

**The legal effect of rights specific to
sectional title property in South Africa,
with reference to selected aspects of
the Australian and Dutch law**

JG Horn

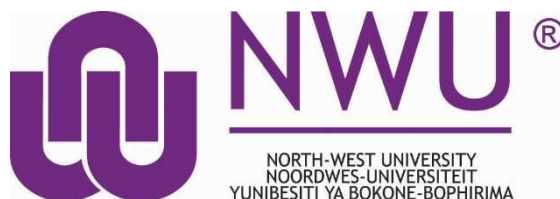
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for the degree *Doctor of Law* in *Private Law* at the
North-West University

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DECLARATION

I, Jacomina Gerharda Horn, identity number 710915 0045 088 and Student No 21009449, hereby declare that this thesis titled 'The legal effect of rights specific to sectional title property in South Africa, with reference to selected aspects of the Australian and Dutch law' is my own original work. The thesis is hereby humbly submitted to the North-West University (NWU), in fulfilment of the requirements for the LLD in Private Law degree. This thesis has not been submitted anywhere before.

.....
JACOMINA GERHARDA HORN

Date: 27 November 2017

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To the Lord our Creator, Saviour and Spirit whose grace is sufficient for us, whose power is made perfect in weakness.

**JG Horn
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ABSTRACT

Title: The legal effect of rights specific to sectional title property in South Africa, with reference to selected aspects of the Australian and Dutch law

Key terms: Subtraction from the *dominium*; *numerus clausus*, sectional titles; right to extend a section; right to extend a scheme; exclusive use rights; strata titles; *appartementsrecht*

The introduction of sectional title ownership as a new area of investigation by property law scholars, resulted in an evolvment of the traditional roots of Roman-Dutch common law of property. Although considerable research has been done on sectional titles in South Africa, due to some *lacunae* in legislation, certain rights specific to sectional title property still lead to uncertainty in practice. Among these are the right of the owner to extend his section in terms of section 24 of the *Sectional Titles Act*, the right of the developer to extend the scheme in terms of section 25 of the *Sectional Titles Act* and the right to exclusive use of parts of the common property in terms of sections 27 of the *Sectional Titles Act* and 10(7) and (8) of the *Sectional Title Schemes Management Act*. It is, therefore, necessary to consider the legal effect of the rights created in terms of sections 24, 25 and 27 of the *Sectional Titles Act* and 10(7) and (8) of the *Sectional Title Schemes Management Act*. In establishing this, the entitlements of the holder of the rights become clearer, as well as how the exercise of these rights will influence the owners' co-ownership of the common property. This thesis deconstructs the formulation, content and consequences of these rights systematically. The theoretical and historical background of the distinction between real and personal rights in South Africa forms the context of this study. As the exercise of these rights is a limitation on the use and enjoyment of other sectional owners of the common property, the need arises to establish the legal effect of these rights. This clarifies the extent to which the sectional owners' ownership is limited by the exercise of these rights and

consequently what the ownership of the common property in a sectional title scheme entails.

It was found that although it may be possible for new rights created in sectional titles to be classified as real rights, these real rights will not fit into the traditional categories of limited real rights. Fortunately, the real rights discussed in this study were statutorily created. That makes the true discovery of the wider concept of the determination of the legal effect of the right, as offered in this thesis, even more applicable.

It is submitted that problems exist around the practical implications of the right to extend a section. It is further submitted that the legislator needs to phrase this section more clearly. The rights and duties of the developer to extend the scheme are investigated. It is suggested that, although the right is a statutorily-created limited real right, it does not fit within the traditional categories of limited real rights. The right of exclusive use of a part of the common property in terms of section 27 of the *Sectional Titles Act* and 10(7) and (8) of the *Sectional Title Schemes Management Act* is divided into two categories: one classified as "real" in terms of legislation the other not. Although these rights are described in legislation in detail, the exercise and content of the rights are still not clear. The uncertainty that this will create in practice is illuminated in this thesis, especially in the light of the creation of an ombud service that will hamper litigation that may clarify the position. It is submitted that the common law principles should be acknowledged as the backbone of property law to provide legal certainty where legislation is silent. This thesis paints a clearer picture of the rights created in terms of section 24, 25 and 27 of the *Sectional Titles Act* and 10(7) and (8) of the *Sectional Title Schemes Management Act*. The legal nature in terms of whether these rights are real or personal is clarified. However, the study goes further to incorporate an investigation into the legal effect of these rights, including the rights and duties involved in the exercise of these rights. This thesis, therefore, aims to contribute to the knowledge base regarding these rights that are specific to sectional titles. As a result, a clearer picture exists

of what the entitlements of owners of sectional titles entail, specifically regarding their undivided share in the common property.

SAMEVATTING

Titel: Die regsimplikasies van regte spesifiek tot deeltiteleiendom in Suid-Afrika, met verwysing na gekose aspekte van die Australiese en Nederlandse reg

Sleutelwoorde: Subtraction form the *dominium*; *numerus clausus*, deeltitels; reg om deel uit te brei; reg om die skema uit te brei; uitsluitlike gebruikgebiede; strata titles; *appartementsrecht*

Die invoering van deeltitels as 'n nuwe ondersoekveld deur sakeregsgeleerdes het 'n ontwikkeling van die tradisionele Romeins- Hollandse gemeenregtelike wortels van die Sakereg tot gevolg gehad. Alhoewel aansienlike navorsing oor deeltitels in Suid-Afrika gedoen is, bestaan die moontlikheid dat sekere nuwe regte geskep deur deeltitelwetgewing steeds tot onsekerheid lei as gevolg van sekere *lacunae* in die wetgewing. Onder hierdie regte val die reg van die eienaar om sy deel uit te brei ooreenkomstig artikel 24 van die *Wet op Deeltitels*, die reg van die ontwikkelaar om die skema uit te brei ooreenkomstig artikel 25 van die *Wet op Deeltitels* en die reg op uitsluitlike gebruik van sekere gedeeltes van die gemeenskaplike eiendom ooreenkomstig artikel 27 van die *Wet op Deeltitels* en artikel 10(7) en (8) van die *Sectional Title Schemes Management Act*. Dit is dus noodsaaklik om die regsimplikasies van die regte wat deur artikel 24, 25 en 27 van die *Wet op Deeltitels* en artikel 10(7) en (8) van die *Sectional Title Schemes Management Act* geskep is, te bepaal. Deur dit te bepaal, sal die bevoegdhede van die reghebbendes duideliker word, en helderheid sal verskaf word oor hoe die uitoefening van die nuwe regte die eienaars se mede-eiendomsreg van die gemeenskaplike eiendom sal beïnvloed. Hierdie proefskrif sit die formulering, inhoud en gevolge van hierdie regte sistematies uiteen. Die teoretiese en historiese agtergrond van die onderskeid tussen saaklike- en vorderingsregte in Suid-Afrika dien as die konteks van hierdie studie. Aangesien die uitoefening van hierdie nuwe regte 'n beperking plaas

op die ander deeleienaars se gebruik en genot van die gemeenskaplike eiendom, is dit noodsaaklik om die regsimplikasies van hierdie regte te bepaal. Dit maak die mate waartoe die deeltiteleienaar se eiendomsreg beperk word deur die uitoefening van hierdie regte, en gevolglik, wat die eiendomsreg van die gemeenskaplike eiendom in 'n deeltitelskema behels, duidelik.

Daar is vasgestel dat, alhoewel hierdie nuwe regte geskep deur deeltitelwetgewing, moontlik as saaklike regte geklassifiseer kan word, hierdie saaklike regte nie in die tradisionele kategorieë van beperkte saaklike regte tuishoort nie. Gelukkig is die saaklike regte wat in die proefskrif bespreek is, deur wetgewing geskep. Dit maak die ontdekking van die wyer konsep van die bepaling van die regseffek, soos in die proefskrif aangevoer, nog meer relevant. Daar word aan die hand gedoen dat die probleme rakende die uitbreiding van die deel, by die praktiese implikasies van die uitbreiding ter sprake kom. Dit word verder aanbeveel dat die wetgewer die artikel duideliker moet formuleer. Die regte en verpligtinge van die ontwikkelaar om die skema uit te brei word ondersoek. Dit word aangevoer dat, alhoewel die reg 'n statutêr geskepte beperkte saaklike reg is, dit nie in die tradisionele kategorieë van beperkte saaklike regte tuishoort nie. Die reg van uitsluitlike gebruik van die gemeenskaplike eiendom in terme van artikel 27 van die *Wet of Deeltitels* en artikel 10(7) en (8) van die *Sectional Title Schemes Management Act* word in twee kategorieë verdeel: een word geklassifiseer as saaklik in terme van wetgewing, die ander een nie. Alhoewel hierdie regte in besonderhede in wetgewing omskryf is, is die uitoefening en inhoud van die regte steeds nie duidelik nie. Die onsekerheid wat dit in die praktyk sal meebring, word in hierdie proefskrif aan die kaak gestel, veral in die lig van die daarstelling van die ombuddiens wat litigasie wat die situasie sou kon opklaar, kortwiek. Daar word aan die hand gedoen dat die gemeenregtelike beginsels steeds erken moet word as die ruggraat van die sakereg om regsekerheid te verleen waar die wetgewing swyg.

Hierdie proefskrif teken 'n duideliker beeld van die regte wat in terme van artikel 24, 25 en 27 van die *Wet op Deeltitels* en artikel 10(7) en (8) van die *Sectional Title Schemes Management Act* geskep is. Die studie gaan verder deur 'n ondersoek na die regsimplikasies van hierdie regte in te sluit. Die proefskrif het derhalwe ten doel om 'n bydrae te lewer tot die wetenskaplike basis rakende hierdie regte spesifiek aan deeltitels. As 'n uitvloeisel bestaan daar 'n duideliker beeld wat die bevoegdheid van deeleienaars behels, spesifiek rakende hulle onverdeelde aandeel in die gemeenskaplike eiendom.

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LIST OF ABBREVIATIONS

ALJ	Australian Law Journal
APLJ	Australian Property Law Journal
CILSA	Comparative and International Law Journal of Southern Africa
CSOSA	Community Schemes Ombud Service Act 9 of 2011
DCC	Dutch Civil Code
DRA	Deeds Registries Act 47 of 1937
EJCL	Electronic Journal of Comparative Law
IJRL	International Journal on Refugee Law
Monash ULR	Monash University Law Review
NSWCSTA	New South Wales Conveyancing (Strata Titles) Act 17 of 1961
PELJ	Potchefstroom Electronic Law Journal
PLD	Property Law Digest
RCR	Registrar's Conference Resolutions
SADJ	South African Deeds Journal
SALJ	South African Law Journal
SARS	South African Revenue Service
SCA	Supreme Court of Appeal
SSDA	Strata Schemes Development Act 51 of 2015
SSMA	Strata Schemes Management Act 50 of 2015
STA	Sectional Titles Act 95 of 1986
Stell LR	Stellenbosch Law Review
STSMA	Sectional Titles Schemes Management Act 8 of 2011
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal of Contemporary Roman-Dutch Law)

TSAR	Tydskrif vir die Suid-Afrikaanse Reg (Journal of South African Law)
UNSWLD	University of New South Wales Law Journal
VVE	<i>Vereeniging van eigenare</i>

Property law is presumed to be the preserve of dull, archaic technicality or crass commercialism... In reality, that dull technicality created and continues to preserve basic values of modern democratic society. This becomes obvious when we stray from traditional land rules to create novel forms of ownership like strata and community title... Property is one of the oldest areas of the law and remains firmly connected to its historic roots.¹

CHAPTER 1

INTRODUCTION

1.1 Background

Property law in South Africa undoubtedly has strong Roman-Dutch common law roots.² The development and investigation of this source of the property law traditionally formed the bulk of the contribution to the research basis of property law. Van der Walt proclaims:

Private law, including and perhaps above all property law, was characterised during the apartheid era by its systemic and consistent ignorance of apartheid laws and their effect on individual property rights. Traditionally, private law specialists preferred to concern themselves with the doctrinal analysis and development of Roman-Dutch law, untainted by legislation...³

Van der Walt claims that "private law novelties" introduced by legislation only became the focus of academic study in South Africa, during the mid-1980's, due to the "doctrinal unity and integrity of common law".⁴ He further claims that the lecture by Cowan in 1984 on new patterns of landownership, introduced sectional title ownership as a new area investigated by property law scholars.⁵ However, as early as 1974, Van der Merwe addressed the new concept of landownership that was statutorily created by the *Sectional Titles Act* 66 of 1971, which came into operation on 31 March 1973.⁶ Sectional title schemes in their totality, are currently regulated statutorily by the *Sectional Titles Act* 95 of

¹ Sherry 2013 *UNSWLJ* 282. Strata title is the Australian equivalent of sectional title.

² Van der Merwe *Sakereg* 7.

³ Van der Walt *Constitutional Property Law* 1.

⁴ Van der Walt *Constitutional Property Law* 2.

⁵ Cowan "New patterns of landownership" 21.

⁶ Van der Merwe 1974 *THRHR* 113.

