PRINCIPLES OF PROPERTY LAW

PART 1

1

THE MEANING OF IMMOVABLE PROPERTY AND INTERESTS IN IMMOVABLE PROPERTY

CHAPTER 1 – THE MEANING OF IMMOVABLE PROPERTY

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1.0 THE MEANING OF IMMOVABLE PROPERTY

1.1 The Distinction between Movable and Immovable property

Property can be classified as either movable or immovable property.

Movable property consists of:

- Objects which can be moved from one place to another, whatever their size and weight. Furniture, pot plants, stoves and door keys are considered to be movable property.

At common law immovable property comprises the following:

- Surveyed land, including surface oil, the geological substances such as gold, coal and clay, as well as surface and subsurface water.
- Everything attached to the soil by natural means such as plants, trees and crops.
- Permanent improvements to land (such as houses, blocks of flats and dams) together with objects which are permanently affixed to these improvements.
- A unit as defined in the Sectional Titles Act 95 of 1986 (such a unit only comes into existence upon registration of a section title plan).

1.2 Improvements to Land and Permanent fixtures

Improvements to land which are of a permanent nature, along with movable objects which are permanently attached to these improvements are also classified as immovable property. Built in cupboards, light fittings and wall-to-wall carpets are therefore deemed to be part of a house (immovable property) provided they are permanently attached to the house. These attachments are usually referred to as permanent fixtures.
A piece of land and all the permanent improvements thereon (including all the fixtures) are regarded as one single immovable property or one entity. This has important consequences:

- Permanent improvements on land cannot be alienated or disposed of independently of the land itself. The owner of a tract of land is also the owner of the permanent improvements on the land and one cannot sell the land to one person and the improvements to another. It is also not possible to transfer ownership in portions of a building to different person unless the building has been sectionalized in terms of the Sectional Titles Act 95 of 1986 as amended.
- When land is sold or leased, the permanent fixtures are by operation of law part and parcel of the property sold or leased and must be delivered to the purchaser or lessee unless a contrary agreement has been reached in this respect between the parties.
- A mortgagee's security in terms of a mortgage bond extends not only in respect of the land itself, but also in respect of the improvements to the land. For example, where a bank holds a mortgage bond of R100 000 on a piece of vacant land and the owner later builds a house costing R500 000 with his own funds the bank's bond covers both the land and the buildings. This means that if the owner fails to meet his mortgage payments the bank will sell the land with the improvements thereon to recover the outstanding mortgage amount.
- In valuing land and the improvements thereon, the value of the permanent improvements and the fixtures must be taken into account but not attachments which do not qualify as fixtures. Thus where the market value of a farm must be ascertained, the value of the land together with the permanent improvements thereon must be taken into account, but not the value of prefabricated structures on the farm which are not of a permanent nature, nor the value of an aboveground irrigation system which is not a permanent fixture. (See *Caltex (Africa) Ltd and others v. Director of Valuations 1961 (1) CPD 525*

To determine whether a particular object qualifies as a fixture and therefore as immovable property itself the following important principles must be applied:

- The basic question is whether the movable item has been permanently affixed to the immovable property.
- To determine whether the attachment is permanent, regard must be had in the first place to the nature of the attachment, the purpose thereof and the manner of attachment. The fact that the item is attached is an essential part or feature of the immovable property (such as electricity cables) is an important consideration which may indicate that the item has become a fixture. The fact that the attachment is physically integrated into the immovable property, or that it cannot be removed without seriously damaging or destroying the item itself or the immovable property is conclusive proof that the item has indeed become a fixture. Water pipes, electricity cables, doors window frames, etc. which are built into a house are therefore permanent fixtures.
- The intention of the owner of the attachment at the time of the attachment must also be considered. Where for example, movable property (such as an outside TV aerial) is sold to someone on hire purchase, the seller (who usually remains the owner of the item until the full purchase price has been paid) normally would not intend the item to be permanently attached since he would want to repossess the item should the purchaser fail to fulfill his obligations in terms of such credit agreement. *(See Macdonald v. Radin).*

The owner's intention must be weighed with all other considerations mentioned above. In particular instances his personal intention must be ignored, such as when it is clear from the manner of attachment that the item has indeed become a permanent fixture. In other instances the owner's intention can be decisive, such as when it is not clear from the nature of the attachment, its purpose or manner of attachment that the item has become a permanent fixture. If for example, an owner erects a special stainless steel washing line on his property with the intention of taking it with him should he ever sell the property, the washing line is not a permanent fixture and it can be removed when the property is sold.
It follows then that there is no fixed rule that certain items in a house such as carpets, light fittings, built in cupboards or television aerials are or are not permanent fixtures. Each case must be considered on its own. Where it is not entirely clear whether a particular item is a permanent fixture or not, it is imperative to state clearly in the sale or lease agreement whether or not the item is included in the sale or lease. From a practical point of view it is advisable to obtain a schedule of items if available of articles or goods which are not to be considered as permanent fixtures.

2.0 INTERESTS IN IMMOVABLE PROPERTY

2.1 Introduction

An interest in immovable property is a limited real right, that is a registered right which one person has over the property of another.

- Where A has a servitude (a right of way) over B's property, he is said to have a limited real right over B's property or, to put it differently, to have an interest in B's immovable property. Mining rights serve as another example of a limited real right (an interest in immovable property).

To understand the nature of an interest in immovable property, one needs to understand the concept of real right and the distinction between real rights and personal rights.

Knowledge of interests in immovable property (limited real rights) is not only important because such interests may be sold or let, but also because the existence of an interest in someone else's land affects the rights which the owner of that property can exercise in respect of that property.

- Where a local authority has a drainage and sewer servitude on a certain property, the owner must take that into account when he constructs his buildings on the property. A valuer must know how a particular interest in land will affect the rights over the property and also whether this right will have any affect on the value of the property.

Moreover, the fact that another person has an interest in someone's property influences the value of the property.

- Where A has a right of way in respect of B's smallholding, this might cause the value of the property to drop since not everyone might wish to own property over which other persons may drive. This is an important fact which must be taken into account when doing a valuation

2.2 Distinction between Real and Personal rights

A person legally entitled to control or make use of immovable property is said to have a real right in that property. A real right must be distinguished from a personal right, i.e. a right which confers upon its shareholder the capacity to claim something from another person. When a person buys a house he has a personal right to demand transfer of the house in terms of the contract of sale. Prior to occupation or transfer, the holder of the personal right has no direct control over the house itself. Once occupation has been given or transfer has taken place there is a direct connection between the person obtaining occupation or transfer and the property itself, and the person concerned then has a real right over the property. The distinction between personal rights and limited real rights is important. A real right is enforceable against the whole world, that is, against the owner of the property and all other persons who have legal claims to the property by virtue of a contract with the owner or because of the death or insolvency of the owner. A personal right on the other hand merely gives the holder the right to claim from a particular person either that he delivers a thing, or performs or refrains from performing a certain act.

- Thus if the owner of a tract of land, A, agrees with owner B of another tract of land that A may have a right of way over B's land, the right arising from the contract in favour of A is a personal right. Should B sell the property to C, the latter would in the absence of knowledge of the right of way, not be bound to recognize A's right because he was not party to the contract between A and B. However should A have registered his right against the title of B's property, the right would on registration have become a real right. As such, C would have had to honour A's right of way if the property was alienated to him by B, since A's real right would have been enforceable against B's successors in title.

2.3 CATEGORIES OF LIMITED REAL RIGHTS

There are two categories of real rights, namely ownership and limited real rights.

(a) Ownership

Ownership is the most comprehensive right which a person can have over a property; no person can have more rights over a property than the owner. An owner may possess, use, enjoy, alienate and destroy his property, subject to certain legal restrictions.

(b) Limited real rights

A limited real right is a right which one person has over another person's property. It restricts the use to which the latter person can put his property and thus limits his right of ownership.
For example: when A obtains a right of way over B's farm, B's rights of ownership is limited because he may no longer farm on the tract of land set aside for A's right of way. The right is limited because, although a real right, it does not confer on the holder the same extensive powers as the right of ownership itself. A person who has a registered right of way over another person's farm has the right to use only a specific tract of land set aside for the right of way. He is not entitled to use the farm as a whole or to dispose of it. He also cannot decide unilaterally to use the tract of land set aside for his right of way for farming.
An owner is free in principle to grant as many limited real rights over his property as he may wish. However, depending on the number of limited real rights granted and the contents of each, the value of the property can be negatively affected by it. If for instance, there is a right of way over 1.8 ha smallholding entitling someone to drive trucks over the property 24 hours a day, the property is unlikely to be bought by anyone looking for some peace and quiet.
There is not a set number of limited real rights. Generally speaking, any right over land which limits or restricts the ownership of the property can be classified as a real right. From a valuers point of view the following limited real rights are most commonly encountered:

- Servitudes
- Mineral rights
- Leasehold
- Real security, such as mortgage bonds.

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THE CAPACITY TO ACQUIRE RIGHTS OVER LAND IN SOUTH AFRICA

CHAPTER 2 – THE CAPACITY TO ACQUIRE RIGHTS OVER LAND IN SOUTH AFRICA

CONTENTS

1.0 STATE AND PRIVATE OWNERSHIP OF LAND

In South Africa all land is deemed to be the property of the State unless there is proof to the contrary. However, the State has always been empowered to confer ownership in State land on the private individual. Today all land in South Africa is owned either by the State, private persons, public or local authorities or statutory bodies. Ownership of unalienated State land (that is land belonging to the State which has not been transferred into private ownership) may be transferred only by registration of a deed of grant in terms of the Deeds Registries Act 47 of 1947. The granting and disposal of State land normally takes place in terms of the State Land Disposal Act 48 of 1961.
There are, however, certain restrictions on the acquisition of certain types of State property, these are referred to in the following Acts:

1.1 The State Land Disposal Act 48 of 1961

The purpose of the Act is to provide for the disposal of certain State land and for matters incidental thereto, and to prohibit the acquisition of State land by prescription.
This Act empowers the State President to sell, exchange, donate or lease any State land on behalf of the State on such terms and conditions as he may deem fit. When land sold in terms of the Act is transferred to a buyer, the Minister of Public Works and Land Affairs may authorize the Register of Deeds to endorse on the title deeds of that land and any other immovable property of the transferee a restriction to the effect that such land and other immovable property may not without the consent of the Minister be sold separately.
The Act also empowers the State President to consent to the amendment or cancellation of any condition which is embodied in or registered against a deed of grant or deed of transfer whereby any right is reserved to or acquired by the State in respect of such land. The State President may also at any time exercise any such right. Section 3 of the Act provides that as from 29 June 1971 State Land is not capable of being acquired by any person by prescription.

1.2 The Sea Shore Act 21 of 1935

The purpose of the Act is to declare the State President to be the owner of the sea-shore and the sea within the territorial waters of the Republic; and to provide for the grant of rights in respect of the sea-shore and the sea, and for the alienation of portions of the sea-shore and the sea and for matters incidental thereto.
In terms of this Act, the State President is the owner of the sea and the seashore. Generally speaking, the sea and the seashore may be let or alienated to a private individual only with the consent of Parliament.

1.3 The National Parks Act 57 Of 1976

The purpose of the Act is to consolidate the laws relating to national parks.

In terms of this Act, land that forms part of a national park may be let or alienated to a private individual only with the consent of Parliament.

2.0 ACQUISITION AND OWNERSHIP OF IMMOVABLE PROPERTY BY DIPLOMATS AND OTHER PERSONS WHO ARE NOT SOUTH AFRICAN CITIZENS

2.1 Aliens Control Act 96 Of 1991.

The purpose of the Aliens Act is to regulate immigration to protect local job and business opportunities.
In terms of the Act an alien who is in South Africa is not entitled to buy or rent immovable property unless he is in possession of a permanent residence permit or a permit to sojourn temporarily in South Africa.
A visitor to South Africa who has lawfully acquired property in the Republic need not dispose of it once he leaves the country. Foreigners acquiring immovable property in South Africa must comply with applicable exchange control regulations.

2.2 Diplomatic Immunities and Privileges Act No. 37 Of 2001

The purpose of the Act is to make provision regarding the immunities and privileges of diplomatic missions and consular posts and their members, of heads of states, special envoys and certain representatives, of the United Nations, and its specialised agencies, and other international organisations and of certain other persons; to make provision regarding immunities and privileges pertaining to international conferences and meetings; to enact into law certain conventions; and to provide for matters connected therewith.
Persons entitled to diplomatic privileges who wish to acquire, improve, expand or lease immovable property in South Africa must comply with the requirements of the Diplomatic Immunities and Privileges Act 74 of 1989.

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FORMS OF LAND TENURE

CHAPTER 3 – FORMS OF LAND TENURE

CONTENTS

1.0 OWNERSHIP

It is not a requirement in law that the seller of immovable property must be the owner of the property at the time of sale. A purchaser who bought property on installments may validly sell the property before he has taken transfer. Only the owner of the property can transfer ownership in the property to a purchaser. It is therefore important to know who the owner of the immovable property is, whether it is the seller himself or someone else.
An owner of property is entitled to two things namely to possess and occupy. It is however possible for a person to own property without being in possession or occupation thereof, and for a person to possess and occupy without being the owner.
For example, where A sells his house to B and B is given possession and occupation of the property before the property is registered in his name, B possesses the property without being the owner. This is a fairly standard practice in South Africa.

2.0 DEFINITION OF OWNERSHIP

Ownership is a real right which in principle confers on the owner complete and absolute control over his property. The owner of a property has all the legally recognized rights and capacities in respect of the property he owns. Nobody has more absolute rights over a property than the owner himself.
Although the owner had absolute rights his ownership is not unlimited in the sense that he can exercise his right is without restriction. His rights are limited by the following:

- Other real rights existing in respect of the property.
- Personal rights which are binding on him
- Statutory control
- Certain common law principles – law of neighbors.

At common law an owner of property has the following capacities in respect of the property he owns:

(a) The right to occupy and possess the property

This means that an owner is entitled to be physically present on his property and to develop it.

(b) The right to use and enjoy his property

This means that the owner may use his property for any ordinary and natural purpose and that he is entitled to enjoy his property and its fruits. He is entitled to plant and sow on the land, to build on it and to use water on and beneath the land surface. The owner is also the owner of all mineral rights on his property, although the mineral rights can be separated from ownership and transferred to another party.

(c) The right to dispose of the property

This means that the owner is entitled to transfer his land to another, to subdivide his property and to encumber it by granting others limited real rights in the property such as servitudes, leases and mortgages.

(d) The right to destroy the property

In principle an owner is free to destroy his property as he pleases, the right to destroy the property is subject to certain restrictions and other limited real rights which may be held over the property.
The owner of land is the owner of the land surface and all the plants and crops on the property. He also owns all the permanent fixtures on the land as well as everything which lays below the surface, except where mineral rights are reserved in favour of someone else, usually the State. An owner's rights also extend to the air above his land. This means that an owner may build as high as he wishes, subject to building regulations as well as title deed restriction and town planning regulations

3.0 RESTRICTIONS ON OWNERSHIP

Although the owner has complete and absolute control over the property he owns, this is not unlimited. Ownership as a real right is limited by the following:

(a) Other real rights which may exist over the property

An owner is entitled to grant other persons limited real rights over his property. Depending on the nature of the limited real rights granted, an owner may sometimes be deprived of virtually all his capacities as owner of his property. For example, where A has a 99-year leasehold on B's property, B would have virtually no rights over the property which he can exercise himself during the 99-year period, except that he may sell the property to someone else subject to the leasehold. (The doctrine of *huur gaat voor koop*).
Ownership is not only restricted by limited real rights granted by the owner himself, but also by limited real rights established by legislation or contained in the original deed of grant of the land. These conditions may include the following that the property may not be subdivided, not more than one living unit is permitted, may only build using a particular type of material.
It is therefore of the utmost importance when doing valuations that the valuer scrutinize the title deeds applicable to the subject property so that any restrictions that are contained in such deeds may be fully investigated as to the affect these conditions may or may not have on the valuation of a property.

(b) Personal rights which are binding on the owner

A property owner may be restricted in exercising his ownership in a certain manner because of a personal right which is binding on him. *For example, where he has contracted with his neighbour not to build a swimming pool on his property near his neighbours fence*. The owner can, also grant personal rights to other persons to do something in respect of his property, for example, where the owner of a farm concludes a contract with a neighbour allowing him to graze cattle on the property. A purchaser of property can be held bound by these personal rights in certain instances if he knew of them when the sale was concluded.

(c) Statutory control

There are a large number of statutes applicable to immovable property in South Africa. These statutes limit an owner's capacity in respect of his property in a number of ways these are as follows:

- By prescribing how a building may be used
- By regulating the subdivision of property
- By setting minimum building standards

- By specifying how it must be maintained
- Restricting the alienation of the property under certain circumstances

(d) Common law restrictions: the law of neighbours

It is the fundamental principle of the law of property that although an owner has complete and absolute control over his property, he must exercise this control with due consideration to the interests of other persons. Although an owner normally may do as he pleases on his property, his neighbour has a right to enjoy his own property as well. Whether an owner is entitled to use his property in a certain manner must always be weighed against whether adjoining landowners are obliged to endure such use. The law of neighbours places the following obligations on a property owner:

(i) The obligation to refrain from causing a nuisance

The owner of property is not permitted to use his property in a manner which interferes with the use and enjoyment of their properties by neighbouring owners. If he acts in such a manner, he is said to cause a nuisance and legal steps can be taken against him. A nuisance is caused only if an owner uses his property unreasonably. The standard which is applied to determine whether a particular use of property is unreasonable or not, is not the standard of the perverse or over-scrupulous person, but of the normal person of sound tastes and habits.
A nuisance normally consists of an excessive or abnormal exercise of a person's rights of ownership. However, even if an owner uses his property in an ordinary manner, his actions may still constitute a nuisance if his sole aim is to cause inconvenience to a neighbour. An example of this would be if an owner plants trees on his property with the sole aim of spoiling his neighbours view.
Excessive noise is probably the most frequent form of nuisance. To determine whether a disturbance is unreasonable, the type of noise, the degree of its persistence, the locality involved and the times when the noise is heard must be considered. The test is whether any reasonable person would find the noise seriously disturbing.
A nuisance can also be caused by planting trees on one's property. It has been held that a landowner is entitled to plant trees on his land and if they exclude light or sunshine from the property of another person, the latter has no right to complain. (*Van der Heever v Hanover Municipality 1938 CPD 95*). If leaves are blown on to an adjoining property he would in the normal course of events have to endure it unless it can be proven that some serious damage is been caused. The mere blocking of gutters would normally not constitute a valid ground for complaint. However, overhanging branches or roots which have spread to a neighbours land may be chopped off on the boundary if their owner has refused to comply with a request to deal with the matter. *(Malherbe v Ceres Municipality 1951 (4) SA 510 (A),*
The law does not allow man to take the law into his own hands, except in cases of absolute necessity. Where, for example, one creates a dangerous health hazard on one's property, the person likely to be injured would be justified in dealing with it. In ordinary circumstances one is not justified in entering another person's land even to abate a nuisance. The normal remedy available to an aggrieved party is to apply for an interdict or to claim damages if he has suffered a loss as a result of the nuisance.

