



THE SOUTH AFRICAN COUNCIL
for the
QUANTITY SURVEYING PROFESSION

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PROFESSIONAL SKILLS MODULE NO. 8

For Continuing Education Purposes Only

**UNDERSTANDING THE BASIC PRINCIPLES OF
PROPERTY LAW IN SOUTH AFRICA**

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ORGANISATIONAL COMPONENT

1.0 GENERAL PREMISE AND EDUCATIONAL APPROACH

The general objective with this module is a refresher and updating of knowledge amongst quantity surveying professionals in the field of property law. A problem-driven approach to learning is followed.

2.0 LEARNING ACTIVITIES

The relevant study material is available through the office of the South African Council for the Quantity Surveying Profession (SACQSP).

3.0 ASSESSMENT CRITERIA AND FEEDBACK

The registered person will require completing an on-line assessment of knowledge attained by this module with the minimum pass mark for the assessment being 60%. The results of the online assessment will be provided immediately and will be automatically inputted into the SACQSP CPD management system.

4.0 LEARNING ASSUMED TO BE IN PLACE

NQF level 7 (360 credits) or equivalent, plus 3 – 5 years of practical workplace experience in general construction administration and/or property management, providing advice on contract documents, managing production processes of construction, property leasing, financing and development processes before undertaking this particular module. Property law is inherently part of all these processes and the identification of the relationships and the management thereof would be more successful if these processes are better understood.

5.0 CPD CREDITS

The CPD credit weighting of this module is 5 Category 1 hours.

6.0 RECOMMENDED READING

In order to give you a comprehensive understanding of the subject, the author has recommended the reading of the additional publications;

- 6.1 DELPORT, H. J. 2005. South African Property Practice and the Law. A practical manual for estate agents and property practitioners, Service 12, Chapter 11.
- 6.2 SOUTH AFRICAN INSTITUTE OF VALUERS. 2007. The Valuers' Manuel. Service issue 16. Lexis Nexis.
- 6.3 VAN DER WALT, A.J. & PIENAAR, G.J. 2009. Introduction to the Law of Property. Sixth edition. Juta.
- 6.4 BADENHORST, P.J. 2006. PIENAAR, J.M. & MOSTERT, H. Silberberg & Schoeman: The law of property. LexisNexis Butterworths.
- 6.5 CONSTAS, M. & BLEIJS, K. 2004. Demistifying sectional title. BBM Publishing.
- 6.6 DELPORT, H. J. 2005. South African Property Practice and the Law. A practical manual for estate agents and property practitioners, Service 12.
- 6.7 IVSC 2011. International Valuation Standards 2011. London: International Valuation Standards Council.
- 6.8 MOSTERT, H., POPE, A. & BADENHORST, P.J. The principles of the law of property in South Africa. Oxford University Press Southern Africa (2010)

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- 6.9 NATIONAL PROPERTY EDUCATION COMMITTEE 2004. Advanced Property Valuation. (2nd ed.) Sandton: SA Property Education Trust.
 - 6.10 NATIONAL PROPERTY EDUCATION COMMITTEE 2004. Introduction to Property Valuation. (2nd ed.) Sandton: S A Property Education Trust.
 - 6.11 NATIONAL PROPERTY EDUCATION COMMITTEE 2004. Principles of Property Valuation. (2nd ed.) Sandton: S A Property Education Trust.
 - 6.12 NATIONAL PROPERTY EDUCATION COMMITTEE 2004. Property Valuation for Expropriation and Special Purposes. (2nd ed.) Sandton: S A Property Education Trust.
 - 6.13 VAN DER WALT, A.J. 2009. Law of Property: casebook for students – Sakereg: vonnisbundel vir studente. Juta.

STUDY COMPONENT

1.0 PERSONS WHO SUCCESSFULLY COMPLETE THIS MODULE WILL GAIN THE FOLLOWING COMPETENCIES:

The ability to:

- 1.1 understand the basic principles of property law;
- 1.2 interpret the role of property law in current South African law and everyday life;
- 1.3 demonstrate a clear understanding of the theoretical framework of property law;
- 1.4 apply the principles of property law in practical situations; and
- 1.5 solve problems associated with property law.

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7.2 Legislation in property development

1. INTRODUCTION

Learning outcomes

After studying this section, you should be able to understand the scope and content of the law of property by:

- conceptualising the law of property in the legal system of South Africa with specific reference to the construction industry
- identifying the different *things* that are typically found on a construction project
- explaining the different property rights, real rights and creditor's rights that could be created due to a construction contract

The law of property in its widest sense deals with all assets that could form part of a person's estate. In a construction context this is important as there are different rights created by what is known as "the law of property". In this module the distinction will be made between ownership, as the most comprehensive right, holdership & possession, and limited real rights. It will be shown that in a construction project, all these rights would normally exist, but they may sometimes be in conflict with each other, or may be in conflict with the general accepted procedure arrangements created by contract, such as stipulated in the JBCC, etc. In order to avoid these conflicts, it is important to have a good understanding of the law of property in order to identify conflicts and resolve them by way of agreement before they arise.

1.1 Introduction to the Law of Property

The law of property, or also commonly referred to as the law of things, deals with anything that forms part of a person's estate and should therefore not be confused with property as fixed assets or real estate. This is very important for anybody involved in construction, because the land, eventual building, tools and equipment, material, servitudes, bonds, etc. are all examples of property that forms part of somebody's estate. What makes this more important is the fact that ownership is transferred constantly throughout the construction process from one person to another, while certain rights are also held in various ways. Due to the number of parties involved, this could become complicated and therefore a good understanding is necessary in order to explain the situation to avoid conflicts. Diagram 1 shows where the law of property fits into the legal system in South Africa.

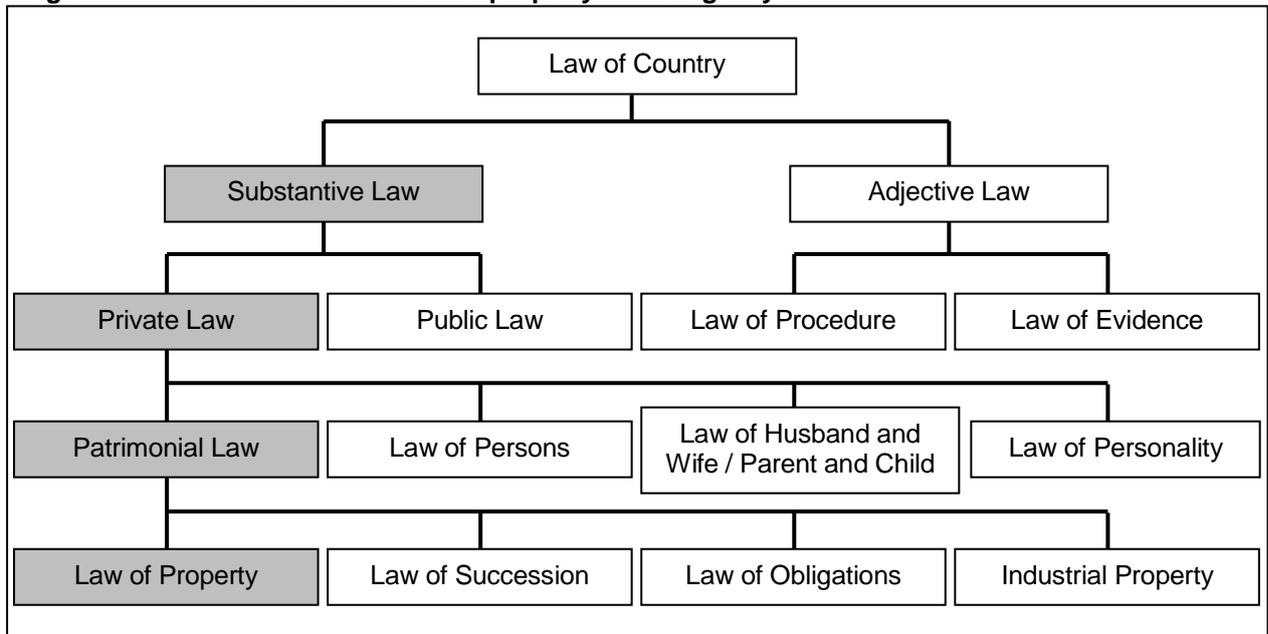
According to Knobel et al (2011) the modern law of property in South Africa and the concept of ownership, are derived directly from Roman law and still bear many similarities to it. This view should be approached with circumspection, since the socio-economic and cultural environment in which a particular legal system functions exerts an important influence on the nature, content and application of legal principles and institutions in that system. The classical Roman law of the first three centuries AD developed in an environment that differed radically from the modern Western, and particularly the African, environment. It would therefore be misleading to assume that specific legal principles in the two systems should be exactly the same. It is true, historically, that the modern law of property is the end product of a long and complex development which had its origin in classical Roman law. However, it is equally true that this legal system underwent drastic changes in the more than twenty centuries of its existence. Therefore, many characteristics of the modern law of things are the products of our time and the circumstances to which it applies.

The sources of the modern law of things are therefore to be found, not only in the historic writings of Romanists since the classical Roman period and the works of the Roman-Dutch writers, but also in statute law (legislation) and in case law (precedents created by court decisions). Since its adoption the Constitution of the Republic of South Africa, 1996, has played a major role in the development of the law in general and in particular, in the development of the law of property. Furthermore, customary law greatly influences various aspects of the law. The sources of the modern law of property can, therefore, be summarised as follows:

- i. The Constitution of the Republic of South Africa, 1996

- ii. Statutory law (legislation)
- iii. Case law (precedent)
- iv. Customary law
- v. Common law (Roman-Dutch)

Diagram 1: Position of the law of property in the legal system



Source: Adapted from Knobel *et al* (2011:32)

In order to keep everything in context, reference is made to various terminologies, which for the purpose of the law of property, are defined as follows (Van der Walt & Pienaar, 2009:7-10):

A **person** is a legal subject who can acquire and exercise rights and obligations in law. A legal subject can be either a natural person (any individual person) or a juridical person (groups or bodies operating and recognised as a single legal entity).

An **object** is anything with regard to which a person can acquire and hold a right.

Property is anything which can form part of a person's estate, including corporeal things and incorporeal interests and rights.

A **thing** is a specific category of property, which is defined with reference to its characteristics: a corporeal object outside the human body, and an independent entity capable of being subjected to legal sovereignty by a legal subject for whom it has use and value.

A **right** is a legally recognised and valid claim by a subject to a certain object. Not all relations between a person and an object are recognised and protected by law.

A **property right** is any legally recognised claim to or interest in property.

A claim or action is **lawful** when it is acknowledged and protected by existing legal principles; **unlawful** when it is in conflict with or not acknowledged by the law.

A **remedy** is a legal procedure provided by the legal system to protect a right against infringement or to control the effects of an unlawful act or situation.

Self-test:

1. Where does the law of property fit into the legal system?
2. Where do property rules come from?
3. How must the terms used in this module be understood?

1.2 Things as legal objects

In terms of the traditional definition a thing has certain characteristics, which are explained as follows:

1.2.1 Corporeality

A thing is usually defined as corporeal or tangible and could therefore be sensorially observed. Therefore the objects that are present in a construction project, such as material, plant and equipment, land, etc. would all be included in this definition, but intangibles such as the creditor's rights created by the contract itself, limited real rights such as bonds registered over the land, etc. would be excluded.

1.2.2 External to humans

A human being is not considered a legal object, but a legal subject. There is however parts of human bodies, such as hair for a wig, which may be considered legal objects, but this falls outside the scope of this module.

1.2.3 Independence

A thing must be a distinct identifiable entity, but composite things may create difficulty in determining whether components form part of a composite thing or exist as independent entities.

1.2.4 Subject to juridical control

Corporeal entities which are not susceptible to juridical control cannot be classified as things; these would include the sea and air when not separated into manageable units.

1.2.5 Useful and valuable to humans

No legal relationship can exist between a corporeal thing and a legal subject if the thing does not have a use or value to the legal subject. It does not necessarily have to have economic value, or value to every legal subject, but if it could have value or usefulness to some legal subject, the value and usefulness could be determined objectively and therefor satisfy this condition.

Things could also be classified as either:

- negotiable or non-negotiable;
- singular or composite;
- movable or immovable;
- fungible or non-fungible;
- consumable or non-consumable; and
- divisible or indivisible.

The above classifications are particularly important in the construction industry due to the negotiability of things such as natural resources and state property which are considered non-negotiable, while other items such as contractor's materials and the developer's land is considered negotiable. While the contractor's material may consist of various singular things at the beginning of the contract, when they are combined throughout the construction process, they would be considered composite thing(s) at the end of the

contract. Similarly the material would be considered movable before the contract, but once combined with each other and the land, they form part of the immovable land. Fungible and non-fungible things are common causes for disputes in the construction sector, whereby fungible things could be replaced by something similar, but non-fungible things such as a very old tree on the land could not be replaced to provide the same usefulness or value to the owner if it should be damaged. Non-consumable things would normally include the plant and equipment of the contractor, as well as material that could be distinctly identified and although forming part of a composite thing after construction, be taken apart again if so be wished, in order to obtain its original character, such as window frames, bricks, roof purlins and tiles, etc. Consumable things cannot be identified ever again after combined with another thing, such as water that is used to mix mortar or concrete. If a thing can be divided into smaller components whilst still retaining its nature and function, without the value of the components being less than the value of the original thing, it would be considered divisible. This would include land, or an old building that is demolished to make way for a new development and materials being sold as second-hand building material.

Self-test:

1. What is the relationship between property and things?
2. What is a thing?
3. What are the characteristics of a thing?
4. How are things classified?
5. What is the purpose and value of this classification?