1986,⁷ which has been amended regularly to address practical uncertainties, the *Sectional Title Schemes Management Act* 8 of 2011⁸ and the *Community Schemes Ombud Service Act* 9 of 2011.⁹

1.2 Aim of the research

Although considerable research has been done on sectional titles in South Africa, due to some *lacunae* in legislation, certain rights to sectional title property still lead to uncertainty in practice.¹⁰ Among these are the right of the owner to extend his section in terms of section 24 of the *STA*, the right of the developer to extend the scheme in terms of section 25 of the *STA* and the right to exclusive use of parts of the common property in terms of section 27 of the *STA* and section 10(7) and (8) of the *STSMA*. These rights specific to sectional title property will form the focus of the study. The main purpose of the research will be to determine the legal effect of the rights created in terms of sections 24, 25 and 27 of the *STA* and section 10(7) and (8) of the *STSMA*. In establishing this, the entitlements of the holder of the rights will become clearer, as well as how the exercise of these rights will influence the owners' co-ownership of the common property. By systematically deconstructing the formulation, content and consequences of these rights, the aim of this study will be to shed light on the legal nature of these rights. In doing so, the theoretical and historical background of the distinction between real and personal rights in South Africa will form the context of this study. As the exercise of these rights is a limitation on the use and enjoyment of other sectional owners of the common property, the establishment of the legal effect of these rights will clarify the extent to which the sectional owners' ownership is limited by the exercise of these rights. This will bring a more defined understanding of what the ownership of the common property in a sectional title scheme entails.

⁷ Hereafter referred to as the *STA*. The *STA* came into effect on 1 June 1988.

⁸ Hereafter referred to as the *STSMA*. It came into effect on 7 October 2016.

⁹ Hereafter referred to as the *CSOSA*.

¹⁰ Pienaar *Sectional Titles* 243.

1.3 Sectional title ownership

After its initial introduction by the *Sectional Titles Act* 66 of 1971, the question of whether sectional title ownership was "true ownership", was common among academics.¹¹ Despite the fact that it has been admitted candidly that it is difficult to define ownership, it is understood that ownership is the "real right that potentially confers the most complete or comprehensive control over a thing ...".¹² All other real rights are derived from it.¹³ The common law maxim *plenum in re potestas* (the owner has the power to do as he pleases with the property owned) encapsulates the traditional conceptualisation of ownership and expresses the view that ownership is "the most extensive legal relationship possible between a person and property". However, the concept of ownership has never been absolute.¹⁴ Ownership of a sectional title unit is one of the "private law novelties" that van der Walt spoke about¹⁵ that extends the traditional notion of ownership, but, it is still severely limited by legislation. The "restrictions and contingent liabilities" experienced in sectional title ownership does not "in equal degree affect the conventional owner of the conventional house".¹⁶ The

... legal powers and privileges of sectional ownership are less extensive than those which normally characterise ownership of a conventional erf with a house built on it.¹⁷

However, sectional titles are characterised as:

... genuine legal ownership to the very substantial bundle of rights, powers, privileges and immunities which are enjoyed by a sectional owner.¹⁸

¹¹ Van der Walt *Constitutional Property Law* 2. Also refer to Cowan "New patterns of landownership" 21.

¹² Badenhorst, Pienaar and Mostert *The Law of Property* 93.

¹³ Van der Merwe *Sakereg* 169.

¹⁴ Mostert *et al The Law of Property in South Africa* 90.

¹⁵ Van der Walt *Constitutional Property Law* 2.

¹⁶ Cowan "New patterns of landownership" 21.

¹⁷ Cowan "New patterns of landownership" 21.

¹⁸ Cowan "New patterns of landownership" 21.

This new form of ownership also provides the possibility of rights created for co-owners of the common property as well as the developer of the sectional title scheme. These rights would be classified as property rights in the context of constitutional protection.

1.4 Property rights

The content and entitlements of ownership as such, although still providing the most complete right a person can have towards a thing, have been amended by the implementation of section 25 of the *Constitution of the Republic of South Africa*, 1996. Although not exactly defined, Van der Walt admits that this is a change from the traditional position. He indicates that case law will play an important role in developing the concept.¹⁹ Van der Walt argues that the court has already started with this development by moving away from an "abstract, rights-based" approach to a "contextual non-hierarchical thinking about property rights".²⁰ The development of constitutional property law will not be one of the main focus areas of this research. However, the importance of the property clause in terms of section 25 of the *Constitution* will be one of the principles underpinning this research. With the introduction of the *Constitution* in South Africa, the property concept has been expanded by the introduction of a wider property concept. Section 25(1) of the *Constitution* provides that:

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 "property" that is protected against deprivation has been given a wider meaning in case law, following the enactment of the *Constitution*. "Property" can include certain interests, for example, a right to a state housing subsidy.²¹ Thus "property" in terms of the *Constitution* can be seen as those resources that are generally taken to constitute a person's wealth and are recognised and can

¹⁹ Van der Walt *Constitutional Property Law* 181.

²⁰ Van der Walt *Constitutional Property Law* 521. Van der Walt refers to the case of *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC).

²¹ *Transkei Public Servants Association v Government of the Republic of South Africa* 1995 9 BCLR 1235 (TKS).

be protected by law, this is often called the dephysicalisation of property.²² Although not all rights with regard to corporeal or incorporeal things are real rights, the wide concept of property will also provide protection for creditor's or personal rights acquired with regards to a corporeal thing.²³ However, even if constitutional protection may be provided to these rights, it would not change the nature of such a right. Pienaar indicates that in a constitutional era it boils down to a balancing of different rights and interests.²⁴ Nonetheless, this does not negate the importance of determining the nature of the right that is dealt with, as the common law system of remedies to protect rights is still the vehicle used to gain access to courts in South Africa.²⁵

1.5 The distinction between real and personal rights

As indicated above, an owner's entitlements to his property may be limited by *inter alia*, the rights created by the STA belonging to other owners or the developer. The legal nature of these rights may be contingent upon the relationship between a person and the property. The relationship between a person and property is dependent upon the "consequences attached to it by law".²⁶ These consequences attached to a right will differ according to the legal nature of the right that is created in terms of the doctrine of subjective rights. At this stage the simplified description by Van der Walt and Pienaar comes to mind. They state that a right to deal with or use property can be categorised as being either personal (a creditor's right) or real. If the right is exercised against a person in respect of the use of his property, it is a personal or creditor's right. A right in a corporeal or incorporeal thing, belonging to oneself, is classified as a real right, whereas the right to a thing, belonging to another person, is classified as a limited real right. Usually this provides the holder of the right with certain entitlements. A right against a person, however, is called a creditor's right,

²² Currie and De Waal *Bill of Rights Handbook* 536-540.

²³ Mostert *et al The Law of Property in South Africa* 6.

²⁴ Pienaar *Sectional Titles* 36.

²⁵ Moseneke "The influence of the Constitution on private law"np.

²⁶ Mostert *et al The Law of Property in South Africa* 41.

normally requiring some sort of performance.²⁷ Besides the fact that the theoretical distinction between real and personal rights is important, as it forms the basis of the division of the law of property into the law of things and the law of obligations,²⁸ this distinction is also important for the practical implications thereof.²⁹ There are vast differences in the legal nature of these rights, as well as its consequences. One of the main practical differences between personal and real rights is that, in terms of South African law,³⁰ only real rights may be registered in the Deeds Registry to come into effect, whereas personal rights may only be registered in exceptional cases, as part of deeds practice.³¹ It is, therefore, important to determine whether a right is real or personal in nature. However, for the purposes of this thesis, the investigation into the legal effect of rights specific to sectional titles will entail more than just a determination of whether the rights are real rights or personal rights. The quest for the legal effect of these rights will also not only focus on the mere registrability of the rights created in sectional titles. In this thesis the legal effect of these rights will be the focus. In order to provide a comprehensive study of the legal effect of the rights specific to sectional titles, the investigation into the legal effect of the rights will also entail an analysis of the rights and duties created by these rights on both the right holder as well as the sectional owners. This research will focus mainly on sectional title schemes that are used for residential purposes except where otherwise indicated.

1.6 Research methodology

This research intends to find solutions by applying common law principles to practical problems which surface daily in sectional title management and registration. The application of accepted property law principles, such as the "subtraction from the *dominium*" test, which distinguishes between real and personal rights in sectional title ownership in South Africa will provide a valuable

²⁷ Van der Walt and Pienaar *Law of Property* 25.

²⁸ Badenhorst, Pienaar and Mostert *The Law of Property* 51.

²⁹ Van der Merwe *Sakereg* 58.

³⁰ Section 63 of the *Deeds Registries Act* 47 of 1937. Hereafter referred to as the *DRA*.

³¹ Van der Merwe *Sakereg* 84.

clarification regarding rights of owners and right holder's in sectional title schemes. The methodology that will be implemented in this study will be an analytical study of existing concepts. The intention of this research is not to study a static set of rules aimed at legal certainty, but rather to study this legal position, as it exists at the moment in a more flexible context where the promotion of justice is more important than legal certainty. This type of study will result in a sound grasp of this specific area of the law and it will contribute to the continuing struggle to realise the social function of the law of ordering rights and responsibilities of legal subjects. The study will comprise a literature study of the relevant South African statutes, other legislative measures, cases, textbooks, journal articles and electronic material in order to give a critical evaluation of the nature of the right of extension of the unit, the right of extension of the developer and exclusive use rights. Reference to the legal positions in Australia and the Netherlands will be done throughout by means of discussing examples of similar situations. Case law and legislation up until 30 September 2017 were worked in.

1.7 Research question

The research question of this thesis is:

To what extent do other parties' rights specific to sectional title ownership affect an owner's corresponding rights?

1.8 Research outline

In order to determine the legal nature of a right, the so-called "subtraction from the *dominium*" test is employed by the courts. In chapter 2, the historical development of this test will be traced up to the most recent decision of *Cowin v Kayalami Estate Homeowners Association*³² and *Willow Waters Homeowners Association (Pty) Ltd v Koka*.³³ This will clarify the distinction between real and personal rights and provide the current position on this distinction. As the only

³² (499/2013) [2014] ZASCA 221 (12 December 2014) (hereafter *Cowin*).

³³ (768/2013) [2014] ZASCA 220 (12 December 2014) (hereafter *Willow Waters*).

test employed by the courts to make this distinction, a thorough exploration of it is crucial.

Consequently, the basis of sectional title ownership will be laid in chapter 3. Its historical development will be traced. The all-important influence of the Constitution will be investigated. As sectional titles are regulated by legislation, the basic principles of sectional title legislation will be scrutinised. The legislative foundation for sectional title ownership will be laid down and the content of the ownership of a sectional title unit will be unpacked. Ownership in general will first be discussed. Then, ownership in terms of a sectional title unit will be delved into. Thereafter, the thing that is owned will be dissected. The two parts of the object, namely the section and the undivided share in the common property will be examined. However, this ownership is not unlimited either, so lastly the limitations on this ownership will be clarified.

After the foundational context for sectional title ownership is laid down in chapter 3, chapter 4 will delve deeper into its intricacies. This chapter will introduce important role players in sectional titles, namely the developer, the body corporate and the sectional owner. The developer as initial sole owner of the property and his decreasing importance in juxtaposition with the rise of importance of the body corporate will be studied. The dualistic relationship of the sectional owner as owner of the section and co-owner of the common property, will be probed. The resolutions and rules that are the tools used to create, terminate and amend specific rights will be introduced. The nature of these rules will be examined critically. Following this broad contextual background, the rights forming the basis of this research will be introduced. The legislative foundation of these rights will be scrutinised, then the uncertainties surrounding these rights will be pointed out. These rights are unique to sectional title ownership. As such it does not have any comparison with other similar rights in South African law. Although the legal nature of these rights seems to be legislatively determined, its position in traditional private law sometimes causes uncertainty as well as the legal effect of these rights.

In chapter 5 these rights will come under more intense investigation. The rights will be deconstructed in terms of its legislative creation, its legal effect, its practical implications and entitlements and duties of right holders. In certain circumstances case law will be discussed, as well as the arguments of academics and the position of the Registrar of Deeds. This compilation will be an attempt to probe the essence of these rights in an effort to shed light on its meaning and its effect on the entitlements of sectional owners.

In the penultimate chapter the aspects of strata title and *appartementsrecht* as a comparative to the South African position, will be an attempt to further elucidate the three rights that form the focus of this research. The similarities between the strata title system, of New South Wales in Australia, and the South African sectional title system, make it an excellent parallel to investigate. To contextualise, a general background to the strata title system will be supplied. Certain general property law principles, such as the *numerus clausus* system, the Torrens system and the principle of indefeasibility of title will be illuminated in short. Subsequently, through a discussion of the relevant termination involved in strata title, a comparison with the South African position will be done. The purpose of this discussion will be to determine whether similar uncertainties are found in strata title as in sectional title in South Africa and whether the New South Wales position can provide any replicable solutions to eradicate the existing uncertainties in the South African position.

Due to its similar common law foundation, the Dutch *appartementsrecht* will finally be discussed. The object and nature of the right will be examined, as well as, the peculiar composition of the *privè gedeelte* and the common property will come under scrutiny. In an attempt to learn from other jurisdictions, this chapter will aim to determine whether similar problems exist in these jurisdictions, which may lead to the clarification of the South African position.

The final chapter will serve as a conclusion of the research. In this chapter an attempt will be made to answer the question regarding the legal effect of the right to extend the section, the developer's right to extend the scheme and

exclusive use areas. In systematically unpacking the content of these rights, it will be possible to not only understand these rights better, but also to determine what the rights and duties of the rights holders are and in what way it will limit the sectional owners' ownership of the sectional and common property.

