CHAPTER 4

PROPERTY RIGHTS, REAL RIGHTS AND PERSONAL RIGHTS

1 Introduction

As stated earlier, the property rights of a person or a legal subject include rights in both corporeal and incorporeal things and rights deriving from the performance of an obligation by another person. The distinction between corporeal and incorporeal things has already been dealt with in chapter 3 (paragraph 8.4.1) with regard to the various categories of rights that constitute the property rights of a person. Hosten,[1] with reference to the various legal objects to which a legal subject might have a right, classifies rights into four broad categories, namely, real rights, personality rights, personal rights and immaterial or industrial property rights. In this context he defines a real right as the right that vests in the holder an immediate control or right over corporeal or material things; examples of real rights are ownership, servitude and pledge. A real right may also be defined as a claim of a legal subject to a thing as against other persons.[2] A personality right may be defined as the right that a person has to certain aspects of his or her personality, for example, his or her body or reputation, and also the right to privacy. If the object of a right is a performance or action by another person, this right or claim is classified as a personal right. This may arise, for example, from a contractual obligation or a delict. The last category of rights is referred to as immaterial, incorporeal or industrial property rights. These are rights that a person may have over his intellectual property, such as copyright, patent and trade mark.

The above represents a brief explanation of the various categories of property rights. For present purposes, it is only necessary to point out that although these various categories of property rights exist in Namibian law, the methods of acquisition, control and protection are different. In this regard, a clear understanding of the difference between a real and a personal

1 WJ Hosten *et al Introduction to South African law and legal theory 2nd ed* (1997) 544.
2 PJ Badenhorst *et al Silberberg and Schoeman's the law of property 5th ed* (2006) 47.

right is essential, especially in view of the provisions of section 63(1) of the Deeds Registries Act.

The following examples illustrate that the determination of whether the right derived from a particular legal relationship is a personal right or a real right will affect the formalities to be complied with, the protection of the rights, and the applicable law.

The purchase of a house involves the transfer of a real right, namely ownership in immovable property. Transfer of ownership in immovable property resulting in the alienation of that property is effected by registration. The relevant areas of the law in terms of which immovable property is transferred are the law of property, conveyancing and contract. Section 63(1) of the Deeds Registries Act provides for the registration of real rights and limited real rights. A deed or a condition in a deed, purporting to create or embodying any personal right, as a matter of principle, shall not be capable of registration. However, a deed containing such a condition may be registered if, in the opinion of the registrar, such condition is complementary or otherwise ancillary to a registrable condition or right contained or conferred in such deed.

The creation of a servitude vests in the holder of the servitude a limited real right. In terms of section 63(1) of the Deeds of Registries Act, as stated earlier, this right is capable of registration and the formalities regulating the process of registration are governed by the rules of conveyancing. The registration of the servitude attracts certain consequences which determine: the legal relationships between the owner of the property and holder of the right of servitude; between the said owner and third parties; and between the owner and any successor in title. The principles governing these relationships are not only covered by the law of contract but also the law of property.

The principles governing the purchase of a car, for example, involve the interplay of the law of purchase and sale and the law of property. The conclusion of the contract confers certain rights and obligations on the parties. The seller has the obligation to deliver a thing, and the corresponding right to receive payment. These rights and obligations are enforceable at the instance of the parties themselves and therefore constitute creditors' rights, falling under the larger category of subjective rights[3] known as personal rights, and are generally governed by the law of contract and specifically under the law of purchase and sale. Delivery constitutes the transfer of the real right of ownership from the seller to the purchaser by which the

3 A subjective right may be defined as a legally recognised and valid claim by a subject to a certain object. When a legal subject acquires a right in a thing or object as a result of a lawful real relationship with the thing, the right is a subjective right. There are four categories of subjective rights, each distinguishable from the others by the nature of the object attaching to the right. These are real rights, personal rights, personality rights and immaterial property rights.

obligation of the seller to effect such transfer is satisfied. Upon transfer of the thing the purchaser becomes the owner of the thing. The principles relating to the right of ownership are governed by the law of property.

2 Categories of real rights

A real right is a subjective right to a material (or immaterial) thing, such as a book, a table, a motor car, a cow, a dog, a house, a farm, et cetera. The holder of a real right is entitled to exercise immediate control over the material thing (the object of the right). A real right, like any other subjective right, is enforceable against the whole world; everybody must respect it. The following are examples of real rights: ownership, servitudes, pledge, mortgage, right of trekpath, right of outspan, lease of land, statutory leasehold, mineral rights and sectional title unit.

2.1 Ownership

Ownership is the most complete real right in the sense that the holder of such right, the owner, in principle, has the widest powers in respect of a thing but it must be borne in mind that ownership may sometimes be limited by another (limited) real right, such as usufruct held by a person who is not the owner of the thing.

If Joseph grants his neighbour, Andrew, the right to use a road over Joseph's farm, Andrew acquires the right to a certain limited use of Joseph's property, while Joseph's ownership remains intact although it is diminished temporarily by the existence of a servitude. Joseph's right of ownership is diminished in the sense that he can no longer exclude Andrew from using the road as determined by the servitude.

The important point is that a limited real right empowers the holder of such right to use and enjoy property belonging to someone else, thereby causing the diminution of the owner's entitlements of use and enjoyment. Long term leases and mineral rights are registered as immovable incorporeal property. It is sometimes difficult to decide whether rights which were created in a contract or a will and which pertain to corporeal things are limited real rights or creditors' rights (personal rights).

The Deeds of Registries Act governs the registration of deeds pertaining to rights in immovable property. According to section 63(1) of the Act only rights in immovable property may be registered. Therefore, if it is a creditor's right, it may not be registered. Real rights are registrable in the Deeds Registry because they pertain to rights and obligations over legal objects or *res in commercio* and need to be documented. In the case of personal rights, the necessity for registration may not be as imperative as in the case of real rights because they pertain to legal actions or legal relationships between

legal subjects. The following are examples of rights that have been recognised as limited real rights.

2.2 Servitudes

A servitude is a limited real right over the property of another. The holder of the servitude has certain powers of use and enjoyment over the property, or the power to prevent its owner from exercising one or more of the powers of an owner.[4]

A servitude is an *ius in re aliena*; it diminishes the owner's *dominium* in a thing.

One must distinguish between personal and praedial servitudes.

A personal servitude can exist over land (immovable property) or over movable property in favour of a particular person (*res servit personae).* That person is the holder of the servitude. The servitude vests in such holder in his or her personal capacity and cannot be alienated.

A personal servitude normally ceases to exist, at the latest, on the death, in the case of a natural person, of the holder of the servitude. It is important to note that although this servitude is known as a personal servitude, it is not a personal right but a real right, because the object of this real right (the servitude) is a thing and not a performance, as in the case of a personal right. The expression 'personal' servitude denotes that the right vests in a person in his or her personal capacity, unlike a praedial servitude where the right also vests in a person but in his or her capacity as owner of the dominant tenement. A servitude may be personal but it is still a burden upon the land, and may be enforced against any and every possessor of the land.[5]

Usufruct is a classic example of a personal servitude.

A praedial servitude, also known as a real servitude, is a burden on land (the servient tenement) in favour of another piece of land (the dominant tenement). It can only exist over land and cannot be transferred and be separated from the land to which it is attached.[6] The owner of the dominant tenement is the holder of the servitude. If ownership of the dominant tenement is transferred to a new owner, the new owner becomes the holder of the servitude. The servitude is incidental to and passes with the ownership of the dominant land to which it is inseparably attached, while it burdens the

4 *Lorentz v Melle & Others* 1978 3 SA 1044 (T).
5 See also AF Maasdorp & CG Hall *Maasdorp's Institutes of Cape Law,* book 2, ch 16, para 5.
6 *Webb v Beaver Investments (Pty) Ltd & Another* 1954 1 SA 13 (T) 25.

servient land irrespective of who the owner is.[7] In this case *res servit rei* is created. The servitude exists as long as the land exists.

