CHAPTER 6

ACQUISITION OF OWNERSHIP

1 Introduction

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

2 Original acquisition of ownership

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

2.1 *Occupatio* (appropriation)

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

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

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

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

2.2 Treasure

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

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

2.3 Accession

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

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

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

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

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

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

2.3.1 Natural accession

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

2.3.1.1 Young animals

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

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

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

2.3.1.2 *Alluvio*

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

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

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

2.3.1.3 *Avulsio*

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

2.3.2 Industrial or artificial accession

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

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

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

Each of these forms of accession will be discussed below.

2.3.2.1 Building (*inaedificatio*)

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

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

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

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

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

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

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

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

16 n 15 above.

17 At 466-7.

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

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

(a) The nature and purpose of the movable thing

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Van Winsen AJA explained the intention consideration approach as follows:

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

26 At 688.

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

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

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

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

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

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

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

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

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

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

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

30 n 15 above.
31 n 23 above.

and ceilings enclosing approximately 255 square metres of office space, valued at R85 000; (2) an alarm system valued at R4 000; (3) an intercom system valued at R1 200; (4) an electrical system valued at R18 000; (5) a steel under-cover parking area valued at R18 000; (6) a steel canopy valued at R3 000; (7) steel security gates valued at R400; (8) air conditioners valued at R35 000; (9) carpet tiles valued at R7 500; (10) a kitchen sink valued at R400; and (11) fire extinguishers valued at R3 000. The plaintiff's claims were based on the contention that the defendant was in possession of these goods, alternatively that it had disposed of them with knowledge of plaintiff's ownership. The defendant admitted possession of most of the articles in question, with the exception of some of the office partitioning, the steel canopy and the carpet tiles, but denied the plaintiff's ownership thereof, pleading that the articles in question had acceded to its property. The defendant furthermore denied the value attributed to the articles by the plaintiff. It appeared that the plaintiff, the sublessee of the site, had been evicted in terms of a court order some time after it had installed the offices. As a result, a dispute arose as to the ownership of these articles in question: the plaintiff regarded them as its property, which it was entitled to remove, while the lessor refused to allow it to do so. During December 1994 the lessor sold the site, including all improvements, to the defendant.

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

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

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

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

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

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

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

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

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

2.4 Mixing (*commixtio* and *confusio*)

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

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

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

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

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

2.5 *Specificatio* (manufacture)

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

2.6 Acquisitive prescription

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

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

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

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

44 2008 2 NR 792 (HC) 797.

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

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

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

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

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

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

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

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

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

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

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

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

50 1946 AD 562 573-4.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

59 Du Bois (n 5 above) 517.

3 Derivative acquisition of ownership

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

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

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

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

3.1 The temporal requirement: Uninterrupted 30-year period

As was indicated above, the acquirer does not have to be in possession personally for the entire period. The 1969 Act is explicit on the point: '… a period which, together with any periods for which such thing was possessed by his predecessors in title …'. This means that the acquirer can add to his own period of possession time that the predecessor was in possession, provided that the character of possession, including the mental element, is compatible with acquisitive prescription. The acquirer need not be present continuously. It is normal for an owner to take a holiday or go on a business trip. So too for the prescriptive acquirer: he may leave the property from time to time, but not indefinitely. The important point is that the objective impression must be that the acquirer possesses as if owner for the requisite period of time.

Sometimes, however, events occur which may serve to disturb the acquirer's possession. There are two kinds of events which have a material effect on acquisitive prescription: interruption and suspension. The 1943 Act is silent on disturbance of possession, which means that the common law rules (as residual law) must apply. The 1969 Act makes specific provision for both kinds of disturbance, adapting the common law position to ease the possibility of acquisition of title prescription.

Interruption. The prescriptive period may be interrupted when an event caused by external forces persuades the acquirer to give up possession.[64] A distinction is made between natural interruption and civil interruption, depending on the type of event that caused the loss of possession.