1.3 Property rights, real rights and creditor's rights

In order to have a full understanding of property rights and ownership, it is necessary to distinguish between property rights, real rights and creditor's rights. In the construction industry this is also particularly important due to the different processes and stakeholders in the industry, where all these rights are commonly present and creating different rights and obligations, which may be in conflict with each other as well as the true intentions of the stakeholders if not clearly defined by agreement. It is therefore necessary to understand the implications of each of these rights.

1.3.1 Property rights

Property rights are all rights that form the subject of the law of property and would include real rights, which is a right in something belonging to oneself; a limited real right, which is a right in something belonging to somebody else; or a creditor's right, which is the right to claim something from another person, being a judicial person or a natural person. Sometimes it is difficult to distinguish if a right is a limited real right or a creditor's right, but it is important to understand the main difference in that a limited real right is a right in the property of somebody else, and the right is transferred to a new owner should the property be alienated, while a creditor's right is a right against a person, not a thing.

1.3.2 Real rights

Real rights usually deal with corporeal things and as it refers to rights in something belonging to oneself, it refers to ownership, which is the most comprehensive right that one can have in something. This right is however limited by the rights of others in one's property. In the construction industry the following would be examples of real rights:

- The land or construction site on which a building would be erected, which is the property of the employer.
- The material, plant and equipment of the contractor, which is the property of the contractor.
- Any material that is acquired on credit, which is the property of the material supplier.
- Any equipment, which is financed by way of a lease, which is the ownership of the financing institution.

1.3.3 Limited real rights

Limited real rights are rights in the property of someone else. Limited real rights are of particular importance due to the fact that it not only provides a right to someone else in one's property, but also limits the rights that the owner has in its own property. Examples of limited real rights in the construction industry are the following:

- A bond registered against the land on which the construction will take place, which provides a limited real right to the mortgagee in the property of the mortgagor, and limiting the rights of the owner (mortgagor) in that he is not allowed to alienate the property without the consent of the mortgagee.
- A power-line or sewerage servitude registered in favour of the municipality, which provides the municipality with a limited right for installing these services on someone's property and limits the rights of the owner in that he is not allowed to build or develop anything on these servitudes.
- A lease that is longer than ten years that is registered against the title deed of a property, which provides the tenant a limited real right to use the property and limit the rights of the owner as he cannot use the property, or do any changes / construction to the leased premises.
- The contractor acquires a lien over the property which he improved by way of construction as security for the payment of his construction fee, which limits the rights of the owner in that he cannot do anything with the property if the lien is exercised and still under control of the contractor.

1.3.4 Creditor's rights

Creditor's rights are rights that provide the holder the right to claim something from someone else, which entails that the other person must do something, refrain from doing something, pay money to the holder of the right or give the holder of the right something. Examples in this case would be:

- A construction contract provides the owner of the land a creditor's right against the contractor, whereby he can claim certain construction work to be performed.
- The construction contract mentioned above would likewise provide the contractor a creditor's right against the owner of the land, whereby the owner of the land needs to pay a certain amount of money to the contractor for work performed.
- The material suppliers obtain a creditor's right against the contractor, whereby the contractor needs to pay the supplier for material supplied.
- The financial institution that provided a bond to the owner of the land receives a creditor's right against the owner for payment of the instalments of the loan for which the bond was registered as security.

Self-test:

1. What is the difference between property rights and real rights, and between the law of property and the law of things?
2. Why and how are real rights divided into ownership and limited real rights?
3. Why is the distinction between real rights and creditor's rights so difficult?

2. OWNERSHIP

Learning outcomes

After studying this section, you should be able to understand the scope and content of ownership of property by:

- conceptualising the definition of ownership as well as the content of ownership
- understanding the nature of co-ownership and its influence on ownership
- conceptualising statutory land use
- defining the limitations on ownership
- explain the difference between original and derivative acquisition of ownership
- defining the different remedies available for the protection of ownership
- understand when ownership is terminated and the influences thereof

2.1 Introduction to ownership

Ownership is something that is formed in a society by legal-sociological, historical, economic, political and philosophical considerations and ideas regarding ownership. It is thus so that the definition of ownership may differ from time to time, or in different societies. The common law description of ownership is found in South African case law where ownership is defined as the most complete real right that a legal subject can have regarding a thing, or as the real right which gives the owner the most complete and absolute entitlements to a thing. Therefore, ownership can be limited by objective law and rights of others. Ownership, therefore, has to do with the relationship between a legal subject and the thing, as well as the relationship between different legal subjects and the thing. The content of ownership entails two components, the entitlements of the owner, and the limitations of the owner in the public interest.

2.1.1 Entitlements of the owner

The entitlements of the owner can be distinguished as:

- *Entitlement to control* which allows the owner to physically control and keep a thing
- *Entitlement to use* allows the owner to benefit from the use of a thing
- *Entitlement to encumber* is the entitlement to grant limited real rights to others in respect of the thing
- *Entitlement to alienate* entitles the owner to transfer the thing to someone else
- *Entitlement to vindicate* allows the owner to claim the thing from someone else

2.1.2 Limitations of the owner in the public interest

Although the description of ownership defines ownership as the complete and comprehensive right, it is limited by objective law. This means that an owner of property can use his property as he wants, but in such a way that someone else is not burdened or prejudiced. Various court cases and statutory legislation describe this and point out details of the extent to which ownership could be limited in the public interest. The limitations on ownership in general will be dealt with later.

2.1.3 Definition of ownership (Van der Walt & Piennaar, 2009:46)

"Ownership can be described as an abstract legal relationship, which implies that:

- (a) a legal relationship exists between the owner and a thing (object) in terms of which the owner acquires certain entitlements, and

- (b) a relationship exists between the owner and other legal subjects in terms of which the owner can require that others respect his entitlements regarding the object.

The relationship:

- (c) consists of indeterminate entitlements in that they vary from time to time regarding the same relationship or regarding different relationships, and
- (d) is limited by statutory measures, limited real rights, creditor's rights of third parties and the interest of the community."

Self-test:

1. What is ownership?
2. What is the difference between property rights, ownership and the concept of ownership?
3. What is the origin of the South African concept of ownership?
4. What is the content of ownership?
5. What is the relationship between an owner and the community? How is ownership defined?

2.2 Co-ownership

Co-ownership refers to the concept where more than one person owns an indivisible thing simultaneously in undivided co-ownership shares. When referring to co-ownership, distinction is made between free co-ownership and bound common ownership. Co-ownership is important as the co-owners cannot individually take decisions that affect the owned property as a whole without the consent of all other owners. It is therefore important to understand the basis of ownership before any dealings with property is considered, i.e. decisions to do construction, or even to alter specifications where there are co-owners involved.

2.2.1 Bound common ownership

Bound common ownership exists due to an underlying legal relationship that exists between the owners. Due the underlying legal relationship, the co-ownership cannot be terminated without terminating the underlying relationship. Examples of this would be:

- (a) The property of people married in community of property. Without ending the marriage, the one spouse cannot cease to be the co-owner of everything owned also by the other spouse.
- (b) Common property in a sectional title complex. All the owners in the complex are co-owners of the common property, but one owner cannot alienate his share of the common property without selling his section in the scheme, thereby ending his relationship with the scheme.
- (c) Partners in a construction company would own all the equipment and plant together and the one partner could therefore not alienate his share in the equipment without ending the partnership.

2.2.2 Free co-ownership

Under free co-ownership the common interest in the property being owned is the only relationship between the owners and no other legal relationship exists between them. Free co-ownership has the following implications:

- (d) A co-owner can deal with his undivided share independently in terms of alienation or encumbrance.
- (e) A co-owner can terminate his ownership unilaterally as no other legal relationship exists
- (f) Joint exercise of entitlements is not determined by an underlying legal relationship, but could be arranged between the co-owners by way of contract

Self-test:

1. How is co-ownership established?
2. How does co-ownership differ from individual ownership?
3. What forms of co-ownership exist in South African law?
4. What are the rights and obligations of co-owners regarding the property?

5. Which remedies do co-owners have at their disposal?

2.3 Statutory land use

Common-law ownership of immovables previously only considered land and the permanent attachments thereto, the air above it and everything below ground. In the past thirty years, this has been extended to also include sectional titles, shareblocks, time-sharing and housing development schemes for retired persons.

2.3.1 Sectional titles

Due to these statutory land use principles the common law principle of ownership of immovable had to be amended. Due to the fact that the land is common property and owned by way of bound common ownership between all the section owners, while the permanent improvements consists largely of the sections which are owned individually, the common law definition of ownership of fixed property had to be amended to make allowance for sectional titles. The common law principle has been amended to include sectional titles as a form of ownership of fixed property and is fully described in the *Sectional Titles Act 95* of 1986 as a composite immovable thing, called a *unit* consisting of a *section* (of a building) along with an *undivided share in the common property* which is apportioned to a unit on the basis of the *participation quota*.

A section could be either a specific portion of a building, or a building itself. The section is indicated on a plan that is approved by the surveyor general, called a sectional plan. The common property is everything that is not apportioned as sections and could include land, walkways, staircases, lifts, etc. The common property is then owned in proportion to every owner's participation quota, which is the floor area of his section, divided by the sum of the floor area of all sections in the case of residential property and as apportioned by the developer for non-residential property. Exclusive use areas are parts of the common property that are allocated for exclusive use by a specific owner. This could be allocated by way of body corporate rules, in which case the owner obtains a creditors right against the body corporate for the use, or it could be registered against the title deed of the property in which case the owner obtains a limited real right in the common property.

In order to establish a sectional title scheme, the following procedure must be followed:

- Preparation of a draft sectional plan
- Meeting with tenants
- Approval of draft sectional plan
- Application to open a sectional title register
- Registration of a sectional plan and opening of a sectional title register.

2.3.2 Share blocks

Share blocks are controlled by the *Share Blocks Control Act 59* of 1980. In contrast to a sectional title unit, the owner of a share block does not become owner of the fixed property, but merely becomes a shareholder in a share block company and obtains a creditors right against the share block company for the use of a particular part of the building owned or leased by the company. A share block scheme has various advantages over a sectional title scheme, but also some disadvantages:

Advantages:

- A share block scheme could be developed where it is not possible for a sectional title scheme, such as where the developer leases the property instead of owning it, or on agricultural property.
- Marketing could be started much earlier, even before the building is erected.
- Fewer formalities than with sectional title, therefore it is a faster and cheaper process.
- The *Share Blocks Control Act* contains various protective measures to protect the interest of shareholders.

Disadvantages:

- The shareholders do not obtain ownership, but only a creditor's right against the share block company.
- Financing is problematic as the financial institution cannot register bonds over the individual apartments. Due to the cash sales requirement it puts a limit on the marketability and subsequently on the value of such units.
- If the share block company should become insolvent the shareholders are not protected as holders of real rights.

2.3.3 Time-sharing

Time-sharing provides the holder of a time-share unit the right of use of a specific property for a specific period of time every year. Although it could be debated whether it really constitutes ownership of such a unit, the legal basis is founded in the law of property. Time-sharing is controlled by the *Time-Sharing Control Act 75 of 1983*. Time-share schemes could be based either on ownership, where the purchaser of a time-share interest becomes a co-owner in the accommodation, or it is based on a right of use, where the scheme is based on accommodation that is leased by the time-share developer, a club, or a share block scheme. The management of a time-share scheme is specifically prescribed by the *Time-Sharing Control Act*.

2.3.4 Housing development schemes for retired persons

According to the *Housing Development Schemes Control Act 65 of 1988* a housing interest could be acquired by retired persons (person older than 50 years) in a housing scheme for retired persons, which interest could be based on a creditor's right or ownership. Such a development provides the purchaser a right of occupation and can take the form of any of the mentioned statutory land-uses, except a time-share. It could also take the form of a registered long term lease, whereby the acquirer obtains a limited real right to use the property.

Self-test:

1. Which new forms of land use are regulated by statute?
2. How is this different from common law ownership?
3. What is a sectional title unit?
4. How is a sectional title scheme established?
5. How does sectional titles function in South African law?
6. What are share blocks?
7. How is a share block scheme established?
8. How do share blocks function in South African law?
9. Which forms of housing development schemes for retired persons can be distinguished?
10. What is the nature of the right that a retired person has in a housing development scheme?

2.4 Limitations on ownership

Ownership was defined as providing the owner with the most complete right in a thing, but ownership is limited in various ways which prevents an owner the full entitlements towards his property. These limitations are categorised under the following:

- Statutory limitations
- Creditor's rights of third parties against the owner
- Limited real rights of third parties in the property
- Provisions of neighbour law

2.4.1 Statutory limitations

There are a number of specific acts that limits the entitlements of an owner towards his property. The reason for this is to ensure that an owner uses his property within the interest of the community. These statutory provisions with specific reference to fixed property are:

- Taxation – levying of property taxes by government in order to provide for services to the community.
- *Restitution of Land Rights Act* 22 of 1994 – for the restoration of land rights.
- *Expropriation Act* 63 of 1975 – enabling government to take land from owners, subject to compensation, in the interest of the community
- *Physical Planning Act* 125 of 1991 – to ensure that there is harmony in the use of land by different owners in the interest of the broader community.
- *Environment Conservation Act* 73 of 1989 and *National Environmental Management Act* 107 of 1998 – to effectively protect and control the use of rural land.
- *National Building Regulations and Building Standards Act* 103 of 1977, *National Environmental Management: Air Quality Act* 39 of 2004, *Health Act* 63 of 1977, *Environment Conservation Act* 73 of 1989 and *Housing Act* 107 of 1997 – Dealing with the regulation of the nature and standard of building in urban areas.
- Various other acts, such as the *Development Facilitation Act* 67 of 1995, the *Land Reform (Labour Tenants) Act* 3 of 1996, the *Extension of Security of Tenure Act* 62 of 1997 and the *Prevention of Illegal Eviction from and the Unlawful Occupation of Land Act* 19 of 1998.