The distinctive feature of a praedial servitude is that it burdens the land to which it relates and that it provides some permanent advantage to the dominant land as distinct from serving the personal benefit of the owner thereof.[8] The usual manner of establishing a praedial servitude is by agreement in the form of a notarial deed between the owners of the two tenements, followed by its registration against the title deed of the servient land. It is an *ius in re aliena* and, for the sake of clarity, it could also be registered against the title deed of the dominant land.[9] The mere fact of registration of a notarial deed does not, however, create any rights of a servitudal character.[10] It may be that only personal rights are created and that registration should not have taken place.

There are various types of praedial servitudes and among these are various servitudes of way, namely servitude of foot-path, right of trekroad, which grants a right to drive cattle over the land of another, and a general right of way. In Namibia, on account of ecological conditions, there is a scarcity of grazing land and water. Consequently, cattle owners and farmers enter into various types of agreements granting grazing and water rights over the servient tenement. These include a servitude of grazing, a servitude pertaining to water and a servitude of outspan. A servitude of outspan is a servitude whereby the owner of the dominant tenement has a right to graze and give water to his cattle on the servient tenement.

2.3 Pledge

A pledge is a limited real right which a debtor creates in favour of a creditor over movable property to secure the repayment of a debt. It is a security over property and creates limitations on the right of ownership and therefore is a limited real right. If the debtor fails to fulfill his or her obligation to the creditor, the creditor has the legal right to sell the pledged property in execution. In the event of the debtor's insolvency, the creditor enjoys the preference on the proceeds of the pledged property.

2.4 Mortgage

A mortgage is a limited real right in respect of the immovable property of another, securing a principal obligation between a creditor and a debtor. This

7 HR Hahlo & E Kahn *The Union of South Africa; The development of its laws and constitution* (1960) 601.
8 Hahlo & Khan (n 7 above) 602.
9 *Van Vuren & Others v Registrar of Deeds* 1907 TS 289 and 295; CG Hall & EA Kellaway *Servitudes 3rd ed* (1973)27.
10 *Hollins v Registrar of Deeds* 1904 TS 603 607; *Schwedhelm v Hauman* 1947 1 SA 127 (E) 136; *Van der Merwe v Wiese* 1948 4 SA 8 (C) 26.

real right is created by registration in the deeds registries pursuant to an agreement between the parties.[11] The agreement is normally known as the mortgage bond which contains the rights and liabilities of the mortgagee and the mortgagor. As indicated in the Namibian case of *Namib Building Society v Du Plessis*[12] a mortgagee 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 sued. Such a mortgagee has advanced money on the understanding that he would have a preferential claim on the proceeds of the mortgaged property.

2.5 Lease

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.[13] A contract of this nature is termed a lease.[14] 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.[15] In Namibia, leases are governed by common law and the provisions of the Formalities in Respect of Leases of Land Act 18 of 1969.

2.6 Statutory leasehold

Statutory leasehold is a right of leasehold over state land granted in terms of statutory provisions, normally for a period of 99 years. In Namibia, for example, under the provisions of the Communal Land Reform Act 5 of 2002, rights of leasehold for 99 years have been provided for and can be granted over communal land.[16]

2.7 Mineral rights

In Namibia mineral rights are governed by the provisions of article 100 of the Namibian Constitution and the Minerals (Prospecting and Mining) Act 33 of 1992. As a consequence of the rights of sovereignty created by article 100 of the Namibian Constitution ownership of natural resources vests in the

11 *Roodepoort United Main Reef GM Co Ltd (In Liquidation) & Another v Du Toit NO* 1928 AD 66.
12 1990 NR 161 (HC).
13 *De Jager v Sisana* 1930 AD 71.
14 F du Bois *Wille's principles of South African law 9th ed* (2007) 907.
15 WE Cooper *Landlord and tenant* (1994) 2. PJ Badenhorst *et al* (n 2 above) 427.
16 See sec 19 and 34 of the Communal Land Reform Act 5 of 2002

state.[17] In terms of section 2 of the Minerals (Prospecting and Mining) Act any right in relation to the reconnaissance, prospecting, mining, sale, disposal and the exercise of control over any mineral or group of minerals vests in the state, regardless of any right of ownership that a person may have over any land.

Strydom ACJ in the case of *Namibia Grape Growers and Exporters Association & Others v Ministry of Mines and Energy & Others*[18] confirmed that article 100 of the Constitution vests mineral rights in the state, in so far as they are not privately owned. In regard to Namibia, mineral rights have vested in the state ever since Colonial times.[19]

2.8 Sectional title unit real right

Sectional title unit real right was introduced by the Sectional Titles Act 66 of 1971, which was repealed and replaced by the Sectional Titles Act 95 of 1986. The Act introduced into South Africa a new concept of ownership which may be obtained in respect of parts of buildings (so-called sectional title units). The Sectional Titles Act 66 of 1971 applies in Namibia but Act 95 of 1986 was not applicable to South-West Africa (Namibia). Namibia has promulgated a new Sectional Titles Act, the Sectional Titles Act 2 of 2014, which has replaced the South African Act, the Sectional Titles Act 66 of 1971.

Sectional title entails a *res* or thing, namely a unit, which comprises a section of a building and a share in common property. It therefore provides for both sole ownership and joint ownership.

A person acquiring sectional title ownership acquires ownership of a unit, which comprises a section together with an undivided share in the common property, being the land on which the building is situated as well as the rest of the building which is not included in any sectional unit, such as stairs, lifts, playrooms, swimming pools, et cetera.

2.9 Water rights

The United Nations General Assembly on 28 July 2010 declared water and sanitation a human right. The human right to water and sanitation is derived from articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 11 provides for adequate standard of living.

17 Art 100 of the Namibian Constitution provides that land, water and natural resources below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia shall belong to the state if they are not otherwise lawfully owned.

18 2004 NR 194 (SC).

19 See the Imperial Mining Ordinances for German South-West Africa, 8 August 1905; and Proc 21 of 1919; Proc 4 of 1940; Ord 26 of 1954; Ord 20 of 1968; and presently the Minerals (Prospecting and Mining) Act 33 of 1992.

It recognises the right of everyone to an adequate standard of living. This includes, but is not limited to, the right to adequate food, clothing, housing, and 'the continuous improvement of living conditions'.[20] The right to adequate food, also referred to as the right to food, is interpreted as requiring 'the availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture'.[21] This must be accessible to all, implying an obligation to provide special programmes for the vulnerable.[22] This must also ensure an equitable distribution of world food supplies in relation to need, taking into account the problems of food-importing and food-exporting countries.[23] The right to adequate food also implies a right to water.[24]

Article 12 of the Covenant recognises the right of everyone to 'the enjoyment of the highest attainable standard of physical and mental health'.[25] 'Health' is understood not just as a right to be healthy, but as a right to control one's own health and body (including reproduction), and be free from interference such as torture or medical experimentation.[26] States must protect this right by ensuring that everyone within their jurisdiction has access to the underlying determinants of health, such as clean water, sanitation, food, nutrition and housing, and through a comprehensive system of healthcare, which is available to everyone without discrimination, and economically accessible to all.[27]

Similarly, under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). States Parties are enjoined to take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, to ensure to such women the right to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.[28]

Namibia is the driest country in sub-Saharan Africa and the country's water resources are extremely fragile. In economic terms Namibia is highly dependent on its natural resource base for its principal productive activities: mining, agriculture, pastoralism, fishing and wildlife-based tourism as well as