Natural interruption occurs when the acquirer voluntarily or involuntarily gives u possession,[65] e.g. because the land is flooded (*vis major),* or because the true owner or a third party demands return of the property. Actual loss of physical control equates with natural interruption. For example, if the prescriptive acquirer leases the property to a third party, thereby giving up possession, then this is not natural prescription because the lessee acquires physical control under rights derived from prescriptive acquirer. By permitting the lessee to lease and occupy the property, the acquirer is, in fact, displaying *animus domini.*

Second, if the true owner demands the return of the property, then natural interruption occurs only if the prescriptive acquirer actually gives up physical control.[66] Mere demand for return is insufficient to interrupt the

64 F Du Bois (ed) *Wille's Principles of South African Law* (2007) pp 514-516; *Silberberg and Schoeman's Law of Property* (2006) pp 169-172.

65 Wille's Principles (n 64 above) pp 514; Silberberg and Schoeman's Law of Property (n 64 above) pp 170.

66 Wille's Principles (n 64 above) pp 514; Silberberg and Schoeman's Law of Property (n 64 above) pp 170.

running of the prescriptive period. The consequence of natural interruption is that under the common law, the running of prescription stops and, if the acquirer were to gain possession again, the required 30-year period would begin afresh (*de novo)*.[67] The common law position is, of course, also that of the 1943 Act since this Act is silent on the point of disturbance of the 30-year period. Under the 1969 Act, however, the position is different. The harsh consequence of the common law is ameliorated by Section 2 of the Act, which provides that if there is involuntary loss of possession, then prescription will not be interrupted if the acquirer requires possession either through legal proceedings within six months of the dispossession or by other lawful means within one year of the dispossession. This means that the prescriptive acquirer could institute the *mandament van spolie* to regain possession within six months from one who dispossessed her. Assuming that the remedy successfully restores possession, then prescription would continue to run without interruption. Similarly, if a natural disaster forced the acquirer to leave the property, but the acquirer is able to regain control within one year, then prescription would not have been interrupted.

Civil interruption (also called judicial interruption) occurs when legal proceedings are initiated by the true owner against the prescriptive aquirer.[68] The true owner's claim must be based on ownership, rather than on a claim for compensation for unlawful possession. This means that ownership rights must be asserted. A claim for compensation would not be sufficient for interruption. Service of process on the acquirer, in terms of which ownership rights are asserted, constitutes a civil interruption.[69] 'Process' means any document initiating legal proceedings. This common law rule is confirmed by the 1969 Act. Under the 1943 Act, the effect of service of process Is to halt the running of prescription. Under the 1969 Act, the service of process halts the running of prescription pending the outcome of the legal proceedings. If the true owner's claim is unsuccessful, or he if he withdraws his claim, or abandons a successful judgement, then the consequence is that no interruption of prescription occurs. If the judgement is successful and acted upon, the date of the final judgement is the date on which prescription is interrupted.[70]

3.2 Suspension

Suspension describes the consequence of the change to the true owner's personal circumstances that affects the ability to form or maintain the

67 Wille's Principles (n 64 above) pp 514; Silberberg and Schoeman's Law of Property (n 64 above) pp 170.
68 Wille's Principles (n 64 above) pp 515; Silberberg and Schoeman's Law of Property (n 64 above) pp 171.
69 Wille's Principles (n 64 above) pp 515; Silberberg and Schoeman's Law of Property (n 64 above) pp 171.
70 Wille's Principles (n 64 above) pp 515; Silberberg and Schoeman's Law of Property (n 64 above) pp 171.

animus domini, which is a necessary element of ownership. For example, due to illness, the true owner may lose the mental capacity to form or maintain the *animus domini.* Such loss of capacity is an impediment (obstacle) to the running of prescription because *Chapter* prescription is not permitted to run against a person who is unable to assert her rights.[71] Sometimes, the impediment is legal rather than due to changed personal circumstances, e.g. when the true owner is a minor or a *fideicommissary*. The rationale for the rule nevertheless applies.