2.4.2 Creditor's rights of third parties against the owner

The entitlements of the owner of property could be limited by way of contract. Thereby a third person obtains a creditor's right against the owner of the property, which limits the owner's entitlements. The most common example in the built environment would be a construction contract whereby a contractor obtains a creditors right against the owner to perform construction work and receive payment for it. Due to this process the owner has limited use of the property while the contractor is in control of the property as a result of the construction work. Another example is where a property owner grants a short term lease to a tenant on his property. During the period of the lease the owner cannot use and enjoy the property as it is under the control of the tenant. It is important to note that with creditor's rights of third parties, the right is not enforceable against successors in title. Therefore the right cannot be enforced against a next owner, should the property be sold, but the third party may have a claim against the previous owner personally.

2.4.3 Limited real rights of third parties in the property

Limited real rights of third parties also limit the entitlements of the owner, but it has distinct differences with creditor's rights. These are as follows:

- The limited real right is a right against the property and not against the owner personally
- The right is enforceable against successors in title
- The right is registered against the title deed of the property (such as mortgages and servitudes), except where it originated due to operation of law (such as liens and hypothecs)

2.4.4 Neighbour law

Neighbour law has very important implications for the owner of a property and also specifically in the built environment. The principle of neighbour law originated in common law and implies that no owner of property can use and enjoy his property to the extent that it prejudices or burdens the use and enjoyment of another person on his property. Five aspects are distinguished:

- Nuisance
- Lateral and surface support
- Encroachments
- Interference with the natural flow of water
- Elimination of danger

2.4.4.1 Nuisance

With nuisance a distinction is made between nuisance in the narrow sense and in the wider sense. With nuisance in the narrow sense an owner of property is using his property in such a way that his neighbour is suffering inconvenience, resulting in the neighbour being unable to comprehensively enjoy his property. Examples of this are typically noise or unhealthy situations that are created, i.e. where construction work is being performed and the contractor does not take care to limit the noise of the machinery, control dust, etc. Due to the fact that the contractor is performing work on behalf of the owner of the property, it is assumed that the owner is causing an infringement of his neighbour's rights.

Nuisance in the wider sense is where the unreasonable use of a property by the owner causes physical damage to his neighbour. An example of this would be where an owner of property is performing construction work and the contractor uses explosives for excavation purposes, during which process the neighbour's buildings are damaged.

2.4.4.2 Lateral and surface support

As a result of the owner also being the owner of the soil below the surface of his property, the soil on his property supports the soil of his neighbour's property. It is therefore accepted that the owner cannot remove this support to his neighbour's property simply due to the fact that it is his own property. This is often required where construction of basements take place and excavations need to be done up to the boundary of the property. In such a case the continuous support of the neighbour's property is the responsibility of the owner doing the excavations. Any damages, such as buildings that are cracking due to soil collapsing on the neighbour's property after the excavation, would be a claim against the owner who removed the support.

2.4.4.3 Encroachments

Encroachments include the encroachment of buildings as well as plants, roots, leaves and branches of trees.

As regards buildings, no part of the building may exceed the boundaries of the property, whether any part of the building above ground, or the foundations below ground. Due to buildings being such a fixed structure it is sometimes difficult to rectify the encroachment. The remedies for rectifying the situation could be summarised as follows:

- Removal of the encroachment
- Compensation to the owner
- Transfer of the encroaching section to the encroacher with compensation to the owner
- Termination of occupation of the encroaching section by the encroacher and compensation by the owner to the encroacher

Plants, leaves and branches of trees could be requested by the aggrieved owner that the encroachment be removed. If this is not done within a reasonable time, an order to affect this can be obtained. With roots the aggrieved owner cannot request the encroacher to remove the roots, but if the roots are causing damage to structures or the nuisance caused warrants it, the owner can get an order for the encroacher to remove the trees.

2.4.5 Interference with the natural flow of water

With urban and rural land, the interference with the natural flow of water is treated in different ways. The essence of this is however that although a neighbour should in the normal course of events, accept natural water flowing from higher lying properties, the natural flow of water may not be disturbed to such an extent that the concentration, volume or direction of the flow could cause damage or nuisance to a neighbouring property.

2.4.6 Elimination of danger

It is accepted that any owner of property may not do anything on his property that could cause a dangerous situation for any neighbour or to the public. This includes keeping of dangerous animals, or storage of explosives, flammable liquids or other dangerous substances. In the built environment this is very important when considering the use of explosives for demolition or excavation, storage of fuel for the use in plant and equipment, certain equipment that needs careful or specialised handling, etc. For these reasons there is legislation that closely regulates these items, as well as health and safety regulations in order to avoid dangerous situations. Although these laws are not specifically noted here, it is important to carefully investigate applicable legislation before any possible dangerous situation is created.

Self-test:

1. How is ownership limited?
2. What are the most important statutory limitations regarding ownership?
3. Why is there a distinction between limitations on urban and rural immovable property?
4. What recent legislation limits ownership of immovable property?
5. Is ownership of movable property also limited?
6. What is the difference between limitations based on real rights and limitations based on creditor's rights?
7. What limitations are there on the ownership of neighbours?
8. What principles apply in the case of nuisance?
9. What are the obligations of neighbours regarding lateral support, encroachments and the flow of water?

2.5 Acquisition of ownership

Ownership could be acquired in two different ways according to the South African legal system, original acquisition and derivative acquisition of ownership. With derivative acquisition the principle is followed that an owner cannot transfer more entitlements or rights than he had himself. Therefore there should be a preceding owner that is transferring certain rights in the property to the new owner.

2.5.1 Original acquisition of ownership

With original acquisition of ownership there is no previous owner that influences the entitlements of the new owner, therefore the entitlements of the new owner is unique and dependent on the specific item acquired and the way in which it was acquired. The different ways in which original acquisition can be acquired are as follows:

2.5.1.1 Appropriation

Appropriation is the unilateral control of a thing that was not previously owned by anyone, with the intention of becoming the owner.

2.5.1.2 Accession

Accession is a concept that is very important in the built environment, especially for construction. It takes place when two independent things are joined together to such an extent that the one thing loses its independent identity and cannot be distinguished separately anymore and becomes part of the other thing. This could be that accession takes place between immovable property to immovable property, such as a changing river bed due to the flow of the river, or sand dune due to wind, movable to movable, such as welding, painting or writing, or movable to immovable, such as planting or construction.

The importance of this is that the owner of the smaller or movable thing, such as the material used for construction, loses his ownership the moment that the material is attached to the larger or

immovable thing (the land). Therefore careful consideration should be taken as to whom the owner is at the time of attachment, and the effect on the owner due to the attachment. In this regard it may be that material is being purchased on credit, in which case it remains the property of the credit grantor or supplier when it is delivered to the contractor, but the moment the contractor attaches it to the land, the supplier loses his ownership and he no longer has a claim against the material. The same would apply if it was the contractor's own material. This has an impact on any legal claims that may arise from the construction process, i.e. if the owner does not pay for the material that he became owner of due to accession, and the contractor therefore cannot pay his supplier, the supplier could claim compensation directly from the land owner due to enrichment, but he cannot claim the materials as it no longer has an independent identity.

2.5.1.3 Manufacture

Ownership under manufacture only passes to a person when he manufactures something from material belonging to somebody else, without the owner's permission, causing the material to lose its independent identity and being shaped so that it cannot be changed back to its original state. In this case the owner of the material would have a claim of compensation against the owner of the new thing that was created for the value of the material, but not for the thing that was created.

2.5.1.4 Mixing and fusing

Mixing takes place when solids of different owners are mixed and fusing is when liquids and liquid solids of different owners are mixed. The requirement is that the different materials should not be divisible anymore, the mixed or fused materials shouldn't have been attached to something else, and the mixing or fusing should have happened without the owner's consent.

2.5.1.5 Acquisition of fruits

Acquisition of fruits takes place by separation and gathering. Usually the owner of the principle thing becomes the owner of the fruit, but there are some exceptions, such as:

- A *bona fide* possessor becomes the owner of separated fruit after gathering, but a *mala fide* possessor is not entitled to any fruit.
- A usufructuary.
- A lessee that gathered the fruit.

2.5.1.6 Expropriation

With expropriation an owner of a thing loses his ownership without consent, but subject to compensation, and ownership then vests in the expropriator. The effect of this is that the entitlements of the previous owner are not transferred to the expropriator and therefore the entitlements are not necessarily the same for the previous owner and the expropriator. More details on expropriation is provided later.

2.5.1.7 Forfeiture and confiscation

Things that are used for the purpose to commit a crime could be declared *forfeit* to the state and property could be *confiscated* by the state if it is considered in the public or state's interest to do so, such as in a state of emergency. Normally with confiscation there may be compensation payable, but with forfeiture no compensation is applicable.

2.5.1.8 Statutory passing of ownership

Statutory passing of ownership takes place without the previous owner's co-operation, but the same limitations are being passed on to the new owner. This usually takes place in the event of insolvency or liquidation of the owner of the property.

2.5.1.9 Prescription

According to section 1 of the *Prescription Act* 68 of 1969, a person can become the owner of property which belongs to someone else by means of prescription provided he is openly in possession of the property for an uninterrupted period of 30 years as if he was the owner thereof. An example of this is where a boundary fence is incorrectly placed; the land that is included by the fence is 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 with him. However, in terms of section 6 of the *Deeds Registries Act* 47 of 1937, the Register of Deeds will not cancel the former owner's registration and register the new person as owner unless a Court order authorising this has been obtained.

2.5.2 Derivative acquisition of ownership

In the case of derivative acquisition of ownership, the co-operation of the current owner or transferor is required, therefore the acquiring owner obtains all rights that the previous owner had and also the obligations or limitations that come with the property. This type of acquisition of ownership is also very important in the built environment, as fixed property is often transferred and subject to specific requirements, while, although said earlier that materials are acquired by way of accession in a construction process. It also often happens that ownership is transferred prior to accession and therefore derivative acquisition is applicable (not original acquisition such as accession). An example of this is where payment is made for materials on site or off site, where there is a requirement by the JBCC contract that ownership shall be transferred to the land owner upon payment.

The requirements for the transfer of ownership in general are as follows:

- The item to be transferred must be negotiable
- The transferor must have contractual capacity
- The transferor must be the owner of the thing
- The transferee must have the contractual capacity to accept the transfer of ownership
- The ownership must be accepted by the transferee or his nominee
- Transfer of ownership of movables only takes place with delivery and with immovable in the event of registration in the deeds office
- Delivery of movables and the registration of immovable must take place with the intention of the transferor to transfer ownership and the intention of the transferee to accept ownership.
- There must be a legal cause for transfer
- If ownership is transferred based on a contract of sale, transfer will only take place when the full purchase price has been paid, unless credit was granted by the seller to the buyer.

Although an obligation creating agreement is deemed important in establishing the transferor and transferee's intentions in such a transfer of ownership, the invalidity of such an agreement does not invalidate the transfer of ownership. This is based on the abstract system of transfer of ownership, where other circumstances at the time of transfer are taken into consideration in establishing the legal cause of transfer. Various decisions in case-law confirm this and is also confirmed as being applicable to immovable property in *Prophitius v Cambell* 2008 (D).

There is also a distinction between credit and cash sales. With cash sales transfer is only passed when the purchase price has been paid in full. It is generally accepted that a sale is a cash sale, unless circumstances prove that it is a credit sale, such as where the seller agreed that the purchase price can be paid at a date after delivery, or where the seller agreed on security for the future payment of the purchase price. In the case of credit sales, an explicit agreement should state that transfer of ownership will take place only after the final instalment has been paid.

2.5.2.1 Delivery

Delivery is a requirement for transfer of ownership of movables. Distinction is made between *actual delivery* and *constructive delivery*. With *actual delivery* the movable asset is physically handed over to the purchaser in such a way that he can exercise control as the owner. With *constructive delivery* the movable asset is not physically handed over due to its size or any other circumstance that prevents actual delivery, but the manner in which control is exercised indicates the intention of the transferee to be the owner. There are various categories of constructive delivery:

- *Clavium traditio* where an instrument to control the asset, such as a key, is handed over whereby the transferee can exercise physical control
- *Traditio longa manu*, or delivery with the long hand, where the asset cannot physically be delivered due to its size or weight, but is pointed out instead so that the transferee can exercise physical control, typically like a heap of bricks.
- *Traditio brevi manu*, or delivery with the short hand, whereby the asset is already in control of the transferee, but without the intention to be owner. Upon change of intention, delivery has deemed to take place. This is typically the case of a lessee purchasing the asset or a credit sale whereby it is agreed that transfer will only take place on payment of the last instalment.
- *Constitutum possessorium* takes place where the transferor retains control of the asset, but the intention of both parties change to such an extent that it is the intention that ownership is passed and the transferor now controls the asset on behalf of the transferee. This generally takes place with material off site whereby payment is made for such material and it is agreed that the supplier would retain control over the material until the construction site is ready for the installation of these materials, with ownership transferred upon payment.
- *Attornment* is where the asset is controlled by a third party, but the intention changes in such a way that the third party no longer controls the asset on behalf of the transferor, but now controls it on behalf of the transferee. This would be the case with materials on site where the contractor controls materials on behalf of the supplier until payment is received by the supplier, upon which ownership is transferred to the owner of the land and the contractor now controls the materials on behalf of the owner of the land.