20 Article 11.1 of the International Covenant on Economic, Social and Cultural Rights.
21 *'Committee on Economic, Social and Cultural Rights (CESCR) General Comment 12: The right to adequate food'* UN Economic and Social Council, 12 May 1999, para 8.
22 CESCR General Comment 12, paragraph 13.
23 ICESCR, article 11(2)(b).
24 CESCR General Comment 15: The right to water, UN Economic and Social Council, 20 January 2003, para 3.
25 ICESCR, article 12(1).
26 CESCR General Comment 14: The right to the highest attainable standard of health, UN Economic and Social Council, 11 August 2000 para 9.
27 CESCR General Comment 14, paras 11-12.
28 Article 14(1) and (2). See also article 24 of the Convention on the Rights of the Child (CRC); and article 28 Convention on the Rights of Persons with Disabilities (CRPD).

urban supplies and manufacturing. Water is therefore the single most important across-the-board contributor to the country's development prospects; conversely, its vulnerability and inadequate management constitute the country's single most important development constraint. It is also important to ensure water security, and to sustain supplies to urban centres while extending services in the rural areas.

Considering the water needs of Namibia and the right to water recognised as a human right by the International Covenant on Economic, Social and Cultural Rights (ICESCR) as indicated above, equitable and sustainable water management by an appropriate legal regime and policy cannot be over-emphasised. The right to water has to be regulated to ensure equity and sustainability.

At the time of independence, however, Namibia inherited a water management regime that had served the political, economic and social priorities of those then in power and underpinned by water law derived from Roman-Dutch common law principles of riparian ownership which was incorporated in legislation, the Water Act of 1958. This legal regime was not only suited to a water-rich environment, such as for example well-watered countries of Europe, but it also deprived the country's majority population of access to reliable water supplies and inhibited productive and sustainable use of the resource.[29] The Roman-Dutch common law doctrine of riparian ownership is based on the principle that any person who owns and occupies land on the bank of a natural stream acquires water use rights which are referred to as riparian rights by virtue of the occupation of the land and therefore the right to water is appurtenant to the riparian land. As a corollary therefore riparian rights cannot be acquired or alienated without the riparian land. Given the skewed tenure system Namibia inherited at the time of independence, the continued application of the riparian ownership regime without any amendments would have meant the perpetuation of the deprivation of the vast majority of the population, especially those who live in the communal areas, the right to water resources.[30] There was therefore the need for the shift from the water resources management paradigm to one based on equity and sustainability of water resources.

The *National Water Policy White Paper* succinctly puts the position as follows:

> The existing law (namely the South African Water Act No 54 of 1956) and the regulatory regime it underpinned similarly reflected a policy of support to the same elite social and economic interests. Ownership of land was regarded as conferring exclusive right to the use of water resources located on or under such land. The development of these water resources was largely unregulated by the

29 See *National Water Policy White Paper* Republic of Namibia, Ministry of Agriculture, Water and Rural Development, August 2000, pp 19-20.

30 *National Water Policy White Paper* (n 29 above) pp 13-14.

> state with the notable exception of ground-water control areas. The entire institutional framework for the development and management of water resources and the provision of water services, including the functions of licensing, pricing and subsidy provision, served the same set of priorities.[31]

As stated above, at the time of independence, the primary legislation relating to ownership, allocation, rights to access, and management of the resource was the Water Act 54 of 1956. This legislation was designed for South Africa and selectively applied to what was then South West Africa. The existing legal regime was therefore not suited to either the country's hydrological conditions or to the political, social and economic realities of the post-apartheid era.[32]

The Water Act of 1956 provides for and draws a distinction between two forms of water, namely 'private water' and 'public water'.[33] The Act however does not define private water or public water but does provide for the use of private water. Private water may be defined as the water which rose or fell naturally on any land, or which naturally drained, or which was led on to one or more pieces of land which were subject of separate grants, but was not capable of common use for irrigation purposes. Furthermore, whenever an owner of land obtained, by artificial means on his or her own land, a source of water which was not derived from a public stream, such water was deemed to be private water.

Private water therefore included (a) spring water (b) rain water, surface water and drainage water before it joined a public stream; (c) water flowing or found in or derived from a stream that was not a public stream; (d) ground water which was not flowing or found in, or derived from, the bed of a public stream, after it was abstracted, and (e) public water left a public stream naturally, for example, water that was discharged from the river onto a level area due to the river banks that disappeared or water overflowing the banks of a public stream during a flood.[34]

Public water is defined as the water flowing or found in, or derived from, the bed of a public stream, whether visible or not. The essence of the definition is that if a stream was a public stream, all the water flowing or found in, or derived from, the bed of that stream was public water. Any water that did not flow or was not found in, or derived from, the bed of a public stream, could not be public water. Public water further consisted of normal flow and surplus water.

31 *National Water Policy White Paper* (n 29 above) p 13.
32 *National Water Policy White Paper* (n 29 above) p 19. See also the General Note to the Water Act 54 of 1956.
33 Section 5.
34 H Thompson *Water Law: A practical approach to resource management & the provision of services (2018) 73.*

A public stream was a natural stream of water which flowed in a known and defined channel and the water had to be capable of common use for irrigation on two or more pieces of land riparian thereto which were the subject of separate original grants. A stream which fulfilled these conditions only in a section of its course, was regarded as a public stream for that section only.[35]

The Act[36] provides that the sole and exclusive use of and enjoyment of private water is vested in the owner of the land on which such water, designated as private water, is found.[37] It is an offence for any person to wilfully or negligently act in a manner that can pollute the water.[38]

The owner does not have to take the needs of other persons into consideration while using the water. However, this right does not deprive downstream owners their right to a reasonable share of water rising on upstream land flowing down to their land in a known and defined channel or along the boundary of the land situated beyond the land upon which such private water rises, if such downstream owners have used the water beneficially for at least 30 years.[39] There are restrictions imposed on the sale and other forms of disposal of private water. A person who is entitled to use private water can only under the authority of a permit from the Minister convey that water beyond the boundaries of the land on which it is found, sell it, donate it, or otherwise dispose of it to any other person for use on any other land. This can only be done to the extent allowed by the Minister as provided for by the conditions of the permit.[40] Furthermore, a person entitled to use private water under the authority of a permit from the Minister, is not permitted to construct any water work other than a water work constructed in terms of a direction contained in an order under section 4 of the Soil Conservation Act 76 of 1969 to impound or store such water or impound or store more than 20 000 cubic meter of such water.[41] In terms of the section the Minister may, by means of a direction, order the owner of land to construct the soil conservation works referred to in such direction either on land belonging to such owner or on land belonging to another person, in such manner and within such period as may be mentioned in such direction, if the Minister is of the opinion that the construction of such soil conservation works is necessary in order to achieve any object of this Act in respect of the land belonging to such owner.

35 Thompson (n 34 above) 65.
36 Water Act 54 of 1956.
37 Section 5(1).
38 Section 23.
39 *Proviso* clause to section 5(1) and Thompson (n 34 above) 90.
40 Section 5(2)(a).
41 Section 5(2)(b).