(ii) The obligation to support and adjoining property

A landowner is normally entitled to require the owners of land adjoining his to provide the necessary support to maintain his land in a stable condition. For example, a person may not excavate his property to such a degree that his neighbours land would subside as a result. Apart from common law there are also various statutory provisions which govern the obligation to provide sufficient support for adjoining properties.

(iii) The obligation not to interfere with the natural flow of water

The owner of property is not entitled to interfere artificially with the natural flow of water on his property if this would prejudice his neighbour. One cannot, therefore channel rainwater through a pipe on to a neighbours property. On the other hand, a landowner is obliged to accept all water which flows naturally on to his land from adjoining properties. He cannot interfere with this artificially so as to prejudice his neighbour. He is not obliged to accept all types of water (waste water) onto his property. The obligation not to interfere with the natural flow of water does not apply to urban properties in general and focuses more on rural properties. There are however exceptions to the rules and these need to be researched through local ordinances and by-laws.

(iv) The obligation not to encroach on another person's property

An owner is obliged to build within the limits of his property. Buildings may not encroach on the property of a neighbouring land owner. Where there is such an encroachment and the owners cannot agree what should be done. A Court order may be obtained ordering the removal of the encroachment. The court has discretion to order payment of damages in lieu of removal. It has also been held that in certain circumstances a neighbour can be compelled to take transfer of the portion of the property encroached upon.

(v) The obligation to avoid a dangerous situation arising on property

A landowner is obliged to take reasonable precautions to avoid the possibility that other people may be injured as a result of a dangerous situation on his property. Thus, if a farmer breeds wild or dangerous animals or allows noxious plants to grow on his land, he may be held liable if the animals leave his property and cause damage on his neighbour's property or if the plants encroach on the neighbour's property. A landowner is does not have duty to control wild animals which are by nature on his property. In other words should he keep a flock of sheep on his property he cannot be expected to control predatory animals which may pursue his sheep).
The owner of a building can be held liable for damages if someone is injured because of defects in the building. Thus where a landlord knows that the steps in a block of flats owned by him are defective, he can be held liable for damages if someone visits a tenant in the building and injures himself by falling on the steps. Where a block of flats is managed by a managing agent, the agent should therefore report the defects to the owner and advise him to have the necessary maintenance work carried out without delay.

4.0 THE OWNER OF IMMOVABLE PROPERTY

In the normal course of events the owner of immovable property is the person in whose name the property is registered in terms of the Deeds Registries Act. However, the fact that a property is registered in a particular persons name in the deeds office is not conclusive proof that such a person is the owner of the property. In the following circumstances immovable property can be owned by someone else or partly by someone else even though the property is registered in a particular person's name.

(a) Expropriation

In terms of the Expropriation legislation the State or any other authorized institution may expropriate property and thereby acquire ownership in the property. In terms of the Expropriation Act 63 of 1975 as amended ownership vests in the expropriating body on the date of expropriation even though the property is still registered in the former owners name. The notice of expropriation is noted against the title deed of the property which is been expropriated.

(b) Prescription

A person can become the owner of property which belongs to someone else by means of prescription provided he has been in possession of the property for an uninterrupted period of 30 years openly and as if he were the owner thereof. For example, if a boundary fence between two farms has been incorrectly placed the land so included by the incorrect fencing can be acquired by means of prescription.
Where ownership is acquired by means of prescription the property need not be registered in the name of the person acquiring the property before ownership actually vests in him. However, the Registrar of Deeds will not cancel the former owners' registration and register the new person as owner unless a Court order authorizing this has been obtained.

(c) Statutory vesting

In terms of legislation ownership of certain property vests directly in the State, a local authority or a statutory body without any further act of expropriation.
When a new township is laid out all public open space which is required in terms of the town planning regulations vests in the local authority even though registration does not take place. The same principle applies in subdivision cases when one property is on the corner of two roads the splay which the local authority requires for the subdivision to be approved also vest in the local authority.

(d) Marriage in community of property

Spouses married in community of property are co-owners of any immovable property forming part of the joint estate and which is registered in the name of one of the spouses. A spouse becomes a co-owner even though the property is not registered in his or her name jointly.

(e) Death of the owner or deregistration of a company

When a person dies he ceases to be the owner of immovable property forming part of his estate. If a company is deregistered while immovable property is still registered in its name the property (apparently) rest with the State.

(f) Insolvency

In terms of the Insolvency Act the estate of the insolvent, including immovable property forming part of that estate vests with the Master of the Supreme Court until a trustee is appointed. Once the trustee is appointed the estate vests in him. The owner of immovable property is therefore divested of his property upon his insolvency even though the property is still registered in his name.

(g) Abandonment

There is some authority to the effect that immovable property can be abandoned, i.e. that the owner can unilaterally rid himself of his ownership. This normally happens when the owner disappears without a trace. Such property is then generally regarded as State property and a formal Court order is normally obtained to this effect.

POSSESSION AND OCCUPATION

5.0 NATURE OF POSSESSION AND OCCUPATION

One of the consequences of ownership of property is that an owner has the right to possess and occupy the property. It is obviously quite possible for a person to be the owner of a property without occupying it, such as when he lets his property to a tenant. It is equally clear that a person can occupy property without being the owner thereof, as in the case of the tenant. Possession and occupation are both factual situations which are recognized by law and which have important legal implications. Both the possessor and occupier of the property enjoy legal protection against interference with their use and enjoyment of the property and both under certain circumstances entitled to be refunded for expenses they may have occurred in respect of the property.
Although the terms possession and occupation are used interchangeably in practice, there exists a clear distinction between the two. For example, an owner can be in possession of his property although not physically in occupation thereof; a tenant can be in occupation of property without being in possession thereof. The following should be noted:

- Both possession and occupation require some form of physical control over the property. This can consist of either a direct physical occupation of the property, or a form of indirect control such as where an owner controls his property through a tenant.
- The main grounds of distinction between possession and occupation lies in the fact that a possessor controls the property with the intention of being the owner thereof, while the occupier controls the property with the intention to merely gain some benefit from the property. An occupier does not control the property with the intention of owning it. A lessee is therefore an occupier of the property because he has no intention to control the property as owner. The true owner on the other hand would possess the property by virtue of the fact that he controls the property, through the tenant, with the intention of being its owner.

Contracts of sale of land usually contain provisions to the effect that possession and occupation of the property will be given to the buyer on a certain date, or that possession will be given on one date and occupation on another. In this context the term possession in normally used merely to denote the right to control the property, while the term occupation is used to denote the right to be physically present on the property. Thus where A has leased his property to B for three years, C, a purchaser of the property, may take possession of the property before expiry of the lease, but he cannot take occupation until the lease has expired and the tenant ahs vacated the premises.

6.0 PROTECTION OF POSSESSION AND OCCUPATION

The interest of both a possessor and occupier of immovable property is protected by law. Both have the following remedies:

- Threatening interference with the use and enjoyment of the property by a possessor or occupier can be prevented by an interdict.
- If a possessor or occupier suffered damages as a result of an infringement of his rights, an action for damages could be instituted.
- If a possessor or occupier has been dispossessed of possession or occupation unlawfully a court will restore the possession or occupation summarily without examining the question of whether the possessor or occupier is legally entitled to possess or occupy the property. The underlying reason for this is the rule that no person is allowed to take the law into his own hands and to dispossess another without a court order. The remedy at the disposal of the possessor or occupier is called a spoliation order.

- Both a possessor and an occupier are entitled to recover certain expenses that they have incurred on property owned by someone else. The right to be compensated is based on the principle that a person cannot be enriched at the expense of another. (Unjustified enrichment will be covered in the law of contracts).

REMOVAL OF RESTRICTION LIMITING OWNERSHIP

7.0 GENERAL

"The extent to which an owner may use his property can be limited by various restrictions. These restrictions can arise from limited real rights registered over the land or from personal rights which are binding on an owner and which limits the manner in which he may use his property. Further restrictions can be imposed by legislation, the provisions of a will, or title deed conditions (i.e. conditions contained in the title deed of the land imposed in terms of the original deed of grant or when consent to township development was granted."

7.1 Manner in which restrictions can be removed

"Restrictions on the use of land may be removed or amended by a court order in terms of common law, as well as in terms of certain specific legislation. There are two specific Acts which deal with this matter, namely, the Immovable Property (removal or Modification of Restrictions) Act 94 of 1965 and the Removal of Restrictions Act 84 of 1967. In terms of the first Act, a beneficiary who has an interest in immovable property which is subject to a restriction imposed by a will may apply to the Supreme Court for the removal of modification of the restriction.
For example, if A, bequeathed his immovable property to B on the basis that the property may not be sold but must be held in trust for B's benefit, B can approach the court for an order authorising the removal of the restriction. It must be shown that the removal or modification of the restriction will be to the advantage of the persons entitled to the property or the income from it under the will. The court has discretion to order removal or modification of the restriction, or to order that the property be sold in whole or in part. It may also make another order which it deems just in the circumstances".
"The Immovable Property (Removal or Modification of Restrictions) Act furthermore provides that a *fideicommissum* in respect of immovable property is limited to two successive *fideicommissaries*.
For example, a typical *fideicommissum* is where A bequeaths his property to B on the basis that on B's death, the property must be bequeathed to C, and on C's death it must be bequeathed to D and then to E etc. In terms of the Act, the property must be transferred to D free of any restrictions. D would therefore be entitled to deal with the property as he pleases and may sell it; he is under no obligation to bequeath the property to E. Restrictions other than *fideicommissum* which restricts the alienation of immovable property also fall away after the property has passed to the third successive beneficiary (in other words D in the above example).
"In terms of the Removal of Restrictions Act 84 of 1967, the administrator of a province may, by proclamation in the official gazette of the province, alter, remove or suspend certain restrictions or obligations binding on the owner of land situated in his province. The administrator must be satisfied that:

- that the alteration, removal or suspension is in the interest of the establishment of development of any township or in the interest of any urban or other area or;
- that the land is required for ecclesiastical (religious) purposes, or public purposes, for the erection or use of any building by the State or local authority, or for purposes incidental to any of these.

"Only restrictions which are binding on the land by virtue of restrictive conditions or servitudes registered against the title deed of land, or by virtue of laws relating to town planning or the establishment of townships, can be removed or amended under the Removal of Restrictions Act. The restrictions must relate to the subdivision of the land, the purpose for which the land may be used or the requirements to be observed in connection with the erection of buildings or the use of the land.

For example of the type of restriction which can be removed under this Act is a condition contained in the title deed of a property which prohibits the use of the property for business purposes or a condition which prohibits the building of a block of flats on the property. The restrictions may be removed by an administrator of his own accord or on application by any person. A specific procedure must be followed in each case." (Delport op cit. p. 25-26).

After consideration of the application, the recommendation of the townships board and the objections and other relevant documents and particulars, the administrator may grant the application or refuse it.

From the valuer's point of view and in addition to any other conditions, if any, he may impose, the administrator may grant an application subject to the condition that the applicant shall pay to any objector specified in such condition, the value of whose land or real right in land will, in the opinion of the administrator, be adversely affected materially by the granting of such application, compensation in an amount which, in the absence of agreement between such applicant and objector, shall be determined by the administrator.

The administrator may, and if requested thereto by the Minister shall, direct that the amount of compensation be determined as if it were a claim for compensation arising from the adoption or amendment of a town planning scheme in terms of the laws of the province in question relating to town planning and townships.

Apart from the above, there are other Acts which authorizes the removal of restrictions in specific instances.

- In terms of the State Land Disposal Act 48 of 1961, the State President may consent to the amendment or cancellation of any condition embodied in a deed of grant or transfer by which any right was reserved to or acquired by the State.
- In terms of the Subdivision of Agricultural Land Act 70 of 1970, the Minister of Agricultural Economics may cancel or vary conditions imposed by him when he initially consented to the subdivision, the amendment or cancellation of conditions imposed by him when the township was established.
- The National Building Regulations and Building Standards Act 103 of 1977 empower the Minister of Trade and Industry to remove or amend a servitude or a restrictive condition if he deems it necessary for the proper compliance of the National Building Regulations.

8.0 LEASEHOLD

Leasehold as a form of land tenure is a lease linked to certain features of ownership. Although the property is leased to a lessee, the lessee effectively obtains all the rights and privileges of ownership. In effect, the owner abandons all his rights to property and he loses all control over it, except for his right to cancel the lease if the rent is not paid for a certain period. The agreement usually assumes the form of a perpetual lease, a 99-year lease, or a lease for a specific period liked to a right of renewal for an unlimited period or forever.

Leasehold as a form of land tenure is very well known in some overseas countries. Although leaseholds were formerly granted for both private and State land in South Africa, the system is no longer used. Some leasehold rights were converted into ownership by legislation, but those that have not been converted are still recognized.

The Black Communities Development Act 4 of 1984 provides for the granting of leasehold in respect of townships for which a township register ha not yet been opened, This will be discussed in detail further on in the notes.

9.0 QUITRENT

Quitrent is a form of land tenure in terms of which immovable property is granted by the State to a person on the basis that he may use the land as if he were its owner, subject to the payment of an annual fee (quitrent) to the State. Although the State granted quitrent for State property to private individuals in earlier years, it can no longer be granted today. Existing quitrent tenure is still recognized but the obligation to pay quitrent to the State was abolished in the early 1930's. Today the holder of land in quitrent is regarded as the owner of the land, provided the Sate retains all mineral rights over the property and the right to build and repair public roads on the land.

4

JOINT OWNERSHIP

CHAPTER 4 – JOINT OWNERSHIP

CONTENTS

1.0 NATURE OF JOINT OWNERSHIP

Joint ownership (also known as co-ownership) exists where two or more persons jointly own the same property. It is then said that they own the property in undivided shares, meaning that no joint owner is the sole owner of any particular portion of the property, the joint owners, together, own the property as a whole.

Joint ownership can be established in a number of ways, for example by a joint purchase or a marriage in community of property. It can also be created as a result of a bequest to two or more beneficiaries in terms of a will. In terms of the Deeds Registries Act 47 of 1937 joint ownership of immovable property is established by registration of the unsubdivided shares in the property in the name of the joint owners. However, such registration is not required where joint ownership is established as a result of a marriage in community of property provided the property is registered in the name of one of the spouses (usually the husband's name).

A particular form of joint ownership has been created by the Sectional Titles Act 95 of 1986 (as amended), this will be discussed later.

The extent of the respective undivided shares which the joint owners hold need not be the same. One joint owner can have a 40% undivided share and the other owner the remaining 60% undivided share in an immovable property. This does not mean that one owner owns 40% and the other 60% of the property. The extent of their respective shares is relevant only for matters such as sharing of profits and general expenses and to determine the rights and duties of the parties in the event of termination of the joint ownership.

2.0 RIGHTS AND DUTIES OF JOINT OWNERS

Joint owners may regulate their rights and duties in respect of the joint property by agreement. In the absence of such an agreement the common law principles regarding joint ownership would apply. These principles are listed below:

- Each joint owner is entitled to make reasonable use of the property in accordance with the object for which the property is intended to be used.
- One joint owner cannot prevent another joint owner from using the joint property.
- All the joint owners must share in the profits derived from the property.
- Each joint owner is liable for the maintenance of the joint property pro rata to his share in the property.
- The joint property or any portion of the property can be sold or mortgaged only with the consent of all the joint owners.
- A joint owner may deal freely with his own unsubdivided share in the property. He may sell or let his undivided share on the open market without the consent of the other owners.

If a joint owner exceeds his rights an interdict can be obtained and in appropriate circumstances a claim for damages can be instituted.

3.0 TERMINATION OF JOINT OWNERSHIP

A joint owner cannot be compelled to remain a joint owner against his wishes. This means that every joint owner is at all times entitled to demand termination of the joint ownership agreement, except if all the parties had agreed not to effect a division until the expiry of a certain period. An agreement never to terminate joint ownership is null and void.

Where the parties cannot agree on the partition of the joint ownership a Court can be approached to make the necessary order. The Court has a wide discretion to effect an equitable partition. If it is practical, the Court would attempt to divide the property physically among the joint owners. If this cannot be done the Court can award the property to one joint owner on the basis that he must compensate the other joint owner for their shares.

Where these methods of partition appear to be impractical, the Court may order the property to be sold by public auctioned the proceeds be shared among the joint owners.

4.0 CONCLUSION OF CONTRACTS BY JOINT PARTIES

This aspect will be covered later in the section dealing with contracts.