The aim of the research and the methodology to be used call for a contextual background to the determination of the legal effect of the rights forming the focus of this thesis. The following chapter will sketch the legal position regarding the distinction between real and personal rights in South Africa.

CHAPTER 2

HISTORICAL ANALYSIS OF THE DISTINCTION BETWEEN REAL AND PERSONAL RIGHTS

2.1 Introduction

The introduction of sectional title ownership as a fairly new concept in the South African law and worldwide,³⁴ inevitably led to the creation of rights and obligations that did not exist before. These rights and obligations impact directly on the sectional owner's entitlements as well as that of the holders of such newly created rights. As indicated previously, the aim of this research is to investigate the extent of the entitlements of ownership regarding a unit in a sectional title scheme. In addition, the correlating attempt to obtain a balance between uniquely created rights such as the developer's rights and the owner's rights in sectional title ownership in South Africa, will be made.

In order to come to reliable and technically sound conclusions, the nature of these rights needs to be clarified by applying existing common law principles to practical problems, resulting from the lack of a palpable delineation of such rights. Sectional title ownership is a legal phenomenon that impacts directly on the rights and obligations of a great number of people in South Africa. The importance of the systematic classification of rights pertaining to this type of ownership is intensified by the fact that these rights also have monetary implications. Correspondingly, these statutory rights impact directly on the owner's entitlements of ownership as the most complete real right that a person has to an object.³⁵ In a quest for the delineation of entitlements of the owner of a sectional title unit, it is, therefore, crucial to determine the legal nature of rights that other owners in the scheme, or the developer of the scheme may

³⁴ Refer to Pienaar *Sectional Titles* 18 regarding the introduction of sectional title ownership in Belgium in 1924 and in South Africa in 1973.

³⁵ In the case of *Gien v Gien* 1979 2 SA 1113 (T) at 1120 the court defined ownership as "the most comprehensive real right that a person can have in respect of a thing". Refer to Badenhorst, Pienaar and Mostert *The Law of Property* 91.

have. As it is not clear what the legal effect of the rights, such as the developer, entails, conventional common law principles will be applied to shed some light.

For this reason, it is imperative to initially provide a foundation for the distinction between real and personal rights. In this chapter the historical evolution of the distinction between real and personal rights will be analysed. Subsequently the Roman Dutch (common law)³⁶ foundations for the distinction between real and personal rights will be discussed, followed by a discussion of the development of the principles in case law in South Africa over the past hundred years. This discussion will indicate how the court's interpretation of real *versus* personal rights is constantly changing and evolving. However, bearing in mind that this is not a historical study of the development of the common law principles surrounding real and personal rights, such development will only be discussed briefly for the sake of completeness.

Although South African property law is based on several well defined Roman Dutch principles, it is by no means as clear, or cast in stone, as to render continues development and critical debate superfluous. Whilst considerable research has been done to examine the distinction between real and personal rights, the lack of a clear delineation still leads to uncertainty in various property relationships. An example of such a relationship, where uncertainties in respect of the nature of certain rights exists, is the extent of ownership of a sectional title unit in a sectional title scheme. Sectional title schemes in its totality are regulated statutorily by the *Sectional Titles Act* 95 of 1986. However, Pienaar³⁷ indicates that the *STA* does not exhaustively define the rights and obligations of a sectional title owner, tenant or occupier (or other right-holders).³⁸ Neither is the legal effect of rights of other right-holders created by the Act, such as

³⁶ Although South Africa has a mixed legal system that contains elements of both civil law (Roman Dutch law) and English common law, the principles of Roman law of property are prevalent in modern South African property law, as well as traces of Germanic customary law. This is loosely referred to as the South African "common law" related to property. This is mostly uncodified and should not be confused with English common law. See in this regard Badenhorst, Pienaar and Mostert *The Law of Property* 6-7.

³⁷ Pienaar *Sectional Titles* 243.

³⁸ This problem is also applicable on other right holders such as holders of mortgages or servitudes.

holders of mortgages or servitudes, exhaustively defined. Therefore, uncertainty still exists regarding the legal effect as well as rights and obligations of newly created statutory rights.

An owner of a unit in a sectional title scheme obtains ownership, as real right, of such a unit.³⁹ A right in a corporeal or incorporeal thing belonging to oneself is termed as a real right. Ownership is the only real right held in respect of one's own property.⁴⁰ Ownership is distinguished from other real rights to property because of its independent existence,⁴¹ whereas the latter is derived from ownership and, therefore, need to be clearly delineated.⁴² If the thing, in respect of which the right is held, belongs to another person such a right will be termed a limited real right.⁴³ Usually a limited real right provides the holder of the right with certain entitlements. These entitlements are specified and will, therefore, serve the holder of the right and consequently restrict the owner's entitlements to his thing.⁴⁴

A right against a person, however, is called a personal right, normally requiring some sort of performance from such person.⁴⁵ Depending on whether a right for the use of the property that a third party may have towards an owner's property is a right against the owner in her personal capacity, or a right against the thing

³⁹ Section 2(b) of the Act.

⁴⁰ The so called *ius in re propria*.

⁴¹ Van der Merwe indicates that one of the characteristics of ownership is that it is an independent real right (*selfstandige saaklike reg*) that provides the most extensive entitlements towards a thing. All other real rights are dependent upon the mother right (*moederreg*) and only provides for expressly provided entitlements. Ownership is not dependent upon any other right. Van der Merwe *Sakereg* 176. Refer to Pienaar 2015 *PELJ* 1484 where he argues that this viewpoint is contrary to the "fragmented use-rights model" proposed by Van der Walt in 1999 *Koers* 268 that "ownership is not necessarily the strongest right but one of many rights to the property.

⁴² Mostert *et al The Law of Property in South Africa* 43.

⁴³ Van der Walt 1992 *THRHR* 175. The initial division between ownership and limited real rights stem from the distinction drawn by Grotius of *beheering* (as part of the distinction of patrimonial rights into *beheering* and *inschuld*) into *bezitrecht* and *eigendom*. The latter is further divided into *volle* and *gebrecklicke eigendom*. *Volle eigendom* signifying the right to do with the thing as the owner pleases and *gebrecklicke eigendom* ownership that lacks something when compared to *volle eigendom*. According to Van der Walt this division explained by Grotius forms the basis of the modern distinction between ownership and limited real rights.

⁴⁴ Mostert *et al The Law of Property in South Africa* 44.

⁴⁵ Van der Walt and Pienaar *Law of Property* 23.

enforceable against any owners of the thing, these rights will be classified as either personal rights or real rights. Grotius⁴⁶ explains the difference between real and personal rights indicating that real rights have a "direct or immediate character" and can be exercised without reference to another person. A personal right, however, may involve a thing, but the right exists against another person.

Van der Linden⁴⁷ described the distinction between real and personal rights in the following way: in the case of the former a person may have the right on or to a thing itself, whereas in the latter the right is against a person to deliver some or other performance. Van der Linden acknowledges the complete difference between real and personal rights and calls this difference "*hemelsbreed*".⁴⁸ He indicates clearly that a real right is a person's right on a thing to the exclusion of others. A person is closely related (*verbonden*/closely bound) to the thing. In the case of a personal right, however, you are closely related (*verbonden*/ closely bound) to the person with whom you have negotiated (*gehandeld heb*/dealt with) to delivery of the thing or performance of a certain action. The emphasis that Van der Linden places on the relationship "to/on" the thing or "towards" the person could maybe explain the initial classical theory,⁴⁹ where the distinction between real and personal rights is based on the object of the right. However, as will be indicated later, this distinction did not really provide the desired outcome in all circumstances.

⁴⁶ As explained in Van der Walt 1992 *THRHR* 176.

⁴⁷ In Delpont and Olivier *Sakereg Vonnisbundel* 1 quoted from Van der Linden *Regtsgeleerd Practicaal en Koopmans handboek* 161 "Voorbedagtelijk zeggen wij, dat de menschen recht hebben op of tot de zaaken: immers dit recht is van tweërleien aart, en in de gevolgen van een hemelsbreed onderscheid.-Recht op eene zaak (jus in re) is dat recht, waar door de zaak zelve aan mij verbonden is, zoo dat ik mijn recht op die zaak zelve vervolge, tegen elken bezitter, wie hij ook zij. – Recht tot eene zaak (jus ad rem, vel in personam) is dat recht, waar door niet de zaak, maar de persoon, met wien ik gehandeld heb, aan mij verbonden is, zoo dat ik allenlijk tegen hem eene actie heb, tot levering der beloofde zaak, of tot de uitvoering der toegezegde daad...".

⁴⁸ Loosely translated to be a "vast distinction".

⁴⁹ See para 2.4.2 for a discussion of the classical theory. The personalist theory will also be addressed in para 2.4.3.

2.2 Importance of the distinction

The rationale behind the distinction between real and personal rights should always be kept in mind. This theoretical distinction formed the basis of the historical Romanist division between the law of obligations and the law of things.⁵⁰ However, this distinction between real and personal rights is important for more than just academic purposes.

According to Van der Merwe,⁵¹ it is also important for the practical implications thereof. The distinction lies mainly in the vast differences in the legal nature of these rights. Van der Merwe illuminates the basis of this distinction by referring to the divisions of procedural actions that can be traced back to Roman law.⁵² As the remedies were pivotal in these times,⁵³ the distinction between real and personal rights was not of paramount importance. However, this distinction gained importance initially to the Glossators⁵⁴ and later on the Post-glossators⁵⁵ who initiated the distinction⁵⁶ by using *iuria in rem*⁵⁷ and *iuria in personam*.⁵⁸ With the later development of the doctrine of rights, the classification between the law of things and the law of obligations was accepted.

The importance of distinguishing between the rights pertaining to a corporeal thing as either real (against the property itself) or personal (in the sense that a performance in respect of the thing may be enforced against the owner), also

⁵⁰ Van der Merwe *Sakereg* 58.

⁵¹ Van der Merwe *Sakereg* 58.

⁵² According to Van der Merwe these remedies were divided into *actiones in rem* (remedies instituted against the thing itself irrespective of who is in possession of the thing) and *actiones in personam* (remedies instituted against one or more persons, namely those persons who are obliged to perform because of an agreement or legal fact against the specific claimant).

⁵³ As opposed to rights in modern times.

⁵⁴ By consciously making the distinction a material one. See Van der Merwe *Sakereg* 59 where he states: *bewustelik deurgetrek tot 'n materiële regtelike onderskeid*.

⁵⁵ They have made the distinction quite clear and elevated the importance of rights over remedies.

⁵⁶ Van der Walt indicates that the concept of real rights and its distinction was initiated by the Post-glossators, Dutch, French and German Romanists during the sixteenth to eighteenth centuries. However, the theoretical concepts existed, though underdeveloped, in the time of the Glossators. Refer further to Van der Walt 1992 *THRHR* 172.

⁵⁷ Real rights.

⁵⁸ Personal rights.

lies in the fact that, although both are "rights in property",⁵⁹ these rights differ *inter alia* in terms of its vesting, application as well as its effect. As indicated earlier⁶⁰ the determination of the nature of the right will influence not only the entitlements of the owner as to his property, but it may also have monetary implications for the holder of the right.⁶¹ Van der Walt and Pienaar summarise it quite simply by indicating the importance of determining the distinction between the rights pertaining a corporeal thing, as either real or personal lies in the fact that these rights are "acquired, exercised and protected" differently.⁶² Mostert *et al*⁶³ elaborates on this by indicating that the transfer of real rights takes place by means of registration in the case of immovable property and, in most cases, delivery of movables,⁶⁴ whereas personal rights are transferred by way of cession. Similarly real rights are protected by proprietary remedies whilst personal rights are protected by the availability of contractual and delictual remedies.⁶⁵

There is no explicit statutory identification of real rights. Section 63(1) of the *DRA* 47 of 1937 provides that personal rights (barring a few) may not be registered in the Deeds Registry and section 102 of the same Act gives a definition of a real right as "any right which becomes real upon registration".⁶⁶ Badenhorst and Coetser⁶⁷ also lament the fact that the *DRA* does not efficiently

⁵⁹ As protected by s 25 of the *Constitution of the Republic of South Africa* 1996.

⁶⁰ Paragraph 2.1.

⁶¹ For example the developer of a sectional title scheme may alienate his right of extension of the scheme in terms of s 25 of the Act. Similarly the owner of a unit in a sectional title scheme may also pay more for a unit if a garage is provided as an exclusive use area to the unit.

⁶² Van der Walt and Pienaar *Law of Property* 25.

⁶³ Mostert *et al The Law of Property in South Africa* 47.

⁶⁴ Section 63(1) of the *DRA* 47 of 1937. This section states that "[n]o deed or condition in a deed, purporting to create or embodying any personal right, and no condition which does not restrict the exercise of any right of ownership in respect of immovable property, shall be capable of registration...".

⁶⁵ The distinction between real and personal rights in the Dutch legal system is summarised in the case of *Blaauboer* HR 3 maart 1905, W. 8191, WPNR 1844 (*Blaauboer/Berlips*) as referred to by Struycken *Numerus clausus* 41

⁶⁶ An exception to this may be so called *onera realia* as registrable personal rights that acquire real effect upon registration. The problem with these rights is they place positive obligations on the owner. The court will be reluctant to register rights that place obligations on the owner or successors in title.

