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.

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.

Diagram 1

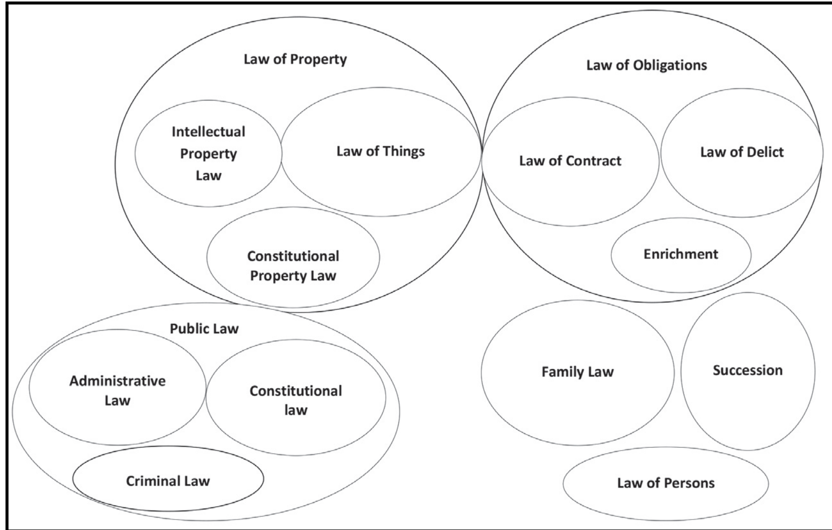


Diagram 1 above indicates the domain of the law of property in the context of the various broad divisions and subdivisions of the law.

What is referred to as 'law of property' relates to the law of property in the wide sense. It includes everything that is of value to a legal person or the legal subject.

In its various sub-divisions, the law of property relates to the law of things, which deals with the relationship between the legal subject and an object, or a thing. In this context, the law of property is classified in a narrow sense.

Intellectual property refers to property that is the product of an individual's intellect. It includes patents and copyrights.

The right to property under both international human rights jurisprudence and municipal law is generally in the province of the Constitution. In this sense therefore, there is an overlapping between the law of property, as a sub-division of private law and the public law since constitutional law is in the domain of public law.

The law of property in the broad sense therefore includes the various broad divisions and subdivisions.

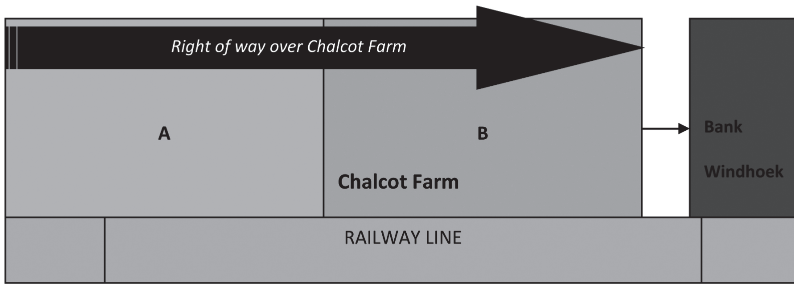
One important area of the law of property is the concept of rights. The law of property draws a distinction between real right and personal right. The former is a right that creates a relationship between a legal subject and a thing whereas the latter, personal right, arises from relationship between legal subjects *inter se*. This relationship may be governed for example by the

law of contract or delict, both of which belong to the realm of the law of obligations, which generally deals with the legal relationships constituting obligations between persons.

It is clear therefore that from the classification point of view and the delineation of the province of the law of property, there is an overlapping between various parts of the law.

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 in a hypothetical scenario.

Diagram 2



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

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

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.

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.

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, the Communal Land Reform Act 5 of 2002 and the Flexible Land Tenure Act 4 of 2012.

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

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'.

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 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 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

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

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.

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

7 1983 5 EHRR 35.
8 1989 ECHR series A, vol 5, 1959.
9 1926 PCIJ series A, no 7 (May 25) 22.
10 See generally Van der Walt & Pienaar (n 2 above) 7-11.

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 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]

11 See also *Mambo & Others v Queensland* (No2) 1992 175 ALR 1 and *Richtersveld Community & Others v Alexkor Ltd & Another* 2003 6 BCLR 583.

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

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[13] 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 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.[14]

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

13 See also the case of *Agnes Kahimbi Kashela v Katima Mulilo Town Council* SA 15/2017 [2018] NASC 409 (16 November 2018).

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

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 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.