5

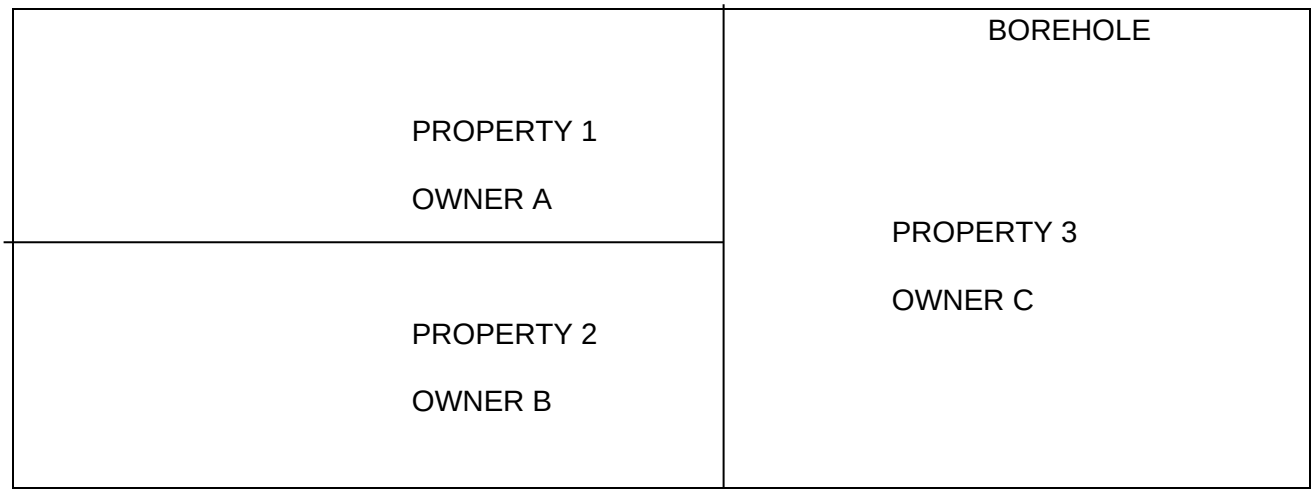
SERVITUDES

CHAPTER 5 – SERVITUDES

CONTENTS

1.0 DEFINITION

A servitude is 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.



RIGHT OF WAY

- If B grants A in his capacity as the owner of property 1 a right of way over property 2, the right of way is a praedial servitude.
- Should A later sell his property to X, X would then be entitled to exercise the servitude because he is the owner of the property 1.
- Where C allows A to draw water from a borehole situated on his property no 3 this is a personal servitude because the servitude is not granted to A in his capacity as owner of property 1.
- Should A sell his property 1 to Y, Y would not be entitled to exercise the servitude merely because he has acquired ownership of property 1: the servitude has been granted to A in his personal servitude.

1.1 The Nature of the Servitude

B wants to cross A's land to get to his property or the railways station.
B could ask A for permission to cross A's property
B cannot possibly ask A's permission every time he want to cross property
A & B may enter into an agreement regulating his right to cross A's property
This agreement when registered in the deeds office becomes a servitude vested in B over A's land
A's land is burdened to the extent that B has a right to cross it.
The land so burdened is called the servient tenement as it serves the person in whom the right is vested.
B's land is called the dominant tenement.

Three main types of servitudes can be distinguished, namely praedial servitudes, personal servitudes and public servitudes.
The main distinction between praedial and personal servitudes lies in the fact that a praedial servitude accrues to a person in his capacity as owner of a particular property whereas a personal servitude is a right in favour of a particular individual.

A praedial servitude is not constituted in favour of a particular person: a person is entitled to exercise the servitude because he happens to be the owner of the property which the servitude intends to benefit.

1.2 Praedial Servitude

Exists over one piece of land in favour of another piece of land and its owner for the time being. If the dominant owner sells the servitude is then in favour of the new owner.

1.3 Personal Servitudes

A personal servitude is one which exists over movable or immovable property in favour of a particular person. A personal servitude exists for the benefit of the person in whom it vests and it is not in favour of or connected to another piece of land.

Both these servitudes have significance for the valuer and could have a bearing on the valuation outcome.

2.0 GENERAL PRINCIPLES RELATING TO SERVITUDES

- In general a servitude does not place a responsibility on the owner of the servient tenement to do something positive. The idea is that he will allow the owner of the dominant tenement to do something on, or over or in connection with the servient tenement. Exceptions to this rule are boundary walls.
- A servitude must confer a benefit on the land or person in whose favour it exists. This follows on from the idea that the servient serves the dominant.
- There can be no servitude on incorporeal things.
- A person cannot have a servitude over his own property even if he own two adjoining properties.
- There can be no servitude of a servitude.
- The grant of the servitude will entitle the person in whose favour it was granted to do everything necessary to give him full enjoyment of the servitude.
- The right of the servitude must be reasonable exercised by the person in whose favour it exists.
- The servient owner may not do anything deliberately which could limit or prevent the dominant owner from exercising his right of servitude.

3.0 COMMON FEATURES BETWEEN PERSONAL AND PRAEDIAL SERVITUDES

- Personal and praedial servitudes are both limited real rights meaning that the holder of the servitude is entitled to enforce his right against all other persons.
- Both types of servitudes exist over land belonging to someone else. The holder of the servitude is therefore entitled to some benefit from another person's property (called the servient property). He is not entitled to demand some positive act on the part of the owner of that property.
- Neither a personal nor a praedial servitude can exist over property owned by the holder of the servitude. A servitude always exists over property belonging to someone else, and if the holder should become the owner of that property the servitude lapses.
- The holder of a praedial or a personal servitude cannot grant to another a servitude in respect of the servitude which he holds.

- The owner of property subject to a servitude is bound to allow the holder of the servitude the opportunity to exercise his right.

It is advisable that the parties indicate by agreement what is deemed to be a proper use of the servitude, the more precise the agreement the less room there is for a complaint that the servitude is not exercised reasonably.
The holder of a servitude is entitled to protect his interests by means of an interdict. In appropriate circumstances damages can be claimed if the servitude holder suffered a loss as a result of a wrongful interference with his rights by someone else.

4.0 PRAEDIAL SERVITUDES

4.1 General Features

A praedial servitude is a limited real right constitutes in favour of the owner of a property in his capacity as such. The servitude entitles him to exercise some right on the property of another, or to prohibit another landowner from exercising one or other ownership right.
There is no fixed number of praedial servitudes. A praedial servitude can have any conceivable content. The following requirements have to be met before a right will qualify as a praedial servitude.

- There must be two tracts of land or erven, the dominant tenement and servient tenement. The servitude benefits the person who is the owner of the dominant tenement. In the drawing property 1 constitutes the dominant tenement and property 2 the servient tenement.
- The servitude must offer some advantage either present or future, to the dominant tenement whereby its value of the enjoyment to be derived from it is increased.
- A praedial servitude can be granted in perpetuity or for a limited period only, say 10 years.
- A praedial servitude cannot compel the owner of the servient tenement to do something positively on the property.
- A praedial servitude is indivisible. This means that a joint owner of the dominant tenement cannot acquire a servitude in favour of his undivided share only.

A praedial servitude cannot be alienated independently of the dominant tenement.

4.2 Types Of Praedial Servitudes

The following are the most common types of praedial servitudes.

- Servitudes of way, including a servitude of footpath, trekpath (the right to drive cattle over the land of another) and a general right of way.
- Servitudes pertaining to water, such as a servitude relating to the watering of cattle, the drawing of waste and the release of water on to the servient tenement.
- Servitudes of grazing, such as the right to graze a specified or unspecified number of cattle on another's land.
- Servitudes of outspan, that is a servitude whereby the owner of the dominant tenement has the right to graze and water his cattle on the servient tenement.
- Servitudes giving the holder of the dominant tenement the right to gather raw materials such as wood, clay or sand from the servient tenement for use on the dominant tenement.
- Servitudes regulating building activities, such as servitude prohibiting the construction of a building above a certain height, or the construction of a building whereby another's light or view is obscured.

- Servitudes granting the right to support buildings and allow balconies to overhang another person's property.
- Servitudes granting the right to lead away sewage, drain and normal storm water.

Some of these servitudes have become less important over the years as a result of statutory control. Modern health regulations adequately control the supply of light and air. Servitudes such as trekpath and outspan have, to a certain extent, fallen into disuse because of modernization. The only example of servitude of outspan that still exists is near Epping market and at Wingfield.

5.0 PERSONAL SERVITUDES

5.1 General Features

A personal servitude is a limited real right entitling the holder in his personal capacity to exercise some right in the property of another, or to prohibit another landowner from exercising one or other normal ownership right. Two erven are not required for the establishment of a personal servitude, the personal servitude is constituted in favour of a particular individual. Apart from this a personal servitude has the following features:

- A personal servitude is not granted in perpetuity. The servitude can be granted for a specified period, if no period is specified, it terminates on the death of the holder of the servitude.
- Once acquired a personal servitude cannot be alienated or transferred to someone else. The servitude holder can, however, let or sell to another person the use and enjoyment of his servitude.
- A personal servitude is divisible meaning that it can be granted on an undivided share in property which is held in joint ownership.

5.2 Types Of Servitudes

As in the case of praedial servitudes, there is no fixed number or personal servitudes. The right to lay cables and pipes on, over or under the ground to provide water, electricity and gas is a personal servitude, as is the right granted to an individual to trade on a specific tract of land. Rights which has the same content as praedial servitudes but which are granted in favour of a particular individual, are also personal servitudes. An example of this right of way over the property granted in favour of a particular individual. The most common forms of personal servitudes are the following usufruct, use and habitatio.

- Usufruct is a personal servitude in terms of which the usufructuary (the holder of the servitude) is entitled to use and take the fruits of another person's property. 'Fruits' here mean natural fruits such as crops, or civil fruits such as the interest earned on capital invested or the rental received on a lease of immovable property. Usufruct is commonly used in wills, a testator bequeaths property to certain persons (for example his children) subject to a usufruct in favour of another person (his wife). The fundamental principles underlying usufruct is that the capital in its entirety remains with the owner, but the yield of the servient property accrues to the usufructory either wholly or in part. On termination of the usufruct, the property must be returned to the owner in the same condition as it was when received, reasonable wear and tear accepted. The usufructory is obliged to maintain the property at his own expense.
- Use confers the right of use the property of another person for daily needs. The holder of the right is entitled only to those fruits that provide him and his family with the necessities of life. Surplus fruits cannot be sold, nor can the holder of the right alienate or let his use.
- Habitatio is the right to occupy or let another person's house. The holder of the right cannot allow strangers to stay in the house free of charge. He is also entitled to gather fruits from the

property for his daily use. Being a personal servitude, the right to stay in the house lapses upon death of the holder.

6.0 PUBLIC SERVITUDES

6.1 General Features

A public servitude is a right constituted in favour of the general public. It is not a praedial servitude because there is not a dominant tenement involved; it is not a personal servitude because the servitude is constituted in favour of the public and not a particular individual.

6.2 Types Of Public Servitudes

- Public outspan
- Common pasturage
- Public roads
- Public trekpaths

7.0 ESTABLISHMENT OF PRAEDIAL AND PERSONAL SERVITUDES

- By agreement between the parties
- By subdivision of land
- By the establishment of a township
- A court order, which is normally, obtained when land has no access or where a servitude results from prescription.
- Expropriation
- A will, usufruct
- Legislation, road widening

8.0 EXTINCTION OR TERMINATION OF PRAEDIAL AND PERSONAL SERVITUDES

- Agreement
- Abandonment
- Repealing of legislation
- Notice in government gazette
- Merger of the dominant and servient tenement under one owner
- Expiry on the death of a person
- Disuse after 30 years give right to prescription
- Destruction of the property which is subject to a servitude

9.0 PUBLIC SERVITUDES ARE ESTABLISHED BY THE FOLLOWING

- Immemorial user, this is where the public has exercised the particular right for so long that it can be said that the state of affairs has an immemorial existence. A period of 30 years is deemed to constitute immemorial use.
- A reservation of the servitude (for example a public right of way) when State land is granted to a particular individual.
- Registration of a notarial deed in terms of the Deeds Registries Act.
- Registration of a public right of way in a partition deed in terms of section 65(1) of the Deeds Registries Act 47 of 1937. This usually takes place when land is subdivided for township development.

- Statutory provisions such as the National Roads Act 54 of 1971 and the various provincial ordinances which give the State President and the provincial Administrators the authority to proclaim public roads.

6

REAL SECURITY

CHAPTER 6 – REAL SECURITY

CONTENTS

1.0 INTRODUCTION: PERSONAL AND REAL SECURITY

A creditor who advances money to a debtor usually requires the debtor to provide some form of security for the due repayment of the debt. In a legal context two main forms of security can be distinguished, namely personal security and real security. In the case of personal security an individual binds himself personally for the due performance of the debtor's obligations. In the case of real security, the creditor obtains a limited real right over the property of the debtor or a third part. The essential aim of such limited real right is to safeguard the creditor's interests in the event of non-payment of the debt.

The most common form of personal security is a surety. In terms of surety a third party (the surety) binds himself to the creditor for the repayment (in whole or in part) of the debtors' debt in the event of non-payment by the debtor himself. T o be valid a contract of surety must be in writing and signed by or on behalf of the surety. The contract must contain the identities of the creditor and the surety, the name of the debtor, the nature of the debtor's obligation and the extent to which the surety is liable. The effect of surety is that the creditor is entitled to claim performance from the surety to discharge the debtor's obligations. The creditor is obliged to claim the debt first from the debtor himself, only when the latter fails to perform may the surety be held liable.

The value of surety as a form of security is limited. Being a form of personal security, a creditor merely obtains a personal right against the surety. This means that the creditor's interest may be seriously prejudiced if the surety himself cannot pay the debt.

Real security on the other hand affords a creditor much wider protection since the creditor obtains a limited real right over the property of another person entitling him to have the property sold in execution if the debtor fails to fulfill his obligations. Real security can arise by means of agreement between the parties, or by operation of law. The most common forms of real security arising by operation of law are tacit hypothec and liens.

A form of security often encountered is the cession of personal rights a security for debt, the most common example been shares and insurance policies ceded to a creditor as security for a debt.

Although real security is a limited real right, it differs somewhat from ordinary real rights in that the holder of the security is not entitled to the use and enjoyment of the property over which the security is held. The holder of the security may sell the property only to enable him to recover the amount due to him. For example, the bank may hold the mortgage bond over the property but the bank is not entitled to the use and enjoyment thereof. The mortgage bond holder may however sell the property to enable him to recover the amount outstanding on the mortgage bond.

2.0 MORTGAGE BONDS

2.1 Nature and Legal Consequences

Mortgage is a limited real right in the immovable property of the mortgagor. It secures the fulfillment of an obligation which the mortgagor (borrower) has towards the mortgagee (lender). A mortgage is normally based on an agreement whereby the lender (the bank or finance house) agrees to advance a fixed sum of money to the borrower (usually the buyer/purchaser of immovable property on the basis that the borrower must pass a mortgage bond over his immovable property in favour of the lender. The agreement itself does not constitute a limited real right in favour of the lender but only a personal right in terms of which the agreement can be enforced. A mortgage can only exist where there is a valid principal obligation, such as the loan. As a general rule the following can be mortgaged:

- Immovable property.
- A unit registered in terms of the Sectional Titles Act.
- An undivided share in immovable property.

- Personal servitudes.
- Mineral rights, registered long leases and leasehold properties.

A mortgage has the following legal consequences:

- The mortgagee does not obtain the use and enjoyment of the mortgaged property. The mortgagor may not without the written consent of the mortgagee grant any servitudes or mineral rights over the mortgaged property. However, the mortgagee's consent is not required if the mortgagor wants to let the property, or if he wants to grant further bonds against security of the property unless this consent is required in terms of the mortgage bond. These bonds will, however, be subject to the rights of any mortgagee whose bond has been registered previously. Thus where A is the holder of a first mortgage over the property and B the holder of the second mortgage, A is entitled to be refunded before B should the property eventually be sold in execution. If A's mortgage secured a loan of say R500 000 and the property was sold for that amount, A would receive the full amount and B nothing. This is based on the principle first in line, first in rights.
- The mortgagor cannot transfer the property unless the mortgage debt has been paid in full and the bond is cancelled, or the land is released from the operation of the bond with the written consent of the mortgagee.
- The mortgage covers the land and all improvements on the land, including improvements effected after the bond was registered. However, the improvements made after the bond was registered may at any time before the bond is called up be removed.
- The mortgagee is entitled to have the property sold in execution if the mortgagor fails to fulfill his obligations under the loan agreement. Where a property is subject to a lease granted after registration of the bond, it must first be put up for sale subject to the lease. Only if the highest bid is insufficient to satisfy the debt due in terms of the mortgage can the property be sold free of the lease. If the property is sold in execution a bondholder is entitled to buy it himself. The purchase price is then set off against the mortgage debt.
- A mortgagee has a preferential claim to the proceeds of the property if it is sold subsequent to the mortgagor's insolvency. For example where a bank holds a mortgage over a property and the owner is declare insolvent, the proceeds from the sale of the property would not be available to all the owners' creditors' equally. The bank will be entitled to claim from the proceeds what is due to it first. Only if anything remains are the other concurrent creditors paid out.
- If the mortgagor fails to fulfill his obligations towards the mortgagee, the latter can enforce his rights against the mortgagor only after a Court order has been obtained which authorizes a sale in execution. The mortgagee therefore cannot sell the property without first obtaining such a Court order.
- The mortgage secures not only the principal obligation of the debtor, but also ancillary expenses which the mortgagee had incurred in respect of the property such as insurance and maintenance expenses.
- If the owner of mortgaged property buys land over which he holds a praedial servitude, transfer of the land may not be registered without the written consent of the bondholder. For example where X holds a mortgage on A's property and A is entitled to a servitude over B's property, A cannot buy B's property and have the property registered in his name without X's consent. This is because the servitude constituted in favour of the first-mentioned property lapses if A buys the second property and this can affect the value of the first property.

2.2 Persons who can grant a Mortgage

As a general rule a mortgage can be granted only by the owner of the property or by a person acting with the consent of the owner. Property held in joint ownership can be mortgaged only if all the co-owners giver their consent.

Rules covering contractual capacity of minors and marriages with regard to mortgages will be dealt with under contract law which will be covered later.

2.3 Vesting of a Mortgage

A mortgage is based on an agreement in terms of which the mortgagor agrees to pass a mortgage bond over a specific immovable property in favour of the mortgagee. However, a limited real right which is embodied in the mortgage bond is constituted only when the bond is registered. To effect registration a mortgage bond must be prepared by a conveyancer and it must be executed in the presence of the Registrar of Deeds by the owner of the immovable property or by the duly authorised conveyancer. In practice an endorsement is also made on the title deed of the property which is mortgaged. A mortgage which purports to bind all the immovable property of the debtor generally, cannot be registered, a mortgage can only b4e registered on a specific property.