⁶⁷ Badenhorst and Coetser 1991 *De Jure* 377.

describe the concepts of real and personal rights. Borraine holds a similar viewpoint and submits that section 63 does not contribute to distinguish between real and personal rights and, therefore, does not provide a solution for the distinction between real and personal rights.⁶⁸ He points out that a real right only comes into existence by registration and that registration makes it binding against third parties. He bases his argument by referring to the case of *Murphy v Labuschagne and The Central Coronation Syndicate*⁶⁹ where the court found:

Now I have always understood the general rule to be that to constitute a real right binding upon and especially against third parties, there must be due registration and that such a right only dates from registration.⁷⁰

2.3 The development of the distinction between real and personal rights in South African law

2.3.1 Common (Roman Dutch) law position

The importance of this distinction has been the topic of many an academic debate, and has acquired a "mystical nature"⁷¹ according to Van der Walt, that is not really necessary. He observes, quite convincingly, that the main problem with the distinction is caused by similarities between real and personal rights involving things. He argues further, that confusion occurs with personal rights that resemble real rights, specifically limited real rights. He correctly states that the confusion is mainly found with limited real rights related to land and the "creation of rights and obligations that do not fit into the established categories of well-known limited real rights".⁷²

⁶⁸ Borraine *Registreerbaarheid* 20.

⁶⁹ 1903 TS 292 at 400.

⁷⁰ Borraine *Registreerbaarheid* 24.

⁷¹ Van der Walt 1992 *THRHR* 179.

⁷² Van Wyk cautions against the effort to fit every newly created right into one of the traditional categories of limited real rights. In an article on the judgement in *Erlax Properties (Pty) Ltd v Registrar of Deeds* 1992 1 SA 879 (A) she refers to the right of extension of a developer in a sectional title scheme that is seen as "around peg in which neatly fits into the round personal servitudinal hole. Unfortunately this right is not a round peg but a square one". Refer to Van Wyk 1993 *THRHR* 144. This case and Van Wyk's discussion will be dealt with in more detail in the discussion of cases in para 2.5.

Although Van der Walt refers to the existing confusion surrounding "rights and obligations that do not fit into the established categories of real rights", the problem is compounded mainly because South African law knows no closed category (*numerus clausus*) limited real rights.⁷³ Mostert and Verstappen⁷⁴ assuage this viewpoint by indicating that South African law recognises the *numerus clausus* principle but does not adhere to it as broadly as the case in modern civil law systems. As a result, private autonomy is acknowledged.

Although this approach is less rigid, it has the effect that new real rights can potentially be created in wills and contracts leading to even more uncertainty, especially when the nature of the right created in a will or a contract needs to be determined. Similarly, Mostert *et al* contend that because of the freedom of contract and testation, the establishment of new, peculiar real rights in respect of (especially) immovable property remains a reality.⁷⁵ The uncertainty that may stem from the creation of new rights and obligations is acknowledged by Badenhorst, Pienaar and Mostert when they indicate that "when the range of potential real rights is extended it becomes essential to determine the basis on which the real right ought to be recognised".⁷⁶ This problem is obviously exacerbated when the right that is created does not fit into any one of the recognised categories of real rights.

According to De Waal:

... new real rights that have been added over the years include the lease of land, mineral rights and real rights in respect of units in a sectional title scheme.⁷⁷

⁷³ Mostert *et al* *The Law of Property in South Africa* 45. The principle of a closed category limited real rights will be discussed fully in para 2.3.2. As opposed to some common law jurisdictions, the South African law, under the influence of the Germanic law do not recognise a *numerus clausus* of limited real rights. Van der Merwe 1989 *Sakereg* 66.

⁷⁴ Mostert and Verstappen 2015 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2572838.

⁷⁵ Mostert *et al* *The Law of Property in South Africa* 48.

⁷⁶ Badenhorst, Pienaar and Mostert *The Law of Property* 49.

⁷⁷ De Waal 1999 <http://www.ejcl.org/33/art33-1.html> at para 2. These real rights, however do not always fit into the traditional categories of real rights. This will be referred to in chapter 4 when for instance exclusive use areas in sectional titles are discussed.

Bearing all these problems in mind, it seems inevitable to question why a *numerus clausus* of limited real rights is not an established principle in the South African law, especially as several closed systems is a basic principle of the civil law of things⁷⁸ and some of the other closed systems do form part of the South African legal system. Therefore, it is necessary to investigate the inception of the *Ius commune* in South Africa.

2.3.2 *Ius commune*

Cheadle, Davis and Haysom refer to property as follows:

At common law, the expression 'property' embraces both the object of real rights (corporeal and incorporeal things) and real rights themselves. Although Roman law recognises a closed list of real rights, the Roman-Dutch law writers recognised a potentially unlimited number of such rights, the most important of which were ownership, servitudes, mortgage, pledge, liens, mineral rights, water rights and, more debatably possession.⁷⁹

The *numerus clausus* principle that was instituted in the Dutch Code in the early half of the nineteenth century⁸⁰ included a catalogue of real rights. However, as the *Ius commune* was received in South Africa in 1700 the Dutch law of that time is acknowledged as the basis of South African common law.

As indicated by De Waal,⁸¹ the South African system builds on categorised limited real rights. This is evident from the fact that the *DRA* recognises certain

⁷⁸ Van der Merwe *Sakereg* 10-11. Van der Merwe states that a basic characteristic of the law of things is that it consists of several closed systems. *'n Basiese kenmerk van die sakereg is dat dit verskeie geslote stelsels het.* See also De Waal 1999 <http://www.ejcl.org/33/art33-1.html> at para 2 where he explains that the *numerus clausus* principle is one of the basic principles of civil law of things. He explains that concerning real rights, means of delivery of movable things and modes of original acquisition of ownership specific recognised categories (*numerus clausus*) exist and are accepted by the law. The South African property law, although recognising the closed system regarding delivery of movables and original acquisition of ownership, do not adhere to this principle regarding the categorisation of real rights. He indicates that regarding the creation of new real rights the South African property law falls back on the traditional categories of real rights that was applicable in Roman Law, for example ownership, servitudes, mortgage and pledge.

⁷⁹ Cheadle, Davis and Haysom *Bill of Rights* 12/27.

⁸⁰ Mostert and Verstappen 2015 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2572838.

⁸¹ De Waal 1999 <http://www.ejcl.org/33/art33-1.html> at para 2.

categories of real rights, and provides for publicity⁸² by registering such categories.⁸³

However the registrability of real rights is a general provision and not only applicable to only certain types of rights. Thus contracting parties and testators have the autonomy to create new rights. This creates uncertainty regarding the legal nature of the rights, because of the freedom of contract and testation, the establishment of new, peculiar real rights in respect of (especially) their immovable property remains a reality.⁸⁴

2.4 The development in the South African law of the distinction between real and personal rights - a theoretical approach

2.4.1 Introduction

The absence of a closed category of limited real rights as well as the establishment of new rights through contract and testation, emphasises the need for a proper distinction to be drawn between real and personal rights. This distinction causes problems when the nature of the right created in a will or a contract needs to be determined. It may then lead to difficulty in identifying the nature and enforceability of a term in a will or a contract as either a real right or a personal (creditor's) right. Initially two theories were used to draw this distinction, namely the classical and personalist theories.

2.4.2 Classical theory

The classical theory emphasises the object of the right. This theory is related to Van der Linden's submission that in the case of a real right, a person is closely related (*verbonden*/closely bound) to the thing itself and in the case of a

⁸² Van der Merwe *Sakereg* 14 indicates the function of publicity is to create a presumption that the person in whose name the property (or right) is registered is the lawful right holder. Refer to Badenhorst and Coetser 1991 *De Jure* 375-376 where they indicate that "the significance of the registration of private law rights is the publicity function". This registration "affords *prima facie* proof of the real right".

⁸³ In terms of s 3(1) of the *DRA* 47 of 1937.

⁸⁴ Mostert *et al The Law of Property in South Africa* 48.

personal right a person is closely related (*verbonden*/ closely bound) to the person with whom you have negotiated (*gehandeld heb*/dealt with) to delivery of the thing or performance of a certain action. This argument by Van der Linden is developed in the classical theory to determine a real right as a right of a person to a thing with the coinciding extensive entitlements of control and enjoyment of the thing. A personal right on the contrary only provides a claim against another person for some kind of performance.⁸⁵ Delpont and Olivier⁸⁶ explain that the nature of the legal relationship forms the basis of the classical theory.⁸⁷

Criticism against this theory includes the following:

- The physical control and even some entitlements flowing from personal rights (for instance lease agreements) are similar to those of real rights;
- The real right includes not only the right on the thing itself, but also the right against another person to respect such a right.

Although Badenhorst, Pienaar and Mostert value the initial argument of Van der Linden, the development of the theory is criticised.⁸⁸ Van der Walt indicates that the theory "contains a central moment of truth" as it does emphasise the direct relationship between the person and a thing as initially indicated by Grotius.⁸⁹

⁸⁵ Van der Merwe *Sakereg* 62-63; Badenhorst, Pienaar and Mostert *The Law of Property* 50.

⁸⁶ Delpont and Olivier *Sakereg Vonnisbundel* 5.

⁸⁷ The differences between real and personal rights is discussed by Delpont and Olivier *Sakereg Vonnisbundel* 5 with reference to Van der Merwe. The latter argues that the object of the rights differ: The object of a real right is a thing, whereas the object of a personal right is a performance. The content of the rights differs: The holder of a real right can claim possession over the thing, whereas the holder of a personal right can claim performance from another person. The remedies of the two rights differ: In the case of a real right the holder of the right may claim the thing with the *rei vindicatio*. This is not possible in the case of a personal right. The origin of the rights differs. A personal right originates from an obligation while a real right originates from other legal facts, such as delivery or prescription.

⁸⁸ Badenhorst, Pienaar and Mostert *The Law of Property* 51.

⁸⁹ Van der Walt 1992 *THRHR* 187.

2.4.3 Personalist theory

Another theory was also used to draw the distinction between real and personal rights, namely the personalist theory. This theory places an emphasis on the way the rights are enforced. Delpont and Olivier indicate that the focus is on the operation of the right.⁹⁰ As the name indicates, the persons against whom the rights are enforced remain the main focal point. Therefore, a real right is seen as an absolute right that is enforceable against the whole world, whereas a personal right is relative and enforceable against only a specific person.⁹¹ Van der Walt⁹² explains this by referring to the absoluteness of the right being enforceable against "any owner of the land". He indicates that the right is directly linked to the land and not to the owner of the land. This is again referring to Grotius's definition of a real right that exists with reference to a thing and not a person.

According to the writings of Van der Merwe, as well as Badenhorst, Pienaar and Mostert, this theory is also not safe from critique. They base their criticism on the following:

- The absoluteness of the enforcement of entitlements of real rights are disputed and deemed a fiction. Van der Merwe contends that persons who never come into contact with the thing on which the real right exists, will not be bound by any obligation to refrain from infringing upon someone's real rights. This absoluteness of these rights is, furthermore contentious as the owner's entitlement to vindicate his property is limited by the rights of the *bona fide* possessor in terms of estoppel.⁹³ Without going into too much detail, as this is not the purpose of the research, it is arguable that this concept of absoluteness will be under even greater scrutiny nowadays

⁹⁰ Delpont and Olivier *Sakereg Vonnisbundel* 5.

⁹¹ Van der Merwe *Sakereg* 60-61; Van der Walt and Pienaar *Law of Property* 28.

⁹² Van der Walt 1992 *THRHR* 187.

⁹³ The entitlement to vindicate (*ius vindicandi*) provides the owner with the right to claim the property from someone who is in unlawful possession of it. See Van der Merwe *Sakereg* 173. However, this entitlement is restricted should the possessor use the defence of estoppel to show that the owner has made a misrepresentation that someone other than the owner had the right to alienate the property and that the possessor acted on the misrepresentation to his detriment. The owner will then not be allowed to vindicate the property, but he will be held to the misrepresentation that he created. Refer further to Van der Merwe *Sakereg* 368.

as the recent interpretation of the *Constitution* by the courts indicates that the balancing of different interests is a core value.⁹⁴

- Badenhorst, Pienaar and Mostert raise another point of critique against the personalist theory and argue that the dual relationship of a right in terms of the doctrine of rights⁹⁵ is overlooked with the application of this theory. They claim that:

The subject-subject relationship in the instance of a real right is erroneously compared with the subject-object relationship in the instance of a personal right, instead of comparing enforceability of a right on the subject-object level.

From this discussion it is clear that neither of these two theories provide for an acceptable mechanism to distinguish between real and personal rights. However, a more elegant approach to this distinction was made by the South African courts when they eloquently employed the so-called "subtraction from the *dominium*" test⁹⁶ to draw this distinction.

2.5 The development in the South African law of the distinction between real and personal rights - a pragmatic approach

2.5.1 Formulation of the subtraction test and its application in early case law

As a result of the criticism lodged against the theories mentioned above, the court developed this twofold test in an effort to clarify the distinction. In *Ex parte Geldenhuys*, the then Orange Free State provincial division of the

⁹⁴ In *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 CC para 23 the court indicated the following: "The judicial function ...is not to establish a hierarchical arrangement between the different interests involved...Rather, it is to balance out and reconcile the opposed claims in as just a manner as possible, taking account of all the interests involved...". Therefore the entitlements of ownership should be balanced against the rights of third parties whether the rights are real rights or personal rights. Refer to 3.3.2.1 where the "fragmented use rights model is based on a similar supposition. The influence of the *Constitution* will be discussed in more detail in 4.3.2.

