CHAPTER 7

REAL RIGHTS OTHER THAN OWNERSHIP

1 Introduction

From the definition and nature of ownership, together with the principles relating to registration under section 16 of the Deeds Registries Act 47 of 1937, we are able to internalise the principles that the holder of a real right may create rights over his *dominium* in favour of another party. Depending on the intention of the parties and the mode of creation of these rights, they may constitute real rights. However, to the extent that these rights are not complete rights of ownership they are referred to as limited real rights in contradistinction to ownership, which is a real right. In chapter 4, with reference to the distinction between real rights and personal rights, we discussed servitudes (2.2) as examples of limited real rights. In this chapter we shall look at servitudes as an established category of real rights in greater depth and will also consider other examples of limited real rights, such as lease, mortgage, pledge and lien.

2 Servitudes

2.1 Definition

A servitude may be defined as a limited real right to another legal subject's movable or immovable property which grants the entitled person, that is the holder of the servitude, certain specified entitlements of use and enjoyment. In the case of *Lorentz v Melle & Others*[1] Nestadt J defined a servitude as a right belonging to one person in the property of another entitling the former either to exercise some right or benefit in the property or to prohibit the latter from exercising one or other of his normal rights of ownership. The

1 1978 3 SA 1044 (T) 1049.

legal effect of a servitude is to diminish the rights of the owner over property for the benefit of another.

Because of this bearing, the right of servitude must be clearly established. As a general rule, a servitude is only recognised as a real right if it has been registered against the land in question, unless it was created by statute or prescription.[2] All servitudes are limited real rights. Examples of servitudes are a right to draw water from the land of someone else; a right of way over the property of someone else; and a right of grazing on the land of someone else.

2.2 Classification

2.2.1 Distinction between active (positive) and passive (negative) servitudes

An active servitude is one which entitles the holder of the servitude to do something with regard to the servient property which the owner of the servient property must endure, for example B's right to draw water from A's dam.

A passive servitude entitles the holder of the servitude, to prohibit the owner of the servient property from exercising any one or more of the powers normally attached to ownership, for example where the owner of the servient tenement is prohibited by the servitude from erecting on his or her property any building higher than a certain height. Personal and praedial servitudes can either be active or passive.[3]

2.2.2 Distinction between praedial and personal servitudes

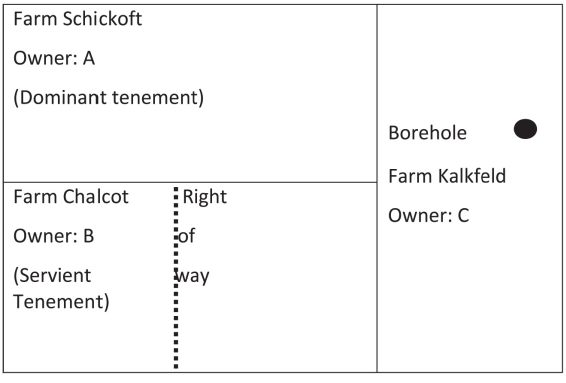
As we saw at 2.2, there are two basic categories of servitudes, namely praedial and personal servitudes. Praedial and personal servitudes may be distinguished in the following ways.[4]

A praedial servitude requires at least two pieces of land. It is constituted in favour of one piece of land, the dominant tenement, over another piece of land, the servient tenement. It therefore confers a real benefit on the dominant tenement and imposes a burden on the servient tenement. This means that the owner of the land benefits from the servitude in his or her capacity as landowner. Successive owners of the land will stand to benefit from the servitude.

2 *Coetzee v Malan* 1979 1 SA 377 (O).
3 PJ Badenhorst *et al Silberberg and Schoeman's the law of property 5th ed* (2006) 322.
4 Badenhorst *et al* (n 3 above) 322-42; F du Bois *Wille's principles of South African law 9th ed* (2007) 593-611; WA Joubert *et al Law of South Africa (Lawsa)* (First Reissue) (2003) 24, para 388; H Mostert *et al The principles of the law of property in South Africa* (2010) 239.

A personal servitude, on the other hand, is always constituted in favour of the individual in his or her personal capacity. It confers on this individual the right to use the owner's property.[5] A praedial servitude is inseparably bound to the land it benefits and therefore when the land is alienated the new owner becomes the holder of the praedial servitude. A personal servitude cannot be transferred by its holder. In terms of the common law principle that a servitude always runs with the land, a praedial servitude, in principle, can be granted in perpetuity or, in terms of section 75(1) of the Deeds Registries Act 47 of 1937, for a limited period only. A personal servitude, on the other hand, is extinguished when the period for which it is granted lapses, or when the holder of the personal servitude dies. Where the holder is a juristic person, the servitude lapses after 100 years. A praedial servitude is indivisible, whereas personal servitudes are divisible.[6] This means that a personal servitude, in principle, can exist over a part of the property, while a praedial servitude, in principle, exists over the whole of the affected land.[7]

The diagram below is a graphic illustration of the distinction between praedial and personal servitudes.



B, the owner of Farm Chalcot, grants A, in his capacity as owner of Farm Schickoft, a right of way over Farm Chalcot. The right of way is a praedial servitude to the extent that it is granted to A in his capacity as owner of Farm Schickoft. Farm Schickoft, which is benefiting from the right of way, is referred to as the dominant tenement and Farm Chalcot which serves, or is burdened in favour of Farm Schickoft, is referred to as the servient tenement. Should A later sell Farm Schickoft to D, D would of course become the owner of that farm and would therefore be entitled to exercise the right of way over

5 *Willoughby's Consolidated Co Ltd v Copthall Stores* 1913 AD 277 281; *Ex parte Geldenhuys* 1926 OPD 155 163-164.
6 *Mocke v Beaufort West Municipality* 1939 CPD 135.
7 Mostert *et al* (n 4 above) 239.

Farm Chalcot. If C, owner of Farm Kalkfeld, grants to A, in his or her personal capacity, the right to draw water from the borehole on Farm Kalkfeld, this right constitutes a personal servitude because the servitude is not granted to A in his or her capacity as owner of Farm Schickoft but in his or her personal capacity. Should A sell his property to D, D would not be entitled to exercise the servitude merely because he or she has acquired ownership of the property. His or her entitlement will be determined by an express grant by C.

Praedial servitudes will now be discussed in detail, while personal servitudes and unregistered servitudes are discussed under 2.2.4 below.

2.2.3 Praedial servitude

2.2.3.1 Requirements

South African law (including Namibian law) knows no *numerus clausus* of real rights, including servitudes, in respect of land. However, certain requirements or pre-requisites must be met before a right will qualify as a praedial servitude.[8] These requirements are discussed under separate headings below.

One piece of land serves another

As stated earlier, there must be two tracts of land or erven, the dominant tenement and the servient tenement. A praedial servitude cannot exist without these two tenements. This accords with the rule of praedial servitudes that one piece of land serves another. The owner of the dominant tenement must derive some benefit from the praedial servitude in his or her capacity as owner of the land.[9]

In *Van der Vlugt v Salvation Army Property Co*[10] it was held that a right of a municipality to lay a sewer over privately owned land was not a praedial servitude because that right was not granted in favour of an identifiable dominant tenement.