2.4 Termination of a Mortgage

There are various ways in which a mortgage can be terminated. The following are the most common ways:

- Complete payment by the debtor of his obligations to the mortgagee. The mortgagor can then have the registration of the bond against his property cancelled. In practice when the bond is paid up the bank will advise the client not to cancel the bond but to leave a balance of R1.00 in case a bond is required again at a later date.
- Passing of time where the mortgage bond was originally granted for a limited period only.
- Where the mortgagee become the owner of the mortgaged property.
- Where the mortgagee releases the mortgaged property from the operation of the bond.
- By Court order, for example where the mortgage was granted contrary to the provisions of the Insolvency Act in that the creditor (lender) was given an undue preference over other creditors by having been granted the mortgage. (The creditor received security for repayment of his debt while other creditors received no security).

2.5 Different Types of Mortgage

The following are the most commonly encountered types of mortgage:

2.5.1 Conventional Mortgage

Here a creditor advances money to the debtor against security of a mortgage bond over the debtor's property or the property of another person. This type of bond is used where, for example, the owner of a property wishes to borrow money from a creditor (bank) to build a swimming pool and the creditor (bank) is willing to advance the money against security of the property.

2.5.2 Kunstingsbrief

This is a mortgage bond granted by the seller of the property to secure payment of the purchase price of the property. The bond is registered simultaneously with the transfer of the property to the purchaser. A Kunstingsbrief need not be registered in favour of the seller of the property; it may be passed in favour of any person or institution that has advance the money to the purchaser enabling him to pay the purchase price.

2.5.2 Collateral Bond

A collateral bond is a bond which a creditor can register over other property of the debtor to further secure payment of a debt which is already secured by a mortgage bond in favour of a creditor.

2.5.3 Surety Bond

This is a bond passed by a mortgagor to provide security for a debt incurred by a third party. Thus where A lends money to B, C can allow a surety bond to be registered over his property in favour of A to secure the fulfillment of B's obligations to A.

2.5.4 Indemnity Bond

This is a bond registered by a debtor in favour of his surety to secure the latter's right of recovery against him. Thus where A stands surety for a debt which B owes C, B can have an indemnity bond registered over his property in favour of A. This secures A's recovery against B should A have to pay B's debt to C.

2.5.5 Debenture Bond

A debenture is an acknowledgement of debt by a company in favour of a person who has lent money to a company. Debentures are often secured by the registration of a mortgage bond by the company over its immovable property in favour of a trustee for all the holders of the debentures. This is referred to a debenture bond.

2.5.6 Covering Bond

This type of bond is designed to secure a debt which is to be incurred at a future date. It secures a fluctuating debt and it must contain an express statement that the bond is intended to secure future debts in general. The maximum amount of the debt must be stated in the bond. A typical example is where a bank grants overdraft facilities to a debtor against registration of a covering bond over the debtor's property.

2.5.7 Participation Mortgage Bonds

A participation bond is a mortgage bond over immovable property which is registered in the name of a company as a nominee for, or representative of those participants who have contributed money to the loan. The nominee company in effect holds the bond on behalf of the participants, and although their names are not disclosed in the bond itself the participants are the real beneficial holders of the rights which the bond confers. The debt secured by a participation bond is deemed to be debt owed by the mortgagor to the individual participants and not to the nominee company. All the participants rank concurrently with one another as from the date of the registration of the bond, irrespective of the date of the grant of the participation of a particular participant.
The operation of a participation bond scheme falls under the provisions of the Participation Bonds Act 55 of 1981.

3.0 TYPES OF LOANS

There are basically three types of loans.

- Housing loan – is an advance or loan against security of a property on urban immovable property (or a right to urban immovable property) which is used to deemed to be used for residential purposes but excludes hotels and boarding houses.
- Business advance – is any advance or loan against security of a mortgage on urban immovable property (or a right to urban immovable property) which is used or intended or deemed to be used for purposes other than residential purposes and includes boarding houses and hotels.
- General advances – is any advance or loan which is not a housing or business advance.

Note the following with regard to the above, if a property has a usage of 50% or less residential it is not deemed to be residential.

4.0 PLEDGE

Pledge is a limited real right which a creditor has in the movable property of another to secure the repayment of a debt. Should the debtor fail to fulfill his obligations to the creditor, the latter can sell the pledged property in execution. In the event of the debtor's insolvency the creditor enjoys preference on the proceeds of the pledged property. The essential features of pledge are that it can be constituted only in respect of movable property and only when the pledged property is delivered to the pledgee.
Pledge is not a popular form of security from a pledgor's point of view because he has to part with the possession of his property. It neither appeals to a pledgee because he is saddled with the maintenance of the property.

5.0 NOTARIAL BONDS

A notarial bond is a bond attested by a notary public and which secures movable property generally or specially (that is all the movable property of the debtor or any other specific movables described in the bond). This type of bond provides a creditor with movable property as security for repayment of a debt, without the requirement that the property must be delivered to him.

6.0 TACIT HYPOTHEC

A tacit hypothec is a form of security which arises by operation of law; it is not dependent on an express agreement between the parties concerned. Three types of tacit hypothec can be distinguished:

- The tacit hypothec of a credit grantor in terms of a credit transaction falling under the Credit Agreement Act.
- The tacit hypothec of a landlord.
- Certain hypothecs imposed by the State.

We will only look at the last two which relate to property.

6.1 Landlords Hypothec

The lessor of immovable property has a tacit hypothec over the movable property of the lessee which is present on the leased premises in order to secure proper payment of the rent by the lessee. The effect of the hypothec is that the landlord can have the movable goods sold in execution if the tenant fails to pay the rent. The landlord acquires (to a certain extent) a preferential right in the proceeds of the movables in the event of the tenant's insolvency.
The hypothec is vested only when a Court order attaching the movables has been obtained, or in the event of the tenant's insolvency, once the sequestration order has been made. Prior to this the tenant is free to remove the movables from the property, although a landlord may prevent him from doing so by means of an interdict.
Not only the movable goods belonging to the tenant are subject to the landlord's hypothec, but also movables belonging to a third party provided the following requirements are met.

- The goods must be on the premises with the knowledge of the owner of the goods.
- The goods must not be on the premises merely for temporary use.
- The goods must be on the premises for the use of the tenant.
- The landlord must have had not notice that the goods belonged to a third party.

6.2 Hypothecs Imposed By Statute

- In terms of statutory provision the transfer of property cannot be registered unless outstanding taxes due to bodies such as the State or Local authority have been paid. The local authority tacit hypothec ranks only second to the holder of the first mortgage bond.
- The land Bank enjoys a statutory hypothec to secure money advanced to farmers for agricultural purposes in the event of the farmer's insolvency or his imprisonment, or if the property is attaché in execution on behalf of another creditor.

7.0 LIENS

A lien (also called a right of retention) is the right which allows a possessor of movable or immovable property to retain possession of the property until he is compensated for expenses which he has incurred in respect of the property. There are tow main categories of liens:

7.1 Enrichment Liens

An enrichment lien arises when a person incurs a certain type of expense in respect of property of another, without there being any agreement between the parties concerning the expense of its refund. Enrichment liens are based on the principle that nobody can be allowed to be enriched at the expense of another.
For example, where a tenant incurs expenses in respect of the leased premises in order to maintain the property in a proper condition. It also applies in situations where a person builds on property which has not been transferred to him; if the owner of the property is declared insolvent the builder would have an enrichment lien whereby he may retain possession of the property until he is compensated for his expenses.
No every expense incurred in respect of property gives rise to an enrichment lien. A person can acquire an enrichment lien only where he has incurred necessary or useful expenses in respect of another person's property. A Court will take all factors into consideration in deciding whether the owner is obliged to accept the enrichment and pay compensation, or whether the person who has incurred the expenses has no right to be compensated but is merely entitled to remove his improvements. Where it is clear that the owner would have incurred the expenses himself he would normally be obliged to refund the person who had incurred the expense.

7.2 Debtor and Creditor Lien

The most well known debtor and creditor lien is the builder's lien. If a building contractor builds a house on a property in terms of a contract between him and the owner of the property, he can retain possession of the house until the owner pays him the agreed price.
A subcontractor (who has not been paid by the main contractor) is not entitled to a lien; his only right of recourse is to claim payment from the contractor.
Banks generally require a waiver of builder lien to be signed by the builder so that the builder does not enjoy preference over the banks mortgage bond in the event of the owner's insolvency.

8.0 CONCLUSION

A lien is dependent upon possession of the property by the holder of the lien. If possession is lost, the lien is also extinguished except (in particular circumstances) if possession has been lost through fraud, force, or mistake and it is restored by Court order.

Enrichment liens are regarded as limited real rights.

Debtor and creditor liens are not real rights but merely personal rights.

7

THE SURVEY OF LAND AND THE REGISTRATION OF RIGHTS OVER IMMOVABLE PROPERTY

CHAPTER 7 – THE SURVEY OF LAND AND THE REGISTRATION OF RIGHTS

CONTENTS

1.0 THE SURVEYOR GENERAL

1.1 The Land Survey Act 9 Of 1927

The Land Survey Act 9 of 1927 was promulgated to consolidate and amend the laws relating to the survey of land. Since promulgation of the Act it has been amended many times. The following definitions as contained in the Act are important:

(a) "Diagram" - means a document, containing geometrical, numerical and verbal representation of a piece of land, line, feature or area forming the basis for registration of a right which has been signed by a person recognized, under any law then in force, as a land surveyor, or which has been approved or certified by a surveyor general or other officer empowered under any law so to approve or certify a diagram and includes a diagram or copy thereof prepared in a surveyor-general's office and approved or certified as aforesaid or a document which has at any time, prior to the commencement of this Act, been accepted as a diagram in a deeds registry or a surveyor-genera's office; but does not include a diagram attached to or issued with a certificate of ownership to land situated in the district of Vryburg, Mafeking or Kuruman.

(b) "General Plan" – means a plan which, representing the relative positions and dimensions of two or more pieces of land, has been signed by a person recognised under any law then in force, as a land surveyor, or which has been approved or certified as a general plan by a surveyor general or other officer empowered under any law so to approve or certify a general plan and includes a general plan or a copy thereof prepared in a surveyor generals office and approved or certified as aforesaid or a general plan which has at any time prior to the commencement of this Act been accepted for registration in a deeds registry or surveyor-generals office".

(c) "Owner" – in relation to land, means the person registered in a deeds registry as the owner of such land and includes; (i) the liquidator of a company or the representative recognized by law, of any owner who has died, become insolvent, assigned his estate, is a minor or of unsound mind or is otherwise under disability, provided that such liquidator or representative acts within the powers conferred on him by law; (ii) the person in whom the ownership of land is vested by statute and the allottee of land held under provisional title and in process of alienation by the State; (iii) the lessee of land held under a lease for a period of 99 years registered in a deeds registry and in Natal, a lease of land from the State for a period of 99 years; (iv) for the purposes of sections 16, 17, 18, 18bis, 21, 22, 31bis, 40, 42, and 43 the holder of a right to minerals in respect of such land.

(d) "Reference mark" – means a survey mark of permanent construction placed in a township to form one of a system of such marks for the purpose of basing the survey or resurvey of the pieces of land in such township thereon or connecting such survey to resurvey thereto.

(e) "Trigonometrical station" – means any survey station excluding a reference mark erected by or under the direction of the Director-General and for which he shall have published, or intends publishing official co-ordinate values, and shall include such other stations as maybe prescribed.

1.2 DUTIES

- Take charge of and preserve all records appertaining to surveys of land which were prior to the commencement of the Land Survey Amendment Act 1972, preserved as records in a surveyor-general's office, or which may become, after such commencement, records of the surveyor-generals office in respect of which he has been appointed.

- Before any registration is effected in a deeds registry, examine and approve all general plans and diagrams which have been prepared in accordance with the regulations and when applicable in accordance with any statutory approval in so far as the layout is concerned.
- Define the geometrical figure representing any portion of such land the transfer whereof has been registered in a deeds registry and deduct the numerical extent of such portion.
- Define the geometrical figure representing any portion thereof for which a certificate of township title or registered title has been issued under the provisions of any law relating to the registration of deeds, and deduct the numerical extent of such portion.
- Define the geometrical figure and make the necessary endorsements in respect of any servitude or lease over or on such land and which has been surveyed in terms of this Act and registered in a deeds registry.
- Cancel and amend in accordance with the provisions of any law any general plan or diagram.
- Prepare, certify and issue, at the request of any person and on payment of such person of such fees as may be prescribed, copies of diagrams and other documents filed in his office and available to the public, and copies of genral plans and diagrams registered in a deeds registry in such region.
- Compile and amend from time to time, as the circumstances necessitate such maps as may be required.
- Conduct such geodetic, trigonometrical, topographical, cadastral, level and tide surveys and such other operations as the Director-General may direct.
- And generally exercise all such powers and perform all such duties as are by any law conferred or imposed upon a Surveyor-General, and perform such other duties as the Director-General may from time to time assign to him.

1.3 Provisions in Respect of Beacons

1.3.1 No poles etc. to be placed near Beacon

Except with the consent of the Surveyor General, it shall not be lawful for any person to place any fence post of fence anchor or any other erection or make any excavation within one metre of any trigonometrical station.

1.3.2 Repair or re-erection of Beacons

- Every owner of land shall maintain in proper order and repair in accordance with regulation any beacon or mark defining a cornier point of such land.
- If such beacon or mark has not been maintained in proper order and repair or has been removed or destroyed, the Surveyor-General may, by delivery or by transmission in a registered letter through the post, serve upon the owner of every piece of land whereof such beacon or mark forms a corner, a notice in writing calling upon him to have such beacon or mark restored by a land surveyor.
- If such beacon or mark is not so restored or re-erected within six weeks of the date upon which any such notice was so delivered or posted, the Surveyor-General may cause such beacon or mark to be restored or re-erected by a land surveyor. The Surveyor-General may at the request of the owner extend the period of six weeks.
- The owners of all such pieces of land shall be liable in equal shares for the costs of the repair, restoration or re-erection of any such beacon or mark and the Surveyor General may recover from every such owner his share of all costs incurred by the Surveyor=General under (c) above, provided that if any such owner or the servant or agent of any such owner damaged, removed or destroyed any such beacon or mark, the entire cost of the repair, restoration or re-erection of such beacon or mark shall be borne by such owner.

1.3.3 Offences in respect thereof

Any person who, without lawful excuse (the burden of proof whereof shall be upon him):

- Alters, moves, disturbs or willfully damages or destroys any beacon, benchmark, reference mark, signal or trigonometrical station intended to be permanent and erected for the purpose of or in connection with any survey operations, whether such beacon, bench mark, reference mark, signal or trigonometrical station is upon his own land or not.
- Erects any beacon except under the supervision of a land surveyor, whether his intention is to alter the boundary line of any piece of land or to cause deception as to that boundary or not,

shall be guilty of an offence and liable on conviction to a fine not exceeding R500 or, in default of payment to imprisonment for a period not exceeding six month, or such imprisonment without the option of a fine or to both such fine and imprisonment.

1.3.4 Authority to remove beacons

Any person who, for the purpose of carrying out any work which he may lawfully perform, desires to remove or disturb any beacon or mark erected in connection with the survey of land, shall apply to the Surveyor-General for authority to effect such removal or disturbance and the Surveyor-General may thereupon, at the expense of such applicant, employ any land surveyor to personally effect or supervise the removal or disturbance and subsequent replacement, in accordance with regulation, of such beacon or mark or the erection or placing of any other mark to indicate the position of such removed or disturbed beacon or mark, in such manner as the Surveyor-General may direct.

1.4 Information Available

- Maps
- Aerial Photographs
- Cadastral information
- Erf diagrams
- General Plans

Note never scale anything off maps in the absence of measurements; it is always best to measure.

2.0 REGISTRAR OF DEEDS

2.1 Deeds Registries Act 47/1937)

The Deeds Registries Act 47 of 1937 was promulgated to consolidate and amend the laws relating to Deeds Registries. Since promulgation of the Act it has been amended many times.

2.2 Duties

- Take charge of and preserve or cause to be preserved all records of any deeds registry in respect of which he has been appointed. The registrar may destroy or otherwise dispose of any record which has been cancelled.

- Examine all deeds and other documents submitted to him for execution or registration and after examination reject any such deed or other document; the execution or registration of which is not permitted by this Act or by any other law, or to the execution or registration of which any other valid objection exists.
- Register grants of leases of land lawfully issued by the Government or grants issued by any other competent authority and register amendments, renewals and cancellations of such leases, and releases of any part of the property leased.
- Attest or execute and register deeds of transfer of land and , execute and register certificates of title of land.
- Attest and register mortgage bonds.
- Register cessions of registered mortgage bonds, and register cancellations of such cessions if made as security.
- Register cancellations of register mortgage bonds, releases of any part of the property if the debt is further secured by collateral bond, releases of any joint debtor or of any surety in respect of any such bond, the substitution of another person for a debtor in respect of any such bond, reductions of cover in respect of any such bond intended to secure future debts, and part payments of the capital amount due in respect of any such bond intended to secure future debts.
- Register waivers of preference in respect of registered mortgage bonds and notarial bonds with regard to the whole or any part of the property hypothecated thereby in favour of other such bonds whether registered or about to be registered.
- Register waivers of preference in respect of registered real rights inland, in favour of mortgage bonds, whether registered or about to be registered.
- Register notarial bonds and cancellations and cessions thereof (including cessions made as security) and cancellations of such cessions if made as security.
- Register releases of any part of the property hypothecated by any registered notarial bond or of all such property if the debt is further secured by a collateral bond, releases of any joint debtor or of any surety in respect of any such bond, reduction of cover in respect of any such bond intended to secure future debts, and part payments in respect of the capital amount due in respect of any such bond other than a bond intended to secure future debts.
- Register ante-nuptial contracts and register such notarial deeds of donation, (including a donation to be held in trust), and such other notarial deed having reference to persons and property within the area served by the registry in question as are required or permitted bylaw to be registered.
- Register grants or leases lawfully issued by Government of rights to minerals.
- Register notarial cessions, leases and sub-leases of rights to minerals and notarial variations of such cessions, leases or sub-leases, notarial cessions of such registered leases or sub-leases, notarial cancellations of such leases or sub-leases, certificates of registration in grants or transfers of land, and notarial variations of such reservations.
- Register on the title deeds of the land and of the rights to minerals affected, and in the relative registers, the issue of mynpachbrieven.
- Register any servitude, whether personal or praedial, and record the modification or extinction of any registered servitude.
- Register notarial leases, sub-leases, and cessions of leases or sub-leases, of land and notarial cessions of underhand leases or sub-leases of land, which have been registered prior to the commencement of the Act and notarial amendments, renewals and cancellations of such leases and sub-leases and notarial releases of any part of the property leased.
- Register notarial prospecting contracts and notarial cessions thereof and cancellations of such contracts.
- Register any real right, not specifically referred to under the duties of the registrar, and any cession, modification or extinction of any such registered right.