The other water rights provided for by the Act are the rights to subterranean water[42] and various types of servitudes.[43] The owner of land is entitled to abstract or obtain any subterranean water under the land or derived from the land for his or her own use for any purpose on the land and subterranean water is defined as water which exists naturally underground and water other than public water which is derived in any manner whatsoever from natural underground sources and which is contained in an area declared to be a subterranean water control area by the President.[44]

In order to promote the optimal and effective use of the rights to public water and subterranean water, the Act avails a person, who has the right to the use of public water or subterranean water, the right to claim temporarily or in perpetuity servitudes of abatement, aqueduct, drainage or storage.[45] A servitude of abutment is the right to occupy by means of a dam, weir, protecting wall or embankment, pump, turbine or power house and its appurtenances, the bed or banks of a public stream or land adjacent thereto belonging to another; a servitude of aqueduct is the right to occupy the land belonging to another as may be necessary for or incidental to the passage of water; servitude of drainage means the right to occupy the land belonging to another for the drainage of land or disposal of water by means of a dam, weir or other work into the nearest public stream or natural channel and servitude of storage is the right to occupy land belonging to another by submerging it with water by means of a dam, weir or other work.[46]

The Act[47] therefore, incorporates by legislation the Roman – Dutch principle of riparian ownership, which, as indicated above, effectively excludes non-land owners – comprising the majority of the population-from having adequate and equitable access to water. It perpetuates discrimination against the black majority since the apartheid era, as indicated earlier, resulted in most of the land belonging to the white minority.[48] Consequently in 1998, the Government of the Republic of Namibia (GRN) decided to initiate a Water Resources Management Review and an appropriate legal regime informed by the principles of equity and integrated water resources management to rectify the injustices of the past.

A new piece of legislation, the Water Resources Management Act 11 of 2013, has been promulgated to replace the Water Act 54 of 1956.[49] The

42 Section 30(1).
43 Sections 139-142.
44 Sections 27 & 28; See generally *Namib Plains Farming & Tourism v Valencia Uranium (Pty) Ltd & Others* Case 25/2005 (Supreme Court), para 29.
45 Section 141(1).
46 Section 139.
47 Section 5 of the Water Act 54 of 1956.
48 *National Water Policy White Paper* (n 29 above) p 19.
49 It must be noted that for a considerable period of time after its promulgation, the Water Act 54 of 1956 is still in force as the regulations to the Water Resources Management Act 11 of 2013 have not been promulgated.

underlying constitutional principle of the Act[50] pertaining to the use and ownership of natural resources, including the right to water, is the public trust doctrine derived from article 100 of the Namibian Constitution, which as a corollary to the sovereign right of States to natural resources, vests ownership of the natural resources in the State unless they are otherwise lawfully owned. The Namibian Constitution, therefore regards natural resources as common resources. Consequently, the new Act[51] has done away with the principle of riparian ownership and has introduced the public trust doctrine, by which doctrine the State is vested with the right of ownership of the natural resources in trust and for the benefit of the people of Namibia. It is worth noting, however, that the riparian right doctrine operates in so far as international water courses are concerned. The new Act focuses on management, protection, development, use and conservation of water resources. [52] Since the riparian right principle is incontinent with the doctrine of public trust, the water rights provided for by the Act pertain generally to the rights to the abstraction and use of water and the common servitudes of water such as the servitude of abutment, aqueduct and submersion.

Access to water may be obtained by means of abstraction and use of water as follows. Firstly, provisions are made for holders of licences issued by the Minister to operate as service providers to distribute water to end-consumers and to operate water treatment facilities.[53] Secondly, a person is entitled to abstract water from a water resource for domestic use without a permit to abstract and use water.[54] Thirdly, the abstraction of water and use of water from a water resource not for domestic use requires a licence issued by the Minister.[55]

In terms of servitudes of water, the Act permits a person who, holds a licence issued under the Act to abstract and use water or discharge wastewater or effluent, to claim a servitude of abutment, aqueduct or submersion to the extent necessary to give effect to the licence.[56] These servitudes are defined as follows: (a) a servitude of abutment is defined as the right to occupy the bed or banks of a stream, or adjacent land belonging to another person, by means of waterwork; (b) a servitude of aqueduct as the right to occupy land belonging to another person by means of a waterwork for abstracting or leading water or discharging effluents; and (c) servitude of submersion as the right to occupy land belonging to another person by submerging it under water.[57] As stated earlier, Namibia is sub-Saharan Africa's driest country because roughly 90 per cent of its area consists of desert, arid and sub-arid land and the only perennial rivers to which Namibia

50 The Water Resources Management Act 11 of 2013
51 Section 4 of the Water Resources Management Act 11 of 2013.
52 Preamble to the Water Resources Management Act 11 of 2013.
53 Section 40(1)(a).
54 Section 38(1).
55 Section 44(1).
56 Section 107(1)(a).
57 Section 106.

has access, lie on its northern and southern borders and are shared with neighbouring countries. More than 70 per cent of the population lives in the rural areas and a considerable proportion is dependent on the Kunene and Kavango watercourses or on boreholes, which they recharge. The sources of these rivers lie in Angola. The northern border follows the Kunene River in the extreme north-west and the Kavango River, Zambezi River and Kwando/ Linyanti/Chobe River system along part of its north-eastern stretch. The country's only other perennial source, the Orange River, forms the Southern border with South Africa. The capital city and seat of Government, Windhoek, is in the centre of the country, far from these rivers. The fact that all the perennial rivers to which Namibia has access are shared with neighbouring states means that international agreements are required regarding their use and management.[58]

The Act takes cognisance of this fact and therefore the functions of the Minister extend to the management of internationally shared water resource one of which is the furtherance of the objectives of the Southern African Development Community Revised Protocol on Shared Watercourses with regard to regional integration, economic growth and poverty alleviation.[59] The contemporary jurisprudence relating to water resources management, including international waters which Namibia subscribes to, consists of the principles of limited territorial sovereignty; the principle of equitable and reasonable utilisation; an obligation not to cause significant harm; principles of notification, consultation, negotiation, cooperation and information exchange and peaceful settlement of dispute. These principles are recognised by international conventions, judicial decisions and international treaties and they form the basis of the 1996 Helsinki Rules on the Uses of Water of International Rivers and the 1997 UN Convention on Non-Navigable Uses of International Watercourses.

3 Registration of real rights

As stated earlier, under section 63(1) of the Deeds Registries Act, only real rights can be registered. The section provides that no deed or condition in a deed purporting to create or embodying any personal right, and no condition which does not restrict the exercising of any right of ownership in respect of immovable property, shall be capable of registration. There is a proviso that permits the registrar to register a personal right if such right is complementary or ancillary to a registrable condition, specifically a real right or a limited real right.

58 *National Water Policy White Paper* (n 29 above) p 10.
59 Section 28(b).

3.1 The classical and personalist theories

There are two theories that have been propounded to explain the differences between personal rights and real rights: the classical theory and the personalist theory**.**

3.1.1 The classical theory

According to the classical theory rights may be classified in accordance with the differing nature of their objects. In terms of this classification the object of a real right is a thing. The thing itself is bound to the holder of the right. A real right consequently establishes a *direct* legal connection between a person and a thing, the holder of the right being entitled to control that thing within the limits of his rights 'zonder noodigh opzicht op een ander mensch', particularly 'without necessary relation to another man'. In terms of a personal right, on the other hand, a person becomes bound to the holder of the right to render a particular performance, specifically to do or not to do something, the performance itself being the object of the right. It never establishes a direct legal connection between its holder and the thing, if any, in respect of which a performance has to be rendered.[60]

3.1.2 The personalist theory

The personalist theory, on the other hand, distinguishes between real rights and personal rights with regard to the persons against whom the respective rights are enforceable. The holder of a real right has a right to a thing which, as a general rule, is enforceable against all other persons, particularly against any person who seeks to deal with the thing to which a real right relates in any manner which is inconsistent with the exercise of the holder's power to control it, and in so far as a person may have a limited real right to another person's thing, that limited real right is also enforceable against the owner of the thing. Real rights, therefore, belong to the category of rights known as absolute rights.