The consequence of a lack of mental or legal capacity Is that the prescriptive period must stop running temporarily until the impediment ends, e.g. until the true owner regains the necessary mental capacity or becomes a major. Under the common law, the running of prescription stopped for the duration of the existence of the impediment and continued when the impediment fell away.[72] The 1969 Act makes specific provision for suspension: the common law is altered to the extent that the running of prescription is not stopped. Instead the 1969 Act postpones the completion of prescription in circumstances where the true owner is incapacitated. The focus of attention is on the final few years of the prescriptive period only. Suspension (postponement) occurs only if the 30 years would have been completed on, before or within three years after the date on which the impediment ended.[73] Suspension serves to extend the prescriptive period by three years after the date in which the impediment falls away.[74]

Section 3 of the 1969 Prescription Act[75] reads as follows:

> 3. (1) If –
>
> (a) the person against whom the prescription is running is a minor or is insane, or is a person under curatorship, or is prevented by superior force from interrupting the running of prescription as contemplated in section 4; or
>
> (b) the person in favour of whom the prescription is running is outside the Republic (including the territory of South-West Africa), or is married to the person against whom the prescription is running, or is a member of the governing body of a juristic person against whom the prescription is running; and
>
> (c) the period of prescription would, but for the provisions of this subsection, be completed before or on, or within three years after, the day on which the relevant impediment referred to in paragraph (a) or (b) has ceased to exist,
>
> (d) the period of prescription shall not be completed before the expiration of a period of three years after the day referred to in paragraph (c).

71 Wille's Principles (n 64 above) pp 515; Silberberg and Schoeman's Law of Property (n 64 above) pp 171.
72 Wille's Principles (n 64 above)s pp 515; Silberberg and Schoeman's Law of Property (n 64 above) pp 171.
73 Wille's Principles (n 64 above) pp 515-516; Silberberg and Schoeman's Law of Property (n 64 above) pp 171-172.
74 In effect the normal extinctive prescriptive period for the assertion of civil claims is added to the acquisitive prescriptive period.
75 Act 68 of 1969.

> (2) Subject to the provisions of subsection (1), the period of prescription in relation to *fideicommissary* property shall not be completed against a *fideicommissary* before the expiration of a period of three years after the day on which the right of that *fideicommissary* to that property vested in him.

The effect of the 1969 Act's change to the common law is to focus the attention on the practicality and importance of the completion period: it is at this stage that it is necessary for the true owner to have the capacity to protect his or her ownership rights. Impediments that fall away well before the completion period are not relevant to the issue of the acquirer becoming owner at a particular point in time.

Until the necessary elements for acquisitive prescription coincide, the acquirer does not become owner. It is thus only a few years of the 30-year period that the true owner's interests are really threatened by the fact that the law could reallocate the ownership rights.

The legal effect of acquisitive prescription is that, by operation of law, the acquirer becomes the owner of the property and is entitled to demand the registration of the land so acquired in her name. A court order is necessary before the Registrar of Deeds may register the property; unless the previous owner is willing to co-operate in effecting the changes to the title deed. The court order compels the Registrar to register the property and is usually granted only after a rule *nisi* has been issued, calling on all interested parties to show cause why registration should not take place.[76] In the event of a dispute on the facts, the matter may be ordered to trial. Note that all pre-existing, actively used, limited real rights as were acquired before the completion of the prescriptive period. Note also that the State Land Disposal Act[77] has prohibited acquisitive prescription of state land since 28 June 1971.

The Importance of the three-year period

The fact that the 1969 Act eases the requirements for prescription by, amongst others, watering down the common law rules does not mean that the true owner is unprotected. The 1969 Act provides that such an owner has three years to assert his claim, after the impediment falls away.

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

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

76 Wille's Principles (n 64 above) pp 517; Silberberg and Schoeman's Law of Property (n 64 above) pp 172-173.
77 Section 3 of Act 48 of 1961.