- Register against any registered mortgage or notarial bond any agreement entered into by the mortgagor and the holder of that bond, whereby any terms of that bond have been varied.
- Register general plans of erven or subdivisions of land, open registers of the erven or subdivisions of land shown on such general plans, and record in such registers the conditions upon which the erven or subdivisions have been laid out or established.
- Register powers of attorney whereby the agents named therein are authorised to act generally for the principals granting such powers, or to carry out a series of acts or transaction registrable in a deeds registry, and register copies of such powers registered in another deeds registry, which have been certified by the registrar thereof, or which have been issued for the purpose of being acted upon in a deeds registry by a Master or registrar of the Supreme Court of Sou6th Africa or a registrar of mining titles or a mining commissioner in his capacity as registration officer.
- Make, in connection with the registration of any deed or other document, or in compliance with the requirements of any law, such endorsements on any registered deed or other document as may be necessary to give effect to such registration or to the objects of such law.
- Record all notices, returns, statements, or orders of courts lodged with him in terms of any law.
- Remove from his records, with the approval of the Master and after the lapse of ten years from the date of entry in such records, any entry made therein, whether before or after the commencement of this Act, in pursuance of the transmission to him of a notice of transmission or an order of liquidation or sequestration or in pursuance of the lodging with him by the Master of a return under section 10 of the Administration of Estates Act.
- Keep the registers prescribed under this Act and any other law, and make such entries therein as are necessary for the purpose of carrying out the provisions of this Act or such other law and of maintaining an efficient system of registration calculated to afford security of title and ready reference to any registered deed
- And generally the registrar shall discharge all such duties as by law may or are to be discharged by a registrar of deeds or as are necessary to give effect to the provisions of this Act, provided that nothing in this Act contained shall be construed as imposing upon the Rand townships registrar the duty of registering any deed or other document which he would not have registered if this Act had not been passed.

2.3 Information Available

When a valuer has to determine market value he has to consider all factors which would influence a purchaser. Many of these factors are obtainable from the records of the Register of Deeds. Some of the information which is contained in the records of the registrar will not necessarily influence a purchaser, but it is nevertheless necessary that the valuer should have knowledge of such information. This information includes the following:

- The correct registered description of the property.
- The size of the property.
- Any restrictive condition of title that may encumber the property.
- Any servitudes that may benefit or encumber the property.
- Any registered leases or cessions of leases that affects the property.
- Who holds the mineral rights?
- The purchase price and date of sale of the property.

Additional information for the benefit of the valuer

- The names of the buyers and sellers of comparable properties.

- The purchases prices and dates of sale.
- Any bonds which are registered against the property.

2.4 General Provision in The Deeds Registries Act

The following general provisions in the Act are important:

(a) When registration takes place – "Deeds executed or attested by a registrar shall be deemed to be registered upon the affixing of the registrar signature thereto."
(b) Deeds to follow sequence of their relative causes – "Save as otherwise provided in this Act or any other law or as directed by the court, transfer of land and cessions of real rights therein shall follow the sequence of the successive transactions in pursuance of which they are made and it shall not be lawful to depart from any such sequence in recording in any deeds registry any change in ownership in such land or of such real right."
(c) Preparation of deeds by a conveyancer – "Save as is otherwise provided in any other law, no deed of transfer, mortgage bond or certificate of title or registration of any kind mentioned in this Act shall be attested, executed or registered by a registrar unless it has been prepared by a conveyancer practising within the province within which his registry is situate."
(d) How real rights shall be transferred – "Save as otherwise provide in this Act or in any other law the ownership of land may be conveyed from one person to another only by means of a deed of transfer executed or attested by the registrar, and other real rights in land may be conveyed from one person to another only by means of a deed of cession attested by a notary public and registered by the registrar. Provided that notarial attestation shall not be necessary in respect of the conveyance of real rights acquired under a mortgage bond."

8

COMMERCIAL ASSOCIATIONS

CHAPTER 8 – COMMERCIAL ASSOCIATIONS

CONTENTS

1.0 COMPANIES

The company which functions under the Companies Act may be regarded as a more advanced form of ownership in which the disadvantages of the sole proprietorship and the partnership, especially in so far as these concern unlimited liability and the ability to acquire capital, are eliminated.
In South Africa two forms of companies can be distinguished, namely the private company and the public company. The main differences between the two are as follows:

- The number of members (shareholders) of the private company varies from one to fifty persons. The public company must have at least seven members, but there is no maximum, so long as the authorised number of shares (share capital) is not exceeded.
- The private company must have at least one director, and a public company at least two.
- The general public cannot apply for shares in a private company, while they can in a public company.
- The transferability of shares in a private company is limited and usually occurs only with the approval of the Board of Directors. Shares in a public company are freely transferable.
- The name of the private company has to end with the words (Pty) Ltd or Propriety Limited, while that of a public company has to end with Ltd or Limited.
- Both private and public companies are subject to a number of legal requirements and limitations, but the private company less so than the public company.

A company has a legal personality, and its assets and liabilities are therefore divorced from those of the owners (shareholders). The personal assets of the shareholders are consequently not involved where claims are made against a company. The liability of the shareholders is limited to the amount paid by them for their share capital – if this share capital has not been paid up in full, the shareholders may, in the case of a claim against the company, be expected to pay up their shares in full – this is however their maximum liability.
The control and authority over the activities and assets of a company reside essentially in two bodies namely the board of directors and a general meeting of members. The operational management of a company is usually entrusted by the articles of the company to the Board of Directors, while the general meeting of members is authorized to amend the articles and is consequently able to bring about a redistribution of powers between itself and the board of directors.
Usually directors are appointed by a general meeting of members and their functions and powers are practiced jointly by the directors (as the Board of Directors) through a majority vote. The Board of Directors may, if it has been authorised by the articles of association of the general meeting, delegate some of its functions and powers to the managing director.
The only way in which the members of a company can voice their opinions on the company's running and management is by voting at a general meeting of members, which has to be held annually. In principle a members voting power is linked to the number of shares he has in the company, and decisions at the general meeting are normally taken by majority vote.
As in the case of the partnership, the company has the advantage of a greater number of people with a say in its management, providing more varied management skills and experience. Once again this extended authority can have the disadvantage that decision-making may be delayed in the case of disagreements.
The company has definite advantages over the sole proprietorship and the partnership regarding the possibilities of acquiring capital and this applies particularly to the public company. This is so because the general public is invited to invest capital in such a company, and members of the public are usually prepared to do this because of the legal personality the company has, the limited liability entailed by this and the strict legal requirements the company has to adhere to. For the same reasons the financial institutions are more willing to invest funds in a company than in a sole proprietorship. The possibilities of obtaining capital can be increased if shareholders,

and particularly the directors, are prepared to provide in their personal capacities additional security for loans.
The transfer of ownership in a public company occurs by the unlimited and free transfer of shares. This takes place by the selling of shares on a private basis or through the stock exchange. The transfer of shares usually has no influence on the activities of an enterprise, and consequently the enterprise has an unlimited life-span.
Shares in a private company are not freely transferable, and their manner of transfer is stipulated in the company's articles. The transfer is usually subject to the approval of the Board of Directors and it is therefore necessary for the shareholder who wants to sell his shares to find someone who is acceptable to the Board of Directors. In practice this usually means relatives or friends, but it should not be too difficult to find someone suitable if a company is profitable. The transfer of shares in a private company usually also has little influence on the activities and therefore the continued existence of the company.
A company is subject to many more legal requirements than a sole proprietorship or partnership.

- Firstly, with the establishment and registration of a company the requirements of the Companies Act have to be complied with, for example the registration of the memorandum and articles of association as well as the payment of registration fees.
- Secondly, requirements regarding accounting practices, financial reports, auditing, minutes, membership register, and so on have to be complied with.
- Thirdly, the Companies Act contains requirements regarding the rights, powers and duties of the directors and other office-bearers, in which respect for the relevant provisions of the articles of association also have to be adhered to.
- Fourthly, there are legal requirements concerning the dissolution or liquidation of a company.
- Finally, there is the taxation of the company and its shareholders. The company pays a fixed percentage of its pre-tax profits as income tax, while shareholders have to add part of their profit from the company (dividends based on their respective shareholdings) to their taxable income – hence the so called double taxation on company profits.

2.0 CLOSE CORPORATIONS

A close corporation functions in terms of the Close Corporations Act. A close corporation is free of many of the formal requirements that govern companies and offers and attractive alternative to entrepreneurs, who would otherwise have been obliged to make use of a partnership or private company or even a sole proprietorship to do business. The abbreviation CC has to appear after the name of a close corporation.
A close corporation has an independent legal personality and its members are therefore in general not liable for its debts or other claims against it. The close corporation has the same legal capacity as a natural person (individual) in respect of matters such as entering into agreements and the registration of fixed property in its name. Membership of a close corporation may vary from one to ten and is limited to natural persons or trustees of natural persons.
The close corporation is closed in the sense that there is no divided responsibility between control and ownership. The interest of a member in a close corporation is expressed as a percentage and the total membership interest must always be 100%. Where a close corporation consists of two or more members, it is desirable although not fully obligatory, to enter into an association agreement between members. Consequently certain internal arrangements can be stipulated in the agreement – for example that all members may actively take part in the management of the corporation and that authority is based on the percentages of membership interest in the corporation. In instances where a definite ratio of power sharing is desired by members, this can also be brought about without much difficulty by inserting a suitable clause in the association agreement.

There are however certain matters that cannot be governed by the association agreement, for example, the withholding of the involvement of one or more members in the management of the corporation, or limitations on the right of every member to convene a meeting of members. The Act does not prescribe when and how meetings have to be held but merely determines that any member may convene a meeting by giving notice to other members. A valid resolution of members can also be taken without convening a formal meeting, on condition that such a resolution is signed by all the members.
The possibilities of acquiring capital are similar to those of the private company, which have already been discussed. To become a member of a close corporation a person has to make a contribution of property, money or services, except in the case where he acquires and existing interest. The contribution of a person and his interest in the corporation do not necessarily have to be in relation to each other.
A member of a close corporation is in a fiduciary relationship with the corporation and is therefore expected to fulfill his duties honestly and in good faith and he may not overstep his authority. Any member, who finds a clash between his personal interests and those of the corporation, must inform all the other members immediately. Failing to do so could render him liable either for compensation to the close corporation for losses suffered by it or for the reimbursement of benefits that have been obtained by such member through the relationship.
A close corporation may not make payments to members in their capacity as members (for example a distribution of profits or reimbursement of contributions) unless the following conditions have been met:

- After the disbursement, the assets of the corporation on the grounds of a reasonable valuation must still exceed the liabilities,
- After disbursement, the corporation must still be able to pay its debts in the normal course of business.

Because of the legal personality of the close corporation, its existence is not affected by the retirement or joining of members. An individual can become a member of an existing close corporation by acquiring, with the consent of all members, the interest of an exiting member. In other words, an existing member can alienate his interest in the corporation as such, on condition that all other members consent. The Act also provides for members to apply to a court of law for the termination of the membership of a specific member.
The legal requirements which the members of a close corporation need to take into account are simple and the corporation can be registered at a nominal fee. Only one document, the founding statement, has to accompany the application for incorporation (registration). The founding statement contains particulars regarding the proposed name of the corporation, the nature of its business, the identity of the members and the interests of members in the corporation. Unlike in the case of companies, close corporations are not expected to employ auditors, but an accountant has to be appointed.
The profits of a close corporation are taxed at affixed rate, which is the same as the rate applicable to companies. Distributed profits (dividends) are however, unlike in the case of companies not taxable in the hands of members.

3.0 PARTNERSHIPS

A partnership corresponds in many respects with a sole proprietorship and many of the disadvantages of the sole proprietorship are therefore also applicable to the partnership. A partnership can be defined as a contractual relationship between two or more persons (known as partners) but usually not more than twenty, who practice a lawful business to which every partner has to contribute something with the objective of making a profit to be distributed among them.

Partnerships are found in the form of ordinary and extraordinary partnerships. A partnership does not have a legal personality and all transactions, contracts or agreements are entered into by the partners in their personal capacities and not by the partnership. The partners are jointly and severally liable for claims against the partnership, irrespective of which partner is responsible for them. The personal belongings of the partners are therefore not safeguarded at all.
Unless the partners decide differently beforehand, they have joint control and authority over the enterprise. Obviously this can in the case of disagreements cause problems and in this respect the partnership is less adaptable to changing circumstances than the sole proprietorship. The fact that more people have a say in the management may improve management, because the knowledge, experience and skills of more people can be drawn upon. At the same time this presents an opportunity for the division of labour and specialization, with the additional advantage that the individual partners are subjected to less personal stress than is the case with the owner in a sole proprietorship.
The possibilities of acquiring capital are usually better than for a sole proprietorship, there are more people available to make contributions and to provide security for credit.
Transfer of ownership is generally more difficult in the case of a partnership than with a sole proprietorship, once again because more people are involved, and the provisions of the partnership contract (if this exists) have to be complied with. On the other hand, it may be easier for a partner to sell his share in a partnership than it is to sell a sole proprietorship. This reason for this is to be found in the advantages of a partnership over a sole proprietorship namely better possibilities of acquiring capital, better management abilities, the possibility of the division of labour and specialization and less personal stress. The most common ways in which an existing partnership can be dissolved are through the following:

- A mutual agreement between the partners.
- The retirement or death of one of the partners.
- The joining of a new partner.
- A declaration of insolvency (or other declarations of contractual incompetence) of a partner or the declaration of insolvency of the partnership, in which case the individual partners are of course also declared insolvent.

With regard to legal requirements, there is little difference between a partnership and a sole proprietorship. The only real difference and this is not even obligatory, although it is very desirable is the written partnership contract in which provision is made for matters such as the nature and aims of the enterprise, capital contributions by the individual partners, distribution of profits, management and dissolution. As with the sole proprietorship, each partner is taxed in his personal capacity in respect of his total income, for example salary plus profits, which he earns from the partnership – the partnership has no liability in this regard per se.
There are two types of extraordinary partnerships, namely the anonymous partnership and the partnership *en commandite*. These partnerships share the feature that certain partners hold the position of partner only with regard to their fellow partners and not in respect of outsiders. In the case of the anonymous partnership two or more people agree to do business collectively, in the understanding that they will do business only in the name of one (or a few) of them. The anonymous partner (or partners) also shares in the risks of the enterprise and he (they) consequently has to share in the losses. Although the anonymous partner has the right to inspect the books of the partnership, he has no right to interfere with the management of the partnership. The partner *en commandite* or dormant partner almost always holds the same position as the anonymous partner. The only difference is that he risks only a certain amount of money in the enterprise and his liability is limited solely to this amount.

4.0 TRADING TRUSTS

The most important features of a trading trust also known as a business trust are the following:

- The most important objective of a trading trust is the carrying on of some kind of enterprise to make a profit for the trust beneficiaries. Depending on the circumstances of each case, such a trust offers certain tax benefits and is not subject to complicated provisions of the Companies Act 61 of 1973.
- In a legal sense, a trading trust is not a legal personality, although it is regarded as one for insolvency purposes.
- Although a trust can be established verbally, in practice a trading trust is usually created by signing a trust instrument in terms of which the founder(s) transfers/transfer certain assets (called trust assets) to a trustee/trustees to trade with the assets in accordance with the prescriptions of the founder(s) in the trust document. The object of the trust must be clear, for example, that it is for the benefit of one or more people (called the trust beneficiaries).
- In terms of section 3(1) of the Trust Moneys Protection Act 34 of 1934, each trustee of a trust is obliged to furnish security to the satisfaction of the Master for the performance of his duties as trustee, unless the trust instrument exempts him from the obligation of security. In terms of section 6(1) of the Trust Property Control Act 57 of 1988, the Master may require a trustee to furnish security despite an exemption order in the trust.
- There are no statutory prescriptions concerning the provisions of what a trust instrument must contain. In a trading trust, the contents of the trust instrument are determined mainly by the nature of the trust property and the object of the trust.
- Once a trading trust has been created, the founder cannot amend it unless a provision for amendments has been included in the trust instrument. If no such provision has been made, the trust can be amended only with the cooperation of the trustee(s) and/or the beneficiaries. In certain circumstances, a court may amend a trust (section 13 of the Trust Property Control Act 27 of 1988).
- The trustee(s) of a trading trust becomes/become the owner of the trust assets once they have been transferred to him/them in terms of provisions of the trust instrument. Trust assets do not form part of the state of a trustee should the latter die or be declare insolvent. If the trust is insolvent, it can be sequestrated.

CHAPTER 9

INSOLVENCY

CHAPTER 9 – INSOLVENCY

CONTENTS

1.0 GENERAL PRINCIPLES OF INSOLVENCY

Insolvency deals mainly with the circumstances in which a person is declared insolvent by a competent court, and the consequences of such court order.
Sequestration is one of the remedies that a creditor can use to enforce payment of a debt. It is usually used when the other "normal" remedies are inadequate to obtain payment. Insolvency is based on the following general principles:

- A debtor is liable to use all his assets to pay his creditors and he may not be allowed to avoid payment. Insolvency therefore provides for methods to recover assets that have been disposed of or concealed by the insolvent. Provision is also made to prevent the further irregular disposal of assets by the debtor.
- All creditors must have equal opportunity to receive payment from the debtor. Insolvency therefore provides for a *concursus creditorium* (a concourse of creditors) where, in principle, each creditor has an equal opportunity of receiving payment of the debt. Certain creditors receive preference, depending on whether they are insured creditors.
- At some time or another, a debtor must be relieved from the effect of his financial mismanagement or dilemma. Insolvency therefore provides for the rehabilitation of an insolvent so that he can lead a "normal" commercial existence. Nevertheless, it must be borne in mind that insolvency was designed primarily for the benefit of creditors and not debtors.

