South African and Namibian. But as stated earlier, the post-1978 South African legislation does not have general application in Namibia.

The above exposition means that Namibia belongs to the Roman-Dutch Law tradition and it is a truism that because of Namibia's historical connections with the

1 1984 (3) SA 949.

South African Judiciary,[2] Namibia's common law is greatly influenced by the South African legal system. Purely on account of these historical factors, Namibian legal literature is dominated by writers of South African pedigree, whose publications primarily reflect the South African laws and legal system. Needless to say, there is the need for the publication of autochthonous Namibian legal literature reflecting the current Namibian jurisprudence for reasons stated hereunder.

Following the attainment of independence and sovereignty, Namibia has an independent Judiciary with a Supreme Court as the highest Court of Appeal and therefore South African precedents have only persuasive effect on the Courts of Namibia. The judicial independence endowed on the Namibian Judiciary has led to the development of home-grown jurisprudence by the superior courts of Namibia since independence. The foregoing notwithstanding, the Parliament of Namibia in the exercise of its sovereign legislative functions has promulgated pieces of legislation to address the needs of the Namibian people and in the process some pieces of legislation promulgated by the erstwhile colonial regime have either been amended or repealed.

The cumulative impact is that Namibian law has acquired a national character and identity which must be captured and given due recognition in the legal literature of the country. In fact, there is a practice directive issued by the Judge President obligating counsel appearing before the Superior Courts of Namibia to first and foremost cite Namibian authorities on a point they want to rely on and when citing foreign authorities to declare that a diligent search had been undertaken and that no relevant Namibian authority on the point could be found. In the realm of property law, for example, there have been developments relating to land tenure titles and land reform that have been brought about by the Constitution and legislation. In the premise, therefore, the rationale for the publication of the law of property in Namibia is grounded in the current trend towards the growth and development of autochthonous Namibian jurisprudence and legal literature.

The book contains chapters on traditional concepts of property law such as the scope and nature of the law of property, classifications of things, real rights and personal rights, ownership and possession. Chapter 9 is devoted entirely to remedies, which is a departure from the norm, but where relevant, appropriate remedies are indicated in the specific parts of the text.

In order to give prominence to Namibian property jurisprudence topics on the genesis of the land tenure systems of Namibia, land reform, and property rights of women in Namibia have either been dealt with in separate chapters or been included as parts of other chapters.

This publication is meant to be utilised by law academics, property law lecturers, legal practitioners and conveyancers, law students, students pursuing specialised land related programmes such as land use planning and officials in government ministries, especially the Ministry of Lands and Resettlement.

Samuel Kwesi Amoo
Windhoek

2 See the Supreme Court Act 59 of 1959.

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A publication on the property law of Namibia will inevitably include references to South African authorities. Prominent South African authorities such as WA Joubert *et al The law of South Africa* (1987); DG Kleyn *et al Silberberg and Schoeman's the law of property 3rd ed* (1993); WJ Hosten *et al Introduction South African law and legal theory 2nd ed* (1997)*;* PJ Badenhorst *et al Silberberg and Schoeman's the law of property 5th ed* (2006); F du Bois *Wille's principles of South African law 9th ed* (2007)*;* AJ van der Walt & GJ Pienaar *Introduction to the law of property 6th ed* (2009)*;* and H Mostert *et al The principles of the law of property in South Africa* (2010) have been cited. The author hereby wishes to acknowledge references to their publications.

The chapters on the genesis of land tenure systems of Namibia, land reform in Namibia and property rights of women in Namibia contain contributions from the publications by S Harring 'Property rights and land reform in Namibia' in B Chigara (*Southern African development land issues: Towards a new sustainable land relations* (2012)*;* SK Amoo & SL Harring 'Namibian land law: Land, law reform, and the restructuring of post-apartheid Namibia' in *University of Botswana Law Journal* Vol 9, June 2009; SK Amoo 'The exercise of the rights of sovereignty and the laws of expropriation of Namibia, South Africa, Zambia and Zimbabwe' in MO Hinz *et al The Constitution at Work: 10 years of Namibian nationhood: proceedings of the conference: Ten Years of Namibian Nationhood, 11-13 September 2000, Windhoek, Namibia* (2002); D LeBeau *et al Women's property and inheritance rights in Namibia* (2004); and D LeBeau *et al Structural conditions for the progression of the HIV/AIDS pandemic in Namibia* (2004). I accord similar acknowledgements to all.

I am extremely grateful to J Kok for editing the book and the following friends and colleagues, Justice P Damaseb, I Nhamu, C Mapaure and M Tjiteere for their various contributions to and assistance in the production of this book.

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CHAPTER 1

THE MEANING AND SCOPE OF THE LAW OF PROPERTY

1 Introduction

South African Roman-Dutch traditional conceptualisation of 'things' as the centrality of the province of the law of property tends to put more emphasis on corporeality as the determining factor in delimiting and defining the province and scope of the law of property rather than on the totality of the rights of the individual or the legal subject including his or her patrimony or estate. However, in modern property jurisprudence property refers to both movable and immovable assets of a person or a legal subject. It includes both corporeal and incorporeal things, for example, rights (interests) in a close corporation and (shares) in a company and copyright. These constitute part of a person's or legal subject's patrimony and therefore part of his or her estate.

The law of property in the wide sense therefore deals with the totality of the individual's or legal subject's patrimony or estate. It includes everything that is of value to the legal subject. A central theme in the law of property is ownership which is a right provided and protected under article 16 of the Namibian Constitution. In its various subdivisions the law of property relates to the law of things which deals with the individual's property relationship with corporeal objects. This is described as the law of property in a narrow sense. Intellectual property law deals with rights in incorporeal things – their recognition, protection and registration. This subdivision of the law is under private law but to the extent that article 16 of the Namibian Constitution deals with property rights, the law of property also falls in the domain of public law. The exercise of the various rights that constitute an individual's estate entails various relationships between individuals and the property, which relationships are regulated by the law of property, the law of obligations and public law.

The inclusion of both corporeal and incorporeal assets as part of the subject matter of the *law of property* renders the scope of *law of property* much wider than that of the *law of things* because the latter deals only with

material or corporeal things. In this context the definition of the law of property has a much broader field of application. The definition of the law of property therefore focuses on real rights, the object of which can be corporeal or incorporeal things.

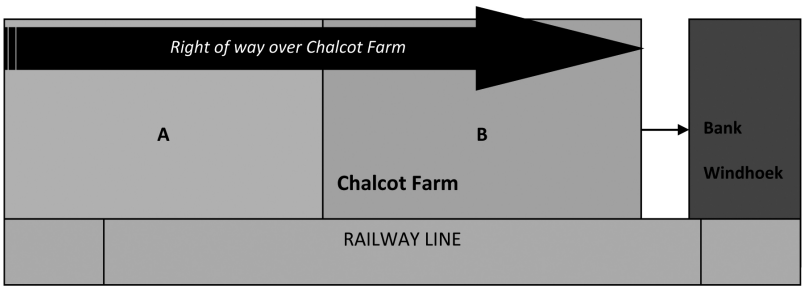
2 Definition of the law of property

In the light of the above, the law of property may be defined as the sum total of the various legal norms which regulate the legal relationships between legal subjects in regard to things or, to distinguish more clearly between the *law of property* and the *law of obligations,* as the sum total of the various norms which regulate the legal relationships between persons and things and between legal subjects *inter se.*[1]

Van der Walt & Pienaar go further and add that the said definition describes the ways in which property rights may be lawfully acquired and exercised, the available remedies in the event of any infringement, and the legal contents of other relations between persons and property.[2]

The definition draws a distinction between the law of obligations and the law of property. The former consists of the subdivision of the law that deals with legal relationships constituting obligations between legal subjects. It deals with personal rights and obligations associated with such rights, whereas the law of property goes beyond the domain of personal rights which may arise from contract, delict or the law of succession.

The diagram below may serve as an illustration of the distinction between the law of obligations and the law of property; and the distinction between the law of property in the wide sense, and the function of the law of property.



1 DG Kleyn *et al Silberberg & Schoeman's the law of property 3rd ed* (1993) 1-2.
2 AJ van der Walt & GJ Pienaar *Introduction to the law of property 6th ed* (2009) 7.

A is the owner of Farm A which is a piece of land adjacent to Chalcot Farm, B. The owner of Chalcot Farm inherited it from his father, who had entered into a contract with the owner of Farm A allowing the latter a right of way over Chalcot Farm. B wishes to construct a farmhouse on Chalcot Farm and has borrowed money from Bank Windhoek using the farm as collateral.

The right that A has over Farm A is the right of ownership which is a real right and the subject matter of the law of property. This is also a constitutional right in terms of article 16(1) of the Namibian Constitution. It falls to be dealt with under constitutional law which is part of public law. The right of ownership vests in A. This right affords A the legal power over his property (Farm A) which may be exercised in any manner whatsoever within the parameters of the law. This is normally referred to as an absolute right. This right includes the power to enter into any agreement with other legal subjects on matters relating to the land. Hence, A is entitled to enter into an agreement with B who inherited the farm from his father. Generally, the law relating to inheritance and succession falls under the law of succession, but issues relating to property that has been inherited will have to be determined with reference to both the law of property and the law of succession. For example, issues relating to the binding effects of a *fideicommissum* on a third party may have to be determined under the law of property, the law of contract and the law of succession.

The agreement entered into between A and B creates a relationship between the two parties which is governed by the principles of the law of contract and the law of property. The agreement has created a servitude which comprises certain powers and obligations. The creation of the agreement is the subject matter of the law of contract but whether this agreement will bind the successors in title of B or A, is determined by the principles of the law of property. The agreement between B and Bank Windhoek creates a mortgage which burdens the land. The agreement itself is governed by the law of contract, but the issues relating to the relationship between the two parties cannot be resolved with reference only to the principles of the law of contract. Issues relating to the binding effect of the mortgage on B's successor in title, in case the mortgage has not been cancelled before the transfer of the property, will have to be resolved under the law of property. It will have to be determined whether the rights and obligations arising from these contractual arrangements are personal rights or real rights. These examples illustrate how the same set of circumstances could involve the subject matter of the law of property, the interrelation between the law of property and the law of obligations, and the functions of the law of property. The law of property and the law of obligations fall under private law.

It can therefore be said that the primary functions of the law of property are to regulate relationships between legal subjects and legal objects, to harmonise competing interests, and to guarantee individual property rights.

3 The sources of the law of property in Namibia

The sources of the law of property in Namibia include the constitution, legislation, Roman-Dutch common law, case law, customary law and international conventions.

3.1 The Constitution

The Namibian Constitution was adopted as the supreme law and *inter alia* creates fundamental rights and freedoms, which include provisions governing property rights. Article 100 vests the allodial title of the land in the State by the provision that land, water and natural resources below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia shall belong to the State, if not otherwise lawfully owned. Lawful ownership of both movable and immovable property in Namibia is constitutionally recognised and protected by article 16(1) of the Constitution. This right to property, however, is limited in article 16(2) by the right granted to the state to expropriate private property in the public interest subject to the payment of compensation. Article 23 of the Constitution also grants Parliament the power to legislate directly or indirectly for the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices, or for the implementation of policies and programmes aimed at redressing social, economic or educational imbalances in the Namibian society, resulting from discriminatory laws or practices. These constitutional provisions have formed the legal basis of the land reform programme of the Government of the Republic of Namibia.

3.2 Other legislation

The legislative sources of Namibian law in general range from legislation applied by the German colonial administration to current legislation enacted by the legislature of the sovereign state of Namibia. The German legislation applicable to the territory during the years of occupation comprised such imperial statutes as had been made applicable to the protectorate by an Act of Imperial Government. These enactments include the Civil Code of 1900, the German Criminal Code and Acts passed by the Imperial Government for the government of the territory in particular. In addition to these enactments, the local Landesrat, since 1913, also had legislative power over the territory. Ordinances passed by the Landesrat became a legislative source of Namibian law. However, most of these pieces of legislation have been repealed. With the promulgation of Proclamation 21 of 1919, the laws that applied in the Province of the Cape of Good Hope were superimposed upon the German Imperial enactments.

Another component of the legislative source of Namibian law was the legislation introduced by South Africa. In 1925 the South African Parliament was given full legislative power over Namibia. Consequently, some South African statutes were extended to Namibia by proclamation. However, legislative authority over the territory was not vested in the South African Union government alone. The local legislature, which comprised the legislative Assembly of South-West Africa and the Administrator-General of South-West Africa, had residuary legislative functions, subject to the superior legislative functions vested in the South African Union Parliament. The former exercised its legislative functions in the form of ordinances whereas the latter was in the form of proclamations. The Head of the Union of South Africa also had the power to legislate for the territory by proclamation in terms of section 38(1) of the South-West Africa Constitution Act 39 of 1968 as amended by section 1 of the South-West Africa Constitution Amendment Act 95 of 1977 and the decision in the case of *Binga v Administrator-General*[3] but after 1978/9 South African legislation did not automatically apply to Namibia. This only applied to the extent that it had been declared applicable by proclamation of the Administrator-General of South-West Africa**.** After the promulgation of the Namibian Constitution, however, full legislative power was vested in the National Assembly 'with the power to pass laws with the assent of the President'.[4] Current legislative functions therefore vest in the National Assembly but the legislative sources of Namibian law have more components than those contained in the enactments passed by the National Assembly of Namibia.

Mention should also be made of the fact that pieces of legislation that were introduced into South-West Africa before independence were not purely and authentically of South African origin. There was quite a number of English statutes that applied to Namibia especially after the passing of Proclamation 21 of 1919.

With regard to the legislative sources of property law in Namibia during the period of German occupation, the Imperial German Government's declarations of the territory as a German protectorate in 1884 and as a Crown Colony in 1890 are very important historical developments of property rights and land classification in South-West Africa. They divested the indigenous people of their allodial rights to their ancestral land and ushered in the classification of the land based on the native-settler dichotomy. The Imperial Ordinance of 1905 legitimised the confiscation of indigenous land by the Governor.

3 *Binga v Administrator-General, South-West Africa, & Others* 1984 3 SA 949 (SWA).

4 Art 44 of the Namibian Constitution provides: 'The legislative power of Namibia shall be vested in the National Assembly with the power to pass laws with the assent of the President as provided in this Constitution subject, where applicable, to the powers and functions of the National Council as set out in this Constitution'.

The South African administration followed a similar pattern. The Transvaal Crown Land Disposal Ordinance of 1903 was declared applicable to South-West Africa by virtue of the Crown Land Disposal Proclamation 13 of 1920. This effectively gave the South African Administration the power to either extend the application of existing South African legislation on property to South-West Africa or to promulgate completely new legislation for the territory. The current legislative sources of property law in Namibia have South African components and these include, to mention a few, the Deeds Registries Act 47 of 1937, Formalities in Respect of Leases of Land Act 18 of 1969, Prescription Act 18 of 1943 on which the Prescription Proclamation 13 of 1943 of South-West Africa was based, Prescription Act 68 of 1969 and Sectional Titles Act 66 of 1975. Since 1990 the Namibian Legislature has promulgated a few pieces of legislation on property, which include the Local Authorities Act 23 of 1992, the Agricultural (Commercial) Land Reform Act 6 of 1995, Married Persons Equality Act and the Communal Land Reform Act 5 of 2002.

3.3 Roman-Dutch common law

The introduction of Roman-Dutch law into Namibia is closely interrelated with the political and historical development of Namibia. After the occupation of the territory by South African troops in 1915, German law remained in force except for such laws as were found necessary to be repealed under martial law. At the end of the First World War, South-West Africa was placed under the League of Nations Mandate system as 'C' mandate. The King of Great Britain accepted and delegated the mandate to the Government of the Union of South Africa to exercise it under the supervision of the League of Nations. Article 2 of the mandate agreement gave the mandatory all powers of administration and legislation over the mandated territory as an integral portion of the Union, and authorised the mandatory to apply the laws of the Union to the territory. Following the imposition of South African administration on South-West Africa, after the granting of the League of Nations Mandate over the territory to South Africa, one obvious historical fact was the extension of the application of the South African legal system to the territory. One basic characteristic of the South African legal system is the element of Roman-Dutch law constituting, as it were, the nucleus of South African common law. In so far as South-West Africa was concerned Roman-Dutch law was formally introduced as the common law of the territory by Proclamation 21 of 1919 (S.W.A Gazette No 25 of 1919) which provided *inter alia* that Roman-Dutch law was to be applied in the territory 'as existing and applied in the Province of the Cape of Good Hope' and the proclamation remained the legal basis for the application of the common law of the Cape as a source of law of South-West Africa until the promulgation of the Namibian Constitution. Article 66(1) of the Constitution stipulates that the common law of Namibia in force on the date of independence shall remain valid to the extent to which such common law does not conflict with the Constitution. It must also be pointed out that in

1959, after amalgamation of the judiciary of the territory into that of South Africa in terms of the Supreme Court Act 59 of 1959, the High Court of South-West Africa became a division of the Supreme Court of South Africa. Since then the courts of the territory were bound by the decisions of the Supreme Court of South Africa. To this extent the Roman-Dutch law developed by the South African courts as the common law of South Africa was binding on Namibian courts. South African Roman-Dutch principles are still the major source of property law in Namibia today.

However, as a consequence of English colonial administration over the Cape of Good Hope, English common law was introduced into the Cape and by virtue of the application of Proclamation 21 of 1919, English law that applied in the Province of the Cape Good Hope also applied in South-West Africa (later Namibia). Unlike the situation with regard to certain areas, such as those of civil and criminal procedure, the law of evidence, commercial law and company law, which were greatly influenced by English law, English property law did not have a similar impact on property law which has essentially remained Roman-Dutch in nature.

In view of the strong historical connections with the South African legal system, Namibia has acquired a legal system which is a convergence of the two major legal traditions resulting in a legal system which can be described as a hybrid or mixed system. In terms of judicial methodology, the common law is a prominent component of the system. Jurisdictions that employ the common law methodology use the case precedent or *stare decisis* as part of the judicial process and therefore case law is the core or an important source of the law. Namibia has a Supreme Court which is the final court of appeal[5] and therefore precedents from foreign jurisdictions are persuasive but not binding. However, in terms of the common law sources of property law, Namibia relies a great deal on South African precedents. This does not suggest complete reliance on South African law. In the landmark case of *Kessl v Ministry of Lands Resettlement & Others,*[6] for example, the High Court laid down principles of reciprocity, which are embodied in the letter and spirit of article 18 of the Namibian Constitution as the basis for the State's powers to expropriate private property under section 16(2) of the Namibian Constitution.

3.4 Customary law

Article 66 of the Namibian Constitution provides as follows:

> (1) Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary

5 Arts 78 and 81 of the Namibian Constitution.
6 2008 1 NR 167 (HC).

> or common law does not conflict with this Constitution or any other customary law.
>
> (2) Subject to the terms of this Constitution, any part of such common law or customary law may be repealed or modified by Act of Parliament, and the application thereof may be confined to particular parts of Namibia or to particular periods.

By virtue of the above provision customary law is a source of law in Namibia, but its application, just as in the case of the application of the common law, is subject to internal conflict rules. The above exposition of the Namibian legal system clearly indicates that there exists legal pluralism or dualism and that the basic internal conflict rule is that the constitutional imperatives and legislative enactments constitute the yardsticks for the resolution of internal conflicts. In property law a particular customary law becomes relevant where there is no relevant legislative principle or where such customary law satisfies internal conflict rules. The Communal Land Reform Act 5 of 2002 governs the creation and allocation of land rights in the communal areas and therefore, in so far as the application of customary law is concerned, the provisions of the Act take precedence over customary law.

3.5 International law

Article 144 of the Namibian Constitution provides that the general rules of public international law and international agreements binding upon Namibia shall form part of the law of Namibia. In *Kessl*, for example, references were made to the international law principle of eminent domain, the cases of *Sporrong & Lönnroth v Sweden*,[7] *Tre Traktorer AB V Sweden*[8] and the decision of the Permanent Court of International Justice in a case concerning certain German interests in Polish Upper Silesia.[9]

4 A glossary of terms

Certain expressions used in this book are defined and explained below**.**

Person: The law of property, as indicated earlier, deals with the patrimony of a person. A person, in the law of property, is a legal subject who can acquire and exercise rights and obligations in law. A legal subject can be a natural person or a legal person, the latter sometimes also being referred to as a juristic or artificial person.

7 1983 5 EHRR 35.
8 1989 ECHR series A, vol 5, 1959.
9 1926 PCIJ series A, no7, (May 25) 22.

Object:	Object is anything with regard to which a person can acquire or hold a right.
Property:	Property is everything which can form part of a person's patrimony or estate, including corporeal and incorporeal things and incorporeal interests and rights.[10]
Allodial title:	Allodial title is the most comprehensive title capable of being held in most jurisdictions. It is an absolute right and is an example of a real right. In Namibia, for example, under article 100 of the Namibian Constitution the allodial title to land is vested in the state. In England the allodial title is vested in the crown. In certain tribal communities in West Africa the allodial title or tribal land is vested in the tribe or the stool and the allodial title of state land is vested in the state. The crown, the state or the stool may be the absolute owner, but the land itself may be in the possession or occupation of individuals or a co-operation and the actual right will be determined between the state or the stool and the individual persons. The state or the stool may by agreement grant freehold titles or leasehold, as the case may be.[11]
Freehold:	A freehold title or interest is a title or interest which is held by the proprietor for an indefinite period of time. It is carved out of the allodial title. In reality the proprietor of freehold title and his or her successors in title hold for an indefinite period until there is a failure of succession in which case the freehold title is merged with the allodial title from which it was originally carved. The title holder has a real right to land. In other jurisdictions, for example in England and the US, the freehold title is known as 'fee simple'.
Customary freehold:	The customary freehold is an interest in land, which is acquired by a person in his or her capacity as a subject of a stool, or as a member of a clan or a family (A stool is a symbol of the chief's authority). Such a subject of a stool or clan has a customary right to freely use part of the stool's or family's land

10 See generally Van der Walt & Pienaar (n 2 above) 7-11.
11 See also *Mambo & Others v Queensland* (No2) 1992 175 ALR 1 and *Richtersveld Community & Others v Alexkor Ltd & Another* 2003 6 BCLR 583.

> if it is not occupied by another person. Such other person could be another subject or member or grantee of the stool or family, who is not a subject of the stool or member of the family. If a subject of the stool or member of a family, in the exercise of this inherent customary right, occupies land and retains possession thereof, either for farming or building, he acquires a customary freehold. The customary freehold is not a mere right of occupation and farming, but an interest in land which prevails against the whole world, including the allodial owner. The proprietor of a customary freehold can dispose of it, either *inter vivos* or by testamentary provision. The customary freehold is acquired as of right and a formal grant from the allodial owner is not necessary. Unlike common law freehold, which is created by an express grant, customary freehold may be created by the occupation of vacant stool or family land whenever a subject of a stool or member of a family exercises that inherent right to occupy vacant stool or family land.[12]

In Namibia the position is different. The ownership of the communal lands is vested in the state, and the concept of customary freehold as part of the land tenure systems of Namibia is therefore merely of academic importance. Before the enactment of the Communal Land Reform Act 5 of 2002, occupiers of communal lands had certain rights, mainly generic rights of usufruct. Such existing rights have been recognised and other rights have been created by the Act, for example, the statutory leasehold, which gives the holder a 99 year lease.

Usufruct: Usufruct is a right to use property belonging to another, a grantor, and to enjoy it while maintaining the substance of such property. The *dominium* of the thing does not pass to the usufructuary. The usufructuary merely exercises a right of use and enjoyment of the property. This is an example of limited real right.

Lease: Lease is an interest in land, which is created to last for a fixed period. Every lease must therefore have a date on which it commences and a date on which it must expire, although it may in certain circumstances be terminated before the actual date fixed for its expiration. A lease is created between a

12 BJ da Rocha & CHK Lodoh *Ghana land law and conveyancing* (1995) 3-14.

lessor and a lessee; the lessor is the landlord and the lessee is the tenant. A special relationship of landlord and tenant exists. Under the current law in Namibia, a lease of less than ten years is not required to comply with the normal formalities. But if it is for more than ten years, the lease must be in writing.[13]

Tenancy: Tenancy is a limited right or interest in land. It is a right of use. A grantor, who is the landlord, retains his or her *dominium* or ownership in the land but grants possessory rights and use to a tenant for a fixed period of time. Tenancy is a species of lease and the two terms are sometimes used interchangeably. The major difference between the two is that in the case of lease its duration terminates when the fixed period of the lease expires, whereas in the case of tenancy its duration could be indefinite. A yearly tenancy continues from year to year until terminated by notice. The same applies to weekly and monthly tenancies. They can be created either by express agreement or by inference which may be drawn when rent due for a month, a week or a quarter, as the case may be, is offered by the one party and accepted by the other whereby the tenancy is then extended for the corresponding period.

Servitude: A servitude is a right belonging to one person to the property of another, entitling the former to either exercise a zone right as benefit in property or to prohibit the latter from exercising one or more of the powers of ownership, for example a right of way, a right of grazing, a right of access to water, et cetera. A servitude normally creates rights and obligations *inter partes* but if they are registered, they bind third parties who, as a result of the registration, are deemed to have knowledge of the servitude.

Real security: Real security is the security a creditor may acquire by exercising a limited real right over a thing owned by the debtor to enforce payment by the debtor. Real security is, for instance, created by mortgage over

13 See sec 1 of the Formalities in Respect of Leases of Land Act 18 of 1969.

immovable property and pledge over a movable thing.

5 Summary

In modern property jurisprudence property refers to both movable and immovable assets of a person or a legal subject. It includes both corporeal and incorporeal things, for instance, rights (interests) in a close corporation and (shares) in a company and copyright. These constitute part of a person's or legal subject's patrimony and therefore part of his or her estate.

The law of property in the wide sense therefore deals with the totality of the individual's or legal subject's patrimony or estate. It includes everything that is of value to the legal subject. The scope of the law of property also includes the principles dealing with the rights and actions of persons with regard to things and other forms of property, as well as other relations between persons and property. It describes the ways in which property rights can be acquired and exercised lawfully and the remedies by which they are protected against infringement, as well as the legal results and implications between persons and property.

The sources of the law of property in Namibia include the Namibian Constitution, legislation, Roman-Dutch common law, case law, customary law and international conventions. These sources place the law of property under both private law and public law.

CHAPTER 2

THE GENESIS OF THE SKEWED LAND POLICIES AND LAND TENURE IN NAMIBIA[1]

1 The colonial expropriation of indigenous lands

Land rights in modern societies are recognised by and defined in law. The 'land title' is the legal document that serves as a representation of land for all legal purposes: it can be sold; mortgaged; pass by inheritance; or given away. Under apartheid, as under the German regime, only whites could hold 'land titles', thus only whites had a 'legal' right to their land. Blacks held land, but under customary law, not under legal title. Any regime recognising such a system is called a regime of 'legal dualism', but it does not allow 'dual' participation because black land rights are not backed by land titles.

The 'stolen lands' issue, which is a world-wide phenomenon, refers to the process of colonial occupation of indigenous lands. In Namibia it derives more narrowly from the Herero/Nama War, one of the most violent of colonial wars. The colonial history of Namibia is complex and still, from the standpoint of the black people who live there, largely unwritten.[2] The Herero War has been the subject of a number of books, with scholars drawn to the unique character of German colonial violence.[3] While a number of meanings can be drawn from the war, the central outcome in terms of land law is clear: Germany terminated by conquest all Herero land rights in South-West Africa, leaving the Herero with no land at all. Herero lands were then 'sold' by

1 See SK Amoo 'Towards comprehensive land tenure systems and land reform in Namibia' (2000) 17 *South African Journal on Human Rights* 87; SK Amoo & SL Harring 'Property rights and land reform in Namibia' in B Chigara (ed) *Southern African development community land issues: Towards a new sustainable Land Relations Policy* (2012) 222; SK Amoo & SL Harring 'Namibian land Law: reform and the restructuring of post-apartheid Namibia' in *University of Botswana Law Journal* (9) June 2009 87-123.

2 There is a growing body of literature on this 'new' Namibian history. H Bley *South-West Africa under German rule, 1894-1915* (1981); P Hayes *et al Namibia under South African rule: Mobility and containment, 1915-1946* (1998); W Hartmann *et al The colonising camera: Photographs in the making of Namibian history* (1998).

3 JB Gewald *Herero heroes: A socio-political history of the Herero of Namibia, 1890-1923* (1999); H Drechsler *Let us die fighting: The struggle of the Herero and Nama against German imperialism, 1885-1915* (1980); JM Bridgman *The revolt of the Hereros* (1981).

colonial authorities to settlers – 90 per cent of them German – on favourable terms, with long-term loans subsidised by the colonial government.[4] These farms are now the heart of Namibian agriculture, occupying a wide swath from Omaruru to Gobabis and the Botswana border and the entire country to the west, north, and east of Windhoek. Further south, most Nama lands were also taken, although the Nama were left with reserves.

This violent dispossession followed a short colonial history. The ovaHerero were occupants of the high plains of central Namibia. They were a Bantu tribe which had moved south into this region from Angola, arriving in about 1750. A series of wars with the Nama who lived to the south, occurred in the mid-nineteenth century, destabilising the entire region.[5] Germany first arrived in South-West Africa in 1884, using the dubious private land claims of a businessman, Adolf Luderitz, as the legal basis for establishing a protectorate over a vast desert hinterland, the first German colony in Africa.[6]

The Herero were not involved in these coastal land treaties but on 29 December 1884 Chief Kamaherero, at Omaruru, entered into a treaty of protection with Great Britain, then engaged in a diplomatic dispute with Germany over what is now Namibia. Great Britain soon abandoned the contest, withdrawing to the Cape Colony and leaving the native people of South-West Africa, with or without treaties of protection, to the Germans.[7] Different chiefs may well have had different strategies to deal with colonial authority and the Germans were beginning to implement a 'divide and rule' strategy. It is also unclear what the Herero believed these 'treaties of protection meant. Such agreements apparently did not cede land or sovereignty.[8] It seems that the Germans rather agreed to 'protect' Herero interests from rival tribes.

In 1895 colonial troops intervened in Okahandja on behalf of Chief Samuel Maharero in an Herero succession dispute. This military action cemented an alliance between the Germans and Maharero that lasted for nine years. During this time, Maharero 'sold' vast tracts of Herero lands under various kinds of arrangements, some more 'legal' than others. For example, traders took vast quantities of land in exchange for trade goods, including liquor. They, in turn, sold the land to farmers at huge profits.[9] Other Herero

4 W Werner *No one will become rich: Economy and society in the Herero reserves in Namibia, 1915-1946* (1998) 48; W Schmokel 'The myth of the white farmer: Commercial agriculture in Namibia, 1900-1983' (1985) 18 *International Journal of African Historical Studies* 1; R Moorsom *Transforming a wasted land* 21-24.

5 JS Malan *Peoples of Namibia* (1995) 68-69; H Vedder *et al The native tribes of South West Africa* (1928) 153-208.

6 JH Esterhuyse *South-West Africa, 1880-1894: The establishment of German authority in South-West Africa* (1968) 46-65.

7 Esterhuyse (n 6 above) 66-83.

8 M Shaw *Title to territory in Africa: International legal issues* (1986) 46-48; MF Lindley *The acquisition and government of backward territory in international law: Being a treatise on the law and practice relating to colonial expansion* (1926) 181-206.

9 Gewald (n 3 above) 129-136; Werner (n 4 above) 43.

land was deserted as a rinderpest epidemic killed most of their cattle. Much land was simply taken with no regard for legality and it is not known how the land was alienated from black ownership. Much closer attention needs to be paid by historians to the colonial land records.

In a 1922 *Memorandum on Treaties between the Late Government and Various Native Tribes in South-West Africa* a colonial official bluntly, but confidentially, stated:

> I would like to mention here that in law there was no confiscation of the Khauash (sic) Hottentots property, and their Treaties with the late Government of the 9th March, 1894 and 4th February, 1885, are still valid. In fact the late Government confiscated their property, and omitted however to give this confiscation the force of law as prescribed in the Imperial Ordinance of the 26th December 1905. The German government in 1913 and 1914 was well aware of this mistake; as, however, nobody had yet found it out, it kept silence. Should the Khauas Hottentots come forward to-day and ask for the return of their former territory, of which a lot has been sold and is still advertised for sale, it would mean the return of one-quarter of the District of Gobabis.[10]

If this treaty is still in force, it may invalidate numerous land titles in this district.

Some black lands were lost through the actions, even duplicity, of their own chiefs. Land was 'sold' to whites, although it is unclear what the parties understood those transactions to mean. There was no history or law of land sales in Herero or Nama society at that time, and it is unclear how these legal transactions were translated into German. By 1902 the Herero only retained about 46 000 cattle of an estimated 100 000 head held ten years before. In contrast, 1 051 German farmers and traders held 44 500 head. The number of settlers increased from 1 774 in 1895 to 4 640 in 1903. Of the 83.5 million hectares of land in the colony, 31.4 million remained in African hands[11] – although these figures include much land that belonged to Nama and other tribes. In an infamous proclamation, issued on 2 October 1904, the German General, Von Trotha, ordered all Herero men to be killed, and all their land and cattle to be seized.[12] After reading the proclamation to a group of Herero prisoners, he proceeded to hang thirty men, and then, after handing out printed copies of the document in the Herero language, drove the women and children out into the Kalahari Desert.

10 'Memorandum on Treaties Between the Law Government and Various Native Tribes in South-West Africa' (author's name illegible) 4 September 1922 *National Archives of Namibia* 457, South West Africa.

11 Werner (n 4 above) 43-44. This data represents a cataclysmic social change: there were virtually no German farmers before the early 1890s. It took scarcely the decade of the 1890's for German herds to grow larger than Herero herds.

12 Quoted in Gewald (n 3 above) 172-173. Gewald has dismissed the view that Von Trotha's proclamation has been interpreted 'out of context' concluding that the proclamation meant what it threatened, a policy of genocide. The fact that it was printed in the Herero language and distributed to women and children about to be driven out into the desert, so they could widely distribute it, demonstrates that it was well planned.

The details of the Herero War are well known and are not in serious dispute.[13] Historian Jan-Bart Gewald constructs a convincing account that the war was used as a pretext by the Germans to annihilate the Herero. Whichever account is accepted, it was a war over land. At least some Herero, offended by increasing German movement on to Herero lands, and subjected to demeaning and inhumane treatment by colonists and traders, rose in revolt. Once the revolt was under way, the Germans refused all attempts for a negotiated resolution.[14] This was not the only colonial war in Namibia: there was a series of such wars. The Nama, in fact, took advantage of the Herero War, attacking the Germans from the south, and carrying on a guerrilla war for several years after the Herero were defeated.[15] But tribes in the north did not directly experience this war, or this violent dispossession of their lands. This reality structures the land reform process in Namibia: most blacks have lost no land to colonisation and therefore the demand for 'land reform' is not equally felt in all segments of the black population.[16] The government has rejected any model of 'restitution of ancestral lands' in the land reform process.[17] Thus, unlike South Africa where the land reform process includes a form of restitution for blacks dispossessed since 1913,[18] land reform in Namibia is not based on restitution of particular land to aggrieved parties. The purpose is to promote national unity but a model of restitution of ancestral land would provide redress to the people of central Namibia who were dispossessed of their land, as opposed to the people of Ovambo and Kavango to the north who were not so dispossessed. Accordingly there is a political advantage to this position.[19]

2 Classification of land in Namibia

In the early era of colonial expansion, as indicated above, protection treaties and rights of conquest were the most prominent tools of land expropriation

13 Like much of German history, there is a right wing 'revisionist' interpretation of the Herero War that denies that genocide occurred. 'Researcher into the Waterberg Tragedy of 1904 Presents a New Radical Version' *Windhoek Observer* July 21, (2001) 2, summarising a University of Hamburg (Germany) Masters thesis by an unknown author, claims that: fewer Herero were killed in the Herero War than modern scholars claim; and that these deaths were not due to the actions of the German army but to starvation. A point-by-point rebuttal was published a few weeks later: J Silvester *et al* 'Waterberg tragedy of 1904 triggers hot debate' *Windhoek Observer* 4 August 2001. The major accounts of the Herero War (n 3 above) agree on the essential details of the deaths of over 60 000 Herero people.

14 Gewald (n 3 above) 141-191 is the best account of the war. The two previous standard accounts are Dreschler (n 3 above); and JM Bridgman 'The revolt of the Hereros (1983) 17 *Canadian Journal of African Studies* 132-163. Neither accounts dispute that the immediate cause of the Herero uprising was the loss of their land but Gewald challenges the idea that it was a widely planned general revolt of the Herero people.

15 J Bridgman (n 14 above) 132-163.

16 W Werner, 'Land reform and poverty alleviation: Experiences from Namibia' NEPRU working paper, no 78, Aug (2001) 1.

17 SL Harring 'German reparations to the Herero Nation: An assertion of Herero Nationhood in the path of Namibian development?' (2001-2002) 104 *West Virginia Law Review* 393.

18 H Klug 'Historical claims and the right to restitution' in J Van Zyl *et al* (eds) *Agricultural land reform in South Africa: Policies, markets and mechanisms* (1996) 390-422.

19 Harring (n 17 above) 3.

and alienation. After 1915, however, land alienation by Europeans and the introduction of new property rights were implemented in a more systematic manner by legislation,[20] resulting in the classification of land which can legitimately be regarded as the genesis of the imbalances in land distribution and ownership in present-day Namibia.

The legal mechanism that was used by the colonial powers in South-West Africa was legislation that was primarily geared at dividing the land on the basis of the settler-native dichotomy. This was done by the initial declaration of the territory as crown land, followed by the declaration of tribal and trust land or communal land over land originally belonging to the natives. Ownership of land in the area demarcated as crown land vested in the colonial power, whilst part of the land was reserved for the occupation and use of the natives. Within the area of crown land the received law of the settlers was applied. Customary law applied to areas reserved for the natives. In most cases, the reservation of land for the occupation and use of the natives did not imply the complete ownership of that land by that particular tribal group. The rights of the tribal group were rather rights of occupation and use, or rights of usufruct.[21] The residual rights were vested in the colonial administration.

2.1 Creation of crown and state land

The formal declaration of land inhabited or owned by the tribal groups as crown land was effected by a series of laws. The Transvaal Crown Land Disposal Ordinance of 1903 was the initial piece of legislation used for this purpose. This ordinance was made applicable to South-West Africa by virtue of the Crown Land Disposal Proclamation 13 of 1920. Firstly, the ordinance proclaimed the territory as crown land and, secondly, in terms of section 12 certain areas of crown land could be reserved 'for the use and benefit of aboriginal natives'. The extension of Transvaal ordinances was made lawful and possible by virtue of section 4(1) of the Treaty of Peace and South-West Africa Mandate Act 49 of 1919.[22]

The general effect of this ordinance was to vest ownership of tribal land in the state or, to be more precise, the mandatory power, South Africa. In 1967 another piece of legislation, the Reservation of State Land for Natives

20 Amoo (n 1 above) 91.

21 See also MO Hinz 'Communal land, natural resources and traditional authority' in FM d'Engelbronner *et al* (eds) *Traditional authority and democracy in Southern Africa* (1998) 183-88.

22 During the conquest of Namibia by South African troops in 1915, the Union government was precluded from alienating or allocating any land on a permanent basis. However, the granting of the mandate over Namibia to South Africa in 1919 enabled South Africa to intervene more decisively on land issues. In terms of the mandate all land held by the previous German government was transferred to South Africa. Henceforth, only the Governor-General of the Union had the power to legislate in regard to the allocation of Crown Land.

Ordinance 35 of 1967 was passed with similar provisions reserving state land for the use and occupation of the natives. The declaration of the territory as crown land and subsequently as state land meant, by necessary implication, that the received law was to be used to determine property relations, but this did not rule out completely the application of the relevant customary law in areas where the land was substantially occupied by tribal groups. In this regard mention should be made of section 4(3) of the Treaty of Peace and South-West Africa Mandate Act which authorised the Governor-General 'in respect of land contained in any such reserve to grant individual titles to any person lawfully occupying and entitled to such land'. The novelty of this provision was the introduction of the concept of private ownership to a community whose land tenure system was community-based. Property relations were to be determined by the received law, which allowed individual rights as opposed to the community-oriented land rights practised by the indigenous people.

2.2 Reserves and trusts

The classification of land in South-West Africa after the declaration of crown land was determined according to identifiable tribes grouped under native reserves and tribal trust areas. The Native Administration Proclamation 11 of 1922, issued by the Governor-General, the official representative of the King of Great Britain on whose behalf South Africa administered the mandate, empowered the administration to establish native reserves. In 1928 the Native Administration Proclamation 15 of 1928 *inter alia* gave the administrator the power to define tribal areas. Government Notice 122 was issued under the said Native Administration Proclamation 11 of 1922 and as early as at the end of 1923 about 14 native reserves had been established. The creation of the native reserves therefore cut the ties that natives had to their ancestral land, adding another dimension to the classification of land in South-West Africa.[23]

Land allocation and utilisation in the reserves were regulated by the Native Reserve Regulation 68 of 1924. These regulations vested ownership of the land in the Administration and further provided that, after the land had been set aside as a reserve, 'it [could] not be alienated or used for any other purpose except with the consent of both Houses of Parliament of the Union of South Africa'. As pointed out by Adams and Werner,[24] traditional leaders in the Police Zone had no powers of their own with regard to the allocation of

23 The creation of the reserves along racial lines was meant *inter alia* to accommodate white settlers on the prime land and to push the indigenous people onto more marginal land. By 1946, surveyed farms in the Police Zone comprised 32 million hectares, representing just over 60 per cent of its area or 39 per cent of the country. By contrast, the area reserved for black Namibians in the Police Zone amounted to 4.1 millions hectares. By shifting the Police Zone further north and opening up land in the desert another 880 farmers were allotted farms between 1945 and 1954, bringing the total number of farms to 5 214. See also F Adams *et al The land issue in Namibia: An inquiry* (1990) 9-20.

24 Adams & Werner (n 23 above) 31.

land in the reserves. The regulations did make provision for a communal land tenure system, but the allocation of land for residential and agricultural purposes could only be made by Reserve Superintendents.[25]

The next step in the process of depriving the indigenous people of their rights to their ancestral lands was the 'conversion' of the reserves into trusts. By virtue of the Development Trust and Land Act 18 of 1936, the native reserves were to be placed under a trust, known as the Development Trust, and the administration of native affairs was transferred from the Administrator of South-West Africa to the responsible South African Minister. Under section 5(2) of this Act, all land placed under the Development Trust was declared the property of the state, to be administered by the State President of South Africa as trustee. In 1978, by virtue of section 2 of the Administration of the South African Bantu Trust in South-West Africa Proclamation AG 19 of that year, the trusteeship was transferred from the South African State President to the Administrator-General of South-West Africa.

2.3 Creation of areas for native nations

The next development in the land policy of the colonial administration was the creation of 'areas for native nations'. This was effected by the Development of Self-Government for Native Nations in South-West Africa Act 54 of 1968. This Act gave the various pieces of land assembled in the Development Trust special status by transforming them into areas for 'native nations'. Section 2 of the Act listed Damaraland, Hereroland, Kaokoland, Okavangoland, Eastern Caprivi, and Ovamboland as such areas. Section 2(g) empowered the State President of South Africa to 'reserve and set apart such other land or area for the exclusive use and occupation by any native nation by proclamation'. This was, for example, done for Bushmanland in terms of the Bushman Nation Advisory Board Proclamation R208 of 1976. Section 2 of the Proclamation recognised Bushmanland, as defined in GN 1196 of 1970, as an area 'for members of the Bushman Nation'.[26]

2.4 Creation of communal land

By virtue of various pieces of legislation, the areas that had been designated for native nations were declared communal land. Examples of such pieces of legislation were: the Representative Authority of the Caprivians Proclamation AG 29 of 1980; the Representative Authority of the Kavangos Proclamation AG 26 of 1980; and the Representative Authority of the Ovambos Proclamation AG 23 of 1980. The Development of Self-Government for Native

25 As above.
26 See also Hinz (n 21 above) 184-88.

Nations in South-West Africa Act was repealed by section 52 of the Representative Authorities Proclamation.

In the Representative Authorities Amendment Proclamation AG 4 of 1981, the Administrator-General was made trustee of the communal lands. More importantly section 48(3) of this proclamation gave the executive authority of the representative authority – to the extent that it was authorised by an ordinance of the legislative authority or any other law – the power to confer ownership, or any other right into or over, any portion of such communal land, thereby maintaining the alien concept of private individual ownership among the tribal communities.[27] The Representative Authorities Proclamation, and those proclamations establishing representative authorities, were amended by the Representative Authority Powers Transfer Proclamation AG 8 of 1989, which dissolved the representative authorities and transferred the powers back to the Administrator-General. Article 147,[28] read with Schedule 8 of the Namibian Constitution,[29] repealed the remaining parts of the various representative authorities proclamations. However, as argued by Hinz:

> All those amendments and repeals, including the repeal by the Constitution … did not alter the status of the land being communal land … This follows from the Interpretation of Laws Proclamation 38 of 1920, which provides in section 11(2)(c) for the continuous legal validity of acts performed under the Act repealed. This appreciation for legal certainty also must apply to acts directly instituted by the repealed law itself.[30]

2.4.1 Land tenure after independence

2.4.1.1 Commercial farms

The historical classification of land is the genesis of the imbalances in land distribution and ownership in present-day Namibia. Land set aside for private ownership is for the most part owned by white settlers. At the time of independence it was recorded that this constituted about most of the commercially viable farming land, while the remainder of such land was held by the indigenous people in the communal areas.

27 Note that the executive authority of the representative authorities was established under the various Representative Authorities Proclamations. See also SK Amoo (n 1 above) 88-89.

28 Article 147 of the Namibian Constitution deals with repeal of laws, and repeals all laws set out in Schedule 8 of the Namibian Constitution.

29 Schedule 8 of the Namibian Constitution is a list of repealed laws, mostly Representative Authority Proclamations.

30 Hinz (n 21 above) 185. It must be mentioned that the Namibian legislature has promulgated the Communal Land Reform Act 5 of 2002, which provides for the allocation of rights in respect of communal land. The Act under section 17 vests all communal land areas in the State in trust for the benefit of the traditional communities residing in those areas, and for the purpose of promoting the economic and social development of the people of Namibia, in particular the landless and those with insufficient access to land who are not in formal employment or engaged in non-agricultural business activities.

As stated by the Prime Minister, Hage Geingob, in his opening address to the Land Conference on Land Reform in 1991:

> There are about 6292 farms. Out of these, 6123 farms are white-owned, and cover 95 per cent of the surface area of the commercial districts (34.4 million hectares). Within this ownership category the overwhelming majority of farms belong to individual white farmers, including non-Namibians. To be more specific, a total area of 2.7 million hectares (382 farms) belong to foreign absentee farmers, that is to say 0.9 million hectares belonging to citizens from Austria, France, Italy and Switzerland, while the bulk of 1.7 million hectares is owned by South African residents. Similarly, there are individual Namibian farmers with more than two large farms, as against thousands of their landless fellow countrymen who live in squalid poverty.[31]

It is therefore clear that the imbalances in the distribution of land cannot be redressed without government intervention, a process to which the SWAPO government has committed itself. Pursuant to various national conferences on the land question,[32] the Agricultural (Commercial) Land Reform Act 6 of 1995 was promulgated. This Act was meant to provide the Namibian government with the necessary legal tools to acquire commercial farms for the resettlement of displaced persons, and for the purposes of land reform. The implementation of the Act has, however, not been free from problems. As pointed out by the Minister of Lands, Resettlement and Rehabilitation, Pendukeni Ithana, the government's policy of 'willing seller, willing buyer' has imposed constraints on its ability to acquire fertile and more productive commercial farms.[33] However, a possible solution to this constraint may be found under the provisions of Chapter IV of the Act. Section 20, read with section 14(1), empowers the Minister to expropriate any commercial land for purposes of land reform in case of failure to negotiate the sale of property by mutual agreement. The report adds that by April 1997, the Ministry of Lands had bought 22 farms in various regions of the country, consisting of 109 287 hectares at a cost of N$ 18 891 282 and that the land had been distributed among some landless Namibians.[34]

As indicated earlier, the government of Namibia has the sovereign power to expropriate private property.[35] Consistent with the norms of international law,[36] the Namibian Constitution provides for the justification of such

31 See Republic of Namibia National Conference on Land Reform and the Land Question *Consensus Document* (1991).

32 The Namibian Government has held a number of consultative conferences on the land question since the National Conference in 1991. These have led to the enactment of legislation on land and related matters and to the drafting of the *White Paper on National Land Policy*. References to appropriate legislation and the *White Paper* are made elsewhere in this book.

33 See T Nandjaa 'The land question: Namibians demand urgent answers' *Namibia Review* (1997) 1-4.

34 As above.

35 See art 16(2) of the Namibian Constitution and secs 14(1) and 20 of the Agricultural (Commercial) Land Reform Act 6 of 1995.

36 See the Resolution on permanent sovereignty over natural resources, 1962 adopted in *Texaco v Libya* 1977 53 ILR 389.

expropriation on grounds of public interest and the payment of compensation. The power to expropriate, therefore, is a legal matter, while the decision to expropriate and determine the public interest is a political one. It is worth mentioning also that this clause is not entrenched and therefore can be derogated from should a state of emergency be declared under articles 24(3) and 26 of the Constitution. The Namibian government has to date expropriated about nine farms. This may be attributed both to political reasons and budgetary constraints relating to the payment of compensation.

2.4.2 Land tenure in urban centres

2.4.2.1 Freehold titles

The historical classification of land in South-West Africa along racial lines led to the development of urban centres in the southern and central parts of the country in the areas designated as non-communal areas reserved principally for white settlement. These urban centres maintained the dominance of white settlement through the pass law system, and through the reservation of property ownership to whites. Black settlement was only allowed as a source of labour. The black workforce lived in separate locations, which basically comprised less-developed formal settlements and undeveloped informal settlements.[37] Black residents in the less-developed formal settlements who were able to satisfy the requirements for registration in terms of surveying and adequate planning were granted freehold titles to the properties. This form of tenure, however, constituted the exception rather than the rule. Occupants of settlements without adequate surveying and planning could not get their properties registered and therefore did not qualify for titles. Informal settlements did not attract any grant of security of tenure.

Article 16 of the Namibian Independence Constitution guarantees everyone the right to private ownership of land. This provision means that black Namibians are constitutionally entitled to own properties with freehold titles. Freehold titles over land in urban centres may be acquired either through alienation of land hitherto vested in local authorities under the Local Authorities Act 23 of 1992,[38] or through private treaties between individuals.

37 I Tvedten & M Mupotola 'Urbanisation and urban policies in Namibia' Discussion Paper 10, University of Namibia, (1995). See also SF Christensen & PD Hojgaard *Report on flexible land tenure system for Namibia* (1997) 6. In the proposal for the introduction and development of a flexible land tenure system for Namibia references are made to 'formal' and 'informal' areas of settlement. The former is used to denote areas that are planned and surveyed. These areas are most often serviced with water, sewage removal, roads and electricity. The latter are areas where people have not settled according to prior planning.

38 See secs 3(3)(a), 3(5)(b) and 30(1)(t) of the Local Authorities Act 23 of 1992.

2.4.2.2 The permission to occupy

Apart from freehold title, the other form of the title granted to residents in the urban centres was the Permission to Occupy (PTO). Before independence, this constituted the only form of title to land, other than rights under customary law that was available to the indigenous population of Namibia (ie considering the prevailing political, social and economic constraints on the capacity of blacks to obtain freehold title).

The PTO was formally introduced into the territory by the Development Trust and Land Act 18 of 1936. It is a licence granted by the Act which allows the licensee to occupy state land under conditions attached to the PTO certificate. There are two types of PTO: rural and urban. The former is issued by the Ministry of Lands, Resettlement and Rehabilitation, and the latter by the Ministry of Regional Local Government and Housing. The urban PTOs are issued in respect of land that falls within the 'old settlement areas'.[39] All other PTOs are in designated rural areas.

Despite the existence of the PTO since 1936, it was the establishment of the Bantustans, after the Odendaal Commission's Report in 1964[40] that resulted in the proliferation of this form of tenure. The 1960s saw the growth of the capitals of the Bantustans or the communal areas of the northern regions of the territory as a response to the administrative and military needs of the colonial administration. Since these urban centres were situated in the Bantustans, it was a contradiction in terms for the colonial administration to grant freehold titles. To suit the apartheid design, the most appropriate title in the circumstances was the PTO. PTOs were granted mainly to residents who occupied government houses in the formal areas and to private persons who developed plots in the formal areas. They were designed to provide the residents thereof with some security of tenure for the development of a surface structure which could be in the form of a house or a shop. In accordance with the overall objective of apartheid, therefore, the PTOs

39 The old settlement areas are the urban or urbanising areas where the colonial administration before independence carried out the surveying of some plots and in some cases provided water and electricity. These are also referred to as formal areas. If the PTO falls within such an area, it is an urban one and will usually be located on one of the numbered surveyed plots.

40 In 1962, the South African Government appointed a commission of inquiry to make 'recommendations on a comprehensive five-year plan for the accelerated development of the various non-white groups of South-West Africa'. This Commission was commonly known as the Odendaal Commission. The recommendations made by the Commission in its 1964 report had little to do with promoting the welfare of black Namibians. One infamous recommendation in the report was that Namibia should be fragmented into a series of economically unviable self-governing homelands or Bantustans for Africans, which would of necessity remain perpetually dependent on the 'white' areas, and, through them, on South Africa. The Odendaal Plan was implemented by two pieces of legislation: the Development of Self-Government for Native Nations in South-West Africa Act 54 of 1968 and the South-West Africa Affairs Act 25 of 1969. The effect of the implementation of the plan was to entrench both territorial apartheid in Namibia and the distribution of land along racial lines. See NK Duggal *Namibia: Perspectives for national reconstruction and development* (1986) 37-41.

satisfied the colonial administration's need for a limited form of title for the indigenous population. As stated earlier, the interest granted by the PTO is a licence and as such, it is similar to leasehold. A PTO conveys no rights of ownership but it does contain an option for the holder to obtain secure title to the land if at any time during the currency of the PTO such title becomes available. As indicated by Christensen and Hojgaard,[41] a PTO provides a limited right to occupy an identified site for a limited period. As stated by Parker J the rights conveyed by the PTO do not amount to freehold tenure.[42] In theory it cannot be transferred or mortgaged. In practice, however, because PTOs are the only form of legally recognised title in unproclaimed towns, they are 'transferable', by cancellation and reissue to the purchaser. In certain instances PTOs have also been used as collateral. The inherent limitations of the PTOs have, however, created a lack of confidence in the system among the holders and also the general public.[43] Current government policy[44] is thus to phase out PTOs in the urban areas as the full range of existing and projected tenure forms becomes available.[45]

2.4.3 Land tenure in resettlement areas

As mentioned earlier, the land reform programme has land resettlement as an essential component. The Namibian Government's Resettlement involves both redefining and reconstructing of land rights that need to be vested in the settlers. The determination of appropriate land rights in these resettlement areas has been premised by the Government's objectives of resettlement. The National Resettlement Policy (2001) states two objectives of resettlement: firstly, to enhance the welfare of the people through improvement of productivity; and secondly, to develop the destination areas where people are supposed to earn a living.

In view of the fact that with the acquisition of these holdings by the state, it is not only the freehold title but logically the allodial title that are vested in the state, the position of the Government in the reconstruction of adequate titles for the resettlement areas is the retention of the freehold and allodial titles and the granting of lesser titles to the settlers. Consequently, the tenure system in the resettlement areas is based on non-freehold where the Government provides long-term leases of 99 years to current holders and

41 See n 37 above.
42 *Nekwaya & Another v Nekwaya & Another* (A262/2008) 2010 NAHC 8.
43 In a report prepared for the Social Sciences Division, University of Namibia, entitled *A summary review of urban land policy issues and options* (1995), JW Howard states that the public's perception of the PTO is that of a second rate form of title given to the black population by the previous regime whilst retaining the best title, freehold, for whites. He argues that if a revised form of PTO is to be accepted, then it must be marketable, trusted by the target group until it gains popular acceptance.
44 *White Paper on National Land Policy.*
45 These projected forms of tenure are the starter title and the landhold title. From the perspective of the holder, landhold or freehold title would be the more appropriate titles to obtain in the place of a PTO.

future generations. The leasehold tenure system allows settlers to use a lease as collateral to secure a loan from lending institutions for agricultural production purposes. However, the reality of the actual situation on the ground is that resettlement areas cannot be used for collateral purposes for the following reasons:

(1) The state is the registered owner of the property.

(2) The ownership structure makes it difficult for the banks to repossess this land in the event of default in payment of loans.

(3) The leasehold of 99 years granted by the Government is not transferable or 'non-tradable'.

The land rights may be granted as individual, group or co-operative holdings.

2.4.4 Security of tenure in the informal areas

With the advent of independence, more Africans were absorbed into the public service and, to a lesser extent, into the private and commercial sectors. This has resulted in the influx of more affluent Africans into the urban centres. The character of black settlement in the urban centres has consequently become more heterogeneous and, with the right of private ownership guaranteed by article 16 of the Constitution, more black urban dwellers are able to acquire property in the form of freehold title. Although this phenomenon may have corrected to a certain degree the effects of past racial discrimination, urbanisation has its own inherent problems. It was estimated in 1995 that urban areas in Namibia were growing at a rate of 3.75 per cent per annum on average. The fastest growing towns, Walvis Bay, Katima Mulilo and Rundu, were estimated to be growing at a rate of approximately 6.5per cent. Windhoek, whose total population was 34.5 per cent of the entire urban population of Namibia, increased by 5.45 per cent from 1991 to 1995. It is estimated that in 1995 about 30 000 families lived in informal settlements in urban areas without security of tenure.[46] The 2001 National Housing and Population Census recorded that about 67 per cent, 1 226 718, of the Namibian population lived in rural areas with only 33 per cent, 603612 in urban areas. Out of the total 603 612 persons living in 31 urban localities, Windhoek accounted for 38.7 per cent with the remaining 61.3 per cent found in the remaining 30 urban localities recorded at that time. In 2006 the estimated population of Windhoek was 288 000 which was expected to increase to 355 000 in 2011, and to 437 000 in 2016. The population of the informal settlement was projected to reach 76 000 in 2006 and 119 000 in 2011.[47]

46 Christensen & Hojgaard (n 37 above).

47 Namibia Planning Commission-NPC (2003). *Population and housing census 2001: National Report – Basic analysis with highlights.* Windhoek: Central Bureau of Statistics. See also F Maanda *et al Where to now? Creating a sustainable community: Case of Windhoek.* Unpublished Conference Paper.

This growth means that there is not only need for more land for urban settlement, but also for security of tenure for people whose rights are not recognised by the existing system. Most of these residents are squatters on land belonging to individuals or local authorities.

One reason for the non-existence of a more secure tenure system for urban settlements in the former Bantustan areas was the deliberate policy of the colonial administration to deny these urban centres official recognition as municipalities. This would have led to the establishment of local authorities with the jurisdiction to grant freehold title after the satisfaction of infrastructural and surveying requirements.[48]

The first democratic government of Namibia reacted to this situation by establishing local authorities in these areas under the Local Authorities Act 23 of 1992. The formalisation of urban centres in terms of this statute involves, firstly, the proclamation of the area as an urban area under the jurisdiction of the relevant local authority. This step is then followed by the registration of the town in the name of the state or relevant local authority. The proclamation and subsequent registration enable the local authority to subdivide urban land into plots or erven. The occupants of such plots receive freehold title. In the formal areas, the intention is to sell existing erven to the relevant local authority, 'subject to the holders of Permissions to Occupy being given the first option on the plots they occupy at the sale date'.[49]

3 Summary and concluding remarks

The current land policies and land reform programmes in Namibia are based on a pedigree of land tenure systems and consequential titles that claim their legitimacy from constructs of colonial racist administrations that illegally dispossessed the indigenous people of Namibia of their ancestral rights to their land and, in the construction of new land tenure and land rights, deprived them of comprehensive titles to their land. The German occupation of the territory was followed by its declaration as a Protectorate and a Crown Colony. Thereafter, a series of statutes was used by the South African administration to classify the land into state land, private land and communal land. This classification was based on the native-settler dichotomy which made access to private land the exclusive right of white settlers. The communal lands were the creation of legislation which *inter alia* deprived the indigenous people of their allodial rights. Individual rights over communal

48 The *White Paper on urban land and the proclamation of local authorities* states that prior to independence many urban areas had developed but, because of the discriminatory policies of the colonial regime, they were never proclaimed as municipalities or townships in which the administration of local authorities could develop. The *White Paper on national land policy* requires the establishment and proclamation of urban and urbanising areas as townships and, where appropriate, as municipalities, to promote decentralisation of government and the close involvement of communities in their own administration.

49 As above.

land took the form of rights of usufruct or rights of use, with limited security of tenure. It follows that on the eve of Namibia's independence most private land was owned by whites. The majority of the indigenous people, with the exception of those few who held the so-called PTOs in the urban centres, held rights of usufruct or use over the communal lands.