⁹⁵ The doctrine of rights provide for the following relationships. The relationship between a person and a thing is the so called subject-object relationship and creates a real right whereas the relationship between a person and another person is the subject-subject relationship and creates a personal right with the performance being the object of the right. However the real right also requires other people to respect someone's right to his property. For a more in depth explanation refer to Kruger and Skelton (eds) *et al Law of Persons* 12-15.

⁹⁶ Hereafter referred to as the subtraction test as discussed to in *Ex parte Geldenhuys* 1926 OPD 155.

Supreme Court of South Africa attempted to remove some of the uncertainty in drawing this distinction. This test is twofold, namely:

- i) The right must be intended to bind successors in title, and
- ii) It must also amount to a subtraction from the *dominium*,⁹⁷ indicating some or other limitation of the owner's entitlements by the holder of the right.

The court had to decide whether rights created in a mutual will were real rights (and could subsequently be registered as such in the Deeds Registry), or whether rights were personal rights and could not be registered. The facts, in short, were that an application was sought for an order instructing the Registrar of Deeds to register a transfer of undivided co-ownership shares, where the children were jointly bequeathed the ownership of an undivided farm in terms of a mutual will. The will contained two conditions that created uncertainty. The first condition provided for the division of the land into equal shares amongst the heirs, "as soon as (our) first child reaches the age of majority".⁹⁸ The second condition provided that the distribution of the divided pieces of land amongst the children should take place by means of a "drawing of lots" and that the heir who obtains the portion of land that included the homestead of the original farm, should pay a certain sum of money, that is £200 to the remaining legatees.

The Registrar of Deeds refused to register these conditions as real rights and argued that the conditions created only personal rights and not real rights. He maintained regarding the first condition, that the rights created were personal and not real and, therefore, not registrable.⁹⁹ He asserted that the condition was not akin to a right of pre-emption, because in this instance the co-owners

⁹⁷ Some writers call this the "two-pronged approach". Mostert *et al The Law of Property in South Africa* 50. Other writers see only the second part of the test as the so-called "subtraction from the *dominium*" test. See De Waal 1999 <http://www.ejcl.org/33/art33-1.html>_para 2. In this thesis reference to the subtraction test will refer to both requirements of the test.

⁹⁸ At 155 in *Ex parte Geldenhuys* 1926 OPD.

⁹⁹ The Registrar of Deeds ironically used the case of *Hollins* for authority for this argument. The exact case was used by the court in its judgement to find just the opposite! This is but one example of the court using the same requirements to achieve different results. The latter is some of the criticism lodged against the test. Refer later in para 2.5.5.

could transfer their share free from the permission of others, which was not the case with a right of pre-emption. This argument led him to insist that the condition did not fit the requirements of a right of pre-emption¹⁰⁰ and is, therefore, not a real right. Therefore, according to the Registrar, the pre-emptive right was a restriction on alienation and as the condition under discussion did not infer such a restriction, it was not a real right. He contended further, that even if the conditions were registered, they would only bind legatees and not successors in title.¹⁰¹ Although he accepted that transfer of co-ownership to the children should take place, he declined to do so under the conditions of the will regarding the eventual subdivision, as these were deemed personal in nature. Upon request the Master also filed a report and lodged a protest against the Registrar's refusal, based mainly on the fact that the interests of minor's¹⁰² were prejudiced by such a refusal.

The court followed a very interesting approach by referring to *Hollins v Registrar of Deeds*.¹⁰³ This decision was one of the first where the court also referred to the subtraction test.¹⁰⁴ The case dealt with the terms of a notarial contract. In terms of this contract the parties agreed that, should the owner's farm be proclaimed and *mynpacht* granted in terms of the old Gold Law, half of the *mynpacht* share and the ownership on which such half will be situated, would be transferred to Hollins as he bought a half-share of the *mynpacht*. Upon refusal of the Registrar of Deeds to register this condition, Hollins approached the court for an order to compel registration. Although the applicant argued that the intention of the contracting parties was to create a real right, the court decided that this condition only conferred personal rights.

The court clarified it as follows:

¹⁰⁰ He indicated that the reason why a right of pre-emption was considered a real right was because it required the assent of other parties.

¹⁰¹ Refer to *Ex parte Geldenhuys* 1926 OPD 155 162.

¹⁰² Mainly the payment of the sum of money.

¹⁰³ 1904 TS 603 as referred to in *Ex parte Geldenhuys* 1926 OPD 155 at 162 (hereafter the *Hollins* case).

¹⁰⁴ Lewis 1987 *SALJ* 603.

The document confers upon Hollins merely a personal right, a *jus in personam* contingent upon the farm being proclaimed under the Gold Law. If no proclamation should take place Hollins will have paid 6000 pounds for nothing. Even if the farm be proclaimed he will merely be able to sue the owner to carry out his bargain. In no sense can it be considered that a portion of the *dominium*¹⁰⁵ has been sold to Hollins [the grantee]; a personal right has been given to him, contingent upon the happening of an event which may never happen...¹⁰⁶

Here the court referred to a portion of the *dominium* that should have been sold in order for the right to be considered real.

The court confirmed further in *Hollins* that "...only real rights can be registered against the title deed of the land" and then found that those rights were,

... i.e., such rights as constitute a burden upon the servient land, and is a deduction from the *dominium*.¹⁰⁷

This remark by Innes J in *Hollins* was used by the court in *Ex parte Geldenhuys* to determine registrability of rights. The court used an analysis of a usufruct and came to the conclusion that it may be registered as "it is a burden upon the land none the less and it 'may be enforced against any and every possessor of the land' ".¹⁰⁸ The court discussed personal servitudes in the form of usufruct in detail and came to the conclusion that the prohibition of registering personal rights do not refer to "rights created in favour of a person, for such rights may be real rights in land".¹⁰⁹ The court found further that:

The reference is to rights, which are merely binding on the present owner of the land and do not bind the land, and do not bind the successors in title of the present owner.¹¹⁰

The court used these remarks to formulate the "subtraction from the *dominium*", test for the first time.

¹⁰⁵ Own emphasis.

¹⁰⁶ Lewis 1987 *SALJ* at 605 refer in the para dealing with the future developments of the test where the contingency principle is discussed. Refer to Lewis 1987 *SALJ* 603.

¹⁰⁷ As referred to in *Ex parte Geldenhuys* 1926 OPD 155 at 162.

¹⁰⁸ Refer to *Ex parte Geldenhuys* 1926 OPD 155 at 163. Here the court relies on Maasdorp's *Institutes of Cape Law* 2 Ch 16 para 5.

¹⁰⁹ *Ex parte Geldenhuys* 1926 OPD 155 at 164.

¹¹⁰ *Ex parte Geldenhuys* 1926 OPD 155 at 164.

It was formulated in the following manner:

One has to look not so much to the right, but to the correlative obligation. If that obligation is a burden upon the land, a subtraction from the *dominium*, the corresponding right is real and registrable; if it is not such an obligation, but merely an obligation binding on some person or other, the corresponding right is a personal right, or right *in personam*, and it cannot as a rule be registered.¹¹¹

The court applied the subtraction test on the specific facts at hand by determining that the condition regarding the time and manner of subdivision restricts co-owners freedom to decide this. The court found that the common law position was that co-owners of undivided shares had the right to claim the division at any time. Therefore, this condition that indicated that the division of the property should take place when the eldest child has reached the age of majority, as well as the condition of how the sub-division should take place (by the drawing of lots), placed a restriction on the common law entitlements of a co-owner. The court initially contemplated the validity of the condition and upon finding it to be valid, deduced that the limitation placed on the entitlements of the co-owners:

(s)o directly affect and adhere to ownership of undivided shares, that they must almost necessarily be regarded as forming a real burden or encumbrance on that ownership.¹¹²

The court did not focus specifically on the intention of the parties as the first part or requirement of the test, but rather on the entitlements of ownership (or in this case co-ownership) that are diminished. In deciding on the second condition, namely the payment of money, the court found this condition to be a *ius in personam*. The court came to this conclusion by finding interestingly enough that the right that was created did not fit into the recognised categories of rights, namely that of a "duly constituted hypothec".¹¹³ Additionally the

¹¹¹ *Ex parte Geldenhuys* 1926 OPD 155 at 164.

¹¹² *Ex parte Geldenhuys* 1926 OPD 155 at 165.

¹¹³ Although the court considered the creation of new real rights and developed a test for determining such, the rights created were still measured against the traditional categories of real rights. This was also done in *Hollins* and *Lorentz* (refer later) where the court looked at whether servitudes were created. So it seems as if the court was still lead by

obligation created by this condition was also found to be uncertain (as to who will draw which lot) and conditional. However, the court found that by not registering the second condition, it would result in an "incorrect representation, and an imperfect picture of the testamentary direction".¹¹⁴ Here the court acknowledged the intention of the testating parties and allowed for the registration of the second condition. Therefore, the test was applied to investigate the nature and effect of the obligation with the intention of the parties seen as merely a clue to determine the nature of the right that is created. In the case of a real right the obligation that was created placed a "burden upon land" and the owner as well as subsequent owners was bound in their capacity as owners of the land. In case of a personal right the obligation placed a "burden upon a person" in his personal capacity and successors in title were not bound.

2.5.2 Further development of the subtraction test in case law regarding the payment of a sum of money

This test has been applied and developed in South Africa case law over nearly a century.¹¹⁵ One of the decisions that contributed to the development of the test was *Lorentz v Melle*.¹¹⁶ In this case, unlike *Ex parte Geldenhuys*, conditions were created in a contract and registered¹¹⁷ in the deeds registry by way of a notarial deed. The parties agreed in the contract on the following conditions:

- To sub-divide a piece of land into three parts of which the two owners each become owner of one part and remain co-owners of the third part; and

the traditional Roman Law categories of limited real rights. Refer De Waal 1999 <http://www.ejcl.org/33/art33-1.html> at para 1. This will be discussed in detail in paras 2.5.6 and 2.5.7 on the criticism against the test and possible future development of the test.

¹¹⁴ *Ex parte Geldenhuys* 1926 OPD 155 at 165.

¹¹⁵ Refer to *Registrar of Deeds (Tvl) v The Ferreira Deep Ltd* 1930 AD 169 and *Odendaalsrus Gold, General v Investments and Extensions Ltd v Registrar of Deeds* 1953 1 SA 600 (O).

¹¹⁶ 1978 3 SA 1044 (T).

¹¹⁷ Although "incorrectly" refer 1055; neither could the fact that it was registered by mistake. See De Waal 1999 <http://www.ejcl.org/33/art33-1.html> at para 3.

- In the event of one of the parties commencing township development on his part of the original piece of land, the other would acquire a claim for half of the net profits of such a development.

The appellant argued that these conditions created in the agreement constituted a praedial servitude and would, therefore, be binding on successors in title. The court debated whether the right to the profit constituted a praedial servitude and came to the conclusion that it was not a praedial servitude as the use made of (burden placed on) the servient tenement did not have a permanent attribute¹¹⁸ to it. The court arrived at this conclusion "irrespective of what the intention of the parties as expressed in the deed was" and effectively disregarded the intention of the parties.¹¹⁹ The court further indicated that if the contractual right was incapable of constituting a servitude, the intention of the parties could make a difference.¹²⁰ However, the court found that although the obligation to pay money diminished the owner's *dominium*, it did not restrict his physical use of land.¹²¹ Should this be the case, obligations to pay money would never be deemed real rights.¹²² Although the court acknowledged that the payment to another of some of the profit gained:

At the alienation of one's land do amount to a subtraction from the dominium, the corresponding right cannot necessarily be clarified as real.¹²³

De Waal argues that the court applied the test by determining whether the effect of the other person's right will curtail the enjoyment of the owner's land in the physical sense. In a case discussion Van der Walt criticises this decision and argues that this application by the court effectively "makes nonsense" of the subtraction test and is not convincing.¹²⁴ This decision was not followed in

¹¹⁸ It did not fit the requirement of a *causa perpetua*.

¹¹⁹ *Lorentz v Melle* 1978 3 SA 1044 (T) at 1055.

¹²⁰ Neither could the fact that it was registered by mistake. See De Waal 1999 <http://www.ejcl.org/33/art33-1.html> para 3.

¹²¹ "His rights are curtailed but not in relation to the enjoyment of land in the physical sense." *Lorentz v Melle* 1978 3 SA 1044 (T) at 1052D-E.

¹²² *Barclays Western Bank Ltd v Comfy Hotels Ltd* 1980 4 SA 174 (EC).

¹²³ See De Waal 1999 <http://www.ejcl.org/33/art33-1.html> at para 3.2.

¹²⁴ Van der Walt *Law of property* 26.

Pearly Beach Trust v Registrar of Deeds,¹²⁵ where the court returned to the traditional application of the subtraction test. However, the opposite point of view was held by De Waal¹²⁶ who applauds the decision in *Lorentz* and contends that the *Pearly Beach* decision was incorrect. This will be discussed in more detail later on.¹²⁷

From the discussion so far, it is clear that although the subtraction test strives toward providing certainty regarding the legal nature of new rights that are created, the application of the test itself on different scenarios do not lead to clear cut solutions.¹²⁸ This is by far not the end of the journey of the development of the subtraction test through case law. The next case that had quite a dramatic influence on the development of the subtraction test is *Pearly Beach*. In this case the court returned to the traditional application of the subtraction test and found that a condition to pay a sum of money restricts the owner's right to dispose of property and enjoy the full fruits of his property derived from the property itself. The applicant sought an order against the Registrar of Deeds for the registration of a condition created in a contract of sale that provides that a third party will be entitled to receive from the transferee and his successors in title one third of the net profit should:

- An option or any prospecting right be granted or;
- Expropriation or transfer to any organ of authority takes place.