The concept of insolvency can be used in three senses. A person is legally insolvent when he is declared insolvent by a competent court. He is factually insolvent when his assets are less than his liabilities. Commercial insolvency is when a debtor is unable to pay his debts, even though his assets exceed his liabilities.

2.0 GROUNDS FOR SEQUESTRATION

The Insolvency Act 24 of 1936 provides for two methods of sequestration:

- Voluntary surrender, where the insolvent debtor himself petitions for the surrender of the estate.
- Compulsory sequestration, where a creditor petitions for the sequestration of the debtor.

A court will grant a petition for voluntary surrender only if:

- The petitioner has followed the correct procedure.
- The debtor concerned is insolvent.
- The free residue of the debtor's estate (that is, the assets not subject to a special mortgage, pledge, tacit hypothec or lien) is sufficient to defray the costs of sequestration.
- The sequestration will be to the advantage of the creditors as a group (see discussion further on). A company or close corporation cannot petition for voluntary surrender, they are liquidated in terms of the Companies Act 61 of 1973.

The requirements for compulsory sequestration are the following:

- The creditor petitioning for sequestration must have a liquidated claim for not less than R100 against the insolvent debtor. If more creditors petition, together they must have liquidated claims of not less than R200.
- The debtor must be factually insolvent or he must have committed an act of insolvency.

- There must be reason to believe that the sequestration will be to the advantage of the creditor.

The Insolvency Act 24 of 1936 as amended provides for the following eight acts of insolvency:

- The debtor leaves the Republic or is out of the Republic and remains absent, or departs from his dwelling or otherwise absents himself, with the intention of evading or delaying the payment of his debts.
- A court has given judgement against a debtor and he fails upon demand of the officer whose duty it is to execute that judgement, or to satisfy it or to indicate sufficient disposable property, or if it appears from the return made by the officer that he has not found sufficient disposable property to satisfy the judgement.
- The debtor disposes or attempts to dispose of his property with the result that his creditors are prejudiced or one is preferred over another.
- The debtor removes or attempts to remove his property, with the intention of prejudicing his creditors or preferring one over another.
- The debtor makes or offers to make any arrangement with one or more of his creditors to release him wholly or partially from his debts.
- After publishing a notice of surrender of his estate which has not lapsed or been withdrawn, the debtor fails to submit a statement of affairs, or submits one which is incorrect or incomplete in any material respect, or fails to apply for the acceptance of the surrender of his estate on the date mentioned in the notice.
- The debtor gives notice in writing to any one of his creditors that he is unable to pay all or any of his debts.
- The debtor is a trader and gives notice in the Government Gazette of his intention to transfer his business and is then unable to pay all his debts.

As previously mentioned, a court will grant a sequestration order only if there is reason to believe that the sequestration will be to the advantage of the creditor. Whether a specific sequestration will be to the advantage of the creditor depends on the circumstances of each case. A sequestration is obviously to the advantage of creditors if the financial position of the debtor would only deteriorate without sequestration or if he prefers one creditor over another. Of course, sequestration is also to the advantage of creditors if they receive a dividend soon after sequestration that they would not have otherwise received.

3.0 EFFECTS OF SEQUESTRATION

From the date of sequestration, the estate of an insolvent vests in the Master of the Supreme Court, and once he has been appointed, in the trustee of the estate. The insolvent has certain obligations in terms of the Insolvency Act:

- The insolvent must keep a detailed record of all assets he has, and all disbursements he has made in the course of his profession or occupation.
- The insolvent must submit a statement of his assets and disbursements as on the date of sequestration order to the Master within seven days after the sequestration.
- The insolvent must transfer all assets belonging to the property and in his possession or under his control to the trustee within 14 days after the appointment of the trustee.
- After sequestration an insolvent may conclude a valid contract, provided the insolvent does not dispose of any assets from his insolvent estate. However, the insolvent cannot conclude any contract that may adversely affect his estate without the written consent of the trustee.

- Subject to certain exceptions an insolvent may follow any profession or occupation. However, he may not carry on the business of or be employed in any capacity as a general dealer or a manufacturer without the written consent of the trustee.
- A sequestration stays all civil proceeding instituted by or against an insolvent until a trustee has been appointed. The trustee must then be directed by the creditors to continue the proceedings. However, an insolvent may institute an action without the consent of the trustee concerning any matter about his status, for example, a libel case, and he may also recover his pension without the consent of his trustee. He may also be sued for any delict committed by him after sequestration.
- The estate of an insolvent remains vested in a trustee until rehabilitation or composition. The insolvent estate consists of all the assets of the insolvent at the time of sequestration, and all assets that the insolvent may require after sequestration or that may accrue to him during the insolvency, subject to certain exceptions. An insolvent may, for example, retain his salary wages or remuneration for work or professional services rendered by him in as far as he needs it for maintaining himself and his family. Assets purchased by the insolvent with money that he could receive for his own account are not included in the insolvent estate.
- The estate of the spouse of the insolvent with whom he or she is married out of community of property is also included in the insolvent estate. The solvent spouse may apply for the release of his/her property by means of an affidavit and by proving with the aid of supporting documents or information that the property was his/hers before the marriage, or that it was acquired in terms of an ante-nuptial contract, or acquired during the marriage by a tile valid against creditors of the insolvent. If the trustee refuses to release the property, the insolvent spouse may apply for a court order within a reasonable period. The trustee may not sell assets in the insolvent estate that obviously belong to the solvent spouse without permission from the court.
- As a general rule no contract than an insolvent concluded before his sequestration lapses. The rights and duties of the insolvent in terms of such a contract are taken over by the trustee who must decide whether to abide by the contract or not, taking into account the interests of creditors. If he abides by the contract the trustee may enforce the right from the contract. If he decides to terminate the contract, he commits a breach of contract and the other party to the contract may claim damages for such a breach of contract. The claim is a concurrent claim against the insolvent estate. Certain legal principles apply to the following contracts:

a) <u>Leases</u>.

If a lessor is sequestrated, the trustee must sell the leased property. If the immovable property is leased, it must be sold subject to the rule “huur gaat voor koop”. If the lessee is sequestrated, the trustee may terminate the lease by written notice to the lessor, but the latter can then claim damages for breach of contract. If the trustee does not terminate the contract, the lease is automatically terminated after three months after the appointment of the trustee, unless the latter notifies the lessor within three months of his intention to abide by the contract.

b) <u>Contract of service</u>.

The sequestration of the estate of an employer terminates all contracts of service with his employees. The employees then have a concurrent claim for damages for breach of contract. Each employee has a preferent claim for outstanding salary of at least tow months (an amount not exceeding R2 000) and for leave money equal to an amount not exceeding 21 days salary and bonus (maximum (R1 000).

c) Contracts of sale of immovable property

The general rule is that property sold but not yet transferred to a buyer remains the property of the seller. If the seller is sequestrated, the buyer has only a concurrent claim against the insolvent estate for repayment of any part of the purchase price already paid, unless the trustee decides to transfer the property to the buyer. Special protection is afforded in terms of the Alienation of Land Act 68 of 1981 if the seller of land on instalments is sequestrated. If a buyer of immovable property is sequestrated, the trustee has the choice of abiding by or terminating the contract. If the trustee fails to make a decision within six weeks after he was requested to do so by the seller, the seller may claim cancellation of the contract from the court.

4.0 VOIDABLE TRANSACTIONS

The Insolvency Act 24 of 1936 provides for the setting aside of certain transaction made by an insolvent before his sequestration. The purpose of such setting aside is to prevent creditors from being prejudiced or one creditor from being preferred over another. The transactions that can be set aside are called dispositions in the Act, and include contracts of sale, leases, mortgage, pledge, delivery of goods, payment, acquittal, settlement, donation or any contract with such a consequence. A transaction is set aside by the court and the trustee must apply to the court for this to be granted. The following transactions can be set aside:

(a) Dispositions without value

Every disposition without value made by an insolvent can be set aside by the court if the trustee can prove that the person who made the disposition (that is the insolvent) was insolvent immediately after the disposition, if the disposition took place more than two years before sequestration. If the disposition took place within two years before sequestration, the transaction can be set aside if the beneficiary cannot prove that the assets of the insolvent still exceeded his liabilities immediately after the disposition. “Without value” means without reasonable value, for example, the market value of the property. Examples are donation, or the sale of property at a below market value price.

(b) Voidable preference

A disposition made by a debtor can be set aside as a voidable preference provided the trustee can prove that (i) disposition was made by the insolvent within six months before sequestration or his death. (ii) The effect of the disposition was that one creditor was preferred over another, and (iii) the liabilities of the debtor exceeded the market value of his assets immediately after sequestration. The beneficiary may, retain the disposition if he can prove that the disposition (a) was made in the ordinary course of business and (b) there was no intention to prefer him over other creditors.

(c) Undue influence

Undue influence is when a debtor made a disposition when his liabilities exceeded his assets, with the intention of preferring one creditor over another. It does not matter how long before sequestration the disposition took place.

(d) Collusion

This is when an insolvent colluded with another person (be it a debtor or not) to dispose of his property, with the result that the creditors were prejudiced or one was preferred over another. It does not matter how long before sequestration the collusion took place.

(e) Voidable sale of business

A trader who transfers his business or the goodwill (or property) except in the ordinary course of business must first publish a notice of such untended transfer in the Government Gazette and in two issues of an Afrikaans and also an English newspaper (in the circulation district in which that business is carried on). Such publication must be done not less than 30 days and not more than 60 days before the transfer. If these requirements are not fulfilled the transfer is void as against the trustee of the trader's insolvent estate and his creditors if his estate is sequestrated within six months after the transfer.

5.0 ADMINISTRATION OF AN INSOLVENT ESTATE

An insolvent estate is administered by a trustee. The latter receives his orders from creditors, given at meetings of creditors. The trustee is elected by the creditors and he must duly report on his activities as trustee.
Meetings of creditors are held so that creditors can prove their claims against the insolvent estate and give orders to the trustee on the management and administration of the insolvent estate.
All claims against an insolvent estate are proved by affidavit on a prescribed form. The trustee examines the claim to determine whether the estate in fact owes the amount claimed to the claimant. If the trustee disputes a particular claim, he must report it to the Master. The latter may confirm, reduce or disallow the claim. If the claim is disallowed or reduced, the claimant may take the necessary legal steps to prove his claim.

6.0 LIQUIDATION OF ASSETS TO MONEY

A trustee must sell all the assets of the insolvent estate in accordance with the orders of the creditors. Clothing, bedding, household furniture and other essential means of subsistence are excluded from the sale. The general rule is that the property of the insolvent estate is sold by public auction, unless the creditors have given another order.

7.0 ACCOUNTS

Within six months of his appointment, the trustee must submit a liquidation account and plan of distribution (or plan of contribution as the case may be). The liquidation account contains an accurate record of all moneys received and disbursed by the trustee, except for those disbursed or received in the ordinary course of business for the estate. A plan of distribution contains particulars of each claim that is secured or otherwise preferent, and each unsecured non-preferent claim. The amount awarded to each creditor and the deficiency on each claim must also be stated. The trustee must sign each account and confirm its accuracy by affidavit.

8.0 COMPOSITION

Composition is an agreement between an insolvent and his creditor in terms of which the latter receive a partial settlement in their claims. In terms of the Insolvency Act, an insolvent may at any time after the first meeting of creditors submit an offer of composition to his trustee.

If the offer is accepted by a majority of 75% of all the creditors (calculated in terms of value and number), the composition is binding on all the creditors in so far as their claims are not secured or preferent. The composition replaces the original debt commitments between the insolvent and his concurrent creditors. If the insolvent paid under the composition (or gave security for such payment), he is entitled to a certificate of the acceptance of the composition from the master. If in accordance with the certificate, he has paid at least 50 cents on every R1.00 of each proved debt (or given security for it), he may without any further delay, apart from three weeks notice in the Government Gazette, apply for rehabilitation.

9.0 LIQUIDATION OF COMPANIES AND CLOSE CORPORATIONS

Liquidation is the process whereby the assets of a company or close corporation are liquidated and the creditors are paid from the return. Surplus funds are paid to members and the company or close corporation is terminated by the liquidation. The liquidation process is controlled by a liquidator under the supervision of the Master.
The liquidation of close corporations takes place in accordance with the Close Corporations Act 69 of 1984, and also a number of provisions of the Companies Act 61 of 1973 and the Insolvency Act 24 of 1936.
Companies are liquidated in terms of the Companies Act 61 of 1973, if at the start of liquidation it appears that the company cannot pay its debts, certain provisions of the Insolvency Act also apply.
There are two types of liquidation: voluntary winding-up and liquidation by court. In the former, the company or close corporation is wound-up after a resolution of the members of the company or close corporation. Voluntary winding-up is divided into (a) winding up by creditors and (b) winding up by members. Winding-up by creditors takes place when an insolvent company is wound up voluntarily by its members. Winding-up by members takes place when a solvent company/close corporation is wounded up by the members.

10.0 LIQUIDATION OF CLOSE CORPORATIONS

A close corporation may be wound up voluntarily if all its members so resolve. This resolution must be made at a meeting of members called for the purpose of considering the winding-up of the corporation. A resolution to wind-up the corporation voluntarily takes effect only once it has been registered by the Registrar of Close Corporations. A court is authorised to liquidate a close corporation if:

- Members with more than 50% of the total number of votes of members have so resolved.
- The corporation has not commenced its business within a year after its registration, or has suspended its business for a whole year.
- It appears on application to the court that it is just and equitable that the corporation be liquidated.
- The corporation cannot pay its debts.

A liquidator appointed by the Master takes care of the liquidation process. In terms of section 70 of the Close Corporations Act, a payment made by a corporation to a member by reason alone of his memberships within a period of two years before the commencement of the liquidation of the corporation must be repaid by the member to the corporation unless such member can prove that:

- After such payment was made the corporations assets fairly valued exceeded its liabilities.
- The payment was made while the corporation was able to pay its debts as they became due in the ordinary course of its business.

- Such payment, in the particular circumstances, did not in fact render the corporation unable to pay its debts as they became due in the ordinary course of its business.

11.0 LIQUIDATION OF A COMPANY

In terms of section 344 of the Companies Act 61 of 1973, a court may liquidate a company if:

- The company has by special resolution resolved that it be liquidated by the court.
- The company commenced business before the Registrar of Companies certified that it was entitled to commence business.
- The company has not commenced its business within a year of its incorporation, or has suspended its business for a whole year.
- The number of members has been reduced to below seven in the case of a public company.
- 75% of the issued share capital of the company has been lost or has become useless for the business of the company.
- The company cannot pay its debts.
- In the case of an external company, that company is dissolved in the country in which it has been incorporated, or has ceased to carry on business or is carrying on business only for the purpose of winding up of its affairs.
- It appears to the court that it is just and equitable that the company be liquidated.

In the case of voluntary winding-up of a company, the process is initiated by a special resolution made by the members of the company. The whole process takes place without the intervention of the court, although a court may be approached to make a decision on any matter arising from the winding-up.
The winding-up process is controlled by a liquidator, who assumes control of the company. The powers and duties of the directors cease as from the commencement of the winding-up of the company. The company remains the owner of its assets until its dissolution, although they fall under the control of the liquidator after the winding-up.
The distribution of the return of assets of the company among the creditors takes place in accordance with the provisions of the Insolvency Act. Surplus assets are distributed among shareholders in accordance with their respective rights and interests in the company. As previously mentioned, a company and a close corporation dissolve after liquidation.

CHAPTER 10

MINERAL RIGHTS

CHAPTER 10 – MINERAL RIGHTS

CONTENTS

1.0 MEANING OF THE WORD 'MINERAL'

The word mineral has several meanings. It can for example be used in a restricted sense that includes minerals such as gold, coal, diamonds etc. In a wider context it includes everything below the land surface that does not form part of plant or animal life. In this sense, raw materials such as salt, lime, stone and certain types of sand are also mineral. The meaning of the word in each particular case depends on the context in which it is used. In *Finbro Furnishers (Pty) Ltd v Registrar of Deed 1985 (4) SA 773 (A),* the court decided that a lease entitling a person to "all minerals and precious metals" did not include the right to extract clay on the property.
In terms of the Minerals Act 50 of 1991, "mineral" is defined as "any substance, whether in solid, liquid or gaseous form, occurring naturally in or on the earth, in or under water or in tailings and having been formed by or subject to a geological process, excluding water, but including sand, stone, rock, gravel and clay, as well as soil, other than topsoil".

2.0 ACQUISITION OF MINERAL RIGHTS

Mineral rights can be acquired by means of the following:

(a) Cession of the right by the landowner to the person wanting to acquire the mineral rights.
(b) Reservation of the mineral rights in favour of the seller when he sells his land to a buyer.
(c) Reservation of the mineral rights in favour of a particular person when joint property is divided.

In practice, a prospecting contract is usually concluded with the landowner when a person wishes to prospect for minerals.

3.0 RELATIONSHIP BETWEEN THE HOLDER OF THE MINERAL RIGHTS AND THE LANDOWNER

According to the common law, the holder of mineral rights is entitled to enter the property concerned, search for minerals and remove them. However, he must act reasonably and in a manner that will be the least inconvenient and disadvantageous to the land owner. If there is a conflict between the interests of the landowner and those of the holder of the mineral rights, the latter receives preference. The landowner is also obliged to allow the holder of the mineral rights to prospect for and mine the minerals without any interference.
The Minerals Rights Act 50 of 1991 also contains several provisions regulating the relationship between the landowner and the holder of mineral rights. The provisions of this Act are discussed briefly below.