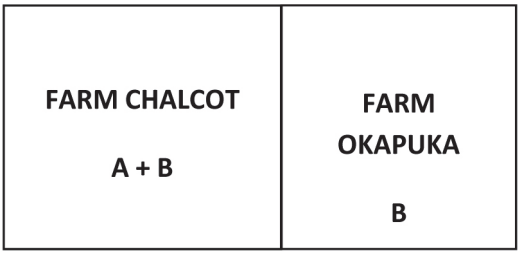
The servitude must offer some advantage, either present or future, to the dominant tenement whereby its value or the enjoyment to be derived from it is increased. The dominant and servient tenements must be situated close enough to allow practical exercise of the servitude. The use made of the servient land must be based on some permanent attribute or feature of such

8 Badenhorst *et al* (n 3 above) 322-6, see also Mostert *et al* (n 4 above) 239.
9 Badenhorst *et al* (n 3 above) 323; Du Bois (n 4 above) 594; Joubert *et al* (n 4 above) Vol 24, para 396; Mostert (n 4 above) 240.
10 1932 CPD 56.

land. This is expressed in the existence of a *causa perpetua* as a requirement.[11]

Nobody can constitute servitude over his or her own property

Nobody can hold a servitude over his or her own property (*nemini res sua servit*). This means that where a person owns two properties, he or she cannot register a servitude as a burden over one property in favour of the other one, not even if the ownership is held under two separate title deeds.[12] There is an exception with respect to co-owners because an owner can acquire a servitude over land of which he or she is only a co-owner and conversely, co-owners may acquire a servitude over land that is owned solely by one of them.[13] The exception which applies in relation to co-owners can be explained graphically as follows:



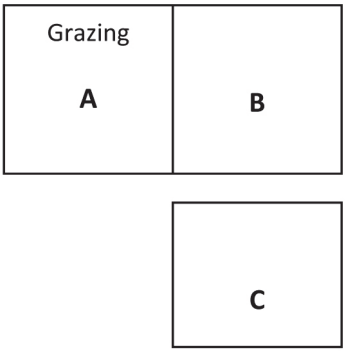
In the above scenario, A and B own Farm Chalcot in undivided shares as co-owners. B is the sole owner of Farm Okapuka. B can acquire a servitude over Farm Chalcot and conversely, A and B can acquire a servitude over Farm Okapuka.

There cannot be a servitude of a servitude

This requirement entails that the benefit of the servitude cannot be severed or separated from the land to which it is attached in favour of another property. It follows that a *dominus* is not permitted to assign his or her servitude (or otherwise allow it to be utilised) for the benefit of another piece of land other than the dominant tenement.[14] Similarly, the holder of a servitude cannot grant to another person a servitude in respect of the servitude which he or she holds.[15] The holder of a right of way, for example, cannot grant to someone else a servitude to use the road.

11 *Lorentz* (n 1 above) 1052.
12 Badenhorst *et al* (n 3 above) 323.
13 *Mocke* (n 6 above); Badenhorst *et al* (n 3 above) 323.
14 Badenhorst *et al* (n 3 above) 323-4; Mostert *et al* (n 4 above) 240.
15 *Dreyer v Letterstedt's Executors* 1865 5 Searle 88.

This rule can be explained graphically by another example:



If A has granted a grazing right over his or her land to B. B cannot cede the right to C because he or she will then be creating a servitude over a servitude.

A servitude must not impose active (positive) duties on owner of servient tenement

As stated earlier, a general characteristic of a servitude is that it exists over land belonging to someone else. Its existence constitutes a diminution of ownership. The holder of the servitude is entitled to some benefit from the servient tenement. However, he or she is not entitled to demand some active (positive) act on the part of the owner of the property.[16] This means that a servitude does not oblige the servient owner to render a performance (*servitus in faciendo consistere nequit*). For example, the holder of a right of way over his or her neighbour's property cannot expect the owner of the neighbouring property to maintain the road.

There are two servitudes constituting exceptions to the general rule that the holder of a servitude may not demand any positive act from the owner of the servient land. These servitudes are:

(a) *servitus oneris ferendi,* which is a servitude which imposes a duty on the owner of a servient land to keep a wall in a good state of repair;[17] and

(b) *servitus altius tollendi*, which is a servitude that compels the owner of a servient property to construct a building of a certain height.

Praedial servitudes are indivisible

The rule is that a praedial servitude is *prima facie* imposed on the servient tenement as a whole to the benefit of the dominant tenement.[18] This rule is

16 *Schwedhelm v Hauman* 1947 1 SA 127 (E); *Van der Merwe v Wiese* 1948 4 SA 8 (C).
17 Badenhorst *et al* (n 3 above) 324.
18 *Nolan v Barnard* 1908 TS 142 151.

particularly important in cases involving joint ownership. The rule means that a joint owner of the dominant tenement cannot acquire a servitude in favour of his undivided share only. Similarly, a joint owner of the servient tenement cannot grant a servitude over his or her undivided share only. Therefore, the creation of a servitude will require the prior consent and cooperation of the joint owners of both the dominant and servient tenements. A servitude registered in favour of a dominant tenement which is subsequently subdivided, extends in favour of each and every subdivided portion of the dominant tenement. If the servient tenement is later subdivided, every portion is subject to the praedial servitude as if the servitude had been constituted at the outset against that particular tenement. For example, where the dominant tenement is owned jointly by A and B, B cannot acquire a right of way over the servient tenement for his undivided share only. The servitude can only be granted to the dominant tenement as such. This implies that the creation or acquisition of the servitude will require the prior consent and cooperation of both A and B. Should the dominant tenement later be subdivided between A and B, each would be entitled to make use of the right of way over the servient tenement.[19]

Once a servitude involving two adjacent pieces of land is created, it is immaterial who the owner of either tenement is at any given time. The common expression is that 'a servitude always runs with the land'. Therefore, neither the benefit nor the burden can be detached from the piece of land on which it is respectively conferred and imposed. Both are passed from one owner to the next when the land is transferred. The praedial servitude is granted to the owner of the dominant tenement in his or her capacity as the landowner. Unlike personal servitudes that may be constituted over either movables or immovables, praedial servitudes may only be constituted over immovables. Traditional praedial servitudes include right of way, way of necessity, water servitudes, grazing servitudes; and the power to prohibit the erection upon the servient tenement of any building (or any building higher than a specific height).

2.2.4 Distinction between rural and urban praedial servitudes

Praedial servitudes are traditionally divided into rural and urban praedial servitudes. This distinction is often said to have no legal significance because some servitudes can be both rural and urban. However, the significance of the said distinction does not seem to be found in the locality of the tenements concerned but in the purpose for which the properties concerned are used. Rural servitudes relate to land or tenements used for agricultural purposes while urban servitudes find application in residential or industrial environments.

19 Badenhorst *et al* (n 3 above) 325-326; Mostert *et al* (n 4 above) 243; Du Bois (n 4 above) 597; Joubert *et al* (n 4 above) 398.

2.2.4.1 Rural praedial servitudes

The following are said to be the most important rural servitudes: rights of way, water servitudes and grazing servitudes.[20]

(a) Right of way

In terms of this servitude the holder of the servitude is entitled to walk across another person's land or to drive cattle or vehicles across the land. When the right to drive cattle across the land is accompanied by the right to allow cattle to graze as they cross the land, the servitude concerned is called a servitude of trek path.[21]

(b) Water servitude

This servitude confers on the owner of the dominant tenement the right to draw water from the servient tenement, either in furrows or pipes; to water cattle on the servient land; and to discharge water and store surplus water on the servient tenement.[22]

(c) Grazing servitude

This servitude confers on the owner of the dominant tenement the right to graze a specified or unspecified number of cattle on the servient tenement. If the number of cattle is specified by the servitude, the owner of the servient tenement (servient owner) may grant others similar servitudes, provided that he or she does not prejudice the first grantee in the exercise of his or her rights. In the absence of a specific provision the owner of the dominant tenement has no exclusive right to any particular grazing area so that the servient owner may make use of his or her land, provided that he or she does not interfere with the owner of the dominant tenement's grazing rights. Where the number of cattle is not specified, the owner of the servient tenement (servient owner) must restrict the use of his or her land to such an extent as to give the owner of the dominant tenement a reasonable opportunity to exercise his or her right; while the dominant owner cannot exclude the owner of the servient tenement (servient owner) from grazing at least a certain number of cattle which he or she requires for his or her farming operations.[23]

2.2.4.2 Urban praedial servitudes

These servitudes consist mainly of prescribing the restrictive use of the servient tenements. The following are examples of traditional urban servitudes.[24]

20 Badenhorst *et al* (n 3 above) 326-327.
21 As above.
22 As above.
23 Badenhorst *et al* (n 3 above) 327.
24 Badenhorst *et al* (n 3 above) 326.