Under the causal (*causa*) system the transfer of ownership takes place by reason of the existing underlying agreement. If the cause for the transfer of ownership is defective the ownership will not pass, notwithstanding that there has been delivery or registration of the thing. In terms of the abstract system transfer of ownership is not dependent on the existence of a valid *iusta causa* or the obligation creating agreement, or obligatory agreement or an agreement creating an obligation, and therefore under the abstract system, even if the *causa* fails, the transfer will be regarded as valid but an aggrieved party can bring a personal action against the defendant for breach of the *causa*.[78]

3.2 Transfer of ownership under the abstract and causal systems

3.2.1 Obligation creating agreements versus real agreements

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

3.2.2 The abstract and causa *principles*

An abstract approach to the transfer of *dominium* is concerned with the parties' intentions to pass and receive ownership, in the abstract, regardless of whether this is supported by an underlying *causa* or basis. On the other

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

hand, the causal approach requires a linking *causa* or basis, typically an underlying contract – which can be seen as the *raison d'être* for delivery.

The causal system prefers the interests of the owner, and ownership will pass only if there is an agreed and legal basis for this. The abstract system, on the other hand, takes more account of the interests of the transferee and third parties; ownership passes if the parties so intended, regardless of whether there is any agreed legal basis. A third party acquiring transfer from the transferee under the abstract system is more likely to get title than under a causal system.

Namibian property law is based on the abstract system of property law. In the Namibian case of *Oshakati Tower (Pty) Ltd v Executive Properties CC & 3 Others*,[79] Muller JJ referring to the application of the abstract system in Namibia quoted Van der Merwe[80] and stated as follows:

> It is common cause between the parties that the land registration system, in Namibia is an abstract system, which is the same in South Africa. In this system two separate agreements are recognised, namely the underlying agreement and the real agreement. A defect in the first agreement does not prevent valid transfer. In respect of the real agreement it is a requirement it should not only be voidable, but it should be void *ab initio* because of a mistake or fraudulent misrepresentation. A forgery would certainly also render the agreement void. For transfer, the owner must have the intention to pass ownership. If there was no such clear intention to transfer ownership, ownership does not pass. The authorities further make it clear that non-compliance with a statutory requirement may render contracts unenforceable, depending on the intention of the legislature. In this regard non-compliance with a statutory requirement, as set out in section 228 of the Companies Act, may render the real agreement unenforceable and void.[81]

The learned Judge further stated that under an abstract system of passing of ownership the mere intention of the parties to pass ownership is sufficient without reference to the underlying *causa* for the transfer. This principle originated in Roman law and was developed further by natural law jurists of the seventeenth century and pandectists, and accepted in modern law. The abstract principle guarantees certainty in that it disallows the invalidity of an underlying *causa* to affect the existence or validity of a transfer. The real agreement to pass ownership is treated *in abstracto,* that is, totally independently from the contractual agreement which provides the *causa* for the transfer. Although the abstract system simplifies matters for the transferee it does not leave the transferor, who has transferred an object by virtue of an invalid *causa,* without a remedy. Since ownership passes to the

79 Case no: [P] A 20/2006 In The High Court of Namibia.
80 CG van der Merwe 'Things' in WA Joubert *et al Law of South Africa (Lawsa)* (First Reissue) (2003) 27, para 203.
81 Para [26].

transferee, the transferor is deprived of his *rei vindicatio.* However, he or she may still claim by way of *condictio* on the ground of unjust enrichment.

The abstract principle is by no means absolute and several exceptions exist. Firstly, certain forms of invalidity of the contractual agreement are considered so material that they affect the real agreement and also, for example, where recognition of the validity of the transfer will conflict with an absolute statutory prohibition. Secondly, it seems possible for parties to the contractual agreement to provide that the transfer of ownership will only be valid if the *causa* for the transfer is valid. Such a term can also be implied from the circumstances of the case.