For purposes of legal continuity and political expediency, the framers of the Namibian Independence Constitution condescended to recognise the pre-existing land titles. If the Namibian Independence Constitution is accepted and recognised as the Grundnorm that confers legitimacy on the pre-existing rights, then this approach glosses over certain fundamental questions relating to the validity of current titles and the policy of the Government relating to the right of the people of Namibia to their ancestral land.

CHAPTER 3

THE LEGAL CONCEPT OF A THING

1 Introduction

It was indicated earlier in Chapter 1 that the law of property deals with the relationship between the individual and the thing. A thing therefore can be regarded as constituting the centrality of the estate or patrimony of the individual or legal subject. A thing has often been defined in the context of rights and its characteristics. Van der Walt and Pienaar[1] for example, describe a thing as the legal object of a real right and is therefore, for the law of property, the most important legal object. The value of a thing lies in the fact that it is juridically destined to satisfy the needs of a legal subject. From this basic premise they proceed to define a thing in terms of its characteristics as a corporeal or tangible object, external to persons and which is an independent entity subject to juridical control by a legal subject to whom it is useful and of value.[2]

From the above definition the characteristics of a thing may be said to be its corporeality, its impersonal nature and therefore its existence external to man; its existence as an independent entity; its susceptibility to human control and its usefulness and value to a legal subject.

2 Corporeality

Both Roman and Roman-Dutch law draw a distinction between corporeal and incorporeal or tangible and intangible things and from this basic premise a thing is defined in terms of its corporeality. This definition notwithstanding, both corporeal and incorporeal things were regarded as things in the legal sense.[3] This is also the principle in current Namibian and South African

1 AJ van der Walt & GJ Pienaar *Introduction to the law of property 6th ed* (2009) 13.
2 As above.
3 DG Kleyn *et al Silberberg and Schoeman's the law of property 3rd ed* (1993) 9-15.

property jurisprudence. In Roman law, corporeal things were described as things which could be felt or touched or otherwise perceived by the ordinary senses, and incorporeal things refer to things which cannot be perceived by the five senses. Nowadays, however, the definition incorporates things which are capable of sensory perception and which do not occupy space. This definition includes natural forces such as gravity, heat, radioactivity, light, sound, and electricity, which do not occupy space. The position therefore is that the legal concept of a thing is given a wider definition to include any other subjective right, such as copyright, usufruct[4] and mortgage,[5] other than a corporeal thing, which serves as the object of a real right.[6]

3 Impersonal nature

The abolition and proscription of slavery under international norms and contemporary human rights jurisprudence, such as the principles embodied in article 4 of the Universal Declaration of Human Rights and the Namibian Constitution[7] underlie the principle that human beings cannot be the object of commerce and therefore are *res extra commercium*. This is consistent with this legal characterisation of a thing. Under this characterisation, things are seen as external to human beings and therefore of an impersonal nature. Thus generally speaking, a human being is a legal subject who can be the holder of a right with respect to some objects, but a human being, consisting of a body and its parts, can never be an object of a right.[8] This aspect entails that a human being does not constitute a thing in a legal sense and therefore, traditionally, human bodies and their parts are classified as *res extra commercium.* However, parts of the body of a living human being which can no longer be connected to a human being and a human corpse can be regarded as negotiable things. For example, it is not unusual to find legislation aimed at the promotion of medical health and science providing for the donation or offering for remuneration human reproductive organs. Namibia currently does not have a particular piece of legislation with such provision but under the National Health Act 61 of 2003 of South Africa,[9] human tissue, blood, products and gametes from living and deceased persons can be donated or given for remuneration.

4 Independence

The characteristic of independence implies that the thing must constitute an independent entity in law. In other words, the thing must be a separate and

4 *Ex parte Eloff* 1953 1 SA 617 (T).
5 Sec 81 of the Deeds Registries Act 47 of 1937.
6 AJ van der Walt & GJ Pienaar (n 1 above) 13-14.
7 Art 9(1) of the Namibian Constitution provides that no person shall be held in slavery or servitude.
8 Kleyn *et al* (n 3 above) 15-16.
9 The National Health Act 61 of 2003 repeals the Human Tissue Act 65 of 1983.

distinct entity that has an independent legal existence. Even though the definition of this characteristic includes physical independence, the existence of sectional ownership and communal ownership over an entity, for example, indicates that a more realistic approach is a holistic one incorporating juridical independence. One example is a sectional title. The Sectional Titles Act 66 of 1971 has introduced the concept of ownership in a section of a building as well as joint ownership in the land on which it stands. In the context of this characteristic the entire complex may have a distinct entity but each holder has a right to a separate unit, section or entity. Independent existence in the physical sense alone will not adequately describe this concept. Juridical independence can be considered as a more accurate description. Other examples which could be mentioned to illustrate this point are composite things such as cars and trees with branches and fruit. The components of these composite things lack individuality and therefore in law individuality or independence is accorded to the composite unit as opposed to the components.[10] Further examples are the atmospheric air, running water and gaseous substances which are not considered as property because they do not fulfill the requirement of independence or individuality. They, however, fulfill this requirement if they are juridically individualised in which case they become property.

In accordance with the maxim *superficies solo cedit* a building or a structure erected on land, even though it can physically be regarded as one unit, is juridically recognised as part of the immovable land.

5 Susceptibility to human control

This characteristic of a thing in a broader sense means that as an object of a legal right, the thing must be susceptible to legal sovereignty. This conversely means that objects over which a legal subject cannot exercise legal control cannot be classified as things. Some classic examples are the sun, the moon and aspects of nature such as the sea, water and free air. In Namibia ownership of water resources below and above the surface of the land belongs to the state and it is the responsibility of the state to ensure that water resources are managed and used to the benefit of all people.[11] However, objects such as the atmospheric or free air, water and gaseous substances can be classified as things susceptible to legal sovereignty if they are placed in containers, bottles and gas cylinders.

10 PJ Badenhorst *et al Silberberg & Schoeman's the law of property 5th ed* (2006) 20-21.
11 Art 100 of the Namibian Constitution and secs 4(a) and (b) of the Water Resources Management Act 24 of 2004.

6 Usefulness and value to human beings

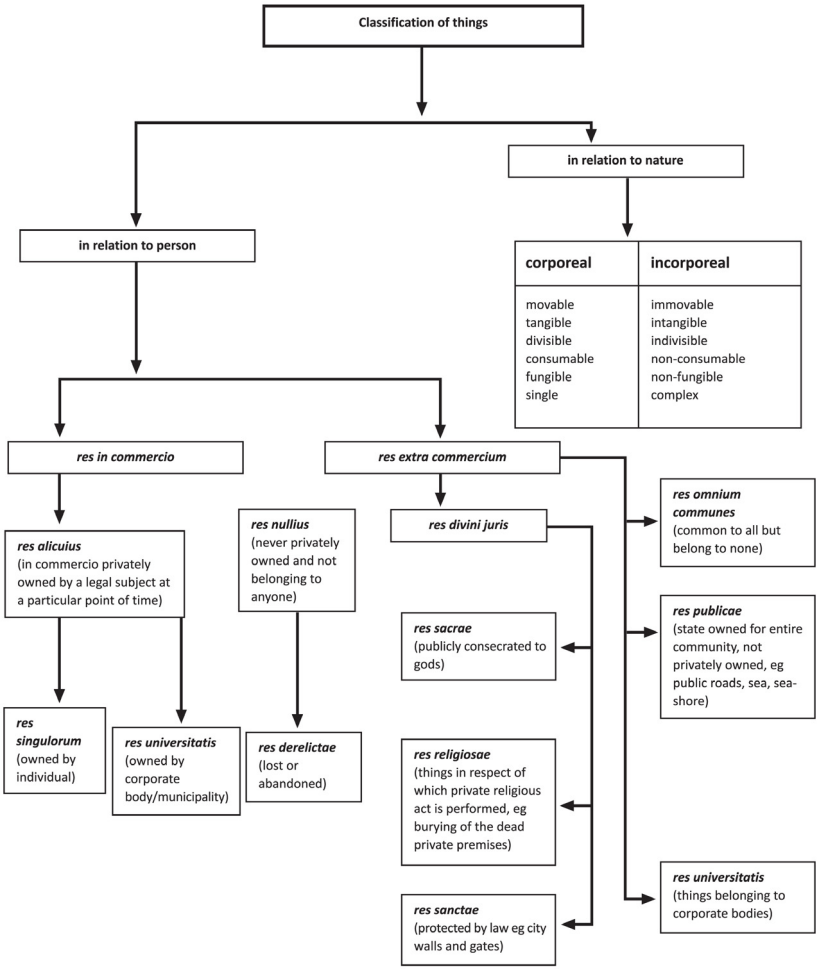
A thing must be useful and valuable to a legal subject. If it is not valuable and useful a legal relationship cannot be established between subject and object. The value may be economic or sentimental. The test to determine whether something is of value is an objective one.

7 Summary

A thing is commonly defined as a corporeal object which is external to man and which is an independent legal entity, susceptible to private ownership and of value to man. In order to qualify as a thing, a physical object must in law constitute an independent entity with a well-defined existence in space. Thus atmospheric air, the sea, running water and gaseous substances do not meet these requirements and are not things. However, such substances acquire individuality and become things as soon as they are placed in a container or compressed in a gas cylinder. Certain things, although to some extent used and enjoyed by humans, are not susceptible of appropriation by an individual. These are the so-called *res extra commercium* which, although outside commerce, may be freely used and enjoyed by members of the general public. Over and above these requirements it is also essential that, for a thing to qualify as a legal object of a real right, it must be of use and value to persons. When an individual is capable of exercising the right of *ius fruendi* or the right of *dominium*, the object is of use and value.

8 Classification of things

8.1 Diagram



8.2 Introduction

The above diagram is meant to assist the reader in following the classification of things.

A thing as a legal object may broadly be classified with regard to its relation to a person or with regard to its relation to nature.

8.3 Classification of a thing with regard to its relation to a person

In this classification a thing may be classified as *res in commercio*, things within the field of commercial dealings or things that are susceptible to private ownership, and *res extra commercium*, things not within the province of commercial dealings or things not susceptible to private ownership. In terms of its nature a thing may be classified as movable or immovable, consumable or non-consumable, divisible or non-divisible, fungible or non-fungible, single or composite, corporeal or incorporeal, tangible or intangible. We shall now proceed to explain the classification in more detail.

8.3.1 Res in commercio*: things within the province of commercial dealings*

Things are regarded as *res in commercio* if they are susceptible to private ownership or if they are things which can function as objects of private property rights. There are two categories of things that are regarded as *res in commercio*, namely *res alicuius* and *res nullius.*

8.3.2 Res alicuius*: things owned by a person*

Res alicuius are things that are owned by a person, a legal subject, and therefore are things *in commercio.* These are things that are privately owned by a legal subject, a natural or juristic person, at a particular point in time and may be divided into *res singulorum* and *res universitatis. Res singulorum* are things that are owned by individuals and *res universitatis* are things that belong to corporate bodies. *Res universitatis* include things which belong to corporate bodies such as a municipality and even the state as opposed to things that are privately owned or owned by individuals. The traditional common law examples are race courses, theatres, markets, city churches etc. However, today, some of these common law examples are subject to private ownership.

8.3.3 Res nullius*: things not owned by a person*

Res nullius consists of things which, although they are susceptible to private ownership, do not belong to anyone at a particular point in time and there are three categories:[12]

12 PJ Badenhorst *et al* (n 10 above) 32-33.

(a) Things *in commercio*, or things which are susceptible to private ownership but which have never been privately owned. Traditional examples are birds, wild animals, fish, etc. The principle is that before they are captured, before effective control is exercised over them, the state exercises control. For example, game in areas declared as conservancies or game reserves in terms of the Nature Conservation Ordinance 4 of 1975[13] is protected by the state. Ownership over such wild animals is acquired only after proper authority for hunting has been granted by the appropriate government ministry. The state, through the appropriate ministry, grants the licence for hunting through which ownership may be acquired. State control and protection do not mean state ownership and in this regard ownership is obtained through the method of original acquisition of ownership. This is one of the reasons why the acquisition of *res nullius* is classified under original acquisition as opposed to derivative acquisition.[14]

(b) The second category of *res nullius* relates to birds or wild animals which have regained their freedom from the one who acquired them.

(c) The third category comprises abandoned things or *res derelictae*. These are things which have been lost or are abandoned by the owner with the intention of giving up ownership. With regard to acquisition of right of ownership over *res derelictae* the person asserting ownership has to prove abandonment and intention to abandon or to relinquish ownership on the part of the owner.[15]

8.3.4 Res extra commercium*: things that cannot be privately owned*

Res extra commercium are things which cannot function as objects of private property rights or which cannot be privately owned. They include res *divini iuris* or religious things, *res omnium communes* or common things, *res publicae* or public things and *res universitatis* or things belonging to corporate bodies.

8.3.5 Res divini iuris*: religious things*

Under Roman law these were *res sacrae, res religiosae and res sanctae*.

Res sacrae were things that were consecrated to the gods and therefore sacred, for example temples, churches and sanctuaries for gods. *Res religiosae* were things that were recognised as sacred as a result of a private act, as opposed to consecration by a pontiff. Burial grounds on private premises could acquire such sacred status. *Res sanctae* were things protected by the laws and the imposition of sanctions, eg city walls and gates. This classification, however, is now obsolete.

13 Sec 24(a) of the Nature Conservation Ordinance 4 of 1975.
14 *R v Mafohla & Another* 1958 2 SA 373 (SR); *Dunn v Bowyer* 1926 NDP 516;*S v Frost, S v Noah* 1974 3 SA 466 (C).
15 *Minister van Landbou v Sonnendecker* 1979 2 SA 944 (A) 947.

8.3.6 Res omnium communes*: common things*

Voet and Grotius[16] define *res omnium communes* as things which by natural law are common to all people but belong to no one. This is a general rule but it is possible to acquire ownership of a specific portion of things of this nature if they are compressed or otherwise contained in, for instance, cylinders or bottles. When things classified as *res communes* are converted into a contained format, such as compressed air or gas in cylinders or water in bottles, they become *res in commercio*. At common law the air and the sea were regarded as common to all, and according to Voet running water was regarded as part of *res communes*. In Roman law any interference with a person's enjoyment of *res communes* could be visited with the *actio iniuriarum* but this action could only be instituted had the injured party suffered a violation of his or her right of personality in his or her attempt to protect the enjoyment of the *res communes* against a physical onslaught from the wrongdoer. As mentioned earlier, in Namibia ownership of water resources below and above the surface of the land belongs to the state and it is the responsibility of the state to ensure that water resources are managed and used for the benefit of all people.[17]

8.3.7 Res publicae

As was pointed out above, *res publicae* are things that belong to the entire civil community and are not intended for private ownership, and *res universitatis* are things that belong to corporate bodies and not individuals. However, nowadays it is possible for certain things, which were traditionally regarded as *res publicae* or *res universitatis,* to be held in private ownership. Note also that, as was mentioned in the course of the discussion of *res in commercio* above, it could be argued that even things that are generally classified as *res universitatis* could in certain circumstances also be recognised as privately owned things. The reason for this is that traditionally *res publicae* and *res universitatis* were dealt with under the broad or general rubric of *res extra commercium* but because of the changes effected to modern property law, today some things which were traditionally considered incapable of private ownership have now attained the quality to be held in such ownership.

8.4 Classification of a thing with regard to its relation to nature

Under this broad rubric things are classified as corporeal or incorporeal things.

16 *Inst* 2 1 1; *D* 1 8 2; Voet 1 8 3; Grotius 2 1 16.
17 Namibian Constitution (n 11 above).

8.4.1 Corporeal or incorporeal things

Traditionally, two basic criteria are used to distinguish corporeal from incorporeal things and these are whether they are tangible or intangible, and whether they can or cannot be perceived by the external senses. Tangible things are classified as corporeal and intangible things as incorporeal and things which can be perceived by external senses are classified as corporeal and *vice versa.*

Siberberg[18] argues that if perception by external senses is used as a criterion for classification then various gases that can be perceived by the external senses but which are intangible can be regarded as property. He adds that in modern South African/Namibian law a corporeal thing is considered to be an object which occupies space and is capable of sensory perception by any of the five senses. In the light of this he goes on to say that natural forces such as heat, sound and electricity are considered as incorporeal things because they do not occupy space.

Incorporeal things are things that cannot be classified as corporeal under the above criteria but in a form of rights they can function as objects of rights or limited real rights and therefore can be considered as property.

8.4.2 Movable or immovable things

Generally, the term 'immovable' refers to land and everything that is attached to land by natural or artificial means. A thing is movable if its condition is such that it can be removed from one place to another but having regard to its nature and position.

Note that there is no single decisive factor to determine whether an object is movable or immovable. For example, in terms of the concept of *inaedificatio*, fixtures or movable things can be attached to immovables by natural or artificial means in such a way that they lose their identity and become part of the immovable thing. Whether this has occurred is determined with reference to the degree of annexation, manner of attachment, nature of the movable thing and intention of the owner.

The difference between movable and immovable property is not only an academic issue. It is also relevant in practical situations. The following are some examples to illustrate this point. In regard to transfer of ownership, whether transfer of a thing is effected will depend on whether the thing is movable or immovable. Transfer of ownership in movable property is effected by delivery whereas in cases of immovable property it is effected by registration in terms of the provisions of the Deeds Registries Act. Of further relevance in this regard are the requirements of a valid contract of sale. In the

18 Kleyn *et al* (n 3 above) 30. See further PJ Badenhorst *et al* (n 10 above) 33-34.

case of immovable property, which involves the registration of the contract, there are formal requirements demanded by the Act. In the case of movables, on the other hand, there are no mandatory formal requirements. Under the Magistrates Court Act 32 of 1944, a judgment debtor's immovable property can be attached for execution only if the value of the movable property is not enough to discharge the debt or the judgment. In terms of the Namibian principles of private international law, the law applicable to immovable things is the *lex loci rei sitae*, the law of the place where the immovable property is situated, while the *lex loci domicilli*, the law of the place where the owner is domiciled applies to movables. The common law offence of arson can only be committed in respect of immovable property.

In the case of *Khan v Minister of Law and Order,*[19] the applicant had been dispossessed of his motor vehicle by a member of the South African Police. He brought an application in terms of section 31(1) of the Criminal Procedure Act 51 of 1977 (the Criminal Procedure Act) for the return of the vehicle. The applicant's supporting affidavit contained sufficient averments to render the initial seizure of the vehicle in terms of section 20, read with section 22, of the Criminal Procedure Act, unlawful. The vehicle, which had been registered as a built-up vehicle, consisted of a rear portion, including the interior, which could positively be identified as having been stolen; the engine and inner front portion, which could positively be identified as belonging to the applicant; and other components, some of which were probably from the same stolen vehicle as the rear portion of the car and others which had been obtained from a different source. It was contended by the applicant that the components and rear portion identified as having been stolen had acceded to the applicant's car and the applicant as owner was therefore entitled to possession of the car.

J du Plessis stated as follows:

> Where one movable is joined to another in such a manner as to form an entity, the owner of the principal thing becomes the owner also of the thing joined to it (die bysaak). Deciding which of the things is the principal thing ordinarily is a matter of pure and simple common sense.
>
> I agree with Van der Merwe and De Waal (op cit) (and see also Van der Merwe Sakereg 2nd ed at 230-1) that the principal things is that one that gives the ultimate things its character, form and function. Grotius Inleidinge 2.9.1 seems to apply a pure value test, although the word that he uses, namely 'waerdiger' might also carry the meaning of 'worthy' in the sense of that portion of the whole that really gives the whole its identity.
>
> (See Scheltinga's Dictata on De Groot.) Voet 41.1.14 merely says that the matter must be decided on what accedes to what or, put differently, on what is added for purposes of adorning the other. Huber RHR 2.6.2 gives various examples. Of these examples, one, the diamond added to the ring clearly indicates that he applies in essence the character, form and function test. In my view the

19 *Khan v Minister of Law and Order* 1991 3 SA 439 (T) 442.

> authorities show that the decision really is an application of common sense. One must view the thing that was ultimately formed, and decide what the identity of that thing is, and the component that gives the ultimate thing its identity will be the principal thing, while the other will have acceded to it. It is also in cases of doubt that the various guidelines, depending upon the facts of each case, need be used. Applying to the present facts the character, form and function test, I am of the view that the vehicle can be said to be a 1988 model, to which a 1985 engine modified to conform to a 1988 engine was added and to which small portions of a 1985 body were added.
>
> Under the circumstances the car cannot be said to be that of the applicant, because the stolen parts were added to his 1985 wreck. In my view it was the other way around and the car in character, identity, form and function is Rheeder's stolen 1988 model.

8.4.3 Divisible or indivisible things

Divisible things are things that are legally capable of being divided without losing their natural and functional integrity. The nature and function of each of the parts remain similar to those of the whole, so that the total value of the parts is not substantially less than the value of the whole.[20] The focus of this distinction is on legal divisibility rather than physical divisibility. This distinction is important for co-ownership. A plot of land, for example, can be divided into two or more parts without any substantial changes in its nature, function and value. It can therefore be classified as a divisible thing. Things such as a car, a chair, a bicycle, a painting, however, cannot be divided without changing their value and function and therefore can be classified as indivisible things.

8.4.4 Consumable or non-consumable things

Consumables are objects that are used up or destroyed by use or have their substance changed by use. Typical examples are food, drinks and oil. Non-consumable things, such as land, houses and paintings, are objects which are not substantially changed or reduced through their use.

8.4.5 Fungible or non-fungible things

Fungibles are things that are weighed, measured or counted out and for this reason they are usually not individually determined. Examples of fungibles are textile materials, coal and milk. In contracts of purchase and sale, where the price is expressed at a certain amount per measure (*ad mensuram),* the risk in the thing (merx) sold does not pass to the purchaser until it has been set aside, or appropriated for him or her. Non-fungibles are things that have been individually determined and have distinctive individual qualities that

20 H Mostert *et al The principles of the law of property in South Africa* (2010) 38.

make them different. Examples of non-fungibles are paintings and other works of art.-

8.4.6 Single or complex (composite) things

Single things may be corporeal, movable or immovable objects, such as books, plots, stones, pieces of metal and organic matter that, according to lay rather than scientific perceptions, form an entity.[21] Certain objects have a commercial value only when dealt with in quantities, such as grains of corn, salt, or sand, or bees. The particular quantity of the object is also considered to be a single thing.[22]

Complex or composite things consist of totalities or generic objects that have lost their individuality on being united organically into a single entity and that cannot be separated from the composite thing without destruction or alteration of their substance of the composite thing. Examples are a house, a motor vehicle, a ship and a potted plant. The various components comprising the entity, for instance, the engine, the chassis, the tyres, can exist independently but have no separate identity while the union lasts.[23]

9 Summary and concluding remarks

Traditionally, things have been classified with reference to their relation to man and in relation to the nature of the thing itself. Under this broad categorisation, things have been classified with respect to their susceptibility to private ownership. Hence, things have been classified on the one hand as either *res in commercio* or *res extra commercium* and on the other hand as corporeal or incorporeal, and movable or immovable. The various categories of things emanating from these broad categorisations have relevant applications in terms of the law and therefore cannot be regarded as serving only academic purposes. Some of these classifications are however, obsolete.

21 F du Bois *Wille's principles of South African law 9th ed* (2007) 420.
22 As above.
23 As above.

CHAPTER 4

PROPERTY RIGHTS, REAL RIGHTS AND PERSONAL RIGHTS

1 Introduction

As stated earlier, the property rights of a person or a legal subject include rights in both corporeal and incorporeal things and rights deriving from the performance of an obligation by another person. The distinction between corporeal and incorporeal things has already been dealt with in Chapter 3 (paragraph 8.4.1) with regard to the various categories of rights that constitute the property rights of a person. Hosten,[1] with reference to the various legal objects to which a legal subject might have a right, classifies rights into four broad categories, namely, real rights, personality rights, personal rights and immaterial or industrial property rights. In this context he defines a real right as the right that vests in the holder an immediate control or right over corporeal or material things; examples of real rights are ownership, servitude and pledge. A real right may also be defined as a claim of a legal subject to a thing as against other persons.[2] A personality right may be defined as the right that a person has to certain aspects of his or her personality, for example, his or her body or reputation, and also the right to privacy. If the object of a right is a performance or action by another person, this right or claim is classified as a personal right. This may arise, for example, from a contractual obligation or a delict. The last category of rights is referred to as immaterial, incorporeal or industrial property rights. These are rights that a person may have over his intellectual property, such as copyright, patent and trade mark.

The above represents a brief explanation of the various categories of property rights. For present purposes, it is only necessary to point out that although these various categories of property rights exist in Namibian law, the methods of acquisition, control and protection are different. In this regard, a clear understanding of the difference between a real and a personal

1 WJ Hosten *et al Introduction to South African law and legal theory 2nd ed* (1997) 544.
2 PJ Badenhorst *et al Silberberg and Schoeman's the law of property 5th ed* (2006) 47.

right is essential, especially in view of the provisions of section 63(1) of the Deeds Registries Act.

The following examples illustrate that the determination of whether the right derived from a particular legal relationship is a personal right or a real right will affect the formalities to be complied with, the protection of the rights, and the applicable law.

The purchase of a house involves the transfer of a real right, namely ownership in immovable property. Transfer of ownership in immovable property resulting in the alienation of that property is effected by registration. The relevant areas of the law in terms of which immovable property is transferred are the law of property, conveyancing and contract. Section 63(1) of the Deeds Registries Act provides for the registration of real rights and limited real rights. A deed or a condition in a deed, purporting to create or embodying any personal right, as a matter of principle, shall not be capable of registration. However, a deed containing such a condition may be registered if, in the opinion of the registrar, such condition is complementary or otherwise ancillary to a registrable condition or right contained or conferred in such deed.

The creation of a servitude vests in the holder of the servitude a limited real right. In terms of section 63(1) of the Deeds of Registries Act, as stated earlier, this right is capable of registration and the formalities regulating the process of registration are governed by the rules of conveyancing. The registration of the servitude attracts certain consequences which determine: the legal relationships between the owner of the property and holder of the right of servitude; between the said owner and third parties; and between the owner and any successor in title. The principles governing these relationships are not only covered by the law of contract but also the law of property.

The principles governing the purchase of a car, for example, involve the interplay of the law of purchase and sale and the law of property. The conclusion of the contract confers certain rights and obligations on the parties. The seller has the obligation to deliver a thing, and the corresponding right to receive payment. These rights and obligations are enforceable at the instance of the parties themselves and therefore constitute creditors' rights, falling under the larger category of subjective rights[3] known as personal rights, and are generally governed by the law of contract and specifically under the law of purchase and sale. Delivery constitutes the transfer of the real right of ownership from the seller to the purchaser by which the

3 A subjective right may be defined as a legally recognised and valid claim by a subject to a certain object. When a legal subject acquires a right in a thing or object as a result of a lawful real relationship with the thing, the right is a subjective right. There are four categories of subjective rights, each distinguishable from the others by the nature of the object attaching to the right. These are real rights, personal rights, personality rights and immaterial property rights.

obligation of the seller to effect such transfer is satisfied. Upon transfer of the thing the purchaser becomes the owner of the thing. The principles relating to the right of ownership are governed by the law of property.

2 Categories of real rights

A real right is a subjective right to a material (or immaterial) thing, such as book, a table, a motor car, a cow, a dog, a house, a farm, et cetera. The holder of a real right is entitled to exercise immediate control over the material thing (the object of the right). A real right, like any other subjective right, is enforceable against the whole world; everybody must respect it. The following are examples of real rights: ownership, servitude~~s~~, pledge, mortgage, right of trekpath, right of outspan, lease of land, statutory leasehold, mineral rights and sectional title unit.

2.1 Ownership

Ownership is the most complete real right in the sense that the holder of such right, the owner, in principle, has the widest powers in respect of a thing but it must be borne in mind that ownership may sometimes be limited by another (limited) real right, such as usufruct held by a person who is not the owner of the thing.

If Joseph grants his neighbour, Andrew, the right to use a road over Joseph's farm, Andrew acquires the right to a certain limited use of Joseph's property, while Joseph's ownership remains intact although it is diminished temporarily by the existence of a servitude. Joseph's right of ownership is diminished in the sense that he can no longer exclude Andrew from using the road as determined by the servitude.

The important point is that a limited real right empowers the holder of such right to use and enjoy property belonging to someone else, thereby causing the diminution of the owner's entitlements of use and enjoyment. Long term leases and mineral rights are registered as immovable incorporeal property. It is sometimes difficult to decide whether rights which were created in a contract or a will and which pertain to corporeal things are limited real rights or creditors' rights (personal rights).

The Deeds of Registries Act governs the registration of deeds pertaining to rights in immovable property. According to section 63(1) of the Act only rights in immovable property may be registered. Therefore, if it is a creditor's right, it may not be registered. Real rights are registrable in the Deeds Registry because they pertain to rights and obligations over legal objects or *res in commercio* and need to be documented. In the case of personal rights, the necessity for registration may not be as imperative as in the case of real rights because they pertain to legal actions or legal relationships between

legal subjects. The following are examples of rights that have been recognised as limited real rights.

2.2 Servitudes

A servitude is a limited real right over the property of another. The holder of the servitude has certain powers of use and enjoyment over the property, or the power to prevent its owner from exercising one or more of the powers of an owner.[4]

A servitude is an *ius in re aliena*; it diminishes the owner's *dominium* in a thing.

One must distinguish between personal and praedial servitudes.

A personal servitude can exist over land (immovable property) or over movable property in favour of a particular person (*res servit personae).* That person is the holder of the servitude. The servitude vests in such holder in his or her personal capacity and cannot be alienated.

A personal servitude normally ceases to exist, at the latest, on the death, in the case of a natural person, of the holder of the servitude. It is important to note that although this servitude is known as a personal servitude, it is not a personal right but a real right, because the object of this real right (the servitude) is a thing and not a performance, as in the case of a personal right. The expression 'personal' servitude denotes that the right vests in a person in his or her personal capacity, unlike a praedial servitude where the right also vests in a person but in his or her capacity as owner of the dominant tenement. A servitude may be personal but it is still a burden upon the land, and may be enforced against any and every possessor of the land.[5]

Usufruct is a classic example of a personal servitude.

A praedial servitude, also known as a real servitude, is a burden on land (the servient tenement) in favour of another piece of land (the dominant tenement). It can only exist over land and cannot be transferred and be separated from the land to which it is attached.[6] The owner of the dominant tenement is the holder of the servitude. If ownership of the dominant tenement is transferred to a new owner, the new owner becomes the holder of the servitude. The servitude is incidental to and passes with the ownership of the dominant land to which it is inseparably attached, while it burdens the

4 *Lorentz v Melle & Others* 1978 3 SA 1044 (T).
5 See also AF Maasdorp & CG Hall *Maasdorp's Institutes of Cape Law,* book 2, ch 16, para 5.
6 *Webb v Beaver Investments (Pty) Ltd & Another* 1954 1 SA 13 (T) 25.

servient land irrespective of who the owner is.[7] In this case *res servit rei* is created. The servitude exists as long as the land exists.

The distinctive feature of a praedial servitude is that it burdens the land to which it relates and that it provides some permanent advantage to the dominant land as distinct from serving the personal benefit of the owner thereof.[8] The usual manner of establishing a praedial servitude is by agreement in the form of a notarial deed between the owners of the two tenements, followed by its registration against the title deed of the servient land. It is an *ius in re aliena* and, for the sake of clarity, it could also be registered against the title deed of the dominant land.[9] The mere fact of registration of a notarial deed does not, however, create any rights of a servitudal character.[10] It may be that only personal rights are created and that registration should not have taken place.

There are various types of praedial servitudes and among these are various servitudes of way, namely servitude of foot-path, right of trekroad, which grants a right to drive cattle over the land of another, and a general right of way. In Namibia, on account of ecological conditions, there is a scarcity of grazing land and water. Consequently, cattle owners and farmers enter into various types of agreements granting grazing and water rights over the servient tenement. These include a servitude of grazing, a servitude pertaining to water and a servitude of outspan. A servitude of outspan is a servitude whereby the owner of the dominant tenement has a right to graze and give water to his cattle on the servient tenement.

2.3 Pledge

A pledge is a limited real right which a debtor creates in favour of a creditor over movable property to secure the repayment of a debt. It is a security over property and creates limitations on the right of ownership and therefore is a limited real right. If the debtor fails to fulfill his or her obligation to the creditor, the creditor has the legal right to sell the pledged property in execution. In the event of the debtor's insolvency, the creditor enjoys the preference on the proceeds of the pledged property.

2.4 Mortgage

A mortgage is a real right in respect of the immovable property of another, securing a principal obligation between a creditor and a debtor. This real right

7 HR Hahlo & E Kahn *The Union of South Africa; The development of its laws and constitution* (1960) 601.
8 Hahlo & Khan (n 7 above) 602.
9 *Van Vuren & Others v Registrar of Deeds* 1907 TS 289 and 295; CG Hall & EA Kellaway *Servitudes 3rd ed* (1973)27.
10 *Hollins v Registrar of Deeds* 1904 TS 603 607; *Schwedhelm v Hauman* 1947 1 SA 127 (E) 136; *Van der Merwe v Wiese* 1948 4 SA 8 (C) 26.

is created by registration in the deeds registries pursuant to an agreement between the parties.[11] The agreement is normally known as the mortgage bond which contains the rights and liabilities of the mortgagee and the mortgagor. As indicated in the Namibian case of *Namib Building Society v Du Plessis*[12] a mortgagee should in principle be entitled to realise the property over which a mortgage bond was registered for the very purpose of securing the debt on which he or she sued. Such a mortgagee has advanced money on the understanding that he would have a preferential claim on the proceeds of the mortgaged property.

2.5 Lease

Letting and hiring (*conductio* or *huur en verhuring*) is a contract whereby one person (the lessor) agrees to give another (the lessee) the use of a thing, or his own services or those of another human being or of an animal, and the lessee agrees to pay the lessor an amount of money (the rent) in return.[13] A contract of this nature is termed a lease.[14] In terms of a contract of lease pertaining to property, the lessor's right of ownership is limited to the extent that the lessee acquires a limited real right to the lessor's property which allows him or her (the lessee) the temporary use and enjoyment of the property in return for payment of rent.[15] In Namibia, leases are governed by common law and the provisions of the Formalities in Respect of Leases of Land Act 18 of 1969.

2.6 Statutory leasehold

Statutory leasehold is a right of leasehold over state land granted in terms of statutory provisions, normally for a period of 99 years. In Namibia, for example, under the provisions of the Communal Land Reform Act 5 of 2002, rights of leasehold for 99 years have been provided for and can be granted over communal land.[16]

2.7 Mineral rights

In Namibia mineral rights are governed by the provisions of article 100 of the Namibian Constitution and the Minerals (Prospecting and Mining) Act 33 of 1992. As a consequence of the rights of sovereignty created by article 100 of the Namibian Constitution ownership of natural resources vests in the

11 *Roodepoort United Main Reef GM Co Ltd (In Liquidation) & Another v Du Toit NO* 1928 AD 66.
12 1990 NR 161 (HC).
13 *De Jager v Sisana* 1930 AD 71.
14 F du Bois *Wille's principles of South African law 9th ed* (2007) 907.
15 WE Cooper *Landlord and tenant* (1994) 2. PJ Badenhorst *et al* (n 2 above) 427.
16 See sec 19 and 34 of the Communal Land Reform Act 5 of 2002

state.[17] In terms of section 2 of the Minerals (Prospecting and Mining) Act any right in relation to the reconnaissance, prospecting, mining, sale, disposal and the exercise of control over any mineral or group of minerals vests in the state, regardless of any right of ownership that a person may have over any land.

Strydom ACJ in the case of *Namibia Grape Growers and Exporters Association & Others v Ministry of Mines and Energy & Others*[18] confirmed that article 100 of the Constitution vests mineral rights in the state, in so far as they are not privately owned. In regard to Namibia, mineral rights have vested in the state ever since Colonial times.[19]

2.8 Sectional title unit real right

Sectional title unit real right was introduced by the Sectional Titles Act 66 of 1971, which was repealed and replaced by the Sectional Titles Act 95 of 1986. The Act introduced into South Africa a new concept of ownership which may be obtained in respect of parts of buildings (so-called sectional title units). The Sectional Titles Act 66 of 1971 applies in Namibia but Act 95 of 1986 was not applicable to South-West Africa (Namibia). Namibia has promulgated a new sectional titles act, the Sectional Titles Act 2 of 2009, which will replace the South African act, the Sectional Titles Act 66 of 1971, when it comes into force.

Sectional title entails a *res* or thing, namely a unit, which comprises a section of a building and a share in common property. It therefore provides for both sole ownership and joint ownership.

A person acquiring sectional title ownership acquires ownership of a unit, which comprises a section together with an undivided share in the common property, being the land on which the building is situated as well as the rest of the building which is not included in any sectional unit, such as stairs, lifts, playrooms, swimming pools, et cetera.

3 Registration of real rights

As stated earlier, under section 63(1) of the Deeds Registries Act, only real rights can be registered. The section provides that no deed or condition in a deed purporting to create or embodying any personal right, and no condition

17 Art 100 of the Namibian Constitution provides that land, water and natural resources below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia shall belong to the state if they are not otherwise lawfully owned.

18 2004 NR 194 (SC).

19 See the Imperial Mining Ordinances for German South-West Africa, 8 August 1905; and Proc 21 of 1919; Proc 4 of 1940; Ord 26 of 1954; Ord 20 of 1968; and presently the Minerals (Prospecting and Mining) Act 33 of 1992.

which does not restrict the exercising of any right of ownership in respect of immovable property, shall be capable of registration. There is a proviso that permits the registrar to register a personal right if such right is complementary or ancillary to a registrable condition, specifically a real right or a limited real right.

3.1 The classical and personalist theories

There are two theories that have been propounded to explain the differences between personal rights and real rights: the classical theory and the personalist theory**.**

3.1.1 The classical theory

According to the classical theory rights may be classified in accordance with the differing nature of their objects. In terms of this classification the object of a real right is a thing. The thing itself is bound to the holder of the right. A real right consequently establishes a *direct* legal connection between a person and a thing, the holder of the right being entitled to control that thing within the limits of his rights 'zonder noodigh opzicht op een ander mensch', particularly 'without necessary relation to another man'. In terms of a personal right, on the other hand, a person becomes bound to the holder of the right to render a particular performance, specifically to do or not to do something, the performance itself being the object of the right. It never establishes a direct legal connection between its holder and the thing, if any, in respect of which a performance has to be rendered.[20]

3.1.2 The personalist theory

The personalist theory, on the other hand, distinguishes between real rights and personal rights with regard to the persons against whom the respective rights are enforceable. The holder of a real right has a right to a thing which, as a general rule, is enforceable against all other persons, particularly against any person who seeks to deal with the thing to which a real right relates in any manner which is inconsistent with the exercise of the holder's power to control it, and in so far as a person may have a limited real right to another person's thing, that limited real right is also enforceable against the owner of the thing. Real rights, therefore, belong to the category of rights known as absolute rights.

In contradistinction to the absoluteness of a real right, a personal right is usually said to be enforceable only against a particular person or association of individuals on the basis of a special legal relationship, such as a contract,

20 PJ Badenhorst *et al* (n 2 above) 50-51.

the commission of a delict or some other good or sufficient cause. Consequently, personal rights are often referred to as being relative rights. The protection granted to the holder of a real right in respect of his interests in the thing which is the *object* of his right is consequently compared with the protection granted to the holder of a personal right in respect of his or her interests in a thing in connection with which a *performance*, for example, delivery has to be rendered, the *performance* and not the *thing* itself, being the object of the right.

3.2 Evaluation of the theories

As theories, the classical and personalist theories do not provide answers to all questions relating to the distinction between personal rights and real rights. As indicated by AJ van der Walt & GJ Pienaar,[21] generally speaking, neither the classical nor the personalist theory has provided a simple and consistent solution to the practical problems presented by the distinction between real and creditor's (personal) rights. In many cases the failure of these theories can be attributed to misunderstandings and inconsistent applications of the theories but it is also true that both socio-economic circumstances and the understanding of rights in general have changed considerably since these theories were originally formulated. A number of alternative theoretical approaches have been suggested recently, but none of them succeeded entirely.

With regard to the classical theory, Silberberg and Schoeman[22] express the criticism that the theory ignores the fact that real rights also constitute legal relationships between legal subjects mutually, and on the other hand, that certain personal rights (such as a lease of a movable thing) also, to some extent, affect control over a thing.

3.3 Criteria or requirements developed by the courts to determine the capability of a right to be registered

In addition to the two theories to illustrate the distinction between real rights and personal rights (or creditor's rights), given above, the courts have developed their own approach to this problem. The following criteria or requirements were laid down in the case of *Cape Explosive Works Ltd & Another v Denel (Pty) Ltd & Others.*[23]

> The intention of the person who creates the real right must be to bind, not only the present owner of the land, but also his successors in title; and

21 AJ van der Walt & GJ Pienaar *Introduction to the law of property 6th ed* (2009) 29.
22 DG Kleyn *et al Silberberg and Schoeman's the law of property 3rd ed* (1993) 43.
23 2001 3 SA 569 at 578.

> The nature of the right or condition must be such that registration of it results in a 'subtraction from the *dominium*' of the land against which it is registered.

3.3.1 The intention of the parties

This test was laid down by Nestadt J in the case of *Lorentz v Melle & Others*[24] as follows:

> Whether a contractual right amounts in any given case to a servitude – whether it is real or only personal – depends upon the intention of the parties to be gathered from the terms of the contract construed in the light of the relevant circumstances. In case of doubt, the presumption will always be against a servitude: the onus is upon the person affirming the existence of one to prove it.

In *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd*[25] Innes CJ said:

> I would add that I do not read the passage and authorities quoted as meaning that the parties' intention (as gathered from the terms of the contract) is the sole criterion in deciding the issue. If a contractual right is of such a nature that it is incapable of constituting a servitude, then obviously the intention of the parties (as expressed) to do so, is irrelevant.

This was reiterated by Streicher JA in *Cape Explosive Works* [26] who stated that the intention with which transfer was given and received was required for the transfer of the property subject to the conditions creating the rights in question.

There is the necessity to interpret the will or the contract in question to determine the intention of the party or parties who created the right.[27] Apart from its subjectivity, intention of the parties is not the sole criterion in determining whether a term of a contract creates a real or personal right.

From the *Ex parte Geldenhuys*[28] decision it may be inferred that such an intention cannot override principles of law. Regardless of the intention, it is impossible to create a real right if the right in question clearly places the obligation upon the debtor in his or her personal capacity. However, wherever possible, the intention of the parties is an important clue which might help the court in deciding whether the obligation was supposed to be real or personal.

24 n 4 above, 1050.
25 1918 AD 1 16. See also *Hotel De Aar v Jonordan Investment (Edms) Bpk & Others* 1972 2 SA 400 (A) 406 and *Elelor (Pty) Ltd v Champagne Castle Hotel (Pty) Ltd & Another* 1972 3 SA 684 (N) 689-690.
26 n 23 above.
27 See also *Hollins v Registrar of Deeds* (n 10 above); *Chiloane v Maduenyane* 1980 4 SA 19 (W).
28 1926 OPD 155.

3.3.2 The subtraction from the dominium *test*

3.3.2.1 The formulation of the test in *Ex parte Geldenhuys*

The subtraction from the *dominium* test was formulated in – *Ex parte Geldenhuys.*[29] In the process of this formulation, the court had to consider the following issues:

(1) the effect a condition that creates a servitude has on the right of *dominium*;

(2) whether the obligation to pay money to someone constitutes a real right or a personal right; and

(3) whether the mere intention to create a real right satisfies the criterion necessary to create such a right.

In this case, by the mutual will of Adriaan Geldenhuys and his wife, certain land was bequeathed to their children in equal shares subject to the usufruct of the surviving testator or testatrix. The will further provided that as soon as the first child reached his or her majority the survivor of the testators would be bound to divide the said land in equal portions and distribute it among the children, such distribution to be made by the survivor and the major child concerned by drawing lots, and that the child who by such lot obtained the portion comprising the homestead of the farm should, within a specified period of time, pay the sum of £200 to the other children. The testatrix died in 1923 and the applicant, who was the surviving testator and the executor of the estate of the deceased testatrix, asked the court for an order instructing the Registrar of Deeds to register the said land in undivided shares in the names of the children, subject to the conditions of the mutual will. The Registrar of Deeds had no objection to a mere transfer of the farm to the children in undivided shares but he objected to the registration against the title deed of the conditions pertaining to the subdivision, the drawing of lots and the payment of £200. The grounds of his objection were, firstly, that the said conditions merely created 'personal rights', and, secondly, that the conditions, even if registered, would only be binding on the legatee, and not on any transferees to whom the legatees might transfer their undivided shares.

3.3.2.2 The formulation of the test in the context of servitudes or usufructs

In his judgment, De Villiers JP in confirming the subtraction from the *dominium* test as a criterion to draw the distinction between personal rights and real rights, referred to the statement of Innes CJ in *Hollins v Registrar of Deeds*[30] that only real rights may be registered against the title deed of land, specifically rights constituting a burden upon the servient land and are a

29 As above.
30 n 10 above.

deduction from the *dominium,* and that that statement represents the correct position of the law in regard to registrable rights. In arriving at this conclusion, the court had to consider the nature of a usufruct to determine its registrability and noted that a usufruct is a personal servitude, but it is also a burden upon the land and it 'may be enforced against any and every possessor of land'.[31] Some servitudes are personal because they are constituted in favour of a particular individual without reference to his being the owner of any particular land. Other servitudes are praedial because they are constituted in favour of a particular piece of land but all servitudes are real rights and burdens upon the land which is subject to them. Consequently, as a general principle, a usufruct can be registered against the title deed except in certain exceptional cases. Generally speaking, therefore, any validly constituted usufruct could be registered against the land, just as any other real right in land may be so registered. Servitudes which are said to be constituting personal rights may not be registered, because the rights are merely binding on the present owner of the land and do not bind the land itself, and thus do not constitute *iura in re aliena* over the land, and do not bind the successors in title of the present owner. These are the personal rights which are not registrable.[32] The determining criterion is for one not to look so much at the right but to the correlative obligation. If that obligation is a burden upon the land, a subtraction from the *dominium*, the corresponding right is real and registrable; if it is not such an obligation but merely an obligation binding on some or other person, the corresponding right is a personal right, or right *in personam,* and it cannot as a rule be registered.

3.3.2.3 Application of the test to determine registrability of conditions in the will

Applying that distinction in the case, the court pointed out that each of the legatees, while being an owner of an undivided share of the land, was subject to certain conditions or obligations. With regard to the first condition that the land be subdivided into defined portions to take place at a specified time, specifically as soon as the eldest surviving child reaches his or her majority, and in a certain manner, that is by means of a drawing of lots, which is to be performed by the surviving testator and such major child, the court held that the limitations formed a real burden, an *ius in re,*on each undivided share and not merely an obligation on the person of each child and consequently that the condition was registrable against the title deeds of the undivided shares. This conclusion was based on the consideration that those limitations as to time and mode of subdivision so directly affected and adhered to the ownership that they had to be regarded as forming a real burden or encumbrance on that ownership. This reasoning was based on the common law principles of co-ownership. By the common law, each owner of an

31 See also Maasdorp (n 5 above).
32 The *Hollins* case (n 10 above) and the case of *Kotze v Civil Commissioner of Namaqualand* (17 CSC 37).

undivided share has the right to claim a subdivision at any time, and can claim that it be effected either by agreement or by the court. The will, therefore, modified the common law right of ownership (or *dominium*) held by an owner of an undivided share. That this can validly be done by a will, and presumably also by agreement *inter vivos*, is clear in principle, because the rights in an undivided share are not sacrosanct or unalterable any more than the rights in a defined share are. Portions of the *dominium* of an owner of an undivided share can be parted with as undoubtedly as portions of the *dominium* of an owner of a defined share can be parted with. This position is supported by *Grotius*,[33] who states that an owner of an undivided share can by will be deprived for a specified time of his right to claim a partition. The rights of a joint owner in regard to partition can therefore be validly limited, by last will at any rate, and the limitations now under discussion, strictly speaking,as to the time of partition and as to the drawing of lots, are therefore valid. This position is also supported by the case of *Ex parte Mulder*[34] where the court ordered that land should be transferred to certain legatees in undivided shares subject to the condition imposed by the will; that upon partition a certain one of those legatees should receive the homestead and certain land round it.

3.3.2.4 Obligation to pay money to someone else and registrability of personal rights intimately connected to real rights

The court, in *Geldenhuys* then proceeded to determine the registrability of the other condition that, upon partition in the manner stipulated in the will, the child who got the homestead should pay £200 to the remaining children within five years after reaching majority. In order to make this determination the court had to consider whether the condition (or obligation) to pay the money constituted an i*us in personam* or an *ius in re* forming a burden on the undivided shares. The court held that it was an *ius in personam* and said:

> [F]or the obligation to pay money cannot easily be held to form a *jus in re*, unless it takes the form of a duly constituted hypothec; moreover the obligation is altogether uncertain and conditional, for it is impossible to foretell what the drawing of lots will decide. This direction of the will therefore does not constitute a real right and is not *per se* registrable. And yet it is intimately connected with a direction which is registrable, as already decided. If the direction as to the time of the partition and the drawing of lots were registered, without the direction as to the payment of the £200, the result would be an incorrect representation, and an imperfect picture of the testamentary direction, which would be most misleading to strangers who may purchase undivided shares from the children before the partition takes place. It seems to me therefore that in the special circumstances of the case the difficulty can only be solved by registering the entire clause of the will.[35]

33 *Grotius 3.28.6,* AF Maasdorp and CG Hall *Maasdorp's Institutes of Cape Law,* bk2, ch 14.
34 4 *Prentice-Hall* G 3.
35 n 28 above, 165-166.

However, as stated by RamsbottomJA in the case of *Nel NOv Commissioner for Inland Revenue*[36] an *ius in personam* if registered, on the principle applied in the *Geldenhuys*[37] case, would not convert into an *ius in re*. Innes CJ had earlier stated in the case of *British South Africa Company v Bulawayo Municipality*[38] that an *ius in personam* does not become an *ius in re* because it is erroneously placed upon the register.

This decision by the court concerning the right of payment of a sum of money has been interpreted to mean that the right to a one-off payment of money which affects a person personally and not in his capacity as owner of the land in question can never be a real right. However, subsequent cases where the issue of the obligation to pay money was considered in order to determine whether such an obligation constituted a real right or a personal right – a determination which had to be made in order to make a finding as to its registrability – involved other aspects of such conditions, namely whether other rights to receive payment of money, which are not one-off payments but periodic payments, and rights to either one-off or periodic payments, that rest upon persons in their capacity as owners of the land in question and not on them personally, are real rights or personal rights. For example in the *Nel* case[39] Ramsbottom JA had to decide whether a burden, imposing an obligation to pay money, that will bind successors in title, either for a definite or ascertainable time or in perpetuity, can in South African law be imposed upon land and registered against the title.

This question was addressed in several later cases, three of which are discussed below.

***Lorentz v Melle and Others*[40]**

This case was an appeal from the grant by a single judge, sitting in the Transvaal Provincial Division, of certain declaratory orders in favour of the first respondent, Melle. During 1905, Johannes Gerard van Boeschoten, the father of Melle, and one Herincus Lorentz, the father of Lorentz (the appellant), were about to acquire in co-ownership certain immovable property situate in the district of Pretoria and being the remaining portion of the middle portion of the farm Zwartkop. Prior to the registration of the farm in their names, they, on 7 April 1905, executed a notarial deed. In terms of this deed the parties recorded that they had agreed to a division of a portion of the property to be acquired so that Van Boeschoten would receive transfer of portion 'B' of the middle portion of the farm, whilst Lorentz would receive transfer of the contiguous portion 'A' of the farm.

36 1960 1 SA 227 (A).
37 As above.
38 1919 AD 84 93.
39 n 37 above, 232.
40 n 4 above.

The remainder of the ground was to remain their joint property. In terms of the deed Van Boeschoten and 'his heirs, executors and assigns' would have certain other rights over portion 'A'. The deed further provided that 'if Lorentz lays out a township on his portion, Van Boeschoten shall have one-half of the net profits arising from the sale of such township payable from time to time as each lot or erf is sold, but Van Boeschoten shall not be entitled to any share in such profits until Lorentz shall have reimbursed himself for all expenses of such township out of the proceeds of stands sold …'. The deed provided for similar rights in favour of Lorentz over the portion registered in Van Boeschoten`s name. The notarial deed was registered simultaneously with the title deed and therefore also registered against the title deeds. The provisions of the notarial deeds remained registered against the title deeds of the owners of certain of the subdivisions of Van Boeschoten's and Lorentz's portions, including the subdivisions registered in the names of appellants and respondents. First respondent Melle was one of Van Boeschoten's successors' in title and intended to sell her portion to a company for the purposes of establishing a township thereon. She wanted to ensure that the purchaser would not be obliged to pay more than half of the profits which might accrue from the establishment of a township. She applied for an order declaring, *inter alia*, that the rights created by the township clause created personal rights to Van Boeschoten and Lorentz which could only be transferred to their 'heirs, executors, administrators and assigns'. The rights accordingly had no real effect in the sense that they could also bind later purchasers such as the company to which she intended to sell her portion. A single judge granted the application.

The respondent's case was based on two alternative submissions. According to the first submission the notarial deed had created a praedial servitude and none of the orders sought could therefore be granted. The second submission was based on the argument that, even if mere personal rights and obligations had come into existence, these were freely transferable to and binding upon all Van Boeschoten's and Lorentz's successors in title, the applicant, would therefore, not, even in relation to portion 203, be entitled to an order declaring that the township clause had not conferred any rights on the respondent, though she was entitled to some of the other orders sought.

In terms of the first submission the court was obliged to decide the case on the basis of the principles relating to the nature and creation of servitudes because if a praedial servitude had been created, then clearly the appeal had to succeed.

The court in principle confirmed the 'subtraction from the *dominium*' test formulated as follows in *Geldenhuys*:

> If an obligation is a burden upon land, a subtraction from the *dominium*, the corresponding right is real and registrable; if it is not such an obligation, but

> merely an obligation binding on some person, the corresponding right is a personal right, and it cannot, as a rule, be registered.[41]

The court held that:

> The right (and obligation) under consideration, so it appears to me, is essentially a personal one sounding in money and cannot be equated to the servitudes referred to … and this for the reason that the conditional obligation to pay attaches of necessity not to the land (which is not burdened) but merely to the owner thereof. His rights are curtailed but not in relation to the enjoyment of the land in the physical sense.[42]

The court held further that:

> In particular, I do not regard them as deciding that a monetary obligation imposed on an owner of land of the type we are dealing with necessarily constitutes an encumbrance against such land.
>
> In the result I am of the opinion that that part of the notarial deed under consideration, namely the township clause, confers only personal rights, which, even on (their incorrect) registration, were not capable of becoming and did not become a praedial servitude. Because of the basis of this conclusion, which is arrived at irrespective of what the intention of the parties as expressed in the deed was, it is unnecessary to consider the various submissions which were respectively made on behalf of both parties and which were founded on what was contended to be the proper construction thereof and in particular of the township clause. I repeat what was said above, namely that, if a contractual right is of such a nature that it is incapable of constituting a servitude, then the intention of the parties (as expressed) to do so, cannot avail.[43]

The novelty of this case in the formulation of the test to determine the distinction between a real right and a personal right is that even if the condition amounts to a subtraction from the *dominium*, the right created by such condition will only constitute a real right if the owner's entitlements to the land are curtailed in the physical sense. In this regard, this case adds another standard to the original test laid down in the *Geldenhuys* case and within this limited application creates a *numerus clausus* (a closed list) of real rights. As pointed out by Van der Walt & Pienaar this limited test tends to produce a result which conflicts with the nature and effect of many traditionally recognised limited real rights, such as mortgage bonds and mineral rights.[44]

Pearly Beach Trust v Registrar of Deeds[45]

The applicant applied to court for an order declaring that a certain condition embodied in a deed of sale was capable of registration in terms of section

41 Headnote of *Geldenhuys*; and *Lorentz* 1050.
42 *Lorentz* (n 4 above) 1052.
43 *Lorentz* (n 4 above) 1055.
44 Van der Walt & Pienaar (n 21 above) 33.
45 1990 4 SA 614 (C).

3(1)(r) of the Deeds Registries Act. The Registrar of Deeds had refused to register the deed in question which provided that a third party was entitled to receive from the transferee and its successors in title one third of the consideration received from the grantee of any option or rights to prospect for minerals on the property, and one third of the compensation received in consequence of expropriation.

The Registrar, who objected to the application, based his objection on the following statutory provisions:

> (1)Section 3(1) (r) of the Act in terms of which the Registrar is required to register 'any real right, not specifically referred to in this subsection'.
>
> (2)Section 63(1), a general provision relating to rights in immovable property, in terms of which '(n)o deed, or condition in a deed, purporting to create or embodying any personal right, and no condition which does not restrict the exercise of any rights of ownership in respect of immovable property, shall be capable of registration'.

In terms of s 63(1) neither a personal right nor a condition which does not restrict the exercise of any right of ownership of immovable property, is capable of registration.

It was common cause that, insofar as the condition in this case would bind not only the owner of the land, but also his successors in title, it did not create a personal right.

However, it was contended by the Registrar that the condition did not restrict any right of ownership in the land and was on that ground not registrable.

The basis of the Registrar's objection was that: in order to qualify for registration the right had to be such as to amount to a subtraction from the *dominium* of the land; in this case the right of successive owners of the land to grant mineral rights or to sell the land was not per se restricted in any manner; there was merely an obligation to pay a third party a share of the proceeds of such grant, sale or expropriation; there was no obligation on the owner to grant any rights to the land; and as far as expropriation was concerned there was no limitation of rights of the owner until expropriation would occur and that would only constitute a personal liability to share the compensation, and a similar liability would arise with regard to disposal of the land.

King J**,** in his judgment, referred to and confirmed the test for determining whether or not a right is personal and therefore not capable of registration laid down by De Villiers JP in *Geldenhuys*[46] as follows:

46 At 164.

> One has to look not so much to the right, but to the correlative obligation. If that obligation is a burden upon the land, a subtraction from the *dominium*, the corresponding right is real and registrable; if it is not such an obligation, but merely an obligation binding on some person or other, the corresponding right is a personal right, or right in personam, and it cannot as a rule be registered.

After reviewing relevant authorities on the issue, the court in applying the subtraction form the *dominium* test, rejected the Registrar's objection and held that one of the rights of ownership was the *ius disponendi* and if this right was limited in the sense that the owner was precluded from obtaining the full fruits of the disposition, it could be said that one of the rights of ownership was restricted. Consequently, the condition creating such limitation was capable of registration in terms of section 3(1) of the Act. This case thus confirmed the subtraction from the *dominium* test as perhaps the primary benchmark to determine the distinction between personal and real rights and their registrability.

The following conclusions may be made from this case.

Firstly, this decision implies a rejection of the restrictive test laid down in *Lorentz* and the reaffirmation of the original *Geldenhuys* test. Consequently, adherence to the restricted standard laid down in *Lorentz* would have resulted in a different conclusion. Secondly, since it did not restrict the owner's right to the use of the property physically, the condition could not have resulted in the creation of a real right. Thirdly, the decision lays down the principle that some obligations to pay money could constitute limited real rights. This position has been criticised for its potentially negative impact on land owners and the economy.

Cape Explosive Works Ltd & Another v Denel (Pty) Ltd & Others[47]

This was an appeal against a judgment in the Transvaal Provincial Division reported as *Denel (Pty) Ltd v Cape Explosive Works Ltd & Another.*[48] The main issue to be decided in this appeal was whether certain conditions registered in a title deed and erroneously omitted from subsequent title deeds were binding on the then current (present) owner of the relevant property.

During 1973 the first appellant, Cape Explosive Works Ltd ('Capex') sold two immovable properties to the second respondent, the Armaments Development and Production Corporation of South Africa Limited, whose name was subsequently changed to the Armaments Corporation of South Africa Limited ('Armscor'). The properties were Farm No 1065, measuring 459 6830 ha, and Portion 3 of the Farm Helderberg Sleeper Plantation No 787, measuring 11 3903 ha. Both properties were situated in the Administrative District of Stellenbosch. In terms of clause 6 of the deed of sale Armscor undertook that the properties would only be used for the development and

47 n 23 above.
48 1992 2 SA 419 (T).

manufacture of armaments and in terms of clause 7(a) thereof Armscor granted to Capex the 'first right to repurchase' the properties, at a price to be determined in a prescribed manner, in the event of the properties no longer being required for the use set out in clause 6. Armscor agreed in terms of clause 7(a)(vii) to the registration of the right conferred on Capex in terms of clause 7(a) against its title deeds to the properties in the Deeds Office. Clause 7(b) provided that in the event of Capex repurchasing the properties Capex would have the right to purchase all or any of the improvements and other facilities erected on the properties which Armscor was desirous of selling, at a price and on such further terms as might be agreed upon between Capex and Armscor.