(a) Beams and windows on servient tenement

The owner of the dominant tenement is entitled to insert one or more beams of his or her building into the building on the servient tenement or to have a window or other opening in a wall on the servient tenement.

(b) Prohibition pertaining to erection of building on servient tenement

The owner of the dominant tenement may prohibit the erection of any building on the servient tenement, either at all or beyond a certain height, or conversely, to compel the erection of a building of a certain minimum height or type. This type of servitude is intended to prevent the owner of the servient tenement from doing anything on his or her land to obscure the view or light from or on the dominant tenement.

(c) Support on servient tenement

The right to service of support (*servitus oneris ferendi*) grants the servitude holder the right to have his or her building supported by a building on the servient tenement. The servitude holder has the right to build a house against the wall of a house on the adjoining tenement and to have it supported by the wall on the latter tenement. This is a reciprocal servitude and is meant to prevent either owner from demolishing his or her building and thus withdrawing the support from the adjoining building. The owner of the servient tenement is bound to keep the wall concerned in good order at his or her own expense.[25]

(d) Encroachment on servient property

This refers to the right to build or otherwise encroach upon the servient property, for example, by having a verandah encroaching upon it or a balcony protruding into its airspace or rain water discharging onto it.[26]

(e) Way of necessity

A way of necessity (*via necessitatis*) is a peculiar servitude with special requirements. It can take any of the forms of a right of way. However, there is one major difference between the conventional right of way and a way of necessity. A way of necessity does not arise from agreement but it is granted by court in order to afford a right of way in respect of land-locked property. It does not require the consent of the servient owner. It is a right which may be claimed as of right by an owner of land when there is no other alternative route available to such owner. It is a right of way granted in favour of property over an adjoining property, constituting the only means of ingress to and egress from the former property. Thus, if there is an alternative reasonable and sufficient route, a claim to a way of necessity will fail. The criterion which is applied in determining whether a way of necessity should be granted is not convenience but necessity, though not absolute necessity.[27] Any owner of

25 Badenhorst *et al* (n 3 above) 327.
26 Badenhorst *et al* (n 3 above) 328.
27 *Illing v Woodhouse* 1923 NPD 166 168.

land is entitled to a reasonable and sufficient means of access to a public road from the property or the land. If a way of necessity is granted, it extends to all persons who wish to visit the owner of the land or who wish to gain access to the landlocked tenement.[28] The owner of the land concerned is not entitled to claim the best and nearest access on the ground of necessity.[29] In *Illing v Woodhouse,*[30] a way of necessity was granted to an owner of land after it had been established that in the absence of a way of necessity the landowner would have been compelled to travel 11 miles along a road crossing a gorge which was difficult though not impossible to traverse, while the road in respect of which he was granted a way of necessity was only 4 miles long and easy to negotiate.

As stated earlier, the criterion for the grant of a way of necessity is necessity and not convenience. Consequently, an owner who has only himself or herself to blame for not having access to the property cannot claim a way of necessity. In *Bekker v Van Vyk*[31] an owner of land had for his own convenience applied for the closure of a public road to which he had perfect access and subsequently sought a way of necessity through someone else's land. It was held that he was not entitled to such way of necessity.

The way of necessity may be granted either as a permanent right of way (*ius viae plenum*) or as a precarious right of way to be used in cases of emergency (*ius viae precario*). The grant of *ius viae plenum* will attract payment of reasonable compensation whereas in the case of *ius viae precario* the payment of compensation is not required.[32]

The following are some guidelines regarding the granting and the nature of a way of necessity:

- Registration of a way of necessity against the title deed of the servient tenement may only take place after such registration has been authorised by a court order.
- The use of a way of necessity prior to the issue of the required court order is unlawful and amounts to trespassing.
- The way of necessity can be established for use in emergency situations only or for use on a continuous basis. In the latter case compensation will have to be paid.
- In determining the route of an authorised way of necessity and its width the least burdensome route over the nearest land between the landlocked tenement and the public road must be chosen. This is in accordance with the principle of *ter naaste lage en minster schaden.*
- Reasonable compensation must be paid in case of a permanent way of necessity.

28 Badenhorst *et al* (n 3 above) 328.
29 *Lentz v Mullin* 1921 EDC 268 270.
30 As above.
31 1956 3 SA 13 (T).
32 Badenhorst *et al* (n 3 above) 328-9.

- Although registration is neither a constitutive requirement for the establishment of the way of necessity or for its enforcement against third parties, the courts recommend that it be done.[33]
- The applicant must prove necessity and furnish reasons why the way of necessity should encumber the defendant's land and must also present evidence concerning the width of the claimed way, the recommended route and the compensation.
- After the court has decided that there is indeed a necessity, it will make a finding as to the width of the way of necessity concerned and fair compensation.

2.2.5 Creation of praedial servitudes

Apart from an original grant by state, servitudes, both praedial and personal, normally originate from agreement between the respective owners of a dominant tenement and a servient tenement. This agreement will contain the extent of servitudal rights, the amount payable to the *dominus* in consideration of the grant of the servitude and its intended duration unless it is intended to remain in force *ad infinitum*.

It must be noted that a mere agreement whereby a servitude is granted is not enough to constitute the servitude. The servitude as a real right comes into existence only when the agreement between the owners of the properties concerned has been registered. To take effect the servitude must be registered against the title deed of the servient tenement.[34] This may be done either by means of a reservation in a deed of transfer when the property is transferred in the circumstances envisaged under section 76 of the Deeds Registries Act[35] or by the registration of a notarial deed, accompanied by an appropriate endorsement against the title deeds of the dominant and servient tenements respectively.[36] In addition, the general principles relating to acquisition of real rights discussed in chapter 6 apply equally to praedial servitudes.

Servitudes may also be created by statute. Section 28 of Sectional Titles Act 95 of 1986, for example, provides for the existence of implied servitudes of subjacent and lateral support and of passage and provision of water and

33 *Van Rensburg v Coetzee* 1979 4 SA 655 (A) 676.

34 Secs 16, 65 and 75 of the Deeds Registries Act. If the servient tenement is subject to a mortgage or another limited real right with which the servitude may conflict, the written consent of the bondholder or holder of the other limited real right must be obtained before the servitude can be registered.

35 In other words if: (a) the servitude is imposed on the land transferred in favour of other land registered in the name of the transferor; or (b) the servitude is imposed in favour of the land transferred on other land registered in the name of the transferor; or (c) the transferor admits that the land to be transferred is subject to unregistered rights of servitude in favour of land registered in a third person's name, and the transferee consents in writing to such servitude being embodied in the transfer, provided further that such third person appears either in person or by a duly authorised agent before the registrar at the time of execution of the transfer and accepts the servitude in favour of his or her land.

36 Badenhorst *et al* (n 3 above) 332.

electricity, which are deemed to be incorporated in the title deeds of all sectional owners.