Van der Merwe[82] discusses the effect of the abstract system on land registration and what the requirements are.[83] He makes it clear that the owner of the property must have the intention to transfer ownership at the moment when ownership passes. He deals with the difference between the underlying agreement and the real agreement and states the following:[84]

> In terms of an abstract system of the transfer, the passing of ownership is wholly abstracted from the agreement giving rise to the transfer and is not made dependent on such an agreement. It is immaterial whether such an agreement is void, voidable, putative or fictional. The puristically-minded do not even talk in terms of a *causa* giving rise to the obligation to transfer but only require a serious intention on the part of the parties to transfer ownership. In terms of the abstract system a clear distinction is thus drawn between the agreement given rise to the transfer ('verbintenisskeppende ooreenkoms') and the real agreement ('saaklike ooreenkoms') in which the parties agree to pass ownership. Emphasis is placed on the real agreement which exists independently of the agreement giving rise to the transfer. The invalidity of the latter agreement has no influence on the validity of the real agreement. If there is a serious intention to transfer ownership, ownership passes to the transferee, who can in turn validly pass transfer to a third party. The original owner in such a case loses ownership of his thing and he has in appropriate circumstances only a personal action, namely the condictio based on unjust enrichment on the ground of the loss suffered by him.

The real agreement is described as follows by Van der Merwe:[85]

> Under the abstract system a real agreement, namely an agreement to transfer and accept ownership, is required for transfer of ownership. In every instance it must consequently be determined factually whether a real agreement had indeed been reached. If the real agreement is merely voidable, for example as a result of undue influence, ownership will pass if the agreement had not been vitiated before transfer. If, however, the real agreement is void, having been induced by the fraudulent misrepresentations or by mistake ownership will not pass.

82 n 66 above.
83 n 66 above, paras 362 and 363.
84 n 66 above, para 363.
85 Para 365, at 300.

He continues:[86]

> Certain contracts are unenforceable because they do not comply with certain statutory requirements: thus writing, official approval or a certain manner of achieving an object may be prescribed. Whether a real agreement or performance in terms of such an enforceable contract is vitiated by the defect in the preceding contract depends on the intention of the legislature in rendering such a contract void on the ground of non-compliance with a certain requirement. The courts have to ascertain the intention of the legislature from the statutes itself and in certain instances it may well be that the legislature intended to render not only the preceding contract but also the real agreement unenforceable.

In this case, the court granted the order for the de-registration of the rights. This case *inter alia* illustrates the principle that the application of the abstract principle is by no means absolute and that the courts have the discretion in appropriate cases to annul the registration of the transfer of property.

3.3 Delivery

As we saw earlier, transfer of a real right takes place when delivery to the transferee is made, in the case of movable property, and when registration takes place, in the case of immovable property. There are two types of delivery, actual and constructive delivery.

3.3.1 Actual delivery

As the term suggests, actual delivery involves the actual physical delivery of the property. However, where this is impossible or inconvenient, one of the forms of constructive or fictitious delivery may be used.

3.3.2 Constructive delivery

This type of delivery refers to various methods of transferring ownership by which no physical handing over of the thing takes place. The various modes of constructive delivery are as follows:

3.3.2.1 Symbolic delivery

By this method the physical control of property is transferred to the person to whom delivery is made by the handing over of a symbol of the property. For example, a person who has been provided with the keys to a warehouse is in the position to exercise immediate power over the contents of the warehouse.

86 Para 365, at 301.

3.3.2.2 Delivery with the long hand (*traditio longa manu*)

This mode of delivery takes place where the property is placed in the presence of and at the disposal of the purchaser.[87] In the case of *Groenewald v Van der Merwe*[88] Innes CJ stated as follows:

> In the great majority of cases the physical factor takes the form of handing the movable in question bodily to the transferee, who accepts it with the requisite intention and thereby becomes owner. This is actual delivery. But physical prehension is not essential if such movable is placed in the presence of the would-be possessor in such circumstances that he, and he alone, could deal with it at his pleasure.