A dispute arose between Capex and Denel as to whether Capex would be entitled to repurchase that portion of Erf 635 which formed part of Farm 1065 in the event of it no longer being required for the use set out in condition 1. As a result Denel applied for an order declaring that its ownership of Erf 635 was not in respect of any portion thereof subject to condition 2. Capex, in a counter-application, applied for an order directing the Registrar of Deeds, Cape Town to rectify the Certificate of Consolidated Title T 33717/77, the Deed of Transfer T 75861/92 and the Certificate of Consolidated Title T 1178/94 so as to include conditions 1 and 2 in so far as they related to the portions of Farm 1065 which had been incorporated into the Remaining Extent of Erf 635 Firgrove; an order directing the Registrar of Deeds to rectify Certificate of Registered Title T1179/1994 so as to include the conditions; orders declaring that Denel was bound to comply with the conditions; an order interdicting Denel from failing to comply with the provisions of the conditions; and an order interdicting Denel from selling or transferring the restricted properties to any person without complying with condition 2.

The court *a quo* found that clause 6 was registrable in terms of section 63(1) of the Deeds Registries Act in that it restricted the exercise of Armscor's right of ownership in respect of the properties but the parties did not intend the restriction to be binding on Armscor's successors in title and specifically agreed not to register it against the property.[49] Clause 7 did not affect the property or curtail Armscor's right of enjoyment of the property in the physical sense. On its own it was not registrable in terms of section 63(1). It was not ancillary to clause 6 and therefore not registrable on that basis either.

On the strength of these findings the court *a quo* dismissed the counter-application and granted an order declaring that Denel's right of ownership in erven 635 and 637 Firgrove was in no way encumbered by condition 2.

49 Section 63(1) of the Deeds Registries Act provides as follows: 'No deed, or condition in a deed, purporting to create or embodying any personal right, and no condition which does not restrict the exercise of any right of ownership in respect of immovable property, shall be capable of registration: Provided that a deed containing such a condition as aforesaid may be registered if, in the opinion of the registrar, such condition is complementary or otherwise ancillary to a registrable condition or right contained or conferred in such deed'.

3.3.2.5 Requirements to determine registrability of conditions

Streicher JA, in his judgment found as a fact that Armscor intended to receive transfer of the properties subject to conditions 1 and 2. Denel similarly did not allege that Capex and Armscor had not intended to pass and receive transfer of the properties subject to conditions 1 and 2. The matter therefore had to be decided on the basis that Capex and Armscor intended to pass and receive transfer subject to conditions 1 and 2. The issue which had to be decided on that basis was whether conditions 1 and 2 were capable of being registered and what the effect of their omission from subsequent title deeds was.

In terms of section 3 of the Deeds Registries Act all real rights in respect of immovable property are registrable. To determine whether a particular right or condition in respect of land is real the court restated that two requirements must be satisfied:

> (1) The intention of the person who creates the real right must be to bind not only the present owner of the land, but also his successors in title; and
>
> (2) The nature of the right or condition must be such that the registration of it results in a 'subtraction from dominium' of the land against which it is registered.[50]

The court *a quo* further elucidated the dictates of this test as follows:

> One compares the right in question and the correlative obligation to see whether the obligation is a burden upon the land itself or whether it is something which is to be performed by the owner personally. If it is the former, the right is capable of being a real right. If it is the latter, it cannot be a real right. In order to ascertain whether the obligation is a burden upon the land, two useful concepts which have been used are that the curtailment of the owner's rights must be something in relation to the enjoyment of the land in the physical sense … or that the obligations 'affect the land' or 'run with the land'.[51]

In applying the test to the two conditions in question, the court held that with regard to clause 6 (the restriction on the use of the land) the condition curtailed the right to use the land and that it therefore amounted to a subtraction from *dominium*. It therefore fell squarely within the definition of section 63(1) of the Deeds Registries Act and could in principle be registered as a real right. The condition contained in clause 7, the first right to repurchase, did not constitute a subtraction from the *dominium*.

The court, however, explained that the use restriction according to condition 1 was materially different from the use restriction according to condition 1 read with condition 2. The two conditions were not independent

50 See also *Erlax Properties (Pty) Ltd v Registrar of Deeds & Others* 1992 (1) SA 879 (A) 885.
51 *Denel* (n 47 above) 435.

of one another and they could not be separated. They formed a composite whole. They were specifically stated to be binding on the transferee, being Armscor, and its successors in title. Furthermore, they constituted a burden upon the land or a subtraction from the *dominium* of the land in that the use of the property by the owner thereof was restricted. The right embodied in conditions 1 and 2, read together, therefore, constituted a real right which could be registered in terms of the Deeds Registries Act.

Accordinlgy, Capex was entitled to orders interdicting Denel from acting contrary to the provisions of conditions 1 and 2. Denel was interdicted from selling or transferring the restricted properties to any person without compliance with pre-emptive conditions and restrictions on rights of *dominium*.

This case demonstrates the application of the test of the intention of the parties by the court to determine whether a condition creates a real right or a personal right. The court's decision not to separate conditions 1 and 2 was based on the intention of the parties to bind the successors in title of Armscor as embodied in the original agreement. The position of the court not to regard the two conditions as mutually exclusive, and to hold that both collectively constituted a real right, is a further demonstration of the unsettled status of the test in *Lorentz*, and the degree of recognition accorded to it by the courts.

4 Summary and observations

In the cases discussed above, the conditions purporting to create limitations on rights of ownership were created in either a contract, notarial deed, or a will. In order to determine their registrabilty in compliance with the dictates of section 63(1) of the Deeds Registries Act, the courts had to draw distinctions between real and personal rights. Almost invariably, the courts determined the issues from the premise of the creation of a servitude. If the impact of the conditions amounted to the creation of a servitude, then it would clearly lead to a burden on the land, and thus satisfy the subtraction from the *dominium* test and the requirements for their registrability. In the context of payment of money, the obligation to pay a sum of money that does not come out of the fruits of the property will be lacking in the essential features of servitudes and therefore cannot constitute a subtraction from the *dominium*. Looked at from this premise, therefore, payment of money, as one-off payment, cannot amount to a real right. In fact the criterion of the condition curtailing the *ius fruendi* or the owner's entitlement of use and enjoyment in the physical sense laid down in *Lorentz* eliminates the possibility of the burden to pay money to someone constituting a real right. From this point of view, a *numerus clausus* of real rights has potentially been created. In order to put the debate over the creation of a *numerus clausus* of real rights in perspective, it may be useful to quote from the judgment of Nestadt J in *Lorentz*[52] when he stated as follows:

> At first sight every personal obligation in terms of which an owner undertakes to deal – or not to deal – with his property in a particular manner restricts him in the exercise of his *dominium* so that the corresponding right which another person acquires as a result of such an undertaking would *prima facie* be a potential real right. However, the law of property would disintegrate if every personal right relating to a thing could be converted into a real right, while on the other hand, circumstances might arise which make it desirable that a further type of 'mere' personal right should be added to those which are capable of being converted into real rights.

The position inSouth African law and to that extent Namibian law is that there is no *numerus clausus* of real rights. Consequently, the restrictive test in*Lorentz*may not stand the test of time.

A final point that may be added with respect to the registration of rights is the statement made by Wessels J in *Hollins*[53] that neither by the common law nor by Proclamation (legislation) can one have registration of a right, the birth of which is dependent upon a contingency.

52 *Lorentz* (n 4 above) 1051, quoting from Silberberg *The Law of Property.*
53 n 10 above, 608

CHAPTER 5

OWNERSHIP

1 Introduction

Article 16 of the Namibian Constitution grants all persons the right to acquire and dispose of all forms of immovable and movable property individually or in association with others, and to bequeath their property to their heirs and legatees. The Namibian Constitution therefore recognises ownership and other forms of property rights.

In the case of *Gien v Gien*[1] ownership was defined as follows:

> Ownership is the most complete real right a person can have with regard to a thing. The point of departure is that a person as far as an immovable is concerned can do and bequeath property as he likes. However this apparently unlimited freedom is only partially true. The absolute entitlements of an owner exist within the boundaries of the law. The restrictions can emerge from either objective law or from restrictions placed upon it by the rights of others. For this reason, no owner ever has the unlimited right to exercise his entitlement in absolute freedom and in his own discretion.

There are two initial comments flowing from this definition. Firstly, ownership is defined in terms of a real right and it has to do with both the relationship between a legal subject and a thing and with the relationship between legal subjects regarding the thing. These relationships are indeterminate and therefore abstract. They are indeterminate because they may differ from time to time or from relationship to relationship. The extent of the owner's entitlements, for example, is limited by the rights of others.

Secondly, there is an element of apparent absoluteness to a real right. This element is notional and fictional as the right of ownership is limited in terms of objective law or the rights created by the owner in favour of others

1 1979 2 SA 1113 (T) 1120.

over his real right to his property. Van der Walt[2] states that these limitations on entitlement can be determined by reference to the subtraction from the *dominium* principle or creditors' rights or by the interests of the community and in this regard the principle of limitation on entitlement will include social factors.

In the light of the above Silberberg, with reference to modern South African legal theory, states that the definition of ownership generally upheld in South Africa is that:

> [O]wnership is the real right that potentially confers the most complete or comprehensive control over a thing, which means that the right of ownership entitles the owner to do with his or her thing as he or she deems fit, subject to the limitations imposed by public and private law.[3]

2 Content of ownership

Ownership vests in the holder a multitude of entitlements, *ius fruendi,* which include the right to control, use, encumber, alienate and vindicate. The entitlement of control gives the holder the right of physical control over the thing. A concomitant right of control is the right of use which entitles the holder to lawfully use and benefit from the thing. The holder also has the right to alienate or transfer ownership and to encumber the property as a security for a loan. If he or she is unlawfully divested of ownership, they have the right to vindicate property by lawful means.[4]

A species of ownership is co-ownership, a concept which received some attention in*Ex Parte Geldenhuys*.[5]

3 Nature of co-ownership

Joint ownership, also known as co-ownership or ownership in common, consists of ownership by more than one person in the same thing, each having an undivided share in it, the shares being equal or unequal. It arises mainly by virtue of will, partnership, joint purchase or private treaty.

Silberberg[6] states that the term 'joint ownership', or 'co-ownership', or 'ownership in common': 'denotes that two or more persons own a thing at the same time in undivided shares, that is to say, each co-owner has the right to a share in the entire thing, but the various shares need not be equal. Joint ownership covers various legal relationships in so far as the business partners

2 AJ van der Walt & GJ Pienaar *Introduction to the law of property 6th ed* (2009) 43-44.
3 PJ Badenhorst *et al Silberberg and Schoeman's the law of Property 5th ed* (2006) 91.
4 Van der Walt & Pienaar (n 2 above) 41.
5 1926 OPD 155.
6 Badenhorst *et al* (n 3 above)133.

and members of an unincorporated association (other than a *universitas*)[7] are also co-owners of the property said to be owned by the partnership or the association'.

From the above definition, the elements of the nature of co-ownership can be summarised as follows:

(a) the thing is owned by several persons in undivided co-ownership shares;

(b) it is only one ownership which vests in several persons in ideal undivided shares;

(c) the co-owners cannot divide the thing physically while the co-ownership still exists and a co-owner cannot alienate or encumber the thing without the consent of the other co-owner(s);

(d) it is possible for a co-owner to alienate or encumber his undivided co-ownership share; and

(e) the entitlements to the thing are not divisible, but the co-owners must exercise the entitlements jointly in accordance with the undivided shares.

The rights of co-owners to their joint property will very often be regulated by agreement between them, and the co-ownership is then referred to as bound common ownership.[8] For instance, if the co-owners are members of a partnership the extent to which they may use and dispose of the partnership property will normally be spelt out in the partnership agreement. In the absence of a specific agreement, in free co-ownership, the law gives each co-owner the usual rights of an owner to the possession, enjoyment and disposal of the joint property, proportional to his or her share in it. These rights, and the restrictions which the law imposes on them in the interests of the other owners, are the following:

3.1 Rights of possession

The extent to which the co-owners are entitled to possess their joint property depends partly on agreement between them and partly on the nature of the property. For example, a farm can be occupied by several co-owners jointly but a joint property such as a motor-car, can only be possessed – in the sense of being controlled – by one person at a time. Subject to any such agreement and the nature of the property, however, a co-owner is entitled to have access to any portion of the jointly-owned property.

7 A *universitatis* is a juristic person quite distinct from the members composing it, having rights and liabilities apart from those of the members, and it may sue and be sued as a separate entity.

8 Van der Walt & Pienaar (n 2 above) 50-51.

3.2 Rights of use and enjoyment

We have seen that a co-owner is entitled to reasonable use of property jointly owned, for the purposes for which the property is intended, but in proportion only to his or her share in such property. In this connection, the following points arise:

(i) A co-owner cannot separate a portion of the property for his or her own separate use, unless he or she has the express or implied consent of the other co-owners. Thus, in *Oosthuysen v Muller*,[9] it was held that a co-owner could not, without the consent of all the other co-owners, use common soil to make bricks, even though the bricks were to be used on the common property.

(ii) A co-owner cannot convert the property to be used for purposes other than those for which it was intended, unless he or she has the consent of all the other co-owners. He cannot apply it to new uses or change its character; thus he cannot convert pasture land into arable land, nor can he build on pasture land, nor can he indiscriminately cut down trees. In the case of *Erasmus v Afrikander Proprietary Mines Ltd*[10] it was stated that in the event of any dispute about the conduct of a co-owner and the manner in which he has made use of the joint property, the court would have to consider whether the conduct complained of constituted an unreasonable use inconsistent with the use to which the property was destined, to the detriment of the rights of the other co-owner, and unless the conduct of the former co-owner can be described as unreasonable, inconsistent and detrimental in the said sense, interdict proceedings against him or her will not succeed.

(iii) Any profits or losses connected with the common property must be shared proportionately, and any joint owner may sue for profits accrued from or be sued for expenses incurred in connection with the property; the owners naturally have a right of recourse against each other. In *Sauerman v Schultz*[11] land was rented out by one of the co-owners without the permission of the others. The co-owner who received the rent was obliged to share it with the other co-owners in accordance with their share in the joint property.

(iv) The majority of co-owners cannot bind the minority with regard to the manner in which the property should be used, unless the co-owners have previously agreed that the views of the majority should prevail. Under such circumstances, the minority is entitled to veto the decision of the majority. These circumstances may lead to the termination of the co-ownership or an application to the court to test the reasonableness of the co-owners and for an appropriate declaratory order, or prohibitive interdict.[12]

If a co-owner exceeds his or her proportionate share of the use of the common property, the others must act timeously to interdict him or her from doing so; otherwise their delay will be regarded as an implied consent.

9 (1877) 7 *Buch* 129.
10 1976 1 SA 950 (W).
11 1950 4 SA 455 (O).
12 *Pretorius v Nefdt and Glas* 1908 TS 854.

4 Creation and establishment of co-ownership

Co-ownership arises by virtue of a will, partnership, joint purchase or private treaty. These may be manifested by inheritance, conclusion of a marriage in community of property, mixing, estate holdership, voluntary association without legal personality and or contract.[13]

4.1 Inheritance

When a testator bequeaths an indivisible thing to two or more persons or a divisible thing to two or more persons, provided that it may not be divided, it is owned by the heirs in co-ownership.[14] In the case of agricultural land, transfer of such land to co-owners is prohibited in terms of the provisions of section 3 of the Subdivision of Agricultural Land Act 70 of 1970, except in those cases where the Minister of Agriculture has, in terms of section 5, given permission for such an inheritance. This Act applies in Namibia.

Section 3 of this Act provides *inter alia* that:

(a) agricultural land may not be subdivided;

(b) no undivided share in agricultural land not previously held by any person, shall vest in any person;

(c) no portion of an undivided share in agricultural land shall vest in any person, if such portion is not at present held by any person';

(d) no long-term lease in respect of a portion of agricultural land may be entered into; and

(e) no portion of agricultural land may be sold or advertised for sale and no right to such portion may be sold or granted by virtue of a long term lease or advertised for sale or for lease unless the minister of agriculture has consented thereto in writing.

Subsection (b) is obviously aimed at preventing the sole owner of agricultural land, not holding the land in undivided shares, from transferring any undivided share to another person without the Minister's consent first having been obtained. It implies the prohibition of the creation of any additional co-owner or co-ownership.

Section 3(b), however, does not prohibit the registration of a farm as a partnership asset in the name of a partner. Upon registration, the other partner or partners do not acquire a real right in the property but only a personal right against the partner in terms of which he or she is bound to treat the property as a partnership asset. Section 3(c) is intended to prevent the holder of an undivided share in the ownership of agricultural land from

13 Van der Walt & Pienaar (n 2 above) 48-50.
14 Van der Walt & Pienaar (n 2 above) 49.

transferring a 'portion' of his or her undivided share to another without such consent. There is, however, nothing which prevents the holder of two or more undivided shares in the ownership of a single piece of land from transferring one, or more of these shares to another, whether or not the latter already holds any share in the ownership of such land. The intention of the legislature was, therefore, to prevent the uncontrolled division of agricultural land into smaller (uneconomic) units, as well as the further division of existing undivided shares in the ownership of such land into smaller 'shares'.[15] An option to extend a lease of nine years and 11 months for a further period of nine years and 11 months is invalid in the light of the provisions of section 3(d). Section 3(e) prohibits in express terms the sale or lease of a portion of agricultural land without the Minister's consent. A sale of a portion of agricultural land is void *ab initio*.

In essence sections 2 and 3 prohibit the alienation or bequest of co-ownership shares of agricultural land which is not already co-owned, or which the Minister has not approved for co-ownership after the commencement of the Act. This is an example of a statutory prohibition.

4.2 Conclusion of a marriage in community of property

The conclusion of a marriage in community of property implies that, for the duration of the marriage, the parties to the marriage share equally in all assets of the joint estate.

Under the common law (Roman-Dutch law) a marriage concluded in community of property is said to be concluded in community of profit and loss as well. Under this property regime the properties of the spouses, wherever situated, in present or in future, movable or immovable and all debts, are merged into one joint estate in which the spouses hold equal and indivisible shares regardless of their contributions. The general principle is therefore that the conclusion of a marriage in community of property creates co-ownership of property.

Under the traditional common law rule, the husband has the marital power over the property. However, in Namibia, by virtue of the Married Persons Equality Act 1 of 1996, the concept of the marital power of the husband has been abolished but the concept of marriage in community of property has not been abolished.

4.3 Mixing (*commixtio*)

When movable things of different owners are mixed, without the permission of the owners, in such a way that the mixture creates a new thing, it is owned

15 Badenhorst *et al* (n 3 above) 108.

by the owners in co-ownership. The previous owners of the mixed things become co-owners of the new thing in relation to which their respective properties have contributed to the new thing (mixture).[16]

4.4 Estate holdership

The surviving spouse in a marriage in community of property continues the community of property with the heirs of the deceased spouse.[17]

4.5 Voluntary association without legal personality

The members of such an association are co-owners of the assets of the association in undivided shares. Members may not, however, alienate or encumber their respective undivided shares because of the unique consequences flowing from their contract of membership with the association.[18]

4.6 Contract

By means of a contract two or more persons can jointly buy a thing and have the ownership transferred in undivided shares through delivery or registration.[19]

5 Limitations on ownership

5.1 Introduction

As pointed out earlier, ownership is defined in absolute terms, but it is also recognised in both law and practice that there are limitations imposed on ownership by both public law and private law. The limitations are imposed by the constitution, legislation, the common law and private treaty.

Article 16(1) of the Namibian Constitution provides that:

> All persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees: provided that Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens.

16 Van der Walt & Pienaar (n 2 above) 49.
17 As above.
18 As above.
19 Van der Walt & Pienaar (n 2 above) 50.

Article 16(2) provides as follows:

> The State or a competent body or organ authorised by law may expropriate property in the public interest subject to the payment of just compensation, in accordance with requirements and procedures to be determined by Act of Parliament.

Article 16 of the Namibian Constitution comes under the fundamental human rights and freedoms provided for and entrenched by Chapter 3 of the Constitution. It is an entrenched provision but in terms of the provisions of articles (24)(1) and (3), the right to property granted under this article may be suspended when a state of emergency has been duly declared under the provisions of article 26. In context, therefore, apart from the restrictions imposed on the acquisition of property by foreign nationals and the right granted to the state to expropriate private property, there is no explicit constitutional provision as the legal basis for any form of limitations on the right of use or *ius fruendi* of ownership, either under legislation or the common law.

However, in the Namibian case of *Namibia Grape Growers and Exporters Association and Others v The Ministry of Mines and Energy and Others*[20] the Supreme Court of Namibia had the occasion to make a pronouncement on this issue. The case was an appeal from the judgment of a single judge dismissing the application brought by the appellants on an urgent basis and discharging the *rule nisi*. The matter concerned, more particularly, certain provisions of the Minerals (Prospecting and Mining) Act33 of 1992 (the Minerals Act). The appellants *inter alia* applied for a *rule nisi* to be issued calling upon the respondents to show cause, why the provisions of Part XV of the Minerals Act could not be declared *ultra vires* the provisions of clause 16(2) of the Namibian Constitution and thus null and void and of no effect.

In his judgment Strydom ACJ stated as follows:

> [T]he protection granted by the article encompasses the totality of the rights in ownership of property. This article, being part of Chapter 3 of the Constitution, must be interpreted in a purposive and liberal way so as to accord to subjects the full measure of the rights inherent in ownership of property. (See in this regard *Minister of Defence v Mwandinghi*, 1993 NR 63 SC).[21]
>
> The owner of property has the right to possess, protect, use and enjoy his property. This is inherent in the right to own property … It is however in the enjoyment and use of property that an owner may come into conflict with the rights and interests of others and it is in this sphere that regulation in regard to property is mostly needed and many instances absolutely necessary. Such regulation may prohibit the use of property in some specific way or limit one or other individual right without thereby confiscating the property and without thereby obliging the State to pay compensation. There are many such examples

20 2004 NR 194 (SC).
21 At 209.

> where, to a greater or lesser degree, the use or enjoyment of property, be it movable or immovable, is regulated by legislation …[22]

The court reasoned that it was inconceivable that the founding fathers of the Namibian Constitution were unaware of the vast body of legislation regulating the use and exercise of rights applicable to ownership, or that it was their intention to do away with such regulation. Without the right to such control it would be impossible for the Legislature to fulfill its function to make laws for the peace, order and good government of the country in the best interest of the people of Namibia. The right to ownership in property under article 16(1) of the Namibian Constitution like the right to equality before the law in terms of article 10(1), is not absolute but subject to certain constraints which, in order to be constitutional, must comply with certain requirements.

5.2 Limitations imposed by the Constitution

5.2.1 Expropriation

Expropriation may be defined as the power of the state to compulsorily but lawfully, and for reasons deemed to be in the public interest, acquire ownership or some of the powers associated with ownership in respect of property, to the extent that the owner is deprived of the power to use or alienate his or her property as he or she deems fit. Expropriation constitutes a limitation on the right of ownership.

Silberberg[23] defines expropriation as follows.

> Expropriation in the strict sense means that the owner is deprived of his right of ownership in his property which then becomes vested in the state or some other public authority or corporation authorised by the state to acquire ownership of the property.

In general terms, the origin of expropriation can be traced to state sovereignty by virtue of which the state is empowered to exercise the right of expropriation. In the Namibian context the legal authority to expropriate is provided for in article 16(2) of the Namibian Constitution. The article empowers the state, or any competent body or organisation authorised by law, to expropriate property in the public interest subject to the payment of just compensation.

Under the Namibian Constitution the authorised bodies can therefore expropriate but the normal practice is that an Act of Parliament has to be promulgated to vest an organ of state or any authorised body the power to expropriate. For example, the Minister responsible for land under the

22 At 210J-211A-B.
23 DG Kleyn *et al Silberberg and Schoeman's the law of property 3rd ed* (1993) 316-317.

provisions of the Agricultural (Commercial Land Reform) Act 6 of 1995 is given the power to expropriate private property with a statutory procedure to follow.[24] Similarly, under the Expropriation Ordinance 13 of 1978, any municipality or local authority has the power to expropriate property for public purposes, subject to certain requirements. These provisions are discussed in more detail under paragraph 5.3.

As stated earlier, the power given to the state to expropriate private property in the public interest is derived from state sovereignty which vests the control of the natural resources in the state. Under the doctrine of eminent domain, the state is given the power to expropriate private property for infrastructural development or public utility such as the construction of bridges, railways and roads.

HM Seervai[25] discussing articles 19(1)(f) and 31of the Indian Constitution which deal with the right of citizens to acquire, hold and dispose of movable and immovable property, points out that the sovereignty of the state involves three elements, namely the power to tax, 'police power' and 'power of eminent domain'. The author further refers to the definition of 'police power' as:

> the inherent power of a government to exercise reasonable control over person and property within its jurisdiction in the interest of general security, health, safety, morals and welfare, except where legally prohibited (as by constitutional provision).
>
> The accepted definition for 'eminent domain' is "the power of the sovereign to take property for public use without the owner's consent upon making just compensation.

The distinction between the exercise of the state's police power and its power of eminent domain is similar to South African expropriation law.[26] This distinction between the state's police power and its power of eminent domain is also found in the property jurisprudence of Namibia specifically under articles 16 and 100 of the Namibian Constitution. Articles 16(1) and 100 can be compared to the state's police powers and Art 16(2) to its powers of eminent domain.

Traditionally, under the doctrine of eminent domain the power of the state to expropriate is limited. The eminent domain concept was incorporated in legislation but there was no uniformity in these pieces of legislation in terms of the purpose of expropriation. There were two models. In the first model the power to expropriate was limited to infrastructural development. In the second model, however, the purpose for expropriation

24 See secs 14 and 20.
25 HM Seervai *Constitutional law of India: A critical commentary 3rd ed* (1984), Vol. 11, para 14.24.
26 See in this regard: A Cachalia *et al Fundamentals rights in the new Constitution* (1994) 243.

was formulated in an open textured manner, generally in terms of public interest, and in most cases no precise definition was given of what constitutes public interest.

Under international law, nationalisation of private property by the state or expropriation is allowed but subject to the condition that nationalisation or expropriation is effected in the public interest and subject to payment of compensation. The UN Resolution on Permanent Sovereignty over Natural Resources, 1962, which was adopted in the case of *Texaco v Libya*,[27] provides that:

> Nationalization, expropriation or requisition shall be based on grounds or reasons of public utility, security, or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any such case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted.

What constitutes public interest, however, is not defined under international law and is therefore subject to municipal laws of a particular jurisdiction. Under the Namibian Constitution, article 16(2) gives the state the power to expropriate property in the public interest, but here again, the public interest is not defined.

Public interest, therefore, is a legal requirement falling within the sphere of political definition. It is therefore the power of the state/government of the day, or of any authorised state organ/authority to determine what constitutes public utility or public interest. In the Namibian case of *Kessl v Ministry of Lands and Resettlement & Others*[28] the welfare and interests of farm workers on commercial agricultural farms earmarked for expropriation, was considered as one of the variables to determine what constitutes public interest.

As mentioned earlier, the traditional concept of public interest as contemplated within the context of eminent domain, includes infrastructural development and public utility. Since the constitution leaves the definition of public interest undefined and open textured, the attempts at definitions are found in a particular piece of legislation. Currently in Namibia, depending on the relevant portfolio, pieces of legislation have been promulgated to empower the state or an appropriate authority to expropriate private property for various purposes but the most prominent among such pieces of legislation is the Agricultural (Commercial) Land Reform Act 6 of 1995. In this Act public interest has been defined to include agricultural and resettlement

27 1977 53 ILR 389.
28 2008 1 NR 167 (HC).

purposes in the context of the government's land reform and poverty alleviation programme.

Since expropriation involves the deprivation of the right of the individual, it is important that procedural mechanisms and requirements are put in place to prevent any potential abuse of the power to expropriate. Mere substantive rules are not enough; procedural rules are equally important. The procedure involved in the process of expropriation therefore becomes a legal requirement in the sense that it is aimed at ensuring procedural justice, transparency, recognition of the rule of law and the protection of individual rights.

The details of the procedure may vary from jurisdiction to jurisdiction, and as stipulated in the relevant legislation but the most important criterion is that of compliance with the principles of natural justice and reciprocity. For example, this will imply that the individual whose property is to be expropriated is involved, to a certain degree, in the expropriation process and given a fair hearing not only with regard to the amount of compensation but also with regard to the decision concerning expropriation. This is necessary to reduce the possibility of corruption, the irregular promotion of individual interests and the arbitrary use of state power. Article 16(2) of the Namibian Constitution clearly stipulates that the power to expropriate can only be exercised following the promulgation of an Act of Parliament. Therefore, the power becomes statutory and discretionary in nature and must be exercised subject to the provisions of article 18 of the Namibian Constitution which enjoins administrative officials to comply with the principles of natural justice in the execution of administrative and executive powers. This was confirmed in *Kessl* by Muller J where he held that article 16 of the Namibian Constitution does not stand alone. This means, therefore, that the requirements of article 18 are applicable to the exercise of the powers of expropriation granted to the Minster by the Agricultural (Commercial Land) Reform Act and that the conduct of the administrative official, the Minister, must be fair and reasonable, as well as legitimate. The ultimate objective is to ensure that the power to expropriate is not abused.

The two requirements of article 18 are, firstly, that the principle of natural justice must be satisfied in order to ensure some involvement of the owner whose property is to be considered for expropriation and, secondly, that the said owner must be given a fair hearing. This should apply not only in the context of assessing the amount of compensation but also in the decision to expropriate the property concerned. As stated by Muller J, before the Minister can take a decision to expropriate, he or she is duty-bound to apply the *audi alteram partem* principle. It implies that he or she must afford the landowner an opportunity to be heard in order to persuade him or her that he or she should not take the decision to expropriate his or her property. Subjecting the Executive's power of expropriation to the concept of reciprocity implies justifiability of rights and judicial review of powers of expropriation.

Since expropriation amounts to deprivation of one of the fundamental rights provided for by Chapter 3 of the Namibian Constitution, article 16(1), any legislation purporting to vest the power of expropriation in the state or an organ of state must be of general application in compliance with the provisions of article 22 of the Constitution. In terms of article 22, limitation of any fundamental right or freedom is only lawful if it is provided for in legislation, if the limitation is generally applicable, and not aimed at a particular individual. The latter two requirements were confirmed in the case of *Cultura 2000 & Another v Government of the Republic of Namibia and Others*[29] with regard to article 22(a).

Expropriation also involves deprivation of the rights of the individual and more especially his entitlements of ownership, and therefore, both in law and on grounds of equity, the individual must be compensated for his loss. This is a principle recognised under international law as stated in the case of *Texaco.*[30] Most municipal laws authorising the state to expropriate private property incorporate the right to compensation in the relevant laws. However, the contentious issue has been the determination of the amount of compensation. Under international law compensation has to be prompt, adequate and effective. This criterion does not, however, find automatic translation and incorporation into the provisions of the municipal legislation which falls under the domain and jurisdiction of the Government of the day.

In Namibia, section 25 of the Agricultural (Commercial) Land Reform Act provides for variables to be taken into consideration for the determination of compensation. These include the current value of the property and improvements made by the state.

5.2.2 Extract: the exercise of the rights of sovereignty and the laws of expropriation of Namibia, South Africa, Zambia and Zimbabwe[31]

5.2.2.1 Sovereignty and development

One of the essential elements of statehood is the occupation of a territorial area within which state law operates. Over this area supreme authority is vested in the state. Hence there arises the concept of territorial sovereignty which signifies that within this territorial domain jurisdiction is exercised by the state over persons and property to the exclusion of other states.[32]

29 1992 NR 110 (HC). This principle was also affirmed in *Kessl* (n 28 above).
30 n 27 above.
31 SK Amoo in MO Hinz, SK Amoo & D van Wyk *The Constitution at work*: *10 years of Namibian nationhood: Proceedings of the conference ten years of Namibian nationhood, 11-13 September 2000* (2002) 255-267.
32 JG Starke & IA Shearer *Starke's International Law* (1994) 144.

The learned Max Huber, arbitrator in the case of *Island of Palmas Arbitration*,[33] and Max Sorensen,[34] in their definition of sovereignty also emphasise the concepts of independence and the power of a state over its territory and citizens. Territorial sovereignty therefore embraces the concept of the rights of a state over its territory and citizens. It includes the right to control and utilise the natural resources of a state for the benefit of all its citizens.[35] The development of the natural resources of the state, however, should be done with the aid of and within the parameters of the law. The functional role of the law in development has been recognised, not only as a political and practical necessity in the process of the execution of the functions of government, but also as a legal theory. Jurists who advocate the relationship between law and society, and law and development, emphasise that the law must not only reflect the ethos of a society but must also be used to engineer the society.

Friedman,[36] recognising the appropriateness of the functional theory of the law as the jurisprudential justification for the development programmes of developing countries, advocated the reappraisal of the role of the law in developing countries as follows:

> A reappraisal of the role of the law, and of the function of the lawyer is needed in the great majority of nations that have recently acquired political independence because of a generally very low and static economic and social level. The characteristic feature of an undeveloped country is a stark gap between its economic and social state and the minimum aspirations of a mid-twentieth century state modelled upon the values and objectives of the developed countries of the west. All these countries have an overwhelming need for rapid social and economic change. Much of this must express itself in legal change – in constitutions, statutes and administrative regulations. Law in such a state of social revolution is less and less the recorder of established social commercial and other customs. It becomes a pioneer, the articulated expression of the new forces that seek to mould the life of the community to new patterns.

Much of the areas of emphasis described by Friedman may come within the scope of the rationale that has generated this interest in law and development in the governments of developing countries. However, the governments of African states have taken a strong partiality to this dimension in jurisprudence within the scope of the general outcry against the evils of colonialism and in particular colonial laws, on the ground that the colonial laws, some of which are still to be found in the statute books of some African states, had no relevance to the African, and therefore serve no purpose in the quest for the realisation of the social, economic and political aspirations of the African society. In a speech marking the formal opening of the Accra

33 'Judicial decisions involving questions of international law – The Island of Palmas (or Miangas)' (1928) 22 *American Journal of International Law* 867 875.
34 M Sorensen *Manual of public international law* (1978) 8-14.
35 In Namibia, eg, art 100 of the Constitution vests ownership of the natural resources of the nation in the state.
36 W Friedman *Legal theory* (1967) 429.

conference on legal education and of the Ghana law school, the late Dr Kwame Nkrumah emphasised the need for the identification of the legal system with the ethos of the society:

> There is a ringing challenge to African lawyers today. African law in Africa was declared foreign law for the convenience of colonial administration, which found the administration of justice cumbersome by reason of the vast variations in local and tribal custom. African law had to be proved in court by experts, but no law can be foreign to its own land and country, and African lawyers, particularly in the independent African states must quickly find a way to reverse this judicial travesty.
>
> The law must fight its way forward in the general reconstructions of African action and thought and help to remould the generally distorted African picture in all other fields of life. This is not an easy task, for African lawyers will have to do effective research into the basic concepts of African law, clothe such concepts with living reality and give the African a legal standard upon which African legal history in its various compartments could be hopefully built up. Law does not operate in a vacuum. Its importance must be related to the overall importance of the people, that is to say, the state.[37]

At independence, most developing countries have been faced with the problem of a choice of ideologies and policies. Most of the countries have been confronted with this problem because it has been argued that the colonial laws and policies had been formulated to serve the interests of colonial powers. In the process of the search for alternative ideologies and economic policies which will serve the interests of the nation, some post-independence governments in developing countries embarked on policies which were a complete departure from those of the colonial governments. Some of them opted for the establishment of socialist-oriented economies, or more recently as a result of pressure from the IMF, the World Bank, donor countries from the West and the fall of the Eastern Block, they have opted for mixed economies. In an attempt to develop the economy in the interest of the ordinary citizen, these governments have taken an interventionist role in the economy and many reforms have been undertaken including, in some cases, nationalisation of foreign firms and radical land reforms and expropriation of land. In essence, the drive in search of new policies has been generated by the need to exercise the full powers of sovereignty, natural resources and wealth and the desire for the exercise of the powers of self-determination in both economic and political affairs.

5.2.2.2 The expropriation of land

The power of a state to exercise the rights of sovereignty over its natural resources is recognised under international law and as pointed out by the late

37 K Nkrumah 'Ghana: Law in Africa' (1962) 6 *Journal of African Law* 103 105.

Chris Ushewokunze,[38] with regard to the exercise of state sovereignty over land, the particular land tenure system of a state is a product of the political and economic ideology of the society. The legal framework may be taken as an expression of that ideology defining the rights and duties in relation to land and the procedure for its acquisition, use and disposal. In the context of land expropriation, however, international law prescribes certain norms.

The Resolution on Permanent Sovereignty over Natural Resources, the relevant section of which is quoted above, was adopted in *Texaco,*[39] and was respected because it is a reflection of customary international law. The consensus of the majority of states belonging to the various representative groups indicated the universal application of the rule incorporated in the resolution relating to nationalisation and expropriation and its conformity with international law.

One of the fundamental principles of the theory of law and development as an aspect of law and social change is that it is the function of the law to provide the legal basis for infrastructural development. This invariably includes land tenure laws. Land is not only an index of development but also an index of the degree of the exercise of sovereignty and independence. As Mary Kingsley[40] puts it: 'unless you preserve your institutions, above all, your land, you cannot … preserve your liberty'. Within this context, therefore, land has been the subject of much legislation in most developing countries.[41]

It has been a constant tug of war between governments which advocate and practise active state participation in the economy, and elements which stand in the way of these governments against development in the context of their economic programmes. In developing countries the source of these problems may be varied ranging from the existence of subsistence economy with all the antecedent problems attached to customary land tenure and the concept of ownership, to the inhibitions imposed by colonial governments in the attempt to promote their own versions of economic development and inherited skewed land policies that favour the white settlers. Most of the laws used in the land tenure centred on what some authors have called the right of eminent domain, and the legislation used in this context has been described as eminent domain legislation. Eminent domain legislation has been used to extinguish private ownership of land when it conflicts with group plans for the use of the piece of land concerned. The colonial administration, for example, passed such legislation for the necessary legal authority to compulsorily acquire land for the public service.

38 Ushewokunze *A Survey of the legal aspects of land tenure, mineral production and manufacturing industries including sanctions in Zimbabwe: Towards a new order*, vol 1, United Nations (1980) 176.

39 n 27 above.

40 AG Russel *Colour, race and empire* (1944) 89

41 HC Dunning 'Law and economic development in Africa: The law of eminent domain' (1968) 68 *Columbia Law Review* 1286. KL Kaarst & KS Rosenn *Law and development in Latin America: A case book* (1975) ch 3.

Such legislation was passed in the Gold Coast in 1876,[42] in India 1894[43] and in East Africa[44] in 1899. The point that must be emphasised, however, is that most of these statutes provided for compensation and where eminent domain legislation was effected by constitutions, the constitutions had entrenched provisions relating to the payment of compensation in the event of expropriation. The point to be noted is that the area of departure from the pattern of these statutes enacted by most post-independence African governments, on attainment of independence, is that the new governments defined their economic policies in terms of active state participation which meant amendments to these laws, which included the public purpose doctrine. Most of these new governments have found that the legal framework of the old laws is inadequate for the achievement of their goals. In the new statues the scope of public purpose was tremendously expanded, as Dunning puts it:

> The relationship between the State and the development process has an important bearing on the public purpose limitation in the law of eminent domain. In the past, the public purpose doctrine has meant that the State could only take property by eminent domain where that property was needed for 'public' activities. Compulsory acquisition was limited to traditional state activities – such as defence, highways, and education. But the modern African government seeking active economic development acts in all spheres. The state either engages directly in production or takes important action to enable private persons to produce and develop … When the State has a dominant [and] rapidly increased production, any productive purpose becomes a public purpose.[45]

Compulsory acquisition therefore was only justified by the use of eminent domain legislation only for the purposes of the public. From the earlier legislation, therefore, it will appear that compulsory acquisition was justified on grounds of public interest or purpose. In Zambia, as in Namibia, the colonial government divided land, into state land trust and reserves. The law applicable to state land was the English land law. All land in the reserves and trust areas was held under customary land law. This division was effected by the Northern Rhodesia Order in Council of 1924. This proclamation was followed by the enactment of the Public Lands Acquisition Ordinance of 1929, which applied only to state land. Under section 53 of the Public Land Acquisition Ordinance of 1929, the Governor was empowered:

> [T]o acquire any lands required for any public purpose for an estate in fee simple, or for a term of years as he may think proper, paying such consideration or

42 The Public Lands Ordinance, Gold Coast 1876, 3 Laws of the Gold Coast Cap 134 (revised ed 1951).
43 Indian Land Acquisition Act, 1894.
44 The Indian Lands Acquisition Act 1894 applied in East Africa, eg, 3 Laws of Uganda Cap 120 (rev ed 1951).
45 Dunning (n 41 above) 1298-1299. Kaarst & Rosenn (n 41 above) ch 3.

> compensation as may be agreed upon or determined under the provisions of the Ordinance.[46]

After independence, however, the Zambian government felt that the then existing legislation relating to land had certain inadequacies located specifically in the provisions of clause 18 of the Constitution. Clause 18 provided for compensation in the event of expropriation, but compensation had to be paid and certain conditions had to be satisfied. The circumstances, under which compulsory acquisition could be allowed, came generally within the scope of the orthodox definition of the right of eminent domain. These circumstances were substantially identical to those given under section 53 of the Northern Rhodesia Public Lands Acquisition Ordinance of 1929, which after independence became known as the Public Lands Acquisition Act.

In addition to these conditions, it was provided that the Government had to pay adequate compensation immediately after expropriation, and provision had to be made for the guarantee of the remittance of money outside the country free from any deduction, charge or tax made or levied in respect of its remission.

This clause was entrenched and could only be repealed by referendum. In 1969 a referendum was held to amend clause 18 of the Independence Constitution. It was argued that since the existing laws of expropriation embodied in clause 18 of the Constitution and the Public Land Acquisition Act were designed to serve the economic interests of the colonial government and were therefore obsolete as a result of the shift in emphasis of economic planning towards rapid development and state participation, the existing laws of expropriation had to be repealed.

The government made it an objective of the new Public Land Acquisition Act[47] to eliminate a society of powerful landlords on the one hand and tenants and workers on the other hand. The Act denied the right of compensation in respect of undeveloped or unutilised land except for unexhausted improvements. Even for unexhausted improvements no compensation was payable if the land was unutilised land belonging to an absentee landowner. In addition, it is interesting to note that the power to acquire land was not restricted only to cases where it was needed for public purpose. In fact, 'public purpose' was eliminated from the Act. Section 3 of the Act reads as follows:

46 The definition of 'public purpose' included the following: 'Any land (1) for the exclusive use of the Government or Federal Government or for general public use; (2) for or in connection with sanitary improvements of any kind including reclamations; (3) for or in connection with the laying out of any new municipality, township in Government station or the extension or improvements of any existing municipality, township or Government station; (4) for obtaining control over land contiguous to, or required for or in connection with any port, airport, railways, roads, or other public works of convenience, constructed or about to be undertaken by the Government or Federal Government'.

47 Public Lands Acquisition Act cap 296 of The Laws of Zambia.

> Subject to the provisions of the Act, the President may, whenever he is of the opinion that it is desirable or expedient in the interest of the Republic so to do, compulsorily acquire any property of any description.

This provision was more liberal than the provision of the earlier Act. For 'public purpose' the latter Act substituted 'interests of the Republic'[48] which is not defined in the Act and which is determined only at the discretion of the President.

In Zimbabwe the land question was one of the issues that had to be settled at the Lancaster House Conference. The Lancaster House Constitution that brought an end to colonial rule in Rhodesia under part III had an enshrined provision that protected fundamental rights to private property and restricted the right of the state to compulsorily acquire land for agriculture or resettlement. Any compulsory acquisition had to be accompanied by prompt and adequate compensation[49] and it was negotiated and agreed that the British government had to make funds available for that purpose. The circumstances under which the state could compulsorily acquire property in the public interest were clearly defined in the Constitution. Property could not be compulsorily acquired except under the authority of law and only after reasonable notice of the intention to acquire the property had been given to any person owning the property or who would be affected by such acquisition.[50] The purposes for which land could be compulsorily acquired included the interests of defence, public safety, public morality, public health and town and country planning. Land acquired in this manner would need to be used for a purpose beneficial to the public generally or a section thereof. The provision further specified that under-utilised land could only be acquired for the settlement of land for agricultural purposes.[51] The entrenched provision, including the provision that reserved twenty seats for whites, could not be amended before ten years after the implementation of the Constitution.

In 1990 the Constitution, including section 16, was amended to give the state more power to remove some of the restrictive provisions and to give the state more leverage in its authority to compulsorily acquire property for agricultural and resettlement purposes. This amendment affected the requirements relating to payment of compensation. The amendment required that compensation be paid but that the compensation had to be 'fair' and be made available 'within a reasonable time'. The amendment implied that 'fair compensation' is necessarily less than adequate compensation, which is market related, and that the state would be in a better position to acquire land since it will not be compelled to pay 'promptly' but within a 'reasonable time'.

48 Public Lands Acquisition Act, s 3.
49 Sec 11(c) of the Constitution of Zimbabwe.
50 Sec 16(1)(a); and L Tshuma & K Makamure 'Land policy in Zimbabwe: The legal framework' in *Conference on land policy in Zimbabwe after Lancaster* (1990).
51 Sec 16(1)(b) of the Public Land Acquisition Act cap 296 of The Laws of Zambia.

The amendment was followed by the Land Acquisition Act of 1992. Section 3 of the Act empowers the President to compulsorily acquire any land, where, *inter alia*:

> (1) the acquisition is reasonably necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the utilization of that or any other property for a purpose beneficial to the public generally or to any section of the public;
>
> (2) any rural land, where the acquisition is reasonably necessary for the utilization of that or any other land –
>
> (i) for settlement for agricultural or other purposes; or
>
> (ii) for purposes of land reorganization, forestry, environmental conservation, or the utilization of wild life or other natural resources; or
>
> (iii) for the relocation of persons dispossessed in consequence of the utilization of land for a purpose referred to in sub-paragraph (i) or (ii).

The new Land Acquisition Act provided for fair compensation within a reasonable time, and it also introduced the concept of deprivation.[52]

After the referendum that rejected the Draft Constitution, the constitutional provisions relating to land acquisition were amended to include some of the provisions of the Draft Constitution.[53] The amended law makes provision for compensation but compensation is not automatic. It gives the government the power to compulsorily acquire agricultural land for the resettlement of people in accordance with the programme of land reform. However, with due regard to the fact that the people of Zimbabwe, as a consequence of colonialism, were unjustifiably dispossessed of their land and additional resources without compensation, consequently took up arms to regain their land and political sovereignty and, therefore, must be enabled to reassert their rights and gain ownership of their land, the Act[54] imposes on the former colonial power the obligation to pay compensation for agricultural land compulsorily acquired for resettlement through a fund established for that purpose. Therefore, if the former colonial power fails to pay compensation through such fund, the government of Zimbabwe has no obligation to pay compensation for agricultural land, compulsorily acquired for resettlement. Furthermore, the amended provision states that even where compensation is to be paid, the following factors must be taken into account in the assessment of any compensation that may be payable:

52 In the case of *Davies v Minister of Lands, Agriculture and Water Development* 1996 9 BCLR 1209 (ZS), the Supreme Court of Zimbabwe in its interpretation of section 11(c) of the Land Acquisition Act, Chapter 20:10 (Zimbabwe) drew a distinction between an acquisition and deprivation and held that section 11(c) did not afford protection against deprivation of property by the State where the act of deprivation fell short of compulsory acquisition or expropriation. It further held that no compensation was required for a deprivation of rights in property and that it was not every deprivation which amounted to a compulsory acquisition of property. Nor did every deprivation require that compensation be paid.

53 See sec 3 of the Constitution of Zimbabwe Amendment Act 16 of 2000.

54 See 16(A) as amended by s 3 of the Constitution of Zimbabwe Amendment Act 16 of 2000.

(a) the history of the ownership, use and occupation of the land;

(b) the price paid for the land when it was last acquired;

(c) the cost or value of improvements on the land;

(d) the current use to which the land and any improvements on it are being put;

(e) any investment which the State or the acquiring authority may have made which improved or enhanced the value of the land and any improvements on it;

(f) the resources available to the acquiring authority in implementing the programme of land reform;

(g) any financial constraints that necessitate the payment of compensation in instalments over a period of time; and

(h) any other relevant factor that may be specified in an Act of Parliament.[55]

The positions in Namibia and South Africa will now be discussed separately.

5.2.2.3 Namibia

The provisions of the Namibian Constitution relating to the power of the state to compulsorily acquire private property are provided under article 16.[56] The purpose of the limitation in the traditional eminent domain clause is an entrenched provision. Article 100 of the Namibian Constitution vests the sovereign ownership of the natural resources of Namibia in the state.[57] Article 16, however, acknowledges private ownership but empowers the state to compulsorily acquire private property in the public interest subject to the payment of just compensation. Article 16 further states that an Act of Parliament should be promulgated for the exercise of the power of expropriation. The article does not define 'public interest'. In the premise, therefore, the determination and definition of 'public interest' lies within the subjective jurisdiction of the state. In the context of the constitutional and political history of Namibia, land resettlement and agrarian reform will legitimately come within the definition of public interest. It is in this context that one can see the justification for the promulgation of the Agricultural (Commercial) Land Reform Act. The purpose of the Act is to provide for the acquisition of agricultural land by the state for the purpose of land reform and for the allocation of such to land to Namibian citizens who do not own or otherwise have the use of any or of adequate agricultural land.

The Act gives the Minister two options: the power to acquire land on the basis of the willing buyer willing, seller option or compulsory acquisition. Section 14 of the Act grants the Minister the general authority to acquire, out

55 Sec 16(A)(2) of the Constitution of Zimbabwe as amended by the Constitution of Zimbabwe Amendment Act 16 of 2000.

56 Art 16 of the Namibian Constitution is quoted on pages 68-69 above.

57 Art 100 of the Namibian Constitution states that land, water and natural resources below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia belong to the state if they are not otherwise lawfully owned.

of moneys appropriated by Parliament for that purpose, agricultural land for implementation of land reform and resettlement policies. It is therefore clear that expropriation is not the only option; it is the last option.[58] Section 14(2) provides as follows:

> The Minister may under subsection (1) acquire:
>
> (a) any agricultural land offered for sale to the Minister in terms of section 17(4), whether or not the offer is subsequently withdrawn;
>
> (b) any agricultural land which has been acquired by a foreign national, or by a nominee owner on behalf or in the interest of a foreign national, in contravention of section 58 or 59; or
>
> (c) any agricultural land which the Minister considers to be appropriate for the purposes or contemplated in that subsection.

Under the authority granted by these provisions and additional relevant laws, the Minister on behalf of the government to date, has acquired 461 000 hectares of land, including 22 605 hectares which were donated. Total Government expenditure is N$ 52 451 355. 79 for the purchase of 79 farms and it must be emphasised that all these farms were purchased on a willing buyer, willing seller basis. During the NDP1 the government spent N$ 45 921 168. 79, and a total number of 22 083 people were resettled. It is, however, now estimated that about 34 000 Namibians have been settled through the government's resettlement programme,[59] and the Ministry intends acquiring an additional 360 000 hectares of land in the next five years and approximately 1 080 people will be resettled.

The criteria used by the Ministry for the selection of people to be resettled are embodied in the Government Resettlement Policy. The policy places people to be resettled into three categories. The first group consists of Bushmen, and any landless former disadvantaged Namibians; the second group consists of landless livestock owners; and the third group comprises people who receive an income but who do not own any land. The resettlement programme aims at improving the living standards of the previously disadvantaged Namibians. Therefore, the resettlement schemes are not restricted to the provision of land for only agrarian purposes. The resettlement schemes have a broader social agenda. They include provision of training facilities and housing. People who are resettled hold the land under leasehold titles of 99 years.

58 Sec 20(1) of the Agricultural (Commercial) Land Reform Act 6 of 1995.
59 As stated in *The Namibian* 30 August 2000. To date it is estimated that 5000 families and cooperatives have been resettled.

The power to expropriate privately owned farms is the alternative option granted to the Ministry by the Act. Under section 20[60] in the event that the Minister, acting on the recommendation of the commission, and the owner of the property are unable to negotiate the sale of the property by mutual agreement, the Ministry may provide for the condition that the exercise of the power to expropriate be subject to the payment of compensation.

5.2.2.4 South Africa

Section 25(1) of the Constitution of the Republic of South Africa, 1996 gives and protects the rights of the individual to own property. However, section 25(2) empowers the state to expropriate property provided that it is done so:

- in terms of a law of general application;
- for a public purpose or in the public interest; and
- subject to compensation determined in the prescribed manner.

The spirit of these provisions is reflected by section 25(3) in terms of which the compensation and the time and manner of payment must be just and equitable and must reflect an equitable balance between the public interest and the interest of those individuals affected by the expropriation. However, notwithstanding this spirit of the compensation provision section 25(3) specifically provides that when compensation is being assessed, regard must be had to all relevant circumstances, including:

(a) the current use of the property;

(b) the history of the acquisition and use of the property;

(c) the market value of the property;

(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and

(e) the purpose of the expropriation.

The significance of these factors in the Zimbabwean and South African Constitutions is that in assessing the amount of compensation the court will not only have to use the market value of the property but will also have to take these specified factors into consideration.

The South African constitutional provision gives the South African government the power to acquire land for land resettlement and reform.

60 Sec 20 provides as follows: '(1) Where the Minister decides to acquire any property for the purposes of section 14(1) and the Minister, acting on the recommendation of the Commission, and the owner of such property are unable to negotiate the sale of such property by mutual agreement, or the whereabouts of the owner of such property cannot be ascertained after diligent inquiry, the Minister may, subject to the payment of compensation in accordance with provisions of this Act, expropriate such property for such purpose'.

Apart from the constitutional provisions pertaining to compensation the Restitution of Land Rights Act 22 of 1994-provides for the restitution of rights to land for persons or communities dispossessed of such rights after 19 June 1913 as a result of past racially discriminatory laws or practices. For the purpose of claiming restitution this Act also established the Land Claims Court.

5.2.3 Consequences of expropriation and land resettlement

5.2.3.1 Protection of the rights of the individual

The individual's right to own property and the protection of that right are recognised as fundamental rights of the individual under international law. This right can be found in most constitutions and international conventions. Article 17 of the United Nation's Universal Declaration of Human Rights 1948 provides that everyone has the right to own property alone as well as in association with others; and no one may be arbitrarily deprived of property. In terms of article 5(d)(v) of The International Convention on the Elimination of all Forms of Racial Discrimination, state parties undertake to eliminate racial discrimination in all forms and to guarantee the right of everyone to own property alone as well as in association with others.[61] The protection of this right is contained in various provisions such as substantive law provisions; provisions for the payment of compensation; procedural requirements to guarantee the application of the rules of administrative justice in the exercise of the powers of expropriation; and procedural mechanisms meant to safeguard against the abuse of the power to expropriate.

Since this right is recognised as a fundamental right, in most jurisdictions, the right is enshrined and guaranteed by the Constitution and therefore the power to deprive the individual of this right can only be granted by the law on justifiable grounds. It is for this reason that in earlier constitutions the right to expropriate could only be justified on grounds of public utility and was subjected to the purpose limitation in the eminent domain clause. The determination of what constitutes public utility is a political one and therefore, the individual might not be competent to make any pronouncement on the validity of that decision. But the individual must be involved in the process of deciding what property must be subjected to expropriation, for example, the individual must be given the opportunity to suggest alternative land equally suitable for expropriation under the public utility justification.

61 See also art 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950; Art 23 of the American Declaration of the Rights and Duties of Man of 1948; Art 21 of the American Convention on Human Rights of 1969; and Art 14 of the African Charter on Human and People's Rights of 1981

In most Southern African countries that achieved independence through liberation wars, it is common knowledge that colonial land policies and land tenure systems constituted the major causes for the liberation struggles. Therefore, at the time of independence, governments had to embark on land reform and resettlement programmes to correct the injustices of the past. In the context of the laws of expropriation the traditional public utility rationale for expropriation was found wanting. The orthodox grounds for expropriation had to be expanded to accommodate resettlement and agrarian reform. In Namibia, for example, land resettlement and agrarian reform have come under the domain of public interest within the context of the provision of article 16 and the government can therefore exercise the powers of expropriation for its resettlement and agrarian reform schemes. Confronted with such onerous provisions justifying the deprivation of his or her rights, the individual can only be assured of equity and justice if the right to compensation is assured.

5.2.3.2 Compensation

The payment of compensation is one of the requirements in customary international law for the validity of the power to expropriate private property by a sovereign state. This right to expropriate is within the competence of a sovereign state but the compensation requirement imposes a legal restriction on this competence.[62] In *Texaco*[63] the requirement that was adopted as a rule of public international law is that the expropriating sovereign state must pay 'prompt, adequate and effective compensation'. The 1962 Resolution on Permanent Sovereignty over Natural Resources also makes provision for the payment of compensation. It provides that in case of expropriation, 'the owner shall be paid appropriate compensation'.

In *Texaco* it was further stated that the standard of 'appropriate compensation' in the resolution 'codifies positive principles', but there is no uniform standard for the quantum of compensation under municipal law. The expropriation laws of Zambia, Zimbabwe, Namibia and South Africa all make provision for the payment of compensation. In the case of Zambia, the Government was required to pay 'adequate compensation' and in the case of Zimbabwe, the Lancaster House Constitution provided for the payment of 'prompt and adequate' compensation. This was amended to 'fair compensation' but only for improvements. The South African Constitution makes provision for the payment of 'just and equitable' compensation and stipulates factors[64] that must be considered in the assessment of

62 In some jurisdictions such as Zimbabwe, South Africa and the USA, the distinction is drawn between expropriation of property and deprivation of property. The former involves the payment of compensation but deprivation has been held not to involve the payment of compensation. In America, expropriation falls under eminent domain and deprivation is known as police power.

63 n 27 above.

64 See secs 25(1)-(3) of the South African Constitution.

compensation. Article 16(2) of the Namibian Constitution *inter alia* provides that the state may expropriate property 'subject to the payment of just compensation'. One is therefore obliged to come to the conclusion that the amount of compensation is a political decision within the competence of the government of the day. If this is accepted as a valid conclusion, this matter must be justiciable. The jurisdiction of the courts in this matter must not be ousted.

The Namibian Agricultural (Commercial) Land Reform Act[65] empowers the Minister, upon the recommendation of the Land Reform Advisory Commission, to offer the owner concerned, in the appropriation notice, the amount of compensation for the property which is being expropriated. In assessing the amount of compensation, the Act stipulates under section 25(5)(a) and (b) that the Minister must take into consideration the enhancement of the value of the property in consequence of the use thereof and the improvements made after the date of notice on or to the property in question, provided that the amount does not exceed the aggregate of the amount which the land would have realised if sold on the date of notice on open market by a willing seller to a willing buyer and an amount to compensate any actual financial loss caused by the expropriation.[66] The Act also provides that if the parties fail to reach an agreement regarding the amount of compensation, compensation is to be determined by the Lands Tribunal on the application of any party, and resettlement to be effected by arbitration in terms of the Arbitration Act 42 of 1965.[67] The Act is silent on the individual's right of appeal to the courts but it does not specifically oust this right either.

5.2.3.3 Procedural and administrative protection

The additional legal mechanisms used to protect the rights of the individual and to safeguard against the arbitrary use of the power to expropriate are the procedural rules. These are meant to ensure that in the exercise of the power of expropriation the individual is protected through the due process of law. Under the Namibian Constitution the exercise of this power will be subjected to the provisions of article 18 of the Constitution, which demands the application of the principles of natural justice. The Agricultural (Commercial) Land Reform Act has provisions to that effect. It also contains provisions to ensure that the power to expropriate is not concentrated in the hands of only one person. The power is exercised in consultation with the Land Reform Advisory Commission and, as mentioned earlier, the determination of the amount of compensation in the event of a disagreement, is subject to the jurisdiction of the Lands Tribunal which is established under section 63 of the Act.

65 Secs 23 and 25.
66 Secs 25(1)(a)(i) and (ii).
67 Secs 27(1)-(3).

Social and economic consequences of expropriation

The decision to expropriate is a political one but it has legal, economic and social implications that impact not only on the individual but also on the budget of the nation. In Zimbabwe, for example, it was reported in the *The Herald* of 21 August 2000 that over 240 000 farm workers were likely to lose their jobs after the conclusion of the acquisition of over 3 000 commercial farms for resettlement. The paper added, however, that the government intended resettling these farm workers. Furthermore, it must be noted that expropriation without compensation erodes the confidence that the banks have in title deeds. It reduces title deeds to mere pieces of paper.