In contradistinction to the absoluteness of a real right, a personal right is usually said to be enforceable only against a particular person or association of individuals on the basis of a special legal relationship, such as a contract, the commission of a delict or some other good or sufficient cause. Consequently, personal rights are often referred to as being relative rights. The protection granted to the holder of a real right in respect of his interests in the thing which is the *object* of his right is consequently compared with the protection granted to the holder of a personal right in respect of his or her interests in a thing in connection with which a *performance*, for example,

60 Badenhorst *et al* (n 2 above) 50-51.

delivery has to be rendered, the *performance* and not the *thing* itself, being the object of the right.

3.2 Evaluation of the theories

As theories, the classical and personalist theories do not provide answers to all questions relating to the distinction between personal rights and real rights. As indicated by AJ van der Walt & GJ Pienaar,[61] generally speaking, neither the classical nor the personalist theory has provided a simple and consistent solution to the practical problems presented by the distinction between real and creditor's (personal) rights. In many cases the failure of these theories can be attributed to misunderstandings and inconsistent applications of the theories but it is also true that both socio-economic circumstances and the understanding of rights in general have changed considerably since these theories were originally formulated. A number of alternative theoretical approaches have been suggested recently, but none of them succeeded entirely.

With regard to the classical theory, Silberberg and Schoeman[62] express the criticism that the theory ignores the fact that real rights also constitute legal relationships between legal subjects mutually, and on the other hand, that certain personal rights (such as a lease of a movable thing) also, to some extent, affect control over a thing.

3.3 Criteria or requirements developed by the courts to determine the capability of a right to be registered

In addition to the two theories to illustrate the distinction between real rights and personal rights (or creditor's rights), given above, the courts have developed their own approach to this problem. The following criteria or requirements were laid down in the case of *Cape Explosive Works Ltd & Another v Denel (Pty) Ltd & Others.*[63]

> The intention of the person who creates the real right must be to bind, not only the present owner of the land, but also his successors in title; and
>
> The nature of the right or condition must be such that registration of it results in a 'subtraction from the *dominium*' of the land against which it is registered.

61 AJ van der Walt & GJ Pienaar *Introduction to the law of property 6th ed* (2009) 29.
62 DG Kleyn *et al Silberberg and Schoeman's the law of property 3rd ed* (1993) 43.
63 2001 3 SA 569 at 578.

3.3.1 The intention of the parties

This test was laid down by Nestadt J in the case of *Lorentz v Melle & Others*[64] as follows:

> Whether a contractual right amounts in any given case to a servitude – whether it is real or only personal – depends upon the intention of the parties to be gathered from the terms of the contract construed in the light of the relevant circumstances. In case of doubt, the presumption will always be against a servitude: the onus is upon the person affirming the existence of one to prove it.

In *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd*[65] Innes CJ said:

> I would add that I do not read the passage and authorities quoted as meaning that the parties' intention (as gathered from the terms of the contract) is the sole criterion in deciding the issue. If a contractual right is of such a nature that it is incapable of constituting a servitude, then obviously the intention of the parties (as expressed) to do so, is irrelevant.

This was reiterated by Streicher JA in *Cape Explosive Works* [66] who stated that the intention with which transfer was given and received was required for the transfer of the property subject to the conditions creating the rights in question.

There is the necessity to interpret the will or the contract in question to determine the intention of the party or parties who created the right.[67] Apart from its subjectivity, intention of the parties is not the sole criterion in determining whether a term of a contract creates a real or personal right.

From the *Ex parte Geldenhuys*[68] decision it may be inferred that such an intention cannot override principles of law. Regardless of the intention, it is impossible to create a real right if the right in question clearly places the obligation upon the debtor in his or her personal capacity. However, wherever possible, the intention of the parties is an important clue which might help the court in deciding whether the obligation was supposed to be real or personal.

64 n 4 above, 1050.
65 1918 AD 1 16. See also *Hotel De Aar v Jonordan Investment (Edms) Bpk & Others* 1972 2 SA 400 (A) 406 and *Elelor (Pty) Ltd v Champagne Castle Hotel (Pty) Ltd & Another* 1972 3 SA 684 (N) 689-690.
66 n 23 above.
67 See also *Hollins v Registrar of Deeds* (n 10 above); *Chiloane v Maduenyane* 1980 4 SA 19 (W).
68 1926 OPD 155.

3.3.2 The subtraction from the dominium *test*

3.3.2.1 The formulation of the test in *Ex parte Geldenhuys*

The subtraction from the *dominium* test was formulated in – *Ex parte Geldenhuys.*[69] In the process of this formulation, the court had to consider the following issues:

(1) the effect a condition that creates a servitude has on the right of *dominium*;

(2) whether the obligation to pay money to someone constitutes a real right or a personal right; and

(3) whether the mere intention to create a real right satisfies the criterion necessary to create such a right.

In this case, by the mutual will of Adriaan Geldenhuys and his wife, certain land was bequeathed to their children in equal shares subject to the usufruct of the surviving testator or testatrix. The will further provided that as soon as the first child reached his or her majority the survivor of the testators would be bound to divide the said land in equal portions and distribute it among the children, such distribution to be made by the survivor and the major child concerned by drawing lots, and that the child who by such lot obtained the portion comprising the homestead of the farm should, within a specified period of time, pay the sum of £200 to the other children. The testatrix died in 1923 and the applicant, who was the surviving testator and the executor of the estate of the deceased testatrix, asked the court for an order instructing the Registrar of Deeds to register the said land in undivided shares in the names of the children, subject to the conditions of the mutual will. The Registrar of Deeds had no objection to a mere transfer of the farm to the children in undivided shares but he objected to the registration against the title deed of the conditions pertaining to the subdivision, the drawing of lots and the payment of £200. The grounds of his objection were, firstly, that the said conditions merely created 'personal rights', and, secondly, that the conditions, even if registered, would only be binding on the legatee, and not on any transferees to whom the legatees might transfer their undivided shares.

3.3.2.2 The formulation of the test in the context of servitudes or usufructs

In his judgment, De Villiers JP in confirming the subtraction from the *dominium* test as a criterion to draw the distinction between personal rights and real rights, referred to the statement of Innes CJ in *Hollins v Registrar of Deeds*[70] that only real rights may be registered against the title deed of land, specifically rights constituting a burden upon the servient land and are a

69 As above.
70 n 10 above.

deduction from the *dominium,* and that that statement represents the correct position of the law in regard to registrable rights. In arriving at this conclusion, the court had to consider the nature of a usufruct to determine its registrability and noted that a usufruct is a personal servitude, but it is also a burden upon the land and it 'may be enforced against any and every possessor of land'.[71] Some servitudes are personal because they are constituted in favour of a particular individual without reference to his being the owner of any particular land. Other servitudes are praedial because they are constituted in favour of a particular piece of land but all servitudes are real rights and burdens upon the land which is subject to them. Consequently, as a general principle, a usufruct can be registered against the title deed except in certain exceptional cases. Generally speaking, therefore, any validly constituted usufruct could be registered against the land, just as any other real right in land may be so registered. Servitudes which are said to be constituting personal rights may not be registered, because the rights are merely binding on the present owner of the land and do not bind the land itself, and thus do not constitute *iura in re aliena* over the land, and do not bind the successors in title of the present owner. These are the personal rights which are not registrable.[72] The determining criterion is for one not to look so much at the right but to the correlative obligation. If that obligation is a burden upon the land, a subtraction from the *dominium*, the corresponding right is real and registrable; if it is not such an obligation but merely an obligation binding on some or other person, the corresponding right is a personal right, or right *in personam,* and it cannot as a rule be registered.