The court in this case pointed out that this mode of delivery is fictitious and is most appropriate to transactions where owing to the weight or bulk of the article concerned actual delivery is difficult.

3.3.2.3 Delivery with short hand (*traditio brevi manu*)

This form of delivery takes place where a person who already has the physical possession of the property on behalf of the owner, acquires physical control as owner of the thing in question. In *Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstein & 'n Ander*[89] it was stated that *traditio brevi manu* takes place when an o*wner* and a *detentor* of a thing agree that the latter shall in future hold the thing in his own right and further that the potential transferee must be in physical possession of the article and must have the *animus* to hold it for himself.

3.3.2.4 *Constitutum possessorium*

This form of delivery is the exact opposite of delivery with the short hand. This operates in a situation where the seller continues to keep the goods in his possession but holds them on behalf of the buyer and not on his own behalf. Innes CJ in *Goldinger's Trustee v Whitelaw & Son*[90] remarked that *constitutum possessorium* is the converse of the *tradition brevi manu* and that both are examples of transfer of possession and consequently ownership due to a contractual change of intention on the part of the person who retains the physical control. He cautioned that a process by which a change of *dominium* may depend upon a mere change of mental attitude should be carefully scrutinised. He therefore laid down the following safeguards:

(a) A *constitutum* is never presumed.

87 *Xapa v Ntsoko* 1919 EDL 177.
88 1917 AD 233 238.
89 1980 3 SA 917 (A) 922-923A.
90 1917 AD 66 74.

(b) The party alleging it must establish facts from which its existence clearly and necessarily follows.

(c) A distinct *causa detentionis* (contractual reason for the possessor to retain detention) is essential. If A, after selling a movable to B, intends to hold it on behalf of the latter that change of mind would not effect a transfer of ownership. There must be a clearly proved contractual relationship under which A becomes the holder of the thing on behalf of the purchaser.

Constitutum possessorium has no application to pledge because pledge always involves the actual delivery of the thing to the pledgee.

3.3.2.5 Attornment

If the property to be delivered is, at the time when the delivery is to be effected, not in the possession of the transferor, but under the control of a third party, who is holding it either as an agent on behalf of the transferor or by virtue of some other relationship between him or her and the latter, delivery of the property may be effected by attornment. In terms of this form of delivery the transferor instructs the third party to hold the property in question henceforth no longer on his or her behalf but on behalf of the transferee.[91]

The essentials for this form of delivery are that the property must be held by an agent who has actual control over the property concerned, and that there must be an agreement between all three parties, the transferor, the transferee and the agent, as to the change of ownership of the property.

3.4 Transfer by registration

Transfer of real rights in immovable property is effected by means of registration. Section 16 of the Deeds Registry Act 47 of 1937 provides that:

> Save as otherwise provided in this Act or in any other law the ownership of land may be conveyed from one person to another only be means of a deed of transfer executed or attested by the registrar, and other real rights in land may be conveyed from one person to another only be means of a deed of cession attested by a notary public and registered by the registrar.

Registration may be defined as the recording of documents or books of some facts or such other acts as the existence of a description of a corporal thing or of a transaction or some event of a right. The object of registration is to give notice of the ownership of a right in property to all persons concerned and in particular to the creditors of the owner of the property or intended purchaser of the property.

91 Kleyn *et al* (n 1 above) 263.

A right becomes a real right on registration if the following conditions are met:

- the register must be kept at the state's Deeds Registry;
- it must be open to inspection by the public; and
- the rights must be capable of and proper for registration.

As already stated, under section 16 of the Deeds Registries Act ownership in land is acquired by means of a deed of transfer duly executed and attested by the registrar. Section 3 imposes a number of duties and obligations on the registrar to ensure *inter alia* an efficient system of registration which affords security of title.