2.5.2.2 Registration

With immovable property, transfer of ownership is done by means of registration in the deeds office in accordance with the *Deeds Registries Act 47 of 1937*. As a result of the application of the publicity principle, whereby the creation, transfer and termination of all rights in immovable assets take place. The fundamental principles of the *Deeds Registries Act 47 of 1937* are as follows:

- Every piece of land that is transferred into private ownership must be indicated on a general plan or diagram, framed by a land surveyor and approved by the Surveyor-General.
- Real rights in immovable property cannot be transferred in any other way than registration in the deeds office, except for certain rights acquired by operation of law.
- A right in immovable property cannot be cancelled in any other way than provided for by the Deeds Registries Act, except by an order of Court.
- Upon registration, the transferee becomes the owner of the property in his own right.
- The transfer of property and subsequent deed must be based on a sound reason or legal cause for the transfer.
- Registration of the new deed cannot be effected unless the transferor is in possession of the existing deed.
- Every deed that is to be registered must be prepared by a registered conveyancer.
- Every deed is inspected for accuracy prior to registration.
- Transfer of immovable property and cession of rights in immovable property must follow the sequence of successive transactions as it took place.

- A mortgage bond may only be registered by the owner of immovable property, or the authorised conveyancer that acts on his behalf.

In terms of section 16 of the Deeds Registries Act, ownership of immovable property can only be transferred by means of a *deed of transfer*, while limited real rights can only be transferred by way of a *deed of cession*. Unalienated State land can only be conveyed by way of a *deed of grant*.

Registration of rights in immovable property has the effect that:

- The person concerned is deemed to be the lawful owner of the right.
- Registration is regarded as notice to the rest of the world of the validity of the right.

Notwithstanding the above, South Africa follows a negative registration system, where the facts on the deed is not guaranteed.

Every deed of transfer must be prepared in accordance with the prescribed forms set out in the Deeds Registries Act, and must contain the following information:

- Full names of the transferor and transferee, as well as their birth dates or official national identity numbers in the case of natural persons, or their registration numbers in the case of judicial persons. There are also special requirements for married persons.
- The legal cause for the transfer.
- The detailed legal description of the property.
- A clause which sets out the existing as well as any new conditions of title which are to be registered.
- A consideration clause that provides the detail with regards to any payment, i.e. the purchase price.

There are various other certificates of registered title, or substituted title deeds that accompany the deed of transfer to make up the title deed. The deeds Registries Act provides for the following:

- Certificate of registered title of undivided share
- Certificate of registered title of aggregate share
- Certificate of registered title of properties held under one deed
- Certificate of consolidated title
- Certificate of registered title to correct error in registration
- Certificate of uniform title
- Certificate of registered title of a portion of a piece of land

When submitting a deed of transfer for registration, the following documents must accompany the request:

- Power of attorney to pass transfer
- Transfer duty receipt or VAT certificate
- Rates clearance certificate
- The mortgagee's consent
- Consents required in terms of the existing title deed
- Consents required in terms of legislation

The cost of transfer is based on the principles set out in the *Transfer Duty Act* 40 of 1949 and the *Value-Added Tax Act* 89 of 1991.

Self-test:

1. What is the difference between original and derivative methods of acquiring ownership?
2. What is appropriation?
3. Which principles are applied in the case of acquisition of ownership by means of planting and building?
4. What is manufacture?
5. How is ownership acquired by mixing?
6. When is the ownership of the fruits of a thing acquired?
7. What are the requirements for acquisition of ownership through prescription?

8. What is the difference between passing and transfer of ownership?
9. What are the requirements for derivative acquisition of ownership?
10. What are the requirements for payment of the purchase price in the case of cash sales and credit sales respectively?
11. Which forms of transfer can be distinguished?
12. What is constructive transfer?
13. What are the requirements for *constitutum possessorium* and why is this form of transfer applied with caution?
14. How is attornment applied in practice?
15. How does transfer of ownership of immovable things take place?

2.6 Protection of ownership

The protection of ownership is distinguished by *real remedies*, *delictual remedies* and *enrichment action*.

2.6.1 Real remedies

The purpose of these remedies is to protect the owner's entitlements to his property by removing any infringement on his entitlements or restore physical control of the property. Different remedies that could be applied are:

- Rei vindicatio
- Actio negatoria
- Inderdict
- Declaratory order

2.6.2 Delictual remedies

With delictual remedies, the aim is to compensate the owner for damages due to loss resulting from unlawful and culpable actions by others. Remedies distinguished here are:

- Actio ad exhibendum
- Condictio furtive
- Actio legis aquiliae

2.6.3 Enrichment action

Enrichment action provides for the compensation to the owner due to the unjust enrichment of another person due to the use and consumption of the property of the owner.

The remedies are only mentioned briefly as it could be very technical and would need detailed discussion to explain in full. For further information it is suggested that more detailed textbooks on the law of property, law of delict and law of enrichment be consulted.

Self-test:

1. How can one distinguish between the various remedies for the protection of ownership?
2. Which requirements must be met before the *rei vindicatio* can be instituted?
3. What are the most important defences available against the *rei vindicatio*?
4. In what circumstances would estoppels be a defence against the *rei vindicatio*?
5. Which delictual remedies are used to protect ownership?
6. What are the requirements for the *actio legis aquiliae*?
7. When can the owner institute an enrichment claim?

2.7 Termination of ownership

Termination of ownership generally happens when someone else obtains ownership and as such is the opposite of the acquisition of ownership. As such termination of ownership will only be discussed very briefly. As a rule, ownership is terminated and the consequences thereof are as follows:

- Death of owner – when the owner of property dies, he cannot be the owner of anything anymore, as he does not have the mental capacity to own anything. In this event the ownership vests in the deceased estate until it is passed to the heirs.
- Object no longer exists – this is relevant for property that is destroyed as well as where the property loses its independent identity, i.e. where it is mixed, fused or due to appropriation with other property (also refer to termination of legal relationship due to operation of law).
- Termination of legal relationship – the legal relationship is terminated where the owner willingly transfers the ownership to somebody else, where he loses physical control over specific types of property and by the operation of law. Last-mentioned includes:
 - Acquisitive prescription
 - Accession
 - Manufacture
 - Insolvency of the owner
 - Attachment and sale in execution
 - Forfeiture
 - Confiscation
 - Expropriation
 - Abandonment condition

Self-test:

1. In what ways can ownership be terminated?
2. What happens to an owner's assets when he dies?
3. Can ownership continue to exist if the thing is destroyed?
4. Does an owner lose his ownership if he no longer controls the thing physically?
5. What requirements must be met for the transfer of ownership?
6. In what circumstances is ownership terminated by operation of law?

3. POSSESSION AND HOLDERSHIP

Learning outcomes

After studying this section, you should be able to understand the scope and content of possession and holdership of property by:

- conceptualising the definition of possession and the definition of holdership as well as the content of both
- understanding the nature of possession and holdership, the difference to ownership and its influence on ownership
- explaining the difference between lawful and unlawful control
- understanding how control over different types of assets are established
- defining the different remedies available for the protection of possession and holdership
- understanding when possession and holdership are terminated and the influences thereof

3.1. Introduction to possession and holdership

Possession and holdership is two special kinds of relationships with an asset that may provide the holder with certain rights to it. The distinction is largely based on the lawfulness of the control with which the asset is being held as well as the mental attitude of the controller. The principles of possession, holdership and control is very important aspects of the built environment as these are the source of many disputes and contractual defaults due to the misunderstanding of the implications thereof. Consider for instance a construction contract, whereby the land is owned by somebody and the ownership is protected as such by law, but during the contract, the land is under the control of an independent contractor, whose rights are also in need of protection and whose rights are limiting the rights of the owner. Similarly the property of an investor who has ownership over an office block could be under the control of a tenant, who has certain rights to the property in his own right, which needs protection and limits the rights of the owner.

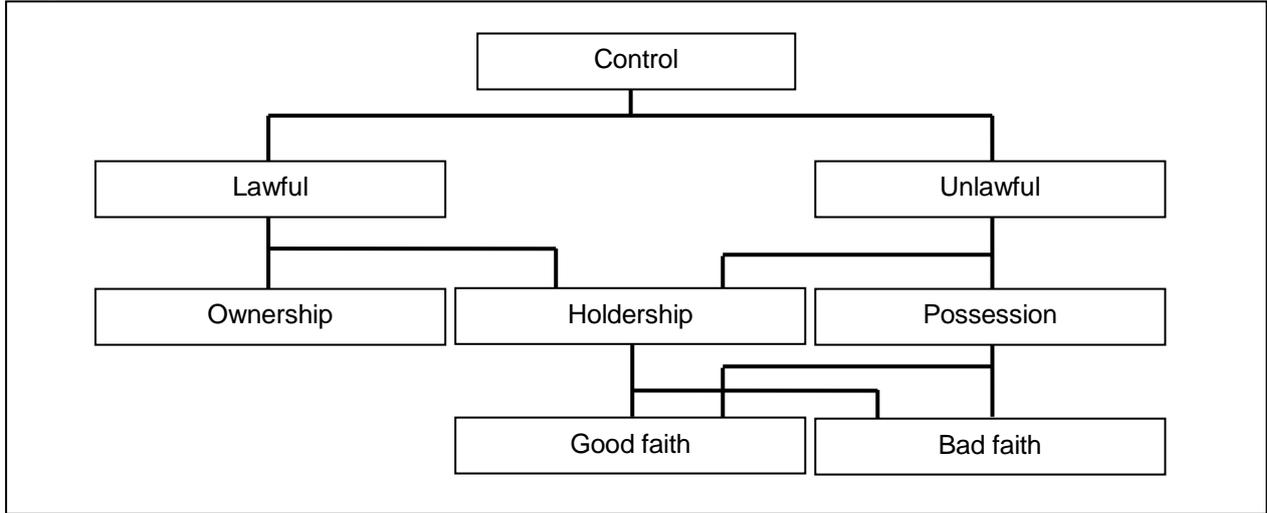
When we refer to control, it is the actual and physical manner in which an asset is being held or dominated. Therefore a property could be controlled by either the owner or another person. Control is then also distinguished to be lawful or unlawful. Control is said to be lawful when it is acquired and held in accordance with the applicable rules and principles of law and as such is recognised and protected by law. Control is unlawful when it is acquired and held in contravention with the principles and rules of law and are therefore not recognised or protected, although there are still certain implications attached to it.

Control could then also be in good faith (*bona fides*) or in bad faith (*mala fides*). When control is lawful, good faith and bad faith is irrelevant and therefore the control will be protected under the normal circumstances of ownership and holdership. With unlawful control the distinction is however important as it influences the legal consequences of the manner in which the asset is controlled. With good faith it is implied that the holder is unaware of the unlawfulness with which the asset is being held, while bad faith occurs when the holder knowingly controls the asset unlawfully.

A distinction should then also be made between possession and holdership. Under holdership, the asset owned by somebody else is controlled without the intention to be the owner, and the lawfulness of the control is determined by the manner in which the control has been acquired, or retained after specific events. Possession is however when an asset owned by somebody else is controlled as if the owner and as such possession is always unlawful.

The various forms of control could be summarised as shown in diagram 2.

Diagram 2: Distinction between various forms of control



Source: Van der Walt & Pienaar (2009:174)

When considering a typical construction project, the land is normally controlled by the owner (ownership) until it is handed over to the contractor, who is then the holder in good faith. If a dispute arises and the contractor exercises his lien (refer section) it could be in good faith of protecting his interests and the contractor having the mental attitude that he has a valid claim, then it is holdership in good faith. Last mentioned also depends on the legal steps which the contractor undertook before he exercised his lien which will determine if the control is lawful or unlawful. If the contractor knows that he does not have a valid claim, but the dispute arose from poor quality performance, and he nevertheless exercises a lien in order to force the owner to pay him more money, the control is in bad faith. He still holds the property as contractor exercising a lien, not as if the owner, therefore it is holdership, not possession.

When material is offloaded on site and the contractor is under the impression that the material was ordered by his office, but in fact it was ordered by the owner for use by himself after completion of the existing contract, and the contractor takes the material for use on another site, then it is possession, as he acted as if it is his own material. It is in good faith because he was under the impression it is his own material, but if he knew that it is the owner of the land's material and he took it with the intention to replace it with other material that he will order later and without the owner's consent, then it is possession in bad faith.

Self-test:

1. When is control lawful?
2. When is control unlawful?
3. What is the distinction between ownership, possession and holdership?

3.2. Acquisition of possession and holdership

Acquisition of possession and holdership is substantially different from the acquisition of ownership in that the actual transfer of ownership does not take place. Thus the emphasis is on the different elements of possession or holdership to determine if and how it is acquired.

3.2.1 Control

Control was discussed in various sections before and it was shown that control is a consequence of delivery in the acquisition of ownership and that the way in which an asset is controlled may indicate the difference between ownership, possession and holdership. Control has two elements, the physical element

and the mental element, which are also elements of possession and holdership. Therefore in order to determine if possession or holdership was acquired, the first element to consider is the control over the asset, how the control was acquired and what the intention was when the control was acquired. In the built environment such control is often given to someone else when for example a construction contract is signed and the control over the land is given to the contractor for purposes of the construction, or when a lease is signed and the control is passed to the tenant for occupation of the building.

3.2.2 Corpus

Corpus or the physical element of acquisition of possession or holdership is the actual way in which control is acquired. In the examples in 3.2.1 it was mentioned that control could be passed to a contractor or a tenant, without transferring ownership. In the case of the contractor, the lease would probably state that there is a site hand-over date, on which date the owner will physically hand over the keys to the gate of the property to the contractor, or specifically point out that the contractor can start to work on that date. In the case of the lease agreement, the tenant would similarly receive the keys to the property on a specific date stated in the lease agreement as the occupation date. The physical action of handing over the property or asset, or any instrument to control the asset is the *corpus* element of acquiring possession or holdership. Also refer to section 2.5.2.1 and consider the different types of delivery to establish how physical control and therefore possession or holdership could be acquired.