3.3.2.3 Application of the test to determine registrability of conditions in the will

Applying that distinction in the case, the court pointed out that each of the legatees, while being an owner of an undivided share of the land, was subject to certain conditions or obligations. With regard to the first condition that the land be subdivided into defined portions to take place at a specified time, specifically as soon as the eldest surviving child reaches his or her majority, and in a certain manner, that is by means of a drawing of lots, which is to be performed by the surviving testator and such major child, the court held that the limitations formed a real burden, an *ius in re,*on each undivided share and not merely an obligation on the person of each child and consequently that the condition was registrable against the title deeds of the undivided shares. This conclusion was based on the consideration that those limitations as to time and mode of subdivision so directly affected and adhered to the ownership that they had to be regarded as forming a real burden or encumbrance on that ownership. This reasoning was based on the common law principles of co-ownership. By the common law, each owner of an

71 See also Maasdorp (n 5 above).
72 The *Hollins* case (n 10 above) and the case of *Kotze v Civil Commissioner of Namaqualand* (17 CSC 37).

undivided share has the right to claim a subdivision at any time, and can claim that it be effected either by agreement or by the court. The will, therefore, modified the common law right of ownership (or *dominium*) held by an owner of an undivided share. That this can validly be done by a will, and presumably also by agreement *inter vivos*, is clear in principle, because the rights in an undivided share are not sacrosanct or unalterable any more than the rights in a defined share are. Portions of the *dominium* of an owner of an undivided share can be parted with as undoubtedly as portions of the *dominium* of an owner of a defined share can be parted with. This position is supported by *Grotius*,[73] who states that an owner of an undivided share can by will be deprived for a specified time of his right to claim a partition. The rights of a joint owner in regard to partition can therefore be validly limited, by last will at any rate, and the limitations now under discussion, strictly speaking,as to the time of partition and as to the drawing of lots, are therefore valid. This position is also supported by the case of *Ex parte Mulder*[74] where the court ordered that land should be transferred to certain legatees in undivided shares subject to the condition imposed by the will; that upon partition a certain one of those legatees should receive the homestead and certain land round it.

3.3.2.4 Obligation to pay money to someone else and registrability of personal rights intimately connected to real rights

The court, in *Geldenhuys* then proceeded to determine the registrability of the other condition that, upon partition in the manner stipulated in the will, the child who got the homestead should pay £200 to the remaining children within five years after reaching majority. In order to make this determination the court had to consider whether the condition (or obligation) to pay the money constituted an i*us in personam* or an *ius in re* forming a burden on the undivided shares. The court held that it was an *ius in personam* and said:

> [F]or the obligation to pay money cannot easily be held to form a *jus in re*, unless it takes the form of a duly constituted hypothec; moreover the obligation is altogether uncertain and conditional, for it is impossible to foretell what the drawing of lots will decide. This direction of the will therefore does not constitute a real right and is not *per se* registrable. And yet it is intimately connected with a direction which is registrable, as already decided. If the direction as to the time of the partition and the drawing of lots were registered, without the direction as to the payment of the £200, the result would be an incorrect representation, and an imperfect picture of the testamentary direction, which would be most misleading to strangers who may purchase undivided shares from the children before the partition takes place. It seems to me therefore that in the special circumstances of the case the difficulty can only be solved by registering the entire clause of the will.[75]

73 *Grotius 3.28.6,* AF Maasdorp and CG Hall *Maasdorp's Institutes of Cape Law,* bk2, ch 14.
74 4 *Prentice-Hall* G 3.
75 n 68 above, 165-166.

However, as stated by RamsbottomJA in the case of *Nel NOv Commissioner for Inland Revenue*[76] an *ius in personam* if registered, on the principle applied in the *Geldenhuys*[77] case, would not convert into an *ius in re*. Innes CJ had earlier stated in the case of *British South Africa Company v Bulawayo Municipality*[78] that an *ius in personam* does not become an *ius in re* because it is erroneously placed upon the register.

This decision by the court concerning the right of payment of a sum of money has been interpreted to mean that the right to a one-off payment of money which affects a person personally and not in his capacity as owner of the land in question can never be a real right. However, subsequent cases where the issue of the obligation to pay money was considered in order to determine whether such an obligation constituted a real right or a personal right – a determination which had to be made in order to make a finding as to its registrability – involved other aspects of such conditions, namely whether other rights to receive payment of money, which are not one-off payments but periodic payments, and rights to either one-off or periodic payments, that rest upon persons in their capacity as owners of the land in question and not on them personally, are real rights or personal rights. For example in the *Nel* case[79] Ramsbottom JA had to decide whether a burden, imposing an obligation to pay money, that will bind successors in title, either for a definite or ascertainable time or in perpetuity, can in South African law be imposed upon land and registered against the title.

This question was addressed in several later cases, three of which are discussed below.

***Lorentz v Melle and Others*[80]**

This case was an appeal from the grant by a single judge, sitting in the Transvaal Provincial Division, of certain declaratory orders in favour of the first respondent, Melle. During 1905, Johannes Gerard van Boeschoten, the father of Melle, and one Herincus Lorentz, the father of Lorentz (the appellant), were about to acquire in co-ownership certain immovable property situate in the district of Pretoria and being the remaining portion of the middle portion of the farm Zwartkop. Prior to the registration of the farm in their names, they, on 7 April 1905, executed a notarial deed. In terms of this deed the parties recorded that they had agreed to a division of a portion of the property to be acquired so that Van Boeschoten would receive transfer of portion 'B' of the middle portion of the farm, whilst Lorentz would receive transfer of the contiguous portion 'A' of the farm.

76 1960 1 SA 227 (A).
77 As above.
78 1919 AD 84 93.
79 n 76 above, 232.
80 n 4 above.

The remainder of the ground was to remain their joint property. In terms of the deed Van Boeschoten and 'his heirs, executors and assigns' would have certain other rights over portion 'A'. The deed further provided that 'if Lorentz lays out a township on his portion, Van Boeschoten shall have one-half of the net profits arising from the sale of such township payable from time to time as each lot or erf is sold, but Van Boeschoten shall not be entitled to any share in such profits until Lorentz shall have reimbursed himself for all expenses of such township out of the proceeds of stands sold …'. The deed provided for similar rights in favour of Lorentz over the portion registered in Van Boeschoten`s name. The notarial deed was registered simultaneously with the title deed and therefore also registered against the title deeds. The provisions of the notarial deeds remained registered against the title deeds of the owners of certain of the subdivisions of Van Boeschoten's and Lorentz's portions, including the subdivisions registered in the names of appellants and respondents. First respondent Melle was one of Van Boeschoten's successors' in title and intended to sell her portion to a company for the purposes of establishing a township thereon. She wanted to ensure that the purchaser would not be obliged to pay more than half of the profits which might accrue from the establishment of a township. She applied for an order declaring, *inter alia*, that the rights created by the township clause created personal rights to Van Boeschoten and Lorentz which could only be transferred to their 'heirs, executors, administrators and assigns'. The rights accordingly had no real effect in the sense that they could also bind later purchasers such as the company to which she intended to sell her portion. A single judge granted the application.

The respondent's case was based on two alternative submissions. According to the first submission the notarial deed had created a praedial servitude and none of the orders sought could therefore be granted. The second submission was based on the argument that, even if mere personal rights and obligations had come into existence, these were freely transferable to and binding upon all Van Boeschoten's and Lorentz's successors in title, the applicant, would therefore, not, even in relation to portion 203, be entitled to an order declaring that the township clause had not conferred any rights on the respondent, though she was entitled to some of the other orders sought.

In terms of the first submission the court was obliged to decide the case on the basis of the principles relating to the nature and creation of servitudes because if a praedial servitude had been created, then clearly the appeal had to succeed.