As we saw in chapter 6, a servitude can be created by prescription. Under section 6 of the Prescription Act 68 of 1969, a servitude is acquired by prescription when a person openly, and as if he were entitled to do so, exercised the rights and powers of the holder of a servitude for an uninterrupted period of 30 years. This applies to both praedial and personal servitudes. In the case of praedial servitudes, any periods for which such rights and powers were so exercised in the required way by the acquirer's predecessors in title would be taken into account to constitute jointly an uninterrupted period of 30 years.

A servitude may also originate from an order of court. A classic example is a servitude of a way of necessity. Registration is not a prerequisite for the vesting of the servitude. In *Van Rensburg v Coetzee*[37] the court left open the question as to whether registration is a prerequisite for the vesting of the servitude. The court, however, cautioned that it was advisable from a practical point of view to have the servitude registered.

2.2.6 Powers and duties of owners of dominant and servient tenements

The rights and duties of the owners of the respective tenements will be determined with reference to the terms of the agreement between them which must be interpreted according to the ordinary rules of interpretation. In addition, well-established principles relating to specific servitudes must govern the construction of the servitude. It follows therefore that an agreement which conflicts with the freedom of a servient owner to use his or her property as he or she deems fit will be interpreted restrictively and its terms construed in a manner which is least burdensome for him or her.[38] Therefore, the owner of the dominant tenement must exercise his or her servitudal rights in a civilised manner with due regard to the rights of the servient owner (*civiliter modo*), which means that the servitude must be exercised in a proper and careful manner so as to cause the least inconvenience to the servient owner. But this principle does not restrict the owner of the dominant tenement in the exercise of his or her rights merely because doing so will prejudice the owner of the servient tenement.[39]

In *Pieterse v Du Plessis*,[40] the holder of a servitude of aqueduct claimed compensation for damage caused to his pipes by the servient owner while the latter was ploughing his land. The court held that the onus was on the holder

37 (n 35 above) 676.
38 Badenhorst *et al* (n 3 above) 331.
39 As above.
40 1972 2 SA 597 (A).

of the servitude to show that the pipes had been laid at the depth stipulated by the agreement and in a proper and workman-like manner because to rule otherwise would impose a restriction on the servient owner's right to use land as he or she saw fit. The court also held that the owner of the dominant tenement must exercise his or her rights (*civiliter modo*) in a manner that least inconvenienced the owner of the servient tenement.

In terms of the remedies which are available where a party's rights have been violated, either party is entitled to claim damages if the other party has exceeded his or her rights, provided that the plaintiff can prove patrimonial loss. If no such loss but only an erosion of rights can be proved the applicable remedy would be an interdict to prevent further breaches.

If the holder of a limited real right exceeds his or her powers in the exercise of that right in respect of the servient land, the owner of the servient land may apply to the court for a declaration of rights.

Since a praedial servitude runs with the land, it may be exercised by anyone who lawfully occupies the dominant tenement. A lessee, for example, who occupies a dominant tenement, is entitled to exercise the limited real right existing over the servient tenement in favour of the dominant tenement. However, only the owner of the dominant tenement may institute legal proceedings against the owner of the servient tenement in the event of the latter disputing the existence or extent of the servitude.

In *Setlogelo v Setlogelo*[41] it was held that only the owner of land is entitled to institute proceedings or to a declaration that the land is free from any alleged servitude, or, if the existence of a servitude is not in dispute, that the holder of the servitude claims rights in excess of those granted to him or her in terms of the servitude.

2.2.7 Termination of praedial servitudes

Praedial servitudes may be terminated in the various manners discussed below under the appropriate headings.

2.2.7.1 Cancellation of a servitude by agreement

A servitude may be terminated by agreement between the owner of the dominant tenement and the owner of the servient tenement.[42] Between the parties (*inter partes*) the agreement becomes effective immediately. The cancellation is also immediately effective against third parties who have knowledge of the cancellation. To be effective against other third parties, a cancellation agreement must be registered against the title deed of the

41 1921 OPD 161.
42 Badenhorst *et al* (n 3 above) 336.

servient tenement by a notarial deed entered into by the respective owners of the dominant and the servient tenements. This means that if the cancellation agreement has not been registered, a purchaser of the dominant tenement will be entitled to exercise the servitude unless he or she had prior knowledge of the cancellation agreement. A purchaser of the servient tenement will be bound by the servitude unless, at the time of the sale, he or she had knowledge of the cancellation agreement.[43]

The cancellation agreement can be either express or tacit. For example, an agreement will be tacit where the owner of the dominant tenement allows the owner of the servient tenement to do something which is inconsistent with rights conferred by the servitude, for instance, if the owner of the dominant tenement allows the owner of the servient tenement to build upon the track of land over which there is a right of way.

2.2.7.2 Abandonment or waiver of a servitude by a holder

Abandonment of a servitude may be express or implied. An express abandonment may be effected unilaterally or by agreement.[44] An implied abandonment may be effected where, for example, the owner of the dominant tenement knows that the owner of the servient tenement is obstructing access to a right of way and the owner of the dominant tenement abstains from doing anything about it.[45] The period of inaction and acquiescence of the owner of the servient tenement is of great importance.

The same principles apply to waiver.[46] Authorities insist that strict proof of the intention to abandon the servitude will be required, although it may be inferred from the conduct of the owner of the dominant tenement, provided that such conduct is consistent only with the intention to abandon the servitude.[47] It must be noted that there are strong views to the effect that a servitude may not be abandoned if it would cause serious injury to the servient tenement.[48]

2.2.7.3 Extinction of a servitude by prescription

In terms of section 7(1) of the Prescription Act, a positive servitude is extinguished by prescription if it is not exercised for an interrupted period of 30 years. In terms of section 7(2), a negative or passive tenement is not lost

43 *Bezuidenhout v Nel* 1987 4 SA 422 (N). See also Badenhorst *et al* (n 3 above) 336 and the criticism against the proposition that the purchaser should know both of the registered servitude and its cancellation.
44 Du Bois (n 4 above) 614.
45 *Margate Estates Ltd v Urtel (Pty) Ltd* 1965 1 SA 279 (N); *Cowley & Another v Hahn* 1987 1 SA 440 (E).
46 Note that most writers refer to termination by abandonment rather than waiver.
47 Badenhorst *et al* (n 3 above) 336.
48 *Du Plessis v Philipstown Municipality* 1937 CPD 335; CG Hall & EA Kellaway *Servitudes 3rd ed* (1973) 144.

as a result of non-user, since its holder is deemed to exercise it as long as nothing is done on the tenement which would impair the enjoyment of the servitude by the owner of the dominant tenement.[49] In other words, a negative servitude is extinguished by prescription where the owner of the servient tenement acts contrary to the servitude for an uninterrupted period of 30 years, for example where an owner trades on his or her property for 30 years contrary to a servitude prohibiting it.[50]

2.2.7.4 Termination of a servitude by merger

A servitude is lost by merger if the owner of the dominant tenement also becomes the owner of the servient tenement, provided that the rights of ownership coincide exactly with regard to both tenements.[51] This is consistent with the principle that a person cannot have a servitude over his or her own property.

2.2.7.5 Termination of a servitude by the destruction of either dominant or servient tenement

The servitude is lost by destruction of either dominant or servient tenement if the event renders the exercise of the rights of servitude permanently impossible. For example, if the house to which a *habitatio* relates is destroyed. The element of permanent impossibility becomes inoperative if the destroyed tenement is restored, in which case, the servitude will revive.

2.2.7.6 Termination of a servitude by lapse of fixed time

If the servitude was granted for a specific period only, it will expire upon termination of that period.

2.2.7.7 Termination of a servitude by order of court due to non-compliance

A servitude can be terminated by an order of court due to the failure of one of the parties to comply with the conditions pertaining to the servitude.