4.0 MINERALS RIGHTS ACT 50 OF 1991

This Act regulates the prospecting for and the optimal exploitation processing and utilization of minerals. It provides for the safety and health of persons involved in mines and works and for the orderly utilization and the rehabilitation of the surface of land during and after prospecting and mining operations. It is administered by the Department of Mineral and Energy Affairs.
In terms of section 5(2), no person may prospect or mine for any mineral without the necessary authorization granted to him in accordance with the Act. However, the occupier of land who otherwise lawfully takes sand, stone, rock, gravel, clay or soil for farming purposes or for effecting improvements on such land does not require authorization and the provisions of the Act are not applicable to him in each case.
In terms of section 7, no person may prospect on land which:

- Comprises a township or urban area.
- Comprise a public road, railway or cemetery.
- Has been reserved or is been used under legislation for government or public purposes.
- May be defined and so determined by the Minister by notice in the Government Gazette, except with the written consent of the Minister of Mineral and Energy Affairs.

Section 9 provides for the issuing of mining authorization. Such authorization is issued only if certain conditions are met, inter alia, that the Department is satisfied with the manner in which and scale on which the applicant intends to mine the mineral concerned optimally and safely under such mining authorization. The applicants must also have the ability and the necessary provision to mine the mineral optimally and safely.
Chapter V of the Act provides for the establishment and functions of a mine safety committee. The function of this committee is to advise the Director-General on the application of this Act in respect of the safety and health of persons employed at mines.
Chapter VI deals with the rehabilitation of the surface of land involved in any prospecting or mining activities. Such rehabilitation must be carried out in accordance with an approved rehabilitation program to the satisfaction of the Department.
Section 42 provides for the acquisition or purchase of land by the State if the minister is satisfied that the land concerned can no longer be used for farming purposes as a result of mining activities, or that it is or will become an uneconomical farming unit as a result of mining activities. Provision is also made for the payment of compensation to a landowner who has suffered damage as a result of the disturbance of land caused by mining activities.
The Act repeals the mines and Works Act 27 of 1956; the Precious Stones Act 73 of 1964; the mining Rights Act 20 of 1967; the Tiger's-Eye Control Act 77 of 1977 and the Nuclear Energy Act 92 of 1982.

CHAPTER 11

LEASE AGREEMENTS

CHAPTER 11 – LEASE AGREEMENTS

CONTENTS

2.0 THE OBJECTIVE OF A LEASE AGREEMENT

The culmination of marketing activity is a written agreement between tenant and owner. By definition, a lease is a contract given by one person (the landlord or lessor) to another (the tenant or lessee) for use or possession of real property for a specified time and in exchange for fixed payments. This contract is usually written and binding in the legal sense with respect to the commitments given by the signatories. The major objective for the drawing of a lease agreement can be described as protection which encompasses the landlord's desire to assure occupancy and income for the period which it covers and, therefore, preventing any loss in income due to sudden vacancy. From the point of view of the tenant, the lease objective would be that security is provided for the tenant to have possession of the premises let for the length of its term. Theoretically, without a lease, tenants can be evicted at the whim of a landlord and, therefore, cannot feel secure in the possession of their premises.
As leases are designed primarily to eliminate misunderstanding between owner and tenant, the lease provisions must be clearly understood by both parties. In this regard, the professional manager should not adopt a lease form simply because it is popular, but should use a form that is reasonable, standardized and suitable for all tenants. Appendix 1 contains the SAPOA Memorandum of Agreement of Lease, which is generally accepted by the property industry as being suitable for use in most cases. It is important to note that the professional manager interested in establishing goodwill, does not use a lease form from which informed people will remove basic clauses and which uninformed people will sign as a matter of faith. A proper lease form is suitable to both informed and uninformed parties and its contents upheld. When properly prepared and presented as a means of protecting the interests of tenants, a lease has excellent marketing value.

2.0 THE NATURE OF A LEASE

2.1 Definition of a lease

“A contract of letting and hiring [or lease] is:

- a reciprocal agreement between one party [the lessor] and another [the lessee]; in terms of which the lessor binds himself to give the lessee the temporary use and enjoyment of a thing, wholly or in part;
- in return for the payment of monetary remuneration [rent] by the lessee." [LAWSA Vol. 14, paragraph 136 at page 138].

2.2 The essentials of a lease

The essentials of a lease are consequently:
- an undertaking by the lessor to deliver the property to the lessee;
- an agreement between the lessor and lessee that the lessee will have the temporary use and enjoyment of the property; and
- An undertaking by the lessee to pay rental.

2.3 Terms of the lease

In the law of contract, and consequently the law of lease there are three types of terms, or as they are sometimes incorrectly described in leases as the “terms and conditions". These are:

(a) The essentialia

These are the terms without which an agreement would not be a valid lease. As was referred to above, the three aspects are: an undertaking to deliver the property; agreement that the lessee will have temporary use of the property; an undertaking by the lessee to pay rent. These terms are the essentialia of a lease.

(b) The naturalia

These are the things that follow automatically unless the parties contract otherwise. For example a naturalia of a lease is that the lessee can sublet the premises. This is normally restricted by way of agreement.

(c) The incidentalia or accidentialia

Which are terms added by the parties. For example, an agreement that the tenant pay additional rental by way of a percentage of his turnover. Or an agreement by which the landlord cannot cancel the lease until he has given the tenant 20 days notice to remedy the breach.

4.0 SPECIFIC ASPECTS OF LEASING

3.1 Writing, "Long" And "Short Term" Leases

A lease does not have to be in writing. This is in terms of the Formalities in respect of Leases of Land Act No. 18 of 1969.
However, that Act provides that where a lease is entered into for more than 10 years, it is not valid against third parties unless it is in writing and registered against the title deeds of the leased land.
Now what does that mean? I, a tenant, enter into a lease with you, the landlord, for 15 years. I do not register the lease against the title deed of the land. You sell the land to a third party, and he is unaware of my lease: he does not have to respect my lease and can eject me immediately. If however the new owner is aware of the lease, he is bound in respect of the tenant's rights.

3.2 Rental

For a lease to be enforceable, the rental must be determined or determinable. The determination must not be under the absolute control of the landlord or the tenant. There have been a number of reported cases on this question, particularly in relation to operating costs. The first case which literally set the cat amongst the pigeons (the cat being the tenant and the pigeon being the landlord) was the case of *Kriel v Hochstetter House [Edms.] Bpk. 1988 (1) SA 220 (T).*
In this case certain operating costs were determinable in the discretion of the landlord. The court held that since the landlord had an unfettered power to determine a portion of the rental, the lease was not valid. Since then a number of cases have been reported, the most notable being:

- *Proud Investments (Pry.) Ltd. v Lanchem International (Pty) Ltd. 1991 (3) SA 738 (A)*
- *Genac Properties JHB (Pty.) Ltd. v NBC Administrators CC (previously NBC Administrators (Pty) Ltd.) 1992 (1) SA 566 (A)*
- *Benlou Properties (Pty) Ltd. v Vector Graphics (Pty.) Ltd. 1993 (1) SA 169 (A).*

(a) The "Proud" case
What is important about the “Proud” case is the three findings of the court, namely:

- that the court assumed without deciding the issue, that the operating costs amounted to rental. As a consequence, the legal principles regarding the fixing and determination of rental applied

- where a tenant had to pay "levies of whatsoever nature", the court held that this was not void for vagueness. The levies were determined by a public body or local authority. They could be easily ascertained and consisted of fixed amounts of money
- in regard to the further operating clauses, being reasonable wages, reasonable costs of maintaining service lifts and reasonable costs of maintenance of water reticulation, it was held that these clauses had to be read in conjunction with clause 9.2. That clause provided that if there was a dispute between the landlord and tenant concerning the reasonableness of the operating costs, the matter had to be determined by the landlord's auditors. In other words, the final determination was taken away from either landlord or tenant. The mere fact that each cost item was qualified by the word "reasonable" did not brand them as reasonable rental. As stated, clause 9.2 provided for an objective determination of reasonableness of any operating costs by a third party i.e. the landlord's auditors.

(b) The "Genac" case

In the Genac case the tenant had to pay a specified part of certain expenses incurred by the Landlord which were termed "maintenance and running expenses'. These expenses were all termed as being "the aggregate of the landlord's actual and reasonable maintenance and running expenses in respect of the property of the building". The important aspect of this case is that using the word "reasonable" did not create uncertainty. The expenses could be determined from the landlord's financial records.
What is disturbing is that the court held that whether they were reasonable was also capable of objective ascertainment. In this regard one must assume that the reasonableness or otherwise would be determined by a court of law. Landlords do not have time, when tenants dispute charges relating to operating costs, to refer the matter to court every time to determine whether the court finds the costs reasonable or not!
It is suggested that the procedure in the Proud case be followed i.e. that if there is a dispute between the landlord and the tenant concerning the reasonableness or extent or nature of the operating costs, the matter is to be determined by the landlord's auditors.

(c) The "Benlou" case

The Appeal Court restated the general principle that rental may not be fixed by either party where the determination of the rental depends entirely upon the unfettered will of one of the parties.
In Benlou's case the tenant had to contribute a specified percentage of any increase in the landlord's expenditure on certain items. The Court held that the landlord's discretion was not unfettered. It was fettered by 3 qualifications, namely:
(i) That only a defined share of the increased expenditure could be recovered from the tenant.
(ii) That such expenditure had to be actually incurred by the landlord in the sense of an increased contractual liability towards a third party.
(iii) That the tenant was only obliged to contribute to the increased expenditure after the date of commencement of negotiations and in respect of certain specified items.

To sum up then on this now settled issue of operating costs - despite the cases I suggest that the principles of the, Proud" case be followed i.e. that where there is a dispute between a landlord and tenant, the matter be determined by a third party.

(d) "Reasonable rental"

It follows from the Genac case that a lease for a reasonable rental may be enforceable. This is contrary to the case of *Trook t/a Trook's Tea Room v Shaik and Another 1983 (3) SA 935 (N)*. This is a very difficult area for landlords and they should carefully consider the various cases.

3.3 Property Identified

The property must be identified in the lease or must be identifiable. Failing that, the contract will be void for vagueness. This is in accordance with the general principles of contract. In an interesting case - *Ellerine Furnishers (Venda) (Pry.) Ltd. v Rambuda 1989 (2) SA 874 (V),* a written lease referred to a building being the subject matter of the lease as depicted on plans annexed as Annexure "E".
Annexure "E" was not attached to the lease when signed. Since the lease was intended to be the sole agreement between the parties, the lease was accordingly held to be incomplete, thus void and unenforceable.

3.4 Duration

It is a requirement for leasing that the use and enjoyment of the property be parted with temporarily. There is compliance with this requirement if the lease is to run for a definite period or until the occurrence of an event, which is bound to happen although the date of its occurrence is uncertain. A lease can also endure for such a period as the landlord or tenant may decide. Furthermore, if the landlord and tenant have not made any agreement about the duration of the lease, it becomes a periodic lease. The period is usually the period in terms of which the rental is payable. In other words, if the rental is payable monthly, it can be terminated on a monthly basis. A contract, which confers the power to use and enjoy the land in perpetuity, is not a lease. (See LAWSA - Volume 14, Lease, paragraph 139).

3.5 Options

One often finds options in leases when it is the intention of the parties that the lease be extended or, as is often said, renewed. In fact an option to renew a lease is a totally new agreement. Therefore the option must comply with the three essential requirements, and one of these, which is so often forgotten, is that the rent must be determined or determinable and not by one of the parties.
In a recent case *(Cash-In CC v OK Bazaars 1991 O) SA 353 (C))*, the lease provided that the tenant should have the right to renew the lease provided he had faithfully carried out the terms and conditions and provided he was not in default at the expiration of the lease. The court held on the particular wording and because of the word "faithfully", that since the tenant had failed to comply with one of the terms of the lease previously, he could not renew the lease.
So often a right of first refusal is confused with an option. An option must be for a specified rental. There are of course ways of determining the rental by referring it to arbitration or to a third party to determine the rental. Such an option will be enforceable.

3.6 Right of First Refusal

In contrast to an option, a right of first refusal or a right of pre-emption (Afrikaans "voorhuurreg") is an agreement in terms of which the landlord undertakes, if he should lease the property again, to offer it to the tenant first and that the tenant will have the "first" right to enter into a new agreement of lease. There are two possibilities here:

- The one is where the landlord receives an offer from a third party, which is not generally the case, but he is obliged in such case to refer the offer to the tenant who must "match" it to conclude the lease.
- The other - the more common position, is where the landlord says "I want to lease it again for a further period and I want R50,00 per square metre" and the tenant says "I accept it”

Clearly a right of first refusal serves as a basis for a negotiated agreement.

The landlord's obligation is always, whether or not negotiations break down between him and the tenant, if he decides to lease it to a third party for say R40, 00 a square metre, to refer that offer to the tenant. These clauses are often poorly worded in leases and should be viewed circumspectly.

The Law Reports abound with cases relating to what was intended because clauses like this were badly worded - see *Soterinu v Retco Poytors (Pty.) Ltd., 1985 (2) SA 822 (A)*

3.7 Huur Gaat Voor Koop

One of the difficult aspects of leases is the so-called principle of "huur gaat voor koop". In a typical situation, let us say a tenant enters into a lease for 10 years with the landlord. The landlord then sells the property to a new owner. The new owner being the purchaser is bound to honour the lease.
In the recent case of *Mignoel Properties (Pry.) Ltd. v Kneebone 1989 (4) SA 1042 (A)*, the principle was aptly illustrated. The court confirmed that once a tenant elects to remain in the premises after a sale, the seller in terms of law falls out of the picture. The new owner steps into the shoes of the seller as landlord. No new contract comes into existence. All that happens is the purchaser is substituted for the seller as landlord. There is no necessity for a cession of rights or assignment of obligations.
One further interesting aspect is that the purchaser acquires all the rights which the seller had in terms of the lease. This includes the right that the seller had against a surety for the tenant's obligations under the lease. In other words, the suretyship remains in place even if there is a change of ownership of the leased premises.

3.8 Subleasing, Assignment And Cession

3.8.1 Subleasing

Remember that it is one of the naturalia of an agreement of lease that the tenant may sublease the premises. The parties can agree otherwise. What is important in a sub-lease is that the sublease does not create a contractual relationship between the sub-lessee and the original lessor. For example if the original lease is terminated the sub-lessee can be ejected. In other words if you are a sub-lessee make sure that the terms of your sublease line up with the terms of the original contract. Furthermore all the conditions and terms of the original contract should be contained in your contract.
A further aspect of sub-lessees is that one often finds a clause reading - “The lessee shall not sublet the premise without the prior consent of the lessor which consent shall not be unreasonably withheld.”

The principles of a clause like this was discussed in the case of *F W Knowles (Pty) Ltd. v Cash-In (Pty.) Ltd. 1986 (4) SA 641 (C)*, which related to an agreement of lease. In that case the tenant sold some of its supermarkets to OK Bazaars. The landlord refused to assign the lease to OK Bazaars. The landlord alleged that by allowing OK to become the tenant the "family image" of the store would change and would downgrade the shopping centre.
The court held that only if the landlord's rights are affected, does the landlord have the right and thus a valid reason to refuse consent. In the circumstances the lesser was unreasonable in not consenting to the cession of the lease. For example, if a tenant runs a supermarket and he wanted to assign his lease or sublet to a person who conducted a barber shop, it would probably be unreasonable.

3.8.2 Cession

A cession relates to rights only. If a lease is silent as to whether a tenant can or cannot cede his rights, he is generally speaking free to cede the lease.

3.8.3 Assignment

An assignment of the lease is both a cession of the tenant's rights and the delegation of his obligations. A tenant can never assign his rights and obligations without the consent of the landlord. The landlord can of course give that consent in advance.

3.8.4 Assignment/Sub-Lease?

The question is often asked whether a landlord should agree to a sublease by a tenant or should he agree to the assignment of the lease. A landlord has a fight of retention known as the landlord's hypothec over the assets of the tenant for arrear rental.
If the landlord consents to a sublease, the landlord knows that the assets in the shop belong to the sub-lessee. Since there is no agreement between the sub-lessee and the landlord, the landlord cannot attach the sub-lessee's property for the rental due by the tenant - *see Schoeman (1991).*
It may therefore be better for the landlord to agree to an assignment of the lease by the tenant to the new tenant, and in addition to obtain the existing tenant's suretyship for the obligations of the new tenant.
The result would be that the landlord would have a right over the new tenant's movables and also a right to claim the rental from the existing tenant.

3.9 Compensation For Improvements

Compensation for improvements is a problem that often arises in a lease and should be dealt with specifically.
The common law position [i.e. if nothing is written] is that a lessee who has effected improvements to the leased property is entitled to compensation for those improvements on termination of the lease. This is a complicated part of the law and entails a detailed discussion on the question of enrichment. Suffice to say that a landlord should deal with this aspect in the agreement of lease.

3.10 Landlord's Hypothec

One of the important rights that a landlord has is that if the tenant fails to pay the rental, he has a prior right to the movables contained in the leased premises. This is the so-called landlord's hypothec. There are certain strict rules regarding the enforcement of the hypothec. One of the most important is that, if the tenant is in arrears with his rental the landlord does not automatically have a hypothec until he institutes action in terms of the procedural laws of court and establishes his right of hypothec. For example, if the goods are removed before the hypothec is so established the landlord loses his hypothec.

3.11 Cancellation

Cancellation is a drastic remedy. Before a landlord cancels an agreement, he must make sure that he complies with the formalities of the lease relating to cancellation. For example if the landlord can only cancel on 7 days notice, he must give a clear 7 days notice.
The landlord should ensure that the notices are sent to the proper parties at the proper addresses. If the landlord cancels incorrectly or as it is called in law "prematurely" he is guilty of breach of contract.

