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.

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 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,

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.

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.[9] 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.[10] 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.

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.

9 PJ Badenhorst *et al Silberberg & Schoeman's the law of property 5th ed* (2006) 20-21.

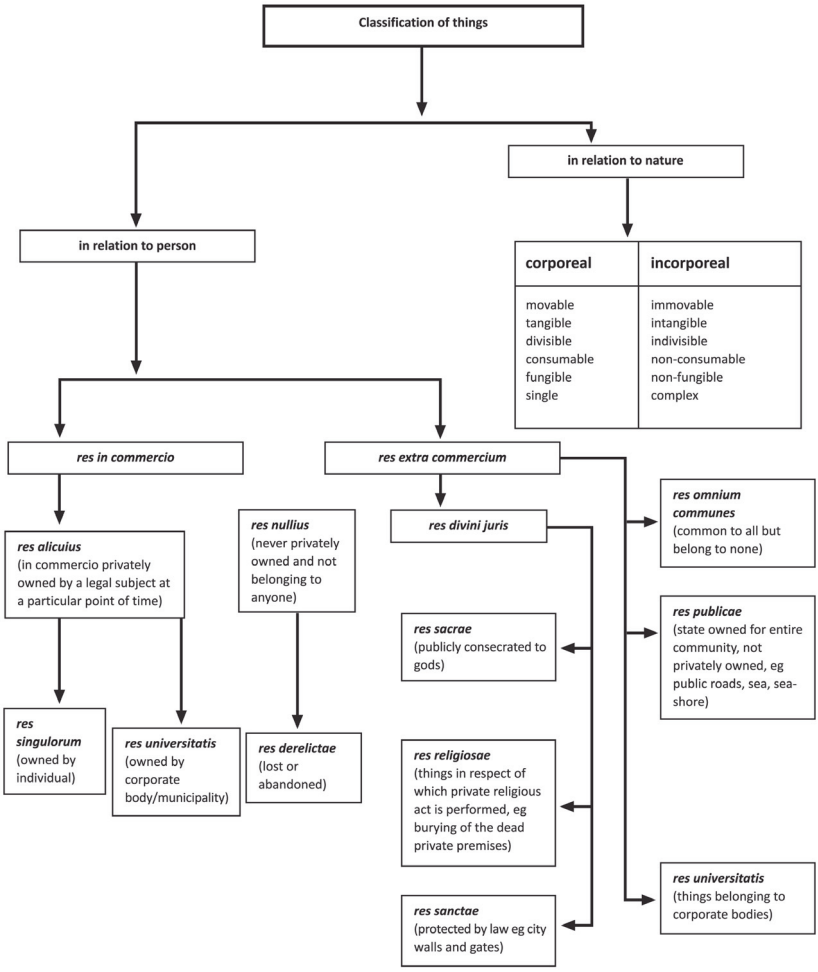
10 Art 100 of the Namibian Constitution and secs 4(a) and (b) of the Water Resources Management Act 24 of 2004.

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:[11]

11 PJ Badenhorst *et al* (n 9 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[12] 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.[13]

(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.[14]

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.

12 Sec 24(a) of the Nature Conservation Ordinance 4 of 1975.
13 *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).
14 *Minister van Landbou v Sonnendecker* 1979 2 SA 944 (A) 947.

8.3.6 Res omnium communes*: common things*

Voet and Grotius[15] 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.[16]

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.

15 *Inst* 2 1 1; *D* 1 8 2; Voet 1 8 3; Grotius 2 1 16.
16 Namibian Constitution (n 9 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[17] 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

17 Kleyn *et al* (n 3 above) 30. See further PJ Badenhorst *et al* (n 9 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,*[18] 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

18 *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.[19] 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

19 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.[20] 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.[21]

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.[22]

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.

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