2.2.7.8 Termination of a servitude by an order of court in pursuance of an application in terms of a statutory provision

A statute may make provision for the cancellation of a servitude upon application to the High Court.[52]

49 Badenhorst *et al* (n 3 above) 337.
50 *Hollman & Another v Estate Latre* 1970 3 SA 638 (A); *Hotel De Aar v Jonordon Investment (Edms) Bpk & Others* 1972 2 SA 400 (A).
51 *Mocke* (n 6 above).
52 Badenhorst *et al* (n 3 above) 338.

2.2.8 Personal servitudes

2.2.8.1 Creation

A personal servitude is established in favour of a particular person over a thing and may confer a variety of benefits to the holder.[53] It can be created for a fixed period of time or be granted until the occurrence of a future event or until the death of the beneficiary but never beyond that. Personal servitudes are normally created by agreement between the relevant parties followed by registration. Registration takes place either by means of a reservation in a deed of transfer, in the circumstances envisaged in section 67 of the Deeds Registries Act, or by the registration of a notarial deed accompanied by an appropriate endorsement against the title deed of the servient tenement.[54]

2.2.8.2 Classification

There are three main categories of personal servitudes, namely usufruct (*usus fructus*), use (*usus*) and habitation (*habitatio*). Each of these personal servitudes will now be discussed separately.

Usus fructus *(usufruct)*
Usufruct is a real right in terms of which a grantor confers on a usufructuary (the holder of the servitude) the right to use and enjoy the thing to which the usufructuary relates.[55] The thing may be either movable or immovable property. Examples of movable and immovable things that may be subject to a usufruct in favour of the usufructuary are a herd of cattle or an entire estate of the grantor. Normally, usufruct extends to the accessories of the thing subject to usufruct, for example usufruct over a farm will normally extend not only to the buildings but also livestock, farming equipment and other furniture in the homestead, provided a contrary intention does not appear from the agreement. It may also consist of natural fruits such as crops, or civil fruits such as the interest earned on a capital invested or the rental received on a lease of immovable property. Usufruct is commonly created in wills where, for example, a testator bequeaths certain property to his children subject to a usufruct in favour of his wife. A usufruct can also be established (*inter vivos*) while the grantor is still alive, where for example, the owner of a farm grants to someone the right to plant crops on a specific tract of land.

The right of the usufructuary is to enjoy and use the property concerned. He or she does not acquire *dominium* over the property but they are entitled to possession and the fruits of the property. The capital in its entirety remains with the owner but the fruits of the servient property accrue to the

53 As above.
54 Badenhorst *et al* (n 3 above) 342; sec 65(1) of the Act.
55 Badenhorst *et al* (n 3 above) 338.

usufructuary, either wholly or in part. They do not have an *ius abutendi* (the entitlement to consume and destroy) but as indicated earlier, the usufructuary has the right to take, consume or alienate its fruits, whether they are natural, industrial or civil. It follows that a usufruct cannot be created over consumables because the usufructuary, when the usufruct comes to an end, has to restore the thing(s) in respect of which the usufruct existed, reasonable wear and tear excepted.[56] Property which is subject to usufruct can at any time be sold or let by the owner, subject to the servitude. In terms of section 69(1) of the Deeds Registries Act, if the owner of the land subject to a personal servitude and the holder of the servitude have disposed of the land or any portion thereof with the rights of servitude to another, they may together give transfer thereof to the person acquiring it. In this case, however, the servitude lapses by virtue of the principle that a person cannot have a servitude over his or her own property.

The usufructuary is obliged to maintain the property at his or her own expense. In the absence of an agreement to the contrary, all the normal expenses, relating to the property (such as taxes) must be paid by him or her. He or she is not entitled to change the material nature of the property by, for example, converting a farm into a restaurant or a holiday resort. The usufructuary is not entitled to compensation for improvements effected by him or her on the property but he or she is entitled to be compensated for special or extraordinary expenses, such as the interest on an existing bond over the property paid by him to the mortgagee.[57]

Usus *(use)*

Use confers the right to use the property of another person for daily needs. The holder of the right is entitled only to those fruits that provide him or her and their family with the necessities of life. Surplus fruits cannot be sold, nor can the holder of the right alienate or let his use.[58]

Habitatio *(habitation)*

The servitude of habitation confers on its holder the right to dwell in the house of another together with his or her family without detriment to the substance of the property. Unlike a servitude of use, it carries with it the right to grant a lease or sublease to others.[59]

2.2.8.3 Termination of personal servitudes

Personal servitudes may be terminated in the various manners discussed below under appropriate heading.

56 Badenhorst *et al* (n 3 above) 340; *Brunsdon's Estate v Brunsdon's Estate* 1920 CPD 159 174-175.
57 *Gordon's Bay Estates v Smuts & Others* 1923 AD 160.
58 Badenhorst *et al* (n 3 above) 341.
59 As above.

(a) By agreement

A personal servitude may be terminated or cancelled by a bilateral agreement between the parties, the owner of the land and the holder of the servitude. Section 68(2) of the Deeds Registries Act provides that cancellation of the registration of a personal servitude in pursuance of an agreement between the owner of the encumbered land and the holder of the servitude shall be effected by a notarial deed, provided that no such deed shall be registered if the servitude is mortgaged, unless the mortgagee consents in writing to the cancellation of the bond or the release of the servitude from its operation.

(b) At expiration of time

A personal servitude will lapse at the expiration of a specified period or at the death of the holder. It may also expire earlier upon fulfillment of a resolutive condition.[60] Under section 68(1) of the Deeds Registries Act the registrar is obliged to note such a lapse on written application by or on behalf of the owner of the encumbered land accompanied by proof of the lapse of the servitude, the title deed of the land and , if available, the title deed, if any, of the servitude.

2.2.8.4 Unregistered servitudes

A servitude, like any other real right, may be acquired by agreement. Such an agreement however, though binding on the contracting parties, does not by itself vest the legal title to the servitude in the beneficiary, any more than a contract of sale of land passes the *dominium* to the buyer.[61] An agreement to establish a servitude will only create the real right concerned on registration[62] and upon registration the real right comes into force and becomes binding on the parties as well as third parties. Where there is a change of ownership certain questions and principles relating to the binding effect of an unregistered servitude arise. The principles are that, firstly, prior to registration a third party, in particular the purchaser of the servient property, who has no knowledge of the servitude, is not bound to recognise it. However, as regards the relation between the parties to the agreement, the agreement would be binding although not registered. Secondly, an unregistered servitude will bind a third party who has actual or constructive knowledge of the servitude.[63] Hoexter JA in *Frye's (Pty) Ltd v Ries*[64] summarised the law as follows:

> As far as the effect of registration is concerned, there is no doubt that the ownership of a real right is adequately protected by its registration in the Deeds

60 Mostert *et al* (n 4 above) 254.
61 *Willoughby's Consolidated Co* (n 5 above) 16.
62 Badenhorst *et al* (n 3 above) 334-335.
63 Badenhorst *et al* (n 3 above) 335.
64 1957 3 SA 575 (A) 582; *Manganese Corporation Ltd v South African Manganese Ltd* 1964 2 SA 185 (W) 189.

