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) Act 33 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 Ghana, 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]

Ghana

The Ghanaian Constitution guarantees the right to property and ownership of property. Under article 18 (1) every person has the right to own property either alone or in association with others. Article 20(1) provides that no property of any description or interest in or right over any property shall be compulsorily taken possession of or acquired by the State unless the following conditions are satisfied-

(a) The taking of the possession or acquisition is necessary in the interest of defence, public safety, public order public morality public health town and country planning or the development or utilization of property in such a manner as to promote the public benefit; and

(b) The necessity for the acquisition is clearly stated and is such as to provide reasonable justification for causing any hardship that may result to any person who has an interest in or right over the property

The constitution under subsection 2 mandates that compulsory acquisition of property by the State shall only be made under a law which makes provision for the prompt payment of fair and adequate compensation and a right of access to the High Court by any person who has an interest in or right over the property whether direct or on appeal from any other authority, for the determination of his interest or right and the amount of compensation to which he is entitled.

The Constitution furthermore, places an obligation on the State by prescribing that where the compulsory acquisition duly authorised by the State results in displacement of any inhabitants, the State is under obligation to provide a suitable alternative land to the affected inhabitants with due regard for their economic well-being and social and cultural values.

The Constitution clearly provides that any property which is compulsorily acquired in the public interest shall be used only in the public interest for which it was acquired. Where the property is not used in the public interest, the affected individual or owner of the property immediately before the compulsory acquisition shall be given the first option for acquiring the property. Upon such re-acquisition he or she shall refund the whole or part of

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'.

the compensation paid to him or her or such other amount as is commensurate with the value of the property at the time of the re-acquisition.

The public interest clause in the Ghanaian Constitution is quite consistent with the traditional doctrine of eminent domain.

Zambia

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:

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.

Zimbabwe

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

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.

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'.

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

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.

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:

(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

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.

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 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 by the year 2000, had 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.

Since the inception of the Land Reform Programme in 1990, the Ministry of Land Reform (MLR) has acquired a total of 529 farms at an overall cost of N$ 1,927,624,528 with a collective size of 3,213,478.9190 ha. The Ministry is targeting to acquire 5 million ha by 2020. So far MLR has already acquired 64 per cent or 3.2 Million ha in total, meaning only 1.8 Million ha is yet to be acquired in order to reach this targeted goal.[60]

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

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.
60 Ministry of Land Reform/MLR. 2018. Annual Land Reform Statistics. Windhoek: Nampa Press, p 3. Also available at http://209.88.21.57/documents/20541/457344/Annual+Statistics/220939f2-823e-41ca-abdb-9fc24d089f33 (accessed 26 May 2022).

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.

The Cabinet has approved a revised National Resettlement Policy that covers 2023 to 2033, replacing the 1991 to 2001 National Resettlement Policy. It prioritizes underprivileged communities, including generational farm workers. Furthermore, the government has created three different resettlement models for the new policy: the high-value, medium-value and low-value economic models.

The power to expropriate privately owned farms is the alternative option granted to the Ministry by the Act. Under section 20[61] 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)

61 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'.

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. 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.[62] 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

62 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

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.

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.[63] In *Texaco*[64] the requirement that was

63 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.

64 n 27 above.

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[65] that must be considered in the assessment of 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[66] 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.[67] 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.[68] The Act is silent on the individual's right of appeal to the courts but it does not specifically oust this right either.

65 See secs 25(1)-(3) of the South African Constitution.
66 Secs 23 and 25.
67 Secs 25(1)(a)(i) and (ii).
68 Secs 27(1)-(3).

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.

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.[69]

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 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

69 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.

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*[70] 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

70 n 27 above.

poverty alleviation programme, was considered by the court in *Kessl,*[71] 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 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*[72] 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.[73] 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.[74]

71 n 28 above.
72 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.
73 *Chairperson of the Immigration Selection Board v Frank & Another* 2001 NR 107 (SC).
74 See also *Aonin Fishing (Pty) Ltd & Another v Minister of Fisheries and Marine Resources* 1998 NR 147 (HC).

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.[75]

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.[76] 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

75 *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).

76 The provisions of the Subdivision of Agricultural Land Act are discussed in more detail under para 4.1 above.

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.[77]

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*[78] establishes the principle that if such creditor's right is closely 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.[79] 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.[80] 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.[81] The lease agreement is therefore enforceable against the new owner. Secondly, the lessee is protected for the duration of the lease by the

77 Van der Walt & Pienaar (n 2 above) 86-88.

78 n 5 above.