5.2.3.4 Conclusion

Under international law, states have a sovereign right over their natural resources. Public international law also recognises the individual's right to property. The problem that could result from these potentially conflicting rights could be resolved by the application of the principle that the right of the community overrides the right of the individual. On this premise, the power of the state to extinguish the individual's right to property could only be justified on grounds of public utility, and where expropriation is justified on grounds of public utility, the individual must be compensated for the deprivation of his or her rights. The demands of natural justice and equity enjoin the expropriating authority to comply with the principles of natural justice since in essence the right to expropriate is discretionary. The spirit and the letter of the Namibian Constitution relating to expropriation are consistent with the principles of international law relating to expropriation, and the Namibian government, to date, has not compulsorily expropriated any private property.[68]

5.3 Statutory Limitations

Statutory limitations on the right of ownership are contained in both pre- and post-independence legislation. An attempt is made below to highlight and discuss some of these pieces of legislation, which do not purport to represent an exhaustive list of all legislation that imposes restrictions on ownership.

5.3.1 Ordinance 18 of 1954

Section 29 of Ordinance 18 of 1954, as amended by the Town Planning Amendment Act 27 of 1993, authorises local authorities to expropriate land for development purposes. The section further provides that the responsible

68 This statement represents the situation at the time of going to press. In 2004 on account of the Namibian Government's realisation of the failure of the willing buyer willing, seller process, the then Prime Minister, Theo-Ben Gurirab, announced that land expropriation would begin. To date only one farm has been successfully expropriated.

authority may, with prior approval of the Minister, purchase land required for any of the purposes of a scheme and exchange it for alternative land within the same scheme. If a local authority is, however, unable to purchase by agreement required land or interest in such land, it may, with prior approval of the Minister, under the provisions of the Expropriation of Land Ordinance of 1927, 'expropriate the same as though it were a municipal council'.

5.3.2 The Expropriation Act 63 of 1975

The Act deals with the expropriation of land. It came into operation on 1 January 1977, in terms of RSA Proclamation 273 of 1976. The Act applied to South-West Africa (SWA) only in respect of expropriations by the Railway Administration. However, the National Transport Corporation Act 21 of 1987 repealed section 4 of the Expropriation Act 63 of 1975 which contains the provision which made the Act applicable to SWA. The National Transport Corporation Act 21 of 1987 was repealed by the National Transport Services Holding Company Act 28 of 1998 with effect from 1 April 1999. The point worth noting here is that the 1998 Act does not contain any express provision vesting the Railway Administration, currently known as Transnamib, with powers of expropriation.

5.3.3 The Expropriation Ordinance 13 of 1978

This Ordinance deals with the expropriation of land and was promulgated before independence and therefore issues may be raised about its applicability and compatibility with the provisions of the Namibian Constitution. The opinion being canvassed here is that since the Ordinance has not been repealed by Parliament, it remains valid to the extent to which its provisions are not inconsistent with the Constitution. Section 2 of the Ordinance gives the Executive powers to expropriate any property for public purposes. Section 3(1) provides for the conferment of powers to expropriate upon a local authority by the executive committee. Therefore, the local authority can expropriate through the conferment of powers to the extent provided for in section 2. These powers may be conferred in general or in relation to particular land or in respect of a particular case. The expropriation of property is subject to the payment of compensation the determination of which is provided for under section 9.

5.3.4 The Local Authorities Act 23 of 1992

Section 30 of the Local Authorities Act 23 of 1992 gives the local authorities the power to purchase any immovable property with the prior authority of the Minister. This power equates to a right of pre-emption which constitutes a restriction on the right of ownership. Furthermore, under section 73 the local authorities are empowered to impose various types of rates on

property. These include a general rate for example for refuse collection, site value rate and improvement rate.

5.3.5 Transfer Duty Act 14 of 1993

If property is being transferred from one person to another under the provisions of sections 2 and 3 of the Transfer Duty Act, the person who has acquired the property or in whose favour or for whose benefit any interest in or restriction upon the use or disposal of property has been renounced, has to pay transfer duty. However, if the property that is the object of the transfer is a commercial property, a value-added tax (VAT) and not a transfer duty, is imposed. One may also add that under section 76 of the Agricultural (Commercial) Land Act the Minister is empowered to impose land tax on commercial farms.

5.3.6 The Stamp Duties Act 15 of 1993

Under section 3 of the Stamp Duties Act, read with schedule 1 thereof, a stamp duty is imposed on a transfer deed relating to immovable property unless an exemption has been granted in respect of a scheduled instrument.

5.3.7 The Electricity Act 2 of 2000

The Act provides for the establishment and functions of the Electricity Control Board. In terms of the provisions of the Act a person who holds a licence duly granted by the Minister may establish or carry on any undertaking for the generation, transmission, supply, distribution, importation and export of electricity. Section 33 provides that a licensee may, with the approval of Cabinet and subject to such conditions as Cabinet may impose, by expropriation acquire any land or right over or in respect of land, as the licensee may require in the public interest, for any purpose associated with the generation, transmission, distribution or supply of electricity by the licensee. Cabinet may grant approval to a licensee only after considering and being satisfied with a report from the Board.

5.3.8 The Agricultural (Commercial) Land Reform Act 6 of 1995

The Agricultural (Commercial) Land Reform Act regulates the purchase and redistribution of privately owned farms. The relevant sections of the Act in respect of acquiring agricultural land and expropriation of such land are section 14, providing for the purchasing of agricultural land by the state on a willing buyer willing seller basis, and section 20, providing for expropriation of such land and requirements therefor.

The Act also provides for the appointment, composition, powers and duties of the Land Reform Advisory Commission. The technical commission on commercial farm land was mandated to investigate the entire land tenure situation in Namibia and make recommendations as far as *absentee foreigners* are concerned.

The Act was promulgated as the legislative tool for the implementation of the Government's land reform programme. In the context of legislative restrictions on the right of ownership, the Act imposes dual restrictions. The first type of restriction entails the pre-emptory right, the so-called willing buyer willing seller option granted to the Minister, in terms of section 17(3), and the second type of restriction arises from the Minister's power to expropriate agricultural land for the purposes of land reform, resettlement of the landless and poverty alleviation in terms of section 14 but subject to the requirements and procedures provided for in sections 14 and 20. These requirements include the payment of compensation and the public interest provision.

These requirements appear to accord with international standards. In *Texaco*[69] it was held that nationalisation of property by the state or expropriation is allowed but subject to the condition that nationalisation or expropriation is done in the public interest, subject to payment of just compensation. Similar provisions are to be found in the 1962 UN General Assembly Resolution on Permanent Sovereignty over Natural Resources, which states, *inter alia,* that expropriation shall be based on grounds or reasons of public utility, security or the national interest which are recognised as overriding purely individual and private interests.

The State's power to expropriate agricultural land which is exercised by the Minister under the Act to advance the Government's land reform and poverty alleviation programme, was considered by the court in *Kessl,*[70] which was described as a 'test case' by Muller J. In this case the applicants applied for an order to review and set aside the decision of the Ministry of Lands and Resettlement to expropriate certain farms belonging to the applicants in the Otjozondjupa Region of the Republic of Namibia. The applicants initially conceded that the Government of the Republic of Namibia has the right to expropriate farms under certain conditions and therefore only two main issues needed to be considered by the court. Firstly, the question whether the *audi alteram partem* principle was relevant in expropriation cases such as those before the court and, secondly, whether the procedure that was followed in all these three cases before the court was in conformity with the law.

As stated earlier, since the Act in principle imposes restrictions on the constitutional right of ownership, the court reiterated the principle that an

69 n 27 above.
70 n 28 above.

act or statute that provides for actions that may infringe fundamental rights should be interpreted restrictively in such a manner as to place the least possible burden on subjects or to restrict their rights as little as possible. The rights of the public should be properly balanced against those of the individual by adhering to the requirement of 'public interest' in article 16(2) and the provisions of section 14 of the Act.

On the issue of the relevance of the *audi alteram partem* principle in expropriation cases such as those under consideration, the court held that article 16(2) is not a self-contained or 'walled-in' provision, excluding the application of the *audi alteram partem*[71] principle which was therefore held to be applicable. In the context of the Act the exercise of the powers of expropriation granted to the Minister was therefore subject to the provisions of article 18 of the Namibian Constitution and the common law grounds for review of administrative discretion.[72] In terms of the said article the Minister may only act within the limits of his statutory discretion and should apply his mind to the requirements of the enabling Act. In order to expropriate land, it must be done within the provisions of the Act and involves a double-barrel process, firstly, in terms of section 14 and then, in terms of section 20. This provision is peremptory and must be complied with before the Minister takes a decision. Furthermore, the court held that under the provisions of section 20(6) the Commission is obliged to consider the interests of the persons employed and lawfully residing on the land and the families of such persons residing with them. This factor becomes a variable in the determination of what constitutes public interest.[73]

The Land Reform Advisory Commission established under section 2 of the Act is mandated to make recommendations to the Minister or advise the Minister in relation to any power conferred upon the Minster by the Act. The court held that such consultation between the Minister and the Commission was a prerequisite before embarking upon the section 20 expropriation process, and that such consultation should take place at the section 14 stage when a determination as to whether there was a willing buyer and a willing seller must be made and *before* the Minister decides to purchase a particular farm. The requirements of this provision go beyond a mere consultation; they demand genuine consultation.[74]

71 The decision in *Westair Aviation (Pty) Ltd & Others v Namibia Airports Company Ltd & Another* 2001 NR 256 (HC) in respect of applicability of the *audi alteram partem* principle was confirmed.

72 *Chairperson of the Immigration Selection Board v Frank & Another* 2001 NR 107 (SC).

73 See also *Aonin Fishing (Pty) Ltd & Another v Minister of Fisheries and Marine Resources* 1998 NR 147 (HC).

74 *Agricultural, Horticultural and Forestry Industry Training Board v Aylesbury Mushrooms Ltd* [1972] 1 ALL ER 280 (QB); *Robertson & Another v City of Cape Town, Truckman-Baker v City of Cape Town* 2004 5 SA 412 (C); *Maqoma v Sebe NO & Another* 1987 1 SA 483 (CK); and *Stellenbosch Municipality v Director of Valuations & Others* 1993 1 SA 1 (C).

5.3.9 The Water Resources Management Act 24 0f 2004

This Act deals with the management, development, protection, conservation, and use of water resources. Section 126 of the Act vests in the Minister the power to expropriate any property, to authorise the temporary use of any property, or issue a written authorisation to a water management institution for the temporary use of property or effluent if this is in the public interest.

5.3.10 Additional relevant legislation

Examples of additional legislation imposing restrictions on the right of ownership are the Weeds Ordinance 19 of 1957,controlling the eradication of weeds on land; the Marketing Act 59 of 1968, controlling the sale of agricultural products; the Agricultural Pest Act 3 of 1973, controlling agricultural pests; the Meat Industry Act 12 of 1981, controlling the meat industry; the Stock Brands Act 24 of 1995, making it compulsory to brand cattle; the Animal Diseases and Parasites Act 13 of 1956, controlling animal diseases; Soil Conservation Act 76 of 1969, dealing with soil erosion; and the Subdivision of Agricultural Land Act 70 of 1970, prohibiting the subdivision of land under certain circumstances.[75] The above legislation is aimed at the use of land and agricultural products.

Examples of control over further property are the Local Authorities Act, controlling the sale of alcohol; the Arms and Ammunition Act 7 of 1996, controlling the use of arms and ammunition; the Road Traffic Ordinance 30 of 1967 and the Road Traffic and Transport Act 22 of 1999, controlling the use of motor vehicles; the Price Control Act 25 of 1964, controlling he price of certain goods; the Water Resources Management Act 24 of 2004, controlling the price of water under certain circumstances; and the Credit Agreements Act 75 of 1980 which regulates transactions where movable goods are purchased or leased on credit.

5.4 Common law limitations

The common law limitations may be broadly categorised under the following headings: creditors' rights of third parties against the owner of property; limited real rights of third parties in the property; and neighbour law.[76]

5.4.1 Creditors' rights of third parties against the owner of property

These are rights arising out of a contract with a third party and can *prima facie* be considered as personal rights. As personal rights they are not registrable. *Geldenhuys*[77] establishes the principle that if such creditor's right is closely

75 The provisions of the Subdivision of Agricultural Land Act are discussed in more detail under para 4.1 above.
76 Van der Walt & Pienaar (n 2 above) 86-88.

related to a registrable limited real right in respect of the immovable property it can be registered but such registration does not convert the nature of the personal right to a real right.[78] Hence, they do not create any burdens on the land and they are enforceable as a general rule against the owner in his or her personal capacity as a party to the contract. They create limitations on an owner's rights of use and entitlement but do not subtract from the *dominium* and are not enforceable against the owner's successors in title. Limitations brought about by short term leases are examples of the limitations now under consideration.

A short-term lease is a lease of immovable property for a term shorter than ten years and is not registered.[79] The lease agreement is not sufficient to constitute a real right, as it creates creditors' rights only. However, the lessee acquires a real right as soon as the lessee takes possession of the property and this alters the relationship between the lessee and new owners of the property. Firstly, new owners who had knowledge of the lease agreement are bound by its terms by virtue of the application of the doctrine of notice. In terms of this doctrine, the lessee is protected for the duration of lease, since the new owner who had knowledge of the lease agreement is deemed to have acquiesced in the lease agreement before purchasing the property.[80] The lease agreement is therefore enforceable against the new owner. Secondly, the lessee is protected for the duration of the lease by the application of the common law principle of *huur gaat voor koop* (lease agreement takes precedence over a sale).

5.4.2 Limited real rights of third parties in the property

When considering the principles relating to the distinction between real rights and personal rights, we saw that rights over the landowner's entitlements created in favour of third parties constituted limited real rights. In terms of the test laid down in the *Geldenhuys*[81] such rights are registrable, since they constitute encumbrances on the land. We also saw that such conditions or rights can be created *inter vivos* by a contract, notarial deed or by testamentary disposition. Such limited real rights therefore, as a general rule, impose limitations on an owner's exercise of entitlements.

77 n 5 above.
78 *Nel NO v Commissioner for Inland Revenue* 1960 1 SA 227 (A) 235.
79 Under sec 102 of the Deeds Registries Act 47 of 1937, the definition of immovable property includes: 'any registered lease of land which, when entered into, was for a period of not less than ten years or for the natural life of the lessee or any other person mentioned in the lease, or which is renewable from time to time at the will of the lessee indefinitely or for periods which, together with the first period amount in all to not less than ten years'.
80 F du Bois *Wille's principles of South African law 9th ed* (2007) 627; Van der Walt & Pienaar (n 2 above) 289-90.
81 n 5 above.

5.4.3 Neighbour law

We saw from the definition of ownership that the element of absoluteness in the definition is notional in that there are restrictions imposed on the owner's exercise of entitlements. In the province of neighbour law such restriction is placed on the interest of the individual at the micro level rather than in the interest of the community at the macro level.

The basis of neighbour law is that land must be used in such a way that another person is not prejudiced or burdened (*sic utere tuo ut alienum non laedas*). If an owner or occupier of land, in the exercise of entitlements, should inconvenience a neighbouring owner or occupier by creating or allowing a situation as a result of which his or her neighbour suffers damage or if the neighbour is disturbed in the use and enjoyment of his or her property, he acts unreasonably.[82] It regulates the way in which conflicts between neighbours in the use of their entitlements can be resolved and creates a balance between the rights of the owner and the interests of the neighbour.

As a general rule neighbour law comprises common law restrictions relating to nuisance, encroachment, damage of surface waters, lateral support, trees, overhanging branches, fallen leaves and intruding roots. These are restrictions or limitations on the exercise of the owner's entitlements in ownership, in the interests of landowner or user adjacent land or nearby land. They are not restrictions on the interests of the community at large.

In the case of *King v Dykes*[83] MacDonald ACJ laid down the general principle of an occupier's duty with regard to his neighbour as follows:

> 'When an owner knows that there is a danger present on his land, not placed there by him, but which he foresees will cause his neighbor damage (natural danger is not discussed here) , there rests a duty upon him in my view to act as long as it is reasonably possible to render the danger harmless' … Whether in a particular case such a legal duty exists is to be decided in the main by factors such as those mentioned in Goldman's case – 'knowledge of the hazard, ability to foresee the consequences of not checking or removing it, and the ability to abate it … and a balanced consideration of what could be expected of the particular occupier as compared with the consequences of inaction'.

The law of neighbours is based on the principles of reasonableness and fairness. From the authorities cited above, the principle of reasonableness means that although landowners, and occupiers of land, can do with their property as they like, they must exercise their rights with due regard to the rights of neighbours. The principle of fairness means that landowners can

82 *Gien* (n 1 above), as translated by Van der Walt & Pienaar (n 2 above) 88.
83 1971 3 SA 540 (RA) 545, quoting from *Goldman v Hargrave* 1967 1 AC 645.

only be held responsible for damage caused to a neighbour in the use of their land when or where it is fair to expect them to avert the damage in question. This implies that owners of land are not only liable for any nuisance caused by themselves but also by others on their property.[84] Authorities, however, draw a distinction between the liability of the actual creator of the nuisance and the successor in title to the land upon which the nuisance continues to exist. The liability of the successor is less than that of the perpetrator. Whereas the criterion for the liability of the latter is a physical possibility, the acceptable basis of the liability of the former is the failure to take reasonably practicable steps to prevent the nuisance or the alternative situation complained of.[85]

The purpose of this limitation is said to be to harmonise the interests of neighbours and to strike a balance between the respective rights and interests of neighbours.[86]

5.4.4 Nuisances

Silberberg and Schoeman are of the view that in the sphere of neighbour relations in our law, nuisance:

> includes ... conduct whereby a neighbour's health, well-being, or comfort in the occupation of his land is interfered with (also referred to as annoyances) as well as the causing of actual damage to a neighbour

With regard to annoyance they say:

> (I)t has been regarded that an annoyance amounts to an infringement to a right of personality namely the right of the neighbour to have an unimpeded enjoyment of his land. On the other hand it has been suggested that the right infringed may be the right of ownership itself.[87]

This definition draws a distinction between interference with personality rights and patrimonial rights, which amounts to a diminution in utility. This distinction can also be found in the definition by Van der Walt &Pienaar. In their definition of nuisance they refer to the first part of Silberberg's definition as nuisance, in the narrow sense, and in this regard they define nuisance as follows:

> [N]uisance in the narrow sense consists in an infringement on the neighbour's use and enjoyment and use of his land which constitute an infringement of personality right (for example his health) or an entitlement of use (for instance his right to the undisturbed enjoyment of his property) by means of noises, smells, gases, etc.

84 *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A) 116-7.
85 *Regal* (n 84 above) 116.
86 Van der Walt & Pienaar (n 2 above) 88.
87 Badenhorst *et al* (n 3 above) 111.

They define nuisance in the wider sense as: 'consisting in the infringement of the neighbours exercise of entitlements in general, or actions by the neighbouring owner or occupier that cause damage'. They maintain that: 'in such circumstances compensation can be paid or the infringement can be prohibited by means of an interdict'.[88]

The primary requirement to establish nuisance in the sense of annoyance, nuisance in the narrow sense, is the standard of the reasonable user. In applying this standard the question to be answered is whether a reasonable man finding himself in the position of the complainant would have tolerated the nuisance. Reasonableness is therefore a variable criterion but from the authorities, one can deduce some established requirements to determine what amounts to reasonableness and what interference would be regarded as nuisance.

The first criterion relates to the continuing nature of the nuisance. Nuisance in the sense of an annoyance denotes a continuing wrong so that an isolated infringement would, as a general rule, not found a cause of action unless there is a reasonable suspicion that it will be repeated.[89]

The second requirement relates to the acceptable degree of tolerance as laid down in the case of *Prinsloo v Shaw*.[90] In this case the plaintiff brought an action for an order restraining or indicting Prinsloo (the respondent) from causing or committing a nuisance on his property or from allowing or permitting other persons to cause or commit a nuisance on the property by conducting or holding religious or other services or exercises accompanied by very loud and strident singing and yelling, singing in a monotonous whine and chant, frenzied praying, stamping of feet, clapping of hands and groaning, all in such a manner that the applicant and his family were seriously incommoded, disturbed, disquieted and interfered with, their comfort seriously diminished and the value of applicant's property diminished. In the supporting petition the applicant applied in the alternative for a temporary interdict pending action.

The court set out the law as follows:

> A resident in a town and more particularly a resident in the neighbourhood, is entitled to the ordinary comfort and convenience of his home, and, if owing to the actions of his neighbour he is subjected to annoyance or inconvenience greater than that to which a normal person must be expected to submit in contact with his fellow-men, then he has a legal remedy. The standard taken must be the standard not of the perverse or finicky or over scrupulous person, but that of a normal man of sound and liberal taste and habits.[91]

88 Van der Walt & Pienaar (n 2 above) 89-90.
89 Badenhorst *et al* (n 3 above) 111.
90 1938 AD 570.
91 At 575.

In the case of *Laskey & Another v Showzone CC & Others*[92] the court stated that the factors which have been regarded as material in determining whether the disturbance is of a degree which renders it actionable, include, where the disturbance consists in noise: the type of noise, the degree of its persistence, the locality involved and the times when the noise is heard. The test is an objective one in the sense that not the individual reaction of a delicate or highly sensitive person who truthfully complains that he finds the noise to be intolerable, is to be decisive, but the reaction of 'the reasonable man' – one who, according to ordinary standards of comfort and convenience, and without any peculiar sensitivity to the particular noise, would find it, if not quite intolerable, a serious impediment to the ordinary and reasonable enjoyment of his property.

Even though *Laskey* dealt with interpretation and application of the provisions of a particular piece of legislation, the Noise Control Regulations made by the Provincial Minister in terms of section 25 of the Environment Conservation Act 73 of 1989, the test laid down is of general application in accordance with common law principles.

It has been suggested that some of the factors to determine reasonable usage include the general character of the area in question or the situation of the land, the class of the person, the habits of the residents and social utility.[93]

The second part of the definition of nuisance, referred to as nuisance in the wider sense, deals with actions where the alleged nuisance actually causes patrimonial damage as opposed to an infringement of the right of personality. If the action for nuisance is based on an unlawful threat to utility of the land, then the possessor or occupier is entitled to an interdict, and if it is a diminution in utility, an action for compensation is the appropriate route to follow. In an action based on patrimonial damage the plaintiff could institute the a*ctio legis Aquiliae* and apply for an interdict, where appropriate. In the case of nuisance that actually causes patrimonial damage the plaintiff will have to establish the five elements of delict and claim for compensation and an interdict where relevant, to stop or abate the alleged nuisance, if it still exists.

It was indicated in *Regal* that in an action based on nuisance *culpa* (culpability or fault) is not a requirement if the remedy sought is an interdict. The court left open the question whether *culpa* would be required for a claim of damages but in an *obiter* Steyn CJ and Rumpff JA indicated that any case based on damage caused to one landowner by the unreasonable use of

92 2007 (2) SA 48 (C).
93 See *Laskey* (n 92 above); Badenhorst (n 3 above) 112; Du Bois (n 80 above) 479; and *Gibbson v South African Railways and Harbours* 1933 CPD 521 at 531.

neighbouring property must be decided on the basis of Aquilian liability for which culpability in the form of negligence or intent is required.[94]

In *Regal*[95] the appellant, in his declaration, alleged that the previous owner of the respondent's land, which bordered on his, in quarrying for slate, had left slate waste where the flood waters of the Elands River could reach it; that it had been washed to the bed of the river on the appellant's ground; and that the respondent had failed to take the necessary steps to deflect the further carrying of slate by flood waters from his land to the appellant's land. The appellant had alleged that he had a right to an order forbidding the respondent to continue or renew the nuisance and had asked that the respondent should be prevented by way of an interdict from allowing the slate waste to be washed by the river water across the boundary between the two farms towards appellant's land.

The court held as follows:

> (1) English law of nuisance had not been substituted for our law and it was necessary to investigate our own common law sources.
>
> (2) If it was reasonably practicable to avert the still threatened damage by a wall on the respondent's – not appellant's – land, then the failure to do so would be unlawful and then the appellant would have a basis for a petition for an interdict and possibly also for a claim for compensation for damage which he might suffer but that the appellant had failed to show that the erection of a wall would be reasonably practicable.
>
> (3) The respondent was liable only for such damage as was caused by his own use of the Elands River as a conduit pipe for carrying slate waste from his property onto appellant's property. To grant the order prayed for would be to equate the respondent's liability to that of his predecessor and to disregard these considerations of fairness and equity which were the bases of the law between neighbours.
>
> (4) The respondent would, during the duration of his ownership, be liable to the appellant for damage, which might be caused by the slate waste on the appellant's land, and the appellant was not entitled to the interdict asked for to prevent damage.
>
> (5) The only acceptable basis of liability was a failure to take reasonably practicable steps to prevent the situation complained of, and the appellant had failed to show that the matter complained of could have been prevented by reasonably practicable measures.

Ogilvie Thompson JA observed that the situation thus created by the respondent's predecessor continued to exist and held that, under circumstances such as those present in this case, the law ought to attach *some* liability to the respondent, as the owner occupying the land whence the invading slate debouched and would continue to debouch upon the

94 See also *Dorland & Another v Smits* 2002 5 SA 374 (C).
95 n 84 above.

appellant's land, which appear to be eminent. The vital question for decision, however, was about the extent and scope of that liability which does not depend upon negligence. The court held that the liability to be attached to the respondent was not absolute as it was distinguishable from the liability of the creator of the *opus manufactum*, the respondent's predecessor. Having regard to the cardinal fact that the apprehended slate invasion had not been caused by or contributed to by any positive act on the part of the respondent, the latter could not be burdened with an absolute liability. In determining liability in cases of nuisance the court must therefore distinguish between the liability of the actual creator of the nuisance and that of the successor in title to the land upon which such a nuisance continues to exist, as the liability of the successor is regarded as less than that of the perpetrator.

With regard to nuisance involving actual infliction of patrimonial damage, the test is also one of reasonableness. The main factor that has to be taken into account is that of the ordinary and natural user.[96] In the case of *Malherbe v Ceres Municipality*,[97] in an action for an order directing the defendant Municipality to abate a nuisance caused by three oak trees located or situated on its property directly opposite a building on the plaintiff's property the plaintiff had averred that the said trees constituted a nuisance in the sense that:

(1) the leaves from the trees had blocked the gutters of his building causing the walls to be damaged and damp from rainwater; and

(2) the roots of the trees had damaged the foundations and walls.

It was held that the planting of oak trees alongside streets of towns and villages in the western province was to be regarded as putting such streets to their natural and ordinary use. It was held further that if leaves from such trees were blown onto neighbouring properties, then the owners thereof had to tolerate the natural consequences of the ordinary user of the street by the defendant. In the same case it was stated that the consequences of the ordinary user by an owner of his land could not be regarded as an unlawful obstruction of his neighbour's land. An owner cannot object to leaves and acorns from oak trees falling on his property when he allowed such tree branches to hang over onto his property. He has an option either to allow the overhanging branches or to ask the owner to cut the branches.

The court further held that if leaves from such trees were blown onto neighbouring properties, then the owners thereof had to tolerate the natural consequences of the defendant's ordinary use of the street. Moreover, the damage which the plaintiff complained of was due to his negligence to disburse a small sum annually to have his gutters cleared. Finally, the court held that the plaintiff was not entitled to an interdict in respect of the leaves

96 Badenhorst *et al* (n 3 above) 114.
97 1951 4 SA 510 (A).

which fell on his roof from the overhanging branches in the absence of an allegation and proof that he had asked the defendant to remove the branches which hung over his property and that the defendant had failed to do so.

As indicated above, the remedies available to the plaintiff in the event of nuisance include an action for an interdict and the *actio legis Aquiliae* under the law of delict. To obtain an interdict, one does not have to establish *culpa* (fault) but under the *actio legis Aquiliae*, being a delictual action, the plaintiff has to establish the five requirements of delict, namely: an act or omission; unlawfulness of such act or omission; intent or negligence (*culpa*); causality or causation; and the actual damage incurred.

5.4.5 Lateral support

One of the entitlements of a landowner is the power to excavate the soil of his land, in particular, though not only, for building and mining purposes. This power is limited by the owner's duty not to withdraw the lateral support which the land affords to adjacent land. A landowner is entitled to the support provided to his or her land by the neighbour's land. A neighbouring owner is therefore obliged to use the land in such a way that lateral and surface support of adjoining land are not disturbed by excavations for building or mining purposes. The obligation to lateral support does not have a clear common law origin and is a South African development influenced by English law.[98]

The obligation refers to the support provided by the land for adjoining pieces of land. In other words, damage to structures affixed to adjoining land does not provide the owners of the land with any type of remedy. It is furthermore an inherent characteristic of landownership that a landowner is entitled to the support of his or her land by the support of a neighbouring owner's land in its natural state.[99] The duty of lateral support is not confined to owners of private land. It is also imposed on public corporations and other bodies so that a municipal authority which makes an excavation and causes a subsidence of privately owned land cannot, as a general rule, avoid liability for damages on the ground that it has acted within its statutory powers.[100]

This power and the corresponding duty have been defined in *Demont v Akals' Investments (Pty) Ltd & Another* [101] as follows:

> An owner of land is normally entitled to expect and to require from land contiguous to his own such lateral support as would suffice to maintain his land in a condition of stability if it were in its natural state. A landowner can, of course, alter the condition of his land, for example by excavating or building on

98 Van der Walt & Pienaar (n 2 above) 92.
99 Van der Walt & Pienaar (n 2 above) 92-93.
100 Kleyn *et al* (n 23 above) 179.
101 1955 2 SA 312 (N) 316.

> it, but he cannot normally, by the mere fact of doing that, acquire greater or different rights to lateral support. His basic rights, apart from contract or (possibly) prescription, etc., remain the same whatever he may choose to do with his land … They are rights ancillary to his ownership, and they are enjoyed reciprocally by him and by all owners of contiguous land; and, while they exist unimpaired, any infringement of them by the withdrawal or disturbance of lateral support furnishes him with a cause of action. Looking at it from the other owner's point of view, unless he has acquired a right to do otherwise, he cannot with impunity execute upon his ground works which have the effect of reducing the above-mentioned quantum of lateral support; and, if he does execute such works, he is liable for the damage, if any, so caused. The duty to refrain from causing this kind of damage normally corresponds with the basic rights possessed by owners of contiguous ground, and, it would seem, is absolute. And so, in proceedings for relief under this head, it would appear, in general sufficient for the plaintiff to allege that, in fact, the defendant has withdrawn or interfered with the lateral support of his land to an extent which infringes his basic rights, and that this has produced damage. It is unnecessary for him to allege any specific details of negligence.

As a general rule the question whether or not a subsidence is caused by intent or negligence is irrelevant. Liability for damage suffered as a result of loss of lateral support is, therefore, strict. The mere fact that the defendant took what appears to be reasonable precautions will not deprive the plaintiff of a claim for damages.

The principles relating to lateral support were explicated in the following decisions.

Demont v Akals' Investment (Pty) & Another [102]

The plaintiff, Rose Demont, sued the defendants jointly and severally. She owned a house in Durban. Her cause of action arose from the fact that the first defendant, being the owner of a piece of land next to her house, employed the second defendant and caused the second defendant to construct a building on the first defendant's piece of land next to the plaintiff's house. In the course of making excavations for that building the second defendant removed earth from the vicinity of the plaintiff's dwelling house and negligently deprived it of lateral support from the first defendant's land. As a result, the foundations of the plaintiff's house subsided, the walls cracked and the building was condemned by the Durban Corporation and became a total loss causing the plaintiff to suffer damage. The defendants did not deny the damage but in their pleas argued that the plaintiff had in a contract agreed to 'release'[103] the defendants' subject to the payment of 300 pounds. This was the subject matter before the court. Selke J[104] said the following:

102 As above.
103 *Demont* 313.
104 *Demont* 316.

> [W]hether or not by executing the release the plaintiff precluded herself thenceforth from claiming for damage caused to her property by the negligence of the defendants in connection with the erection of the buildings.

As from 316 the court gives an outline of the law and a conclusion which can be summarised as follows:

> An owner of land is normally entitled to expect and to require from land contiguous to his own, such lateral support as would suffice to maintain his land in a condition of stability as if it were in its natural state.
>
> A landowner may alter the condition of his land, for example by excavating or building on it but he may not normally, by the mere fact of doing that, acquire greater or different rights to lateral support. His basic rights, apart from possible alteration through contract or, possibly prescription, remain the same whatever he may choose to do with his land.

Rights to lateral support are ancillary to the right of ownership and they are enjoyed reciprocally by a landowner and all owners of contiguous land. While they exist unimpaired, any infringement of them by the withdrawal or disturbance of lateral support furnishes the landowner with a cause of action.

From the point of view of the owner of adjacent land, unless he or she has acquired a right to do otherwise, a landowner cannot with impunity execute upon his ground works which have the effect of reducing the above-mentioned quantum of lateral support; and if he does execute such works, he is liable for any damage if any, so caused. The duty to refrain from causing this kind of damage corresponds with the basic rights of the owners of contiguous ground and is absolute. The court dismissed the plaintiff's claim based on the finding that the document of 'release' had relieved the defendants from liability for the kind of damage claimed in the action.

If lateral support of land is disturbed by excavations made by the neighbouring owner, this owner is obliged to pay compensation. It is not necessary to prove culpability in the form of intent or negligence, since the very activity by means of which the lateral support was disturbed and damage ensued, entitles the disadvantaged landowner to compensation. It is a form of strict liability and the only requirement is that damage must have been caused through the disturbance of the land as a result of the neighbouring owner's activities. In the circumstances of this case, however, the claimant did not succeed with his compensation claim, because he had previously exempted the defendant from his obligation to pay the compensation.

Gijzen v Verrinder[105]

The plaintiff and the defendant lived on adjoining properties. In 1956 the defendant caused excavations to be made on his property near the boundary line between the two properties. The plaintiff averred that by reason of these

105 1965 1 SA 806 (D) 811.

excavations his ground was deprived of lateral support and that, as a result continuous subsidence occurred on his land thereafter. The defendant had attempted to build a wall on the common boundary to prevent further subsidence but with little or no success. On the other hand, the defendant admitted to the excavations but denied that they had caused any subsidence on the plaintiff's land in breach of the common law duty to provide lateral support. The defendant further argued that the plaintiff was not entitled to such support of his property from the adjacent property because it was not in its natural state by reason of the erection of buildings and structures on it (This defence was later abandoned). However, in claims in reconvention the defendant alleged that the plaintiff had also caused subsidence on the defendant's land when the plaintiff had constructed a garage whose construction had the effect of removing from his land the lateral support to which he was entitled.

Hennings J said that the question to be considered was 'whether the defendant deprived the plaintiff of lateral support resulting in damage'.[106]

At the outset it is pointed out that a landowner's right to lateral support from adjacent land is a right given in the nature of things. The judge noted that the defendant excavated right up to the boundary line and in so doing effectively and directly impaired the stability of the plaintiff's property, a direct consequence of which was that in the normal course of events the plaintiff was bound to lose some of his soil. In this regard the judge remarked as follows:

> I do not think that subsidence in the sense of falling down, collapsing or caving in of land, is the only circumstance which would warrant a plaintiff having a cause of action based on the removal of lateral support … [I]t would be unrealistic to confine the right of action to circumstances in which loss is occasioned in this particular manner. I can see no distinction between a situation where, following upon the removal of lateral support, lumps of soil fall down during a rainfall and a situation where the soil is gradually eroded by rain water.[107]

The judge went on to say that there was no magic in the word subsidence.[108] It was further said that in each of the instances postulated there would be a disturbance of the natural surroundings of the ground because of the removal of lateral support.

The judge categorically stated that the defendant had deprived the plaintiff of a right to lateral support to which he was entitled and in consequence thereof the plaintiff suffered loss.[109]

106 At 810.
107 At 811.
108 As above.
109 At 811. In subsidence cases there is usually no unlawful act and the cause of action is damage and damage only. In this respect they are distinguishable from cases based on negligence in which the cause of action is an unlawful act plus damage and where, as soon as the damage has occurred, all damages flowing from the act can be recovered, including

In ruling in favour of the plaintiff, the judge averred that on the evidence as a whole, the measures taken by the defendant fell well short of the extent of lateral support which the plaintiff's land had before the excavation was made.[110]

The claimant need not prove culpability or unlawfulness but merely that damage was caused by the removal of lateral support by the defendant. Future damage cannot be claimed, but future disturbance can be prohibited by means of an interdict.

***Foentjies v Beukes*[111]**

In this case it was decided that the disturbance caused by the damage violated the claimant's use and enjoyment of his land and the claim was therefore based on violation of a right (entitlement) resulting from the ownership of the land and not a delict. The calculation of compensation is not based on a delict, where the value of the property before and after the disturbance is compared but on determining the cost of the restoration of lateral support and repair of the damage.

***East London Municipality v South African Railways and Harbours*[112]**

The plaintiff desired further ground for the construction of an electric power station and entered into an agreement with the defendants in 1946. Under this agreement, the plaintiff and defendants exchanged certain lands. The plaintiff was to get an area within a quarry owned by the defendant and the transfer of this land was to take place only after the defendant had levelled the quarry at its own expense. The defendant commenced to level the quarry in a southerly direction towards a road called Nuffield. In 1948 when the defendant had levelled a substantial part of the quarry, a subsidence of a rock occurred. This subsidence was preceded by cracks appearing on the Nuffield road and as a result of this cracking and subsiding, a portion of the Nuffield road had to be diverted and the electric cables had to be re-laid, all at extra costs to the plaintiff. The plaintiff instituted a claim to recover these costs but the defendant denied liability. This was the issue before the court.

The plaintiff's main cause of action is put up as follows:

> [T]here was a duty or obligation resting on the defendant not to remove any lateral support necessary, that this duty arises apart from any question of negligence, and by reason of breach of this duty the damage complained of occurred. The second is that in any event defendant was under a duty to exercise

prospective damages. In subsidence cases prospective damages are not recoverable and each successive subsidence, although proceeding from the original act or omission, gives rise to a fresh cause of action, the cause of action not being the act which caused the loss.

110 At 813.

111 1977 4 SA 964 (C).

112 1951 4 SA 466 (E).

> proper care in the levelling, that in breach of this duty there was negligence on the part of the defendant, and that this caused damage.[113]

Reynolds J coined the issue of lateral support in a very simplified manner: 'What was the duty of support, if any, to Nuffield road?'[114]

The court held *inter alia* that it could not be denied that the cause of subsidence in the quarry, which in turn caused the deviation on Nuffield road, was the operation of the defendant in quarrying out the portion it was levelling. The judge went on to enquire as to whether the defendant owed absolute duty not to remove lateral support to Nuffield road, and the court said that this was purely a question of support due from land to land and not buildings.

The court ruled *inter alia* that the right of a landowner to lateral support from adjacent land is well recognised in our law and it rests on the foundation that it is not so much a principle as a right given the nature of things.[115]

It was further held, that an owner of land, who had granted the municipality and the public in general a public road over his property, must be regarded as having included as part of the grant the right to such lateral support as was required to enable the road to continue to function after it came into existence.[116]

The court cited with approval *Humphries v Brogden*[117] where mining had caused the collapse of a surface which was owned by one person and although there was no evidence of the actual terms of the grant, it was held that the owner of the surface was entitled to have it supported by the subjacent mineral strata.

In *East London Municipality*[118] it was held, that by the creation of a public road in 1931 a duty had been imposed on the defendant not to remove any lateral support which would affect the road in a manner in which the quarrying had affected that portion of the road constructed on the property of the plaintiff. It was held that where a party makes an actual grant involving

113 At 471.
114 As above.
115 At 473. If that is so, it is difficult to see why persons having some vested interests in the land should not be entitled to properly enjoy, within the limits of their vested right, the benefits in terms of the right given to them, and it is difficult to see why they may not insist on the right being respected where their enjoyment casts no additional burden on the property which owes the duty of support.
116 At 474.
117 (1850) 12 QB 739.
118 n 116 above, 475.

lateral support he does so by his own deed and contract and by his own volition and must intend the consequences of his free action.[119]

The obligation towards lateral support is only valued for the land in its natural state and not for the erection of fixtures or buildings. Therefore, if excavations on neighbouring land cause damage to neighbouring buildings the owner of the land on which the structures have been erected cannot claim compensation. This principle is only valid, however, when the fixtures caused an encumbrance regarding the natural state of the land. Natural state means that the land to be supported is in such a state at the time of the withdrawal of support that no extra (unnatural) burden that was placed there artificially was necessary to increase the amount of support in order to avoid any subsidence.

When this is not the case, compensation regarding fixtures like an orchard can be claimed. To prevent problems in urban areas, building regulations regarding the support of buildings have been formulated.

5.4.6 Series of successive subsidences

This phenomenon occurs where the same acts or omissions result in a series of successive subsidences, or where there is an interval between the withdrawal of the support and the occurrence of the subsidence or subsidences resulting from the withdrawal of the support. For the purpose of deciding whether or not a claim for damages has become prescribed, it is therefore necessary to eliminate the stage at which the cause of action accrues. It was held in *John Newmark & Co (Pty) Ltd v Durban City Council*[120] that where a claim was made for damages in respect of subsidence resulting from the removal of lateral support, it was the act causing injurious consequences which gave rise to the cause of action 'but the cause of action does not *accrue* until the actual damage exhibits itself and prescription does not commence to run until then'.[121]

5.4.7 Encroachment

There are two types of encroachments, encroachment from buildings and encroachment from branches and roots of plants planted on the neighbouring land.

119 At 477. If A and B own adjacent land where some natural support is required from the land of A for the support of the land of B, then A can without permission from B excavate on his land so long he does not remove the amount of natural support required. But If A approached B and asked for permission to excavate within a stipulated distance from the boundary of B, and received that permission, then it may be argued that B has released his right of support *pro tanto* because A comes to him for permission to do something he (A) could not lawfully do without that permission.

120 1959 1 SA 169 (N).

121 Kleyn *et al* (n 23 above) 179.

One relevant entitlement of ownership embodied in the maxim *cuius est solum eius est usque ad coelum et usque ad inferos* is that the landowner's entitlements extend into the air above the land and into the earth below the land. However, these entitlements are subject to both statutory and common law limitations.

Under the provisions of the Town Planning Ordinance 18 of 1954, every local authority is required to prepare a town planning scheme for the development of the local authority area. Under section 19(1) of the Ordinance, a scheme with respect to buildings and building operations may contain provisions: prescribing the space about buildings; limiting the number of buildings; and regulating or enabling the local authority to regulate the size, height, design and external appearances of buildings.

In terms of the common law relating to encroachment, a duty is imposed upon every landowner not to wrongfully deprive or interfere with his neighbour's possession of the land. Therefore, a landowner must not cause his building to project over his neighbour's property. Projection of buildings may be in the nature of foundations of buildings, roofs, balconies and sign boards. The restriction is that these must not protrude from the land owner's land into the air space or the adjacent land which belongs to another owner. Restrictions therefore relate to both vertical and horizontal structures.

Where a neighbour's land has been unlawfully encroached upon, the remedies available to the owner of the land which is encroached upon are the following:

(a) an application for a court order compelling the neighbour to remove the encroachment (removal);

(b) an award of compensation to the owner (compensation);

(c) transfer of the encroaching section to the encroacher and compensation to the owner (transfer and compensation); and

(d) termination of occupation of the encroaching section by the encroacher and compensation by the owner to the encroacher (termination and compensation).[122]

These remedies will now be discussed in some detail.

5.4.7.1 Removal

In the case of *Smith v Basson*[123] Coetzee J in tracing the rationale for this remedy explained that encroachment amounts to *inaedificatio* or industrial accession, and that an essential difference exists where the building is not erected wholly on the ground of another but partly on the builder's own

122 Van der Walt & Pienaar (n 2 above) 94.
123 1979 1 SA 559 (W).

ground and encroaches on the ground of another. In this case, the law cannot regulate the rights of the neighbour on the same simple basis as an *implantatio* where by virtue of his acquired ownership he enjoys a free hand. Unlike plants that are part of the structure which is on the neighbour's land it is still an integral portion of the whole which is not his property. It cannot simply be demolished. It is treated rather as a trespass by the owner of the building, giving rise, logically, to the action for removal of the encroachment. This action flows from the duty to respect the neighbour's possession of what belongs to him or her or interfere therewith but the authorities nowhere support the view that this is applicable to *implantatio.*

Hence, the owner of the land which is encroached upon may demand the encroacher to remove the encroaching parts of the building or can approach the court for an order compelling his neighbour to remove the encroachment. He may not remove them himself.

5.4.7.2 Compensation

The owner of the land which is encroached upon may dispense with the right to demand removal and demand an award of compensation in circumstances where the award of compensation is more reasonable and equitable and especially in circumstances where the facts of the case clearly indicate that the innocent party is prepared to accept monetary compensation. In the case of *Trustees of the Brian Lackey Trust* v *Annandale*[124] the plaintiffs were the owners of erven 880 and 881, Laaiplek, on the Cape West Coast. The defendant owned the adjacent erf 878. The plaintiffs had acquired their property at a purchase price of R140 000 per erf while the defendant had purchased his erf for R130 000. All three stands were vacant upon purchase. Subsequently, a luxury home was designed for the plaintiffs and a building contract concluded. The contract price stipulated in the building contract was in excess of R3 million. The intention was that the building would straddle erven 880 and 881. After building operations had progressed to quite an advanced stage, an inspection by a building inspector revealed that the building was not straddling erven 880 and 881 but erven 880 and 878. It was common cause that the structure covered approximately 80 per cent of the surface area of erf 878, the defendant's property, rendering that property completely useless to the defendant in that state. The plaintiff offered to purchase the defendant's property at a price of R250 000. The defendant refused to accept the offer and instead demanded the removal of the encroaching structure. The dispute between the parties resulted in the issue of a summons on behalf of the plaintiff claiming an order declaring that the defendant was not entitled to the removal of the encroaching structure subject to the payment of damages as determined by the court. The defendant counterclaimed, claiming an order for the removal of the encroaching structure and the restoration of the property to its original

124 [2003] 4 ALL SA 528 (C).

condition. The main issue to be considered was whether the court had the discretion to order what amounted to an involuntary deprivation of property in those circumstances. Griesel J stated that despite the rule to demand removal, the court can, in its discretion, in order to reach an equitable and reasonable solution, order the payment of compensation rather than the removal of the structure. This discretion is usually exercised in cases where the costs of removal would be disproportionate to the benefit derived from the removal. If the court considers it equitable it can order that the encroaching owner take transfer of the portion of the land which has been encroached on. In such circumstances the aggrieved party is entitled to payment for that portion of land, costs in respect of the transfer of the land as well as a *solatium* on account of trespass and involuntary deprivation of portion of his land.

The court added that it was abundantly clear that there would be a striking disproportionality of prejudice if a demolition order were to be granted, as opposed to the position if damages were to be ordered. Apart from the direct costs of demolition (approximately R100 000), the bulk of the building costs incurred by the plaintiff to date (approximately Rl.75 million) would be wasted. Moreover, in the intervening two years since the original building operations commenced, building costs had escalated by more than 30 per cent, with the result that the same house would then cost more than R4 million to build. In addition, there was likely to be further intangible prejudice, for instance, the inconvenience of a lengthy delay before eventual completion. As against the plaintiff's prejudice the defendant would undoubtedly also suffer prejudice, in that he would inevitably lose his property if a demolition order were refused. However, it was clear that this would not have nearly the same disastrous consequences for the defendant as demolition would have for the plaintiff. Because he had only acquired it some two years before the problem arose, having disposed of his previous (similar) property in the same development at a very handsome profit within a period of only six months after purchase, he had as yet made no concrete plans to develop the property in question.

The court's discretion to award monetary compensation as opposed to an order for removal was premised on considerations of reasonableness, equity, disproportional prejudice and principles of neighbour law, which find application where the circumstances of the case indicate that the innocent party is prepared to pay compensation.

5.4.7.3 Transfer and compensation

From the case of *Meyer v Keiser*[125] it is evident that an owner whose land has been encroached upon may demand that the encroaching owner take transfer of the encroaching portion upon which he has built against payment

125 1980 3 SA 504 (D).

by the encroacher of compensation including all costs of transfer, costs of survey and diagram. This is an additional order to the payment of compensation. The encroaching owner however cannot claim transfer of the whole property on which the encroachment took place against payment.

5.4.7.4 Termination and compensation

Another remedy available to the owner whose land has been encroached upon is that he may have the builder ejected from his land subject to the payment of compensation to the encroacher for the enhanced value of the land. This remedy is only available when the building is complete.[126]

Different forms of encroachments in respect of which neighbour law has been applied by the courts will now be discussed.

Trees, overhanging branches and intruding roots

The principle of law relating to circumstances where trees, branches and leaves of plants encroach on the air space above a landowner's land or the roots of plants encroach on the land under the surface of the neighbour's land was explained in *Smith*.[127] In this case Coetzee J pointed out that, unlike in the case of an encroaching building, overhanging branches or roots which have spread to the neighbour's land may be chopped off on the boundary if their owner has refused to do so after a request therefor has been made to him. He may compel him or her to remove them by means of a mandatory interdict, or chop them off himself. However, he may not keep them unless their owner (that is, the owner of the trees) consents or fails to remove them within a reasonable time after demand. In *Malherbe v Ceres Municipality*[128] where leaves from oak trees planted by the defendant on a public street had blocked the gutters of the plaintiff's house, it was held that the plaintiff was justified in demanding that the branches overhanging his property should be trimmed but he was not entitled to an interdict as he had not previously called on the defendant to lop off such branches. Furthermore, it was held that if the owner of land allows the overhanging branches to remain, he cannot compel the owner of the trees to remove the leaves and acorns which fall from the branches on to his land. Where there has actually been a building and planting on the neighbour`s land a difference in available remedy exists. In both cases the owner of the land becomes the owner of what has acceded to it through *inaedificatio* or *implantatio* in accordance with the rules *superficies solo cedit.*

In the case of *implantatio* ownership of the plant is acquired only after it has taken root. There is, however, a difference in remedies. Once the plants have taken root and have become the property of the owner of the soil, he

126 See also *Glaston House (Pty) Ltd v Cape Town Municipality* 1973 4 SA 276 (C).
127 n 123 above.
128 1951 4 SA 510 (A) 518.

may do with them what he likes including destruction, unless the land is in the bona fide possession of the person who planted them. If trees are planted so close to the boundary of land that their branches intrude into airspace of adjacent land, the owner of such adjacent land may insist on such branches being lopped by the owner of the trees.

Party walls and fences

Party walls and fences refer to built structures like fences, shrubs, foliage or trees separating two properties and the law laid down in the case of *De Meillon v Montclair Society of the Methodist Church of Southern Africa*[129] is that the two neighbours own a common boundary. It is irrelevant whether it was erected by one or both of them. Both neighbours in co-ownership own it and, generally speaking, each can prevent the other owner from demolishing any part of the common wall. The common wall cannot be demolished without the consent of the other but if in the case of changes or construction that might cause changes to the common boundary, then the law is that if what is being constructed is a substantial improvement on the original structure, then the neighbour can act without the consent of the other. In the Namibian case of *Passano v Leissler*[130] Maritz J citing Voet Commentarius ad Pandectas[131] stated that if the wall intermediate between two adjoining erven is proven to be a party or common wall, the law vests a number of rights in and imposes an equal number of obligations on the neighbouring owners. Among them are the rights of the owners of the two adjoining properties that the one may not, without the consent of the other, pull down the common wall unless the demolition becomes absolutely necessary for the protection of both properties. The court further held that not only may the one landowner interdict the unlawful demolition of a party wall but also require the offending neighbour to repair any damage caused to the wall in the process.

Drainage of surface water

The law in this regard was laid down in the case of *New Heriot Gold Mining Co Ltd v Union Government (Minister of Railways and Harbours)*[132] in which it was held that, with the exception of entitlements in terms of a servitude, no one is entitled by means of artificial works to discharge upon a neighbour's land water which would not naturally flow there or, similarly, to concentrate and increase the natural flow to the detriment of a neighbour. This principle is not applicable when the discharge and the concentration are caused by works which are carried out in terms of statutory authorisation, provided that reasonable precautions have been taken to prevent injury or damage. If the natural flow of water is disturbed in either of these ways, the aggrieved party is entitled to two remedies: the *actio aquae pluviae arcendae* and the

129 1979 3 SA 1365 (D).
130 2004 NR 10 (HC).
131 8. 2. 15-17.
132 1916 AD 415 421. See also *inter alia* Voet 39.3.2.

interdictum quod vi aut clam. The *actio aquae pluviae arcendae* is an interdict, which either orders the higher-lying landowner to remove the obstruction, or forbids him or her to erect such structures in future. These remedies are available where the normal flow of water is disturbed in the interests of agriculture;[133] where the plots concerned are situated in an urban and not in a rural area and considerable disturbance of the natural topography by building has altered the flow of water; and where artificial structures are erected under statutory powers**.** The *interdictum quod vi aut clam* is an action for compensation and is available to the owner of a lower-lying tenement for damage caused by a change of the natural flow of surface water. The aggrieved party need not prove fault on the part of the upper owner but must prove that an obstruction has been erected by force or secretly, causing unwarranted volumes of water to be discharged on the land. However, no liability arises where the obstruction has been erected in the interests of agriculture. The *interdictum* is available against a neighbouring owner and also against any person who erected or approved the erection of the obstruction, or obtained possession of the structure. Even if the landowner has not erected the structure himself or herself, they must allow the removal thereof.[134]

6 Conclusion and observations

As part of the introduction above, reference was made to the element of apparent absoluteness pertaining to a real right. However, this concept of absoluteness is fictional. The need for harmonious relationships between the holder of the right of ownership and the other members of the community necessitate the imposition of restrictions under both public and private law on the exercise of the entitlements of *ius fruendi.*

133 *Johannesburg Municipality v African Realty Trust Ltd* 1927 AD 163 171*; Regal* (n 84 above) 107.

134 Du Bois (n 80 above) 486-7.

CHAPTER 6

ACQUISITION OF OWNERSHIP

1 Introduction

There are two methods of acquisition of ownership, original and derivative acquisition of ownership. Original acquisition of ownership refers to a unilateral act by the acquirer without any cooperation from the predecessor whereas derivative acquisition refers to a bilateral act involving the cooperation from a predecessor in title.[1]

2 Original acquisition of ownership

This method of acquisition does not involve the transfer of rights from a predecessor in title. It recognises the existence of certain factual requirements leading to conferment of the legal right and title of ownership. It is a unilateral act by the acquirer without any cooperation with the predecessor owner and this may occur by *occupatio, accessio*, *commixitio et confusio*, *specificatio* and acquisitive prescription as opposed to extinctive prescription.

2.1 *Occupatio* (appropriation)

Occupatio as an original method of acquisition of ownership may be described as a unilateral act by which a person obtains physical use over a corporeal thing which can be owned (*res in commercio*) but which is not owned by anyone (the thing is *res nullius)* and with the intention of becoming the owner of the thing. The person laying claim to ownership by occupation must satisfy the following requirements: actual physical control and intention to control and acquire ownership, *animus domini*.[2] The thing must not be

1 DG Kleyn *et al Silberberg and Schoeman's the law of property 3rd ed* (1993) 67.
2 See also chapter 3 above at 8.3.3.

owned; it must be *res nullius* or *res derelictae* and must be *in commercio* but at the relevant point in time not be owned.[3]

Res derelictae are abandoned things or things lost by the owner with the intention of giving up ownership. A person may claim ownership of such *res derelicta*e if the following requirements have been met: actual abandonment of the thing and an intention on the part of the owner to abandon the thing.[4]

2.2 Treasure

In terms of the law relating to the acquisition of ownership of treasure, treasure found by a landowner on his or her own land belongs to him or her as the owner of the land. If an independent person finds the treasure by accident and not in consequence of a deliberate search, it must be divided equally between the landowner and the finder.[5] The finder is entitled to a share only if the treasure is movable and valuable, was concealed in the ground or elsewhere on the land, has been concealed since time immemorial, and was discovered by accident.

Discovery of a treasure differs from occupation (*occupatio*) *inter alia* because a treasure is not *res nullius* and because the landowner's half share is acquired automatically without any act of occupation on his or her part. Neither can it be accommodated under accession since the landowner acquires only half of the treasure.[6]

2.3 Accession

According to the judgment in *Khan v Minister of Law and Order & Another*[7] ownership is acquired by accession where one movable thing is joined to another in such a manner as to form one entity of which the original owner of the principal thing becomes the sole owner. The owner of the principal thing therefore also becomes the owner of the thing (the *bysaak*) joined to the principal thing.[8] In order to decide which is the principal thing, a number of common law rules or guidelines have been devised. However, one test that was applied in the *Khan*[9] case is the so-called value test. In terms of this test the principal thing is the thing that defines the character, form and function of the ultimate thing.[10] In this case, the South African Police had seized a BMW 320i motor vehicle which, at the time, was in the possession of the

3 *R v Mafohla & Another* 1958 2 SA 373 (SR); *Dunn v Bowyer* 1926 NPD 516; *S v Frost, S v Noah* 1974 3 SA 466 (C).
4 *Minister of Land v Sonnendecker* 1979 2 SA 944 (A).
5 F du Bois *Wille's principles of South African law 9th ed* (2007) 492.
6 Du Bois (n 5 above) 492.
7 1991 3 SA 439 (T).
8 CG van der Merwe *Sakereg 2nd ed* (1989) 242.
9 As above.
10 Grotius *Inleidinge* 2.9.1.

applicant. The applicant applied for an order directing the respondent to return the vehicle. The respondent argued that it was not obliged to return the vehicle to the applicant in terms of the provisions of s 31(1) of the Criminal Procedure Act 51of 1977 because it was a stolen vehicle.

The applicant had purchased the wreck of a 1985 model BMW 320i and then entered into an agreement with the panel beater concerned called Morris Panel Beaters (Morris) in terms of which the latter would rebuild the wreck so that it would appear to be a 1988 model and not a 1985 model. Morris succeeded in doing this by cutting through the 1985 wreck just in front of the windscreen pillars of the car thereby separating the front and rear portions of the 1985 model from each other and by then joining the rear portion of a 1988 model to the front portion of the wreck. The entire car thus formed was then sprayed the colour of the 1988 portion, namely dolphin grey.

Expert evidence showed that virtually the entire body of the car was that of a 1988 model BMW 320i. The only 1985 body components were the inner portion of the front housing the engine compartment. The outer portions of the body such as mudguards, bonnet, front fender and the valance were all those of a 1988 model.

In applying the character, form and function test, the court held that the vehicle could be regarded as a 1988 model, to which a 1985 engine modified to conform to that of a 1988 model together with small portions of a 1985 body, had been added. In the circumstances the car could not be regarded as that of the applicant, because the stolen parts had been added to his 1985 wreck. The court concluded that the car in character, identity, form and function was the stolen 1988 model. The process of accession is traditionally classified as natural, industrial or mixed. Each of these will now receive separate attention.

2.3.1 Natural accession

Natural accession takes place with respect to the following: young animals, *alluvio, avulsio,* island arising in a river, and a river changing its course.

2.3.1.1 Young animals

The general principle is that ownership of young animals is vested in the owner of their mother who *prima facie* has the right to *ius fruendi.* Exceptions to this general principle apply where the mother:

- is in the possession of a person who mistakenly, but bona fide, believes that he or she is the owner thereof; and
- is the object of the right of usufruct or lease.

The mere fact the owner has entered into a contract in terms of which another person shall have the right to possess and use his or her property does not *ipso facto* transfer the *ius fruendi* in that property. But the parties to such a contract may of course expressly or by implication vary the general common law rule.[11]

2.3.1.2 *Alluvio*

The process of natural accession by *alluvio* has been described as a deposit of earth upon the bank of a (non-navigable) river so gradually that no one can perceive how much is added at any specific moment; such deposit is inseparable from the native soil of the bank and the owner of the latter acquires the former by right of accession.[12]

This rule applies only if the land concerned is not delimited land (*ager non limitatus*) and bounded by a public river. However, if the boundaries of the land are artificial or (*ager limitatus*) then the owner is not entitled to any addition to the land beyond its boundaries. *Agri limitati* are lands granted by the state to private individuals and defined by artificial boundaries, such as pillars, posts, walls, and fences.

On account of the climatic and ecological conditions of Namibia, most of the riverbeds are silted up and therefore the process of natural accession is of particular relevance to Namibia.

2.3.1.3 *Avulsio*

This occurs when a piece of land is torn off by the force of water and washed up against another person's land. The owner of the latter acquires ownership of that piece of land as soon as it becomes firmly attached to his or her own land, for example as a result of plants taking root.[13]

2.3.2 Industrial or artificial accession

Industrial accession refers to the conversion of two or more separate things. Van Der Walt & Pienaar define this process as follows: the accession of movables to immovables usually takes place through human activities whereby a movable is permanently attached to an immovable; the owner of the immovable (principal thing) becomes the owner of the composite thing where the movable accessory was permanently attached to the principal thing, and must in certain circumstances compensate the previous owner of

11 Kleyn *et al* (n 1 above) 200; see also *Tucker v Farm and General Investment Trust* [1966] 2 All ER 508 (CA); and *Mlombo v Fourie* 1964 (3) SA 350 (T).
12 Kleyn *et al* (n 1 above) 202.
13 Kleyn *et al* (n 1 above) 203.

the movable accessory.[14] Instances of industrial accession are building (*inaedificatio),* planting and sowing (*plantatio et satio*).

Each of these forms of accession will be discussed below.