> Office. Indeed the system of land registration was evolved for the very purpose of ensuring that there should not be any doubt as to the ownership of the persons in whose names real rights are registered. Theoretically, no doubt, the act of registration is regarded as notice to all the world of the ownership of the real right which is registered … If a servient tenement is sold, the buyer is bound by the servitude registered in favour of the owner of the dominant tenement and it is immaterial whether he did or did not know of the existence of the servitude. Knowledge of a servitude on the part of a buyer is material only when the servitude has not been registered. If it has not been registered the buyer of the servient tenement is not bound by the servitude unless he had knowledge of it when he bought. But if the servitude has been registered the buyer of the servient tenement is bound by the servitude, not because he knew of it or because he is deemed to have known of it, but because the servitude was registered. It is true that it has been said that a buyer of a servient tenement is bound by a registered servitude because its registration is notice to the world; but that is merely a way of saying that registration is as effective as though in fact everybody in the world had been expressly notified of the servitude.

Thirdly, in the case of *Manganese Corporation Ltd v South African Manganese Ltd*[65] it was laid down that when the owner of land who had no knowledge of a servitude which had erroneously been omitted from his title deeds, and who is accordingly not bound by the unregistered servitude, passes transfer to a purchaser who has knowledge of the servitude, that servitude is binding on the transferee.

Fourthly, in *Van den Berg & 'n Ander v Van Tonder*[66] it was held that where a servitude is created by agreement, the owner of the servient tenement is bound to comply with it and the owner of the dominant tenement can be forced or ordered to effect registration. A purchaser of the servient tenement who had actual knowledge of the servitude at the time of purchase, is also obliged to allow registration against his land, although he was not a party to the agreement creating the servitude. He is therefore, prior to registration, unlike his predecessor in title, not obliged to observe it. But if disregard thereof will cause irretrievable damage to the owner of the dominant tenement and observance thereof will cause no irretrievable damage to the owner of the servient tenement, the owner of the servient tenement can be obliged to comply with the servitude. It is done by a procedure which is a combination of an interdict and a spoliation application, and the order can always be purely temporary, pending an action for registration.

Fifthly, a purchaser with knowledge of an unregistered servitude is bound by the servitude notwithstanding the intervention between the grantor and such purchaser of a prior owner of the servitude who had bought without knowledge of the servitude. If such a purchaser repudiates the servitude, he is acting *mala fide.* However, *mala fides* is not readily presumed

65 As above.
66 1963 3 SA 558 (T).

and as a general principle, proof of actual knowledge of the agreement constituting the servitude is required before the court will hold a purchaser bound by an unregistered servitude. But, if a person willfully shuts his eyes and declines to see what is perfectly obvious, he must be held to have had actual notice.[67] The case of *Grant & Another v Stonestreet & Others*[68] illustrates these principles. In *Grant*, a right of aqueduct was created during 1865 by means of an agreement between the owners of farm A (the dominant tenement) and farm B (the servient tenement) but it was never registered in the deeds registry. The successor in title of the contracting owner of farm B (the servient tenement) had no knowledge of the right of aqueduct and it was never enforced against him. The next successor in title of farm B, however, did have knowledge of the written agreement. When the owner of farm A (the dominant tenement) tried to enforce it by means of a court order, he claimed that the right of aqueduct was only a creditor's right in terms of the unregistered servitudal agreement. As a creditor's right it was enforceable only between the original contracting parties and, in any case, it had been terminated since the successor in title of the contracting owner of farm B had no knowledge of the agreement. The court held:

> that the servitudal agreement was enforceable between the contracting parties; that because the successor in title to the contracting owner of farm B had no knowledge of the agreement, it was not enforceable against him but that if he had had knowledge, it would have been enforceable against him in terms of the doctrine of notice; that the next successor in title of farm B did have knowledge of the agreement and, consequently, it was enforceable against him in terms of the doctrine of notice; and that the agreement had not been terminated because of the previous owner of B's lack of knowledge of the agreement.[69]

3 Lease

As stated earlier (2.5 of chapter 4), letting and hiring (*conductio* or *huur en verhuring*) is a contract whereby one person (the lessor) agrees to give another (the lessee) the use of a thing, or his own services or those of another human being or of an animal, and the lessee agrees to pay the lessor an amount of money (the rent) in return.[70] A contract of this nature is termed a lease.[71] In terms of a contract of lease pertaining to property the lessor's right of ownership is limited to the extent that the lessee acquires a limited real right to the lessor's property which allows him or her (the lessee) the temporary use and enjoyment of the property in return for payment of rent.[72] In Namibia leases are governed by common law and the provisions of the Formalities in Respect of Leases of Land Act 18 of 1969.

67 *Grant & Another v Stonestreet & Others* 1968 4 SA 1 (A).
68 As above.
69 AJ van der Walt & GJ Pienaar *Introduction to the law of property 6th ed* (2009) 245.
70 *De Jager v Sisana* 1930 AD 71.
71 F du Bois *Wille's principles of South African law 9th ed* (2007) 906-907.
72 Cooper (n 15 above), Badenhorst *et al* (n 2 above) 427.

A short–term lease is a lease of immovable property for a term shorter than ten years and is not registered. The lease agreement is not sufficient to constitute a real right, as it creates creditor's rights only. However, the lessee acquires a real right as soon as the lessee takes possession of the property and this alters the relationship between the lessee and the new owners of the property. Firstly, new owners who had knowledge of the lease agreement are bound by its terms by virtue of the application of the doctrine of notice. In terms of this doctrine, the lessee is protected for the duration of the lease since the new owner, who had knowledge of the lease agreement, is deemed to have acquiesced in the lease agreement before purchasing the property.[73] The lease agreement is therefore enforceable against the new owner. Secondly, the lessee is protected for the duration of the lease by the application of the common law principle of *huur gaat voor koop* (the lease agreement takes precedence over a sale).

Under the provisions of the Formalities in Respect of Leases of Land Act a long-term lease is described as one that is entered into for a period of not less than ten years or for the natural life of the lessee or any other person mentioned in the lease or is renewable by the lessee indefinitely for periods which, together with the first period of the lease, amount to a total of at least ten years.[74] An unregistered long-term lease merely creates a personal right against the lessor in terms of which the lessee may demand possession of the property to which the lease relates. However, the situation changes if the lessee takes possession of the real property. In this case the lessee acquires the right to use the leased property. Such right is a limited real right in the property of another – an *ius in re aliena* – for the duration of the lease and subject to the common law principle of *huur gaat voor koop.*

The Act further stipulates that a long-term lease must be registered and if registered, it binds the owners and their successors in title because in this case a real right is acquired on registration of the lease.[75] However, if such lease is not registered, it is not valid against a creditor or successor under onerous title of the lessor for a period longer than ten years after the conclusion of the lease agreement. It must be mentioned that this does not oust the common law principle of *huur gaat voor koop,* which protects the lessee for only the first ten years of the lease.

Furthermore, such unregistered long-term lease shall be valid against anyone who acquires the land with knowledge of the lessee's rights under the lease agreement, including the duration of the lease which may exceed ten years. In this case the unregistered long-term lessee is protected under the doctrine of notice for the entire period agreed to in the lease agreement.

73 Du Bois (n 4 above) 627; Van der Walt & Pienaar (n 69 above) 289-90.
74 Sec 1(2).
75 *Executor of Hite v Jones* (1902) 19 SC 235 at 244.

4 Mortgage

4.1 Definition and general features

As indicated earlier (2.4 of chapter 4) a mortgage is a real right in respect of the immovable property of another, securing a principal obligation between a creditor and a debtor. The agreement is normally known as the mortgage bond which contains the rights and liabilities of the mortgagee and the mortgagor. The borrower is the grantor of the bond and the lender the bondholder. The agreement *per se* constitutes only a personal right between the borrower (mortgagor) and the bondholder (mortgagee). The real right is created only when the mortgage has been registered in the deeds registries pursuant to an agreement between the parties.[76] A mortgage can only exist where there is a valid principal obligation, such as a loan. Its existence and continued existence depend on the existence of the principal obligation which it secures.[77] Consequently, a bond registered in the deeds registry terminates when the debt is repaid in full.[78] A mortgage is indivisible; this means that the entire mortgaged property serves as security for the debt and a partial satisfaction of the principal debt does not result in a proportional reduction of the burden on the mortgaged property.[79]

4.2 The legal consequences of mortgage

A duly constituted mortgage entails certain legal consequences which will now be discussed.