79 *Nel NO v Commissioner for Inland Revenue* 1960 1 SA 227 (A) 235.

80 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'.

81 F du Bois *Wille's principles of South African law 9th ed* (2007) 627; Van der Walt & Pienaar (n 2 above) 289-90.

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*[82] 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.

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.[83] 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*[84] MacDonald ACJ laid down the general principle of an occupier's duty with regard to his neighbour as follows:

82 n 5 above.
83 *Gien* (n 1 above), as translated by Van der Walt & Pienaar (n 2 above) 88.
84 1971 3 SA 540 (RA) 545, quoting from *Goldman v Hargrave* 1967 1 AC 645.

> '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 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.[85] 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.[86]

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.[87]

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

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

> enjoyment of his land. On the other hand it has been suggested that the right infringed may be the right of ownership itself.[88]

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.

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'.[89]

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.[90]

The second requirement relates to the acceptable degree of tolerance as laid down in the case of *Prinsloo v Shaw*.[91] 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

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

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.[92]

In the case of *Laskey & Another v Showzone CC & Others*[93] 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.[94]

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

92 At 575.
93 2007 (2) SA 48 (C).
94 See *Laskey* (n 93 above); Badenhorst (n 3 above) 112; Du Bois (n 81 above) 479; and *Gibbson v South African Railways and Harbours* 1933 CPD 521 at 531.

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 neighbouring property must be decided on the basis of Aquilian liability for which culpability in the form of negligence or intent is required.[95]

In *Regal*[96] 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.

95 See also *Dorland & Another v Smits* 2002 5 SA 374 (C).
96 n 85 above.

(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 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.[97] In the case of *Malherbe v Ceres Municipality*,[98] 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

97 Badenhorst *et al* (n 3 above) 114.
98 1951 4 SA 510 (A).

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 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.[99]

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.[100] The duty of lateral support is not confined

99 Van der Walt & Pienaar (n 2 above) 92.
100 Van der Walt & Pienaar (n 2 above) 92-93.

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.[101]

This power and the corresponding duty have been defined in *Demont v Akals' Investments (Pty) Ltd & Another* [102] 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 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* [103]**

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

101 Kleyn *et al* (n 23 above) 179.
102 1955 2 SA 312 (N) 316.
103 As above.

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'[104] the defendants' subject to the payment of 300 pounds. This was the subject matter before the court. Selke J[105] said the following:

> [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

104 *Demont* 313.
105 *Demont* 316.

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[106]

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 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'.[107]

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

106 1965 1 SA 806 (D) 811.
107 At 810.

> 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.[108]

The judge went on to say that there was no magic in the word subsidence.[109] 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.[110]

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.[111]

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[112]

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[113]

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

108 At 811.
109 As above.
110 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 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.
111 At 813.
112 1977 4 SA 964 (C).
113 1951 4 SA 466 (E).

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 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.[114]

Reynolds J coined the issue of lateral support in a very simplified manner: 'What was the duty of support, if any, to Nuffield road?'[115]

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.[116]

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.[117]

114 At 471.
115 As above.
116 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.
117 At 474.

The court cited with approval *Humphries v Brogden*[118] 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*[119] 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 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.[120]

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*[121]

118 (1850) 12 QB 739.
119 n 117 above, 475.
120 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.
121 1959 1 SA 169 (N).

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'.[122]

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.

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

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

(d) termination of occupation of the encroaching section by the encroacher and compensation by the owner to the encroacher (termination and compensation).[123]

These remedies will now be discussed in some detail.

5.4.7.1 Removal

In the case of *Smith v Basson*[124] 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 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*[125] 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

123 Van der Walt & Pienaar (n 2 above) 94.
124 1979 1 SA 559 (W).
125 [2003] 4 ALL SA 528 (C).

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 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*[126] 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 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.[127]

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*.[128] 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*[129] 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

126 1980 3 SA 504 (D).
127 See also *Glaston House (Pty) Ltd v Cape Town Municipality* 1973 4 SA 276 (C).
128 n 124 above.
129 1951 4 SA 510 (A) 518.

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 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*[130] 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*[131] Maritz J citing Voet Commentarius ad Pandectas[132] 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.

130 1979 3 SA 1365 (D).
131 2004 NR 10 (HC).
132 8. 2. 15-17.

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)*[133] 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 *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;[134] 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.[135]

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 1916 AD 415 421. See also *inter alia* Voet 39.3.2.
134 *Johannesburg Municipality v African Realty Trust Ltd* 1927 AD 163 171*; Regal* (n 85 above) 107.
135 Du Bois (n 81 above) 486-7.