3.2.3 Animus

Animus or the mental element of acquisition of possession or holdership refers to the intention with which control was acquired. This largely will distinguish the difference between possession and holdership and will also distinguish it from ownership. With reference to the mentioned examples of construction contract and lease agreements, it is also possible to determine the attitude with which the asset is controlled. In the case of the construction contract, the agreement would state the terms of the contract, stating that the purpose of transferring control is with the intention of the contractor performing construction work. Therefore the mental attitude is stated in the contract that the control is for a specific purpose and for a specific period of time. Due to the fact that the mental attitude is that the control is given to the contractor to perform construction work, it is identifiable as holdership and not possession. In the case of the lease agreement also the agreement states the terms of contract which reflects the mental attitude that control is transferred for purposes of use and occupation, but not to take ownership, again it points to holdership rather than possession. Certain aspects of *animus* should be taken into consideration when determining whether control points to acquisition of possession or holdership, mentioned as follows (Van der Walt & Pienaar, 2009:187):

- Mental capacity is required
- Conscious control is required
- Intention to hold for a principal is insufficient for own control
- A specific intention with regard to control is required, namely,
 - intention to hold as owner, or
 - intention to hold for one's own benefit
- Nobody can change the nature of control simply by means of a change in the intention

3.2.4 Direct and indirect control

When an asset is controlled directly, the control is physically exercised by oneself in person. Indirect control is when somebody else is exercising physical control, but one has control over that person. This would typically be when a construction company is considered to have control over a construction site, but the company is not exercising the control directly. Instead it has employees in direct control of the site (typically a site agent) that are being controlled by way of instructions from the directors of the construction company. The company (directors) would therefore have indirect control over the site.

3.2.5 Shared control

Shared control is when two or more people would have simultaneous control over the asset. Typically the construction manager and the site agent both have keys to the site and can therefore access the premises independently without being interfered with by the other. They would then share the control over the site.

Self-test:

1. What is the difference between possession and holdership?
2. What are the elements of possession and holdership?
3. When is a person effectively in control of property?
4. How is possession acquired?
5. How is holdership acquired?
6. How does the acquisition of possession and holdership relate to the acquisition of ownership?

3.3. Protection of possession and holdership

As with the protection of ownership, the protection of possession and holdership can become very technical. The remedies are therefore only briefly discussed, depending on the circumstances at the time. Should more information be required, more advanced textbooks on property law could be consulted.

3.3.1 Declaratory order

The court sets out the rights and obligations to the parties involved before an actual infringement occurs.

3.3.2 Interdict

A summary court order that orders somebody to do something, stop doing something, or refrain from doing something in order to prevent infringement. This is normally granted upon urgent application.

3.3.3 Spoliation

A summary court order that restores control if it was unlawfully taken away through self-help. This is normally also granted upon urgent application, without investigating the merits of the parties' rights to control.

3.3.4 Possessory action

An action based on the merits of a stronger right to control which has the aim to claim the asset or the value thereof from a person with a weaker right.

3.3.5 Claim for delictual damages

An action whereby the claimant can claim for compensation of damages due to the defendant's unlawful actions.

3.3.6 Condictio furtiva

A special type of remedy to recover the value of an asset from a thief or his heirs after it was stolen.

3.3.7 Extended enrichment action

A remedy to claim for compensation from the owner of an asset, if his estate was unjustifiably enriched due to actions by the plaintiff.

3.3.8 Constitutional protection of property rights

Protection from unlawful interference by the state in terms of section 25 of the constitution of 1996.

Self-test:

1. What does the protection of possession and holdership entail?
2. What is the difference between remedies for the protection of rights and other remedies?

3.4. Termination of possession and holdership

As mentioned in section 3.2, there are a number of requirements for the acquisition of possession and holdership. When one of these elements is not present, it would mean that possession or holdership would be terminated. There are also a number of other ways in which this could be the case. The different ways in which possession or holdership could be terminated, are discussed below.

3.4.1 Death of the subject

When the person who has control over the asset dies, the possession or holdership would be terminated, as a dead person cannot exercise control.

3.4.2 Object destroyed or lost

When the object is destroyed or lost, and all hope to find it again is lost, then possession or holdership is terminated, as the physical element of control is now not present. In this regard also refer to transfer of ownership, where the object could lose its independent identity, i.e. when a brick is being built into a wall, when the brick ceases to have its own identity and therefore the holdership over the brick is terminated.

3.4.3 Physical element terminated

When the physical element is terminated, the holdership or possession will be terminated. With a typical construction contract, and more specific the JBCC suite of contracts, the contract will call for a specific practical completion date, whereby the construction works should be sufficiently advanced for the purpose for which the building was designed. On this date, the contractor will hand back the instrument (keys) with which the property is controlled. This physical termination of the contractor's ability to control the property will then terminate the holdership of the property. Similarly, at the end of a lease agreement, the tenant will hand over the keys of the property to the owner of the property, which will terminate the holdership of the property.

3.4.4 Mental element terminated

By terminating the mental element of control, the holder or possessor loses the intention to holdership and therefore the possession or holdership is terminated. With a construction contract, the handing back of the keys on the stipulated practical completion date indicates that the contractor does not wish to control the site any longer. As such the mental element is terminated and so is the holdership. If the contractor would abandon the site and remove all his tools and material before the construction is completed, then it may also be an indication that he lost the mental element of control and therefore the holdership is terminated. This does not terminate the contractor's obligation to complete the construction work, for which the owner has a creditor's right against the contractor, but that is a different issue.

3.4.5 Transfer of control

The examples used where the contractor handed back the keys to the construction site, or the tenant

handed back the keys to the leased premises, indicate that he does not have the ability to continue to control the respective properties, and also indicates that he does not have the mental intention to continue to control the properties. In effect he also transfers the control back to the owner. It could be that control could be similarly be transferred to somebody else, other than the owner, i.e. a new tenant, or another contractor. In such a case the original holdership is terminated.

3.4.6 Operation of law

Possession and holdership could also be terminated by way of the operation of law, irrespective of the mental or physical elements of control. More information on this could be obtained from property law text books.

Self-test:

1. When is possession (or holdership) terminated?
2. What happens when the possessor (or holder) dies?
3. Is possession (or holdership) lost when the object is destroyed or lost?
4. Can possession (or holdership) be retained if one of the elements (physical or mental) is terminated?
5. How is possession (or holdership) affected when it is transferred to another person?
6. Can possession (or holdership) be lost when the elements (physical and mental) are still present?

4. LIMITED REAL RIGHTS AND OTHER RIGHTS IN PROPERTY

Learning outcomes

After studying this section, you should be able to understand the scope and content of limited real rights and other rights in property by:

- conceptualising the definition of limited real rights and the definition of other rights in property as well as the content of both
- understanding the nature of limited real rights and other rights in property and how these relate to rights in property already discussed in the text
- explaining the different types of servitudes and restrictive conditions and how these are acquired and terminated
- defining the different forms of security that are distinguishable
- defining real security rights created by law and understanding when these rights are created
- understanding what other rights in property are possible

4.1 Introduction to limited real rights and other rights in property

Rights in property could be categorised as the rights in one's own property or rights in the property of another person. It was noted previously (refer section 1.3) that ownership is the most comprehensive right in a property, which is a real right in your own property. Limited real rights is a right in the property of another person, without providing the right of ownership, and thereby also limiting the right of the owner. The different types of limited real rights that could be distinguished are the following;

- servitudes,
- restrictive conditions,
- pledge as a form of real security,
- mortgage as a form of real security,
- real security rights created by law,
- other property rights such as leases, land-use rights and mineral rights.

Self-test:

1. Which rights in property are discussed in the text?
2. How do limited real rights relate to the other rights already discussed in the text?
3. What is the nature of these limited real rights?

4.2 Servitudes and restrictive conditions

A servitude is a limited real right that grants the holder of the servitude a right or entitlement in the property of another person. This entitlement could be in person's capacity as owner of a property or in his personal capacity. These entitlements of the holder of the servitude likewise limits the entitlements of the owner of the property.

Two main categories of servitudes are distinguished, praedial servitudes and personal servitudes.

4.2.1 Praedial servitudes

With praedial servitudes, distinction is made between a servient property and a dominant property. The servient property is the property over which the servitude is registered, while the dominant property is the

property that will benefit from the servitude, or in which favour it is registered. A praedial servitude grants the holder of the servitude certain rights in the servient property, which allows the holder certain entitlements in his capacity as owner of the dominant property. With this definition of a praedial servitude it is evident that if the dominant property would be sold, the new owner would still have the benefit of the servitude, in his capacity as owner, as the servitude is registered in favour of the property, not in favour of a person.

The different categories of praedial servitudes, with examples, are as follows:

- *Rural praedial servitudes*, i.e. right of way, right to lead water, right of outspan or grazing and right to fetch wood.
- *Urban praedial servitudes*, i.e. right of support of a building by the servient property, right to insert a beam into the building of the servient property, right to encroach the boundary of the servient property, right to install pipes or electrical cables over the servient property, right to influence the normal flow of water, servitudes dealing with light and view.
- *Statutory servitudes*, i.e. rights in terms of the dealings of water in terms of the *National Water Act* 36 of 1998, servitudes in respect of support in terms of section 28 of the *Sectional Titles Act* 95 of 1986, the right to extend the scheme in terms of section 25 of the *Sectional Titles Act* 95 of 1986.

4.2.2 Personal servitudes

With personal servitudes, there is no dominant property, as the servitude is registered in favour of a person. Therefore the personal servitude grants the holder of the servitude certain rights in the servient property, which allows the holder certain entitlements in his personal capacity. The importance of this distinction is that the servitude is not transferable and therefore the holder cannot transfer his entitlements to anybody else.

The different categories of personal servitudes, with examples, are as follows:

- *Common law personal servitudes*, i.e. usufruct, use and habitation.
- *Servitudes which resembles praedial servitudes*, which could be all examples mentioned under rural and urban praedial servitudes, but which are registered in favour of the holder in his personal capacity.
- *Statutory personal servitudes*, i.e. a right to install electrical cables over land in terms of the *Electricity Act* 41 of 1987, the right to extend the scheme in terms of section 25 of the *Sectional Titles Act* 95 of 1986.

4.2.3 Public servitudes

Public servitudes grant certain entitlements to the general public in respect of the servient property, thereby limiting the entitlements of the owner of the servient property, i.e. to use a road (*National Road Traffic Act* 93 of 1996), cut wood, or the right to picnic in certain spots.

4.2.4 Restrictive conditions

Restrictive conditions are limitations that are registered against the title deed of properties in a township by the original township developer at the establishment of the township (restrictive conditions in the narrow sense) or against the township in general (restrictive conditions in the wide sense). In the case of restrictive conditions in the narrow sense, it is possible to distinguish between personal restrictive conditions and real restrictive conditions.

The aim of restrictive conditions is to limit the entitlements of a single owner to the benefit of the other owners of the township in case of a real restrictive condition, or a specific person in the case of a personal restrictive condition. This could include restricting the size of development, height, style, finishes, etc.

Remedies for the non-compliance of restrictive conditions are:

- An interdict

- A delictual claim for compensation of damages
- An application to abolish the restrictive condition in terms of the *Removal of Restrictive Conditions Act 84 of 1967*

Self-test:

1. What is a servitude?
2. How is ownership limited by servitudes?
3. Which entitlements does the holder of a servitude acquire?
4. What kinds of servitudes are there?
5. What is the distinction between praedial and personal servitudes?
6. Which categories of praedial servitudes are distinguished?
7. Which categories of personal servitudes are distinguished?
8. What is the legal nature of restrictive conditions?
9. How do restrictive conditions differ from servitudes?

4.3 Real security by agreement

In section 1.3 distinction is made between real rights, limited real rights and creditors' rights. When a creditor has obtained a creditor's right against a debtor, he may need security to ensure he would be paid in terms of the principal debt. Security for the payment of the debt could be provided by way of personal security or real security.

Personal security implies that the creditor acquire a creditor's right against another person as security for payment of the principle debt. An example of this would typically be where a construction company wishes to purchase material for use on a construction contract and obtains an overdraft facility from the bank for this purpose. The bank would require security for the repayment of the overdraft and for this reason requires the directors of the company to bind themselves for payment of the principle debt in their personal capacities. If the company cannot repay the overdraft, the bank would have a claim against the directors, which includes any assets that they may own.

Real security provides the creditor with a limited real right in the property of the debtor as security for the repayment of the principle debt. If the debtor therefore fails to repay the debt, the creditor can apply through legal proceedings to sell the property in execution and use the proceeds of the sale to repay the principle debt.

4.3.1 Pledge

A pledge is a real security that is applicable to movable assets, whereby the debtor provides his assets to the creditor in pledge until the full debt has been repaid. It is important to note that delivery of the asset is a requirement of the pledge and should the pledgor lose control over the asset, the pledge would be terminated. The pledge obtains a limited real right in the asset as security for the principle debt, but has the obligation to take reasonable care of the asset.

Because a pledge is only relevant on movable assets, applicability to the built environment would largely be when a contractor is pledging plant and equipment to obtain funding for whatever purpose required in the line of operations.

4.3.2 Mortgage

A mortgage is a more commonly used form of real security as it provides the creditor with similar rights to that of a pledge, but without the burden of having to take care of the asset, and it is applicable to both fixed and movable property. In the case between *Thienhaus v Metje and Ziegler* 1965 (A) it was held that the functions of a mortgage are (quoted from Van der Walt & Pienaar, 2009:263):

1. It serves as confirmation of the limited real right of the creditor to the property as security for the payment of the principal debt.
2. It serves as written acknowledgement of the principal debt.
3. It serves as record regarding the conditions pertaining to the interest, payment, terms and default of the principal debt.

In the case of movable property, a notarial bond is registered against the asset in terms of *Security by Means of Movable Property Act 57 of 1993*, which asset should be corporeal property without the requirement that the asset be delivered to the creditor.

With immovable property a mortgage could be registered against corporeal or incorporeal property. Incorporeal property would include the right of extension in terms of section 25 of the *Sectional Titles Act 95 of 1986*, a registered long term lease, or mineral rights.