Although it was common cause that the condition did create a real right also binding successors in title, the Registrar of Deeds refused to register the condition. The Registrar's objection, according to Van der Walt,¹²⁹ was based on the assumption that the condition would only be a subtraction from the dominium if it placed an obligation on the owner to effect the sale or expropriation of the property resulting in the payment to the third party and thereby limiting the owner's entitlement of alienation. The court found,

¹²⁵ 1990 4 SA 614 (C) (hereafter the *Pearly Beach* case).

¹²⁶ 1999 *ECJL* <http://www.ejcl.org/33/art33-1.html> at para 3.3.

¹²⁷ Refer to 2.5.4.

¹²⁸ The criticism that the test evoked will be discussed in detail in 2.5.4.

¹²⁹ Van der Walt 1992 *THRHR* 171.

however, that the obligation was intended to bind successors in title¹³⁰ and also limited the owner's right to obtain the "full fruits of the disposition" and is, therefore, a restriction on ownership.¹³¹ Although the court negated the additional requirement of a restriction on the physical use of land, this case also did not escape criticism.¹³² Van der Walt criticises the obligation to pay money although he indicates that the condition is a direct product of land, as it reduces the owner's benefit of use and enjoyment. However, he applauds the fact that the intention of the parties to the contract is taken into account¹³³ and emphasises the importance of not negating the intentions of the parties creating the right. Van der Merwe, on the other hand, warns that too many restrictions placed on the land may place a restriction on commerce.¹³⁴

As interesting as the three previous cases may be, it focussed mainly on the registrability of conditions to pay money. The focus of this study remains on the broader principles applicable in the distinction of real and personal rights, especially with reference to ownership in sectional title schemes. For this reason Van der Walt's analysis of the legal position after *Pearly Beach* is important, especially when he refers to the principle that a real right is characterised by the immediate bond between the legal subject and the thing.¹³⁵ This implies that the right must be objectively capable of being registered. Van der Walt comes to the conclusion that:

The test is whether the obligation can be regarded as a burden upon the land itself, in the sense that it limits the ownership of the land directly, and not only the present owner in his personal capacity.¹³⁶

¹³⁰ *Pearly Beach Trust v Registrar of Deeds* 1990 4 SA 614 (C) at 618E.

¹³¹ *Pearly Beach Trust v Registrar of Deeds* 1990 4 SA 614 (C) at 617I.

¹³² Sonnekus 1991 *TSAR* 173-180, De Waal 1999 <http://www.ejcl.org/33/art33-1.html>; Badenhorst and Coetser 1991 *De Jure* 375-389.

¹³³ Van der Walt 1992 *THRHR* 202.

¹³⁴ Van der Merwe *Sakereg* 83.

¹³⁵ Van der Walt 1992 *THRHR* 194.

¹³⁶ Van der Walt 1992 *THRHR* 203.

2.5.3 Most recent development of the subtraction test in case law

In a case that is extremely relevant to the current study, *Erlax Properties (Pty) Ltd v Registrar of Deeds*,¹³⁷ the court had to decide on the developer's right to phased development in a sectional title scheme. However, this case will only be discussed briefly in so far as the subtraction test is applicable. It will be discussed in greater detail regarding the right of the developer in Chapter 5.¹³⁸ The facts of the case were briefly that a developer of a sectional title scheme, Erlax Properties (Pty) Ltd,¹³⁹ wanted to alienate the final unit still in its possession in a sectional title scheme, together with the right to phased development. This right provided the holder with the right to develop a further fourteen units in the scheme. After the initial completion of the first phase, the scheme was duly registered in the sectional title register and a certificate of registered title for each unit was provided to the developer. The title deeds of all the completed units were endorsed with the condition that allowed Erlax to develop the second phase. Erlax initially planned to do the development of the second phase, but later decided to dispose of its ownership of the last unit as well as the rights as developer to extend the scheme. To effect the sale and transfer of the right to extension, registration thereof was needed in the Deeds Registry. Erlax needed a certificate of real right in terms of section 64(1) of the *DRA*.¹⁴⁰ The registrar required a court order for such an action whereupon Erlax approached the court for a declaratory order. In the court *a quo* it was denied. Upon appeal the court found that the first question to be answered was whether this right to phased development was a real right or a personal right. Interestingly enough, the court applied the principle of Grotius, which was discussed earlier, when indicating that:

¹³⁷ 1992 1 SA 879 (A) (hereafter the *Erlax* case).

¹³⁸ This will be referred to again in 5.3.2.1.

¹³⁹ Hereafter Erlax.

¹⁴⁰ Act 47 of 1937.

A real right consists basically of a legal relationship between a legal subject (holder) and a legal object or thing (*res*) which bestows on the holder a direct power and absolute control over the thing.¹⁴¹

The court proceeded to quote the two-fold subtraction test and upon application found that the intention in the conditions was clearly to bind successors in title. Secondly, the court found the right to phased development resulted in a diminution of the ownership of each of the initial eight units in regard to their share in the common property. The court, therefore, found that the conditions constituted a burden on the common ownership of the initial eight units and, therefore, real and registrable.¹⁴² The ensuing part of the judgement dealt with the nature of the real right that was created. This will be discussed in a later chapter.¹⁴³ It is, however, clear that the court did not hesitate to apply the subtraction test in its two-fold nature in a case of a hereto unknown limited real right and determined the nature of the right based on the condition that created it. The ruling of this right as a real right has been accepted by many academic authors.¹⁴⁴ According to Van Wyk the right diminishes the ownership of the owners of units in three ways, namely they may not withhold written consent from the developer to continue with the development, they must abide by the fact that their participation quotas will be affected and they must allow the building to proceed according to the sketch plan.¹⁴⁵

The registrability of rights were again illuminated in *Cape Explosive Works Ltd v Denel (Pty) Ltd*¹⁴⁶ where a deed of sale was entered into by Armaments Development and Production Corporation of South Africa (Ltd)¹⁴⁷ and Cape Explosive Works (Ltd)¹⁴⁸ in which two pieces of land were sold to Armscor by Capex under the following conditions:

¹⁴¹ *Erlax Properties (Pty) Ltd v Registrar of Deeds* 1992 1 SA 879 (A) at 884I.

¹⁴² *Erlax Properties (Pty) Ltd v Registrar of Deeds* 1992 1 SA 879 (A) at 885C-F.

¹⁴³ Refer to 5.3.2.1.

¹⁴⁴ Van Wyk 1993 *THRHR* 139.

¹⁴⁵ Van Wyk 1993 *THRHR* 140.

¹⁴⁶ 2001 3 SA 569 (SCA) (hereafter *Denel*).

¹⁴⁷ Hereafter Armscor.

¹⁴⁸ Hereafter Capex.

- The buyer would only use the property for the development and manufacture of armaments,¹⁴⁹
- The seller would have a "first right of repurchase" should the buyer not use the property as in the prescribed manner. This right included the right of purchase of all improvements on the property at a price agreed upon by the parties.¹⁵⁰

The contract further provided the arrangements of how and when Armscor would have to inform Capex should he no longer wish to use the property in the prescribed manner as well as arrangements regarding the determination of the purchase price.

In this case the court had to decide whether the conditions in a deed of sale created real or personal rights. However, the problem was further complicated by the fact that condition one was erroneously omitted from subsequent title deeds on a large piece of the property and only registered to the title deed of a small portion of the original land. Condition two was totally omitted from subsequent title deeds. This brought about a dispute between Capex and Denel (the current owner) as to whether the conditions were still applicable. Whilst Denel brought an application for an order, declaring that the property is not subject to the conditions, Capex brought an application for an order directing the Registrar of Deeds to rectify the title deeds to include the omitted conditions as well as orders declaring that Denel should comply with the conditions.

The court *a quo* found that although the omission of said conditions on subsequent title deeds were errors by the Registrar of Deeds and the conveyancer, the clause regarding the repurchase of the property was "void for vagueness"¹⁵¹ and "did not curtail Armscor's right of enjoyment of the property

¹⁴⁹ Refer to *Denel* at 573E where the court quotes the condition. It reads as follows: "... Condition 1: The property hereby sold shall be used by the transferee only for the development and manufacture of armaments...".

¹⁵⁰ Refer to *Denel* at 573I Condition 2: In the event of the property no longer required for the use set out ...above, the transferor herein shall have the first right to repurchase the property.

¹⁵¹ Refer to *Denel* at 575I.

in the physical sense".¹⁵² In this sense the court *a quo* followed the application of the subtraction test as formulated in *Ex parte Geldenhuys*.

The court *a quo* also found the following regarding the restriction on Armscor's entitlements of use:

It restricted the exercise of Armscor's right of ownership in respect of the properties but the parties did not intend the restriction to be binding on Armscor's successors in title...

From the above-mentioned it is clear that the court changed the order of the application of the subtraction test and "preferred to first apply the second criterion".¹⁵³ Although the court found that this condition did restrict the owner's right of use of the land, it found when interpreting the deed as a whole, that the intention was to bind parties only *inter partes* and was so convinced about the nature of the right being personal, it indicated that even if the parties intended it to be a real right, their intention could not elevate what was a personal right into a real right.¹⁵⁴ The court *a quo*, therefore, dismissed the counter-application and granted an order declaring Denel's ownership to be free from any encumbering conditions.

Upon appeal, however, the court referred to *Commissioner of Customs and Excise v Randles, Brothers and Hudson*¹⁵⁵ where it was established that transfer of ownership of movable property will take place:

When delivery of possession is given accompanied by the intention on the part of the transferor to transfer ownership and on the part of the transferee to accept it.

The court came to the conclusion:

There is no reason why the same principle should not apply to the transfer of ownership of immovable property.¹⁵⁶

¹⁵² Refer to *Denel* at 576A.

¹⁵³ De Waal 1999 <http://www.ejcl.org/33/art33-1.html> at para 3.4.

¹⁵⁴ De Waal 1999 <http://www.ejcl.org/33/art33-1.html> at para 3.4.

¹⁵⁵ 1941 AD 369 at 398; refer also to *Denel* at 577C-D.

¹⁵⁶ *Denel* at 577G.

The confirmation that the presence and content of the real agreement (that is in South African law, essential for the transfer of ownership in terms of the abstract system) in the case of immovable property is also of paramount importance. Investigating the real agreement may lead to an answer on the intention of the parties who created the right.

The court also clarified the so-called subtraction test as follows:

To determine whether a particular right or condition in respect of land is real, two requirements must be satisfied:

- 1) The intention of the person who creates the right must be to bind not only the present owner, but also successors in title; and
- 2) The nature of the right or condition must be such that the registration of it results in a "subtraction from the dominium" of the land against which it is registered.¹⁵⁷

When applying these requirements to the facts at hand the court came to the conclusion that the first condition did not purport to be an option contract and, therefore, a personal right. The court found that:

Condition one contained a use restriction and condition two provided that in the event of the property no longer being required for the restricted use it would be useless to the owner thereof unless Capex repurchased it or the use restriction could be terminated. Condition two was intended to provide Armscor and its successors in title with a mechanism for such termination.¹⁵⁸

The court further found that the conditions were "a composite whole" and could not be separated from each other and the rights were also "specifically stated to be binding on the transferee ...and its successors in title".¹⁵⁹

When dealing with the erroneous omission of the conditions, the court simply confirmed the negative system of registration of transfer applicable in South Africa, indicating that the Deeds Registry does not "necessarily reflect the true state of affairs".¹⁶⁰ In this case the court placed a high stake on the intentions of the parties who create the right and confirmed that the intention of the

¹⁵⁷ *Denel* at 578D. The court referred to *Erlax*.

¹⁵⁸ *Denel* at 578J-579A.

¹⁵⁹ *Denel* at 579B-C.

¹⁶⁰ *Denel* at 579E.

parties who created an agreement needs to be established. This will indicate whether a limited real right has been created with the subsequent intention to bind successors in title, as opposed to merely a creditor's right with its object the performance between the parties.

The most recent judgement in the debate about the distinction between real and personal rights is *Cowin*. Although the principles set out in *Denel* were confirmed here, this case is mentioned as an example of the need for a more flexible approach to the creation of real rights. Modern fragmented ownership leads to the development of new and hereto, unknown rights that need to be defined and determined. This, heard in the South Gauteng High Court dealt with membership of a homeowners' association. The court was approached for *inter alia*, a declaratory order that a certain title condition is not applicable on successors in title, but only *inter partes* between the current owner and the homeowners' association. In this case a condition was registered against the title deed which was binding on the owners of a certain unit in a complex, as well as their successors in title. The condition determined that:

Every owner...shall automatically become and shall remain a member of the homeowners' association and be subject to its constitution until he ceases to be ...owner.¹⁶¹

The condition further prescribes that a unit may not be transferred to a new owner if such an owner has not bound himself to become a member of the association. In its judgement, the court defined the legal question regarding this condition to be whether the condition is only enforceable against the current owner or would it bind successors in title as well? Thus, does the condition create a real right or merely a personal right?¹⁶² The court confirmed the legal position to be that a real right is registrable and enforceable against successors in title whereas a personal right is only enforced against a specific person.¹⁶³

¹⁶¹ *Cowin* at para 3.