As regards prescription, it was stated in the case of *Willoughby's Consolidated Co Ltd v Copthall Stores*[92] that when land was acquired by prescription, the practice is for the party who had so acquired it, to institute an action for the registration of his or her acquired rights in the deeds office.

The rights that may be registered are provided for by various provisions under the Deeds Registries Act. Section 16 deals with ownership of land and other real rights. Section 18(3) deals with unalienated state land and this may be transferred from the state only by a deed of grant. Section 65 deals with personal servitudes. It provides that:

> [s]ave as provided in any other law, a personal servitude may be created by means of a deed executed by the owner of the land and encumbered thereby and the person in whose favour it is created, and attested by a notary public.

Such personal servitudes can be registered.

Mortgages can also be registered. They fall under section 50(1)(2) and (3) according to which:

> [a] mortgage bond shall be executed in the presence of the registrar by the owner of the immovable property therein referred or by a conveyancer duly authorized by such owner by power of attorney'.

Section 50(2) provides that a 'mortgage bond or notarial bond may be registered to secure an existing debt or a future debt or both existing and future debts'.

Section 56 provides that:

> [n]o transfer of mortgaged land shall be attested or executed by the registrar and no cession of a mortgaged lease of immovable property, or of any mortgaged real right in land shall be registered until the bond has been cancelled or the land,

92 1913 AD 267.

> lease or right has been released from the operation of the bond with the consent in writing of the holder thereof.

Section 16 of the Deeds Registries Act makes registration a precondition for the conveyance of ownership of land. In the case of *Crause & Andere v Ocean Bentonite Edms (Bpk)*[93] it was held that in all cases in which a registered real right is to be transferred as a result of an agreement, such real right cannot vest in the acquirer without an act of registration in the deeds office.

Under Roman-Dutch law the transfer of a real right, even though done in performance of a contract, is always regarded and must be analysed as a separate transaction from the contract itself because the contract merely creates personal rights and obligations and therefore an additional act is required to create the real right. The additional act is delivery in the case of movables, and in the case of immovables delivery is effected by registration.

By virtue of the application of the doctrine of constructive notice, every person is deemed to have knowledge of a duly registered document as a result of which it becomes enforceable against the whole world at large in accordance with the maxim *nemo ex suo delicto meliorem suam conditionem facere potest* meaning nobody will be permitted to defeat another person's potential right for his own individual benefit if he or she knows of its existence. Registration is therefore meant to protect real rights in immovable property.

It must be mentioned, however, that according to the decision in *Cassim & Others v Meman Mosque Trustees*[94] registration is not an absolute criterion for if there is a flaw in the title of ownership this flaw cannot be cured or rectified by the mere fact of registration. Furthermore, in the case of sale or transfer of land where the transferor or the plaintiff who has an effective title is not the sole owner of the property, registration cannot exempt the defendant from liability on the basis that the defendant should have been aware of the fact that the plaintiff was not the holder or the sole holder of any particular registered real right. In the case of *Frye's (Pty) Ltd v Ries*[95] the defendant was co-owner of land which was registered in her name and those of her two daughters. The defendant entered into a contract with the plaintiff company. In terms of this contract the company leased part of a building and also obtained an option to buy the whole of the property. The contract required the consent of two daughters who were co-owners but they refused to ratify the agreement. The plaintiff company was therefore unable to enforce the lease or option and sued the defendant for damages for breach of contract. The defendants relied on the doctrine of constructive notice and argued that the plaintiff company was deemed to have knowledge of the limited authority as the registrar of deeds showed that she was only a co-

93 1979 1 SA 1076 (O).
94 1917 AD 154162.
95 1957 3 SA 575 (A).

owner who required the consent of the two daughters. This argument was rejected and the defendant was held liable.

In the case of *Nel NO v Commissioner for Inland Revenue*[96] it was held that registration of a personal right does not convert a personal right into a real right and specifically with regard to an annuity, the right was not registrable or, if registered, registration would not convert it into a real right.