4.2.1 Powers of mortgagee and mortgagor

The mortgagee does not obtain the use and enjoyment of the mortgaged property. This is retained by the mortgagor subject to certain restrictions. The mortgagor may not, without the written consent of the mortgagee, grant any servitudes or mineral rights over the encumbered property.[80] However, the mortgagee's consent is not required if the mortgagor wants to let the property or if he or she wants to grant further bonds against security of the property, unless this consent is required in terms of the mortgage bond. These further bonds will, however, be subject to the rights of any mortgagee whose bond has been registered previously. This is based on the principle *first in time, first in rights.*[81] For example, where A is the holder of a first mortgage

76 *Roodepoort United Main Reef GM Co Ltd (in Liquidation) & Another v Du Toit NO* 1928 AD 66. 71; see also sec 50 of the Deeds Registries Act.
77 Du Bois (n 4 above) 631-632.
78 *Thienhaus NO v Metje & Ziegler Ltd & Another* 1965 3 SA 25 (A).
79 Du Bois (n 4 above) 632.
80 Secs 65(3); 70(6); and 75(2) of the Deeds Registries Act.
81 HJ Delport (ed) *South African property practice and the law: A practical manual for property practitioners* (2001) 66.

over a property and B is the holder of a second mortgage over the same property, A is entitled to be refunded before B should the property eventually be sold in execution. However, there is authority to the effect that the law does not allow a mortgage on an existing mortgage.[82]

4.2.2 Restrictions upon disposal of mortgaged property

Section 56(1) of the Deeds Registries Act provides *inter alia* that no transfer of mortgaged land shall be attested or executed by the registrar, and no cession of mortgaged lease of immovable property, or of any mortgaged real right in land, shall be registered until the bond has been cancelled or the land, lease, or right has been released from the operation of the bond with the consent in writing of the holder thereof. This in essence implies that the mortgagor cannot transfer the property hypothecated under a registered bond unless the mortgage bond has been paid in full and the bond has been cancelled. However, in terms of section 57(1) if the owner of the hypothecated land transfers to another person the whole of the land hypothecated thereunder, and has not reserved any real right in such land, the registrar may register the transfer and substitute the transferee for the transferor as debtor in respect of the bond, provided that both the mortgagee and the transferee give their written consent. For example, where a building society or a bank holds a mortgage over a property which is sold to X, X can take over the bond and X will be substituted as the mortgagor, provided that the building society or the bank gives its written consent. The transferee (X) is then substituted for the transferor (mortgagor) as the debtor under the bond, and this is endorsed on the bond by the registrar of deeds.

4.2.3 Proceeds and fruit of, and additions to, mortgaged property

The mortgage covers the land and all the improvements on the land, including improvements effected after the bond was registered. However, the latter improvements may be removed at any time before the bond is foreclosed. Until foreclosure the mortgagor is entitled to gather or collect all natural and civil fruits of the property (such as rent) and to consume or dispose of them. Once the bond has been called up the mortgagee becomes entitled to the fruits.[83]

4.2.4 Sale in execution of mortgaged property

The mortgagee is entitled to have the property sold in execution if the mortgagor fails to fulfill his or her obligations under the loan agreement. In the Namibian case of *Namib Building Society v Du Plessis*[84] the appellant, a

82 Du Bois (n 4 above) 632.
83 Delport (n 81 above) 67.
84 1990 NR 161 (HC).

building society, granted a loan to the respondent. The loan was secured by a first mortgage bond over immovable property. The respondent defaulted on due payment of the monthly instalments owing under the bond. The appellant *inter alia* applied for a declaration by the court that the mortgaged property was executable but the court *a quo* refused an order to that effect. It was held on appeal that except where, by judgment of the court, immovable property has been declared executable, a writ of execution against immovable property would not be issued by the registrar of the court until a return on a writ against movables shows that they (the movables) will not satisfy the debt. It was held further that a mortgagee plaintiff should in principle be entitled to realise the property over which a mortgage bond was registered for the very purpose of securing the debt on which he or she sues. Such a mortgagee has advanced money on the understanding that he or she would have a preferential claim on the proceeds of the mortgaged property.

If the bond is called up, the property must be sold subject to the limited real rights which other persons may have over the property, provided these rights existed at the time of the registration of the bond, or were registered afterwards with the consent of the mortgagee.[85]

If the property is sold in execution, a bondholder has the preferential right of purchase. In this case the purchase price is set off against the mortgage debt.

4.2.5 Preferential claim of mortgagee

If the property hypothecated by mortgage is sold following the mortgagor's insolvency, the mortgagee has a preferential claim to the proceeds of the property because the mortgagee is regarded as a secured creditor enjoying a preference over other creditors of the insolvent. The machinery created and laid down for the resolution of competing interests of the creditors is provided for by the relevant provisions of the Insolvency Act 24 of 1936.

4.2.6 Alienation of mortgaged property without consent of mortgagee

Whenever immovable property which has been properly burdened by a mortgage is alienated to a bona fide third person without the mortgagee's consent and, contrary to the provisions of the Deeds Registries Act, there has not been a proper cancellation of the mortgage, and therefore the mortgagee does not lose his or her rights in the immovable property. There is no mention

85 Delport (n 81 above) 67.

in the Deeds Registries Act of a requirement that the deed of transfer in the third party's name should in such circumstances be cancelled.[86]

4.2.7 Court order essential for sale in execution of mortgaged property

If the mortgagor is in default of his or her mortgage bond obligations, the mortgagee can enforce his or her rights against the mortgagor only after a court order has been obtained which authorises a sale in execution. The mortgagee therefore cannot sell the property without first obtaining such a court order. In *Iscor Housing Utility Co & Another v Chief Registrar of Deeds & Another*[87] it was held that an agreement permitting *parate executie* (immediate execution) without recourse to the court, or, after default, to the debtor in the case of immovable property, is void.

4.2.8 Consent of mortgagee necessary for merger of mortgaged property (dominant tenement) with servient tenement in respect of which praedial servitude exists

Under section 60 of the Deeds Registries Act, if the owner of the mortgaged land which is entitled to rights of servitude over other land, acquires the ownership of that other land, such acquisition of the additional land or rights shall not be registered without the consent in writing of the holder of the bond. The reason for this rule is that the acquisition of the additional property creates a merger of the two properties. As mentioned earlier, a merger leads to the termination of the servitude and this can affect the value of the property.

4.3 Termination of mortgage

There are various grounds on which a mortgage can be terminated. The most important ones will now be discussed.

4.3.1 Extinction of principal obligation

The mortgage bond is a security for the payment of the debt, the principal obligation, and therefore there exists an accessory relationship between the real right of mortgage and the principal obligation. A mortgage therefore is extinguished by discharge of the principal debt and termination of the principal obligation by release, novation, compromise, set-off, merger or

86 *Barclays Nasionale Bank Bpk v Registrateur Van Aktes, Transvaal, en 'n Ander* 1975 4 SA 936 (T).

87 1971 1 SA 613 (T); see also *Bock & Others v Duburoro Investments (Pty) Ltd* 2004 2 SA 242 (SCA).

prescription.[88] Upon complete fulfillment by the debtor of his or her obligations to the mortgagee, the mortgagor can have the registration of the bond against the property cancelled in terms of section 56(2) of the Deeds Registries Act.