¹⁶² *Pearly Beach Trust v Registrar of Deeds* 1990 4 SA 614 (C) at paragraph 8.1 of *Cowin v Kayalami Estate Homeowners Association* (499/2013) [2014] ZASCA 221 (12 December 2014).

¹⁶³ *Cowin* at para 9.

The court also confirmed the requirements to establish the nature of the right as either real or personal as set out in *Dene!*. The court applied the first requirement and found that the intention of the creator of the right:

... could not have been any other but to create a real right that could prevail against the whole world.¹⁶⁴

The court based this finding on the reasoning that if the intention was:

... not to create such a right then a simple contract between the parties would have sufficed.

In its application of the second requirement of the subtraction test the court found it:

... indubitable that the result of the registration restricts the owner from dealing with the land in the manner in which any other owner with full dominium would.¹⁶⁵

The court used the case of *Pearly Beach* as authority and specifically where the court in that case found that:

If an owner is incapable of passing ownership free of encumbrance then the ownership is indeed restricted.

It, therefore, came to the conclusion that a condition that prohibits the owner to pass ownership to the next person unless there is compliance with such a condition, is a subtraction from the *dominium*, as the owner cannot deal with its property freely.¹⁶⁶ Such a refusal to accept the condition will have the effect that the new owner will not be able to acquire ownership. The court also found that "this condition will always remain on the land".¹⁶⁷ This case is an interesting indication of the burden placed on the courts to classify newly created limited real rights that is an inevitable result of economic development.

¹⁶⁴ *Cowin* at para 11.

¹⁶⁵ *Cowin* at para 12.

¹⁶⁶ *Cowin* at para 13.

¹⁶⁷ *Cowin* at para 16.

Upon appeal, the judgement in *Cowin* was handed down on the same day as the judgement upon appeal of *Willow Waters* due to the similarities in the legal questions and facts of the cases. The full judgement in *Willow Waters* was made applicable in *Cowin*.¹⁶⁸ In *Willow Waters*, the court *a quo* came to the opposite decision as in *Cowin* and granted an order that the registered embargo was a personal right and not a limited real right.¹⁶⁹ Upon appeal, the court had to decide whether the clause that has been registered as a condition of title, is a real right or a personal right. As a personal right may not be registered, if the court decided a personal right was created, it would have been an erroneous registration of the right.¹⁷⁰ The court used the two pronged approach as set out in the *Denel* case.¹⁷¹ In order to determine the intention of the parties to the title deed the court found that it:

Must be gleaned from the terms of the instrument ie (sic) the words in their ordinary sense, construed in the light of the relevant and admissible context, including the circumstances in which the instrument came into being. The interest the condition is meant to protect or, in other words, the object of the restriction, would be of particular relevance.¹⁷²

The underlying purpose of the condition was to create a general security for payment of debt.¹⁷³ The court looked at the general wording used in the condition and found that "generic, unqualified terms such as 'owner' and 'any person'" "include every owner or holder of a real right in the property from time to time". The court consequently found that "(T)he first aspect for a real right is, therefore, satisfied".¹⁷⁴ Freedman indicates that a distinction should be drawn between the personal right, which is the claim for outstanding levies and forms a concurrent claim in the insolvent estate and the right to prevent the transfer of the property by withholding the clearance certificate and is a limited real right.¹⁷⁵ This embargo is found to be similar to embargos contained in section

¹⁶⁸ *Willow Waters* at para 9.

¹⁶⁹ Freedman "Application of the *numerus clausus* principle" 6.

¹⁷⁰ Tuba 2016 *THRHR* 341.

¹⁷¹ *Willow Waters* at para 16.

¹⁷² *Willow Waters* at para 16.

¹⁷³ *Willow Waters* at para 20.

¹⁷⁴ *Willow Waters* at para 20.

¹⁷⁵ Freedman "Application of the *numerus clausus* principle" 8.

118 of the *Local Government: Municipal Systems Act*¹⁷⁶ and section 15B(3)(a)(i)(aa) of the *STA*. The court found that these statutory embargos:

... are aimed at achieving an important social goal, namely to create a security right ...in order to recover the costs of the basic services they have provided and ...ensure that (they)...remain financially viable.¹⁷⁷

The court held that this embargo, although not statutorily provided for in the case of homeowners' associations, had the exact same goal and is an effective tool to collect levies.¹⁷⁸

The court then went on to investigate the second part of the subtraction test and confirmed by referring to case law that:

Ownership comprises a bundle of rights or competencies which include the right to use or exclude others from using the property or to give rights in respect thereof.¹⁷⁹

One of these entitlements or competencies include the "right to freely dispose of the property, the *ius disponendi*". The court found that the embargo registered against the property's title deed "caves out or takes away from the owner's *dominium* by restricting its *ius disponendi*". Therefore, this embargo:

... subtracts from the dominium of the land ...It satisfies the second aspect and is, therefore, a real right.¹⁸⁰

The court further found that:

The right diminishes ownership in the property by entitling the association to withhold a clearance certificate thus preventing the transfer of the property until the ... outstanding debt has been paid.¹⁸¹

In his discussion of the case, Tuba criticises the fact that the court took into account that the condition has already been registered by the Registrar of

¹⁷⁶ 32 of 2000.

¹⁷⁷ Freedman "Application of the *numerus clausus* principle" 9 and paras 24-25 of the *Willow Waters* case.

¹⁷⁸ Freedman "Application of the *numerus clausus* principle" 9.

¹⁷⁹ *Willow Waters* at para 22.

¹⁸⁰ *Willow Waters* at para 22.

¹⁸¹ *Willow Waters* at para 23.

Deeds. He argues that this position will open the door for the erroneous assumption that personal rights that were mistakenly registered, may become real upon registration.¹⁸² Tuba argues correctly that the nature of the right should be determined irrespective of whether it has been registered or not, as the function of the registrar is not "judiciary". He, furthermore, argues that this decision negates the previously cautious approach adopted by the court. He states that although the court practiced an "open system", with regard to the categories of real rights, it was reluctant to extend the "existing range of real rights beyond the specific categories of real rights recognised under Roman Dutch law". This application by the court, according to Tuba, implies the creation of a new set of real rights in the form of home owners' associations' conditions. He argues that these are not statutorily provided for and, therefore, the court should not take over the power of the legislature.¹⁸³ Although he agrees with the decision that a real right was created by the embargo, he submits that the court must be willing to test the registrability of every right.¹⁸⁴

Freedman correctly agrees to some extent that this was a broader application of the subtraction test. He argues that this judgement

... confirms that the freedom to develop limited real rights encompasses the freedom to develop real security rights.¹⁸⁵

He argues that in the past this freedom to create limited real right was restricted largely to servitudes and rights, similar to servitudes.¹⁸⁶ He also argues that this judgement confirms that the restricted version, as applied in *Lorentz*, is not supported. Therefore, the restriction should not necessarily limit the physical use of the property.¹⁸⁷ This is seen as evidence that in future, the court may decide to confirm the application of the subtraction case as decided in *Pearly Beach*, as it is "necessary for the economic development of the

¹⁸² Tuba 2016 *THRHR* 346.

¹⁸³ Tuba 2016 *THRHR* 348.

¹⁸⁴ Tuba 2016 *THRHR* 351.

¹⁸⁵ Freedman "Application of the *numerus clausus* principle" 10.

¹⁸⁶ Freedman "Application of the *numerus clausus* principle" 10.

¹⁸⁷ Freedman "Application of the *numerus clausus* principle" 10.

country, although the problem regarding the payment of money has not been addressed in this case. Freedman concludes that the decision of the court was based on policy grounds to promote financial viability of homeowners' associations by facilitating the collection of outstanding levies.¹⁸⁸ Freedman argues, however, that these policy considerations should not be a convincing enough reason for "such a broad approach to the development of new limited real rights." He argues that there are sufficient arguments in favour of the *numerus clausus* principle, namely:

- The *numerus clausus* principle protects land from being overburdened by limited real rights.
- The *numerus clausus* principle promotes legal certainty and reduces the cost of third parties needing to determine what burdens rest on the land.
- It prevents the "contractualisation of property law". One of the characteristics of property law is that rights are mainly stable and non-negotiable as opposed to personal rights which are "dynamic and highly negotiable". He cautions that this broad approach will blur the distinction between property law and contract law. Therefore, he argues that the policy considerations should take arguments for and against the *numerus clausus* principle into account.¹⁸⁹

Sonnekus¹⁹⁰ also correctly criticises the application of the subtraction test in such a haphazard fashion in *Willow Waters*. He argues that the traditional property law principles should be upheld and refer to the distinction between real and personal rights by Van der Merwe.¹⁹¹ He argues that it is impossible in South African property law for parties to change a creditor's right to a limited

¹⁸⁸ Freedman "Application of the *numerus clausus* principle" 10-11.

¹⁸⁹ Freedman "Application of the *numerus clausus* principle" 11-12.

¹⁹⁰ Sonnekus 2015 *TSAR* 405 where Sonnekus argues that "Regsekerheid volg nie uit 'n kasuïstiese aanmekeerflans van noodsponge om 'n bepaalde praktyksfenomeen die hoof te probeer bied nie, maar eerder uit 'n beheersde omgang met gevestigde regsbeginsels wat reeds die toets van die tyd deurstaan het." Loosely translated it means: Legal certainty will not be the result of a casuistic fudging together of desperate leaps to address a certain practical phenomenon, but rather by a controlled application of established legal principles that have withstood the test of time.

¹⁹¹ Refer to footnote 87 in 2.4.2 where Delpont and Olivier also refer to Van der Merwe's distinction. Sonnekus 2015 *TSAR* 407-408.

real right by way of agreement. His argument is similar to Tuba that this application would then render legislation superfluous if the court can adjudicate that parties may create limited real rights by means of consensus in an agreement.¹⁹² He argues that the intention of the parties should not change the objective law and the renaming of a creditor's right to a limited real right is not correct. He substantiates his argument by indicating that this application of the intention principle in *Willow Waters*, creates the erroneous idea that all limitations on ownership are limited real rights.¹⁹³ This can obviously not be the case as ownership may be limited by other rights such as creditor's rights and statutory provisions as well. Sonnekus maintains that *Cowin* in the court *a quo* also followed this incorrect argument.¹⁹⁴ Sonnekus correctly argues that the parties in *Willow Waters* chose to operate the property without the statutory protection provided by the *STA* and cannot try to receive the protection of limited real rights by concluding a contract to such an extent.¹⁹⁵

2.5.4 Evaluation of the two-fold subtraction test

From the abovementioned case discussions it is clear that the application of the two fold subtraction test has been firmly entrenched in the South African law for more than a century. Although a lot of criticism can be lodged against the application of the test by the courts and the reliability of the test is constantly questioned, the reality remains that the test is currently the only mechanism used by the courts to distinguish between real and personal rights. Badenhorst and Coetser state this more strongly when they indicate that "the test is at present part and parcel of the South African law".¹⁹⁶ Boraine argues that the right registered must encroach on the exercise of ownership.¹⁹⁷ He also states that there should not be any uncertainty regarding the intention of the parties and the part of the property over which the right is granted must be clearly

¹⁹² Sonnekus 2015 *TSAR* 409.

¹⁹³ Sonnekus 2015 *TSAR* 425.

¹⁹⁴ Sonnekus 2015 *TSAR* 426.

¹⁹⁵ Sonnekus 2015 *TSAR* 427.

¹⁹⁶ Badenhorst and Coetser 1991 *De Jure* 380.

¹⁹⁷ Boraine *Registreeerbaarheid* 25.

delineated. He bases his argument on the principle of certainty and indicates that the nature of the property must be clear.¹⁹⁸

In the discussion of the development of the subtraction test in case law, it became clear that the court placed an increasing weight on the intention of the parties who created the right or condition. The court made quite an effort to establish whether the right that is created intended to bind a person in his personal capacity or whether it was the intention to bind successors in title. In *Denei*, the Supreme Court of Appeal confirmed the principle that the intention of the parties who created an agreement needs to be established. This will indicate whether a limited real right has been created with the subsequent intention to bind successors in title, as opposed to merely a creditor's right with its object the performance between the parties. Furthermore, the presence and content of the real agreement also highlights the importance of determining the intention of the parties as determined from the contract or will.

Unfortunately, the content and the meaning of this element of the test - the intention to bind successors in title¹⁹⁹ continues to be vague although endowed with ever-increasing importance. The second part of the test has received the brunt of the attention with the first part mostly being referred to in passing.²⁰⁰ This lacuna leaves open the possibility that a proper investigation of the intention of the parties could solve uncertainties that still exist in some cases. The intention is supposedly subjective in nature,²⁰¹ although De Waal acknowledges the importance of interpreting the will or contract in question to determine the intention of the party or parties who created the right, but claims that an objective criterion can be found in the application of the second part of the test. Nevertheless, he acknowledges that the practical application of the second part of the subtraction test is not so easy. Badenhorst, Pienaar and

¹⁹⁸ Boraine *Registreerbaarheid* 27.

¹⁹⁹ Mostert *et al The Law of Property in South Africa* 248.

²⁰⁰ See De Waal 1999 <http://www.ejcl.org/33/art33-1.html> at para 2 where he states that the first requirement (as he refers to the first part of the test) "does not generally speaking, present any difficulties".

²⁰¹ De Waal 1999 <http://www.ejcl.org/33/art33-1.html> at para 2.