2.3.2.1 Building (*inaedificatio*)

Inaedificatio denotes a method of acquisition of ownership through the accession of a movable to an immovable,[15] such as buildings, pumps, walls or other structures becoming part of land in accordance with the Roman maxims *superficies solo cedit* and *omne quod inaedificatio solo cedit* which mean anything which is built and attached to the soil forms part of the soil.

The accessories which are building materials or structures become part of the principal thing, for example¸ where the owner of an immovable thing buys cement and builds a house. The accessory thus loses its individuality and becomes the property of the landowner of the principal thing by accession. The test for the existence of *inaedificatio*, or for a movable to become an immovable thing, was laid down in the case of *Macdonald Ltd v Radin NO & the Potchefstroom Dairies and Industries Co Ltd*.[16] In this case Innes CJ said that the decision whether *inaedificatio* had taken place depended upon a consideration of certain elements. He further explained as follows:

> As was pointed out in *Olivier v Haarhof* each case must depend on its own facts; but the elements to be considered are the nature of the particular article, the degree and manner of its annexation and the intention of the person annexing it. The thing must be in its nature capable of acceding to realty, there must be some effective attachment (whether by mere weight or by physical connection) and there must be an intention that it should remain permanently attached. The importance of the first two factors is self-evident from the very nature of the inquiry. But the importance of the intention is for practical purposes greater still; for in many instances it is the determining element. Yet it is sometimes settled by the mere nature of the annexation.[17]

The following tests, elements or factors identified by the court will be discussed in some detail below:

(a) The nature and purpose of the movable thing;

(b) The degree and manner of its annexation to the immovable thing; and

14 AJ van der Walt & GJ Pienaar *Introduction to the law of property 6th ed* (2009) 104.

15 W Freedman 'The test for *inaedificatio*: What role should the element of subjective intention play?' 2000 117 *South African Law Journal* 667. See also *McDonald v Radin NO & the Potchefstroom Dairies and Industries Co Ltd* 1915 AD 454, C Lewis 'Superficies *solo cedit – Sed quid est superficies*?' (1979) 96 *South African Law Journal* 94, *Olivier & Others v Haarhof & Co* 1906 TS 497, *Pettersen & Others v Sorvaag* 1955 3 SA 624 (A), *Newcastle Collieries Co v Borough of Newcastle* 1916 AD 561, *Standard Vacuum Refining Co of SA (Pty) Ltd v Durban City Council* 1961 2 SA 669 (A), *Melcorp SA (Pty) Ltd v Joint Municipal Pension Fund (Transvaal)* 1980 2 SA 214 (W).

16 n 15 above.

17 At 466-7.

(c) The intention with which the movable thing was attached to the immovable thing.

The first two tests are objective tests and the third one is a subjective test.

(a) The nature and purpose of the movable thing

The movable thing must in its nature be capable of being annexed to an immovable thing, and thus the purpose of the attachment must be to serve the immovable thing on a permanent basis. When considering the purpose of the movable thing the courts sometimes apply the so-called integration test. In order to apply this test the question to be determined is whether the movable thing forms an integral part of an immovable after attachment. If the movable thing is structurally integrated into the land, or is part of the fabric of a building, it is likely to be regarded as having acceded to the immovable through *inaedificatio*.[18] For example, a borehole may be considered as destined to serve the land. In other words, this criterion relates to the functionality of the movable thing. For example, in *Melcorp*[19] the court held that a lift installation satisfied this functionality test because it could be considered as an integral part of the multi-storey flat building. However, because of clause 14 of the contract this inference did not override the express intention of the plaintiff that the lift installation must be considered as movable until final payment.[20]

(b) The degree and manner of its annexation to the immovable

This element implies that if the movable thing is completely incorporated into the immovable, it becomes part of the immovable. In a similar vein, the consideration of the manner and degree of attachment entails that one must determine whether the movable thing can be removed without damaging the immovable thing. If the movable thing cannot be removed without damage to itself or the immovable, the courts are likely to regard it as having become immovable through *inaedificatio.*[21]

The objective tests, as discussed above, portray the outward manifestations of permanent attachment to the public, and are therefore consistent with the publicity principle.

(c) The intention with which the movable thing was attached to the immovable

The third element entails an examination as to whether the movable thing was annexed to the immovable with the intention that it should remain there permanently. The courts have followed two different approaches in inferring intention of permanency: the traditional approach, and the new approach.[22]

18 Freedman (n 15 above) 668.
19 n 15 above.
20 This case is discussed in more detail in the pages that follow.
21 Freedman (n 15 above) 669.
22 As above.

According to the traditional approach, the subjective intention will only be considered if an examination of the first two objective elements does not produce a conclusive answer. If the first two elements do produce an unequivocal result, then the subjective intention will not be taken into account.

The new approach, however, stresses intention above the other two factors. In this case, the nature of the object and the manner of its attachment are not independent of intention. They are simply factors to be taken into account when determining whether the owner or person who annexed the movable thing intended the annexation to be permanent.[23]

In *Macdonald*,[24] Potchefstroom Dairies had sold a building containing a dairy plant to Jacobson. The price was payable in instalments. If Jacobson should fail to pay the purchase price in due course Potchefstroom Dairies would be entitled to rescind the contract of sale and to repossess the building and plant together with all permanent, interim improvements made by Jacobson. Ownership of the building and plant was to pass to Jacobson only when the price had been paid in full. Shortly thereafter Jacobson acquired certain machinery from Macdonald on hire-purchase terms and installed the same in the building instead of the original plant which was removed and stored elsewhere. The new plant was embedded in solid concrete foundations and firmly attached to the walls of the building by nuts and bolts. Nevertheless, it could be removed without damage to the premises and the old plant reinstated at a moderate cost. Before he had paid either Potchefstroom Dairies or MacDonald in full, Jacobson's insolvent estate was sequestrated and MacDonald claimed the return of the new machinery, whilst Potchefstroom Dairies claimed the return of the building, together with that machinery, on the ground that it was a permanent fixture of the immovable property.

In this case the application of the two objective tests was not conclusive and therefore the court relied on the subjective test, particularly the test pertaining to the intention of the owner of the machinery to determine annexation. The intention was inferred from the intention of the parties to the hire-purchase agreement. This application of the tests obviously confirms the court's approach not to unjustifiably and without the consent of the owner of the property deprive an owner of his or her ownership of the property.

In the case of *Theatre Investments (Pty) Ltd & Another v Butcher Brothers Ltd*[25] the lessee undertook to proceed with the erection of a theatre and

23 See Freedman (n 15 above). See also *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 2 SA 986 (T) 998-999.
24 n 15 above.
25 1978 3 SA 682 (A).

other buildings on property owned by the lessor. The lease was for 50 years with a right of renewal. Clause 15 of the lease provided that:

> [O]n termination of the lease or any renewal from any cause whatever all buildings and improvements on the immovable property were to 'revert to and *ipso facto* become the absolute property of the lessors without their having to pay or being liable to the lessees for any compensation in respect of the said buildings or improvements'.

The theatre was erected and the lessee equipped it with theatre seats, carpets, lighting and cinema projection equipment and air-conditioning equipment with the necessary ancillary fittings and ducting. At the expiration of the lease the parties were unable to agree about the terms of the renewal. The lessee claimed certain equipment as movable property belonging to it and asserted the right to remove the movable things at the termination of the lease. The lessor challenged this right on the ground that in terms of clause 15 of the lease these items constituted improvements which became the absolute property of the lessor when the lease expired. The lessor applied for and obtained an interdict restraining the lessee from removing the disputed items. Some of these articles were held to be removable, for example the carpets. The disputed items were held to constitute immovable property and thus not to be removed by the lessee. In an appeal the court found that the manner in which the seats had been annexed raised the reasonable inference that the annexor contemplated them to remain there permanently.

It was held that if regard was to be had to the intended duration of the original contract, including any period of its possible extension; to the fact that the building was erected for the purpose of conducting therein a theatre; and to the fact that the seats, the emergency lighting and dimmer-board constituted equipment essential to the effectuation of such a purpose, then it was difficult to avoid the conclusion that such items of equipment when they were attached to the building were intended to remain there indefinitely.

Van Winsen AJA explained the intention consideration approach as follows:

> A generally accepted test … to be applied to determine whether a movable, capable of acceding to an immovable and which has been annexed thereto, becomes part of that immovable is to enquire whether the annexor of such a movable did so with the intention that it should remain permanently annexed thereto. Evidence as to the annexor`s intention can be sought from numerous sources, *inter alia*, the annexor` s own evidence as to his intention, the nature of the movable and of the immovable, the manner of annexation and the cause for and circumstances giving rise to such annexation.[26]

26 At 688.

When considering the intention of the parties the question that may arise is whose intention must be taken into account: that of the owner of the movable property or that of the person who actually attached the object to the immovable property? This aspect was considered in *Macdonald*[27] where Innes CJ held that it was the intention of the owner of the erstwhile movable thing which had to be considered. In this regard the court remarked as follows:

> [T]he intention required (in conjunction with annexation) to destroy the identity, to merge the title, or to transfer the *dominium* of movable property, must surely be the intention of the owner. It is difficult to see by what principle of our law the mental attitude of any third party could operate to effect so vital a change.[28]

In *Melcorp*[29] the plaintiff had contracted with the R Company for the supply and installation of two lifts in a building to be erected by R. Clause 14 of the contract read:

> It is agreed that all apparatus furnished hereunder can be removed and we retain title thereto until final payment has been made, with the right to retake possession of same or any part thereof at your cost if default is made by you in any of the payments, irrespective of the manner of attachment to the realty, the acceptance of notes, extension of time for payment or sale, mortgage or lease of the premises. For the purpose hereof you agree that the apparatus shall not become a fixture in the building and shall remain a movable thing until fully paid for.

The finance for the erection of the building had been largely provided by means of a mortgage loan granted by the defendant. R fell into arrears with its payment to the plaintiff and, under the bond, to defendant. Ultimately the defendant as bondholder caused the property to be sold in execution and purchased the property at the sale. Before the sale the plaintiff had sent the defendant a copy of its agreement which the defendant had filed without reading it. The plaintiff sought to enforce its right to remove the lift installation against the defendant, also claiming damages resulting from the delay in handing over. The defendant contended that the lift had acceded to the building, notwithstanding that the greater part of the components could readily be removed, averring that any rights of removal the plaintiff might have had by virtue of Clause 14 were only personal rights enforceable against R only. It was held that with regard to the objective condition of the degree and manner of annexation, the evidence showed that the installation was not so secure that separation would involve substantial injury either to the immovable or its accessory, and that detachment could be effected with more or less ease. With regard to the nature of the particular article it was held that the lift installation was an integral part of the multi-storey flat building. However, the court added that the inference did not override the

27 n 15 above.
28 n 15 above, 467.
29 n 15 above.

expressed intention of the plaintiff as embodied in Clause 14 of the contract, which was not an *ipse dixit* of the plaintiff made *ex post facto* but which formed the very basis upon which the plaintiff had been prepared to install the lifts in the building without prior payment therefor, including that the installation could not become a fixture until fully paid for. The court therefore found that the annexor's intention was not to make the installation a permanent one until such time as the plaintiff had been paid for it. Accordingly the plaintiff was entitled to remove the lift installation.

In an action for damages in *Pettersen*[30] an important issue was whether a house which had been destroyed by fire was a movable or an immovable. The house was a pre-fabricated one which had been brought from Norway, where it was regarded as a movable thing by a Norwegian who had erected it on property belonging to another. It was very heavy and probably incapable of being moved as a unit but was so constructed that it could be taken to pieces which could be removed and put together again on another site. In the process of assembling the house, the parts which were made up of wood and iron, had been fitted into one another but nails had also been used. In its completed state it was a large double-storey house consisting of 14 rooms in all, resting upon a brick or concrete foundation without being fixed to it. The trial judge found, on the evidence, that the house had been erected for a permanent purpose. In an appeal, it was held that regard being had finally to the fact that the house appeared to have been regarded as a movable thing by all the persons who had any interest in it, the respondent had established that the house was a movable.

A prefabricated double-storey 14 roomed house was said to be a movable thing because it was designed to be dismantled and reassembled somewhere else. The owner did not intend it to be a permanent fixture and therefore the presumption as to the nature of the thing was rebuttable. The courts have repeatedly said that the intention element is the most important because it is the decisive element when, upon consideration of the first two elements, a conclusive determination is impossible.

In appropriate circumstances consideration of the first two elements might be conclusive or decisive in which case the third element would become superfluous or otiose.

In *Unimark*[31] the plaintiff instituted the *rei vindicatio* for the recovery of certain articles, office installations on a factory site belonging to the defendant company, valued at R188 500. Alternative claims were based on the *actio ad exhibendum*, for the value of the articles no longer in the defendant's possession, and on enrichment, for the sum by which the defendant had been enriched as a result of the accession of those articles to the factory site. The articles in question were: (1) chip-core wall partitions

30 n 15 above.
31 n 23 above.

and ceilings enclosing approximately 255 square metres of office space, valued at R85 000; (2) an alarm system valued at R4 000; (3) an intercom system valued at Rl 200; (4) an electrical system valued at Rl8 000; (5) a steel under-cover parking area valued at R18 000; (6) a steel canopy valued at R3 000; (7) steel security gates valued at R400; (8) air conditioners valued at R35 000; (9) carpet tiles valued at R7500; (10) a kitchen sink valued at R400; and (11) fire extinguishers valued at R3 000. The plaintiff's claims were based on the contention that the defendant was in possession of these goods, alternatively that it had disposed of them with knowledge of plaintiff's ownership. The defendant admitted possession of most of the articles in question, with the exception of some of the office partitioning, the steel canopy and the carpet tiles, but denied the plaintiff's ownership thereof, pleading that the articles in question had acceded to its property. The defendant furthermore denied the value attributed to the articles by the plaintiff. It appeared that the plaintiff, the sublessee of the site, had been evicted in terms of a court order some time after it had installed the offices. As a result, a dispute arose as to the ownership of these articles in question: the plaintiff regarded them as its property, which it was entitled to remove, while the lessor refused to allow it to do so. During December 1994 the lessor sold the site, including all improvements, to the defendant.

It was held that the plaintiff, in order to succeed with the *rei vindicatio,* had to prove that it was the owner of the said articles, that they were in the possession of the defendant at the commencement of the action and that they were still in existence and clearly identifiable. If the plaintiff was able to prove ownership but it appeared that some of the items were no longer in the defendant's possession, the *actio ad exhibendum* would come into play so as to compel the defendant to compensate the plaintiff for the value of those articles. If the plaintiff had lost ownership of some of the items due to *accessio,* the requirements of unjust enrichment would have to be applied in order to determine whether the defendant had been unjustly enriched at the expense of the plaintiff.[32] It was held further, as to the issue of ownership that the crucial question was whether the articles in question had acceded to the immovable property. Three factors were relevant: (1) the nature of the article annexed; (2) the manner of its annexation; and (3) the intention of the owner of the annexed article at the time of its annexation. According to the 'traditional' approach, the intention was irrelevant if the first two factors proved conclusive, while the 'new' approach stressed intention above the other two factors. It was, however, clear that the nature of the article and the manner of its annexation were not independent of intention. If a clear inference as to intention could be drawn from an examination of the other factors, nothing could be gained from evidence as to the owner's subjective intention.[33]

32 At 995-996.
33 At 998-999.

The court also held that every case had to be decided on its own facts and that common sense and reasonableness had to play a prominent role. Because annexation involved conscious human conduct, the starting point and most important factor had to be the intention of the owner of the annexed property, which had to be determined within the context of all the relevant facts.[34] The court considered the element of what was referred to as the 'publicity principle' and held that the question was not only what the specific individual intended or believed possible or feasible, regardless of the objective facts. An element of reasonableness or common sense, or the prevailing standards of society, had to be invoked. In this context the 'publicity principle', or the impression created with others, including prospective buyers, was also relevant. In other words, one of the factors to be taken into account when an intention as to the annexation is formed, or later determined, was how other people were likely to interpret the situation on the basis of factual evidence. An intention that was totally insulated from and devoid of reality could not be recognised and given effect to in law.[35] The court also held that as to whether the plaintiff had remained the owner of the above-mentioned articles, their nature and manner of attachment differed, as well as the plaintiff's intention with regard to them, and that each article accordingly had to be examined individually.

After applying the above-mentioned principles, the court held that the partitioning, the alarm system, the intercom system, the electrical system, the air conditioners and the fire extinguishers had remained movable and had thus remained the property of the plaintiff.[36]

By way of conclusion, the above exposition on the jurisprudence of *inaedificatio* indicates that the application of the three elements to determine whether in any particular case annexation has taken place will depend on the peculiar facts of a particular case. Predictabilty of outcome of the application of the tests is not possible. One does not have to take a monolithic mentality to the appreciation and understanding of these cases. The courts' initial response to these issues has been the initial application of what is dubbed 'the traditional approach' or by analysing a particular case with the aid of the objective tests as the initial reference yardstick. But the cases indicate that the courts are prepared to stretch their inquiry beyond the objective tests and consider other variables to determine whether annexation has taken place under the general rubric of the subjective test – the intention of the annexor. As stated by Van der Westhuizen AJ in the *Unimark*,[37] the courts' inquiry includes a consideration and application of the 'publicity principle'. The variation in terminology notwithstanding, the important point is that policy considerations cannot be ruled out as factors or variables that inform the judgments of the courts. These cases invariably

34 At 1000-1001.
35 At 100I.
36 At 1005.
37 As above.

involve the potential deprivation of the ownership of property, which raises constitutional issues. It has generally been recognised as the *ratio decidendi* in the *Macdonald*[38] that an owner cannot be deprived of his property without his consent except in very limited circumstances. The decison of *Pettersen*,[39] for example, could be explained in terms of the avoidance of a possible absolution from a delictual or criminal liabilty. The judgments in the hire-purchase and the *Melcorp*[40] cases may also be explained in terms of the court's insistence to enforce legally binding agreements.

2.3.2.2 Planting and sowing (*plantatio* and *satio*)

The rule relating to acquisition of ownership by planting or sowing is that anything planted in the ground accedes to it so that the owner of the land or soil becomes the owner of the plant through *implantatio* in accordance with the rule *superficies solo cedit.* The crops accede to the soil after they have been sown and get nourishment from the soil.[41]

2.4 Mixing (*commixtio* and *confusio*)

This form of acquisition takes place when things are mixed together in a manner that the principal and accessory things lose their separate identities and become inseparable and indeterminate. Since the nature of the amalgamation makes it impossible to classify things as principal or accessory, the rules relating to accession do not apply. Similarly, since a new thing is not formed or since human creativity plays a subordinate role in the creation of the final product, the rules relating to *specificatio* cannot apply either.[42] There is a distinction made between the mixing of liquids and the mixing of solids.

With regard to the mixing of liquids, the rule is that if the liquids can be separated reasonably easily, for example, if oil and water are mixed, no change of ownership in the liquids takes place. If, on the other hand, the liquids cannot be separated the mixture becomes the common property of the owners in proportion to their respective contributions.

In the case of mixing of solids, the rule is that if solids belonging to two people are mixed together so that they can be separated easily, no change of ownership takes place. If, however, they cannot be separated easily, the mixture will belong to them jointly if the mixing took place with their consent. If, however, they did not consent, each owner may vindicate a portion of the mixture proportional to his or her contribution.

38 n 15 above.
39 n 15 above.
40 n 15 above.
41 *Secretary for Lands v Jerome* 1922 AD 103.
42 Du Bois (n 5 above) 507-508.

One can conclude therefore that in both cases, the mixing of liquids and the mixing of solids, the underlying criterion that determines ownership is the consistency of the amalgamation to assess the degree of retention of the separate identities of the various components.

2.5 *Specificatio* (manufacture)

This occurs where a person by his skill and labour converts another person's material, either wholly or partly into a new species or a new product without any legal relationship between the parties.[43] Examples include olive oil produced from olives, wine from grapes, bread from wheat or corn, clothes fashioned from wool, a ship made out of planks from trees, a statute sculptured from marble or wood, and a patchwork quilt fashioned from pieces of cloth. The following principles determine the ownership of the new thing. Where the materials belong partly to another person and partly to the maker, the new thing belongs wholly to the maker who must compensate the other party for his or her share of the materials. Where the materials belong wholly to another person and the new thing has been made without such person's consent, the question of ownership will depend on whether the new article can be reduced to the original materials. If it can be dismantled or reduced to its original materials, the article will belong to the owner of the materials. If it cannot, be so reduced, as for example where beer is made from corn or wine from grapes, the article will belong to the maker. These rules apply only in the absence of an agreement between the parties.

2.6 Acquisitive prescription

There are two types of prescription: acquisitive prescription and extinctive prescription.

The former is one of the original methods of acquisition of ownership or real rights by the passage of time whereas the latter refers to various types of obligations that may be extinguished or rendered unenforceable by the passage of time.

The sources of the principles relating to acquisition of ownership by prescription are two statutes, the Prescription Act 18 of 1943 and the Prescription Act 68 of 1969, and the common law. In the Namibian case of *O'linn v Minister of Agriculture, Water and Forestry & Others*[44] Muller J stated

43 As above. See also DL Carey Miller & A Pope 'Acquisition of ownership' in R Zimmermann *et al* (eds) *Mixed legal systems in comparative perspective: Property and obligations in Scotland and South Africa* (2004) 637, 682-4.

44 2008 2 NR 792 (HC) 797.

that the 1943 Act was never applicable to Namibia or the old South-West Africa. The Prescription Proclamation 13 of 1943, promulgated on 25 May 1943, was applicable to the territory of South-West Africa and it was based on the South African Prescription Act 18 of 1943. Section 2 of the South-West Africa Proclamation was similar to section 2 of the South African Act of 1943. The relevant South African decisions were also applicable in respect of the Proclamation.

The Prescription Act of 1943 was later superseded by the Prescription Act of 1969 which came into operation on 1 December 1970. It has no retrospective effect[45] and therefore has no application where the prescriptive period was completed before the date it came into operation, namely 1 December 1970. However, where the prescriptive period began to run before the new Act came into force but was only completed afterwards, the 1943 Act is applicable in respect of the period before 1 December 1970, and the 1969 Act applies in respect of the period after 1 December 1970.[46] This means that any claim to the acquisition of ownership through prescription has to be determined, either partially or totally, with reference to the 1943 Act. Thus, if the period of prescription began to run in 1950 the first period, namely from 1950 until 1 December 1970, is governed by the requirements of the Prescription Act of 1943,whereas the later period from 1 December 1970 onwards is regulated by the Prescription Act of 1969. The 1943 Act remains relevant to be applied to a prescriptive period running until 30 November 2000. Therefore, the requirements of both Acts must as a rule be kept in mind to determine whether prescription has occurred in a particular case.[47]

The Prescription Act 18 of 1943[48] defines acquisitive prescription as the acquisition of ownership by the possession of movable or immovable property belonging to another or the use of a servitude in respect of immovable property continuously for thirty years, *nec vi, nec clam, nec precario*. It stated clearly that the possessor automatically became owner of the thing after the said period had expired.[49]

The first requirement of the 1943 Act is that the possession must be continuous or uninterrupted for a full period of thirty years and must be *nec vi*, *nec clam and nec precario.* The *nec vi* requirement means that the possessor must retain his possession without force or peaceably. The *nec clam* requirement is meant to satisfy the publicity principle in that the possession must be overt or visible to demonstrate the intention to acquire ownership. The two requirements are meant to indicate to the public that if possession is exercised in such a manner, an owner who exercises reasonable

45 Section 5.
46 As above
47 See W A Joubert *et al* (eds) *The Law of South Africa 2nd ed* vol 21 (2010) 41, para 105.
48 Sec 2(1).
49 Sec 2(2).

care must be in the position to notice it and reclaim possession. The *nec precario* requirement means that the possession must be without prior permission of the owner or without consent.

In *Malan v Nabygelegen Estates*[50] Watermeyer CJ said the following:

> It will be seen from these references that 'nec precario' does not mean without permission or without consent in the wide sense accepted by the learned Judge, but 'not by virtue of a precarious consent' or in other words 'not by virtue of a revocable permission' or 'not on sufferance'. In order to avoid misunderstanding, it should be pointed out here that mere occupation of property 'nec vi, nec clam, nec precario' for a period of thirty years does not necessarily vest in the occupier a prescriptive title to the ownership of that property. In order to create a prescriptive title, such occupation must be a user adverse to the true owner and not occupation by virtue of some contract or legal relationship such as lease or usufruct which recognises the ownership of another.

Even though the requirements for acquisitive prescription in both Acts are virtually the same, they have different provisions relating to the type of possession required for prescription. Section 1 of the 1969 Act defines acquisition of ownership by prescription as follows:

> [A] person shall by prescription become the owner of a thing which he has possessed openly and as if he were the owner thereof for an uninterrupted period of thirty years or for a period which, together with any periods for which such thing was so possessed by his predecessors in title, constitutes an uninterrupted period of thirty years.

This Act differs from the old Act in so far as it has eliminated the *nec vi* element and replaced the *nec precario* element with the requirement of possession 'as if he or she were the owner thereof'. As stated earlier, under the 1943 Act possession must have been *nec vi*, *nec clam, nec precario*. The 1969 Act, however, requires only that a person must have been in possession of the thing concerned openly and as if he or she were the owner. The element of 'as if he were the owner thereof' requires the establishment of full juristic possession for the acquirer to succeed in the claim for acquisitive ownership. This means the establishment of *possessio civilis,* which was not specifically set out in the 1943 Act. This means that both the mental (*animus domini*) and physical (*corpus*) elements of possession must have been present simultaneously and during the whole prescriptive period.[51]

In terms of section 2(1) of the Prescription Act of 1943, a servitude can be acquired by prescription by the use of the servient property for 30 years *nec vi, nec clam, nec precario.* In terms of section 6 of the Prescription Act of 1969, a person may acquire a servitude by prescription if he or she has openly and

50 1946 AD 562 573-4.
51 *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd & Another* 1972 2 SA 464 (W) 467; *Glaston House (Pty) Ltd v Cape Town Municipality* 1973 4 SA 276 (C) 281; *Barker NO v Chadwick & Another* 1974 1 SA 461 (D) 468.

as though they were entitled to do so, exercised the rights and powers which a person who has a right to such servitude is entitled to exercise for an uninterrupted period of 30 years or, in the case of a *praedia*l servitude, for a period which, together with any period for which such rights and powers were so exercised by his or her predecessors in title, constitutes an uninterrupted period of 30 years.

In an application for the acquisition of a servitude by prescription Muller J in the case of *O'linn*[52] stated that the requirements for the acquisition of a servitude through prescription were governed by the same principles applicable to the acquisition of ownership by prescription, with the necessary modifications, and that in order to establish the acquisition of a servitude by prescription, it must be proved that the user of the servitude had *de facto* been exercising the servitude as if he or she were entitled to do so for the required period of prescription. He held further that full *possessio civilis* was required for such acquisition through prescription and not mere detention. For *possessio civilis* both possession as well as the *animus* (intention) to possess the property were necessary. The possessor must have the intention (*animus*) to keep the land as if he or she were the owner. In that case the applicant had used a certain access road near his house for more than 30 years. The said road was adjacent to a river bank owned by the first respondent. Over the years the applicant had used the road daily, had placed a gate between the road and his property, had maintained the road and had strengthened the river bank. He sought an order declaring that he had acquired a *praedia*l servitude over the road in terms of section 6 of the Prescription Act 68 of 1969. The court held that from the uncontested allegations by the applicant, it was apparent that he not only had physical possession of the property, but in fact had the intention to use it as if it was his own and did use it in such a manner for more than 30 years.The facts clearly established *possessio civilis* and therefore the applicant had acquired a *praedial* servitude to this access road by way of acquisitive prescription. The state, as owner, could always have prevented him from using the access road, but did not do so and it was clearly careless in not looking after its property.

The second requirement for acquisition of ownership by prescription is that the possessor must have possessed the object for an uninterrupted period of thirty years. In accordance with the notion of *coniunctio temporis* or *accessio possessionis* a person relying on prescription may add to the period of possession the period of possession of the predecessor or predecessors in title. This requirement of continuity must relate not only to the physical control (*detentio*) but also to the elements peculiar to prescriptive possession, namely the *nec vi, nec clam, nec precario* elements of the 1943 Prescription Act.[53]

52 n 44 above.
53 Kleyn *et al* (n 1 above)235.

The possession must have been uninterrupted for a period of thirty years and interruption of prescription can be either natural or civil (judicial). Natural interruption occurs whenever the possessor loses possession of a thing either voluntarily or involuntarily. Possession is lost voluntarily when the possessor voluntarily surrenders the thing to the true owner or a third party. It is also lost voluntarily if the possessor no longer fulfils the requirements of *possessio civilis*, for example, if he or she acknowledges the title of the owner.[54] Involuntary loss can occur by stealth or by force as a result of acts by the owner or an outsider, or by *vis major*, for example war conditions or flooding.[55] In the case of *Volkskas Bpk v The Master & Others*[56] it was stated that the two chief causes of the interruption of acquisitive prescription under the common law are acknowledgement of liability and the institution of legal proceedings by someone who claims ownership of the thing, referred to as judicial or civil interruption. Judicial interruption, however, falls away and is of no effect if the claimant does not successfully pursue his claim or if he or she abandons any judgment given in their favour.[57]

Section 2 of the 1969 Act provides for involuntary loss of possession. It provides that any interruption by involuntary loss of possession will fall away if possession is regained at any time by legal proceedings instituted within six months of such loss or if possession is lawfully regained in any other way within one year after such loss.

If possession is interrupted, either by judicial interruption or by natural interruption, and interruption does not fall away, the whole period has to start again before the possessor can acquire ownership.

The Prescription Act of 1969, however, introduced a new provision based on the consideration that a person's possession need not be interrupted if that person is dispossessed only temporarily by a thief, a robber or even by the owner.[58]

At common law the course of prescription could be suspended for a certain category of persons who as a result of some legal disability, incapacity or other recognised impediments could not enforce their legal rights. Unlike interruption, suspension only leads to a temporary interruption of the course of prescription. Under the provisions of section 3(1)(a) of the Prescription Act of 1969, if the person against whom the prescription is running (the true owner of the property) is under a legal disability, that is, if he or she is a minor or a lunatic or a married woman whose husband has legal control over her separate property by virtue of marital power, or if he or she has been

54 Joubert *et al* (n 47 above) vol 27, 142, para 155.
55 Du Bois (n 5 above) 514-5.
56 1975 1 SA 69 (T) 73.
57 Section 4(2) of the Prescription Act 68 of 1969.
58 Du Bois (n 5 above) 515.

declared to be a prodigal and control of his or her property has been vested in the curator, the prescriptive period will not end until three years after the property ceases to be owned by a person under such disability. The provisions also apply to the true owner of the property who has been prevented by superior force (*vis maior*) from instituting the necessary legal process to claim ownership. It must be mentioned that in terms of sections 2(1)(a) and (b) of the Married Persons Equality Act 1 of 1996, the common law rule in terms of which a husband acquires the marital power over the person and property of his wife was repealed. The abolition of the marital power of the husband effectively removes this legal disability from the prescription laws of Namibia. This principle therefore ceases to have application to prescriptive periods which run after the promulgation of the Act.

Section 3(1)(b) provides that if the person in favour of whom the prescription is running, that is the possessor, is outside the country, the period of prescription will not end until three years after he or she returns to Namibia. The section further provides that if the possessor is married to the person against whom the prescription is running, that is the true owner, or if the possessor is a member of the governing body of a juristic person against whom the prescription is running, that is the company that owns the property, the prescriptive period will not end until three years after the relevant impediment has ceased to exist. This may occur, for example, when the marriage is dissolved or when the possessor ceases to be a member of the governing body.

Section 3(2) has similar provisions with respect to the acquisition of *fideicommissary* property by prescription. Where the property concerned is the subject of a *fideicommissum*, the period of prescription will not end until three years after the property has vested in the *fideicommissary*.

Under the provisions of section 2(2) of the Prescription Act of 43 and section 1 of the Prescription Act of 1969, upon satisfaction of the requirements for prescription, the former owner loses ownership by operation of law and the possessor *ipse jure* becomes the owner of the property without need for any further act. However, it is advisable for such new owner who has acquired the property through prescription to apply for a court order to have the property registered in the deeds registry in his or her name for purposes of certainty and to satisfy the requirements of the publicity theory.[59]

A possessor who is being threatened with dispossession or has been dispossessed of the property, may apply for a restitutory interdict or *mandament van spoile*.

59 Du Bois (n 5 above) 517.

3 Derivative acquisition of ownership

As mentioned earlier, derivative acquisition of ownership occurs as a result of a bilateral transaction involving the cooperation of a predecessor in title. Property is acquired from a person who has possession and presumably ownership. Derivative acquisition is perhaps the most important way of acquiring ownership today and is mainly referred to as *traditio* or transfer of ownership and normally takes place in pursuance of a contract.

This method of acquisition of ownership or transfer involves the co-operation of a predecessor in title and almost invariably there must be some juridical act to transfer ownership and in most cases this would be a contract of sale or a donation. A donation can be *inter vivos* or by testamentary disposition. One basic characteristic of this method of acquisition is the juridical act of transfer. There are two ways of transfer of ownership, delivery in case of movable property and registration in the case of immovables.

There are legal requirements that are needed for a transfer of title. The first requirement is derived from the *nemo quod non habet* or *the nemo plus iuris* rule. This principle simply means no one is capable of transferring more rights than he or she has. There is also the element of legal capacity of the transferor and transferee to transfer and accept ownership respectively. There are various variables and natural dispositions that determine the legal capacity and these include natural, financial and legal capacities in areas such as marital status, mental disposition, age, and insolvency. Under the relevant provisions of the Married Persons Equality Act 1 of 1996, the common law rule in terms of which a husband acquires the marital power of his wife was abolished.[60] Consequently a husband and wife married in community of property have equal capacity to dispose of the assets of the joint estate and generally to administer the joint estate.[61] However, except under certain extraordinary circumstances, a spouse married in community of property shall not, without the consent of the other spouse, alienate or enter into any contract for the alienation of any right in the immovable property forming part of the joint estate.[62] With regard to an estate involving the rights of a minor, as a general principle, consent of the guardian is a pre-requisite. However, if the value of the property to be transferred is N$100.000 and above, the consent of the guardian is not enough. The consent of the Master of the High Court is also required. If the value of the property is more than N$100, 000, the consent of a High Court Judge is essential since the current jurisdiction of the Master of the High Court in such matters is limited.[63]

60 Sec 2(1)(a).
61 Sec 5(a).
62 Sec 7(a).
63 Section 80(2) of the Administration of Estates Act 66 of 1965.

The other requirement is that the property must also be *in commercio*; that is the property must be susceptible to private ownership.

As mentioned earlier, transfer of ownership in law involves a juridical act and almost invariably there must be an *iusta causa* or a cause or reason for transfer of ownership. There are two systems of transfer of ownership, namely the *causa* system and the abstract system.

Under the causal (*causa*) system the transfer of ownership takes place by reason of the existing underlying agreement. If the cause for the transfer of ownership is defective the ownership will not pass, notwithstanding that there has been delivery or registration of the thing. In terms of the abstract system transfer of ownership is not dependent on the existence of a valid *iusta causa* or the obligation creating agreement, or obligatory agreement or an agreement creating an obligation, and therefore under the abstract system, even if the *causa* fails, the transfer will be regarded as valid but an aggrieved party can bring a personal action against the defendant for breach of the *causa*.[64]

3.1 Transfer of ownership under the abstract and causal systems

3.1.2 Obligation creating agreements versus real agreements

A contract of sale (or a contract of transfer of ownership) involves two agreements, namely the underlying agreement (the obligation creating agreement or the *causa*) and the ownership transferring agreement (the so-called real agreement). An ordinary contract of sale creates an obligation between two parties, the seller and the buyer. The mutual intentions to sell and purchase the thing constitute the *causa* or the underlying agreement. If payment is made, the seller is bound by law to make delivery and transfer ownership. This is known as the ownership transferring agreement (the real agreement). If the seller therefore receives the purchase price but does not deliver, the buyer has the right to claim delivery from the seller. The buyer's right to demand delivery is a personal right against the seller. The obligation creating agreement thus relates to something that must be done in the future. If delivery is executed, in other words, if the real agreement is executed, a property relationship is created between the buyer and the thing. Hence, the buyer has a real right over the property. The ownership transferring agreement (or the real agreement) therefore creates a relationship directly to the thing, a property relationship. This simple illustration is meant to provide the basis for the two systems of transfer; the abstract and *causa* systems.

64 See *Commissioner of Customs and Excise v Randles, Brothers and Hudson Ltd* 1941 AD 369; *Trust Bank van Afrika Bpk v Western Bank Bpk & Andere NNO* 1978 4 SA 281 (A); *Klerck NO v Van Zyl & Maritz NNO & Another & Related Cases* 1989 4 SA 263 (SE): *Legator McKenna Inc & Another v Shea & Others* 2010 1 SA 35 (SCA).

3.1.3 The abstract and causa *principles*

An abstract approach to the transfer of *dominium* is concerned with the parties' intentions to pass and receive ownership, in the abstract, regardless of whether this is supported by an underlying *causa* or basis. On the other hand, the causal approach requires a linking *causa* or basis, typically an underlying contract – which can be seen as the *raison d'être* for delivery.

The causal system prefers the interests of the owner, and ownership will pass only if there is an agreed and legal basis for this. The abstract system, on the other hand, takes more account of the interests of the transferee and third parties; ownership passes if the parties so intended, regardless of whether there is any agreed legal basis. A third party acquiring transfer from the transferee under the abstract system is more likely to get title than under a causal system.

Namibian property law is based on the abstract system of property law. In the Namibian case of *Oshakati Tower (Pty) Ltd v Executive Properties CC & 3 Others*,[65] Muller JJ referring to the application of the abstract system in Namibia quoted Van der Merwe[66] and stated as follows:

> It is common cause between the parties that the land registration system, in Namibia is an abstract system, which is the same in South Africa. In this system two separate agreements are recognised, namely the underlying agreement and the real agreement. A defect in the first agreement does not prevent valid transfer. In respect of the real agreement it is a requirement it should not only be voidable, but it should be void *ab initio* because of a mistake or fraudulent misrepresentation. A forgery would certainly also render the agreement void. For transfer, the owner must have the intention to pass ownership. If there was no such clear intention to transfer ownership, ownership does not pass. The authorities further make it clear that non-compliance with a statutory requirement may render contracts unenforceable, depending on the intention of the legislature. In this regard non-compliance with a statutory requirement, as set out in section 228 of the Companies Act, may render the real agreement unenforceable and void.[67]

The learned Judge further stated that under an abstract system of passing of ownership the mere intention of the parties to pass ownership is sufficient without reference to the underlying *causa* for the transfer. This principle originated in Roman law and was developed further by natural law jurists of the seventeenth century and pandectists, and accepted in modern law. The abstract principle guarantees certainty in that it disallows the invalidity of an underlying *causa* to affect the existence or validity of a transfer. The real agreement to pass ownership is treated *in abstracto,* that is, totally

65 Case no: [P] A 20/2006 In The High Court of Namibia.
66 CG van der Merwe 'Things' in (WA Joubert *et al Law of South Africa (Lawsa)* (First Reissue) (2003) 27, para 203.
67 Para [26].

independently from the contractual agreement which provides the *causa* for the transfer. Although the abstract system simplifies matters for the transferee it does not leave the transferor, who has transferred an object by virtue of an invalid *causa,* without a remedy. Since ownership passes to the transferee, the transferor is deprived of his *rei vindicatio.* However, he or she may still claim by way of *condictio* on the ground of unjust enrichment.

The abstract principle is by no means absolute and several exceptions exist. Firstly, certain forms of invalidity of the contractual agreement are considered so material that they affect the real agreement and also, for example, where recognition of the validity of the transfer will conflict with an absolute statutory prohibition. Secondly, it seems possible for parties to the contractual agreement to provide that the transfer of ownership will only be valid if the *causa* for the transfer is valid. Such a term can also be implied from the circumstances of the case.

Van der Merwe[68] discusses the effect of the abstract system on land registration and what the requirements are.[69] He makes it clear that the owner of the property must have the intention to transfer ownership at the moment when ownership passes. He deals with the difference between the underlying agreement and the real agreement and states the following:[70]

> In terms of an abstract system of the transfer, the passing of ownership is wholly abstracted from the agreement giving rise to the transfer and is not made dependent on such an agreement. It is immaterial whether such an agreement is void, voidable, putative or fictional. The puristically-minded do not even talk in terms of a *causa* giving rise to the obligation to transfer but only require a serious intention on the part of the parties to transfer ownership. In terms of the abstract system a clear distinction is thus drawn between the agreement given rise to the transfer ('verbintenisskeppende ooreenkoms') and the real agreement ('saaklike ooreenkoms') in which the parties agree to pass ownership. Emphasis is placed on the real agreement which exists independently of the agreement giving rise to the transfer. The invalidity of the latter agreement has no influence on the validity of the real agreement. If there is a serious intention to transfer ownership, ownership passes to the transferee, who can in turn validly pass transfer to a third party. The original owner in such a case loses ownership of his thing and he has in appropriate circumstances only a personal action, namely the condictio based on unjust enrichment on the ground of the loss suffered by him.

The real agreement is described as follows by Van der Merwe:[71]

> Under the abstract system a real agreement, namely an agreement to transfer and accept ownership, is required for transfer of ownership. In every instance it must consequently be determined factually whether a real agreement had indeed been reached. If the real agreement is merely voidable, for example as a

68 n 66 above.
69 n 66 above, paras 362 and 363.
70 n 66 above, para 363.
71 Para 365, at 300.

> result of undue influence, ownership will pass if the agreement had not been vitiated before transfer. If, however, the real agreement is void, having been induced by the fraudulent misrepresentations or by mistake ownership will not pass.

He continues:[72]

> Certain contracts are unenforceable because they do not comply with certain statutory requirements: thus writing, official approval or a certain manner of achieving an object may be prescribed. Whether a real agreement or performance in terms of such an enforceable contract is vitiated by the defect in the preceding contract depends on the intention of the legislature in rendering such a contract void on the ground of non-compliance with a certain requirement. The courts have to ascertain the intention of the legislature from the statutes itself and in certain instances it may well be that the legislature intended to render not only the preceding contract but also the real agreement unenforceable.

In this case, the court granted the order for the de-registration of the rights. This case *inter alia* illustrates the principle that the application of the abstract principle is by no means absolute and that the courts have the discretion in appropriate cases to annul the registration of the transfer of property.

3.2 Delivery

As we saw earlier, transfer of a real right takes place when delivery to the transferee is made, in the case of movable property, and when registration takes place, in the case of immovable property. There are two types of delivery, actual and constructive delivery.

3.2.1 Actual delivery

As the term suggests, actual delivery involves the actual physical delivery of the property. However, where this is impossible or inconvenient, one of the forms of constructive or fictitious delivery may be used.

3.2.2 Constructive delivery

This type of delivery refers to various methods of transferring ownership by which no physical handing over of the thing takes place. The various modes of constructive delivery are as follows:

72 Para 365, at 301.

3.2.2.1 Symbolic delivery

By this method the physical control of property is transferred to the person to whom delivery is made by the handing over of a symbol of the property. For example, a person who has been provided with the keys to a warehouse is in the position to exercise immediate power over the contents of the warehouse.

3.2.2.2 Delivery with the long hand (*traditio longa manu*)

This mode of delivery takes place where the property is placed in the presence of and at the disposal of the purchaser.[73] In the case of *Groenewald v Van der Merwe*[74] Innes CJ stated as follows:

> In the great majority of cases the physical factor takes the form of handing the movable in question bodily to the transferee, who accepts it with the requisite intention and thereby becomes owner. This is actual delivery. But physical prehension is not essential if such movable is placed in the presence of the would-be possessor in such circumstances that he, and he alone, could deal with it at his pleasure.

The court in this case pointed out that this mode of delivery is fictitious and is most appropriate to transactions where owing to the weight or bulk of the article concerned actual delivery is difficult.

3.2.2.3 Delivery with short hand (*traditio brevi manu*)

This form of delivery takes place where a person who already has the physical possession of the property on behalf of the owner, acquires physical control as owner of the thing in question. In *Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstein & 'n Ander*[75] it was stated that *traditio brevi manu* takes place when an o*wner* and a *detentor* of a thing agree that the latter shall in future hold the thing in his own right and further that the potential transferee must be in physical possession of the article and must have the *animus* to hold it for himself.

3.2.2.4 *Constitutum possessorium*

This form of delivery is the exact opposite of delivery with the short hand. This operates in a situation where the seller continues to keep the goods in his possession but holds them on behalf of the buyer and not on his own behalf. Innes CJ in *Goldinger's Trustee v Whitelaw & Son*[76] remarked that

73 *Xapa v Ntsoko* 1919 EDL 177.
74 1917 AD 233 238.
75 1980 3 SA 917 (A) 922-923A.
76 1917 AD 66 74.

constitutum possessorium is the converse of the *tradition brevi manu* and that both are examples of transfer of possession and consequently ownership due to a contractual change of intention on the part of the person who retains the physical control. He cautioned that a process by which a change of *dominium* may depend upon a mere change of mental attitude should be carefully scrutinised. He therefore laid down the following safeguards:

> (a) A *constitutum* is never presumed.
>
> (b) The party alleging it must establish facts from which its existence clearly and necessarily follows.
>
> (c) A distinct *causa detentionis* (contractual reason for the possessor to retain detention) is essential. If A, after selling a movable to B, intends to hold it on behalf of the latter that change of mind would not effect a transfer of ownership. There must be a clearly proved contractual relationship under which A becomes the holder of the thing on behalf of the purchaser.

Constitutum possessorium has no application to pledge because pledge always involves the actual delivery of the thing to the pledgee.

3.2.2.5 Attornment

If the property to be delivered is, at the time when the delivery is to be effected, not in the possession of the transferor, but under the control of a third party, who is holding it either as an agent on behalf of the transferor or by virtue of some other relationship between him or her and the latter, delivery of the property may be effected by attornment. In terms of this form of delivery the transferor instructs the third party to hold the property in question henceforth no longer on his or her behalf but on behalf of the transferee.[77]

The essentials for this form of delivery are that the property must be held by an agent who has actual control over the property concerned, and that there must be an agreement between all three parties, the transferor, the transferee and the agent, as to the change of ownership of the property.

3.3 Transfer by registration

Transfer of real rights in immovable property is effected by means of registration. Section 16 of the Deeds Registry Act 47 of 1937 provides that:

> Save as otherwise provided in this Act or in any other law the ownership of land may be conveyed from one person to another only be means of a deed of transfer executed or attested by the registrar, and other real rights in land may be conveyed from one person to another only be means of a deed of cession attested by a notary public and registered by the registrar.

77 Kleyn *et al* (n 1 above) 263.

Registration may be defined as the recording of documents or books of some facts or such other acts as the existence of a description of a corporal thing or of a transaction or some event of a right. The object of registration is to give notice of the ownership of a right in property to all persons concerned and in particular to the creditors of the owner of the property or intended purchaser of the property.

A right becomes a real right on registration if the following conditions are met:

- the register must be kept at the state's Deeds Registry;
- it must be open to inspection by the public; and
- the rights must be capable of and proper for registration.

As already stated, under section 16 of the Deeds Registries Act ownership in land is acquired by means of a deed of transfer duly executed and attested by the registrar. Section 3 imposes a number of duties and obligations on the registrar to ensure *inter alia* an efficient system of registration which affords security of title.

As regards prescription, it was stated in the case of *Willoughby's Consolidated Co Ltd v Copthall Stores*[78] that when land was acquired by prescription, the practice is for the party who had so acquired it, to institute an action for the registration of his or her acquired rights in the deeds office.

The rights that may be registered are provided for by various provisions under the Deeds Registries Act. Section 16 deals with ownership of land and other real rights. Section 18(3) deals with unalienated state land and this may be transferred from the state only by a deed of grant. Section 65 deals with personal servitudes. It provides that:

> [s]ave as provided in any other law, a personal servitude may be created by means of a deed executed by the owner of the land and encumbered thereby and the person in whose favour it is created, and attested by a notary public.

Such personal servitudes can be registered.

Mortgages can also be registered. They fall under section 50(1)(2) and (3) according to which:

> [a] mortgage bond shall be executed in the presence of the registrar by the owner of the immovable property therein referred or by a conveyancer duly authorized by such owner by power of attorney'.

78 1913 AD 267.

Section 50(2) provides that a 'mortgage bond or notarial bond may be registered to secure an existing debt or a future debt or both existing and future debts'.

Section 56 provides that:

> [n]o transfer of mortgaged land shall be attested or executed by the registrar and no cession of a mortgaged lease of immovable property, or of any mortgaged real right in land shall be registered until the bond has been cancelled or the land, lease or right has been released from the operation of the bond with the consent in writing of the holder thereof.

Section 16 of the Deeds Registries Act makes registration a precondition for the conveyance of ownership of land. In the case of *Crause & Andere v Ocean Bentonite Edms (Bpk)*[79] it was held that in all cases in which a registered real right is to be transferred as a result of an agreement, such real right cannot vest in the acquirer without an act of registration in the deeds office.

Under Roman-Dutch law the transfer of a real right, even though done in performance of a contract, is always regarded and must be analysed as a separate transaction from the contract itself because the contract merely creates personal rights and obligations and therefore an additional act is required to create the real right. The additional act is delivery in the case of movables, and in the case of immovables delivery is effected by registration.

By virtue of the application of the doctrine of constructive notice, every person is deemed to have knowledge of a duly registered document as a result of which it becomes enforceable against the whole world at large in accordance with the maxim *nemo ex suo delicto meliorem suam conditionem facere potest* meaning nobody will be permitted to defeat another person's potential right for his own individual benefit if he or she knows of its existence. Registration is therefore meant to protect real rights in immovable property.

It must be mentioned, however, that according to the decision in *Cassim & Others v Meman Mosque Trustees*[80] registration is not an absolute criterion for if there is a flaw in the title of ownership this flaw cannot be cured or rectified by the mere fact of registration. Furthermore, in the case of sale or transfer of land where the transferor or the plaintiff who has an effective title is not the sole owner of the property, registration cannot exempt the defendant from liability on the basis that the defendant should have been aware of the fact that the plaintiff was not the holder or the sole holder of any particular registered real right. In the case of *Frye's (Pty) Ltd v Ries*[81] the defendant was co-owner of land which was registered in her name and those

79 1979 1 SA 1076 (O).
80 1917 AD 154162.
81 1957 3 SA 575 (A).

of her two daughters. The defendant entered into a contract with the plaintiff company. In terms of this contract the company leased part of a building and also obtained an option to buy the whole of the property. The contract required the consent of two daughters who were co-owners but they refused to ratify the agreement. The plaintiff company was therefore unable to enforce the lease or option and sued the defendant for damages for breach of contract. The defendants relied on the doctrine of constructive notice and argued that the plaintiff company was deemed to have knowledge of the limited authority as the registrar of deeds showed that she was only a co-owner who required the consent of the two daughters. This argument was rejected and the defendant was held liable.

In the case of *Nel NO v Commissioner for Inland Revenue*[82] it was held that registration of a personal right does not convert a personal right into a real right and specifically with regard to an annuity, the right was not registrable or, if registered, registration would not convert it into a real right.

3.3.1 Registration of servitudes

A duly executed agreement to grant a servitude gives rise to a real right only when it has been registered. Prior to registration a third party, in particular a purchaser of a servient property, without notice of the servitude, is not bound to recognise it. Although the agreement becomes binding immediately *inter partes* it was held in *Frye's* that knowledge of a servitude on the part of a buyer is material only in the event of an unregistered servitude.[83] The buyer of the servient tenement is not bound by the servitude unless he or she had knowledge of the servitude at the time of buying the servient property.

In *Grant v Stonestreet & Others*[84] Ogilvie Thomson JA said the following:

> Having regard to our system of registration, the purchaser of immovable property who acquires clean title is not lightly to be held bound by an unregistered praedial servitude claimed in relation to that property. If, however, such purchaser has knowledge, at the time he acquires the property, of the existence of the servitude, he will … be bound by it notwithstanding the absence of registration.

However, in that case the court was not dealing with a real right; it was dealing with an agreement in terms of which reciprocal servitudes, which had never been registered, had been granted. An agreement to grant a servitude gives rise to a real right only when it has been registered.[85] Dealing with the distinction between real rights and contractual rights, in that case,

82 1960 1 SA 227 (A) 227.
83 See section 7.2.2.2.4.4.
84 1968 4 SA 1 (A) 20.
85 See *Van Vuren & Others v Registrar of Deeds* 1907 TS 289 at 295; Van der Merwe *Sakereg* (n 8 above) 526-527, and Kleyn *et al* (n 1 above) 380-381.

unregistered servitudes, Ogilvie Thomson JA referred to *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd*[86] where Innes CJ said at 16:

> Now a servitude, like any other real right, may be acquired by agreement. Such an agreement, however, though binding on the contracting parties, does not by itself vest the legal title to the servitude in the beneficiary any more than a contract of sale of land passes the *dominium* to the buyer. The right of the beneficiary is to claim performance of the contract by delivery of the servitude, which must be effected *coram lege loci* by an entry made in the register and endorsed upon the title deeds of the servient property.

Grant is therefore no authority for a proposition that a registered real right is no longer maintainable against the whole world when it is erroneously omitted from a subsequent title deed.

3.3.2 Positive and negative systems of registration

3.3.2.1 Positive system

This system guarantees the accuracy of the registration/registered information to third parties or, at times, to bona fide acquirers of immovable property or real rights to such property. It therefore follows that a bona fide acquirer of a real right which has been registered can enforce such registered right against everyone. The state guarantees the accuracy of the registered information, including the registration of a title, and therefore there is a high degree of state intervention securing the protection of a bona fide third party. The system of registration in Namibia is consistent with this type of registration.[87]

3.3.2.2 Negative system of registration

Under this system the accuracy of information is not guaranteed. If a third party, acting in good faith, accepts incorrect data in the deeds office as correct, and acts on this information, he or she will normally not enjoy protection under the negative system of registration unless of course the doctrine of estoppel could find application or he or she might have a claim for delictual damages.[88]

4 Summary and concluding remarks

The principles and tests applied to determine whether *dominium* or ownership has passed under the various methods of acquisition of ownership

86 1918 AD 1.
87 See also sec 99 of the Deeds Registries Act.
88 Kleyn *et al* (n 1 above) 99.

discussed in this Chapter indicate that the actuality of certain factual situations will give rise to the inference of the acquisition of ownersip by operation of the law. These are guiding principles to assist the courts to draw an inference of acquisition of ownership after considering the peculiar facts of each case. They include the publicity principle, which deals with the outward manifestations indicative of the intention to pass ownership. In cases involving *inaedificatio*, for example, which may lead to the deprivation of property, and consequently the violation of the constitutional right of the owner of the movable property, the enquiry of the courts will be stretched to determine the unequivocal intention and consent to transfer ownership.

CHAPTER 7

REAL RIGHTS OTHER THAN OWNERSHIP

1 Introduction

From the definition and nature of ownership, together with the principles relating to registration under section 16 of the Deeds Registries Act 47 of 1937, we are able to internalise the principles that the holder of a real right may create rights over his *dominium* in favour of another party. Depending on the intention of the parties and the mode of creation of these rights, they may constitute real rights. However, to the extent that these rights are not complete rights of ownership they are referred to as limited real rights in contradistinction to ownership, which is a real right. In Chapter 4, with reference to the distinction between real rights and personal rights, we discussed servitudes (2.2) as examples of limited real rights. In this Chapter we shall look at servitudes as an established category of real rights in greater depth and will also consider other examples of limited real rights, such as lease, mortgage, pledge and lien.

2 Servitudes

2.1 Definition

A servitude may be defined as a limited real right to another legal subject's movable or immovable property which grants the entitled person, that is the holder of the servitude, certain specified entitlements of use and enjoyment. In the case of *Lorentz v Melle & Others*[1] Nestadt J defined a servitude as a right belonging to one person in the property of another entitling the former either to exercise some right or benefit in the property or to prohibit the latter from exercising one or other of his normal rights of ownership. The

1 1978 3 SA 1044 (T) 1049.

legal effect of a servitude is to diminish the rights of the owner over property for the benefit of another.

Because of this bearing, the right of servitude must be clearly established. As a general rule, a servitude is only recognised as a real right if it has been registered against the land in question, unless it was created by statute or prescription.[2] All servitudes are limited real rights. Examples of servitudes are a right to draw water from the land of someone else; a right of way over the property of someone else; and a right of grazing on the land of someone else.

2.2 Classification

2.2.1 Distinction between active (positive) and passive (negative) servitudes

An active servitude is one which entitles the holder of the servitude to do something with regard to the servient property which the owner of the servient property must endure, for example B's right to draw water from A's dam.

A passive servitude entitles the holder of the servitude, to prohibit the owner of the servient property from exercising any one or more of the powers normally attached to ownership, for example where the owner of the servient tenement is prohibited by the servitude from erecting on his or her property any building higher than a certain height. Personal and praedial servitudes can either be active or passive.[3]

2.2.2 Distinction between praedial and personal servitudes

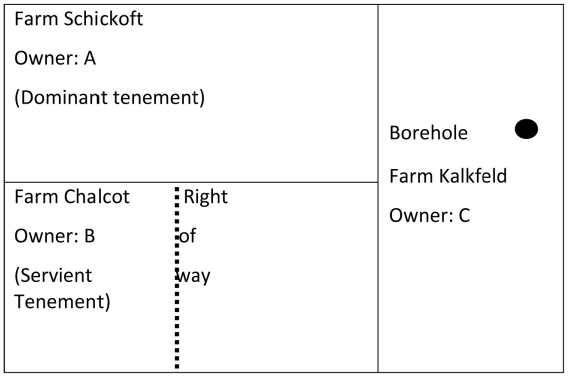
As we saw at 2.2, there are two basic categories of servitudes, namely praedial and personal servitudes. Praedial and personal servitudes may be distinguished in the following ways.[4]

A praedial servitude requires at least two pieces of land. It is constituted in favour of one piece of land, the dominant tenement, over another piece of land, the servient tenement. It therefore confers a real benefit on the dominant tenement and imposes a burden on the servient tenement. This means that the owner of the land benefits from the servitude in his or her capacity as landowner. Successive owners of the land will stand to benefit from the servitude.

2 *Coetzee v Malan* 1979 1 SA 377 (O).
3 PJ Badenhorst *et al Silberberg and Schoeman's the law of property 5th ed* (2006) 322.
4 Badenhorst *et al* (n 3 above) 322-42; F du Bois *Wille's principles of South African law 9th ed* (2007) 593-611; WA Joubert *et al Law of South Africa (Lawsa)* (First Reissue) (2003) 24, para 388; H Mostert *et al The principles of the law of property in South Africa* (2010) 239.

A personal servitude, on the other hand, is always constituted in favour of the individual in his or her personal capacity. It confers on this individual the right to use the owner's property.[5] A praedial servitude is inseparably bound to the land it benefits and therefore when the land is alienated the new owner becomes the holder of the praedial servitude. A personal servitude cannot be transferred by its holder. In terms of the common law principle that a servitude always runs with the land, a praedial servitude, in principle, can be granted in perpetuity or, in terms of section 75(1) of the Deeds Registries Act 47 of 1937, for a limited period only. A personal servitude, on the other hand, is extinguished when the period for which it is granted lapses, or when the holder of the personal servitude dies. Where the holder is a juristic person, the servitude lapses after 100 years. A praedial servitude is indivisible, whereas personal servitudes are divisible.[6] This means that a personal servitude, in principle, can exist over a part of the property, while a praedial servitude, in principle, exists over the whole of the affected land.[7]

The diagram below is a graphic illustration of the distinction between praedial and personal servitudes.



B, the owner of Farm Chalcot, grants A, in his capacity as owner of Farm Schickoft, a right of way over Farm Chalcot. The right of way is a praedial servitude to the extent that it is granted to A in his capacity as owner of Farm Schickoft. Farm Schickoft, which is benefiting from the right of way, is referred to as the dominant tenement and Farm Chalcot which serves, or is burdened in favour of Farm Schickoft, is referred to as the servient tenement. Should A later sell Farm Schickoft to D, D would of course become the owner of that farm and would therefore be entitled to exercise the right of way over

5 *Willoughby's Consolidated Co Ltd v Copthall Stores* 1913 AD 277 281; *Ex parte Geldenhuys* 1926 OPD 155 163-164.
6 *Mocke v Beaufort West Municipality* 1939 CPD 135.
7 Mostert *et al* (n 4 above) 239.

Farm Chalcot. If C, owner of Farm Kalkfeld, grants to A, in his or her personal capacity, the right to draw water from the borehole on Farm Kalkfeld, this right constitutes a personal servitude because the servitude is not granted to A in his or her capacity as owner of Farm Schickoft but in his or her personal capacity. Should A sell his property to D, D would not be entitled to exercise the servitude merely because he or she has acquired ownership of the property. His or her entitlement will be determined by an express grant by C.

Praedial servitudes will now be discussed in detail, while personal servitudes and unregistered servitudes are discussed under 2.2.4 below.