4.3.2 Effluxion of time or upon fulfillment of resolutive condition

Where the mortgage bond was originally granted for a limited period only or upon the fulfillment of a resolutive condition upon which it was constituted, the right of mortgage will be terminated.[89]

4.3.3 Destruction of mortgaged property

The total destruction of the mortgaged property will result in the termination of the mortgage. However, if the property is partially destroyed, it will remain subject to the burden and the mortgage will extend to any improvements effected subsequent to such destruction. The mortgagor will be obliged to effect a reconstruction to the destroyed property only where he or she is under a duty to do so in terms of the bond.[90]

4.3.4 By court order

A mortgage may be set aside by an order of court if, for example, it is established that its constitution was vitiated by mistake, undue influence, duress or misrepresentation. Likewise, the court may terminate the mortgage where it amounts to a fraudulent alienation under the common law or a voidable or undue preference under the provisions of the Insolvency Act.[91]

5 Pledge

5.1 Definition and general features

A pledge is a limited real right of security in a movable asset, created by the delivery of the asset to the pledgee pursuant to an agreement between the pledgee and the owner of the asset, by which it is sought to secure the fulfillment of an obligation due to the pledgee by the pledgor, or a third person.[92] If the debtor fails to fulfill his or her obligations to the creditor, the latter can sell the pledged property in execution.

88 Du Bois (n 4 above) 640-641.
89 Joubert *et al* (n 4 above) vol 17, para 450.
90 As above.
91 Joubert *et al* (n 4 above) vol 17, para 451.
92 Joubert *et al* (n 4 above) vol 17, para 474.

As stated earlier, a pledge can be constituted only in respect of movable property and only when the pledged property is delivered to the pledgee,[93] as contrasted with a mortgage that is constituted by registration. The pledgee is entitled to remain in possession of the property but not entitled to use it.[94] The pledgee is obliged to take reasonable care of the pledged asset and to return it to the pledgor when the pledge is extinguished.[95] The pledgor is usually the debtor but a third party may also agree to pledge his or her property as security for payment of a debt due by another person.[96] The agreement creating a pledge need not be in writing to be valid.[97]

5.2 Termination of pledge

A pledge may be terminated in similar ways as a mortgage, namely by discharge of the principal debt; destruction of the pledged property; confusion or merger; effluxion of time or fulfillment of condition; agreement; and sale in execution or upon insolvency.[98]

In addition, a pledge is terminated when the pledgee voluntarily surrenders possession of the pledged object to a third party in terms of the principle of *mobilia non habent sequelam ex causa hypothecate*, by express or tacit renunciation of the pledge without the principal obligation necessarily being affected.[99]

6 Liens

6.1 Definition and general features

A right of retention (*ius retentionis*) or lien is the right to retain physical control of another's movable or immovable property as security for payment of a claim for money or labour expended on that property. It does not include the right to have the property sold in execution and it could either be a real (security) right that arises by operation of law or a personal right.[100] It functions as a defence to the owner's *rei vindicatio* and like other real (security) rights is accessory to a principal obligation, indivisible and incapable of being assigned.[101]

93 *Zandberg v Van Zyl* 1910 AD 302; *Vasco Dry Cleaners v Twycross* 1979 1 SA 603 (A).
94 *Visagie v Muntz & Co* 1921 CPD 582.
95 *Lourens v Du Toit* (1878) 8 Buch 182; *Daly v Chisholm & Co Ltd* 1916 CPD 562; *SA Breweries v Levin* 1935 AD 77.
96 Du Bois (n 4 above) 645-646; see also *Liquidators of Cape of Good Hope Permanent Land, Building & Investment Society v Standard Bank* (1899) 16 SC 324; *Bokomo v Standard Bank van SA Bpk* 1996 4 SA 450 (C).
97 Joubert *et al* (n 4 above) vol 17, para 485.
98 Mostert *et al* (n 4 above) 320.
99 Du Bois (n 4 above) 650.
100 Du Bois (n 4 above) 661; Mostert *et al* (n 4 above) 328.
101 *Volkskas Bpk v Esmail* 1950 2 SA 74 (T) 77.

6.2 Categories of liens

There are two main categories of liens, namely enrichment liens and debtor and creditor liens. An enrichment lien arises when a person incurs a certain type of expense in respect of the property of another, without the existence of any agreement between the parties concerning the expense or its refund. An enrichment lien is based on the principle that nobody is allowed to benefit at the expense of another. A debtor and creditor lien arises where a person incurs expenses in respect of the property of another person by reason of an agreement between the parties. For example, where a tenant incurs expenses in respect of leased premises in order to maintain the property in a proper condition, such tenant is entitled to be compensated for expenses incurred.

However, not every expense incurred in respect of property gives rise to an enrichment lien. A person is only entitled to an enrichment lien where the expenses incurred are necessary or useful but not luxurious. A distinction must therefore be made between necessary, useful, and luxurious expenses.

Necessary expenses are those which are necessary to preserve or protect the property, while useful expenses are those which increase the market value of the property and which are considered useful according to the economic and social views of the community. Luxurious expenses are those expenses which are incurred at the whim of a particular person and which are considered luxurious according to the economic and social views of the community. They may also increase the market value of the property.[102]

Necessary and useful expenses are also discussed in the context of salvage lien and improvement lien. A salvage lien secures a claim for necessary expenses while an improvement lien is associated with a claim for useful expenses. Both salvage and improvement liens are real security rights, enforceable against the owner, any successors in title as well as any holders of another limited real right in the property, even if the latter was created before the lien came into existence.[103]

Unlike salvage and improvement liens (enrichment liens) which are regarded as limited real rights, a debtor and creditor lien is a personal right and not a real security right. The implication is that it is only enforceable *inter partes*. Therefore, a debtor and creditor lien is not enforceable against the owner of the property unless the owner is also the debtor or has consented to the expenditure. In those cases where the debtor is the owner, the lien is also enforceable against a gratuitous successor in title and a successor in title

102 Mostert *et al* (n 4 above) 331.
103 As above.

who knew about the existence of the lien at the time the transfer of ownership took place.[104]

The most common form of a debtor and creditor lien relating to immovable property is the so-called builder's lien. In *Congress (Pty) Ltd & Another v Gallic Construction (Pty) Ltd,*[105] a builder's lien was described as a debtor and creditor lien, which is a right of retention for a debt *ex contractu.* By virtue of such a lien the creditor in possession of property can retain it against the debtor until the latter has been paid all that is due under the contract in respect of work done and expenses incurred upon the property. But the creditor can have no right, in disregard of a contractual provision regarding delivery, to retain the property until he or she has been paid money which although owing is not yet due. Thus, under the standard form of building contracts, retention monies become payable only some months after delivery of the work done in terms of the contract. The builder cannot claim a *jus retentionis* in respect of retention monies which are not yet due.

6.3 Termination of liens

Generally, a lien is terminated in the same way as other real security rights, namely, by extinction of the principal obligation, total destruction of the property subject to the lien, merger (confusion), and renunciation (waiver).

The owner of the property burdened by the lien or any person with a possessory right to the property may defeat the lien by furnishing adequate security for the payment of the debt secured.[106]

7 Concluding remarks

One of the cardinal principles of registration of rights under the provisions of the Deeds Registries Act is that only real rights or limited real rights may be registered. As a general principle, personal rights are not registrable and may only be registered if they are complementary or ancillary to a registrable condition or right contained or conferred in a deed. In this chapter an attempt has been made to describe and discuss some examples of limited real rights. It does not, however, represent an exhaustive discussion of all real rights.

104 As above.
105 1981 3 SA 73 (W) 76.
106 Du Bois (n 4 above) 665.