The different categories of mortgages are as follows:

- *Kustingsbrief*, which is a mortgage to be registered in favour of the seller for the payment of the outstanding balance of the purchase price.
- *Money lent and advanced*, which is a mortgage in favour of the mortgagee for money lent and advanced other than for the payment of the purchase price.
- *Covering bond*, which is a mortgage in favour of the mortgagee for an uncertain amount of future debt.
- *Surety bond*, which is a bond registered over the property of a surety to the debtor.
- *Participation bond*, which is registered in terms of the requirements of the *Collective Investment Schemes Control Act 45 of 2002*.
- *Notarial bonds*, which is registered against specific movable assets of the debtor.
- *Land bank mortgages*, which are mortgages registered as security for money lent and advanced for agricultural purposes.

Conditions in mortgage or pledge agreements that state that the ownership of the object passes to the creditor in the event that the principal debt is not paid in full, or that execution can take place without recourse to court is unenforceable. Even if included in the agreement would be unlawful execution.

4.3.3 Cession *in securitatum debiti*

Cession *in securitatum debiti* is a special kind of real security with regards to incorporeal property whereby the debtor cedes his creditor's rights against third parties to the creditor of the principal debt. This could be done as the pledging of creditor's rights as security for a debt, whereby the debtor retains ownership of the creditor's right against the third party, but are not allowed to dispose of the repayments. It could also be as a general cession of security, whereby the creditor could exercise the enforcement of the repayment of the creditor's right that the debtor has against the third party as if he is the direct creditor to the third party.

Self-test:

1. What forms of security are distinguished?
2. What forms of personal security are distinguished?
3. What forms of real security are distinguished?
4. What does the fact that real security is an accessory legal relationship mean?
5. What does pledge mean?
6. What requirements must be met regarding the object of pledge?
7. What requirements must be met regarding control in the case of pledge?
8. What are the rights and duties of the pledgee?
9. What does mortgage mean?
10. What is the distinction between the various categories of mortgages?
11. What conditions are unenforceable in the case of mortgage and pledge?
12. Why is pledging of documents not a form of personal security?

4.4 Real security rights created by law

The real security rights discussed so far are created by way of agreement between the creditor and the debtor. This is however not always the case and sometimes real security rights are created by law. These are particularly important in the built environment as they are commonly applicable and the effect thereof should also be taken into consideration when agreements are put in place between different parties.

4.4.1 Tacit hypothec of the lessor

The tacit hypothec of the lessor provides the lessor of immovable property a security right over the movable assets of the lessee which are stored at the leased premises for payment of rent in arrears. As a rule the hypothec only applies to the movable assets of the lessee, but in certain circumstances the assets of third parties could also be included. It is very important to note that the hypothec only applies to assets that are still present on the premises. Should the assets be removed, the hypothec ceases to apply. Should a lessor therefore expect that a lessee will vacate the premises and remove all movable assets in order to avoid the hypothec, the lessor could apply for an interdict preventing the lessee to remove the assets.

4.4.2 Tacit hypothec of the credit grantor

The tacit hypothec of the credit grantor provides the credit grantor with a real right against goods purchased on credit. The *National Credit Act* 34 of 2005 however prescribes that the ownership of goods purchased by way of credit agreements will remain with the seller until the credit receiver pays the last instalment of the purchase price. If the credit receiver becomes insolvent before the last instalment has been paid, the ownership of the goods sold is transferred to the trustee of the insolvent estate and the credit grantor is protected by a hypothec in terms of section 84 of the *Insolvency Act* 24 of 1936.

Important to note in this regard, are the implications for material purchased on credit for the purpose of use in construction. According to the above, the ownership to the material will not be transferred to the construction company (purchaser) until the last payment had been made, but the hypothec of the credit grantor will be terminated if the material is destroyed. This implies that if the material is actually used in the construction process, it loses its independent identity by way of accession and becomes part of the building that is attached to the land. Therefore the hypothec will be terminated as soon as the material is used.

4.4.3 Judicial pledge

Any creditor without security rights can obtain a judicial pledge or mortgage by way of attachment through a writ of execution. This will provide the creditor with a right that is similar to an ordinary pledge or mortgage and therefore the creditor would enjoy a preference claim against the assets under the judicial pledge. This could typically happen where a contractor is not performing and the owner suffers losses due to the non performance which is in excess of the security rights already obtained by contract, if any. The owner could then obtain a writ of execution to attach the movable assets such as plant and equipment or any other assets that the contractor may own. Once the owner has attached the property, he would have rights similar to a mortgage or pledge against the property. Similarly the contractor can have a claim against the property of the owner, should the owner fail to pay for the work performed. The contractor would, however, as a first claim have a lien over the immovable property that is being improved (see section 4.4.5 below), but should the contractor realise that the outstanding debt is more than what could be realised from the sale of the immovable property, the judicial pledge would include any other assets of the owner, independent from the construction process.

4.4.4 Statutory security rights

Statutory security rights are created by legislation due to specific debtor-creditor relations. These are very specific and it is recommended that further information be obtained from more advanced property law text books.

4.4.5 Liens

Liens provide the holder of a movable or immovable asset a right of retention, or right to refuse return of the asset, for expenses incurred with regard to the asset. This could be repairs to a movable asset or improvements to an immovable asset. Two main categories of liens are distinguished; debtor-creditor liens and enrichment liens. The former would be of particular importance to the built environment, whereby a contractor receives a right of retention over the immovable property of the owner as security for the payment of the construction work performed. The latter would be applicable where a tenant has to incur expenses, i.e. repairs to a burst water pipe, in order to prevent further damages, whereby the tenant can claim back the expenses incurred from the owner and has a lien over the property as security for payment. It is thus evident that the debtor-creditor lien originates from contractual obligations and the enrichment lien from an extended enrichment action (refer section 3.3.7).

The main requirements for a lien is that the holder of the lien must be in control of the property at the time that the lien originated and the holder must retain the property for the lien to stay effective. This means that a contractor that is exercising a lien should not give up holdership of the property otherwise the lien will be terminated. Furthermore a lien is a defensive strategy, meaning that the holder of the lien will use the lien as a defence mechanism against the *rei vindicatio* (see section 2.6.1) claim of the owner. If the owner forcefully or otherwise through selfhelp and without recourse to court take back control over the property in order to terminate the lien, or because he believes the lien is not valid, the holder of the lien could apply for the property to be returned to his control by means of a *spoliation remedy* (see section 3.3.3)

Liens are a particularly strong right, which may provide the holder of the lien a stronger right than holders of other rights. A typical example is where the owner of land obtained financing for construction work and registered a *money lent and advanced mortgage* (see section 4.3.2) in favour of the financing institution. If during the course of construction, the owner defaulted on his instalments to the financing institution, but also neglected to pay the contractor the full amount for work done thus far, the financing institution could claim sale of the property in execution, but the contractor can exercise a lien over the property. This conflict resulted in financing institutions to request contractors to waive their rights to a lien, should they be financing construction work. As a result the contractor would not have this form of security available to him, and should insist on another type of security, i.e. payment guarantee before entering into the contract.

Self-test:

1. When are real security rights created by law?
2. When is a real security right granted to the lessor of immovable property?
3. When is a real security right granted to a credit grantor with regard to movable property?
4. What is a judicial pledge?
5. What is a lien?

4.5 Other property rights

Other property rights provides somebody other than the owner with rights in the fixed property of the owner, other than that discussed already. The most commonly found rights that will be discussed here are landlord-tenant relationships, common-law land-use rights and mineral rights.

4.5.1 Landlord-tenant relationships

A lease is a use right that provides the holder the right of use of the fixed property of the owner. The *Deeds Registries Act 47 of 1937* defines a long-term lease as a lease of ten years or longer. Therefore a lease of less than ten years is considered a short-term lease. The important distinction between a long-term lease and a short-term lease is that a short-term lease provides the tenant with a creditor's right against the owner of the property, whilst a long-term lease should be registered against the title deed of the property and thereby establishing a limited real right in the property.

An important aspect of leases is the *huur gaat voor koop* principle, whereby the sale of a property does not terminate the tenant's rights in terms of the lease. There are also special arrangements for the eviction of residential tenants, which are stipulated by the *Rental Housing Act 50 of 1999*.

4.5.2 Common-law land-use rights

Common-law land-use rights provide alternative options for ownership of land. A short description of each is:

- *Partiarian lease*; which is a land lease of agricultural land and the lessee use the land for agricultural purposes and pays the lessor a certain percentage of the crop or produce.
- *Labour tenancy*; also commonly used for agricultural properties, whereby the lessee can use a certain part of the property in return for labour to the lessor.
- *Leasehold*; is a form of long term lease, usually from the state and mostly for land only.
- *Quitrent*; is also a form of land lease but is practically a perpetual lease and is therefore for practical purposes very similar to full ownership.

4.5.3 Mineral rights

Mineral rights provide the holder with the right to prospect for minerals, to mine them and dispose the extracted minerals. Mineral rights are regulated by the *Mineral and Petroleum Resources Act 28 of 2002*. This is based on the principle of state grants that are provided for a specific period of time to prospect and mine for minerals. The act instilled so-called new order rights and replaces the old order rights whereby mineral rights originated from land-ownership. The mineral rights on a property could be separated from the ownership and the *Deeds Registries Act* provides the following ways to do this:

- Notarial cession of mineral rights
- Reservation in a deed of transfer of the land
- Exclusion in a deed of subdivision of the land
- Division of mineral rights held in undivided shares by co-owners of the land
- Reservation in the process of establishment of a township on the land
- Exclusion from a process of expropriation of the land
- Acquisition of a separate certificate of mineral rights by the landowner

Self-test:

1. What possibilities are there for creating other property rights besides the ones discussed in earlier study units?
2. What are the property rights of the tenant with regard to land?
3. Are there other common-law land rights which are important?
4. How are mineral rights separated from ownership?

5. CONSTITUTIONAL PROPERTY LAW

Learning outcomes

After studying this section, you should be able to understand the scope and content of constitutional property law by:

- understanding the role of the *Constitution* in private law
- conceptualising the features of the *Constitution*
- understanding section 25 of the *Constitution* dealing with property rights
- explaining the principles of the expropriation clause of the *Constitution*
- explaining the principles of land reform in South Africa

5.1 Introduction to constitutional property law

Generally speaking the *Constitution of the Republic of South Africa* of 1996 regulates the functions of government and the state and therefore it should form part of public law. However, there are certain aspects of the *Constitution* that are important in private law and specifically dealing with property. The *Constitution* can be characterised by a number of important features that are particularly important to private law. These are (Van der Walt & Pienaar, 2009:301):

- The *Constitution* is the supreme law
- The *Constitution* is entrenched
- The *Constitution* contains a bill of rights
- The *Constitution* is enforced by an independent judiciary
- The *Constitution* acknowledges the validity of common and customary law
- The *Constitution* embodies important values and principles
- The *Constitution* protects property
- The *Constitution* makes provision for horizontal application

Self-test:

1. What is the role of the *Constitution* in private law?
2. What are the most important features of the *Constitution*?
3. How must the *Constitution* be interpreted?

5.2 Section 25 of the Constitution: Property rights

Section 25 deals with the protection of property as a fundamental right and is in line with an established worldwide tradition of human rights' protection. It contains a negative property guarantee which means that property rights may not be restricted unless certain requirements are met. The property guarantee therefore allows for state regulation, but protects private property rights through limiting state interference. In this regard property rights include all kinds of property, i.e. immovable, movable, immaterial and incorporeal property.

5.2.1 Section 25(1): Deprivations clause

"No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

This ensures that deprivations only occur with a properly promulgated law of the regulator and that it is not arbitrary in that they affect one person or a specific group of persons and not the general public as a whole.

5.2.2 Section 25(2): Expropriation clause

“Property may be expropriated only in terms of law of general application –

- (a) for a public purpose or in the public interest; and
- (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.”

One of the main differences between deprivation and expropriation of property is that with expropriation there is compensation payable while with deprivation there is not. Furthermore deprivation can include only certain property rights, such as restrictive conditions, while expropriation takes ownership of the property away. For this purpose it is generally the case that a defendant would want to prove that a property is expropriated, rather than subject to deprivation.

In this section it is debatable what the extent is of “*for public purpose or in the public interest*”. For instance it is debatable if expropriation for purposes of land reform is in the public interest, but 25(4) specifically deals with “*the nation’s commitment to land reform*” which clarifies this aspect.

Expropriation can also only happen subject to compensation, which is either to be agreed by the parties, or it should be determined by court. The determination of compensation is explained in section 25(3) of the *Constitution*.

5.2.3 Section 25(3): Compensation clause

“The amount of compensation and the time and the manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interest of those affected having regard to all relevant circumstances, including –

- (a) the current use of the property;
- (b) the history of the acquisition and use of the property;
- (c) the market value of the property;
- (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
- (e) the purpose of the expropriation.”

The exact meaning of section 25(3) in calculating the compensation for expropriation is quite vague but in case law it was held that regard should be given to legislation in this regard. The *Expropriation Act* 63 of 1975 is still widely used in this regard, which stipulates the compensation in section 12 of the Act as (Delport, 1999:152):

- (a) In the case of any property other than a right, excepting a registered right to minerals, the aggregate of:
 - The market value of the property; and
 - An amount to make good any actual financial loss caused by the expropriation.
- (b) 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 the right.

In addition, the following amounts must be added to the total amount payable in accordance with the aforesaid calculations:

- 10% of such total amount, if it does not exceed R100,000; plus
- 5% of the amount by which it exceeds R100 000, if it does not exceed R500 000; plus
- 3% of the amount by which it exceeds R500 000, if it does not exceed R1 000 000, plus
- 1% (but not amounting to more than R10 000) of the amount by which it exceeds R1 000 000.

The act also allows for payment of interest from the date that the State takes occupation of the property up to the final date of payment.