The court in principle confirmed the 'subtraction from the *dominium*' test formulated as follows in *Geldenhuys*:

> If an obligation is a burden upon land, a subtraction from the *dominium*, the corresponding right is real and registrable; if it is not such an obligation, but

> merely an obligation binding on some person, the corresponding right is a personal right, and it cannot, as a rule, be registered.[81]

The court held that:

> The right (and obligation) under consideration, so it appears to me, is essentially a personal one sounding in money and cannot be equated to the servitudes referred to … and this for the reason that the conditional obligation to pay attaches of necessity not to the land (which is not burdened) but merely to the owner thereof. His rights are curtailed but not in relation to the enjoyment of the land in the physical sense.[82]

The court held further that:

> In particular, I do not regard them as deciding that a monetary obligation imposed on an owner of land of the type we are dealing with necessarily constitutes an encumbrance against such land.
>
> In the result I am of the opinion that that part of the notarial deed under consideration, namely the township clause, confers only personal rights, which, even on (their incorrect) registration, were not capable of becoming and did not become a praedial servitude. Because of the basis of this conclusion, which is arrived at irrespective of what the intention of the parties as expressed in the deed was, it is unnecessary to consider the various submissions which were respectively made on behalf of both parties and which were founded on what was contended to be the proper construction thereof and in particular of the township clause. I repeat what was said above, namely that, if a contractual right is of such a nature that it is incapable of constituting a servitude, then the intention of the parties (as expressed) to do so, cannot avail.[83]

In other words, the mere fact that these rights were erroneously registered against the title deeds of the properties could not convert them into real rights. According to the court this was a case where the sanctity of the register had to yield to the need for deleting the incorrect registration of contigent personal rights.

The novelty of this case in the formulation of the test to determine the distinction between a real right and a personal right is that even if the condition amounts to a subtraction from the *dominium*, the right created by such condition will only constitute a real right if the owner's entitlements to the land are curtailed in the physical sense. In this regard, this case adds another standard to the original test laid down in the *Geldenhuys* case and within this limited application creates a *numerus clausus* (a closed list) of real rights. As pointed out by Van der Walt & Pienaar this limited test tends to produce a result which conflicts with the nature and effect of many

81 Headnote of *Geldenhuys*; and *Lorentz* 1050.
82 *Lorentz* (n 4 above) 1052.
83 *Lorentz* (n 4 above) 1055.

traditionally recognised limited real rights, such as mortgage bonds and mineral rights.[84]

***Pearly Beach Trust v Registrar of Deeds*[85]**

The applicant applied to court for an order declaring that a certain condition embodied in a deed of sale was capable of registration in terms of section 3(1)(r) of the Deeds Registries Act. The Registrar of Deeds had refused to register the deed in question which provided that a third party was entitled to receive from the transferee and its successors in title one third of the consideration received from the grantee of any option or rights to prospect for minerals on the property, and one third of the compensation received in consequence of expropriation.

The Registrar, who objected to the application, based his objection on the following statutory provisions:

> (1) Section 3(1) (r) of the Act in terms of which the Registrar is required to register 'any real right, not specifically referred to in this subsection'.
>
> (2) Section 63(1), a general provision relating to rights in immovable property, in terms of which '(n)o deed, or condition in a deed, purporting to create or embodying any personal right, and no condition which does not restrict the exercise of any rights of ownership in respect of immovable property, shall be capable of registration'.

In terms of s 63(1) neither a personal right nor a condition which does not restrict the exercise of any right of ownership of immovable property, is capable of registration.

It was common cause that, insofar as the condition in this case would bind not only the owner of the land, but also his successors in title, it did not create a personal right.

The Registrar argued that in order to qualify for registration the right must be such as to amount to a subtraction from the *dominium* of the land. Consequently, since in this particular case the right of successive owners of the land to grant mineral rights or to sell the land was not *per se* restricted in any way, the condition created merely an obligation to pay over to a third party a share of the proceeds of such grant, sale or expropriation. The condition did not restrict any right of ownership in the land and was therefore on that ground not registrable.

The basis of the Registrar's objection was that: in order to qualify for registration the right had to be such as to amount to a subtraction from the *dominium* of the land; in this case the right of successive owners of the land to grant mineral rights or to sell the land was not per se restricted in any

84 Van der Walt & Pienaar (n 61 above) 33.
85 1990 4 SA 614 (C).

manner; there was merely an obligation to pay a third party a share of the proceeds of such grant, sale or expropriation; there was no obligation on the owner to grant any rights to the land; and as far as expropriation was concerned there was no limitation of rights of the owner until expropriation would occur and that would only constitute a personal liability to share the compensation, and a similar liability would arise with regard to disposal of the land. The condition did not restrict any right of ownership in the land and was therefore on that ground not registrable.

King J**,** in his judgment, referred to and confirmed the test for determining whether or not a right is personal and therefore not capable of registration laid down by De Villiers JP in *Geldenhuys*[86] as follows:

> One has to look not so much to the right, but to the correlative obligation. If that obligation is a burden upon the land, a subtraction from the *dominium*, the corresponding right is real and registrable; if it is not such an obligation, but merely an obligation binding on some person or other, the corresponding right is a personal right, or right in personam, and it cannot as a rule be registered.

After reviewing relevant authorities on the issue, the court in applying the subtraction form the *dominium* test, rejected the Registrar's objection and held that one of the rights of ownership was the *ius disponendi* and if this right was limited in the sense that the owner was precluded from obtaining the full fruits of the disposition, it could be said that one of the rights of ownership was restricted. Consequently, the condition creating such limitation was capable of registration in terms of section 3(1) of the Act. This case thus confirmed the subtraction from the *dominium* test as perhaps the primary benchmark to determine the distinction between personal and real rights and their registrability.

The following conclusions may be made from this case.

Firstly, this decision implies a rejection of the restrictive test laid down in *Lorentz* and the reaffirmation of the original *Geldenhuys* test. Consequently, adherence to the restricted standard laid down in *Lorentz* would have resulted in a different conclusion. Secondly, since it did not restrict the owner's right to the use of the property physically, the condition could not have resulted in the creation of a real right. Thirdly, the decision lays down the principle that some obligations to pay money could constitute limited real rights. This position has been criticised for its potentially negative impact on land owners and the economy.

86 At 164.

Cape Explosive Works Ltd & Another v Denel (Pty) Ltd & Others[87]

This was an appeal against a judgment in the Transvaal Provincial Division reported as *Denel (Pty) Ltd v Cape Explosive Works Ltd & Another.*[88] The main issue to be decided in this appeal was whether certain conditions registered in a title deed and erroneously omitted from subsequent title deeds were binding on the then current (present) owner of the relevant property.

During 1973 the first appellant, Cape Explosive Works Ltd ('Capex') sold two immovable properties to the second respondent, the Armaments Development and Production Corporation of South Africa Limited, whose name was subsequently changed to the Armaments Corporation of South Africa Limited ('Armscor'). The properties were Farm No 1065, measuring 459 6830 ha, and Portion 3 of the Farm Helderberg Sleeper Plantation No 787, measuring 11 3903 ha. Both properties were situated in the Administrative District of Stellenbosch. In terms of clause 6 of the deed of sale Armscor undertook that the properties would only be used for the development and manufacture of armaments and in terms of clause 7(a) thereof Armscor granted to Capex the 'first right to repurchase' the properties, at a price to be determined in a prescribed manner, in the event of the properties no longer being required for the use set out in clause 6. Armscor agreed in terms of clause 7(a)(vii) to the registration of the right conferred on Capex in terms of clause 7(a) against its title deeds to the properties in the Deeds Office. Clause 7(b) provided that in the event of Capex repurchasing the properties Capex would have the right to purchase all or any of the improvements and other facilities erected on the properties which Armscor was desirous of selling, at a price and on such further terms as might be agreed upon between Capex and Armscor.