2.2.3 Praedial servitude

2.2.3.1 Requirements

South African law (including Namibian law) knows no *numerus clausus* of real rights, including servitudes, in respect of land. However, certain requirements or pre-requisites must be met before a right will qualify as a praedial servitude.[8] These requirements are discussed under separate headings below.

One piece of land serves another

As stated earlier, there must be two tracts of land or erven, the dominant tenement and the servient tenement. A praedial servitude cannot exist without these two tenements. This accords with the rule of praedial servitudes that one piece of land serves another. The owner of the dominant tenement must derive some benefit from the praedial servitude in his or her capacity as owner of the land.[9]

In *Van der Vlugt v Salvation Army Property Co*[10] it was held that a right of a municipality to lay a sewer over privately owned land was not a praedial servitude because that right was not granted in favour of an identifiable dominant tenement.

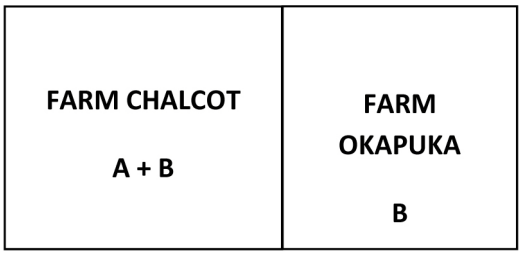
The servitude must offer some advantage, either present or future, to the dominant tenement whereby its value or the enjoyment to be derived from it is increased. The dominant and servient tenements must be situated close enough to allow practical exercise of the servitude. The use made of the servient land must be based on some permanent attribute or feature of such

8 Badenhorst *et al* (n 3 above) 322-6, see also Mostert *et al* (n 4 above) 239.
9 Badenhorst *et al* (n 3 above) 323; Du Bois (n 4 above) 594; Joubert *et al* (n 4 above) Vol 24, para 396; Mostert (n 4 above) 240.
10 1932 CPD 56.

land. This is expressed in the existence of a *causa perpetua* as a requirement.[11]

Nobody can constitute servitude over his or her own property

Nobody can hold a servitude over his or her own property (*nemini res sua servit*). This means that where a person owns two properties, he or she cannot register a servitude as a burden over one property in favour of the other one, not even if the ownership is held under two separate title deeds.[12] There is an exception with respect to co-owners because an owner can acquire a servitude over land of which he or she is only a co-owner and conversely, co-owners may acquire a servitude over land that is owned solely by one of them.[13] The exception which applies in relation to co-owners can be explained graphically as follows:



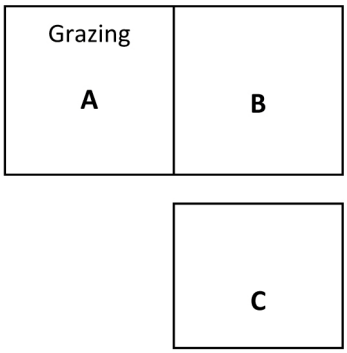
In the above scenario, A and B own Farm Chalcot in undivided shares as co-owners. B is the sole owner of Farm Okapuka. B can acquire a servitude over Farm Chalcot and conversely, A and B can acquire a servitude over Farm Okapuka.

There cannot be a servitude of a servitude

This requirement entails that the benefit of the servitude cannot be severed or separated from the land to which it is attached in favour of another property. It follows that a *dominus* is not permitted to assign his or her servitude (or otherwise allow it to be utilised) for the benefit of another piece of land other than the dominant tenement.[14] Similarly, the holder of a servitude cannot grant to another person a servitude in respect of the servitude which he or she holds.[15] The holder of a right of way, for example, cannot grant to someone else a servitude to use the road.

11 *Lorentz* (n 1 above) 1052.
12 Badenhorst *et al* (n 3 above) 323.
13 *Mocke* (n 6 above); Badenhorst *et al* (n 3 above) 323.
14 Badenhorst *et al* (n 3 above) 323-4; Mostert *et al* (n 4 above) 240.
15 *Dreyer v Letterstedt's Executors* 1865 5 Searle 88.

This rule can be explained graphically by another example:



If A has granted a grazing right over his or her land to B. B cannot cede the right to C because he or she will then be creating a servitude over a servitude.

A servitude must not impose active (positive) duties on owner of servient tenement

As stated earlier, a general characteristic of a servitude is that it exists over land belonging to someone else. Its existence constitutes a diminution of ownership. The holder of the servitude is entitled to some benefit from the servient tenement. However, he or she is not entitled to demand some active (positive) act on the part of the owner of the property.[16] This means that a servitude does not oblige the servient owner to render a performance (*servitus in faciendo consistere nequit*). For example, the holder of a right of way over his or her neighbour's property cannot expect the owner of the neighbouring property to maintain the road.

There are two servitudes constituting exceptions to the general rule that the holder of a servitude may not demand any positive act from the owner of the servient land. These servitudes are:

(a) *servitus oneris ferendi,* which is a servitude which imposes a duty on the owner of a servient land to keep a wall in a good state of repair;[17] and

(b) *servitus altius tollendi*, which is a servitude that compels the owner of a servient property to construct a building of a certain height.

Praedial servitudes are indivisible

The rule is that a praedial servitude is *prima facie* imposed on the servient tenement as a whole to the benefit of the dominant tenement.[18] This rule is

16 *Schwedhelm v Hauman* 1947 1 SA 127 (E); *Van der Merwe v Wiese* 1948 4 SA 8 (C).
17 Badenhorst *et al* (n 3 above) 324.
18 *Nolan v Barnard* 1908 TS 142 151.

particularly important in cases involving joint ownership. The rule means that a joint owner of the dominant tenement cannot acquire a servitude in favour of his undivided share only. Similarly, a joint owner of the servient tenement cannot grant a servitude over his or her undivided share only. Therefore, the creation of a servitude will require the prior consent and cooperation of the joint owners of both the dominant and servient tenements. A servitude registered in favour of a dominant tenement which is subsequently subdivided, extends in favour of each and every subdivided portion of the dominant tenement. If the servient tenement is later subdivided, every portion is subject to the praedial servitude as if the servitude had been constituted at the outset against that particular tenement. For example, where the dominant tenement is owned jointly by A and B, B cannot acquire a right of way over the servient tenement for his undivided share only. The servitude can only be granted to the dominant tenement as such. This implies that the creation or acquisition of the servitude will require the prior consent and cooperation of both A and B. Should the dominant tenement later be subdivided between A and B, each would be entitled to make use of the right of way over the servient tenement.[19]

Once a servitude involving two adjacent pieces of land is created, it is immaterial who the owner of either tenement is at any given time. The common expression is that 'a servitude always runs with the land'. Therefore, neither the benefit nor the burden can be detached from the piece of land on which it is respectively conferred and imposed. Both are passed from one owner to the next when the land is transferred. The praedial servitude is granted to the owner of the dominant tenement in his or her capacity as the landowner. Unlike personal servitudes that may be constituted over either movables or immovables, praedial servitudes may only be constituted over immovables. Traditional praedial servitudes include right of way, way of necessity, water servitudes, grazing servitudes; and the power to prohibit the erection upon the servient tenement of any building (or any building higher than a specific height).

2.2.4 Distinction between rural and urban praedial servitudes

Praedial servitudes are traditionally divided into rural and urban praedial servitudes. This distinction is often said to have no legal significance because some servitudes can be both rural and urban. However, the significance of the said distinction does not seem to be found in the locality of the tenements concerned but in the purpose for which the properties concerned are used. Rural servitudes relate to land or tenements used for agricultural purposes while urban servitudes find application in residential or industrial environments.

19 Badenhorst *et al* (n 3 above) 325-326; Mostert *et al* (n 4 above) 243; Du Bois (n 4 above) 597; Joubert *et al* (n 4 above) 398.

2.2.4.1 Rural praedial servitudes

The following are said to be the most important rural servitudes: rights of way, water servitudes and grazing servitudes.[20]

(a) Right of way

In terms of this servitude the holder of the servitude is entitled to walk across another person's land or to drive cattle or vehicles across the land. When the right to drive cattle across the land is accompanied by the right to allow cattle to graze as they cross the land, the servitude concerned is called a servitude of trek path.[21]

(b) Water servitude

This servitude confers on the owner of the dominant tenement the right to draw water from the servient tenement, either in furrows or pipes; to water cattle on the servient land; and to discharge water and store surplus water on the servient tenement.[22]

(c) Grazing servitude

This servitude confers on the owner of the dominant tenement the right to graze a specified or unspecified number of cattle on the servient tenement. If the number of cattle is specified by the servitude, the owner of the servient tenement (servient owner) may grant others similar servitudes, provided that he or she does not prejudice the first grantee in the exercise of his or her rights. In the absence of a specific provision the owner of the dominant tenement has no exclusive right to any particular grazing area so that the servient owner may make use of his or her land, provided that he or she does not interfere with the owner of the dominant tenement's grazing rights. Where the number of cattle is not specified, the owner of the servient tenement (servient owner) must restrict the use of his or her land to such an extent as to give the owner of the dominant tenement a reasonable opportunity to exercise his or her right; while the dominant owner cannot exclude the owner of the servient tenement (servient owner) from grazing at least a certain number of cattle which he or she requires for his or her farming operations.[23]

2.2.4.2 Urban praedial servitudes

These servitudes consist mainly of prescribing the restrictive use of the servient tenements. The following are examples of traditional urban servitudes.[24]

20 Badenhorst *et al* (n 3 above) 326-327.
21 As above.
22 As above.
23 Badenhorst *et al* (n 3 above) 327.
24 Badenhorst *et al* (n 3 above) 326.

(a) Beams and windows on servient tenement

The owner of the dominant tenement is entitled to insert one or more beams of his or her building into the building on the servient tenement or to have a window or other opening in a wall on the servient tenement.

(b) Prohibition pertaining to erection of building on servient tenement

The owner of the dominant tenement may prohibit the erection of any building on the servient tenement, either at all or beyond a certain height, or conversely, to compel the erection of a building of a certain minimum height or type. This type of servitude is intended to prevent the owner of the servient tenement from doing anything on his or her land to obscure the view or light from or on the dominant tenement.

(c) Support on servient tenement

The right to service of support (*servitus oneris ferendi*) grants the servitude holder the right to have his or her building supported by a building on the servient tenement. The servitude holder has the right to build a house against the wall of a house on the adjoining tenement and to have it supported by the wall on the latter tenement. This is a reciprocal servitude and is meant to prevent either owner from demolishing his or her building and thus withdrawing the support from the adjoining building. The owner of the servient tenement is bound to keep the wall concerned in good order at his or her own expense.[25]

(d) Encroachment on servient property

This refers to the right to build or otherwise encroach upon the servient property, for example, by having a verandah encroaching upon it or a balcony protruding into its airspace or rain water discharging onto it.[26]

(e) Way of necessity

A way of necessity (*via necessitatis*) is a peculiar servitude with special requirements. It can take any of the forms of a right of way. However, there is one major difference between the conventional right of way and a way of necessity. A way of necessity does not arise from agreement but it is granted by court in order to afford a right of way in respect of land-locked property. It does not require the consent of the servient owner. It is a right which may be claimed as of right by an owner of land when there is no other alternative route available to such owner. It is a right of way granted in favour of property over an adjoining property, constituting the only means of ingress to and egress from the former property. Thus, if there is an alternative reasonable and sufficient route, a claim to a way of necessity will fail. The criterion which is applied in determining whether a way of necessity should be granted is not convenience but necessity, though not absolute necessity.[27] Any owner of

25 Badenhorst *et al* (n 3 above) 327.
26 Badenhorst *et al* (n 3 above) 328.
27 *Illing v Woodhouse* 1923 NPD 166 168.

land is entitled to a reasonable and sufficient means of access to a public road from the property or the land. If a way of necessity is granted, it extends to all persons who wish to visit the owner of the land or who wish to gain access to the landlocked tenement.[28] The owner of the land concerned is not entitled to claim the best and nearest access on the ground of necessity.[29] In *Illing v Woodhouse,*[30] a way of necessity was granted to an owner of land after it had been established that in the absence of a way of necessity the landowner would have been compelled to travel 11 miles along a road crossing a gorge which was difficult though not impossible to traverse, while the road in respect of which he was granted a way of necessity was only 4 miles long and easy to negotiate.

As stated earlier, the criterion for the grant of a way of necessity is necessity and not convenience. Consequently, an owner who has only himself or herself to blame for not having access to the property cannot claim a way of necessity. In *Bekker v Van Vyk*[31] an owner of land had for his own convenience applied for the closure of a public road to which he had perfect access and subsequently sought a way of necessity through someone else's land. It was held that he was not entitled to such way of necessity.

The way of necessity may be granted either as a permanent right of way (*ius viae plenum*) or as a precarious right of way to be used in cases of emergency (*ius viae precario*). The grant of *ius viae plenum* will attract payment of reasonable compensation whereas in the case of *ius viae precario* the payment of compensation is not required.[32]

The following are some guidelines regarding the granting and the nature of a way of necessity:

- Registration of a way of necessity against the title deed of the servient tenement may only take place after such registration has been authorised by a court order.
- The use of a way of necessity prior to the issue of the required court order is unlawful and amounts to trespassing.
- The way of necessity can be established for use in emergency situations only or for use on a continuous basis. In the latter case compensation will have to be paid.
- In determining the route of an authorised way of necessity and its width the least burdensome route over the nearest land between the landlocked tenement and the public road must be chosen. This is in accordance with the principle of *ter naaste lage en minster schaden.*
- Reasonable compensation must be paid in case of a permanent way of necessity.

28 Badenhorst *et al* (n 3 above) 328.
29 *Lentz v Mullin* 1921 EDC 268 270.
30 As above.
31 1956 3 SA 13 (T).
32 Badenhorst *et al* (n 3 above) 328-9.

- Although registration is neither a constitutive requirement for the establishment of the way of necessity or for its enforcement against third parties, the courts recommend that it be done.[33]
- The applicant must prove necessity and furnish reasons why the way of necessity should encumber the defendant's land and must also present evidence concerning the width of the claimed way, the recommended route and the compensation.
- After the court has decided that there is indeed a necessity, it will make a finding as to the width of the way of necessity concerned and fair compensation.

2.2.5 Creation of praedial servitudes

Apart from an original grant by state, servitudes, both praedial and personal, normally originate from agreement between the respective owners of a dominant tenement and a servient tenement. This agreement will contain the extent of servitudal rights, the amount payable to the *dominus* in consideration of the grant of the servitude and its intended duration unless it is intended to remain in force *ad infinitum*.

It must be noted that a mere agreement whereby a servitude is granted is not enough to constitute the servitude. The servitude as a real right comes into existence only when the agreement between the owners of the properties concerned has been registered. To take effect the servitude must be registered against the title deed of the servient tenement.[34] This may be done either by means of a reservation in a deed of transfer when the property is transferred in the circumstances envisaged under section 76 of the Deeds Registries Act[35] or by the registration of a notarial deed, accompanied by an appropriate endorsement against the title deeds of the dominant and servient tenements respectively.[36] In addition, the general principles relating to acquisition of real rights discussed in Chapter 6 apply equally to praedial servitudes.

Servitudes may also be created by statute. Section 28 of Sectional Titles Act 95 of 1986, for example, provides for the existence of implied servitudes of subjacent and lateral support and of passage and provision of water and

33 *Van Rensburg v Coetzee* 1979 4 SA 655 (A) 676.

34 Secs 16, 65 and 75 of the Deeds Registries Act. If the servient tenement is subject to a mortgage or another limited real right with which the servitude may conflict, the written consent of the bondholder or holder of the other limited real right must be obtained before the servitude can be registered.

35 In other words if: (a) the servitude is imposed on the land transferred in favour of other land registered in the name of the transferor; or (b) the servitude is imposed in favour of the land transferred on other land registered in the name of the transferor; or (c) the transferor admits that the land to be transferred is subject to unregistered rights of servitude in favour of land registered in a third person's name, and the transferee consents in writing to such servitude being embodied in the transfer, provided further that such third person appears either in person or by a duly authorised agent before the registrar at the time of execution of the transfer and accepts the servitude in favour of his or her land.

36 Badenhorst *et al* (n 3 above) 332.

electricity, which are deemed to be incorporated in the title deeds of all sectional owners.

As we saw in Chapter 6, a servitude can be created by prescription. Under section 6 of the Prescription Act 68 of 1969, a servitude is acquired by prescription when a person openly, and as if he were entitled to do so, exercised the rights and powers of the holder of a servitude for an uninterrupted period of 30 years. This applies to both praedial and personal servitudes. In the case of praedial servitudes, any periods for which such rights and powers were so exercised in the required way by the acquirer's predecessors in title would be taken into account to constitute jointly an uninterrupted period of 30 years.

A servitude may also originate from an order of court. A classic example is a servitude of a way of necessity. Registration is not a prerequisite for the vesting of the servitude. In *Van Rensburg v Coetzee*[37] the court left open the question as to whether registration is a prerequisite for the vesting of the servitude. The court, however, cautioned that it was advisable from a practical point of view to have the servitude registered.

2.2.6 Powers and duties of owners of dominant and servient tenements

The rights and duties of the owners of the respective tenements will be determined with reference to the terms of the agreement between them which must be interpreted according to the ordinary rules of interpretation. In addition, well-established principles relating to specific servitudes must govern the construction of the servitude. It follows therefore that an agreement which conflicts with the freedom of a servient owner to use his or her property as he or she deems fit will be interpreted restrictively and its terms construed in a manner which is least burdensome for him or her.[38] Therefore, the owner of the dominant tenement must exercise his or her servitudal rights in a civilised manner with due regard to the rights of the servient owner (*civiliter modo*), which means that the servitude must be exercised in a proper and careful manner so as to cause the least inconvenience to the servient owner. But this principle does not restrict the owner of the dominant tenement in the exercise of his or her rights merely because doing so will prejudice the owner of the servient tenement.[39]

In *Pieterse v Du Plessis*,[40] the holder of a servitude of aqueduct claimed compensation for damage caused to his pipes by the servient owner while the latter was ploughing his land. The court held that the onus was on the holder

37 (n 35 above) 676.
38 Badenhorst *et al* (n 3 above) 331.
39 As above.
40 1972 2 SA 597 (A).

of the servitude to show that the pipes had been laid at the depth stipulated by the agreement and in a proper and workman-like manner because to rule otherwise would impose a restriction on the servient owner's right to use land as he or she saw fit. The court also held that the owner of the dominant tenement must exercise his or her rights (*civiliter modo*) in a manner that least inconvenienced the owner of the servient tenement.

In terms of the remedies which are available where a party's rights have been violated, either party is entitled to claim damages if the other party has exceeded his or her rights, provided that the plaintiff can prove patrimonial loss. If no such loss but only an erosion of rights can be proved the applicable remedy would be an interdict to prevent further breaches.

If the holder of a limited real right exceeds his or her powers in the exercise of that right in respect of the servient land, the owner of the servient land may apply to the court for a declaration of rights.

Since a praedial servitude runs with the land, it may be exercised by anyone who lawfully occupies the dominant tenement. A lessee, for example, who occupies a dominant tenement, is entitled to exercise the limited real right existing over the servient tenement in favour of the dominant tenement. However, only the owner of the dominant tenement may institute legal proceedings against the owner of the servient tenement in the event of the latter disputing the existence or extent of the servitude.

In *Setlogelo v Setlogelo*[41] it was held that only the owner of land is entitled to institute proceedings or to a declaration that the land is free from any alleged servitude, or, if the existence of a servitude is not in dispute, that the holder of the servitude claims rights in excess of those granted to him or her in terms of the servitude.

2.2.7 Termination of praedial servitudes

Praedial servitudes may be terminated in the various manners discussed below under the appropriate headings.

2.2.7.1 Cancellation of a servitude by agreement

A servitude may be terminated by agreement between the owner of the dominant tenement and the owner of the servient tenement.[42] Between the parties (*inter partes*) the agreement becomes effective immediately. The cancellation is also immediately effective against third parties who have knowledge of the cancellation. To be effective against other third parties, a cancellation agreement must be registered against the title deed of the

41 1921 OPD 161.
42 Badenhorst *et al* (n 3 above) 336.

servient tenement by a notarial deed entered into by the respective owners of the dominant and the servient tenements. This means that if the cancellation agreement has not been registered, a purchaser of the dominant tenement will be entitled to exercise the servitude unless he or she had prior knowledge of the cancellation agreement. A purchaser of the servient tenement will be bound by the servitude unless, at the time of the sale, he or she had knowledge of the cancellation agreement.[43]

The cancellation agreement can be either express or tacit. For example, an agreement will be tacit where the owner of the dominant tenement allows the owner of the servient tenement to do something which is inconsistent with rights conferred by the servitude, for instance, if the owner of the dominant tenement allows the owner of the servient tenement to build upon the track of land over which there is a right of way.

2.2.7.2 Abandonment or waiver of a servitude by a holder

Abandonment of a servitude may be express or implied. An express abandonment may be effected unilaterally or by agreement.[44] An implied abandonment may be effected where, for example, the owner of the dominant tenement knows that the owner of the servient tenement is obstructing access to a right of way and the owner of the dominant tenement abstains from doing anything about it.[45] The period of inaction and acquiescence of the owner of the servient tenement is of great importance.

The same principles apply to waiver.[46] Authorities insist that strict proof of the intention to abandon the servitude will be required, although it may be inferred from the conduct of the owner of the dominant tenement, provided that such conduct is consistent only with the intention to abandon the servitude.[47] It must be noted that there are strong views to the effect that a servitude may not be abandoned if it would cause serious injury to the servient tenement.[48]

2.2.7.3 Extinction of a servitude by prescription

In terms of section 7(1) of the Prescription Act, a positive servitude is extinguished by prescription if it is not exercised for an interrupted period of 30 years. In terms of section 7(2), a negative or passive tenement is not lost

43 *Bezuidenhout v Nel* 1987 4 SA 422 (N). See also Badenhorst *et al* (n 3 above) 336 and the criticism against the proposition that the purchaser should know both of the registered servitude and its cancellation.
44 Du Bois (n 4 above) 614.
45 *Margate Estates Ltd v Urtel (Pty) Ltd* 1965 1 SA 279 (N); *Cowley & Another v Hahn* 1987 1 SA 440 (E).
46 Note that most writers refer to termination by abandonment rather than waiver.
47 Badenhorst *et al* (n 3 above) 336.
48 *Du Plessis v Philipstown Municipality* 1937 CPD 335; CG Hall & EA Kellaway *Servitudes 3rd ed* (1973) 144.

as a result of non-user, since its holder is deemed to exercise it as long as nothing is done on the tenement which would impair the enjoyment of the servitude by the owner of the dominant tenement.[49] In other words, a negative servitude is extinguished by prescription where the owner of the servient tenement acts contrary to the servitude for an uninterrupted period of 30 years, for example where an owner trades on his or her property for 30 years contrary to a servitude prohibiting it.[50]

2.2.7.4 Termination of a servitude by merger

A servitude is lost by merger if the owner of the dominant tenement also becomes the owner of the servient tenement, provided that the rights of ownership coincide exactly with regard to both tenements.[51] This is consistent with the principle that a person cannot have a servitude over his or her own property.

2.2.7.5 Termination of a servitude by the destruction of either dominant or servient tenement

The servitude is lost by destruction of either dominant or servient tenement if the event renders the exercise of the rights of servitude permanently impossible. For example, if the house to which a *habitatio* relates is destroyed. The element of permanent impossibility becomes inoperative if the destroyed tenement is restored, in which case, the servitude will revive.

2.2.7.6 Termination of a servitude by lapse of fixed time

If the servitude was granted for a specific period only, it will expire upon termination of that period.

2.2.7.7 Termination of a servitude by order of court due to non-compliance

A servitude can be terminated by an order of court due to the failure of one of the parties to comply with the conditions pertaining to the servitude.

2.2.7.8 Termination of a servitude by an order of court in pursuance of an application in terms of a statutory provision

A statute may make provision for the cancellation of a servitude upon application to the High Court.[52]

49 Badenhorst *et al* (n 3 above) 337.
50 *Hollman & Another v Estate Latre* 1970 3 SA 638 (A); *Hotel De Aar v Jonordon Investment (Edms) Bpk & Others* 1972 2 SA 400 (A).
51 *Mocke* (n 6 above).
52 Badenhorst *et al* (n 3 above) 338.

2.2.8 Personal servitudes

2.2.8.1 Creation

A personal servitude is established in favour of a particular person over a thing and may confer a variety of benefits to the holder.[53] It can be created for a fixed period of time or be granted until the occurrence of a future event or until the death of the beneficiary but never beyond that. Personal servitudes are normally created by agreement between the relevant parties followed by registration. Registration takes place either by means of a reservation in a deed of transfer, in the circumstances envisaged in section 67 of the Deeds Registries Act, or by the registration of a notarial deed accompanied by an appropriate endorsement against the title deed of the servient tenement.[54]

2.2.8.2 Classification

There are three main categories of personal servitudes, namely usufruct (*usus fructus*), use (*usus*) and habitation (*habitatio*). Each of these personal servitudes will now be discussed separately.

Usus fructus *(usufruct)*
Usufruct is a real right in terms of which a grantor confers on a usufructuary (the holder of the servitude) the right to use and enjoy the thing to which the usufructuary relates.[55] The thing may be either movable or immovable property. Examples of movable and immovable things that may be subject to a usufruct in favour of the usufructuary are a herd of cattle or an entire estate of the grantor. Normally, usufruct extends to the accessories of the thing subject to usufruct, for example usufruct over a farm will normally extend not only to the buildings but also livestock, farming equipment and other furniture in the homestead, provided a contrary intention does not appear from the agreement. It may also consist of natural fruits such as crops, or civil fruits such as the interest earned on a capital invested or the rental received on a lease of immovable property. Usufruct is commonly created in wills where, for example, a testator bequeaths certain property to his children subject to a usufruct in favour of his wife. A usufruct can also be established (*inter vivos*) while the grantor is still alive, where for example, the owner of a farm grants to someone the right to plant crops on a specific tract of land.

The right of the usufructuary is to enjoy and use the property concerned. He or she does not acquire *dominium* over the property but they are entitled to possession and the fruits of the property. The capital in its entirety remains with the owner but the fruits of the servient property accrue to the

53 As above.
54 Badenhorst *et al* (n 3 above) 342; sec 65(1) of the Act.
55 Badenhorst *et al* (n 3 above) 338.

usufructuary, either wholly or in part. They do not have an *ius abutendi* (the entitlement to consume and destroy) but as indicated earlier, the usufructuary has the right to take, consume or alienate its fruits, whether they are natural, industrial or civil. It follows that a usufruct cannot be created over consumables because the usufructuary, when the usufruct comes to an end, has to restore the thing(s) in respect of which the usufruct existed, reasonable wear and tear excepted.[56] Property which is subject to usufruct can at any time be sold or let by the owner, subject to the servitude. In terms of section 69(1) of the Deeds Registries Act, if the owner of the land subject to a personal servitude and the holder of the servitude have disposed of the land or any portion thereof with the rights of servitude to another, they may together give transfer thereof to the person acquiring it. In this case, however, the servitude lapses by virtue of the principle that a person cannot have a servitude over his or her own property.

The usufructuary is obliged to maintain the property at his or her own expense. In the absence of an agreement to the contrary, all the normal expenses, relating to the property (such as taxes) must be paid by him or her. He or she is not entitled to change the material nature of the property by, for example, converting a farm into a restaurant or a holiday resort. The usufructuary is not entitled to compensation for improvements effected by him or her on the property but he or she is entitled to be compensated for special or extraordinary expenses, such as the interest on an existing bond over the property paid by him to the mortgagee.[57]

Usus *(use)*

Use confers the right to use the property of another person for daily needs. The holder of the right is entitled only to those fruits that provide him or her and their family with the necessities of life. Surplus fruits cannot be sold, nor can the holder of the right alienate or let his use.[58]

Habitatio *(habitation)*

The servitude of habitation confers on its holder the right to dwell in the house of another together with his or her family without detriment to the substance of the property. Unlike a servitude of use, it carries with it the right to grant a lease or sublease to others.[59]

2.2.8.3 Termination of personal servitudes

Personal servitudes may be terminated in the various manners discussed below under appropriate heading.

56 Badenhorst *et al* (n 3 above) 340; *Brunsdon's Estate v Brunsdon's Estate* 1920 CPD 159 174-175.
57 *Gordon's Bay Estates v Smuts & Others* 1923 AD 160.
58 Badenhorst *et al* (n 3 above) 341.
59 As above.

(a) By agreement

A personal servitude may be terminated or cancelled by a bilateral agreement between the parties, the owner of the land and the holder of the servitude. Section 68(2) of the Deeds Registries Act provides that cancellation of the registration of a personal servitude in pursuance of an agreement between the owner of the encumbered land and the holder of the servitude shall be effected by a notarial deed, provided that no such deed shall be registered if the servitude is mortgaged, unless the mortgagee consents in writing to the cancellation of the bond or the release of the servitude from its operation.

(b) At expiration of time

A personal servitude will lapse at the expiration of a specified period or at the death of the holder. It may also expire earlier upon fulfillment of a resolutive condition.[60] Under section 68(1) of the Deeds Registries Act the registrar is obliged to note such a lapse on written application by or on behalf of the owner of the encumbered land accompanied by proof of the lapse of the servitude, the title deed of the land and , if available, the title deed, if any, of the servitude.

2.2.8.4 Unregistered servitudes

A servitude, like any other real right, may be acquired by agreement. Such an agreement however, though binding on the contracting parties, does not by itself vest the legal title to the servitude in the beneficiary, any more than a contract of sale of land passes the *dominium* to the buyer.[61] An agreement to establish a servitude will only create the real right concerned on registration[62] and upon registration the real right comes into force and becomes binding on the parties as well as third parties. Where there is a change of ownership certain questions and principles relating to the binding effect of an unregistered servitude arise. The principles are that, firstly, prior to registration a third party, in particular the purchaser of the servient property, who has no knowledge of the servitude, is not bound to recognise it. However, as regards the relation between the parties to the agreement, the agreement would be binding although not registered. Secondly, an unregistered servitude will bind a third party who has actual or constructive knowledge of the servitude.[63] Hoexter JA in *Frye's (Pty) Ltd v Ries*[64] summarised the law as follows:

> As far as the effect of registration is concerned, there is no doubt that the ownership of a real right is adequately protected by its registration in the Deeds

60 Mostert *et al* (n 4 above) 254.
61 *Willoughby's Consolidated Co* (n 5 above) 16.
62 Badenhorst *et al* (n 3 above) 334-335.
63 Badenhorst *et al* (n 3 above) 335.
64 1957 3 SA 575 (A) 582; *Manganese Corporation Ltd v South African Manganese Ltd* 1964 2 SA 185 (W) 189.

> Office. Indeed the system of land registration was evolved for the very purpose of ensuring that there should not be any doubt as to the ownership of the persons in whose names real rights are registered. Theoretically, no doubt, the act of registration is regarded as notice to all the world of the ownership of the real right which is registered … If a servient tenement is sold, the buyer is bound by the servitude registered in favour of the owner of the dominant tenement and it is immaterial whether he did or did not know of the existence of the servitude. Knowledge of a servitude on the part of a buyer is material only when the servitude has not been registered. If it has not been registered the buyer of the servient tenement is not bound by the servitude unless he had knowledge of it when he bought. But if the servitude has been registered the buyer of the servient tenement is bound by the servitude, not because he knew of it or because he is deemed to have known of it, but because the servitude was registered. It is true that it has been said that a buyer of a servient tenement is bound by a registered servitude because its registration is notice to the world; but that is merely a way of saying that registration is as effective as though in fact everybody in the world had been expressly notified of the servitude.

Thirdly, in the case of *Manganese Corporation Ltd v South African Manganese Ltd*[65] it was laid down that when the owner of land who had no knowledge of a servitude which had erroneously been omitted from his title deeds, and who is accordingly not bound by the unregistered servitude, passes transfer to a purchaser who has knowledge of the servitude, that servitude is binding on the transferee.

Fourthly, in *Van den Berg & 'n Ander v Van Tonder*[66] it was held that where a servitude is created by agreement, the owner of the servient tenement is bound to comply with it and the owner of the dominant tenement can be forced or ordered to effect registration. A purchaser of the servient tenement who had actual knowledge of the servitude at the time of purchase, is also obliged to allow registration against his land, although he was not a party to the agreement creating the servitude. He is therefore, prior to registration, unlike his predecessor in title, not obliged to observe it. But if disregard thereof will cause irretrievable damage to the owner of the dominant tenement and observance thereof will cause no irretrievable damage to the owner of the servient tenement, the owner of the servient tenement can be obliged to comply with the servitude. It is done by a procedure which is a combination of an interdict and a spoliation application, and the order can always be purely temporary, pending an action for registration.

Fifthly, a purchaser with knowledge of an unregistered servitude is bound by the servitude notwithstanding the intervention between the grantor and such purchaser of a prior owner of the servitude who had bought without knowledge of the servitude. If such a purchaser repudiates the servitude, he is acting *mala fide.* However, *mala fides* is not readily presumed

65 As above.
66 1963 3 SA 558 (T).

and as a general principle, proof of actual knowledge of the agreement constituting the servitude is required before the court will hold a purchaser bound by an unregistered servitude. But, if a person willfully shuts his eyes and declines to see what is perfectly obvious, he must be held to have had actual notice.[67] The case of *Grant & Another v Stonestreet & Others*[68] illustrates these principles. In *Grant*, a right of aqueduct was created during 1865 by means of an agreement between the owners of farm A (the dominant tenement) and farm B (the servient tenement) but it was never registered in the deeds registry. The successor in title of the contracting owner of farm B (the servient tenement) had no knowledge of the right of aqueduct and it was never enforced against him. The next successor in title of farm B, however, did have knowledge of the written agreement. When the owner of farm A (the dominant tenement) tried to enforce it by means of a court order, he claimed that the right of aqueduct was only a creditor's right in terms of the unregistered servitudal agreement. As a creditor's right it was enforceable only between the original contracting parties and, in any case, it had been terminated since the successor in title of the contracting owner of farm B had no knowledge of the agreement. The court held:

> that the servitudal agreement was enforceable between the contracting parties; that because the successor in title to the contracting owner of farm B had no knowledge of the agreement, it was not enforceable against him but that if he had had knowledge, it would have been enforceable against him in terms of the doctrine of notice; that the next successor in title of farm B did have knowledge of the agreement and, consequently, it was enforceable against him in terms of the doctrine of notice; and that the agreement had not been terminated because of the previous owner of B's lack of knowledge of the agreement.[69]

3 Lease

As stated earlier (2.5 of chapter 4), letting and hiring (*conductio* or *huur en verhuring*) is a contract whereby one person (the lessor) agrees to give another (the lessee) the use of a thing, or his own services or those of another human being or of an animal, and the lessee agrees to pay the lessor an amount of money (the rent) in return.[70] A contract of this nature is termed a lease.[71] In terms of a contract of lease pertaining to property the lessor's right of ownership is limited to the extent that the lessee acquires a limited real right to the lessor's property which allows him or her (the lessee) the temporary use and enjoyment of the property in return for payment of rent.[72] In Namibia leases are governed by common law and the provisions of the Formalities in Respect of Leases of Land Act 18 of 1969.

67 *Grant & Another v Stonestreet & Others* 1968 4 SA 1 (A).
68 As above.
69 AJ van der Walt & GJ Pienaar *Introduction to the law of property 6th ed* (2009) 245.
70 *De Jager v Sisana* 1930 AD 71.
71 F du Bois *Wille's principles of South African law 9th ed* (2007) 906-907.
72 Cooper (n 15 above), Badenhorst *et al* (n 2 above) 427.

A short–term lease is a lease of immovable property for a term shorter than ten years and is not registered. The lease agreement is not sufficient to constitute a real right, as it creates creditor's rights only. However, the lessee acquires a real right as soon as the lessee takes possession of the property and this alters the relationship between the lessee and the new owners of the property. Firstly, new owners who had knowledge of the lease agreement are bound by its terms by virtue of the application of the doctrine of notice. In terms of this doctrine, the lessee is protected for the duration of the lease since the new owner, who had knowledge of the lease agreement, is deemed to have acquiesced in the lease agreement before purchasing the property.[73] The lease agreement is therefore enforceable against the new owner. Secondly, the lessee is protected for the duration of the lease by the application of the common law principle of *huur gaat voor koop* (the lease agreement takes precedence over a sale).

Under the provisions of the Formalities in Respect of Leases of Land Act a long-term lease is described as one that is entered into for a period of not less than ten years or for the natural life of the lessee or any other person mentioned in the lease or is renewable by the lessee indefinitely for periods which, together with the first period of the lease, amount to a total of at least ten years.[74] An unregistered long-term lease merely creates a personal right against the lessor in terms of which the lessee may demand possession of the property to which the lease relates. However, the situation changes if the lessee takes possession of the real property. In this case the lessee acquires the right to use the leased property. Such right is a limited real right in the property of another – an *ius in re aliena* – for the duration of the lease and subject to the common law principle of *huur gaat voor koop.*

The Act further stipulates that a long-term lease must be registered and if registered, it binds the owners and their successors in title because in this case a real right is acquired on registration of the lease.[75] However, if such lease is not registered, it is not valid against a creditor or successor under onerous title of the lessor for a period longer than ten years after the conclusion of the lease agreement. It must be mentioned that this does not oust the common law principle of *huur gaat voor koop,* which protects the lessee for only the first ten years of the lease.

Furthermore, such unregistered long-term lease shall be valid against anyone who acquires the land with knowledge of the lessee's rights under the lease agreement, including the duration of the lease which may exceed ten years. In this case the unregistered long-term lessee is protected under the doctrine of notice for the entire period agreed to in the lease agreement.

73 Du Bois (n 4 above) 627; Van der Walt & Pienaar (n 69 above) 289-90.
74 Sec 1(2).
75 *Executor of Hite v Jones* (1902) 19 SC 235 at 244.

4 Mortgage

4.1 Definition and general features

As indicated earlier (2.4 of chapter 4) a mortgage is a real right in respect of the immovable property of another, securing a principal obligation between a creditor and a debtor. The agreement is normally known as the mortgage bond which contains the rights and liabilities of the mortgagee and the mortgagor. The borrower is the grantor of the bond and the lender the bondholder. The agreement *per se* constitutes only a personal right between the borrower (mortgagor) and the bondholder (mortgagee). The real right is created only when the mortgage has been registered in the deeds registries pursuant to an agreement between the parties.[76] A mortgage can only exist where there is a valid principal obligation, such as a loan. Its existence and continued existence depend on the existence of the principal obligation which it secures.[77] Consequently, a bond registered in the deeds registry terminates when the debt is repaid in full.[78] A mortgage is indivisible; this means that the entire mortgaged property serves as security for the debt and a partial satisfaction of the principal debt does not result in a proportional reduction of the burden on the mortgaged property.[79]

4.2 The legal consequences of mortgage

A duly constituted mortgage entails certain legal consequences which will now be discussed.

4.2.1 Powers of mortgagee and mortgagor

The mortgagee does not obtain the use and enjoyment of the mortgaged property. This is retained by the mortgagor subject to certain restrictions. The mortgagor may not, without the written consent of the mortgagee, grant any servitudes or mineral rights over the encumbered property.[80] However, the mortgagee's consent is not required if the mortgagor wants to let the property or if he or she wants to grant further bonds against security of the property, unless this consent is required in terms of the mortgage bond. These further bonds will, however, be subject to the rights of any mortgagee whose bond has been registered previously. This is based on the principle *first in time, first in rights.*[81] For example, where A is the holder of a first mortgage

76 *Roodepoort United Main Reef GM Co Ltd (in Liquidation) & Another v Du Toit NO* 1928 AD 66. 71; see also sec 50 of the Deeds Registries Act.
77 Du Bois (n 4 above) 631-632.
78 *Thienhaus NO v Metje & Ziegler Ltd & Another* 1965 3 SA 25 (A).
79 Du Bois (n 4 above) 632.
80 Secs 65(3); 70(6); and 75(2) of the Deeds Registries Act.
81 HJ Delport (ed) *South African property practice and the law: A practical manual for property practitioners* (2001) 66.

over a property and B is the holder of a second mortgage over the same property, A is entitled to be refunded before B should the property eventually be sold in execution. However, there is authority to the effect that the law does not allow a mortgage on an existing mortgage.[82]

4.2.2 Restrictions upon disposal of mortgaged property

Section 56(1) of the Deeds Registries Act provides *inter alia* that no transfer of mortgaged land shall be attested or executed by the registrar, and no cession of mortgaged lease of immovable property, or of any mortgaged real right in land, shall be registered until the bond has been cancelled or the land, lease, or right has been released from the operation of the bond with the consent in writing of the holder thereof. This in essence implies that the mortgagor cannot transfer the property hypothecated under a registered bond unless the mortgage bond has been paid in full and the bond has been cancelled. However, in terms of section 57(1) if the owner of the hypothecated land transfers to another person the whole of the land hypothecated thereunder, and has not reserved any real right in such land, the registrar may register the transfer and substitute the transferee for the transferor as debtor in respect of the bond, provided that both the mortgagee and the transferee give their written consent. For example, where a building society or a bank holds a mortgage over a property which is sold to X, X can take over the bond and X will be substituted as the mortgagor, provided that the building society or the bank gives its written consent. The transferee (X) is then substituted for the transferor (mortgagor) as the debtor under the bond, and this is endorsed on the bond by the registrar of deeds.

4.2.3 Proceeds and fruit of, and additions to, mortgaged property

The mortgage covers the land and all the improvements on the land, including improvements effected after the bond was registered. However, the latter improvements may be removed at any time before the bond is foreclosed. Until foreclosure the mortgagor is entitled to gather or collect all natural and civil fruits of the property (such as rent) and to consume or dispose of them. Once the bond has been called up the mortgagee becomes entitled to the fruits.[83]

4.2.4 Sale in execution of mortgaged property

The mortgagee is entitled to have the property sold in execution if the mortgagor fails to fulfill his or her obligations under the loan agreement. In the Namibian case of *Namib Building Society v Du Plessis*[84] the appellant, a

82 Du Bois (n 4 above) 632.
83 Delport (n 81 above) 67.
84 1990 NR 161 (HC).

building society, granted a loan to the respondent. The loan was secured by a first mortgage bond over immovable property. The respondent defaulted on due payment of the monthly instalments owing under the bond. The appellant *inter alia* applied for a declaration by the court that the mortgaged property was executable but the court *a quo* refused an order to that effect. It was held on appeal that except where, by judgment of the court, immovable property has been declared executable, a writ of execution against immovable property would not be issued by the registrar of the court until a return on a writ against movables shows that they (the movables) will not satisfy the debt. It was held further that a mortgagee plaintiff should in principle be entitled to realise the property over which a mortgage bond was registered for the very purpose of securing the debt on which he or she sues. Such a mortgagee has advanced money on the understanding that he or she would have a preferential claim on the proceeds of the mortgaged property.

If the bond is called up, the property must be sold subject to the limited real rights which other persons may have over the property, provided these rights existed at the time of the registration of the bond, or were registered afterwards with the consent of the mortgagee.[85]

If the property is sold in execution, a bondholder has the preferential right of purchase. In this case the purchase price is set off against the mortgage debt.

4.2.5 Preferential claim of mortgagee

If the property hypothecated by mortgage is sold following the mortgagor's insolvency, the mortgagee has a preferential claim to the proceeds of the property because the mortgagee is regarded as a secured creditor enjoying a preference over other creditors of the insolvent. The machinery created and laid down for the resolution of competing interests of the creditors is provided for by the relevant provisions of the Insolvency Act 24 of 1936.

4.2.6 Alienation of mortgaged property without consent of mortgagee

Whenever immovable property which has been properly burdened by a mortgage is alienated to a bona fide third person without the mortgagee's consent and, contrary to the provisions of the Deeds Registries Act, there has not been a proper cancellation of the mortgage, and therefore the mortgagee does not lose his or her rights in the immovable property. There is no mention

85 Delport (n 81 above) 67.

in the Deeds Registries Act of a requirement that the deed of transfer in the third party's name should in such circumstances be cancelled.[86]

4.2.7 Court order essential for sale in execution of mortgaged property

If the mortgagor is in default of his or her mortgage bond obligations, the mortgagee can enforce his or her rights against the mortgagor only after a court order has been obtained which authorises a sale in execution. The mortgagee therefore cannot sell the property without first obtaining such a court order. In *Iscor Housing Utility Co & Another v Chief Registrar of Deeds & Another*[87] it was held that an agreement permitting *parate executie* (immediate execution) without recourse to the court, or, after default, to the debtor in the case of immovable property, is void.

4.2.8 Consent of mortgagee necessary for merger of mortgaged property (dominant tenement) with servient tenement in respect of which praedial servitude exists

Under section 60 of the Deeds Registries Act, if the owner of the mortgaged land which is entitled to rights of servitude over other land, acquires the ownership of that other land, such acquisition of the additional land or rights shall not be registered without the consent in writing of the holder of the bond. The reason for this rule is that the acquisition of the additional property creates a merger of the two properties. As mentioned earlier, a merger leads to the termination of the servitude and this can affect the value of the property.

4.3 Termination of mortgage

There are various grounds on which a mortgage can be terminated. The most important ones will now be discussed.

4.3.1 Extinction of principal obligation

The mortgage bond is a security for the payment of the debt, the principal obligation, and therefore there exists an accessory relationship between the real right of mortgage and the principal obligation. A mortgage therefore is extinguished by discharge of the principal debt and termination of the principal obligation by release, novation, compromise, set-off, merger or

86 *Barclays Nasionale Bank Bpk v Registrateur Van Aktes, Transvaal, en 'n Ander* 1975 4 SA 936 (T).

87 1971 1 SA 613 (T); see also *Bock & Others v Duburoro Investments (Pty) Ltd* 2004 2 SA 242 (SCA).

prescription.[88] Upon complete fulfillment by the debtor of his or her obligations to the mortgagee, the mortgagor can have the registration of the bond against the property cancelled in terms of section 56(2) of the Deeds Registries Act.

4.3.2 Effluxion of time or upon fulfillment of resolutive condition

Where the mortgage bond was originally granted for a limited period only or upon the fulfillment of a resolutive condition upon which it was constituted, the right of mortgage will be terminated.[89]

4.3.3 Destruction of mortgaged property

The total destruction of the mortgaged property will result in the termination of the mortgage. However, if the property is partially destroyed, it will remain subject to the burden and the mortgage will extend to any improvements effected subsequent to such destruction. The mortgagor will be obliged to effect a reconstruction to the destroyed property only where he or she is under a duty to do so in terms of the bond.[90]

4.3.4 By court order

A mortgage may be set aside by an order of court if, for example, it is established that its constitution was vitiated by mistake, undue influence, duress or misrepresentation. Likewise, the court may terminate the mortgage where it amounts to a fraudulent alienation under the common law or a voidable or undue preference under the provisions of the Insolvency Act.[91]

5 Pledge

5.1 Definition and general features

A pledge is a limited real right of security in a movable asset, created by the delivery of the asset to the pledgee pursuant to an agreement between the pledgee and the owner of the asset, by which it is sought to secure the fulfillment of an obligation due to the pledgee by the pledgor, or a third person.[92] If the debtor fails to fulfill his or her obligations to the creditor, the latter can sell the pledged property in execution.

88 Du Bois (n 4 above) 640-641.
89 Joubert *et al* (n 4 above) vol 17, para 450.
90 As above.
91 Joubert *et al* (n 4 above) vol 17, para 451.
92 Joubert *et al* (n 4 above) vol 17, para 474.

As stated earlier, a pledge can be constituted only in respect of movable property and only when the pledged property is delivered to the pledgee,[93] as contrasted with a mortgage that is constituted by registration. The pledgee is entitled to remain in possession of the property but not entitled to use it.[94] The pledgee is obliged to take reasonable care of the pledged asset and to return it to the pledgor when the pledge is extinguished.[95] The pledgor is usually the debtor but a third party may also agree to pledge his or her property as security for payment of a debt due by another person.[96] The agreement creating a pledge need not be in writing to be valid.[97]

5.2 Termination of pledge

A pledge may be terminated in similar ways as a mortgage, namely by discharge of the principal debt; destruction of the pledged property; confusion or merger; effluxion of time or fulfillment of condition; agreement; and sale in execution or upon insolvency.[98]

In addition, a pledge is terminated when the pledgee voluntarily surrenders possession of the pledged object to a third party in terms of the principle of *mobilia non habent sequelam ex causa hypothecate*, by express or tacit renunciation of the pledge without the principal obligation necessarily being affected.[99]

6 Liens

6.1 Definition and general features

A right of retention (*ius retentionis*) or lien is the right to retain physical control of another's movable or immovable property as security for payment of a claim for money or labour expended on that property. It does not include the right to have the property sold in execution and it could either be a real (security) right that arises by operation of law or a personal right.[100] It functions as a defence to the owner's *rei vindicatio* and like other real (security) rights is accessory to a principal obligation, indivisible and incapable of being assigned.[101]

93 *Zandberg v Van Zyl* 1910 AD 302; *Vasco Dry Cleaners v Twycross* 1979 1 SA 603 (A).
94 *Visagie v Muntz & Co* 1921 CPD 582.
95 *Lourens v Du Toit* (1878) 8 Buch 182; *Daly v Chisholm & Co Ltd* 1916 CPD 562; *SA Breweries v Levin* 1935 AD 77.
96 Du Bois (n 4 above) 645-646; see also *Liquidators of Cape of Good Hope Permanent Land, Building & Investment Society v Standard Bank* (1899) 16 SC 324; *Bokomo v Standard Bank van SA Bpk* 1996 4 SA 450 (C).
97 Joubert *et al* (n 4 above) vol 17, para 485.
98 Mostert *et al* (n 4 above) 320.
99 Du Bois (n 4 above) 650.
100 Du Bois (n 4 above) 661; Mostert *et al* (n 4 above) 328.
101 *Volkskas Bpk v Esmail* 1950 2 SA 74 (T) 77.

6.2 Categories of liens

There are two main categories of liens, namely enrichment liens and debtor and creditor liens. An enrichment lien arises when a person incurs a certain type of expense in respect of the property of another, without the existence of any agreement between the parties concerning the expense or its refund. An enrichment lien is based on the principle that nobody is allowed to benefit at the expense of another. A debtor and creditor lien arises where a person incurs expenses in respect of the property of another person by reason of an agreement between the parties. For example, where a tenant incurs expenses in respect of leased premises in order to maintain the property in a proper condition, such tenant is entitled to be compensated for expenses incurred.

However, not every expense incurred in respect of property gives rise to an enrichment lien. A person is only entitled to an enrichment lien where the expenses incurred are necessary or useful but not luxurious. A distinction must therefore be made between necessary, useful, and luxurious expenses.

Necessary expenses are those which are necessary to preserve or protect the property, while useful expenses are those which increase the market value of the property and which are considered useful according to the economic and social views of the community. Luxurious expenses are those expenses which are incurred at the whim of a particular person and which are considered luxurious according to the economic and social views of the community. They may also increase the market value of the property.[102]

Necessary and useful expenses are also discussed in the context of salvage lien and improvement lien. A salvage lien secures a claim for necessary expenses while an improvement lien is associated with a claim for useful expenses. Both salvage and improvement liens are real security rights, enforceable against the owner, any successors in title as well as any holders of another limited real right in the property, even if the latter was created before the lien came into existence.[103]

Unlike salvage and improvement liens (enrichment liens) which are regarded as limited real rights, a debtor and creditor lien is a personal right and not a real security right. The implication is that it is only enforceable *inter partes*. Therefore, a debtor and creditor lien is not enforceable against the owner of the property unless the owner is also the debtor or has consented to the expenditure. In those cases where the debtor is the owner, the lien is also enforceable against a gratuitous successor in title and a successor in title

102 Mostert *et al* (n 4 above) 331.
103 As above.

who knew about the existence of the lien at the time the transfer of ownership took place.[104]

The most common form of a debtor and creditor lien relating to immovable property is the so-called builder's lien. In *Congress (Pty) Ltd & Another v Gallic Construction (Pty) Ltd,*[105] a builder's lien was described as a debtor and creditor lien, which is a right of retention for a debt *ex contractu.* By virtue of such a lien the creditor in possession of property can retain it against the debtor until the latter has been paid all that is due under the contract in respect of work done and expenses incurred upon the property. But the creditor can have no right, in disregard of a contractual provision regarding delivery, to retain the property until he or she has been paid money which although owing is not yet due. Thus, under the standard form of building contracts, retention monies become payable only some months after delivery of the work done in terms of the contract. The builder cannot claim a *jus retentionis* in respect of retention monies which are not yet due.

6.3 Termination of liens

Generally, a lien is terminated in the same way as other real security rights, namely, by extinction of the principal obligation, total destruction of the property subject to the lien, merger (confusion), and renunciation (waiver).

The owner of the property burdened by the lien or any person with a possessory right to the property may defeat the lien by furnishing adequate security for the payment of the debt secured.[106]

7 Concluding remarks

One of the cardinal principles of registration of rights under the provisions of the Deeds Registries Act is that only real rights or limited real rights may be registered. As a general principle, personal rights are not registrable and may only be registered if they are complementary or ancillary to a registrable condition or right contained or conferred in a deed. In this Chapter an attempt has been made to describe and discuss some examples of limited real rights. It does not, however, represent an exhaustive discussion of all real rights.

104 As above.
105 1981 3 SA 73 (W) 76.
106 Du Bois (n 4 above) 665.

CHAPTER 8

POSSESSION

1 Definition and elements of possession

Possession may be defined as the physical control (*detentio*) by a person of a corporeal thing with the intention (*animus possidendi*) of keeping control of it for his or her own benefit. It comprises two elements:

- physical control (*detentio*); and
- the intention to control the thing for oneself (*animus possidendi*)

These two elements will now be discussed.

1.1 Physical control (*detentio*)

The first requirement demands the exercise of actual physical control or detention over the thing. This is usually acquired by taking hold of the thing, or where this is not practicable, of exercising control over it. The type and degree of control will of course vary according to the nature of the thing. Small movable things can be possessed by holding them and immovable property, such as land, can be possessed by living on it. Physical contact is not necessary to constitute detention**.** Where the possessor does not have immediate physical contact with the thing possessed, the question may arise as to whether he or she has sufficient control over the thing to give them possession. The certainty of their being able to exercise this power of control is not essential. A probability that they will be able to do so will suffice. What constitutes sufficient probability is a question of fact which must be decided in each case from the circumstances. In general the following factors must be taken into account:

(a) the nature, size, extent, purpose and function of the object of possession;

(b) whether possession of the thing is acquired by delivery or occupation; and

(c) whether acquisition or retention of possession is considered.[1]

This aspect of the definition of possession emphasises the factual or physical domination of corporeal things on account of the physical or corporeal nature of the objects of possession but as pointed out by WA Joubert[2] the law also recognises so-called quasi-possession or juridical possession (*possessio juris*). This notion consists in the exercise of control over an incorporeal thing coupled with an *animus* to exercise such control over the thing in question and this is exercised whenever the thing is exploited in accordance with an actual or presumed legal right, for example, a servitude or a contractual right of use with regard to the thing.

1.2 Intention (*animus possidendi*)

This is the intention to hold an exercise control over the thing possessed for one's own benefit, not for the benefit of someone else. Consequently, if the person who has detention of a thing has the intention of holding it for someone else, he or she does not have legal possession of it: he or she is the custodian, and the person on whose behalf he or she holds it is the true possessor. Hence, an employee who holds his or her employer's property on behalf of his employer does not possess it in law; his or her employer is the true possessor: the former is termed the holder and the latter the possessor.

Traditionally, the criterion used to draw the distinction between a mere holder and a possessor was the form of intent (*animus*). The presence of the will to possess (*animus possidendi*) determined whose possession should be protected in law. Possession accompanied with the will to possess (*animus possidendi*) was protected by the law whereas possession devoid of the requisite *animus possidendi* was not protected by the law. The former was described as *possessio civilis* and the latter *possessio naturalis*. The authorities indicate that in South African law, however, the legal justification for this distinction has lost much of its importance since the main reason for distinguishing between mere holders and possessors, namely the question as to whose possession should be protected, in law has fallen away. In current South African (and Namibian) law almost all holders enjoy the protection of the law.[3]

1 For details of these factors see WA Joubert *et al* (eds) *The law of South Africa* (First Reissue) (2003) vol 27, para 58.
2 Joubert *et al* (n 1 above) para 52.
3 WJ Hosten *et al Introduction to South African law and legal theory 2nd ed* (1997) 627.

2 Types of possession

2.1 Civil and natural possession

As stated earlier, the factual situation of possession arises from the existence of physical control (detention) and the mental element (*animus possidendi*) and this type of possession is referred to as civil possession (*possessio civilis*). Natural possession (*possessio naturalis*), on the other hand, is a much wider concept including not only the possession of an indirect or derivative possessor, such as that of precarist (*precario tenens*),[4] a stakeholder (sequester),[5] or a pledgee, but also the possession of a mere holder such as the depositary, the borrower for use, the mandatary, the lessee, the usufructuary and the representative or agent.[6] There is a further distinction drawn between holders, who are protected by possessory remedies, and those who are not. The former comprise holders who have the intention of securing benefit for themselves and the latter are those who merely hold for someone else as servant or quasi-servant. Examples of holders who are protected are a usufructuary, a pledgee, a builder, a lessee and a person who hires out his or her services. These holders in their various capacities exercise physical control over the thing with the intention of securing benefit for themselves and are therefore protected by the possessory remedies. However, a servant is not protected because a servant cannot claim to have the requisite intention and interest since he or she holds possession solely on behalf of somebody else and does not exercise possession for his or her own benefit.[7] As stated by Steyn AJ in *Mpunga v Malaba*[8] before a person can bring spoliation proceedings he or she must show that the right of which he or she has been 'spoliated' is something in which he or she has an interest over and above that interest which he or she has as servant or as a person who is in the position of a servant or as a quasi-servant.

2.2 Lawful possession (*possessio iusta*) and unlawful possession (*possessio iniusta*)

This distinction was employed in the Roman law systems of interdict to determine which of the parties in vindication proceedings would have the

4 The legal status of a precarist is derived from the concept of *precario*, which is by consent or permission. Land or a thing is said to be held *precario* or under *precarium* only when it is held by permission revocable at the will of the person giving it. A precarist is a person who has acquired possession through such derivative method. A *preacio habens* (or *tenens*) may be entitled to compensation for improvements affected by him or her.

5 By the Roman law two parties who disputed about the ownership of a thing could voluntarily agree to deposit such thing with a third person called a *sequester* pending the settlement of the dispute. The *sequester* then held the thing on behalf of the successful litigant.

6 F du Bois *Wille's principles of South African law 9th ed* (2007) 452.

7 As above.

8 1959 1 SA 853 (W).

advantage of being the defendant but is no longer relevant as far as the protection of possession is concerned.[9]

2.3 *Bona fide* and *mala fide* possession

Possession is in good faith (*bona fide*) when the possessor believes on reasonable or probable grounds, that he or she has, for some or other reason, ownership of the property possessed. If the possessor realises that he or she does not have any real right in respect of the thing which is possessed, the possession is known as possession in bad faith (*mala fide* possession).[10]

This distinction plays an important role as far as the acquisition of fruits by a possessor is concerned. Traditionally, it played an important role with regard to compensation for improvements to the thing affected by a possessor thereof. However, since a claim for improvement is now based on the principle of enrichment, the importance of the said distinction has declined.[11]

3 The legal effect of possession

The right to the possession of a thing is referred to as *ius possidendi* and may arise either from a personal right against the owner of the thing, for example, a lessee, or from a real right in the thing, such as owner or usufructuary. The *ius possidendi* may be exercised in the real sense by means of actual physical possession of the thing or in a constructive sense. If a person has actual possession of a thing, his or her *ius possidendi* empowers the possessor to protect his or her possession against any infringement However, if a person does not have actual possession of the thing, the *ius possidendi* enables him or her to be given possession of the thing, for example, in terms of a contract of lease.[12]

The right of possession is referred to as *ius possessionis,* and comprises the rights, privileges and powers that flow from the mere fact of possession and is available only to a person in actual possession of a thing. A person may have an *ius possessionis* either with *ius possidendi*, as in the case of an owner, or without *ius possidendi,* as in the case of a bona fide possessor.[13] The different powers of possession available to the finder of a lost thing and the owner of the property, respectively, may be used to illustrate the difference between the right to possession of a thing (*ius possidendi*) and the right of possession to a thing (*ius possessionis*). A finder of a lost item, at the material time that he or she is in possession of the lost item, has *ius possessionis*,

9 Joubert *et al* (n 1 above) vol 27, para 67.
10 Du Bois (n 6 above) 452.
11 Joubert *et al* (n 1 above) vol 27, para 67; Du Bois (n 6 above) 453.
12 Joubert *et al* (n 1 above) vol 27, para 52.
13 As above.

which means the owner has ceased to have the *ius possessionis* because he or she lost physical control over the thing. Nevertheless, the owner retains the *ius possidendi*, the right to possession which entitles him or her to demand or regain possession.[14]

Opinions differ as to whether possession is a fact or real right. It has been suggested that the key solution to these divergent views lies in maintaining a clear distinction between the fact of possession and the right flowing from possession. If emphasis is placed on the fact of possession, possession can easily be regarded as a mere fact. Conversely, if the rights flowing from possession are emphasised, possession approximates a real right.[15]

Possession is an attribute of ownership. It is a requisite for various types of acquisition of ownership, for example, as we saw in Chapter 6, for acquisition of ownership by occupation, transfer and prescription. In this regard possession serves a real function in that it facilitates the transformation of a factual situation into a legal situation.[16]

We saw in Chapter 7 that one of the essential attributes of real securities, such as pledge and lien, is possession. In this regard, possession fulfills an important real security function. There is a rebuttable presumption in law that the possessor of a movable thing is also the owner thereof. In this regard, possession has a procedural function in indicating which of the two contesting parties in a vindicatory action is the respondent.[17] In the context of criminal liability, possession is an element of various statutory crimes. For example, section 2 of the Arms and Ammunition Act 7 of 1996 prohibits the possession of arms without a licence. Under section 2 of the Stock Theft Act 12 of 1990, any person who is found in possession of stock or produce in regard to which there is reasonable suspicion that it has been stolen and is unable to give a satisfactory account of such possession, shall be guilty of an offence. Section 2(b) of the Abuse of Dependence-producing Substances and Rehabilitation Centres Act 41 of 1971 prohibits dealing in, use or possession, of prohibited or dangerous dependence-producing drugs. It also provides for the removal from jurisdiction of non-citizens who are deemed to be undesirable residents and for the detention of persons in possession of information relating to drug dealing but who are unwilling to co-operate with law enforcement officers.