Self-test:

1. What is the function of a property clause such as section 25?
2. Which property rights are guaranteed in section 25?
3. How does section 25 provide for regulation of property?
4. When is expropriations permitted in terms of section 25?
5. How will section 25 work in practice?

5.3 Land reform

Land reform was initiated in 1991 and formulated in the 1993 *Constitution* with special provisions in sections 121 to 123. The 1993 *Constitution* was replaced by the 1996 *Constitution* which now regulates land reform, protection of property rights and the right to access to housing through sections 25 and 26 of the *Constitution*. The main aspects of land reform is the restitution of land rights, redistribution of land and the improving of the security of tenure of existing land rights.

5.3.1 Restitution of land rights

Restitution of land rights is based specifically on land claims from people where property rights were taken away previously. This is regulated by the *Restitution of Land Rights Act* 22 of 1994, which was promulgated specifically for this purpose. The 1996 *Constitution* section 25(7) provides for people that were dispossessed from their property after 19 June 1913 due to past racially based laws, are entitled to the restitution of that land.

It is however not always possible for the restitution of the specific land that were taken away, and therefore the act allows for either the provision of alternative land or compensation as alternative remedies.

5.3.2 Redistribution of land

The aim with the redistribution of land is to make land available to more people and to establish an equitable distribution of land. For this purpose a number of laws and programs were introduced to facilitate the process:

- The *Development Facilitation Act* 67 of 1995, which allows for the more expeditious development of land, thereby making land available faster and at a lower cost.
- The *Housing Development Agency Act* of 2008, which established the Housing Development Agency which must fast-track the processes of housing development.
- The *Social Housing Act* 16 of 2008 establishes and promotes a sustainable social housing environment by defining the functions of national, provincial and local governments in respect of social housing and establishing the Social Housing Regulatory Authority in order to regulate all social housing institutions obtaining or having obtained public funds. It furthermore allows for the undertaking of approved projects by other delivery agents with the benefit of public money and gives statutory recognition to social housing institutions.
- The Land Reform Pilot Programme of 1995, allowing for mechanisms to assist land redistribution in rural areas.
- The *Land Reform (Labour Tenancy) Act* 3 of 1996, which regulates the rights of labour tenants.
- The *Housing Act* 107 of 1997, controlling the provision of housing with implementation at provincial level.
- The *Rental Housing Act* 50 of 1999, which protects the rights of residential tenants.

5.3.3 Security of tenure

The security of tenure has its aim at the protection of tenure rights and preservation of its value. This is largely achieved by regulating the eviction process of different types of tenure rights through a set of acts:

- The *Land Reform (Labour Tenancy) Act* 3 of 1996;

- the *Communal Property Association Act* 28 of 1996;
- the *Interim Protection of Informal Land Rights Act* 31 of 1996; and
- the *Communal Land Rights Act* 11 of 2004;
- the *Extension of Security of Tenure Act* 62 of 1997.

Self-test:

1. What is land reform and why is it necessary?
2. What is the role of the *Constitution*?
3. How is land reform subdivided into categories?
4. Which practical reform steps have been taken up to now?

6. PROPERTY VALUATION

Learning outcomes

After studying this section, you should be able to understand the scope and content of constitutional property law by:

- defining the definition of market value
- understanding the role of valuations in property ownership
- conceptualising the legal framework governing the valuation of immovable property
- explaining the different approaches that could be utilised for property valuation

6.1 Introduction to property valuation

Property valuation means different things to different people. In order to understand what is to be achieved with property valuation, it is necessary to understand the different aspects of value. Not all interpretations of value constitute *open market value*. When reference is made to value, it could mean the value of a property to the owner, which is not necessarily the same as the value that a specific prospective purchaser would put on that value. The different aspects of value are given by the South African Institute of Valuers (2007:6-3 – 6-5) as follows:

- Value in use; the utility value or value to replace the property if the owner is deprived thereof.
- Value in exchange; the amount of money that a property could be exchanged or sold for.
- Temporary value; indicating that value change over time.
- Fair value; which is the fair market value of the property at the date of acquisition and therefore not necessarily the actual price paid.
- Subjective and objective value; indicating the special significance to a particular person that would put a subjective value to it, or the facts of the property attributes from which an objective value is determined.
- Capitalised value; the investment value or the worth to an investor based on the property's income earning potential.
- Utility value; the usefulness of a property to satisfy some human need.
- Intrinsic value; an inherent quality attribute that the property possess.
- Highest and best use; the optimum likely use of the property given it is legally permissible, financially viable and optimally possible.
- Arm's length transaction; indicating that there are now relationship between parties to a transaction that may influence the transaction price.
- Plottage; the value put to a property due to its relationship with another property, i.e. if the development of two adjoining properties could be better exploited than the two individually, the value of the consolidated property would be higher than the value of the sum of the two individual values.

These aspects of value differ from the open market value, which is generally accepted as the definition of market value as per the International Valuation Standards Council (IVSC, 2005:82 & RICS, 2012:30):

"The estimated amount for which an asset (or liability) should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion."

This definition of market value excludes any costs of the transaction or associated taxes and is explained by the IVSC (2005:83-84) as follows:

- (a) “*the estimated amount*” refers to a price expressed in terms of money payable for the asset in an arm’s length market transaction. Market value is measured as the most probable price reasonably obtainable in the market on the date of valuation in keeping with the market value definition. It is the best price reasonably obtainable by the seller. This estimate specifically excludes an estimated price inflated or deflated by special terms or circumstances such as atypical financing, sale and leaseback arrangements, special considerations or concessions granted by anyone associated with the sale, or any element of special value.
- (b) “*an asset should exchange*” refers to the fact that the value of an asset is an estimated amount rather than a predetermined amount or actual sale price. It is the price at which the market expects a transaction that meets all other elements of the market value definition should be completed on the date of valuation.
- (c) “*on the date of valuation*” requires that the estimated market value is time-specific as of a given date. Because markets and market conditions may change, the estimated value may be incorrect or inappropriate at another time. The valuation amount will reflect the actual market state and circumstances as of the effective valuation date, not as of either a past or future date. The definition also assumes simultaneous exchange and completion of the contract for sale without any variation in price that may otherwise be made.
- (d) “*between a willing buyer*” refers to one who is motivated, but not compelled to buy. This buyer is neither over eager nor determined to buy at any price. This buyer is also one who purchases in accordance with the realities of the current market and with current market expectations, rather than in relation to an imaginary or hypothetical market that cannot be demonstrated or anticipated to exist. The assumed buyer would not pay a higher price than the market requires. The present owner is included among those who constitute “the market”.
- (e) “*and a willing seller*” is neither an over eager nor a forced seller, prepared to sell at any price, nor one prepared to hold out for a price not considered reasonable in the current market. The willing seller is motivated to sell the asset at market terms for the best price attainable in the open market after proper marketing, whatever that price may be. The factual circumstances of the actual owner are not a part of this consideration because the willing seller is a hypothetical owner.
- (f) “*in an arm’s length transaction*” is one between parties who do not have a particular or special relationship, eg, parent and subsidiary companies or landlord and tenant, that may make the price level uncharacteristic of the market or inflated because of an element of special value. The market value transaction is presumed to be between unrelated parties, each acting independently.
- (g) “*after proper marketing*” means that the asset would be exposed to the market in the most appropriate manner to effect its disposal at the best price reasonably obtainable in accordance with the market value definition. The method of sale is deemed to be that most appropriate to obtain the best price in the market to which the seller has access. The length of exposure time is not a fixed period but will vary according to the type of asset and market conditions. The only criterion is that there must have been sufficient time to allow the asset to be brought to the attention of an adequate number of market participants. The exposure period occurs prior to the valuation date.
- (h) “*wherein the parties had each acted knowledgeably, prudently*” presumes that both the willing buyer and the willing seller are reasonably informed about the nature and characteristics of the asset, its actual and potential uses and the state of the market as of the date of valuation. Each is further presumed to act for self-interest with that knowledge and prudently seek the best price for their respective positions in the transaction. Prudence is assessed by referring to the state of the market at the date of valuation, not with benefit of hindsight at some later date. For example, it is not necessarily imprudent for a seller to sell assets in a market with falling prices at a price that is lower than previous market levels. In such cases, as is true for other exchanges in markets with changing prices, the prudent buyer or seller will act in accordance with the best market information available at the time.
- (i) “*and without compulsion*” establishes that each party is motivated to undertake the transaction, but neither is forced or unduly coerced to complete it.

Valuations are conducted for different purposes and may be based on the definition of open market value. Valuations would typically be performed for the following purposes where open market value is the basis of valuation, or typically where the willing buyer / willing seller principle is applied:

- Legal

- Financial statements
- Financing
- Tax

Valuations could also be performed for other purposes, not based on open market value, which are largely based on another aspect value, or the replacement cost of the improvements, such as insurance valuations, or development viabilities.

Self-test:

1. What are the different aspects of value?
2. What is the difference between these aspects of value and *open market value*?
3. How can the definition of open market value be interpreted?
4. For what different purposes are valuations being conducted?

6.2 Legislation in valuations

Various statutes are governing the need for valuations, the valuations profession as well as the purpose and methods of valuation that needs to be performed. These could become very extensive and involved, with jurisprudence affecting the interpretation of this. It will however only be mentioned with a brief description thereof for the purpose of an overview knowledge.

6.2.1 Council for the Built Environment Act 43 of 2000

The purpose of the *Council for the Built Environment Act 47 of 2000* is “to provide for the establishment of a juristic person to be known as the Council for the Built Environment; to provide for the composition, functions, powers, assets, rights, duties and financing of such a council; and to provide for matters connected therewith”.

The *Council for the Built Environment Act 43 of 2000* establishes the Council for the Built Environment (CBE) which deals with the relationship between the different built environment professions. One of these professions is the Property Valuers Profession.

6.2.2 Property Valuers Profession Act 47 of 2000

The purpose of the *Property Valuers Profession Act 47 of 2000* is “to provide for the establishment of a juristic person to be known as the South African Council for the Property Valuers Profession; to provide for the registration of professionals; candidates and specified categories in the property valuations profession; to provide for the regulation of the relationship between the South African Council for the Property Valuers Profession and the Council for the Built Environment; and to provide for matters connected therewith”.

The *Property Valuers Profession Act 47 of 2000* establishes the South African Council for the Property Valuers Profession (SACPVP), which regulates the registration of valuers, code of conduct, rules, disciplinary processes, etc. of valuers.

6.2.3 Municipal Property Rates Act 6 of 2004

The *Municipal Property Rates Act 6 of 2004* regulates the power of any municipality to impose rates on property. It also makes provision for fair and equitable valuation methods of properties, as well as for an objections and appeals process. With regards to valuation methods, it stipulates that properties are to be valued in accordance with the open market value basis of valuation (see section 6.1) which are to be performed by a municipal valuer registered in accordance with the *Property Valuers Profession Act 47 of 2000*. Increasingly mass-appraisal techniques are being used to value properties for this purpose, causing some differences between the municipal valuation and the market value if performed individually. This

causes appeals against the municipal process from time to time in which independent valuers play a large part as expert witnesses.

6.2.4 *Transfer Duty Act 40 of 1949*

Section 5 of the *Transfer Duty Act 40 of 1949* stipulates the value of property on which transfer duty is payable. Distinction is made between the consideration or the declared value, but importantly, if these are different from the fair value (see section 6.1) in the opinion of the Commissioner, then the duty could be determined on the fair value.

6.2.5 *Expropriation Act 63 of 1975*

As mentioned in section 5.2, the *Expropriation Act 63 of 1975* stipulates that compensation should be paid with the expropriation of property and for this purpose the value of the property should be taken into consideration, normally requiring a professional valuer's opinion of the value. If the parties cannot agree on the compensation payable, it needs to be resolved by way of arbitration or court proceedings, in which the independent valuer will act as expert witness.

6.2.6 *Insolvency Act 24 of 1936*

Section 4 of the *Insolvency Act 24 of 1936* calls for a notice of surrender of an insolvent estate to the Master of the Supreme Court. The Master may direct the petitioner to cause any property set forth therein to be valued by a sworn appraiser (professional valuer) or by any person designated by the Master for the purpose.

6.2.7 *Estate Duty Act 45 of 1955*

Section 5 of the *Estate Duty Act 45 of 1955* calls for the determination of the value of any property that is owned by a deceased estate. In terms of this any fixed property should be valued according to its *fair market value* by a professional valuer.

6.2.8 *Banks Act 94 of 1990 and Co-Operative Banks Act 40 of 2007*

According to the *Banks Act 94 of 1990* and section 20 of the *Co-Operative Banks Act 40 of 2007*, banks should have certain minimum credit ratings and capital reserves. According to this banks should provide information on the security that they take when granting loans. The largest of this is normally mortgages (see section 4.3.2) registered against immovable properties. The value of these properties need to be assessed by professional valuers and are normally carried out prior to the registration of the mortgage for loan approval purposes. This requirement for valuation of properties that are taken as security is also influenced by international agreements of good practice, such as the Basel accord, whereby it is required to also re-value their securitised assets independently from time to time. The latest Basel III has such strict requirements that assets may have to be re-valued as much as every year.

6.2.9 *Companies Act 71 of 2008*

Section 29 and 30 of the *Companies Act 71 of 2008* describe the requirements for annual financial statements of companies. According to this, all companies must provide their annual financial position and being audited on this. Although it would therefore be good practice for all companies to have their assets re-valued annually for inclusion in the financial statements, this usually is done by directors and not independently, with a formal valuation every three to five years. This requirements is however stricter for companies listed on the Johannesburg Securities Exchange (JSE), especially those that are property investment companies and derive their operating income directly from property, such as Property Loan Stock companies and Property Unit Trust funds. These companies must re-value their assets at least once every three years by independent professional valuers for inclusion in their financial statements. A number

of these companies however see this as the minimum and as a principle do it more regularly, up to valuing their assets independently every year.