3.4.1 Registration of servitudes

A duly executed agreement to grant a servitude gives rise to a real right only when it has been registered. Prior to registration a third party, in particular a purchaser of a servient property, without notice of the servitude, is not bound to recognise it. Although the agreement becomes binding immediately *inter partes* it was held in *Frye's* that knowledge of a servitude on the part of a buyer is material only in the event of an unregistered servitude.[97] The buyer of the servient tenement is not bound by the servitude unless he or she had knowledge of the servitude at the time of buying the servient property.

In *Grant v Stonestreet & Others*[98] Ogilvie Thomson JA said the following:

> Having regard to our system of registration, the purchaser of immovable property who acquires clean title is not lightly to be held bound by an unregistered praedial servitude claimed in relation to that property. If, however, such purchaser has knowledge, at the time he acquires the property, of the existence of the servitude, he will … be bound by it notwithstanding the absence of registration.

However, in that case the court was not dealing with a real right; it was dealing with an agreement in terms of which reciprocal servitudes, which had never been registered, had been granted. An agreement to grant a servitude gives rise to a real right only when it has been registered.[99] Dealing with the distinction between real rights and contractual rights, in that case, unregistered servitudes, Ogilvie Thomson JA referred to *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd*[100] where Innes CJ said at 16:

> Now a servitude, like any other real right, may be acquired by agreement. Such an agreement, however, though binding on the contracting parties, does not by itself vest the legal title to the servitude in the beneficiary any more than a contract of sale of land passes the *dominium* to the buyer. The right of the beneficiary is to claim performance of the contract by delivery of the servitude,

96 1960 1 SA 227 (A) 227.
97 See section 7.2.2.2.4.4.
98 1968 4 SA 1 (A) 20.
99 See *Van Vuren & Others v Registrar of Deeds* 1907 TS 289 at 295; Van der Merwe *Sakereg* (n 8 above) 526-527, and Kleyn *et al* (n 1 above) 380-381.
100 1918 AD 1.

> which must be effected *coram lege loci* by an entry made in the register and endorsed upon the title deeds of the servient property.

Grant is therefore no authority for a proposition that a registered real right is no longer maintainable against the whole world when it is erroneously omitted from a subsequent title deed.

3.4.2 Positive and negative systems of registration

3.4.2.1 Positive system

This system guarantees the accuracy of the registration/registered information to third parties or, at times, to bona fide acquirers of immovable property or real rights to such property. It therefore follows that a bona fide acquirer of a real right which has been registered can enforce such registered right against everyone. The state guarantees the accuracy of the registered information, including the registration of a title, and therefore there is a high degree of state intervention securing the protection of a bona fide third party. The system of registration in Namibia is consistent with this type of registration.[101]

3.4.2.2 Negative system of registration

Under this system the accuracy of information is not guaranteed. If a third party, acting in good faith, accepts incorrect data in the deeds office as correct, and acts on this information, he or she will normally not enjoy protection under the negative system of registration unless of course the doctrine of estoppel could find application or he or she might have a claim for delictual damages.[102]

4 Summary and concluding remarks

The principles and tests applied to determine whether *dominium* or ownership has passed under the various methods of acquisition of ownership discussed in this chapter indicate that the actuality of certain factual situations will give rise to the inference of the acquisition of ownership by operation of the law. These are guiding principles to assist the courts to draw an inference of acquisition of ownership after considering the peculiar facts of each case. They include the publicity principle, which deals with the outward manifestations indicative of the intention to pass ownership. In cases involving *inaedificatio*, for example, which may lead to the deprivation of property, and consequently the violation of the constitutional right of the

101 See also sec 99 of the Deeds Registries Act.
102 Kleyn *et al* (n 1 above) 99.

owner of the movable property, the enquiry of the courts will be stretched to determine the unequivocal intention and consent to transfer ownership.