The general common law principle relating to possession as an element of the crime of theft was discussed in *S v Van Coller*,[18] which was followed in the Namibian case of *S v Hengua*.[19] The appellant, a medical doctor, had removed medical equipment from Botswana to South-West Africa in order to

14 See H Mostert *et al The principles of the law of property in South Africa* (2010) 67.
15 Joubert *et al* (n 1 above) vol 27, para 52-3.
16 Joubert *et al* (n 1 above) para 54.
17 As above.
18 1970 1 SA 417 (A); *S v Hengua* 2007 2 NR 562 (HC) 562.
19 As above.

exert pressure on an official of the Botswana Government to withdraw criminal charges against him – something which was undertaken by the official but not carried out. The Appellate Division, Jansen JA writing the judgment, held, after a thorough consideration of relevant cases, that, where someone takes the property of another, for purposes of keeping it as security for payment, it does not constitute the crime of theft as the accused continues to acknowledge the ownership of the person from whom the article was removed. Jansen JA concluded at 426 that the taking of another person's property with the intent to hold it as security, specifically to enforce a debt, does not amount to taking with intent to deprive the owner of the whole benefit of his ownership. There appears to be no reason in principle why the position should not be the same, where the owner is held to ransom for purposes other than for enforcing a debt.

4 Possession compared with ownership

Ownership, as indicated earlier, is an absolute right which the holder can exercise against the whole world. Possession affords the possessor certain powers, which are in the following respects distinctive from the powers afforded by ownership:

(a) Possession of a movable thing raises a presumption of ownership. Any claimants who do not possess must prove their title.[20] There is no similar presumption in relation to immovable property, because our system of land registration creates a presumption that whoever is registered in the Deeds Registry as the owner of any immovable property is indeed the true owner thereof.

(b) In some cases a possessor can confer good title even though he or she is not the owner but only a possessor. For example, in the case of negotiable instruments, a holder in due course will not lose his or her title even if the person from whom he or she has acquired the instrument was not owner.

(c) Possession concerns a factual relationship of a person to a thing which exists irrespective of whether or not the person has any legal right to the thing. Thus, even a thief acquires possession of the thing he or she steals. Conversely, ownership concerns a legal relationship between a person and a thing. Ownership requires a legal basis or title to the thing. An owner must be able to prove right of ownership.[21]

(d) Long possession may confer ownership by prescription in terms of the provisions of the Prescription Proclamation 13 of 1943, Prescription Acts 18 of 1943 and 68 of 1969.

(e) The acquisition of possession may establish ownership, for example, the acquisition of possession of a *res nullius.*

(f) Possessors may be entitled to compensation for necessary and useful expenditure.

20 *Zandberg v Van Zyl* 1910 AD 302.
21 Joubert *et al* (n 1 above) vol 27, para 55.

(g) Possession is protected by various remedies, namely the *mandament van spolie*, interdicts and possessory actions.[22] These differ from the *rei vindicatio,* the remedy by which ownership is protected. The procedure required for the remedy of the *mandament van spoile* is less cumbersome and faster than in the case of the *rei vindicatio.* To succeed with the *mandament van spoile* the applicant has only to prove that he or she has been in peaceful possession and that this has been disturbed. In the case of *rei vindicatio* the plaintiff must prove his or her title to the thing. Whereas in the case of the *mandament van spoile* the action can in principle only be instituted against the *spoliator,* in the case of the *rei vindicatio* the action can be brought against whoever is in control of the thing.

5 Loss of possession

Possession is lost when the possessor loses or gives up either or both of physical control of the thing possessed and the intention to hold the thing. This may occur in instances of abandonment or transfer of the thing to a new possessor. In the case of movables, possession can be lost by the mere loss of physical control. The principle is that a thing is lost if a diligent search was made and was fruitless or if the recovery of the thing is at least uncertain and unlikely. It is immaterial whether the movable has been stolen or has merely been mislaid.[23] In the case of immovables however, both the physical and mental elements must be established because even if loss of physical control is established, possession may be retained 'with the mind only' (*solo animo*).[24] Possession is also lost if the thing is destroyed, is no longer a *res in commercio* or if the possessor dies. The establishment of loss of possession is important because it interrupts the running of prescription[25] and terminates the availability of the *mandament van spoile*.

6 The possessory remedies: protection of possession

As stated in (g) above, the law protects possession by giving possessors the benefit of the possessory remedies. The advantage of these remedies is that the possessor is not obliged to prove ownership, which would be necessary if he or she were to proceed as owner against a person who has dispossessed them by *vindicatio.* The remedies available to a person who has been deprived of peaceful and undisturbed possession are an interdict and a spoliation order (*mandament van spolie)*. These remedies are discussed in more detail in the next Chapter.

22 See Chapter 9.
23 Joubert *et al* (n 1 above) vol 27, para 71. See also *Holmes v Payne* 1930 2 KB 301 where, after an insurance claim had been settled, a necklace was found in the folds of an evening cloak in which it had become concealed. It was held that the insurance company was nevertheless bound by the settlement.
24 As above. Examples are given of summer and winter pastures (*saltus aestivi et hiberni*) and a farmer who seldom visits the farm.
25 See Chapter 6.

7 Summary and concluding remarks

Possession as a legal fact and the right accruing from such legal fact are very important areas in property law as possession is a common feature of human interaction. Possession is constituted by the factual existence of physical control over a thing accompanied by the mental attitude to have possession. These are the minimum requirements since the exact content of possession will depend on the context in which and the purpose for which it is used. In the area of, for example acquisition of ownership by prescription, possession serves a functional role in facilitating the transformation of a factual situation into a legal situation. Possession, whether as a legal fact or a right flowing from such legal fact, is protected in law by certain remedies that provide relief for a claim based on possession. These are discussed in the next Chapter.

CHAPTER 9

REMEDIES

1 Introduction

In this Chapter the remedies available in terms of the Namibian law of property are discussed, which include, as indicated in the previous Chapter, the remedies available to a possessor who has been unlawfully deprived of possession or whose possession is threatened. The remedies that are discussed in this Chapter are by no means exhaustive and it is recommended that other sources be consulted for further understanding. Some of the recommended sources will be referred to in this Chapter. Appropriate case law has been selected, but once again, the readers, particularly students, are encouraged to read other cases apart from those cited in this Chapter. Before we get into the details of the remedies to be discussed, it is important that a correct meaning of the concept of remedies is clearly established.

2 What are remedies?

It is generally agreed in our Roman-Dutch law that the law of remedies is concerned with the character and extent of relief to which an individual who has brought a legal action is entitled once the appropriate court procedure has been followed. In *Meyer v Hessling*,[1] the full bench of the Supreme Court of Namibia supported the above general definition.[2] The party seeking a remedy must show that he or she has a substantive right that has been

1 (SA 7/91) 1991 NASC 7.

2 In this case the seller entered into a written agreement with the purchaser in terms of which the seller sold to the purchaser a certain farm in the district of Omaruru for consideration of R67 500 (equivalent to N$67 500). The purchaser occupied the farm before paying the full purchase price as per agreement. It was stipulated that the transfer of the farm must occur as soon as possible. The farm was duly transferred to the purchaser on condition that the principal sum had to be paid within a period of three years upon the date of registration. The first mortgage bond was registered on 10 May 1985. By 10 May 1987 no portion of the purchase price had been paid. The seller sent a notice purporting to cancel the sale arguing that the purchase price had not been timeously paid. On page 5,

infringed by the defendant. For instance, in *Meyer*[3] the seller had to prove that the purchaser had failed to comply with his contractual obligations of paying the full purchase price as per agreement.

A remedy may also be defined as any of the methods available at law for the enforcement, protection, or recovery of rights, for obtaining redress for their infringement.[4] It is important to note that since one of the central themes of the law of property is the right of ownership, the remedies that are available to an aggrieved person in the field of property relations relate either directly to the protection of the right of ownership or the protection of any other right or interest that may relate to the object of a right of ownership, for example, possession.

3 Protection of ownership

One of the entitlements of *dominium* is the power of exclusive possession of the *res,* with the necessary corollary that the owner may claim his or her property wherever it is found, and from whomsoever is holding it. It is inherent in the nature of ownership that possession of the *res* should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner.[5] The right to recover, *rei vindicatio*, is by way of vindicatory action, and lies against anyone, even though such person may have acquired the thing in good faith (*bona fide*) and given value for it, and the owner need not compensate him or her. For example, if a thief steals a watch belonging to A, sells it to B, and receives payment of the purchase price from B, who is totally unaware of the theft, A is entitled to recover the watch from B without compensating B for the purchase price. B may, however, claim damages from the thief. The owner's right to vindicate must be exercised by the institution of court proceedings. If the person from whom the owner wishes to recover the thing in question refuses to part with it, the owner is not allowed to take the law into his or her own hands by, for example, physically seizing the property. He or she must instead sue the possessor in court for the recovery of the property.

There are various remedies that protect ownership and these include the *rei vindicatio*, the *actio negatoria*, the archaic remedies based on neighbour law, the *actio ad exhibendum*, the Aquilian action, the *condictio furtiva*, and remedies based on enrichment.[6] These are classified as real remedies

2 Mahomed AJA held *inter alia*, that on a proper interpretation of the sales agreement, the seller had two remedies: (i) To cancel the sales agreement and take the property back; or (ii) to transfer the farm to the purchaser and then demand payment of the outstanding amount due to the seller.
3 As above.
4 Oxford Dictionary of Law.
5 *Chetty v Naidoo* 1974 3 SA 13 (A) 20.
6 F du Bois *Wille's principles of South African law 9th ed* (2007) 538-539.

(pertaining to the law of property), delictual remedies, and remedies based on unjustified enrichment.[7] Real remedies restore physical control of the property, or confirm the ability of an owner to exclude others from access, use or enjoyment of the property. The *rei vindicatio* and the *actio negatoria* are classified as real remedies. Delictual remedies are available to an owner who has suffered financial loss either because the property itself has been alienated, damaged or destroyed, or because the owner could not exercise the entitlements available to an owner. These remedies provide a claim for payment of compensation or damages and include the *condictio furtiva*, the *actio ad exhibendum* and *actio legis Aquiliae*. In the event of unjustified enrichment, an aggrieved owner is entitled to compensation where someone other than the owner is unjustifiably enriched at the expense of the owner.[8]

3.1 *Rei vindicatio*

3.1.1 Definition

This is a common law remedy which may be instituted by an owner for an order of ejectment to reclaim his or her movable or immovable property from anyone who is in physical control thereof without the owner's consent, irrespective of whether possession is bona or male fide in accordance with the maxim *ubi rem meam invenio, ibi eam vindico* (where my property is found, there I may vindicate it).[9]

In approving this definition, the court in *Khuzwayo v Dludla*,[10] held that this common law remedy is a well settled principle in our law. Van der Walt & Pienaar[11] submit that this is an action whereby an owner may recover an existing and identifiable thing from any person who is exercising unlawful physical control over it.

3.1.2 Requirements

In *Shingenge v Hamunyela*[12] Maritz J with respect to nature of the *actio rei vindicatio* stated as follows:

> The *actio rei vindicatio* is a remedy given in common law to an owner to recover his or her property from any person who is in possession thereof (see *Chetty v Naidoo* 1974 3 SA 13 (A) at 20C). Any person purporting to institute a vindicatory action and who fails to prove any of these elements on a balance of probabilities must fail. So, for instance, the action will be unsuccessful if the plaintiff cannot

7 H Mostert *et al The principles of the law of Property in South Africa* (2010) 215; WA Joubert *et al The law of South Africa* (First Reissue) (2003) vol 27, para 182.
8 As above.
9 Du Bois (n 6 above) 539; Mostert *et al* (n 7 above) 217
10 (LCC33R/00) 2000 ZALCC 26.
11 AJ van der Walt & GJ Piennar *Introduction to the law of property 6th Edition* (2009) 145.
12 2004 NR 1 (HC).

prove that he or she is the owner of the *res* (*Vumane and Another v Mkize* 1990 (1) SA 465 (W) at 467D) or that the defendant is still in possession thereof (*Leal & Co v Williams* 1906 TS 554 at 558). It follows from the requirement of 'ownership' that, if the *res* has been consumed, acceded to or mixed or mingled with another thing or has been used to manufacture a new product, it is no longer *in esse* as a clearly identifiable thing and cannot be 'owned' as such.

It follows therefore that in order to succeed with the *actio rei vindicatio* the plaintiff must prove:

(a) that he or she is the owner of the property;[13]

(b) that the property exists and is identifiable;

(c) that the property is under the defendant's physical control at the time when the action is brought before the court.

These requirements will now be discussed in more detail.

3.1.2.1 The plaintiff must be the owner of the property

The law places an onus on the person who institutes the *rei vindicatio* to prove on a balance of probabilities that he or she is the owner of the property.[14] In the case of the recovery of a movable thing, there is a rebuttable presumption of law that the possessor of a movable thing is also the owner thereof and therefore the owner who is seeking to recover possession must rebut the presumption of ownership arising from the possession.[15] For example, the registration papers of a vehicle or an invoice can serve as evidence of proof of purchase and an inference of continued ownership.[16] In the case of immovable property proof of registration of the property in the name of the owner will satisfy this requirement.[17]

In *Pascheka v Bernstein*[18] an application for an order was sought ordering the defendant to deliver a motor vehicle to the plaintiff since she (defendant) had no bona fide defence to the plaintiff's claim and since her defence was entered solely for the purpose of causing a delay.

In his particulars of claim the plaintiff alleged that he was the owner of the motor vehicle in possession of the defendant. In her opposing affidavit

13 In *Pascheka v Bernstein* (P16/05) 2005 NAHC 7 the owner of the car had to prove that he was the lawful owner of the car. In other situations the defendant can challenge that ownership.

14 Joubert *et al* (n 7 above) vol 27, para 183; Mostert *et al* (n 7 above) 218; *Ebrahim v Deputy Sheriff, Durban & Another* 1961 4 SA 265 (N).

15 *Zandberg v Van Zyl* 1910 AD 302 308; *McAdams v Flander's Trustee and Bell NO* 1919 AD 207 232*; K&D Motors v* Wessels 1949 1 SA 1 (A) 11*; Gleneagles Farm Dairy v Schoombee* 1949 1 830 (A) at 836*; Ebrahim* (n 14 above) 267; Du Bois (n 6 above)539; and Joubert *et al* (n 7 above) vol 27, para 183.

16 Mostert *et al* (n 7 above) 218.

17 Joubert *et al* (n 7 above) vol 27, para 183; Du Bois (n 6 above) 539.

18 n 13 above.

the defendant stated that the plaintiff had given her 'the full right to possess and use' the vehicle on a permanent basis and by virtue of the fact that she had rendered services to him personally and to his close corporation for which she was never remunerated. According to her she had 'obtained vested and valid enrichment claims' against plaintiff.

In considering the *rei vindicatio* the court *inter alia* referred to *Arend & Another v Astra Furnitures (Pty) Ltd*[19] and ruled that when a plaintiff reclaims possession of property in terms of the *rei vindicatio,* the plaintiff must allege and prove that he or she was the owner of the thing and that the defendant was in possession of the property at the time of the institution of the action.[20] To succeed with the *rei vindicatio* the owner is therefore required to prove that he or she is the owner of the thing (the *res*) and that the defendant is holding the *res.* The *onus* is on the defendant to allege and establish any right to continue to retain possession against the owner. It appears immaterial whether the owner alleges that the defendant's possession is 'unlawful*',* 'against the owner's will' or without any such qualification. However, if the owner goes beyond alleging merely that he or she is the owner and that the defendant is in possession, whether unqualified or described as 'unlawful' or 'against the owner's will', other considerations come into play.

The other considerations referred to relate to a situation where for instance a plaintiff concedes in his or her particulars of claim that the defendant has had an existing right to hold the property. Plaintiff must then *ex facie* his or her statement of claim prove the termination of such right to hold.[21]

In Shimaudi v Shirungu[22] Levy J said the following,[23]

> In respect of occupation, the defendant may well admit such occupation but contend that his occupation is lawful. The *onus* would then be on him to prove such lawfulness but he or she is relieved of this *onus* if there is some form of admission on the pleadings in terms whereof plaintiff concedes that he lawfully parted with such occupation.

3.1.2.2 The property must exist and be identifiable

As explained by Mostert *et al*[24] the objective of the *rei vindicatio* is the restoration of physical control of the property to the owner and this can only occur if the property is in existence and can be identified clearly. As stated in *Shingenge*,[25] if the *res* has been consumed, acceded to or mixed or mingled

19 1974 (1) SA CPD 298 304 F-G.
20 See *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 1 SA 77 (A) 82; *Chetty* (n 5 above) 20; and *Minister van Wet en Orde v Matshoba* 1990 1 SA 280 (A) 286.
21 See *Chetty* (n 20 above) 21.
22 1990 3 SA 344 (SWA).
23 At 347.
24 Mostert *et al* (n 7 above)218.

with another thing or has been used to manufacture a new product, it is no longer *in esse* as a clearly identifiable thing and cannot be 'owned' as such. In such case, the *rei vindicatio* is not the appropriate remedy, simply because the property no longer exists. The facts of each case will determine the appropriate remedy to be sought. A delictual remedy may in certain cases be appropriate.[26]

3.1.2.3 The property must be in the defendant's physical control at the time when the action is brought before the court

As stated earlier, the objective of the *rei vindicatio* is the restoration of the property to the owner and logically this objective can only be achieved if the defendant is actually in physical control of the property at the time when the action is brought before the court. This is therefore meant to ensure that the order of the court does not result in futility.

3.1.3 Defences against rei vindicatio

The concept of *rei vindicatio*, as can be seen from what is said above, is susceptible to an array of either common law or statutory defences which will now be discussed separately.

3.1.4 Common law defences: Estoppel

O'Linn JA, in the judgment of the Full Bench of the High Court in *Eysselinck v Standard Bank Namibia Limited Stannic Division & Another*,[27] after referring to several of the leading authorities on the requirements for a successful defence of estoppel, stated the principles of the Namibian law of estoppel in regard to ownership as follows:

> Our law jealously protects the right of ownership and the correlative right of the owner in regard to his property, unless, of course, the possessor has some enforceable right against the owner. Consistent with this, it has been authoritatively laid down by this Court that an owner is estopped from asserting his rights to his property only –
>
> (1) where the person who acquired his property did so because, by the culpa of the owner, he was misled into the belief that the person, from whom he acquired it, was the owner or was entitled to dispose of it; or
>
> (2) (possibly) where, despite the absence of culpa, the owner is precluded from asserting his or her rights by compelling considerations of fairness within the broad concept of the *exceptio doli*.

25 As above.
26 Mostert *et al* (n 7 above) 218. Money in the form of coins and banknotes is not easily identifiable and thus not easily vindicable. See Du Bois (n 6 above) 539.
27 2004 NR 246 (HC).

See *Grosvenor Motors (Potchefstroom) Ltd v Douglas* 1956 (3) SA 420 (AD); *Johaadien v Stanley Porter (Paarl) (Pty) Ltd* 1970 (1) SA 394 (AD) at p 409.

These two cases relate to estoppel in respect of ownership of movables. There seems no reason for not applying these principles to a case such as the present one where the plaintiff seeks a declaration that it is the 'owner' of shares.

As to the formulation in (b) supra, the occasion has not yet arisen for its further development by this Court. Certainly it does not arise in the present appeal, having regard to the pleadings, the evidence, and the arguments in this Court.

As to (a), supra, it may be stated that the owner will be frustrated by estoppel upon proof of the following requirements –

(i) There must be a representation by the owner, by conduct or otherwise, that the person who disposed of his property was the owner of it or was entitled to dispose of it. A helpful decision in this regard is *Electrolux (Pty) Ltd v Khota and Another* 1961 (4) SA 244 (W), with its reference at p 247 to the entrusting of possession of property with the *indicia of dominium* or *ius disponendi.*

(ii) The representation must have been made negligently in the circumstances.

(iii) The representation must have been relied upon by the person raising the estoppel.

(iv) Such person's reliance upon the representation must be the cause of his acting to his detriment. As to (iii) and (iv), see *Standard Bank of SA Ltd v Stama (Pty) Ltd* 1975 (1) SA 730 (AD).

This test has been consistently followed by the courts and was reaffirmed in *Quenty's Motors (Pty) Ltd v Standard Credit Corporation Ltd* [1994] ZASCA 41; 1994 (3) SA 188 (A) at 198-199 and particularly at 199 C-G in the following terms:

In the Electrolux case referred to by Holmes JA, Trollip J said at 247B-E:

'To give rise to the representation of *dominium* or *ius disponendi,* the owner's conduct must be not only the entrusting of possession to the possessor but also the entrusting of it with the *indicia* of the *dominium* or *ius disponendi*. Such *indicia* may be the documents of title and/or of authority to dispose of the articles, as for example, the share certificate with a blank transfer form annexed …; or such *indicia* may be the actual manner or circumstances in which the owner allows the possessor to possess the articles, as for example, the owner/ wholesaler allowing the retailer to exhibit the articles in question for sale with his other stock in trade ... In all such cases the owner "provides all the scenic apparatus by which his agent or debtor may pose as entirely unaccountable to himself, and in concealment pulls the strings by which the puppet is made to assume the appearance of independent activity. This amounts to a representation, by silence and inaction … as well as by conduct, that the person so armed with the external indications of independence is in fact unrelated and unaccountable to the representor, as agent, debtor, or otherwise."

(Spencer Bower on Estoppel by Representation at 208).'

Trollip J said further (at 247 in fine – 249 in pr):

'It follows that to create the effective representation the dealer or trader must, in addition, deal with the goods with the owner's consent or connivance in such

> manner as to proclaim that the *dominium* or *ius disponendi* is vested in him; as for example, by displaying, with the owner's consent or connivance, the articles for sale with his own goods. It is that additional circumstance that provides the necessary "scenic apparatus" for begetting the effective representation.'
>
> In the context of an attempted reliance on estoppel by conduct in respect of a motor vehicle subject to instalments sale agreements it was held as follows in *Info Plus v Scheelke and Another* [1998] ZASCA 21; 1998 (3) SA 184 (SCA) at 194-195:
>
> 'The requirements for a successful reliance on estoppel in the context under consideration have been set out in a number of decisions of this court. See, for example, *Quenty's Motors (Pty) Ltd v Standard Credit Corporation Ltd* [1994] ZASCA 41; 1994 (3) SA 188 (A) at 198-9. The first requisite is that there must be a representation by the owner (or possessor) that the person who disposed of his property ("the defrauder") was the owner, or entitled to dispose, of it. In most cases, of course, the ultimate representation is made by the defrauder. The real question then is whether the conduct of the owner effectively contributed to the making of that representation.'[28]

As stated earlier,[29] to create the effective representation the dealer or trader must, in addition, deal with the goods with the owner's consent or connivance in such a manner as to proclaim that the *dominium* or *ius disponendi* is vested in him; as for example, by displaying, with the owner's consent or connivance, the articles for sale with his own goods. It is that additional circumstance that provides the necessary 'scenic apparatus' for begetting the effective representation.

3.1.5 Statutory Defences

Some statutory provisions exclude the *rei vindicatio.* Two such provisions are discussed below.

> Section 36(5) of the Insolvency Act 24 of 1936 provides that:
>
> The owner of the movable property which was in possession or custody of a person at the time of the sequestration of that person's estate, shall not be entitled to recover that property if it has, in good faith, been sold as part of the

28 For example in the *Eysselinck* case (n 27 above) the court ruled that the second defendant had not relied upon a representation that, apart from ownership, the *ius disponendi* of the Mercedes vested in Sharman Motors. As has appeared, Gavin represented to the second defendant that Sharman Motors was the owner of the vehicle. No doubt the prior delivery of the vehicle to Sharman Motors causally assisted Gavin in making that representation but the mere delivery of property by one person to another does not by itself constitute a representation that the latter is the owner (or is entitled to dispose) thereof: *Electrolux (Pty) Ltd v Khota & Another* 1961 4 SA 244, cited with apparent approval in *Oakland Nominees (Pty) Ltd v Gelria Mining and Investment Co (Pty) Ltd* 1976 1 SA 441 (A), and *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) (Bpk)* 1996 3 SA 273 (A). Nor does the fact that the transferee is a dealer or trader in the particular commodity transform the transfer of possession into such a representation.

29 *Electrolux* (n 28 above) 247-8; see also *Konstanz Properties (Pty) Ltd* (n 28 above) 288 and *Grosvenor Motors (Potchefstroom) Ltd v Douglas* 1956 3 SA 420 (A) 428.

> said person's insolvent estate, unless the owner has, by notice in writing, given, before the sale, to the curator bonis if one has been appointed or to the trustee of the insolvent estate, or if there is no such curator bonis or trustee, to the Master, demanded a return of the property.

This implies that after the sale of the movable property of an insolvent estate, the said property, after having been sold and transferred, may not be vindicated by way of a *rei vindicatio.*

Section 70 of the Magistrates' Courts Act 32 of 1944 provides that:

> A sale in execution by the messenger shall not, in the case of movable property after delivery thereof or in the case of immovable property after registration of transfer, be liable to be impeached as against a purchaser in good faith and without notice of any defect.

This means that the previous owner of movable or immovable property cannot challenge the sale in execution of such property and the subsequent transfer of ownership after delivery in the case of movable property and registration in the case of immovable property.

The general effect of these provisions is that the owner of the property is barred from redeeming the property through the application of the *rei vindication*, thus limiting the usual effect of this remedy.[30]

3.2 *Actio negatoria*

WA Joubert *et al*[31] state that in Roman law the *actio negatoria* was a remedy in terms of which a landowner could restrict the exercise of unauthorised real rights, especially servitudes, with regard to his or her land. In Roman-Dutch law this remedy was transformed into a remedy in terms of which any physical disturbance of land could be challenged even though the disturbance was not based on a presumed exercise of right. Mostert *et al*[32] add that as a real remedy, the *actio negatoria* permits an owner to deny the existence of an alleged servitude or other right entitling the defendant to cause physical disturbance to the land. In other words, it is a remedy granted to a landowner to restrict physical disturbance of the land irrespective of the existence, or otherwise, of a servitude. The application of the *actio negatoria* has been extended to movables and therefore it can be applied to cases involving any physical infringement of a person's ownership. The following could serve as examples where the remedy would apply in situations involving physical infringement of a person's ownership: where land is trespassed upon; where movables are sold and delivered to third parties without the owner's consent; where structures are erected on land without the owner's permission; where

30 See Mostert *et al* (n 7 above) 219-220 for further explanation.
31 Joubert *et al* (n 7 above) vol 27, para 184.
32 Mostert *et al* (n 7 above) 226.

a road is obstructed; and where the owner is physically prevented from ploughing his land.[33]

For the owner to succeed with the *actio negatoria* he or she must prove the ownership of the property; the existence of the property; and that it is identifiable. Furthermore, he or she must establish that the defendant's conduct infringes on his or her right, either because it amounts to an excessive exercise of an acknowledged limited real right or because the defendant is exercising a non-existent limited real right.[34]

3.3 Delictual remedies

As stated earlier, the real remedies are employed to restore the possession of property to the owner, or to restore *dominium* or to prevent any infringement of *dominium*. Delictual remedies on the other hand are appropriate when physical restoration is not possible in which case the owner must be compensated for his or her patrimonial loss. This may happen in situations where, for example, the property has been destroyed, lost, or damaged so that it cannot be identified or be used for its destined purpose.[35] Under delictual remedies we shall specifically look at the *condictio furtiva,* the *actio ad exhibendum* and the *action legis Aquiliae* (the general action for damages).

3.4 *Condictio furtiva*

The *condictio furtiva* is a *delictual* action which can be instituted by an owner against a thief or his or her heirs for the patrimonial loss (or prejudice) suffered as a result of the theft. The *condictio* is aimed at the recovery of the thing, together with its fruits, or its highest value since the commission of the theft.[36] It entitles the owner to the highest value of the thing between the time it was stolen and *litis contestatio.* Therefore, to the extent that it can also be employed for the recovery of the thing, it is possible to use the *condictio* in the alternative to the *rei vindicatio.*[37]

In order to succeed with the *condictio* certain requirements must be established by the claimant. As sated earlier, the *condictio furtiva* is a remedy available to the owner of a thing, or someone with an interest in the thing,[38] to claim damages from a thief and his or her heirs.[39] The *condictio* will

33 Joubert *et al* (n 7 above) vol 27, para 184.
34 Mostert *et al* (n 7 above) 226.
35 Mostert *et al* (n 7 above) 227; Du Bois (n 6 above) 541.
36 Joubert *et al* (n 7 above) vol 27, para 187.
37 Mostert *et al* (n 7 above) 227; Joubert *et al* (n 7 above) vol 27, para 187.
38 *Clifford v Farinha* 1988 4 SA 315 (W).
39 *Kruger v Navratil* 1952 4 SA 405 (SWA) 408; *John Bell & Co Ltd v Esselen* 1954 1 SA 147 (A) at 151-152; *Minister van Verdediging v Van Wyk & Andere* 1976 1 SA 397 (T) 400; *Crots v Pretorius* 2010 6 SA 512 (SCA) para 3.

therefore only find application if the thing in question has been stolen. It was held in *Clifford v Farinha*[40] that the intention to appropriate the thing permanently (a requirement for criminal theft) is not a requirement to succeed with the *condictio* where *furtum uses* is concerned. The *condictio furtiva* will be available where, for example, the defendant has deprived possession of the thing from another, or has 'taken' the thing and used it with the intention of later restoring possession. It follows that the person instituting the *condictio* must prove that he or she is the owner of the property or has a lawful interest in it.[41] This interest must endure from the time of the theft until the time the action is instituted.[42]

As mentioned earlier, the remedy is available only against the thief or, in the case of death, his or her heir. The action cannot be instituted against any subsequent (*bona fide* or *male fide*) acquirer of the stolen property.[43]

Since the *condictio* can be employed for the recovery of the thing, an owner can in principle avail himself or herself of either this remedy or the *rei vindicatio* if the thief is still in possession of the stolen thing. However, these remedies are available in the alternative only. The owner has the discretion to choose which one should be instituted. Since the highest value of the thing attained in the interim period, specifically the period between the date of deprivation of possession until *litis contestatio*, may be claimed, the *condictio furvita* may in appropriate circumstances be more advantageous than the *rei vindicatio*.[44]

In Roman law the *actio ad exhibendum* was usually instituted in conjunction with the *rei vindicatio* to compel the possessor of a thing which was not vindicated to produce it. If the defendant produced the thing, the action for the *rei vincatio* was proceeded with. If the thing was not produced, the defendant was ordered to compensate the plaintiff for its value.[45] This aspect of the *actio ad exhibendum* had become obsolete in Roman-Dutch law and never became part of South African (or Namibian) law.[46]

Currently, under South African (Namibian) law, the *actio ad exhibendum* is instituted as a general action against a mala fide possessor, who has fraudulently alienated, consumed or destroyed the thing, for the recovery of its value since the thing itself can obviously not be recovered. It is also available against any possessor, who after becoming aware of the title of the owner, fraudulently alienated, consumed or destroyed the thing. Since the

40 n 38 above, 322C-D.
41 Mostert *et al* (n 7 above) 227.
42 *Minister van Verdediging* (n 39 above).
43 Mostert *et al* (n 7 above) 227.
44 Joubert *et al* (n 7 above) vol 27, para 187.
45 Joubert *et al* (n 7 above) vol 27, para 185.
46 Du Bois (n 6 above) 542.

basis of the liability is *mala fides*, the plaintiff must allege and prove it.[47] For the claimant to succeed the following requirements must be satisfied:

(a) the person who has instituted the action must be the owner of the property;

(b) the defendant must have wrongfully and intentionally disposed of the property; and

(c) the owner must have suffered patrimonial loss as a result of the disposal of the property.

As stated earlier, it must be emphasised that since the property has been disposed of, the amount claimed is the market value of the property at the time of disposal.[48]

3.5 *Actio legis Aquiliae*

The *actio legis Aquiliae* as an action to claim compensation is of general application in the sense that it can be instituted to claim damages in all cases where property has been destroyed or damaged by the defendant in an unlawful and culpable manner. The two delictual remedies discussed earlier, the *condictio furtiva* and the *actio ad exhibendum* have particular application. The former is utilised in the case of theft, whereas the latter is instituted when the possessor has wrongfully disposed of the property in bad faith. The *Aquilian* action lies for patrimonial loss caused wrongfully (unlawfully) and culpably.[49] For the plaintiff to succeed, it must be proved that he or she has suffered patrimonial loss as a result of the wrongful conduct of the defendant. The loss can be physical damage to person or property. The wrongful conduct must have caused the loss. The plaintiff is also required to establish blameworthiness in the form of *dolus* (intention) or *culpa* (negligence) on the part of the defendant.

4 Unjustified enrichment

The doctrine of unjustified enrichment is based on an equitable principle that prohibits one person from profiting or being enriched at the expense of another person without making restitution for the reasonable value of any property, services, or other benefits that have unjustifiably been received or retained. In the law of property an owner may institute a *condictio sine causa* on ground of unjust enrichment against a bona fide possessor who has acquired a thing ex *causa lucrativa* (without consideration) in respect of any

47 Joubert *et al* (n 7 above) vol 27, para 185; Du Bois (n 6 above) 542; Mostert *et al* (n 7 above) 228.

48 Mostert *et al* (n 7 above) 228. For the scope of the application between the *rei vindicatio* and the *actio ad exhibendum* see also Joubert *et al* (n 7 above) vol 27, para 185; and Du Bois (n 6 above) 543.

49 *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 4 SA 371 (D) 377.

profit made when the property is sold. A *condictio* is available also where the enrichment acquired *ex causa lucrativa* is a sum of money or land which has been obtained as a result of accession.[50]

5 Protection of possession; the possessory remedies

The possessory remedies provide relief for a claim based on possession and they include the *mandament van spoile* (spoliation) and interdict. They are used to restore lost possession.[51]

5.1 *Mandament van spolie* (spoliation)

5.1.1 Definition

The *mandament van spolie* is a common law remedy available to the possessor of property who has been dispossessed of that property by another, either unlawfully or under the pretext that the said person was entitled to dispossess the possessor.

5.1.2 Requirements

The requirements for obtaining the mandament van spolie are:

(a) a person must have been unlawfully deprived of the whole or part of his or her possession of a movable or immovable thing; and

(b) a person must have been deprived unlawfully of his or her quasi-possession of a movable or immovable incorporeal thing.[52]

In *Nino Bonino v De Lange*[53] Innes CJ defined spoliation as follows:

> Spoliation is any illicit deprivation of another of the right of possession which he has, whether in regard to movable or immovable property or even in regard to a legal right.

50 Du Bois (n 6 above) 546; Joubert *et al* (n 7 above) vol 27, para 188; and Mostert *et al* (n 7 above) 229.

51 See Mostert *et al* (n 7 above) 75; Badenhorst *et al Silberberg & Schoeman's the law of property* 288; Du Bois (n 6 above) 453.

52 See *Nino Bonino v De Lange* 1906 TS 120; *Shahmahomed v Hendriks & Others* 1920 AD 151; *Mans v Loxton Municipality & Another* 1948 1 SA 966 (C). The treatment of the *mandament* in volume 27 of *Lawsa* under the title 'Things' by CG van der Merwe is extremely helpful.

53 n 64 above, 122.

This definition was adopted from *Augustini a Leyser Meditationes Ad Pandectas* and was approved *inter alia* in *Sillo v Naude*;[54] *Nienaber v Stuckey*;[55] and *Van Eck NO & Van Rensburg NO v Etna Stores*.[56]

The question as to the utilisation of the mandament to protect incorporeal rights has been the subject of wide-ranging discussion in the case law and amongst academics. In *Telkom SA Ltd v Xsinet (Pty) Ltd*[57] Jones AJA deals with the origins and development of the mandament as follows:[58]

> Originally, the mandament only protected the physical possession of movable or immovable property. But in the course of centuries of development, the law entered the world of metaphysics. A need was felt to protect certain rights (tautologically called incorporeal rights) from being violated. The mandament was extended to provide a remedy in some cases. Because rights cannot be possessed, it was said that the holder of a right has 'quasi-possession' of it, when he or she has exercised such right. Many theoretical and methodological objections can be raised against this construct, *inter alia*, that it confuses contractual remedies and remedies designed for protecting real rights. However, be that as it may, the semantics of 'quasi-possession' has passed into our law. This is all firmly established.'

The facts of the case were that the appellant supplied the respondent (an internet service provider) with a telephone system and a bandwidth system in order for the latter to conduct its business as an internet service provider. The appellant alleged that the respondent was indebted to it in a sum of money in respect of one of the services provided, which the respondent disputed. The appellant thereupon disconnected the respondent's telephone and bandwidth systems. The respondent successfully brought an urgent spoliation application in a Provincial Division. In an appeal it was held that there was no suggestion that the appellant had interfered with the respondent's physical possession of its equipment.[59]

It was held, further, that there was no evidence that the respondent had ever been in possession of any of the mechanisms by which its equipment was connected to the internet.[60] It was held further, that the appellant had not entered the respondent's premises and removed an item of respondent's equipment in order to affect the disconnection.[61] The court was of the view that it was both artificial and illogical to conclude on the facts that the respondent's use of the telephones, lines, modems or electrical pulses gave

54 1929 AD 21.
55 1946 AD 1049.
56 1947 2 SA 984 (A) 1000.
57 2003 5 SA 309 (SCA).
58 Para [9].
59 Para [13].
60 As above.
61 As above.

it 'possession' of the connection of its corporeal property to the appellant's systems.[62]

Furthermore, Jones AJA held that the quasi-possession of the right to receive the appellant's telecommunication services consisted of the actual use of those services and that was a mere personal right.[63] He further held that the order sought was essentially to compel specific performance of a contractual right in order to resolve a contractual dispute. This had never been allowed under the *mandament van spolie* and there was no authority for such an extension of the remedy.[64]

In *Zulu v Minister of Works, Kwazulu, & Others*,[65] Thirion J grappled with the question of incorporeal rights and accepted that '"the possession of incorporeal rights is protected against spoliation". (*Nienaber v Stuckey* 1946 AD 1049 at 1056)'. The judge then had the following to say:

> In truth the *mandament van spolie* is not concerned with the protection or restoration of *rights* at all. Its aim is to restore the factual possession of which the *spoliatus* has been unlawfully deprived. The question of the lawfulness of the *spoliatus*' possession is not enquired into at all. What then does a *spoliatus* have to prove to establish the possession of 'an incorporeal right' and what such 'rights' qualify for protection by the *mandament van spolie*? … Accepting then that what is protected by the remedy is the actual performance of acts which, if lawfully performed, would constitute the exercise of a right, the question which arises is what such acts are protected by the remedy.[66]

Thirion J in discussing this question considered *Nienaber v Stuckey*[67] where Greenberg JA observed as follows with reference to Voet;[68] Wassenaar;[69] and Lee:[70]

> The fact that these authorities state generally and without any limitation or exception that the possession of incorporeal rights is protected against spoliation means that the holders of such servitudal rights as rights of way ... are entitled to the relief against dispossession by spoliation.

Thirion J maintained that:

> Too much should not be read into this statement. Greenberg JA was here simply pointing out that possession need not be exclusive in order to qualify for protection by the mandament. The question of what kinds of rights the possession of which is protected by the mandament did not arise because the *spoliatus* there had clearly been in physical possession of the land. It is true that

62 As above.
63 Para [14].
64 As above.
65 1992 1 SA 181 (D).
66 At 187 et seq.
67 1946 AD 1049 1055-6.
68 43.16.7.
69 G Wassenaar *Praktyk judicieel* (1708) ch 14, art 1
70 RW Lee *An Introduction to Roman-Dutch Law 3rd ed* (1931) 167.

> *Wassenaar* states in the passage referred to that the mandament van spolie may be obtained in any case of a spoliation of 'enige goederen of gerechtigheden' but I would not conclude from this bald statement that the dispossession of just any right can be made the subject of spoliation proceedings. If the protection given by the *mandament van spolie* were to be held to extend to the exercise of rights in the widest sense then supposedly rights such as the right to performance of a contractual obligation would have to be included – which would be to extend the remedy beyond its legitimate field of application and usefulness.

The possession in *Nienaber* was fairly extensive and encompassed a whole year from June 1945 during which period the appellant ploughed the lands. From 1943 the appellant had leased the land in question. The court found that he had not abandoned the possession in question and that when the respondent locked the gate he effectively despoiled the appellant's possession.[71]

5.2 Interdict

5.2.1 Definition

An interdict is an order made by a court prohibiting or compelling performance of a particular act for the purpose of protecting a legally enforceable right which is threatened by continuing or anticipated harm. In this instance the interdict would be prohibitory, ordering the respondent to desist or refrain from doing a particular act. Three requisites exist for the granting of a high court interdict, namely a clear right, an actual or threatened invasion of the right, and the absence of another suitable remedy. A further requisite, namely that a balance of convenience favours the granting of the interdict, exists where a temporary interdict is sought pending an action between the parties.

5.2.2 Requirements

The requirements of an interdict were set out in an appeal judgment by the Supreme Court of Namibia in the case of *Van Ellinckhuijzen v Botha*.[72] For the sake of completeness it is important to set out the salient facts in this case.

The applicant, Jan Botha, a businessman of Swakopmund in Namibia, and the respondent, Koos van Ellinckhuijzen, an artist residing in Windhoek, had entered into an agreement in terms of which Botha had commissioned van Ellinckhuijzen, to paint for him a so-called 'relief map' or 'tourist perspective map of Namibia' as well as a 'relief map' of South Africa. The final price to be paid by applicant to respondent for the paintings was N$36 000 for the

71 1057-8.
72 (SA 11/01) [2002] NASC 11.

Namibian map and N$45 000 for the South African map. After completion of the maps they were delivered to the applicant.

Prior to the institution of litigation, the applicant had paid to the respondent the full purchase price of the Namibian map and all but N$5 000 of the purchase price of the South African map. After keeping the maps in his possession for a certain period, the applicant returned the maps to the respondent for certain purposes.

Whilst the maps were in the possession and/or custody of the first respondent, the applicant discovered that the first respondent was busy selling the maps through the agency of the House of Art, the second respondent, who had been placed in possession of the maps and who had framed the maps on the instructions of first respondent.

The applicant immediately confronted the two respondents to state his claim as owner of the paintings and got the following response from the respondents. The first respondent said in effect: 'I have done my homework and am entitled to sell the paintings'. Second respondent, in reaction to a letter from applicant's attorneys, indicated by means of a letter from her attorneys, that 'she will not let the paintings out of her possession or control, until such time as her retention rights, for work done on the pictures in the amount of N$3 000,00 has been satisfied'. The applicant was not satisfied with the aforesaid responses and applied to the court *a quo* on an urgent basis for an interdict to prevent the paintings from being sold by the first respondent.

After a settlement was reached with the second respondent and certain agreements were reached with the first respondent relating to the procedure to be followed for an expeditious finalisation of the dispute, the applicant and respondents set out their respective cases in their affidavits and argued the matter before the court *a quo*.

Gibson J after careful consideration made the following order, *inter alia:*

> That first and second respondents are ordered forthwith, upon second respondent's right of retention in respect of work done in framing the paintings, to place the applicant in possession of the aforesaid original paintings, failing which the Deputy Sheriff for the district of Windhoek is authorized and directed to attach and hand over to the applicant, the aforesaid painting.

This is part of the order against which an appeal was noted. The following requirements for an interdict were confirmed in this case:

(a) a clear right;

(b) impending unlawful infringement; and

(c) no other effective remedy.

In *Passano v Leisslerk,*[73] a case that touched on a number of topics of property law, Maritz J confirmed the requisites of an interdict by stating:

> Seeking a final mandatory interdict, the applicant must satisfy the well-established requisites thereof: '(i) a clear right (ii) unlawful interference with that right, actually committed or reasonably apprehended; and (iii) the absence of any other satisfactory remedy.'[74]

6 Protection of servitudes

As we saw in Chapter 7, one basic characteristic of every servitude is the right of use and enjoyment granted by the owner to the holder of the servitude. Almost invariably the effective utilisation and enjoyment of these entitlements involve possession of the object of the right. In this regard, therefore, the remedies for the protection of servitudes will include the possessory remedies and most of the remedies available to an owner, discussed earlier. These will include an application for a declaration of rights if the servitudal rights have been infringed or there is a risk of interference. The holder of the servitude may also ask for a mandatory interdict compelling the wrongdoer to restore the *status quo ante* and/or a prohibitory interdict prohibiting the wrongdoer from perpetrating future infringements. This replaces the old *actio confessoria* which may be instituted against the owner of the servient property or any third party who unlawfully infringes the holder's right. In order to succeed, the plaintiff has to prove the existence of the servitude; that he or she is the holder; and that the defendant has unlawfully infringed the plaintiff's use and enjoyment of the servitude.[75] The *mandament van spolie* is also available for the restoration of lost possession of a right of servitude.[76]

7 Concluding remarks

Every legal system provides for rights and obligations and how these may be enforced. In the law of property there are various remedies that are available to the individual whose rights have been violated. These remedies may be instituted to restore ownership, to recover property and for compensation for patrimonial loss and prejudice. The remedies may be broadly classified as real remedies because they pertain to the infringements of real rights, delictual damage to property and unjustified enrichment where property is involved. The choice of an appropriate remedy will be determined by the peculiar circumstances of each case.

73 2004 NR 10 (HC).
74 Quoting Smalberger JA in *Diepsloot Residents and Landowners' Association & Another v Administrator, Transvaal* 1994 3 SA 336 (A) 344.
75 WJ Hosten *et al Introduction to South African law and legal theory 2nd ed* (1997) 650; *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi* 1989 1 SA 508 (A) 513-516.
76 Joubert *et al* (n 7 above) vol 25, para 105.

CHAPTER 10 PROPERTY RIGHTS OF WOMEN IN NAMIBIA

1 Introduction

The colonial policy of apartheid and more especially that of 'bantustanisation'[1] that generally deprived a certain sector of the South-West African/ Namibian community of their basic fundamental rights was legitimised not only by the imposed political and social systems but also by the legal system including legislation and some principles of the Roman-Dutch common law. In terms of property rights the general black population was denied the rights to certain property rights, like for example, freehold titles, as a result of the Bantustan policy. The policies of the financial institutions requiring collaterals as a prerequisite for the granting of loans totally disqualified the generality of the black population from qualifying for the wherewithal and the empowerment necessary for the acquisition of property, more especially immovable property. The situation was even more pathetic in the case of women, who were not only subjected to the application of some of the discriminatory principles of the Roman-Dutch common law relating to matrimonial property rights, in the case of women who were subjected to the general law, but more especially the black women whose property rights were governed by the customary law of their tribal

1 In 1962, the South African government appointed a Commission of Inquiry to make 'recommendations on a comprehensive five-year plan for the accelerated development of the various non-white groups of South-West Africa'. This Commission was commonly known as the Odendaal Commission. The recommendations made by the Commission in its 1964 report had little to do with promoting the welfare of black Namibians. One infamous recommendation in the Report was that Namibia should be fragmented into a series of economically unviable self-governing homelands or Bantustans for Africans, which would of necessity, remain perpetually dependent on the 'white' areas, and, through them, on South Africa. The Odendaal Plan was implemented by two pieces of legislation: the Development of Self-Government for Native Nations in South-West Africa Act 54 of 1968 and the South-West Africa Affairs Act 25 of 1969. The effect of the implementation of the Plan was to entrench both territorial apartheid in Namibia and the distribution of land along racial lines. See NK Duggal *Namibia: Perspectives for national reconstruction and development* (1986) 37-41. See also SK Amoo & M Conteh 'Women's Property Rights in Namibia and HIV and AIDS: Myth or Reality?' *Namibia Law Journal* vol 3, 1 January 2011, 3-27.

communities as a result of the Bantustan policy. In terms of property rights therefore, it was not only the black women who did not have the full legal rights to property and the means to acquire property but also the white women whose property rights were governed by the general law that recognised better titles of men to property.

In the context of the HIV/AIDS pandemic, gender inequality is a social factor that has significantly contributed to the spread of the virus since unequal power relations between men and women put women at a greater risk of HIV/AIDS infection. Given this reality, the national policy on HIV/AIDS was adopted in 2007. The policy addresses issues of gender inequalities in terms of the burden of care placed on women and girls by the pandemic, the cultural acceptance of intergenerational sex, especially sex of older men with young girls, and gender based violence in general. In recent years, the impact of structural factors such as gender inequalities on the severity and spread of HIV has been noted with increasing alarm. Namibia's Vision 2030 highlights the HIV and AIDS epidemic as one of the most serious threats facing the country. The epidemic is affecting health, livelihoods, economic perspectives, demographic futures as well as many individual lives. HIV has reduced life expectancy in Namibia significantly, and has left many families economically vulnerable.[2] Women are also diagnosed at a younger age than men, given the median age of HIV diagnosis is 30 years old for women and 35 years old for men. The percentage of young women living with HIV is 29 per cent compared to only 8 per cent for young men.[3]

2 Background to property rights of women and HIV and AIDS in Namibia

In Namibia there are 13 different ethnic groups, all of which demonstrate gender inequality in the form of patriarchy to a greater or lesser extent. Patriarchy is a dynamic system of male dominance over a woman that manifests itself in, *inter alia*, male dominance over women's economic and social lives. As a system, patriarchy depends upon differential access to power and resources and has different implications for women in each community. In traditional African communities women had de facto social power and exerted pressure on men both as mothers and wives.[4] In some cultures, such as the Nama and in the Kavango, women were traditional leaders and chiefs. Women in many traditional communities had access to property and were highly-valued as agricultural producers. With the Owambo communities, the economy was based on a mixed agricultural-pastoral

2 Vision 2030: Policy Framework for Long-term National Development (2003), Republic of Namibia, Office of the President, Windhoek.
3 National Strategic Plan on HIV/AIDS Medium Term Plan (MTP III), (2004 –2009), Ministry of Health and Social Services (MoHSS), Windhoek.
4 D LeBeau *et al Women's property and inheritance rights in Namibia* (2004).

system, the value socially attached to men's products such as cattle was high because of its ritual significance.[5]

At the time of independence the Government of the day was confronted with the problem of adopting policies that would address the general policies of discrimination that had affected not only the black population but also disadvantaged groups, and in the case of property rights, the generality of women in Namibia. These institutionalised and legally enforceable discriminatory policies constituted the genesis of gender inequality in pre-independence Namibia. However, there is ample evidence that cultural and customary practices reinforced the state sanctioned gender inequality.

Currently, there is still a confusing web of civil and customary laws, some of which still cause gender-based discrimination.[6] There are several government initiatives such as the Customary Law Bill, which will, among others, recognise customary marriages and harmonise civil and customary laws. As well as law reform, law enforcement and judicial responses to violations of human rights do not yet guarantee women and men equitable protection in Namibia. At independence, Roman-Dutch law allowed a husband to acquire power over his wife as well as property within the marriage, even if the wife had acquired such property prior to marriage. The Married Persons' Equality Act 1 of 1996 specifies equality of persons within marriage and does away with the legal definition of the man as head of the household. The Act also provides women who are married in community of property equal access to bank loans and stipulates that immovable property should be registered in both spouses' names. However, the act only covers couples married under civil, not customary, law, although one-third of all marriages are under customary law.[7] The provisions of the Act relating to the abolition of the marital power and the consequences of that abolition and marriages in and out of community of property are not applicable to marriages by customary law.

The most important piece of legislation in Namibia promoting gender equality has been the Namibian Constitution adopted by the Constituent Assembly in February 1990. Article 144 of the Constitution incorporates all international instruments that Namibia has ratified into Namibia's legislative sphere. Therefore, a discussion now follows taking into consideration the relevant articles of the Namibian Constitution and the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) that were ratified by Namibia on 28 February 1995 and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) that was ratified on 23 November 1992. In terms of the ICCPR, everyone has the right everywhere to be

5 S La Font & D Hubbard (eds) *Unraveling taboos: Gender and sexuality in Namibia* (2007).
6 Le Beau *et al* (n 4 above).
7 *Guide to the Married Persons Equality Act* (2009) Legal Assistance Centre, Windhoek.

recognised as a person before the law[8] and all persons are equal before the law and are entitled, without any discrimination, to equal protection of the law. In this respect, the law prohibits any discrimination and guarantees all persons equal and effective protection against discrimination on any ground including race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[9] The ICESCR confers that in terms of equal rights the states parties to the Covenant undertake to guarantee that the rights enunciated in the Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,[10] and that they undertake to ensure the equal rights of men and women to the enjoyment of all economic, social and cultural rights set forth in the Covenant.[11]

The Government of the Republic of Namibia has further committed itself to the policy of non-discrimination as enshrined in article 10 of the Namibian Constitution and this underlies its National Policy on Land, including property rights. The opening paragraph of the *White Paper* on the National Land Policy reaffirms the Government's commitment as follows:

> Access to and tenure of land was among the most important concerns of the Namibian people in their struggle for independence. Since 1990, and following the 1991 National Conference on Land Reform, and the Consultative Conference on Communal Land Administration 1996 Namibia's democratically elected Government has maintained and developed its commitments to redressing the injustices of the past in a spirit of national reconciliation and to promoting sustainable economic development. The wise and fair allocation and administration, and use of the nation's urban and rural land resources are essential if these goals are to be met.

The Government's position postulated in this policy is not only a political commitment but it is also in compliance with a moral and legal (constitutional) obligation.[12] The relevant portion of article 95 of the Constitution, that deals with the principles of State Policy and the Promotion of the Welfare of the People, states as follows:

> The State shall actively promote and maintain the welfare of the people by adopting, *inter alia*, policies aimed at the following:
>
> (a) enactment of legislation to ensure equality of opportunity for women, to enable them to participate fully in all spheres of Namibian society; in particular, the Government shall ensure the implementation of the principle of non-discrimination in remuneration of men and women; the Government shall further seek, through appropriate legislation to provide maternity and related benefits for women …

8 Art 16.
9 Art 26.
10 Art 2(2).
11 Art 3.
12 Article 95 of the Constitution has been declared to be obligatory on the Government.

(e) ensurance that every citizen has a right to fair and reasonable access to public facilities and services in accordance with the law.

These principles have been upheld in the case of *Government of The Republic of Namibia & Others v Mwilima & Others*[13] as 'an expression by the state of its willingness' to provide those services and that 'they are not enforceable in any court of law'. In terms of access to property and the provision of the necessary framework, legal or otherwise , for the attainment of these rights by the erstwhile disadvantaged members of the community, especially women, this may not be a justiciable right but the provision does impose a standing obligation on the government to be seen to be measuring up to its commitment. Furthermore, under the Constitutional provisions on Apartheid and Affirmative Action[14] the government is enjoined to pass legislation to empower women, needless to say, to have access to property.

With regard to the rights to property, and more especially the rights of women, the Namibian legislature, since independence, has promulgated pieces of legislation aimed at redressing the injustices of the colonial legacy, including the discriminatory laws and practices relating to property rights, especially the rights of women. Apart from the Constitutions of the former Soviet Union and the other Communist States in the former Eastern Bloc, which made the provision of housing a constitutional obligation of the government, not many constitutions in the world make the provision of housing to its citizens a constitutional obligation of the state and therefore a justiciable right of the individual. The Namibian government may therefore not be under such obligation but it has the duty to provide within available means adequate and affordable housing for members of the society in the lower income group brackets. It is recognised that since the government's resources are limited and Namibia has a mixed economy the private sector must of necessity play an important role in the provision of the wherewithal, credit facilities, for the acquisition of property. It is however, the function of the government to ensure that the policies of the private sector are not discriminatory; especially against women and that credit facilities are reasonably accessible to them. It is therefore the aim of this Chapter to establish the following:

(a) whether the legislation promulgated by Parliament has adequately redressed the injustices of the past with respect to the rights of women to property;

(b) related to (a) above, whether the general rule inhibits women from enjoying the same rights as women in terms of rights to property;

(c) whether the facilities provided by both the public and private sectors are equally accessible to both men and women in their own rights;

13 2002 NR 235 (SC).
14 Art 23 of the Namibian Constitution.

(d) whether the promulgation of the Communal Land Act 5 of 2002 redresses the inherent inequities of the communal land tenure systems with respect to the rights of women, given the inarticulate premise, patriarchal biases and predispositions of the male dominated traditional leadership;

(e) whether Proclamation 15 of 1925 should be amended, especially section 18(2), so as to ensure that cognisance be taken of the type of marital regime applicable for the purposes of determining rights of widows in cases of succession to immovable property; and

(f) possible national and international solutions.

3 Ownership of property and inheritance rights

The issue of women's property and inheritance rights has been at the forefront of many recent discussions and advocacy programmes in Namibia. In some communities the customary norms whereby male relatives take all property upon the death of a husband, as well as the customary practice of demanding all property from a failed marriage are lately increasingly being called into question. In Namibia the disinheritance of widows whose husbands have died from AIDS related causes is a common occurrence.[15] The AIDS pandemic has been brought to the forefront by the realities of gender based inequalities stemming from discriminatory property and inheritance laws and practices. As indicated earlier, in some communities, a married woman enjoys no right of ownership and upon her husband's death she could be left destitute. It is envisaged that the new bill on inheritance issues will address this problem.

Half of the land in Namibia is communal land held under customary tenure. Both men and women retain usufruct to communal land which cannot be transferred in any manner. In reality, however, the right of occupation and use is often transferred to a man who is regarded as the head of the household. This in practice has led to the vulnerability and victimisation of women despite existing legislation that guarantees them inheritance rights, for example the Married Persons Equality Act of 1996 and the Communal Land Reform Act of 2002.[16]

A major legislative development for rural women has been brought about by the enactment of the Communal Land Reform Act 5 of 2002. In terms of this Act, men and women are equally eligible for individual rights to communal land and widows and widowers are entitled to equal treatment. The new law has altered practices in certain areas where a widow was previously dispossessed of the communal occupation fee. It is noteworthy that the law, which provides a procedure for official recognition of traditional authorities, requires that they 'promote affirmative action amongst the members of the community …' particularly '… by promoting women to

15 LeBeau (n 4 above).
16 As above.

positions of leadership'. Even though the Act contains no specific monitoring or enforcement mechanism, it provides a basis for encouraging greater participation by women in traditional leadership roles.

There was a complex background to this law. Parliament passed a resolution requesting traditional leaders to allow widows to remain on their land in 1992 and in 1993 traditional authorities in the north-central regions revised customary laws to help secure the land tenure of widows. The Act gives women further protection by ensuring that, after a husband's death, his widow has a right to remain on communal land allocated to him even if she remarries. One recent study concluded that customary land rights of widows appear to be much more secure now than at the time of independence.[17] The infrequent eviction of widows which still occurs could, however, leave many widows without the necessary means to cultivate their land, and sometimes even without adequate shelter. This is a problem which must still be solved.[18]

Currently there has been government intervention on behalf of widows who find themselves evicted from marital property, based on the arguments that such practices violate a woman's constitutional rights of property ownership and gender discrimination as enshrined in article 10 of the Namibian Constitution. The government is currently drafting a Succession Bill that will harmonise methods of inheritance and property regimes for all Namibians.

4 The links between gender inequality and HIV and AIDS

The biannual serosurvey conducted amongst pregnant women gives an indication of the extent of the sexual activity of the population. The survey is done anonymously during routine antenatal care visits, which means that the results cannot be linked to any particular individual. Monitoring the HIV infections in Namibia is particularly important in informing policy makers on the challenges and needs facing a large proportion of the Namibian population. Results from the 2008 sero-prevalence data has determined the overall HIV prevalence in the country to be 17.8 per cent, a slight decline from the 2006 prevalence of 19.9 per cent. The prevalence rate is the same in rural and urban areas. The prevalence increased from 1992 (4.2 per cent) to 2002 (22 per cent) and then stabilised at 22 per cent before the decline to the current prevalence rate. The highest age specific prevalence rate is observed among those aged between 30-34 years.[19]

17 W Werner *Protection for women in Namibia's Communal Land Reform Act: Is it working?* (2008).
18 As above.
19 Report of the 2008 National HIV Sentinel Survey (2009), Ministry of Health and Social Services (MoHSS), Windhoek.