6.2.10 *Long-term Insurance Act 52 of 1998, Short-term Insurance Act 53 of 1998 and Medical Schemes Act of 1998*

Section 30 of the *Long-term Insurance Act 52 of 1998*, section 29 of the *Short-term Insurance Act 53 of 1998* and section 35 of the *Medical Schemes Act of 1998* prescribes the requirements with regards to the assets and capital adequacy for long-term and short-term insurance companies as well as medical schemes respectively. In terms of this, the mentioned companies should have sufficient assets to be able to cover their liabilities on any day, resulting in these companies to frequently re-value their assets.

6.2.11 *Pension Funds Act 24 of 1956*

Section 16 of the *Pension Funds Act 24 of 1956* calls for investigations by a valuator, which for the purpose of this act means an actuary, of the financial position of the fund once every three years. This would also include the revaluation of assets, which would be carried out by professional valuers in the case of fixed property. Furthermore section 19 of this act allows for loans to be granted to members of the fund, which may include security to be called for by way of mortgages against immovable property. These, similar to banks, would be valued when granting such loans, or re-valued from time to time to determine the financial position of the fund as contemplated in section 16 of the act.

6.2.12 *Public Finance Management Act 1 of 1999, Municipal Finance Management Act 56 of 2003 and Public Audit Act 25 of 2004*

Section 8 of the *Public Finance Management Act 1 of 1999* prescribes that the national treasury should ensure that consolidated annual financial statements be prepared with regards to all public finances. This includes assets held by all levels of Government. Although the assets are not directly valued by the national treasury, all departments or municipalities should submit their financial position to the national treasury on an annual basis in accordance with chapter 12 of the *Municipal Finance Management Act 56 of 2003* to enable the preparation of the consolidated financial statements to be audited by the Auditor General in accordance with the *Public Audit Act 25 of 2004*. The assets held by the different departments and municipalities would therefore have to be re-valued from time in order to provide for transparency with regards to public finances.

Self-test:

1. What different acts are governing the valuations profession?
2. What acts regulate the use of valuations for tax purposes?
3. What acts require that valuations be performed in order to proof capital adequacy?
4. What acts require that valuations be performed in order to provide transparency with regards to the financial situation of different types of organisations?

6.3 Valuation methods

Different types of property are usually valued using different techniques. This is due to the information available to use a specific technique or the value creating attributes of the property. There are three broad categories of valuation methods:

- Comparable methods
- Income methods
- Cost methods

6.3.1 Comparable methods

Comparable methods are usually used where sufficient information of a large number of uniform property sales are available, in order to perform a valuation by way of direct comparison. This is typically the case with residential property, but could also be used for uniform industrial or office buildings. This method is the most preferred by courts in various countries around the world as it determines the value of property with direct reference to market forces.

The principle of the method is that someone will not pay more for a property than the closest alternative and the seller of a property will not accept less than the closest alternative. Therefore due to comparative evidence, the value of a property is determined by comparing it to other properties that have sold in the comparable location of the subject property through a process of deductive logic. It is important to take into consideration the date of sale, due to the fact that market forces change over time, resulting in different equilibrium prices being reached.

6.3.2 Income methods

Property that is purchased primarily for investment purposes could be valued using income methods of valuation. The main types of income methods are:

- Income capitalisation
- Discounted cash flow
- Accounts method

(a) *Income capitalisation* refers to the capitalisation of the first year's net income of a property at a market related capitalisation rate. The capitalisation rate is obtained by referring to sales of similar properties, whereby the first year's income of such a property is divided by the purchase price. The method is therefore also referred to as the indirect comparison method, due to the fact that the income is calculated into a value by way of a comparative factor, which is the capitalisation rate. The method is fairly easy to apply, but has the shortcoming that it could only be used for properties with income that is close to market related and it is therefore difficult to adjust for leases that are not market related.

(b) The *discounted cash flow* method takes into consideration all future cash flows and determines the present value of such cash flows in order to derive the total current value. This method addresses the shortcomings of the income capitalisation method and is especially suitable for properties with multiple tenants or long leases such as shopping centres or large office parks.

(c) The *Accounts method* is also called the business use method and is used for properties where the operations on the premises could not be easily separated from the property itself. This is typically hospitality properties, filling stations, hospitals, etc. The method entails the calculation of the business income, deducting the business expenses to arrive at the net business income. This could then be capitalised (after deduction of property expenses) at an appropriate rate for similar businesses or the net business income could be divided into a suitable return for the business operator and a property rent, which is then capitalised at an appropriate property capitalisation rate after deduction of property expenses.

6.3.3 Cost methods

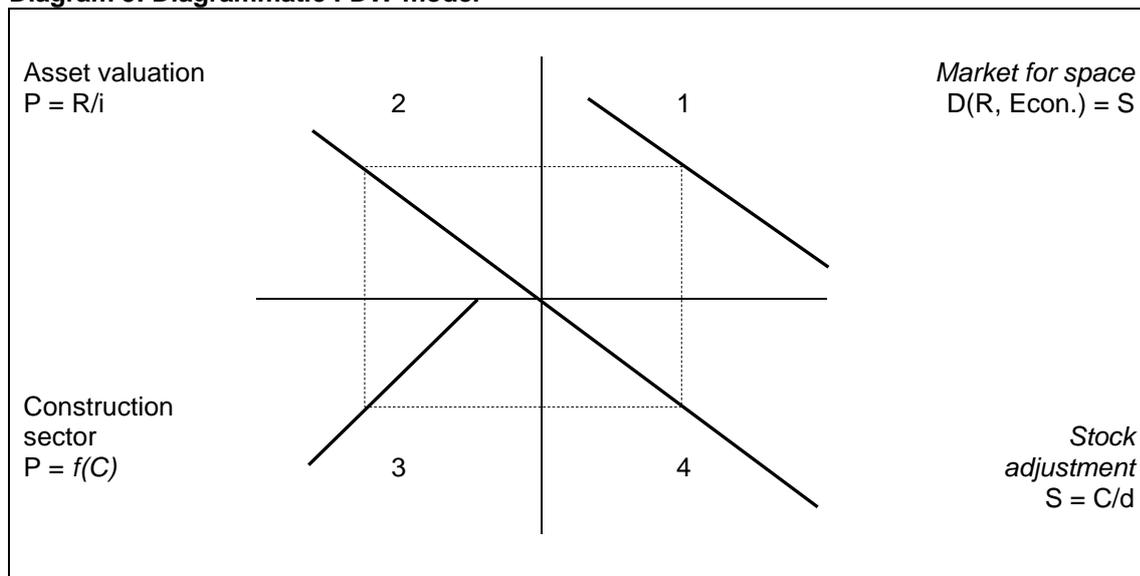
Cost methods are mainly used to determine the replacement cost of the improvements to a property. This is firstly done for insurance purposes and secondly it could be used for infrequently transacted properties. In the latter case, the replacement cost is depreciated to allow for obsolescence and then added to the market value of the land. Examples of properties being valued in this way would typically be monuments, churches, sport stadiums, as well as the improvements on farms which could be very different from farm to farm.

6.3.4 Integration

Although specific valuation methods are preferred for specific types of property, the integration takes effect in the fact that any property has the attributes to be considered from any of these methods. For instance a residential property that is generally owner occupied would normally be valued using the comparative method, but the fact that the owner is occupying it is providing the owner with the benefit of space which, if not owned, would have had to be rented. The owner also has the opportunity cost of rent that is foregone by using it rather than letting it to a tenant. This cost of use is generally referred to as owner equivalent rent. The same property could then also be viewed from a cost perspective, comparing the depreciated replacement cost to the market value. Although the physical depreciation of improvements does not explain the difference between the cost method and other methods of valuation, the difference is explained by functional and economic obsolescence.

This integration of the different considerations to value is explained by models that integrate space and capital markets. Two of these are the Fischer Di-Pasquale Weaton (FDW) model and the Real Estate Econometric Forecast (REEFM) model. The latter is quite involved with a high level of knowledge of econometrics required to explain it, but the former provides a fairly simple graphical explanation of space and capital markets as shown in diagram 3.

Diagram 3: Diagrammatic FDW-model



Source: Archour-Fischer (1999)¹

The model consists of four quadrants as shown in figure 1, and represents the following (Achour-Fischer, 1999: 34 – 37)¹:

- Quadrant 1 – Demand function on the market for space
- Quadrant 2 – The valuation function
- Quadrant 3 – The construction function
- Quadrant 4 – The adjustment of supply

Quadrant 1 indicates the demand function on the market for space demanded by users. With a static supply, the price of space, or rent level, will increase when demand increases, and conversely decreases when demand decreases. In equilibrium, the supply of property should be equal to the demand at various price levels.

¹ ARCHOUR-FISCHER, D 1999. “An Integrated Property Market Model: A Pedagogical Tool”, Journal of Real Estate Practice and Education. Volume 2, Number 1.

In Quadrant 2 the rent level applicable to the equilibrium level of demand is discounted at the capitalisation rate, which is illustrated in figure 1 as the slope of the asset valuation curve, to arrive at the asset value, represented by the function $P = R/i$.

Quadrant 3 represents the construction activity, which is a function of the asset value. When the asset value is higher than construction costs (represented in figure 1 as the intersection of the construction curve and the x-axis), new construction will be triggered, otherwise construction will come to a halt. Thus, $P = f(C)$.

The level of construction activity is carried over to Quadrant 4, the adjustment of supply and is given by the function $S = C /d$, or $\Delta S = C - dS$.

Self-test:

1. What are the different valuation methods that could be used to value fixed property?
2. What is the difference between these methods and when are they used?
3. How can the integration of the different methods of valuation be interpreted?
4. Explain the principles of space and capital markets?

7. PROPERTY DEVELOPMENT

Learning outcomes

After studying this section, you should be able to, understand the scope and content of legislation pertaining to property development by:

- conceptualising the legal framework of land development in South Africa
- defining the different acts that regulate property and land development in South Africa
- explaining the differences in the legislation governing land development

7.1 Introduction to property development

Reference has been made above to property law, which deals with the different relationships with regards to property as an asset. Reference was also made to legislation with regards to property and the development thereof, especially with regards to statutory land control and constitutional rights in terms of property and land reform. In this section legislation will be briefly discussed that was not mentioned in the rest of the text, with specific reference to the requirements for the development of property.

7.2 Legislation in property development

7.2.1 *Subdivision of Agricultural Land Act 70 of 1970*

According to the *Subdivision of Agricultural Land Act 70 of 1970* no farmland as defined by the act may be subdivided, or certain other actions as provided for by the act, unless the Minister has consented thereto in writing.

7.2.2 *National Roads Act 54 of 1971*

The *National Roads Act 54 of 1971* stipulates that certain trade may not take place within certain distances from a National Road or an intersection on such a road. This provides for limitations on the type of development and the sale of land that may take place on this type of property.

7.2.3 *State Land Disposal Act 48 of 1961*

The *State Land Disposal Act 48 of 1961* provides certain powers to the President to sell, exchange, donate, or lease any State land on behalf of the State, including any rights transfer as discussed previously in this text. According to this act prescription is also not applicable to State land.

7.2.4 *Environment Conservation Act 73 of 1989 and National Environmental Management Act 107 of 1998*

The aim of the *Environment Conservation Act 73 of 1989* and *National Environmental Management Act 107 of 1998* is to protect the natural environment of the country, to combat pollution and activities which may detrimentally affect the environment. The purpose is to establish principles for decision-making on matters affecting the environment by providing for co-operative environmental governance. It establishes the National Environmental Advisory Forum and Committee for Environmental Co-ordination which aim to have co-ordinated environmental implementation and management plans and to achieve informed decision-making by different organs of State and other stakeholders.

7.2.5 *Less Formal Township Establishment Act 113 of 1991*

The *Less Formal Township Establishment Act 113 of 1991* provides for the speedy designation and development of land for less formal residential settlement and empowers the Administrator of the Act with certain powers in administering the Act.

7.2.6 *Physical Planning Act 125 of 1991*

The *Physical Planning Act 125 of 1991* regulates planning in South Africa at Macro level by empowering the Minister of Planning, Provincial Affairs and National Housing to divide the country in different development and planning regions.

7.2.7 *Provision of Certain Land for Settlement Act 126 of 1993*

The *Provision of Certain Land for Settlement Act 126 of 1993* provides for the settlement of persons on land made available for this purpose by the Minister of Land Affairs or a private landowner.

7.2.8 *Land Administration Act 2 of 1995*

The *Land Administration Act 2 of 1995* empowers the Minister of Land Affairs to delegate certain of his powers regarding the administration of land affairs.

7.2.9 *Housing Consumers Protection Measures Act 95 of 1998*

The aim of the *Housing Consumers Protection Measures Act 95 of 1998* is to regulate the activities of home builders.

7.2.10 *National Heritage Resource Act 25 of 1999*

The *National Heritage Resource Act 25 of 1999* provides for the protection of the country's heritage resources. In terms of this the act provides certain regulations with regards to demolition of heritage properties or part thereof, as well as certain types of development.

7.2.11 *Community Schemes Ombud Service Act 9 of 2011*

The *Community Schemes Ombud Service Act 9 of 2011* provides for the establishment of the community schemes ombud service, for its mandate and functions and for a dispute resolution mechanism in community schemes.

7.2.12 *National Building Regulation and Building Standards Act 103 of 1977*

The *National Building Regulations and Building Standards Act 103 of 1977* provides for the promotion of uniformity in the law relating to the erection of buildings in the areas of jurisdiction of local authorities and the prescribing of building standards.

Self-test:

1. What different acts are governing the development of land in South Africa?
2. What are the main aims of the different acts?
3. How do these acts promote sustainable development practices that protect property rights as described in the rest of this text?