A dispute arose between Capex and Denel as to whether Capex would be entitled to repurchase that portion of Erf 635 which formed part of Farm 1065 in the event of it no longer being required for the use set out in condition 1. As a result Denel applied for an order declaring that its ownership of Erf 635 was not in respect of any portion thereof subject to condition 2. Capex, in a counter-application, applied for an order directing the Registrar of Deeds, Cape Town to rectify the Certificate of Consolidated Title T 33717/77, the Deed of Transfer T 75861/92 and the Certificate of Consolidated Title T 1178/94 so as to include conditions 1 and 2 in so far as they related to the portions of Farm 1065 which had been incorporated into the Remaining Extent of Erf 635 Firgrove; an order directing the Registrar of Deeds to rectify Certificate of Registered Title T1179/1994 so as to include the conditions; orders declaring that Denel was bound to comply with the conditions; an order interdicting Denel from failing to comply with the provisions of the conditions; and an order interdicting Denel from selling or transferring the restricted properties to any person without complying with condition 2.

87 n 63 above.
88 1992 2 SA 419 (T).

The court *a quo* found that clause 6 was registrable in terms of section 63(1) of the Deeds Registries Act in that it restricted the exercise of Armscor's right of ownership in respect of the properties but the parties did not intend the restriction to be binding on Armscor's successors in title and specifically agreed not to register it against the property.[89] Clause 7 did not affect the property or curtail Armscor's right of enjoyment of the property in the physical sense. On its own it was not registrable in terms of section 63(1). It was not ancillary to clause 6 and therefore not registrable on that basis either.

On the strength of these findings the court *a quo* dismissed the counter-application and granted an order declaring that Denel's right of ownership in erven 635 and 637 Firgrove was in no way encumbered by condition 2.

3.3.2.5 Requirements to determine registrability of conditions

Streicher JA, in his judgment found as a fact that Armscor intended to receive transfer of the properties subject to conditions 1 and 2. Denel similarly did not allege that Capex and Armscor had not intended to pass and receive transfer of the properties subject to conditions 1 and 2. The matter therefore had to be decided on the basis that Capex and Armscor intended to pass and receive transfer subject to conditions 1 and 2. The issue which had to be decided on that basis was whether conditions 1 and 2 were capable of being registered and what the effect of their omission from subsequent title deeds was.

In terms of section 3 of the Deeds Registries Act all real rights in respect of immovable property are registrable. To determine whether a particular right or condition in respect of land is real the court restated that two requirements must be satisfied:

> (1) The intention of the person who creates the real right must be to bind not only the present owner of the land, but also his successors in title; and
>
> (2) The nature of the right or condition must be such that the registration of it results in a 'subtraction from dominium' of the land against which it is registered.[90]

The court *a quo* further elucidated the dictates of this test as follows:

> One compares the right in question and the correlative obligation to see whether the obligation is a burden upon the land itself or whether it is something which is

89 Section 63(1) of the Deeds Registries Act provides as follows: 'No deed, or condition in a deed, purporting to create or embodying any personal right, and no condition which does not restrict the exercise of any right of ownership in respect of immovable property, shall be capable of registration: Provided that a deed containing such a condition as aforesaid may be registered if, in the opinion of the registrar, such condition is complementary or otherwise ancillary to a registrable condition or right contained or conferred in such deed'.

90 See also *Erlax Properties (Pty) Ltd v Registrar of Deeds & Others* 1992 (1) SA 879 (A) 885.

> to be performed by the owner personally. If it is the former, the right is capable of being a real right. If it is the latter, it cannot be a real right. In order to ascertain whether the obligation is a burden upon the land, two useful concepts which have been used are that the curtailment of the owner's rights must be something in relation to the enjoyment of the land in the physical sense … or that the obligations 'affect the land' or 'run with the land'.[91]

In applying the test to the two conditions in question, the court held that with regard to clause 6 (the restriction on the use of the land) the condition curtailed the right to use the land and that it therefore amounted to a subtraction from *dominium*. It therefore fell squarely within the definition of section 63(1) of the Deeds Registries Act and could in principle be registered as a real right. The condition contained in clause 7, the first right to repurchase, did not constitute a subtraction from the *dominium*.

The court, however, explained that the use restriction according to condition 1 was materially different from the use restriction according to condition 1 read with condition 2. The two conditions were not independent of one another and they could not be separated. They formed a composite whole. They were specifically stated to be binding on the transferee, being Armscor, and its successors in title. Furthermore, they constituted a burden upon the land or a subtraction from the *dominium* of the land in that the use of the property by the owner thereof was restricted. The right embodied in conditions 1 and 2, read together, therefore, constituted a real right which could be registered in terms of the Deeds Registries Act.

Accordinlgy, Capex was entitled to orders interdicting Denel from acting contrary to the provisions of conditions 1 and 2. Denel was interdicted from selling or transferring the restricted properties to any person without compliance with pre-emptive conditions and restrictions on rights of *dominium*.

This case demonstrates the application of the test of the intention of the parties by the court to determine whether a condition creates a real right or a personal right. The court's decision not to separate conditions 1 and 2 was based on the intention of the parties to bind the successors in title of Armscor as embodied in the original agreement. The position of the court not to regard the two conditions as mutually exclusive, and to hold that both collectively constituted a real right, is a further demonstration of the unsettled status of the test in *Lorentz*, and the degree of recognition accorded to it by the courts.

91 *Denel* (n 87 above) 435.

4 Summary and observations

In the cases discussed above, the conditions purporting to create limitations on rights of ownership were created in either a contract, notarial deed, or a will. In order to determine their registrabilty in compliance with the dictates of section 63(1) of the Deeds Registries Act, the courts had to draw distinctions between real and personal rights. Almost invariably, the courts determined the issues from the premise of the creation of a servitude. If the impact of the conditions amounted to the creation of a servitude, then it would clearly lead to a burden on the land, and thus satisfy the subtraction from the *dominium* test and the requirements for their registrability. In the context of payment of money, the obligation to pay a sum of money that does not come out of the fruits of the property will be lacking in the essential features of servitudes and therefore cannot constitute a subtraction from the *dominium*. Looked at from this premise, therefore, payment of money, as one-off payment, cannot amount to a real right. In fact the criterion of the condition curtailing the *ius fruendi* or the owner's entitlement of use and enjoyment in the physical sense laid down in *Lorentz* eliminates the possibility of the burden to pay money to someone constituting a real right. From this point of view, a *numerus clausus* of real rights has potentially been created. In order to put the debate over the creation of a *numerus clausus* of real rights in perspective, it may be useful to quote from the judgment of Nestadt J in *Lorentz*[92] when he stated as follows:

> At first sight every personal obligation in terms of which an owner undertakes to deal – or not to deal – with his property in a particular manner restricts him in the exercise of his *dominium* so that the corresponding right which another person acquires as a result of such an undertaking would *prima facie* be a potential real right. However, the law of property would disintegrate if every personal right relating to a thing could be converted into a real right, while on the other hand, circumstances might arise which make it desirable that a further type of 'mere' personal right should be added to those which are capable of being converted into real rights.

The position inSouth African law and to that extent Namibian law is that there is no *numerus clausus* of real rights. Consequently, the restrictive test in *Lorentz* may not stand the test of time.

A final point that may be added with respect to the registration of rights is the statement made by Wessels J in *Hollins*[93] that neither by the common law nor by Proclamation (legislation) can one have registration of a right, the birth of which is dependent upon a contingency.

92 *Lorentz* (n 4 above) 1051, quoting from Silberberg *The Law of Property.*
93 n 10 above, 608