In a bid to attack the spread of the virus, government launched a series of plans, namely the National AIDS Control Programme (1990); the First Medium Term Plan (1992-1998) initiated in 1992; the Second Medium Term Plan (1999-2004) launched in 1999; and the Third Medium Term Plan (2004-2009), launched in 2004.

It is estimated that about 200 000 people are living with HIV in Namibia. 60 per cent of these are women.[20] Women are more prone to become infected with HIV than men, which is in part due to the fact that women have larger mucosal surface area than men and on account of the pooling of semen during sexual intercourse. However, this does not fully explain why there are more HIV-infected women than men. Some of the most significant factors that shape the spread of HIV and AIDS in Namibia include high mobility, cross border travel, the high prevalence of sexually transmitted infections, widespread alcohol and substance abuse, poverty, gender inequalities, disintegration of families and ignorance

More than 25 years into the AIDS pandemic, gender inequality and unequal power relations between women and men continue to be the major drivers of HIV transmission. An array of societal beliefs, norms, customs and practices that define masculine and feminine attributes and behaviour, play an integral part in determining an individual's vulnerability to infection, his or her ability to access care, support or treatment and the ability to cope when affected or infected. Gender inequality and harmful gender norms are not only associated with the spread of HIV but also with its consequences.

Women and girls bear a disproportionate burden of responsibility for families affected by AIDS and women who disclose their HIV-positive status have often faced greater stigma and suffered more extreme negative reactions than men. Gender norms and expectations also influence male sexuality, risk taking and vulnerability to HIV.

5 Property rights in Namibia and the enabling legal regime

5.1 Land classification and land tenure in independent Namibia

In order to fully appreciate the nature of problems connected with property rights of women in Namibia, it might be necessary to trace the genesis of property rights in Namibia and the enabling legal regime. This is important because the historical classification of land, together with the enabling legal regime that legitimised the land tenure systems and titles attached to a particular classification, is the genesis of the imbalances in land distribution

20 Report on estimates and projections of the impact of HIV/AIDS in Namibia (June 2008) Ministry of Health and Social Services.

and ownership in present-day Namibia. As stated in Chapter 2, before the Independence Constitution came into force, land in Namibia was classified as state or crown land, communal land and private land. This classification by and large has been maintained under the Constitution.[21] Article 100[22] and Schedule 5(1)[23] of the Constitution maintain the status of crown land; article 16(1) affirms the fundamental right to acquire, own and dispose of all forms of immovable and movable property, more specifically it maintains the status of private property; and by virtue of section 11(2)(c) of the Interpretation of Laws Proclamation 38 of 1920, article 102(5) of the Constitution and the promulgation of the Communal Land Reform Act 5 of 2002, it can be authoritatively concluded that the status of communal land has also been maintained.[24] Consequently, land in Namibia may be classified as state land, private land and communal land. The applicable law governing the first two categories is the general law of Namibia, while the provisions of the Communal Land Reform Act 5 of 2002 and customary law govern land tenure systems in the communal areas subject to the internal conflict rules.

5.2 Private land/commercial farms

The primary legal regime governing property rights in Namibia is article 16 of the Constitution that provides for the right to property as one of the fundamental rights of the individual under the enshrined provisions of the Constitution. It provides that:

> All persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees: provided that Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens.

This provision comes under the entrenched provisions of the Constitution and can only be derogated from under a state of emergency.[25] The

21 See also SK Amoo 'Towards comprehensive land tenure systems in Namibia' (2001) 17 *SAJHR* 87.

22 Art 100 provides that 'land, water and natural resources below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia shall belong to the State if they are not otherwise lawfully owned'.

23 Schedule 5(1) provides that: 'all property of which the ownership or control immediately prior to the date of independence vested in the Government of the Territory of South-West Africa, or in any of the Representative Authorities Proclamation,1980 (Proclamation AG 8 of 1980), or in the Government of Rehoboth, or in any other body, statutory or otherwise, constituted by or for the benefit of any such Government or Authority immediately prior to the date of Independence, or which was held in trust for or on behalf of the Government of an independent Namibia, shall vest in or be under the control of the Government of Namibia'.

24 See also Amoo (n 21 above).

25 Arts 24(1) and (3) of the Constitution of Namibia.

commercial farms of Namibia are held under private titles acquired and legitimised under the provisions of article 16 of the Namibian Constitution.

6 Accessibility of commercial farms to Namibian women

The Namibian courts have upheld the principles of article 10 of the Constitution[26] as one of the binding principles in the judicial and legislative processes of the country. In view of the injustices of the colonial past of the country and as a matter of principle and in the spirit of the strict application and implementation of the law and Government policies relating to property rights of, especially, the previously disadvantaged members of the community, these rights must be accessible to all members of the society, including women. It is one of the objectives of this Chapter therefore, to ascertain the myths and realities of this desired position.

Before independence land set aside for private ownership was for the most part owned by white settlers. At the time of independence it was recorded that this constituted about 75 per cent of the commercially viable farming land, whilst a paltry 25 per cent of such land was held by the indigenous people in the communal areas.[27] Since independence some indigenous people, comprising mainly civil servants and members of the private sector, have moved to the urban centres but the majority of the indigenous African Namibians continue to reside in the communal areas. In the context of the ownership of commercial farms the position of inequitable distribution of land and imbalances in land distribution remains and most Africans and particularly women, remain disadvantaged. This is compounded by the fact that most commercial farmers are men. Women do not have direct access and control over the commercial farms. Most women who interact with the dynamics of commercial farming are either housewives or workers.

The Namibian Government in its attempt to correct these imbalances and empower the previously disadvantaged Africans, including women, promulgated the Agricultural (Commercial) Land Reform Act 6 of 1995. Under the authority of this Act the government has used the policy of willing buyer, willing seller to purchase some commercial farms for resettlement and farming purposes. To date the government has settled about 1512 families on commercial farms at an average of 6 people per family giving a grand total of 9072 resettled persons. A total of 4617 people have been resettled on communal farms, at an average of 6 people per family giving a grand total of

26 Art 10 of the Constitution states that: '(1) All persons shall be equal before the law; (2) No person shall be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status'.

27 See Amoo (n 21 above) 96.

28 380 persons resettled on communal farms**.** Of the total of both categories of resettled persons, 48 per cent are women.

6.1 Rights of women to commercial farms before marriage

In terms of the general law, all single or unmarried women in Namibia have the right to own any property including commercial land, subject to the laws relating to capacity. This is in terms of the law but the questions of accessibility to credit facilities and other wherewithal of empowerment provided by both the public and private sectors will have to be addressed separately.

6.2 Rights of women to commercial farms during marriage

There are two types of marriages in Namibia, civil law marriages and customary law marriages and to a great extent marriage as an institution in Namibia is one of the factors that govern the proprietary rights of women and have contributed to some of the discriminatory laws and practices that prevent women from getting access to property.

6.2.1 Civil law marriages

Until 1996 the proprietary consequences of marriage in Namibia were governed by the Roman-Dutch common law which provided that all marriages were automatically in community of property unless, before entering into the marriage, the parties had concluded an ante nuptial contract, creating a property regime that was out of community of property. Under the Roman-Dutch common law principles relating to marriages in community of property, the property of the spouses, wherever situated, present and future, movable and immovable, including debts is merged into a joint estate in which the spouses hold equal and indivisible shares regardless of their contributions.[28] The joint estate automatically falls under the administration of the husband by virtue of his marital power. As administrator of the estate the husband has the power to alienate, encumber or otherwise deal with the property as he sees fit. More importantly, in terms of proprietary rights, the wife may not enter into any contract to obtain property or have property registered in her name without the consent of the husband.[29]

These two types of marital property regimes are still recognised in Namibia but the common law principles relating to the marital power of the husband were substantially modified by the Married Persons Equality Act 1 of

28 Voet 32.2.85.
29 See generally WJ Hosten *et al Introduction to South African law and legal theory 2nd ed* (1997) 590-596.

1996. Section 2 of the Act abolishes the marital power of the husband acquired under the common law and removes the restrictions which the marital power places on the legal capacity of a wife to contract and litigate, including, but not limited to, the restrictions on her capacity to register immovable property in her name.[30] It follows that during marriage a married woman has the capacity to register any immovable property in her name. However, if the property forms part of a joint estate, she will need the consent of her husband if she wants to alienate, mortgage, burden with a servitude or confer any other real right in any immovable property forming part of the joint estate.[31]

With regard to marital proprietary rights of Black Namibians, the applicability of the Roman-Dutch common law rules relating to marriages in and out of community of property depended on the geographical location of the place that the marriage was contracted. The Native Administration Proclamation 15 of 1928, part of which is still in force in Namibia, provides that all civil marriages between natives north of the old 'Police Zone' concluded on or after 1 August 1950 are automatically out of community of property, unless a declaration establishing another property regime was made to the marriage officer one month before the marriage took place.

Marriages contracted under customary law are regulated by the customary law of a particular tribal community. The proprietary rights of women married under customary law are governed solely by a particular customary law. Women can be allotted land in some communities but in practice communal land is usually allocated to the husband. This has led to the problem of widows in some communities being stripped of land and household goods by the husband's extended family members after his death. This exacerbates women's vulnerability to HIV and AIDS and creates an overdependence on men.

6.2.1.1 Property rights of women after divorce

The property rights of spouses at divorce will be determined by Roman-Dutch law. This means that if they were married in community of property, they share their property equally and if they were married out of community of property, each takes the share that belongs to him or her. This is, however, subject to the facts of each case with regard to the conduct of the parties because under current Namibian law, the property rights of spouses, after dissolution of marriage by divorce, are governed by the fault principle. It is worthwhile mentioning that in the case of a marriage contracted by African persons, the proprietary rights of the spouses will be governed by the relevant provisions of the Native Administration Proclamation 15 of 1928, which *inter alia* states that:

30 Sec 3(a)(i).
31 Sec 7(1)(a).

> such marriage shall not produce the legal consequences of marriage in community of property between the spouses. There is a proviso to the extent that in the case of a marriage contracted otherwise than during the subsistence of a customary union between the husband and any woman other than the wife, it shall be competent for the intending spouses, at any time within one month previous to the celebration of such marriage, to declare jointly before any magistrate or marriage officer that it is their intention and desire that community of property and of profit and loss result from their marriage, and thereupon, such community shall result from their marriage.[32]

In *Mofuka v Mofuka*[33] the respondent sued the appellant for a divorce and alleged in her particulars of claim that the parties had been married on 1 September 1995 at Onawa, Ovamboland,[34] and that the marriage was in community of property. The Supreme Court *inter alia* affirmed the finding of the Judge *a quo* that section 17(6) of Proclamation 15 of 1928 applied to the marriage and that it was out of community of property, unless declared or agreed otherwise.

The common law principles which govern maintenance, the distribution of the matrimonial estate and custody of children have very scant parallels in customary law.[35] The husband in most cases obtains the majority of the marital assets and because of the application of the consequences of *lobola* he has custody of the children.

LeBeau[36] observes that with most communities in Namibia the law is such that, even if the husband is at fault with regard to the divorce, the customary court, where divorce proceedings take place, will grant the wife little or none of the marital property, with the possible exception of cooking pans or small household items. In other communities, such as Lozi, a wife may receive a small amount of communal property if she can prove that her husband was at fault for the break-up of the marriage. In the Kavango the person found at fault for the divorce, whether the husband or the wife has to pay a 'divorce fine'. However, given the fact that customary courts are only held by men, that in many customary courts women may not be allowed to attend or may not be allowed to speak, and that the men who are members of the customary court are frequently related to the husband who is accused of wrong-doing, women often do not get a fair hearing before a customary court. In Nama, division of property in the event of a divorce is probably the most equitable because all divorces are done in a civil court. The Nama say that in the past the husband got all of the livestock but now livestock are shared between the couple. In most Namibian communities it is not a requirement that *lobola* be returned, unless the wife is found to be at fault for the divorce and in certain other circumstances, for instance, if she has not

32 Sec 17(6).
33 2003 NR 1 (SC).
34 Ohangwena Region.
35 TW Bennett *A sourcebook of African customary law for Southern Africa* (1996).
36 LeBeau *et al* (n 4 above).

yet had a child by her husband. In most Namibian communities, if *lobola* was paid, it is not returned. However, in Herero society, when *lobola* was paid, the extended family of the person at fault for causing the divorce has to pay the other extended family a gift for getting divorced which is not considered as a repayment of *lobola* but rather as a divorce fee.

Many people recognise that the manner in which property division takes place upon civil divorce depends upon whether the couple is married in or out of community of property. In the Khomas Region and with the Nama, there is general consensus that civil law makes provision for property to be shared equally and that civil law is more likely than other legal systems to protect women's rights to property during a divorce. In the Kavango and Omusati, people say that under customary law property is divided according to who owns the property, and as previously mentioned, the husband is considered the owner of most marital property but under civil law, if the couple is married in community of property, then the property is divided equally. In all of the regions the vast majority of those interviewed say that people with higher education and those that are urbanised are less likely to follow customary rules for the division of property upon divorce. Several people specifically mention that educated and**/**or urban women are more likely than uneducated or rural women to want to divorce in civil courts because these women feel they will get more of the marital assets than in a customary divorce. However, urban and rural people are interlinked, with most urban and educated people having their roots in the rural areas but primarily accessing the legal system that gives them the greatest advantage in the event of a divorce.[37]

6.2.1.2 Spousal inheritance

According to Le Beau,[38] the practices of widow inheritance (levirate) and widower inheritance (sororate) are still common among the Owambo, Herero, Lozi and, to a lesser extent, the Kavango. Under these customary laws, when a man dies one of his male relatives – usually the deceased husband's brother, nephew or uncle – 'inherit' his widow. The husband's extended family must decide who will inherit the widow and will send the man decided upon to take over the household of the deceased man. If the widow does not want to be inherited, she has to leave the household and all of its property and return to her natal extended family. In most cases the widow is expected to have sexual relations with the man who inherits her, unless she is elderly in which case the couple will simply live together. Also in Owambo, Hereo, Lozi and, to a lesser extent, Kavango custom a widower is inherited by one of his deceased wife's female relatives – usually the deceased wife's younger sister, cousin or niece. Again, the widower is expected to have sexual relations with his new wife. Of interest is the fact that

37 As above.
38 As above.

widowers are said to have more latitude in deciding whether or not they want to be inherited. In most of the communities under consideration, people say that the practice of spousal inheritance has only changed slightly due to the advent of AIDS. However, people in the Kavango report that the practice of widow inheritance has all but disappeared while the practice of widower inheritance has been greatly reduced.[39]

6.2.1.3 Rights of women to property upon death of spouse

The proprietary rights of a surviving spouse depend on whether the deceased spouse died testate or intestate. If the spouse died testate, the provisions of Wills Act 7 of 1953 will apply. In the case of intestate succession there is no uniform legislation applying to both whites and Africans. The Intestate Succession Ordinance 12 of 1946, as amended by the Intestate Succession Amendment Act 15 of 1982, applies to whites and the provisions of Proclamation 15 of 1928 apply to Africans.[40]

In terms of the Intestate Succession Ordinance 12 of 1946 the surviving spouse of every person who dies either wholly or partly intestate, is declared to be an intestate heir of the deceased spouse according to the following rules:

> (a) If the spouses were married in community of property and if the deceased spouse leaves any descendant who is entitled to succeed *ab intestato,* the surviving spouse shall succeed to the extent of a child's share or to so much as together with the surviving spouse's share in the joint estate, does not exceed fifty thousand rand in value (whichever is the greater).
>
> (b) If the spouses were married out of community of property and if the deceased spouse leaves any descendant who is entitled to succeed *ab intestato,* the surviving spouse shall succeed to the extent of a child's share or to so much as does not exceed fifty thousand rand in value (whichever is the greater).
>
> (c) If the spouses were married either in or out of community of property, and the deceased spouse leaves no descendant who is entitled to succeed *ab intestato* but leaves a parent or a brother or a sister (whether of the full or half blood) who is entitled to succeed, the surviving spouse shall succeed to the extent of a half share or to so much as does not exceed fifty thousand rand in value (whichever is the greater).
>
> (d) In any case not covered by paragraphs (a), (b), or (c) the surviving spouse shall be the sole intestate heir.

With regard to marriages contracted between two Africans, the proprietary rights of the surviving spouse are governed by section 18(1) and (2) which provide as follows:

39 As above.
40 See also *Mofuka* (n 33 above).

> (1) All movable property belonging to a Native and allotted by him or accruing under native law or custom to any woman with whom he or she lived in a customary union, or to any house, shall upon his death devolve and be administered under native law and custom.
>
> (2) All other property of whatsoever kind belonging to a Native shall be capable of being devised by will. Any such property not so devised shall devolve and be administered according to native law and custom.

The customary rules on intestate inheritance are different in different communities and inheritance depends on whether the tribal community follows a matrilineal or patrilineal system of inheritance. It follows therefore that with regard to immovable property, the rights of a widow of such marriage will be determined by the relevant customary law. The provisions of this Proclamation have been challenged as unconstitutional and discriminatory.

6.2.1.4 Private land freehold titles

As mentioned earlier, article 16 of the Constitution guarantees everyone the right to private ownership of land. This provision means that black Namibians, including women, are constitutionally entitled to own properties with freehold titles. Freehold titles over land in urban centres may be acquired through alienation of land hitherto vested in local authorities under the Local Authorities Act 23 of 1992,[41] or through private treaties between individuals.

The rights of women discussed under the various scenarios above apply *mutatis mutandis.*

6.2.2 The property rights of women under customary law

6.2.2.1 Communal Lands

Article 66 of the Constitution recognises the general application of customary law as source of law in Namibia subject to the proviso that it shall remain valid to the extent to which such customary law does not conflict with the Constitution or any other statutory law. The proprietary rights of women governed by customary law will be discussed within the general context of customary land tenure systems that operate within the communal areas. The relevant legal regime consists of the particular customary law of a tribal community and the provisions of the Communal Land Reform Act 5 of 2002.[42]

The primary purpose of the Act is to make the process of land allocation and land administration fair and transparent, and to enhance security of tenure in the communal areas by giving statutory recognition to existing land

41 See Secs 3(3)(a), 3(5)(b) and 30(1)(t) of the Local Authorities Act.
42 See generally Amoo (n 21 above) 103-108.

rights and by creating new rights. It vests ownership of the communal lands in the state and creates two rights that may be allocated in respect of communal land: customary land rights and rights of leasehold. The Act thus reaffirms customary rights of usufruct granted to occupiers of communal land and confers statutory recognition on this tenure system. It does not grant full rights of ownership to holders of customary rights of usufruct but it does specify the duration of the customary land rights and makes provision for registration. The Act has one provision relating to the allocation of land to a surviving spouse in the event of the death of the holder of the right.[43]

In terms of the provisions of the Act, the proprietary rights of a woman to a communal land under the various statutory titles are guaranteed by legislation. But the Act fails to recognise the realities of the patriarchal nature of the traditional society and how this will influence the allocation of land by the traditional authorities and the Land Boards. It also fails to recognise the leadership role that a boy/man plays in the family and therefore the preferential, legitimate choice that is accorded him rather than the girl in family relations, including land allocation.

In most communal areas in Namibia, traditional leaders such as headmen, chiefs, *indunas* and kings, control land although communal land is owned by the state.[44] With the possible exception of the Nama, these traditional leaders are mostly men. Land in the communal areas is distributed by traditional leaders, who are generally male, to the males in the community. Thus, those who use land are not necessarily the same as those who control land. The Nama communities are an exception; the general perception is that women use land, although men control land. Le Beau[45] noted that there used to be the perception in the Khomas Region that due to private land ownership, the person who controls, uses and owns land is one-and-the-same. However, people in Kavango, Owambo, Herero and Lozi noted that traditional leaders and heads of households – identified as men – control land, while women are the primary users of it.

The study also acknowledges that several customary practices in Namibia discriminate against women in that they are denied access to property accumulated during marriage. This lack of access to property, including lack of access to land, serves to reinforce women's subordination to men. Women are caught in a cycle of poverty due to a lack of control over property, which leads to a lack of economic independence. Most interviewees[46] noted that women are entitled to use most types of property. However, it was also said that married women required the permission of their husbands to use property. Property that women are most often said to be able to use with impunity includes their own personal items such as clothes and shoes, as well

43 See sec 26 of the Communal Land Reform Act.
44 LeBeau *et al* (n 4 above); sec 17 of the Communal Land Reform Act.
45 LeBeau *et al* (n 4 above).
46 As above.

as household and kitchen items such as cooking pots and dishes. In most communities under study,[47] unmarried women have more rights to use property than married women because the latter have to ask their husbands' permission first. Unmarried women in the study often had their own homes and could do as they pleased with their own property.[48] Although it was pointed out that in traditional societies unmarried women were not allowed to live alone, the respondents felt that contemporary women in most Namibian communities were better off if they did not marry because they had greater freedom in the use of property. In most traditional households in Namibia, once a woman marries, her husband takes over control of the marital property, sometimes even including her own separate property contribution. However, most people hold the 'traditional' attitude that land, homesteads, livestock and large moveable property, such as cars and tractors, should remain in the hands of men, and that men should, in general, continue to dominate property ownership.

As regards property women are permitted to use without restriction, unmarried women were said to be able to own more types of property than married women.[49] As with property use and ownership, women are limited in types of property they can dispose of and married women cannot dispose of any communal property without their husbands' consent.

There are significantly differing opinions within and between communities as to whether or not children born outside of marriage should inherit from their father. In the Khomas Region respondents felt it was the mother's responsibility to find out if her children had inherited any property.[50] Others believed children had no right to inherit any property at all. In general, respondents in Nama communities said that children born out of wedlock have a right to inherit from their father's estate. In Owambo and Herero, interviewees felt that children born out of wedlock had no right to their father's estate – although in Herero communities, the father's family could 'purchase' the right for his children to inherit by paying the mother's extended family one head of cattle. In Kavango and Lozi communities, children born outside marriage could inherit from their father if they had already been recognised as being the children.[51] However, it should be noted that in the case of *Frans v Pasche & Others,*[52] the High Court of the Republic of Namibia ruled that the principle that illegitimate children could not inherit was unconstitutional.

47 As above.
48 As above.
49 As above.
50 As above.
51 As above.
52 2007 2 NR 520 (HC) at 528-529. See also sec 16(2) of the Children's Status Act 6 of 2006.

7 Access to credit

As indicated earlier, a mere provision of legal rights to property is not enough. For one to fully realise the right to property one must be empowered or must have access to the wherewithal that will make the realisation of the legal rights possible. In other words, the individual or in this context women, must have access to credit. NDP1 describes Namibia's financial sector as small and dualistic. It states that 'as is the case in many developing countries, there is on the one hand, a well-developed financial system, mainly serving the urban centers, while on the other hand, large portions of rural areas are left with little or no access to financial services'. It has been observed that due to women's concentration in the rural areas, the distribution credit institutions are a major barrier to rural women's access to credit.

Formal sources of credit in Namibia include five commercial banks, two building societies, seven parastatals, including the Namibian Development Cooperation (NDC), National Housing Enterprise (NHE), and the Agricultural Bank of Namibia (ABN). There is also the Build Together Programme (BTP) administered by the Ministry of Regional and Local Government and Housing, as well as NGOs and a number of credit unions and rural saving schemes. Women's Action for Development (WAD), although not a source of credit, does provide financial support to a few female owned and operated income-generating projects.

Although there is, in theory, no discrimination against women by commercial banks and all customers are supposed to be treated equally, women tend to have more difficulty to acquire loans due to a lack of collateral and credit record. There are no statistics on loans by these institutions which distinguish between customers on the grounds of gender, so loan prevalence rates cannot be determined. However, in the past women married in community of property were required to have the consent of their husbands to enter into contracts and obtain loans due to the husband's 'marital power' over his wife. This situation has changed as from 21 May 1996 when the Married Persons Equality Act 1 of 1996 was passed which abolished marital power.

Commercial institutions such as banks do not have any programmes directed specifically at women and they do not have any significant programmes or activities in the field of micro-economic enterprise development. Interviews with bank officials reveal they do not feel that they discriminate against women when extending credit. However, Standard Bank officials say that women can get loans if they have repaid previous loans on time. The City Savings and Investment Bank loans money for informal investment if an applicant can meet a list of criteria including proof of regular income. The Commercial Bank only gives loans to invest in the formal sector. All of these various criteria, although not specifically directed at women, form

an effective barrier to women's access to credit, although women tend to have better repayment records on home mortgage loans than men.[53]

The figures released by the Agribank to The Parliamentary Standing Committee on Economics, Natural Resources and Public Administration indicate that during the 2003/2004 financial year a total number of 553 farmers were granted loans.

The statistics on Gender Housing Occupancy from the NHE taken from a sample of six of their German Development Funded Projects in Windhoek and other towns in 2003/4 are as follows:

- 123 houses in Goreangab, Windhoek, 51/ 123 = 41.46 per cent females
- 95 houses in Freedom Square, Windhoek, 51/95 = 53.68 per cent females
- 99 core houses in Twahaagana, Walvis Bay, 23/99 = 23.23 per cent females
- 203 houses in Kuisebmund, Walvis Bay, 63/203 = 31.03per cent females
- 80 houses in Swakopmund, 30/80 = 37.5 per cent females

Namibia has inherited a history of several forms of social and economic structural inequalities resulting from colonialism and South African apartheid. This historical imbalance had a gender dimension which impacted negatively on the rights of women to property and related social problems. The HIV/AIDS pandemic has added its toll to the impact of discrimination that women in Namibia face with regard to especially property rights, access to credit facilities, unemployment and certain customary practices.

As a matter of general legal principle, the respect for human dignity and equality and freedom from discrimination clauses in the Namibian Constitution extend to all persons, including both persons living with AIDS and those who are HIV positive. However, there are still some legal and cultural norms and practices that do not accord with the letter and spirit of the noble ideals of the Constitution.

In the area of property rights it has been mentioned earlier that the mere provision of the right to the acquisition of property without the requisite workable and enforceable empowerment strategies and policies by government and the private sector will reduce the ideals of the Constitution to a mere charade or façade. It will therefore be worthwhile to look at the practices of the financial sector in relation to HIV/AIDS.

The financial sector comprises mainly the insurance companies and the commercial banks. In the context of property rights of women living with AIDS and those who are HIV/AIDS positive, the policies and practice of the financial sector play a very crucial role in determining the realisation of the rights of women to property.

53 EM Ipinge & D LeBeau *Beyond inequalities, women in Namibia* (2005).

Insurance provides financial security against unforeseen and unpredictable events such as death and disability. Therefore, it is regarded as the key long-term investment made by working individuals. More importantly, it is also used as collateral in obtaining mortgage bonds for the purchase of property, in particularly a home.

There are essentially the following four types of insurance cover that present difficulties for people living with HIV/AIDS:

(a) *Life insurance* is obtained when the insurer, in exchange for the periodical payments of premiums, agrees to pay an amount of money to a beneficiary indicated by the insured person on the occurrence of the death of the latter. Funeral insurance for more than $10 000 falls in this category.

(b) *Assistance insurance* is similar to life insurance except that the benefits payable are valued at less than $10 000.

(c) *Disability insurance* usually forms part of life insurance. The benefit payable is two-fold. Should the insured person be unable to pay insurance premiums for a certain period of time because of ill health (period of temporary disability), the company waives payment of premiums for that period. Should the insured person become permanently disabled, the insurer would pay the insured person a large single amount of money or periodic smaller amounts.

(d) *Health insurance* covers payment for hospitalisation, major surgery, and emergency transportation to hospital.. Health insurance is not the same as medical aid.

A common factor with all these types of insurance is that the life expectancy and health is the basis for cover. More especially, in the context of a woman living with HIV/AIDS, wishing to obtain a home loan current policies and practice of the insurance industry and commercial banks are closely interrelated. Policy and practice in terms of profit-making may make good business sense and be justifiable but in terms of protecting the interests of women infected and affected with HIV/AIDS, there is much to be desired. The current situation is in need of legislative intervention or review by the insurance industry itself.

To obtain a home loan from a bank, one needs to provide the bank with some sort of security or collateral. Usually this is done by ceding a life insurance policy to the bank. For people living with HIV this is not an option as they are denied life insurance cover because of their HIV status.

Furthermore, insurance contracts usually contain exemptions or exclusion clauses which exclude the liability of the insurance company if the insured person was infected with HIV at the time of death or where, in the opinion of the company, the claim is occasioned by infection with HIV. The injustices inherent in these policies are evident in the subjectivity of the absolute discretion given to the insurance industry in determining the cause of death, irrespective of the actual cause of death. Women living with HIV/AIDS are disadvantaged by this practice. In the first place, it is common

knowledge that Namibia is a patriarchal society and most households in Namibia are headed by men. The Census Indicators for 2001 and 1991 show that 55 per cent of households are headed by males and 45 per cent by females. A widow cannot claim under the policy of a deceased husband in such instances and, furthermore, the property which is not covered by a life policy is subject to foreclosure irrespective of the widow's wish to continue with payment of instalments under the bond entered into between the husband and the insurance company. In the case of a single mother living with HIV/AIDS she is denied access to obtaining credit facilities or has to pay a higher premium.

Some insurance companies have, under pressure from activists, revised their policies to include coverage for people living with HIV/AIDS. However, there is no indication that similar policy changes with respect to access to mortgage bonds or house loans are in the offing.

Documented evidence of research conducted on information obtained from various sources shows that lack of accessibility to property resulting from acceptable commercial practices, not directly prohibited by the law, or from customary practices impacts on lowering the social status of women *vis-à-vis* men. Hence, women find themselves at risk of being exploited by men. According to Le Beau,[54] consequences of gender inequality and patriarchy, such as gender-based violence, women in poverty and women's lack of access to social and economic resources, place them at particular risk of HIV infection.[55] Barcelona is not the only forum on HIV/AIDS where gender inequality and patriarchy have been linked to women's risk of HIV infection. At the *Durban National Treatment Conference on HIV/AIDS,* COSATU General Secretary, Zwelinzima Vavi, said the following: 'Quite clearly as long as we still have a patriarchal society that undermines gender equality we are far from defeating HIV/AIDS. Statistics bear testimony to this unequal relationship between men and women. Indeed the Namibia UNDP report (2001:35) concludes that in Namibia, the major area where differences between women and men come to the fore is that of access to resources and decision-making'.[56]

8 Conclusion

This Chapter is an attempt to highlight some of the salient aspects of property rights in Namibia, the impact of the gender inequality on women's vulnerability to HIV infection and to ascertain on the preponderance of the current enabling laws and practices whether the issue of proprietary rights of women in Namibia is a myth or reality.

54 LeBeau *et al* (n 4 above).
55 LeBeau *et al Structural conditions for the progression of the HIV/AIDS pandemic in Namibia* (2004).
56 As above.

The Government of the Republic of Namibia inherited a land tenure system that was discriminatory. It was discriminatory against Africans in general and women in particular. Property rights of women were governed by both the general law and in the case of African women, customary law. One of the challenges faced by women in contemporary Namibian society is women's unequal access *vis-à-vis* men to property and inheritance rights, which in turn limits women's ability to strive for gender equality within both their personal and social spheres of life. The lack of ability to manipulate property through use, ownership and disposition limits women's economic choices and causes them to be economically dependent on men, which in turn makes women more vulnerable to HIV and AIDS.

In the rural areas, women's lack of access to communal land in their own right is a significant cultural impediment to greater gender equality because women are dependent on men to access their main means of production. The practice of widow inheritance is degrading to women and makes them vulnerable to physical abuse at the hands of the inheriting husband, exposes both men and women to the risk of HIV infection, and no longer serves the purpose of protecting young widows and children. A similar problem can be seen in widower inheritance whereby the new spouse, often younger than the widower, is exposed to violence and HIV infection. Spousal inheritance should be discouraged through information campaigns and possibly addressed through legislative reform.

Any reforms in property regimes should also encourage greater accumulation of property which women can customarily own. Of concern is that, if civil law were changed to provide for the equal division of joint property, it would preclude extended family members from inheriting all joint assets, although they could, theoretically, inherit the deceased's spouse's portion of the joint assets. There is also scope for adapting the accrual concept of sharing the gain from the marriage. Law reform should progress towards a more equitable distribution of property during divorce or upon death. These laws should specifically protect vulnerable groups such as rural women and orphans.

The constitutional principle of equality needs to be applied to customary law on inheritance. Customary inheritance rules need to be reformed so as to ensure, for example, that, a woman born in a Herero community should not have fewer rights to property than a man or a woman born in a Nama community. Law reform should insist that boys and girls should be treated equally as children for purposes of their intestate inheritance under customary law. The principle of primogeniture (inheritance by the oldest male child) was once the norm in Western civil law around the world but over the years this principle has been discarded in favour of equality between the sexes. A similar evolution is needed in the African customary law context. Law reforms on inheritance, which could remove sex discrimination, need to be officially formulated and then widely discussed and debated so that changes in this highly personal and traditional area can be acceptable and workable in

practice. Much groundwork will be needed before rights given in theory can be asserted in practice in this area.

CHAPTER 11

LAND REFORM IN NAMIBIA

1 Introduction

As stated in the previous Chapter, the concern for land reform in Namibia is raised in the opening paragraph of the *White Paper* in the following terms:

> Access to and tenure of land were among the most important concerns of the Namibian people in their struggle for independence. Since 1990, and following the 1991 National Conference on Land Reform, and the Consultative Conference on Communal Land Administration 1996 Namibia's democratically elected Government has maintained and developed its commitments to redressing the injustices of the past in a spirit of national reconciliation and to promoting sustainable economic development. The wise and fair allocation, administration and use of the nation's urban and rural land resources are essential if these goals are to be met.[1]

Pursuant to various national conferences on the land question[2] and consistent with its avowed policy of land reform the Government had the Agricultural (Commercial) Land Reform Act No 6 of 1995 promulgated. This Act is meant to provide the Namibian government with the necessary legal tools to acquire commercial farms for the resettlement of displaced persons, and for the purposes of land reform. To date the implementation of the policy has been facilitated by the state and by market-assisted acquisition schemes based on the 'willing seller, willing buyer' principle. In terms of the acquisition scheme known as the National Resettlement Programme (NRP) the state acquires land for resettlement purposes in the market under the auspices of the Ministry of Lands and Resettlement (MLR). The Affirmative Action Loan Scheme (AALS) is a programme implemented by the Agricultural Bank of

1 Government of the Republic of Namibia *White paper on national land policy* (1997).
2 The Namibian Government has held a number of consultative conferences on the land question since the National Conference in 1991. These have led to the enactment of legislation on land and related matters and to the drafting of the *White paper on national land policy.* References to appropriate legislation and the *White Paper* are made elsewhere in this book.

Namibia on behalf of the Ministry of Agriculture, Water and Forestry. This programme was introduced by the Agricultural Bank Amendment Act 27 of 1991 and the Agricultural Bank Matters Amendment Act 15 of 1992 with the aim *inter alia* of resettling well-established and strong communal farmers on commercial farmland so as to minimise the pressure on grazing in communal areas. It assists formerly disadvantaged persons to acquire land themselves on the open market at subsidised interest rates. Between 1990 and October 2004 the two programmes together redistributed 4.31 million hectares, or 12 per cent, of the total area of freehold land in Namibia, benefiting some 2151 families. Since 1992 the AALS has distributed nearly four times the amount of land the NRP has distributed since 1990, namely 3.47 million hectares compared with some 874 000 hectares. In addition, the MAWF transferred 398 859 hectares to the MLR in 1992.[3] In his address to the National Assembly in May 2010 the Minister, Alpheus! Naruseb, indicated that the Ministry of Lands and Resettlement had earmarked 15 million hectares of freehold land to be redistributed by the year 2020.[4] The Minister added that in the 2009/10 Financial Year, the Ministry acquired eight farms covering a total area of 26 000 hectares at a cost of N$21.2 million, and he pointed out that this figure fell short of the set annual target of 534 000 hectares. He explained that the slow pace at which land was acquired had negatively impacted on the rate at which government could resettle people.

The implementation of the Act has, however, not been free from problems. As pointed out by the then Minister of Lands, Resettlement and Rehabilitation, Pendukeni Ithana, the Government's policy of 'willing seller, willing buyer' has imposed constraints on its ability to acquire fertile and more productive commercial farms.[5] This constraint was also alluded to by Minister Alpheus! Naruseb in his address mentioned earlier. However, an option that is open to the Government as a possible solution to this constraint may be found under the provisions of Chapter IV of the Act. Section 20, read with section 14(1), in terms of which the Minister is empowered to expropriate any commercial land for purposes of land reform in case of failure to negotiate the sale of property by mutual agreement. Under article 16 of the Constitution the government of Namibia has the sovereign power to expropriate private property.[6] Consistent with the norms of international law,[7] the Namibian Constitution provides for the justification of such expropriation on grounds of public interest and the payment of compensation. The power to expropriate is therefore a legal matter, while the decision to expropriate and determine the public interest is a political

3 'Strategic options and action plan for land reform in Namibia' Government of the Republic of Namibia, November 2005.
4 *The Namibian Sun* 20 May 2010.
5 See T Nandjaa 'The land question: Namibians demand urgent answers' *Namibia Review* (1997) 1-4 and note 89.
6 See art 16(2) of the Namibian Constitution and sec 14(1) and 20 of the Agricultural (Commercial) Land Reform Act.
7 See the Resolution on Permanent Sovereignty over Natural Resources, 1962 adopted in the case of *Texaco v Libya* (1977) 53 ILR 389.

one. It is worth mentioning also that this clause is not entrenched and therefore can be derogated from should a state of emergency be declared under articles 24(3) and 26 of the Constitution.[8] The Namibian government has to date expropriated about nine farms. This may be attributed both to political reasons and budgetary constraints relating to the payment of compensation.

2 White agriculture in modern day Namibia

Just as land dispossession has its history, so does the white agricultural order which followed. Namibian agriculture, under colonialism and apartheid, took on particular forms. In a state where farm ownership is politically and racially charged, it is not easy to determine exactly who owns the land because some ownership is concealed through various legal devices.[9] It is generally thought that about 4 200 families own about 6 000 commercial farms, with up to 700 of these farms held by blacks. Since independence black businessmen and politicians have purchased farms and about up to 700 black farmers have been loaned money through various state affirmative action programmes to buy commercial farms[10] but the commercial agricultural sector is still overwhelmingly white, and is so perceived by Namibian blacks. The 4 200 families referred to above represent much of the wealth in Namibia, with many urban residents owning farms that they use on weekends and holidays. At the same time, little of this wealth is actually generated by these farms, a situation much different from Zimbabwe where white-owned commercial farms were major sources of income, particularly in the form of foreign exchange. Many Namibian farms are held as 'hobby farms', one asset of people wealthy from other areas of enterprise. Again, this data is difficult to get access to but it is clear that the average Namibian farm is not a profitable enterprise and is in fact suffering under severe debt. At least 60 per cent, and up to as many as 70 per cent of all Namibian farms, are unprofitable. Debt loads are large, with debt repayment amounting to about N$300 million a year, representing about one-third of Namibia's estimated agricultural

8 This clearly means that the government, under such a state of emergency, can expropriate private property without compensation.

9 Because these various legal arrangements are secret it is not possible to say precisely how common these devices are, or even exactly what they are. Some 'foreign' ownership, for example, is concealed by registering farms in the name of Namibian citizens. Other farms are held in the name of relatives, or corporations. Corporately held farms may legally appear in individual ownership. Still other farms may still be legally registered to their former owners, although ownership has been secretly transferred by an unregistered legal arrangement. Some affirmative action scheme farmers have apparently bought land from whites at inflated prices, then leased these farms back to the original owners. There are rumours that politicians do not want farms in their own names because it would reveal wealth that cannot be accounted for, thus the number of politicians (mostly black) who own farms is not known.

10 There is no firm data on the number of blacks who own commercial farms. While 700 loans have been taken out under an affirmative action farm loan scheme, it is not clear that 700 farms have been purchased with this money.

income.[11] Debt loads are also rapidly increasing: in 1991 the average commercial farmer had to sell 31 per cent of his livestock to pay his debts; in 1998 this had increased to 64 per cent, effectively doubling debt in seven years.[12]

Debt per farmer has doubled since 1990, increasing from N$112 000 to N$227 000. Given that some farmers – perhaps as many as 30 per cent – carry no debt, the remaining farmers are even further in debt than these 'average' data would indicate.[13] The farms of such remaining farmers, averaging about 8 000 hectares each, 20 000 in the south, are running at an increasing annual loss. This means that the present generation of white farmers, averaging about 55 years of age, are content with agricultural enterprises producing little cash income and forcing them to borrow against their capital investments in order to maintain their agrarian life styles.[14]

Ironically, it now seems that this was always the case with Namibian farms: they were never profitable and always heavily subsidised by the state. Initially, the German government, using the model of the yeoman German farmer that worked so well in Canada and the United States, subsidised small farmers in order to populate its colony with Germans, a necessary requirement to create a colonial settler society on the model of North America or South Africa. Later, the South African government moved thousands of poor Afrikaners to Namibia, setting them up in a rural welfare scheme, a bulwark of agrarian Afrikaner values.[15] Even the choice of cattle or small stock as the major 'crop' was determined by South African officials who granted loans only for particular types of agricultural enterprises. A vast road system was built which is still among the best in Africa.[16] Wells were sunk all over the country in order to insure a constant supply of water in a semi-desert environment.[17] Dams and canal projects were built with plans developed to divert water from the Kunene and Kavango Rivers into central Namibia.[18]

Even with elaborate state efforts to develop water sources, drought is a periodic occurrence in Namibian agriculture. What rainfall that exists occurs

11 W Werner 'Agriculture and Land' in H Melber *Namibia: A decade of independence* (2000) 33.
12 As above.
13 As above.
14 M Adams & J Howell 'Redistributive land reform in Southern Africa' ODI (64) January 2001,4-5. This is a logical conclusion, drawn from the above data. The farming sector is distrustful of the Namibian government and may want to appear stronger and more important to the nation's economy than it is, therefore accurate economic data is not easily gained. It should also be noted that the threat of expropriation has encouraged farmers to use various devices to raise the value of their farms, both to discourage expropriation and to increase the payment in the event of expropriation.
15 W Schmokel 'The myth of white agriculture: Commercial agriculture in Namibia, 1900-1983' (1985) 18 *International Journal of African Historical Studies* 1.
16 R Moorsom *Transforming a wasted land*(1982) 11-14; JH van der Merwe (ed) *National atlas of South-West Africa* (1983) plates 10-14; J Mendelsohn *et al A profile of North-Central Namibia* (2000) 9-11.
17 C Stern & B Lau *Namibian water resources and their management: A preliminary history* (1990).
18 HW Stengel *Water Affairs in S.W.A Windhoek: Afrika-Verlag der Kreis* (1963).

during a few months between November and March[19] but rainfall, even in the 'rainy' season, is often irregular. It is therefore difficult to plan for herd development.[20] Periodic drought has also resulted in high levels of environmental degradation which ironically, is lowering the value of the farms, making it easier for the government to purchase them but also making it harder to successfully resettle black farmers on the land. Namibian grazing lands are stressed even under good conditions. Drought forces overgrazing, which has led to the permanent depletion of grasslands, desertification,[21] and bush encroachment, as worthless species of brush take hold where grass is gone, converting grasslands into shrubby wastelands.[22]

Since the 1950s, Namibian agriculture has become increasingly monocultural: cattle are the main cash source, and most farms are now 'ranches', raising nothing but cattle.[23] Cattle herds in the commercial areas have declined by 27 per cent since 1990, now numbering under 1 000 000 head.[24] Because Namibia has little grain, its cattle are grass fed, further stressing the environment. This means that it takes longer to raise cattle to market weight and they therefore produce an inferior grade of meat in the world market.[25] In the south, where there is too little grass for cattle, farmers raise over 2 000 000 sheep.[26] Namibia, a vast agricultural land, is self-supporting only in beef and mutton. Most of its food products must be imported, almost exclusively from South Africa.[27] Although cattle and small stock production dominates Namibian agriculture, there are several regions that support commercial crop production. A 'maize triangle' in the north, where there is more rainfall, produces about half of Namibia's corn and wheat requirements.[28]

What are now left of Namibian agriculture are the remnants of a wasteful, politically determined and subsidised system that never originally

19 See also Moorsom (n 16 above) 9-36.
20 J Sweet 'Livestock: Coping with drought: Namibia – A case study' unpublished paper, December 1998.
21 M Seely & K Jacobson 'Desertification in Namibia' *Namibia Environment* 1 (1996) 170-174; M Seely 'Environment: Harsh constraints, political flexibility,' in I Diener & O Graefe (eds) *Contemporary Namibia: The first landmarks of a post-apartheid society* (1948) 35-52; J Timberlake 'Soils and land use' in M Chenje & P Johnson (eds) *State of the environment in Southern Africa* (1994) 105-132; MK Seely & KM Jacobson 'Desertification and Namibia: a perspective 1994' *Journal of African Zoology* 108(1) 21-26.
22 B Bester 'Bush encroachment: A thorny problem' *Namibia Environment* 1 (1996) 175-177. Bush infestation is estimated to cover between 8 and 14.4 million hectares, the latter figure about 50 per cent of the commercial farming area. J Sweet 'Livestock – Coping with drought' 13.
23 B Lau & P Reiner *100 Years of Agricultural Development in Colonial Namibia* (1993) 20-22, 43.
24 Werner (n 11 above) 30-31; Sweet (n 20 above) 4 puts the number of cattle on commercial farms as 790 699 in 1997. The same year blacks held 1.3 million cattle in the communal areas.
25 Cattle fed on poor grass take longer to mature and yield tougher, poorer quality meat.
26 Sweet (n 20 above) 4.
27 Lau &Reiner (n 23 above) 11-14. W Elkan *Namibian agriculture: policies and prospects* 1992.
28 Sweet (n 20 above) 3.

belonged in Namibia but was introduced for concealed purposes which related to a colonial policy that no longer exists.[29] The irony here is striking: even if those farms were vacated tomorrow, it is not clear that they should – or even could – be re-occupied as farms. To do so would simply continue a wasteful form of colonial era agriculture. If white farmers required vast subsidies to operate in Namibia, black farmers will in all likelihood require the same. Thus, the major expense of land reform is probably not the cost of the land itself but the cost of government subsidies for future generations.

These commercial farms are at the core of an agrarian social structure that may provide jobs for about 15 per cent of the population. In 1997, 42 277 farm workers were employed in the commercial agricultural sector. An additional 38 125 were 'unpaid family workers'. With an average household size of 5.1, about 211 000 blacks are employed or supported by commercial agriculture.[30] Many black Namibians have worked on these farms their whole lives, and often have known no other home. While farm wages are generally low, farm workers may also draw benefits in terms of food, housing, and medical care that are much better than similar benefits available to the average Namibian. Any change in the ownership of these commercial farming operations will therefore displace large numbers of poor blacks with no other homes, low educational levels, and few other job skills.[31] The irony of 'land reform' is obvious: most of the people displaced are poor blacks while most of the whites who own farms already live in cities.

3 Security of tenure in the informal areas

In terms of land holding rights and security of tenure, the other category that needs to be considered are residents of the informal areas. Most of these people obtain their rights of occupation from traditional leaders. Such rights approximate to rights of usufruct. This category of residence has, however, never been granted official land rights by the authorities. It is this group of residents, together with those in the spontaneous settlements on the fringes of proclaimed urban areas, at which the newly proposed form of tenure, the starter title,[32] is aimed.

With the advent of independence, more Africans were absorbed into the public service and, to a lesser extent, into the private and commercial sectors. This has resulted in the influx of more affluent Africans into the urban centres. The character of black settlement in the urban centres has consequently become more heterogeneous and, with the right of private ownership guaranteed by Article 16 of the Constitution, more black urban

29 R Moorsom (n 16 above) 30-36.
30 W Werner *Promoting development among farm workers: Some options for Namibia* 2002 4.
31 Werner (n 30 above) 6-9.
32 These titles are the subject matter of the Flexible Land Tenure Act 4 of 2012.

dwellers are able to acquire property in the form of freehold title. Although this phenomenon may have corrected to a certain degree the injustices of the skewed colonial land policies, the effects of past racial discrimination and urbanisation had their own inherent problems. It is estimated that urban areas in Namibia are growing at a rate of 3.75 per cent per annum on average. The fastest growing towns, Walvis Bay, Katima Mulilo and Rundu are estimated to be growing at a rate of approximately 6.5 per cent per annum. Windhoek, whose total population was 34.5 per cent of the entire urban population of Namibia, increased by 5.45 per cent from 1991 to 1995.[33] This growth means that there is not only need for more land for urban settlement but also for security of tenure for people whose rights are not recognised by the existing system. It was estimated in 1995 that about 30 000 families living in informal settlements in urban areas did not enjoy security of tenure.[34] Most of these residents were squatters on land belonging to individuals or local authorities.

One reason for the non-existence of a more secure tenure system for urban settlements in the former Bantustan areas was the deliberate policy of the colonial administration to deny these urban centres official recognition as municipalities. A different policy would have led to the establishment of local authorities with the jurisdiction to grant freehold title after the satisfaction of infrastructural and surveying requirements.[35]

The first democratic Government of Namibia reacted to this situation by establishing local authorities in these areas under the Local Authorities Act 23 of 1992. The formalisation of urban centres in terms of this statute involves, firstly, the proclamation of the area as an urban area under the jurisdiction of the relevant local authority. This step is then followed by the registration of the town in the name of the state or relevant local authority. The proclamation and subsequent registration enable the local authority to subdivide the area and create plots or erven of urban land. The occupants of such plots receive freehold title. In the formal areas the intention is to sell existing erven to the relevant local authority, 'subject to the holders of Permissions to Occupy being given the first option on the plots they occupy at the sale date'.[36]

33 See also Chapter 2 at 2.4.4.

34 SF Christensen & PD Hojgaard *Report on flexible land tenure system for Namibia* (1997) 6.

35 According to the *White Paper on urban land and the proclamation of local authorities* the development of many urban areas prior to independence took place as a result of the discriminatory policies of the colonial regime in terms of which such areas were never proclaimed as municipalities or townships in which local authority administration could develop. The *White Paper on National Land Policy* requires the establishment and proclamation of urban and urbanising areas as townships and municipalities, where appropriate, to promote decentralisation of government and the close involvement of communities in their own administration.

36 As above.

4 Reform of customary land tenure

4.1 Nature of customary land tenure

Apart from the misdistribution of land along racial lines, the Namibian land programme has to be analysed from the perspective of customary land tenure systems that operated in the communal areas within the general context of customary law. Some of the issues of customary land tenure discussed in this book focus on the recognition and status of customary law and the nature of customary land tenure.

One of the legacies of colonisation in Africa is the juxtaposition of the received law emanating from the legal systems of the colonial countries alongside the customary law of the indigenous African communities. This juxtaposition subjected the application of customary law to various tests of recognition. As Max Gluckman[37] and other students of the jurisprudence and legal systems of traditional African societies have acknowledged, before the advent of colonialism African communities had their own laws and legal systems regulating the behaviour of individuals in society. These laws covered areas like civil and criminal liability, marriage, inheritance and succession and land tenure systems. Faced with the problem of accommodation, the colonial administration accorded limited recognition to customary law by subsuming it under the received law and by subjecting it to the all too familiar repugnancy clause test for equity, good conscience, and morality. This precondition for the recognition of customary law still exists in the constitutions and statute books of many African countries.

Customary law principles relating to criminal law generally did not withstand scrutiny under the repugnancy clause test. In the area of land law, however, the recognition and survival of indigenous legal principles depended upon different factors and considerations, including the ultimate colonial intent and design, economic factors, public domain concerns, and environmental and land use preoccupations. The general pattern was that in territories where the colonial administration did not intend to settle immigrants from the colonial country or from elsewhere in Europe, customary law relating to land tenure was given a fair amount of recognition.[38] In territories where the settlement of immigrants from Europe was the ultimate goal of the colonial powers, indigenous land tenure systems and property rights were given marginal recognition only and the indigenous

37 M Gluckman *Judicial process among the Barotse of Northern Rhodesia (Zambia)* (1967).

38 BJ da Rocha & CHK Lodoh *Ghana land law and conveyancing* (1995) state that in Ghana, for example, neither in theory nor in practice can it be said that all land is held from the state. Land in Ghana is held from various stools (skins) or families or clans, which are the allodial owners. The state holds lands only by acquisition from these traditional allodial owners. This right was recognised by Rayner CJ in a report on land tenure in West Africa, cited in the judgment of the Privy Council in the case of *Amodu Tijani v Secretary, Government of Southern Nigeria* 1921 2 AC 399.

communities were dispossessed of their property rights in favour of the immigrants and their property rights regimes. By legislation land was classified into crown (or state land) and native reserves (or communal lands) so that, as pointed out by TW Bennett,[39] 'the authority of customary law recognised in the administration of communal lands was a creation of colonial authorities'. In other words, native land was not communal land until the colonial authorities defined away all other forms of native land tenure. The latter pattern was more prominent in Southern Africa so that in these areas the characteristic feature of the customary law of land tenure is either the adulteration or lack of development of the indigenous systems. The Namibian pattern of classification, as described earlier, fits into this general Southern African pattern.

With the promulgation of the Namibia Independence Constitution customary law was recognised as one of the sources of law in Namibia. In its recognition of customary law as a source of law,[40] the Constitution removes the repugnancy clause and equates customary law with the common law. However, the Constitution left open the question of whether the new constitutional status of customary law in Namibia means that ownership of the communal lands is vested in the indigenous people as the holders of allodial titles to their ancestral lands. Article 100 of the Constitution vests ownership of all land in Namibia in the state, except for the land otherwise lawfully owned. The application of customary law in the communal areas, coupled with the fact that communal lands were the creation of legislation, has left many uncertainties regarding the exact rights of the indigenous people who occupy the communal lands and the administrative authority of the chiefs.

The position adopted in the *White Paper* on National Land Policy is that in terms of Schedule 5(1) of the Constitution, communal land is vested in the state to be administered in trust for the benefit of traditional communities and for the purpose of promoting the economic and social development of the Namibian people. This position constitutes one of the underlying principles of the Communal Land Reform Act 5 of 2002.

39 TW Bennett & NS Peart *A source book of African customary law for Southern Africa* (1991) 384-96.

40 Article 66(1) of the Constitution states that both the customary law and the common law of Namibia in force on the date of independence shall remain valid to the extent to which such customary and common law does not conflict with this Constitution or any other statutory law.

4.2 The Communal Land Reform Act

Article 100[41] of the Constitution and section 17 of the Communal Land Reform Act have maintained the position that the communal lands are vested in the state in trust for the benefit of the traditional communities residing in those communal areas and for the purpose of promoting the economic and social development of the people, in particular the landless and those with insufficient access to land who are not in formal employment or engaged in non-agricultural activities. This position goes further than the position of the communal lands at the time of independence, as will be explained later.

The claims arising from Article 100 and Schedule 5 of the Constitution have an international law foundation supported in a series of resolutions of the United Nations. In the 1970s, developing countries attempted to establish what they termed the 'New International Economic Order' (NIEO) through a series of UN resolutions, including the 1973 Resolution on Permanent Sovereignty over Natural Resources,[42] the Charter of Economic Rights and Duties of States,[43] and the Declaration on the Establishment of a New International Economic Order.[44] In contrast with Resolution 1803, the 1973 Resolution on Permanent Sovereignty over Natural Resources 'affirmed' that:

> the application of the principle of nationalization as carried out by States, as an expression of their sovereignty in order to safeguard their natural resources, implies that each State is entitled to determine the amount of possible compensation and the mode of payment, and that any disputes which might arise should be settled in accordance with the national legislation of each State carrying out such measures.

The extent of these sweeping claims of state ownership at community level is, however, truly staggering. These international resolutions are meant to cover mainly rights regarding compensation when the state nationalises private property.[45] In many countries, the nation-state claims ownership to well over half of the land base. In this regard the word 'vested' in section 17(1) of the Communal Land Reform Act is of particular relevance because of the confusion it creates regarding the ownership of communal land and resources like trees found on that land. Section 17 therefore requires closer analyses.

41 Article 100 provides that: '[l]and, water and natural resources below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia shall belong to the State if they are not otherwise lawfully owned'.
42 GA Res 3171 XXVIII 1973.
43 GA Res 3281 XXIX 1974.
44 GA Res 3201 XXIX 1974.
45 PB Gann (1985) 23 Col. JTL. 615.

Since independence the ruling Government has, under the empowerment of the constitution and international law, embarked upon a land reform agenda which also included reform of communal land. The Government's proposals on communal land reform in the *White paper* on Land Policy have been addressed in the Communal Land Reform Act.[46] As stated in Chapter 10, the primary purpose of this Act is to make the process of land allocation and land administration fair and transparent, and to enhance security of tenure in the communal areas by giving statutory recognition to existing land rights and by creating new rights. The Act also seeks to introduce a certain degree of uniformity in land policy throughout the country by laying down new procedures regarding land allocation, utilisation and transfer or inheritance. It addresses, *inter alia*, issues relevant to administration of communal land, titles to communal land, security of tenure and as stated earlier, it reiterates the position in the *White Paper* that ownership of rural land is vested in the state.

With regard to rights over communal land, whilst recognising the underlining principle that the ownership of communal lands is vested in the state, the Act creates two rights that may be allocated in respect of communal land: customary land rights and rights of leasehold.[47] The Act thus reaffirms customary rights of usufruct[48] granted to occupiers of communal land and seeks to confer statutory recognition on this tenure system. The Act does not go beyond the right of usufruct. It does, however, specify the duration of customary land rights[49] and makes provision for their registration[50] and upgrading to the status of leaseholds in order to encourage and promote the development of the communal lands. Registration only constitutes publicity or proof of title. It does not confer on the holder any additional power for example, the power to use the title as collateral.

The other right created by the Act is the right of leasehold, or statutory leasehold.[51] This right is intended to replace the existing PTO, which is granted by the Ministry of Lands for the use of land for any specific purpose, especially for commercial undertakings. In terms of the Act, the power to grant leasehold rights is vested in the Communal Land Board,[52] and not in the Ministry of Lands. The right is granted for a maximum statutory period of 99 years. If the right is granted for a period exceeding 10 years, it is invalid unless

46 The Communal Land Reform Act contains the proposed provisions on the question of ownership, types of titles, security of tenure, and administration of communal land. In addition to this, the Traditional Authorities Act 17 of 1995 and the Council of Traditional Leaders Act 19 of 1997 provide for jurisdiction with regard to certain matters pertaining to the allocation and administration of communal land to the traditional authorities.

47 See sec 19 of the Act.

48 Under section 21 the customary rights that may be allocated comprise a right to a farming unit and a right to a residential unit. Section 20 vests the power to allocate or cancel any customary land right in the communal area of a traditional community in the Chiefs and Traditional Authorities.

49 See sec 26.

50 See sec 25(1)(b).

51 See secs 19(b) and 30(1).

52 The Communal Land Boards are created under section 2(1) of the Act.

approved by the Minister.[53] The grant of leasehold rights is subject to registration.[54] If the land in respect of which the right of leasehold is granted is surveyed land, in other words land which is shown on a diagram as defined in section 1 of the Land Survey Act 33 of 1993, and the lease is for a period of 10 years or more, the leasehold must be registered in accordance with the Deeds Registries Act 47 of 1937.[55] These provisions therefore guarantee security of tenure, and could serve as a catalyst for the development of commercial activities in the communal areas.

The Act recognises the role of traditional authorities in communal land administration by vesting in the Chiefs and the traditional authorities the power to allocate communal land, subject to supervision by the Communal Land Boards.[56] This provision should not be interpreted as a potential threat to the rights of traditional leaders under Article 102(5) of the Constitution, which provides for the establishment of a Council of Traditional Leaders by Act of Parliament 'to advise the President on the control and utilization of communal land'. The role of the Communal Land Boards must rather be seen as administrative and advisory.

5 Conclusion

As stated earlier, access to land and tenure of land were among the most important concerns of the Namibian people in their struggle for independence. Consequently, since independence Namibia's democratically elected Government has maintained and developed its commitments to redressing the injustices of the past in a spirit of national reconciliation and to promoting sustainable economic development. Namibia's land reform is premised on correcting the imbalance created by the apartheid-skewed land policy. It is driven by the policy of reconciliation and it is geared towards poverty alleviation and social and economic equity. In this sense it is aimed at redistribution and restitution which is necessary to ensure the long term stability of the country. Poverty alleviation in the context of land reform can be realized through effective and productive utilisation of the distributed land, which in turn contributes to increased agricultural productivity and improvement in gross national income.

53 See sec 34.
54 See sec 33(1).
55 See sec 33(2).
56 See secs 2 and 3. The establishment of the Communal Land Boards will be a completely new development in the law relating to communal land in Namibia, though Botswana and other countries have similar Boards.

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