3.12 Termination

Generally speaking, a lease is not terminated by the death of either the landlord or the tenant unless the contract provides otherwise.
Where a lease is for an undetermined period, it can only be cancelled by reasonable notice. Generally speaking, the notice should go with the basis of the rental. If it is payable monthly, a month's notice should be given. The lease is not terminated by the landlord's insolvency. When the leased property is sold by the insolvent landlord's trustee, the tenant is protected by the roles of Huur Gaat Voor Koop. A stipulation in the lease that the lease will terminate on liquidation of the landlord is void.
Where a tenant is liquidated or is sequestrated, the Insolvency Act provides that the lease is not terminated automatically but may only be terminated by the trustee by way of notice. If the trustee fails to notify the landlord within three months, he is deemed to have terminated the lease at the end of those three months.

4.0 VALUE ADDED TAX/OPERATING COST

VAT is an inclusive tax. Only in certain circumstances may rental be stated to be exclusive of VAT. In such a case the rental must be stated as say - R100,00 + R14,00 VAT = RI14,00.
Since VAT is an inclusive rental, it is suggested that the rental be increased by the amount of VAT (14% at the current rate).
Operating costs are more difficult. In the Proud judgment, the court accepted without deciding that operating costs were rental. In the Genac case likewise, the court in a statement made suggested strongly that operating costs are rental. However, like in the "*Proud"* judgment the court did not find it necessary to express a firm opinion on this point.
This was only accepted for the purposes of determining whether the operating costs, like rental had to be determined or determinable. Often leases themselves provide that operating costs are deemed to be rental.
This is for a good reason. It is because the landlord wants to have his landlord's hypothec over the tenant's property for any arrear operating costs which is then rental. Unless stipulated otherwise, operating costs are inclusive of VAT.

CHAPTER 12

STATUTORY CONTROL OF THE USE OF FIXED PROPERTY

CONTENTS

1.0 ADVERTISING ON ROADS AND RIBBON DEVELOPMENT ACT 21 OF 1940

The purpose of the Act is to regulate the display of advertisements outside certain urban areas at places visible from public roads, and the depositing or leaving of disused machinery or refuse and the erection, construction or laying of structures and other things near certain public roads, and the access to certain land from such roads.
The Advertising on Roads and Ribbon Development Act 21 of 1940 prohibits the display of an advertisement which is visible from a public road, unless it is done in accordance with the written permission of a controlling authority. No permission is required for the display of an advertisement on a building which discloses the name or nature of any business carried on inside. The display outside a public road of an advertisement which merely indicates the name of a farm or that a particular road or path is a private or farm road is also not prohibited. The name of a property may also be displayed on a gate.
The prohibition on advertising does not apply to advertisements in urban areas. The Act regulates the erection, construction or laying of structures near certain public roads.

2.0 THE NATIONAL ROADS ACT 54 OF 1971

The purpose of the Act is to provide for the construction and control of national roads; to repeal or amend certain laws; and to provide for incidental matters.

In terms of the National Roads Act 54 of 1971 no person may:

- Display an advertisement on a national road.
- Display outside an urban area any advertisement visible from a national road.
- Display on any land adjoining a national road in an urban area or separated by a street from a national road in an urban area, any advertisement visible from a national road.

The prohibition does not apply to advertisements authorized by the regulations under the Act or advertisements displayed on a building and which contain no more than the name of the business or undertaking carried on in the building, or the name of its proprietor.
In terms of the National Roads Act no person may carry on any trade or expose, offer or manufacture for sale any goods on a national road or, without the necessary permission, in a building restriction area. A building restriction area is an area outside an urban area situated within 60 metres from the boundary of a national road or within a distance of 500 metres from the point of intersection at a junction. (The selling of property by an estate agent alongside a national road outside an urban area can fall under this restriction).
A contravention of these prohibitions constitutes a criminal offence.

3.0 FENCING ACT 31 OF 1963

The purpose of the Act is to consolidate the laws relating to fences and the fencing of farms and other holdings and matters incidental thereto.
This Act deals with the fencing of farms and other holdings. It does not cover the fencing of any erf or stand situated within a municipality or proclaimed town, village or township unless the erf or stand is at least 2.5 hectares in extent and is one of a number adjacent to each other on which farming operations are carried on.
In terms of the Act the State President may by proclamation in the Government Gazette specify areas in which owners are obliged to contribute to the cost of boundary fences. In certain areas owners can be obliged to contribute to the cost of jackal-proof fences. The Act lays down that if an owner intends to erect a boundary fence between his holding and that of another, he must give the owner notice of his intention to erect the fence if he requires him to contribute to the cost of the fence. The owner may then proceed to erect the fence if no objections lodged by the other owner.

The Act also provides that if any holding which is fenced under the Act is leased, the owner may during the term of the lease claim from the lessee from the date the holding became fenced a payment of six percent per year on the amount paid for the fence. The lessee has a right to terminate the lease if he receives a notice from the owner that he requires payment of the amount in question, unless the owner's liability to contribute to the cost of the fence arose from any act of the lessee. The Act also provides for the installation of gates and other related matters.

4.0 THE COMMUNITY DEVELOPMENT ACT, 1966 (ACT NO. 3 OF 1966)

The purpose of the Act is to consolidate the law relating to the development of certain areas, the promotion of community development in such areas, the control of the disposal of affected properties, the grant of assistance to persons to acquire or hire immovable property, the establishment for such purposes of a board and the definition of its functions, and matters incidental thereto.

5.0 SUBDIVISION OF AGRICULTURAL LAND ACT NO. 70 OF 1970

To control the subdivision and, in connection therewith, the use of agricultural land.
This Act imposes a prohibition on certain actions regarding agricultural land as defined in the Act. Unless the Minister of Agriculture consents thereto in writing.

- Agricultural land may not be subdivided.
- No undivided share in agricultural land not already held by any person may vest in any person (meaning that agricultural land cannot be bequeathed to joint owners).
- A long lease of agricultural land may not be entered into.
- No portion of agricultural land, whether or not it has been surveyed or built on, may be sold or advertised for sale or be let on a long lease (except for mining).

A sale contrary to the provisions of this Act is null and void. A contravention of any of the prohibitions is also a criminal offence. Application for the Minister's consent must be made by the owner of the land and must be lodged in a place and form and be accompanied by the plans, documents and information determined by the Minister.
The Act also restricts the registration of a servitude over agricultural land without the written consent of the Minister. The following servitudes are not included in the prohibition:

- A right of way with a width not exceeding 15 metres (including a servitude supplementary to the first servitude and which has an area not exceeding 225 square metres which adjoins the area of the first servitude.
- A usufruct over the whole of agricultural land in favour of an individual, either alone or with his spouse. Or the survivor of them if they are married in community of property.

6.0 PHYSICAL PLANNING ACT NO. 125 OF 1991

To promote the orderly physical development of the Republic, and for that purpose to provide for the division of the Republic into regions, for the preparation of national development plans, regional development plans, regional structure plans and urban structure plans by the various authorities responsible for physical planning, and for matters connected therewith.
The Minister of Public Works is empowered to reserve land as a nature area or for the utilization of a specific natural resource. Certain areas can be established as 'controlled areas'. No person may use land in a controlled area otherwise than for the purpose for which it is being used immediately before it was declared a controlled area.

The Act makes provision for the establishment of guide plan committee to compile a draft plan in which guidelines for the future development of a specific area are laid down. A draft guide plan must be approved by the Minister. Once a guide plan is approved, no town planning scheme introduced in which provision is made for the zoning of land which may conflict with a guide plan. No permission may be given in terms of any town planning scheme to use land in a guide plan area for a purpose not consistent with the plan. The Act requires a permit to be issued before land may be used as brickworks, for brick making, pottery, stone crushing or sand washing or to process any mineral in any other manner. Use of land as a quarry is also regulated.

7.0 HEALTH ACT 63 OF 1977

To provide for measures for the promotion of the health of the inhabitants of the Republic; to that end to provide for the rendering of health services; to define the duties, powers and responsibilities of certain authorities which render health services in the Republic; to provide for the co-ordination of such health services; to repeal the Public Health Act, 1919; and to provide for incidental matters.

This Act authorizes the Minister of Health to make regulations concerning:

a) The prevention and remedying of overcrowded, dirty, unsanitary or verminous conditions in any dwelling or other building.
b) The control, restriction or prohibition of the erection of new buildings and the provision of sewerage and drainage systems for buildings, the siting, construction and repair of buildings and the provision of water, washing and sanitary conveniences, lighting and ventilation in buildings.
c) The control, restriction or prohibition of the establishment and running of caravan parks, camping sites and holiday resorts.
d) The periodic cleansing of premises, the removal of rubbish, waste or spillage from premises and the evacuation of any premises on which a condition exists that constitutes a danger to health.

8.0 HEALTH AMENDMENT ACT NO. 33 OF 1981

To amend the Health Act, 1977, so as to substitute certain designations therein; provide for subsidies to local authorities instead of refunds to them in respect of health services rendered by them; authorize the Minister of Health, Welfare and Pensions to make regulations relating to standards and requirements for graves in cemeteries, the burial of dead bodies, the catching, gathering and supply for human consumption of fish, molluscs, crustaceans, plants or other products in or originating from polluted water, the addition of substances to water with a view to the promotion of health, and the training of persons to be employed at water purification works; authorize any local authority, hospital or institution responsible for the burial of the body of a deceased person, to cremate such body; and extend the power of officers of the Department of Health, Welfare and Pensions to enter any land or premises; and to provide for incidental matters.

9.0 FOREST ACT 122 OF 1984

This Act provides for the protection, management and utilization of certain plant and animal life. It also contains provisions to regulate trade in forest produce and to protect and combat veld, forest and mountain fires. In terms of section 7, no land, including land in the possession of the State:

a) Which has not been used previously for the establishment and management of commercial timber plantation, or

b) Which for a period of more than five years after the removal, harvesting or destruction of a commercial timber crop, has not been used,

May without the prior written approval of the Director-General of Environmental Affairs be used for the planting of trees to produce timber for commercial or industrial purposes. An owner who intends to establish a commercial timber plantation on any land must apply for approval in the prescribed manner.

10.0 FOREST AMENDMENT ACT NO. 53 OF 1991

To amend the Forest Act, 1984, so as to make further provision regarding the clearing and maintenance of fire belts; to change the name of the Board for National Botanic Gardens to the National Botanical Institute; and to extend and further define the objects and functions of the said institute; and to provide for matters connected therewith.

11.0 NATIONAL MONUMENTS AMENDMENT ACT NO. 13 OF 1981

To amend the National Monuments Act, 1969, so as to further regulate the constitution of the National Monuments Council and its committees; to extend the said Council's powers and duties; to vest that Council also with the powers of the South African War Graves Board, and in pursuance hereof to provide for the establishment of a Burgergraftekomitee and a British War Graves Committee; to regulate the declaration of certain burial grounds and graves to be national monuments; to make further provision for the delegation of powers; to provide for the transfer of the officers and employees of the said War Graves Board to the said National Monuments Council, and for the vesting in the said National Monuments Council of the assets, rights, liabilities and obligations of the said War Graves Board; to effect the continued existence of the War Graves Trust Fund; to make new provision in respect of National Gardens of Remembrance; to regulate the preservation of certain antiques; and to create additional offences and penalties; to repeal certain laws; and to provide for matters connected therewith.

12.0 NATIONAL MONUMENTS ACT 28 OF 1969

This Act provides for the preservation of certain movable or immovable property as national monuments. In terms of section 12(2), no person may destroy damage, excavate or alter any monument unless he has a permit issued by the National Monuments Council. Similarly, no person may disfigure, destroy, remove or alter or damage any memorial tablet, badge or sign erected on a national monument, or a fence, wall or gate on the premises of a national monument, unless he has the written approval of the Council. Any contravention of any section of this Act is considered an offence.

13.0 THE EXPROPRIATION ACT NO. 63 OF 1975

13.1 INTRODUCTION

South African legislation and judgments on expropriation has played the major role in the field of legal influence on property valuation. Prior to 1975 expropriation legislation was fragmented and often contradictory. There was no consolidated basis or norm for expropriation prior to 1965 when Act no. 55 constituted the first Consolidated Expropriation Act. This has been replaced be Act 63 of 1975 which, although is does not differ materially form its predecessor, certain weaknesses of the 1965 Act have been eliminated. There are however, still a limited number of statutes that have not been repealed by this Act, while the Provincial Ordinances concerning road expropriations is possibly the most used expropriation legislation outside of the Expropriation Act.

It is not the purpose of this work to consider the historic background or to enter into a comparative study of overseas legislation. This work is aimed at the legislation and judgments that concern property valuations. The most important section of the Act is therefore section 12 which sets out the basis on which compensation is to be determined.

13.2 THE PROCESS OF EXPROPRIATION

Expropriation is usually effected by a notice of expropriation. The notice of expropriation must comply with certain requirements:

1) The property to be expropriated must be clearly and fully described.
2) If only a portion of a piece of land or a right in respect of such portion is to be expropriated, the approximate location must be shown on a sketch and the approximate extent must be indicated.
3) There must be a full and clear description of the expropriated rights.
4) The date of expropriation must be given.
5) The notice of expropriation must either state the amount of compensation offered or call upon the expropriatee to submit his claim for compensation within sixty days,

After the notice of expropriation has been served the expropriator and the expropriatee must take certain prescribed steps which are mainly designed to establish an agreement on the amount of the compensation. If no agreement can be reached, the amount of compensation is determined by a Compensation Court if the amount of the claim is less than R100 000 and by the Supreme Court if the amount of the claim exceeds R100 000.

The power to decide whether an expropriation shall take place or not vests in the expropriator *(Theunissen Town Council v du Plessis 1954 4 SA 491 (O) 424C)*. The expropriator need not give any reasons for his decision. He also need not consult the owner of the property on the necessity or the desirability of any proposed expropriation.
The Expropriation Act prescribes the procedures to be followed by the expropriator in order to bring about an expropriation. These procedures must be strictly complied with, otherwise the expropriation will be declared null and void. *(Perumal v Minister of Public Health 1950 SA 631 (A) 644* and *Durban City Council v Bacus & Hussain 1969 1 SA 118 (N) 122E).* The prescribed requirements for an expropriation are strictly interpreted and full compliance therewith is required. (*Durban Corporation v Lewis 1942 NPD 24 39).*

The Expropriation Act authorises an expropriator to expropriate property for public purposes. The term public purposes is given wide interpretation. Anything which extends to the benefit of the general public will be included.
Slabbert v Minister van Lande 1963 3 SA 620 (T) 621F and *Fourie v Minister van Lande 1970 4 SA 165 (O) 165G.*
Compensation can be subdivided into three broad categories being:

(a) the market value of the expropriated property,
(b) an amount to make good financial loss
(c) an amount for inconvenience (solatium) equal to 10% of the market value of the expropriated property, but limited to a maximum of R10 000.

This section has been replaced by section 12(2)

Where Section 12(1) (a) (i) refers to:

"The amount which the property would have realized if sold on the date of notice in the open market by a willing seller to a willing buyer;"

Reference is actually being made to the concept of market value of the property. This concept is dealt with more fully hereunder with particular reference to Supreme Court and Appellate Division decisions.

Section 12(1) (a) (ii) reads:

"An amount to make good any actual financial loss caused by the expropriation;"

The actual financial loss can be considered in two broad categories being "severance" and the diminution in value of the remainder of the property that has not been expropriated.
Severance losses occur when a property is divided into two or more portions. These losses are those caused by the loss of access, or limited access, diminution in value of the property caused by necessary uneconomic or more expensive development costs or the severance of services for example water to the severed portion. English legislation differentiates between severance and the diminution in value of the remainder (injurious affection). These concepts are very similar and there is no reason why they should be treated separately.
No allowance may be made for any indirect damage in the determination of compensation payable under the Expropriation Act.
In *Pienaar vs. Minister van Landbou 1972 (1) S.A. 14 (A)* the Appellate Division held that direct loss, as against indirect loss, is loss, which flows naturally, and without any intervening cause form the act of expropriation. The loss must be natural, direct and as a reasonable consequence of the expropriation. A mere 'cause sine qua non' is not sufficient for a claim of compensation.
In *Estate Marks vs. Pretoria City Council 1969 (3) S.A. 227 (A)* the Court held: "The broad concept of the statute is that monetary compensation is substituted for the property expropriated." This means that the owner of the property must receive compensation equal to the market value of that property and direct actual financial loss. This loss must not be uncertain or speculative. (*Greyvenstein & Andere vs. Minister van Landbou 1970 (4) S.A. 233 (A)).*
In *Lochner vs. Afdelingsraad Stellenbosch 1976 (4) S.A.737 (C)* it was held that compensation should be paid for the diminution in value or the remainder of the property because of the noise that would be made by the construction and also the use of the road. This approach has subsequently been rejected by the Appellate Division in *Tongaat Group vs. Minister of Agriculture 1977 (2) S.A. 961 (A)* where it was held that the meaning of the word expropriate does not include the concept of use of the expropriated property. The anticipated future use of the expropriated property by the State after expropriation will constitute a nova causa which is independent of the expropriation and any loss owing form such anticipated future use will therefore not be compensated. This means that although it could be expected that a certain activity will be generated on the expropriated property and that such activity might decrease the value of the remainder of the property, no claim may be made for the reduction of value of that remainder.
In Minister of Agriculture vs. Federal Theological Seminary 1979 (4) S.A. 162 (E) the Court held that if a special property is expropriated, the owner cannot claim for the replacement thereof under the heading of actual financial loss.
In Bouwer vs. Stadsraad van Johannesburg 1978 (1) S.A. 624 (W) the Court gave a reasonably detailed list of aspects that can be claimed under actual financial loss.
As pointed out above the broad concept of the statute is that monetary compensation is substituted for the property expropriated. The nature of an expropriation itself creates abnormal circumstances and therefore certain special rules have been incorporated in Section 12 (5) of the Act.

Section 12 (1) (b) reads:

"in the case of a right, excepting a registered right to minerals, an amount to make good any actual financial loss caused by the expropriation or the taking of a right".

Section 12 (2) reads:

"Notwithstanding anything to the contrary contained in this Act there shall be added to the total amount payable in accordance with subsection (1) an amount equal to –"

a) *10% of such total amount if it does not exceed R100 000 plus*
b) *5% of such total amount between R100 000 and R500 000 plus*
c) *3% of such total amount between R500 000 and R1 000 000 plus*
d) *1% of such (but not amounting to more than R10 000) if the amount exceeds R1 000 000*