Mostert²⁰² refer to this as the intention test. According to them, the court has to determine what the intention of the parties was in the preceding contract or the intention of the testator in a will.

This begs the question whether an investigation on how the intention with which the creator of the right operates, differs depending on the legal document involved when creating the condition. Finally, the consequence(s), if any, of such a distinction in the application of the subtraction test should be investigated.

However, this test does not clarify all possible scenarios. The evolution of the test through ensuing cases has brought about some clarity on contentious issues.²⁰³ The application of the subtraction test in case law has also not escaped criticism. De Waal indicates that the formulation of (the second part of the subtraction test) is easier than the practical application thereof. After the case discussion of the *Lorentz* case, De Waal remarks that the case "illustrates the unreliability of the test in properly identifying a right as real".²⁰⁴ Badenhorst and Coetser indicate that "different variations" of the test can lead to different results. They plead for the courts to apply the test with policy considerations taken into account. They also suggest that the land should not be overburdened. This view point is similar to the one held by Struycken where he indicates that the tradability of the property should not be influenced negatively.²⁰⁵

One of the advantages of the current approach in South Africa, by not adhering to the *numerus clausus* principle regarding limited real rights, is the flexibility that this approach allows. Especially in a fast-changing economy where the law may struggle to keep abreast of constant demand for and introduction of new legal phenomena. The court may thus upon a wider or flexible application of the

²⁰² Badenhorst, Pienaar and Mostert *The Law of Property* 57.

²⁰³ The specific application of the subtraction test in sectional titles will be discussed in chapter 5 para 5.3.2.1.

²⁰⁴ De Waal 1999 <http://www.ejcl.org/33/art33-1.html> at para 2.

²⁰⁵ Refer to para 2.5.6.

subtraction test decide a new real right has been created.²⁰⁶ However, the "downside" as De Waal refers to it, is obviously the legal uncertainty that is caused by the more flexible approach. Although the subtraction test is supposed to act as objective criterion against which the nature of a right can be judged, De Waal indicates that it does not fulfil its function satisfactorily, is unreliable and can produce wrong results. He, therefore, pleads for a complete list of real rights (tantamount to the *numerus clausus*) to be drawn up and passed as legislation and advises that real rights should only be created by legislation. If we look critically at the decisions discussed where the subtraction test has been applied, albeit with vastly different results, it is easy to understand and support De Waal's criticism. However, in the discussion of real rights in sectional titles created by legislation, it will be shown that this creation is also not without uncertainty.

2.5.5 Possible future development of the test: Follow the road of the Ius Commune?

A *numerus clausus* recognition of a number of categories of real rights based on Roman law, though sometimes inflexible, does provide more clarity and predictability. Unfortunately, on the negative side, such a rigid approach will not keep up with fulfilling the needs in practice. Neither will it provide financial security to the holder of the right and consequently restrict legal autonomy. Ironically the continued need for the *numerus clausus* is questioned by certain modern day civil law jurists because of the pressure of changes in economic organisation, information technology, social practices of production and new environmental changes.²⁰⁷

The Dutch jurist Struycken, on the other hand, pleads for the continuation of the principle. He illuminates the advantages thereof by indicating that the limited number of real rights allowed serves to protect ownership. This has the effect that the tradability of the property is not negatively influenced and that

²⁰⁶ De Waal 1999 <http://www.ejcl.org/33/art33-1.html> at para 4.

²⁰⁷ Refer to Di Robilant in Mostert and Verstappen 2015 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2572838.

legal certainty exists.²⁰⁸ Although Struycken acknowledges the fact that a strict application of the *numerus clausus* principle may hinder the necessary development of the legal system to meet the needs of a developing society, he is of the opinion that the legislator should play an active role in the development of real rights to add to the existing categories of real rights. He, therefore, pleads for an active legislator that is prepared to develop new real rights as needed in practice.²⁰⁹

However, another Dutch jurist, Akkermans, who studied the *numerus clausus* principle in the civil law systems, acknowledges that a substantial difference in the application of the principle in the civil law jurisdictions exists. Therefore, he acknowledges that a system without this principle could function completely even though legal certainty may be adversely affected. Akkermans proposes a test which provides that:

- it derives from the primary right and relate to an object capable of being subject to primary rights;
- parties intend to bind successors in title and have sufficient interest to do so; and
- the new relation can still be categorised within existing categories.²¹⁰

Domanski suggests that a distinction should be draw between a contingent and a vested right. The contingent right is conditional upon an event that may not occur and creates a personal right, whereas a vested right is unconditionally fixed and established in a holder and creates a real right. Upon application of the subtraction test it will then be determined whether the vested right "constitutes a subtraction from the *dominium*" and only then will it be

²⁰⁸ Struycken *Numerus clausus* 753.

²⁰⁹ Refer to Struycken *Numerus clausus* 770-771 where he indicates that "De numerus clausus vraagt een actieve wetgever, die beireid en in staat is om door middel van wetgeving op nieuwe maatschappelijke ontwikkelingen, vooral in het handelsverkeer, in te spelen."

²¹⁰ Akkermans *The principle of Numerus Clausus* 569.

registered. However, this view point still does not address the difficulties regarding the second part of the subtraction test.²¹¹

Another option that seems to exist is to look at the registrability of the right to determine the nature of the right. Earlier there was a reference to Badenhorst and Coetser's²¹² view where they indicate that "the significance of the registration of private law rights is the publicity function". This registration "affords *prima facie* proof of the real right". They continue to explain that the "creation" of a real right can take place either directly by registration of a notarial deed of cession or indirectly if the deed of transfer is registered with the real rights included as reservation clauses. De Waal indicates that for a right "to have real effect, it must be registered".²¹³ Pienaar²¹⁴ indicates that the essence of the limited real right is to burden the property while the effect is that the entitlements of the owner of the property and any subsequent owners are limited. He argues that the existence of the limited real right is based on the fact that it is a burden on the land, not its limitation of entitlements. Although the latter is a factor in the subtraction test, it is not the essence of it as personal rights and statutory measures can also limit an owner's entitlements. Van der Merwe²¹⁵ similarly indicates that certain rights, will vest in the holder by means of possession. It is not registered at all and will, therefore, not become real upon registration. This is in accordance with De Waal's opinion of the right "having real effect" because of the publicity thereof as opposed to Badenhorst and Coetser's opinion that the right "is created" upon registration. The latter may be an unfortunate choice of words as Badenhorst indicates later that the erroneous omission of the real right from the title deed does not extinguish the right.²¹⁶ *Denel* is a fitting example of such a situation where the court found that the erroneous omission of a condition does not negate the existence of the

²¹¹ Badenhorst, Pienaar and Mostert *The Law of Property* 57.

²¹² Badenhorst and Coetser 1991 *De Jure* 375-376.

²¹³ 1999 *EJCL* <http://www.ejcl.org/33/art33-1.html> at para 2.

²¹⁴ Pienaar 2015 *PELJ* 1492-1493.

²¹⁵ *Sakereg* 68.

²¹⁶ Refer to Badenhorst, Pienaar and Mostert *The Law of Property The Law of Property* 65. This was supported in the case of *Denel* at 579E.

limited real right and that it can be corrected by the deeds office. In terms of the negative registration system and specifically section 100 of the *DRA*:

(N)o act in connection with any registration in a deeds registry shall be invalidated by any formal defect, whether such defect occurs in any deed passed or registered, ...

It is, therefore, submitted that De Waal's position is correct and that the real right is given effect by its registration. The nature of the right should be determined by focussing on the application of the subtraction test and not by the question of whether the right has been registered or not. Consequently such an argument will allow for the opinion that a real right is initially created by contract, will or legislation, however to become effective it must be registered. The existence or not of the real right should be determined by the *a priori* criteria as set out in the subtraction test and not by whether it is registered or not. Tuba holds a similar viewpoint and argues that the court should apply the subtraction test "without taking into account whether or not such rights are already registered".²¹⁷ It would be interesting to test some of the contentious terms that are included in contracts against the subtraction test. However, the test should be applied with caution and the criticism against the test should be borne in mind.

The ensuing consequences of the application of the subtraction test are that if it is determined that if a right is found to be real, the category of limited real right needs to be determined. After establishing that a condition in a contract or will constitutes a real right it is essential to determine the category of limited real right the newly created right falls into. This will prescribe the entitlements and obligations that such a right will provide to the holder of the right as well as the resulting limitations on the owner's entitlements. Traditionally Roman law only classified the categories of real rights being servitudes and real security

²¹⁷ Tuba 2016 *THRHR* 349.

rights.²¹⁸ The courts initially endeavoured to bring all new real rights within the ambit of servitudes.²¹⁹

However, Van der Merwe also indicates after *Erlax* that other categories of limited real rights (may) be created to accommodate new developments.²²⁰ In certain circumstances these rights are statutorily created as is the case with rights created for sectional title ownership. Van der Merwe suggests that although real rights have certain traditional characteristics, the content may differ according to the purpose of the right. This leaves the position open for newly developed rights to not be pushed and prodded into unsuitable traditional categorisation.²²¹ The possibility exists that limited real rights created for burdening sectional title ownership may be classified outside the "traditional" categories of limited real rights. As seen in *Willow Waters* the court decided to follow a broad approach to the acceptance of new real rights created in new legal phenomena. However, as it is not always clear what the nature of these rights that are created in new legal phenomena such as sectional titles is, it causes uncertainty as to the practical enforcement of the rights. As indicated by *Deneil* even the erroneous non-registration of the right will not change the nature of the right. It is thus important for the holder of the right as well as the owner of the thing to know what the right entails.

This distinction between real and personal rights will be utilised in order to determine the nature and effect of rights held by the developer and in some circumstances the owner in sectional title ownership. However, before the nature of these rights should be determined, it should first be discussed what ownership of a sectional title unit entails. Thereafter, the rights of the developer, the owner's right to extend his section and the rights of exclusive use to certain areas as limitations on such ownership will be discussed.²²² Therefore, the next chapter will focus on the legal nature of sectional ownership in South

²¹⁸ Mostert *et al* *The Law of Property in South Africa* 45.

²¹⁹ Van der Merwe 2004 *SALJ* 814.

²²⁰ Van Wyk 1993 *THRHR* 140.

²²¹ Van der Merwe 2002 *SALJ* 814.

²²² Chapters 4 and 5.

Africa with reference to the thing that is owned, the entitlements of ownership and the limitation of ownership brought about by the unique character of sectional titles.

CHAPTER 3

THE LEGAL NATURE OF SECTIONAL OWNERSHIP IN SOUTH AFRICA

3.1 Introduction

The distinction between real and personal rights affects sectional title ownership in South Africa, as real and personal rights can be granted in respect of a unit in a sectional title scheme, being the object of sectional title ownership. The introduction of sectional titles in South Africa through the promulgation of the *Sectional Titles Act*²²³ is an example of the development of common law through legislation. South African property law has its origins in Roman-Dutch private law²²⁴ and the fact that it is mostly uncodified means that the Roman-Dutch common law is still applicable in South Africa, subject to the spirit, purport and objects of the Bill of Rights in the constitutional democracy. However this does not mean that common law cannot be developed through legislation. An example of such development was the introduction of sectional titles in South Africa through the promulgation of the *Sectional Titles Act*. The development of sectional titles in South Africa was a result of a worldwide trend to introduce ownership of part of a building due to an increased shortage of housing in urban areas. After the introduction of legislation enabling sectional title ownership in South Africa, the number of sectional title schemes registered increased rapidly. According to Van der Merwe, approximately 780 000 sectional title units exist throughout South Africa and statistics show that almost 50% of all home ownership is now in the form of sectional title.²²⁵ However, the meaning of this kind of ownership must be established.

With the increased popularity of fragmented home ownership, it is of paramount importance to determine the legal nature and consequences of this type of

²²³ 66 of 1971.

²²⁴ Mostert *et al The Law of Property in South Africa* 15; Van der Walt and Pienaar *Law of Property* 3.

²²⁵ Van der Merwe *Sectional Titles* 1.8 "...or some other form of community scheme, including share block schemes and schemes like gated villages and retirement schemes governed by a home owners' association...".

ownership. The introduction of this chapter will serve to contextualise sectional title legislation in South Africa with reference to the undeniable influence of the Roman-Dutch common law and within the current constitutional democracy. The main question that will be addressed will be to determine what is meant by ownership of a unit in a sectional title scheme by referring to the thing that is owned, the entitlements of the owner and the limitations on ownership. To achieve a reliable and thorough answer to this question, the content of ownership of a sectional title unit and the different components making up the object of sectional ownership will first be analysed. Secondly, the object will then be assessed in terms of the traditional common law classification of things. Finally, the limitations on the entitlements of the owner will be addressed.

3.1.1 Introduction of sectional titles in South Africa

When fragmented ownership of immovable property in South Africa was introduced with the promulgation of the *Sectional Titles Act* 66 of 1971,²²⁶ it included the introduction of several new concepts.²²⁷ According to Pienaar²²⁸ the introduction of this kind of composite ownership was a novelty in South Africa as it did not comply with existing common-law principles applicable to immovable property.²²⁹ In addition, this was also evident from the *DRA* that only made provision at the time for the transfer of a piece of land with reference to the vertical boundaries of the land, but no reference to any attachments²³⁰ to the land.²³¹ It was, therefore, imperative for legislation to be promulgated to provide a statutory foundation for sectional titles in South Africa.²³²

²²⁶ As well as the *Sectional Titles Act* 95 of 1986.

²²⁷ Pienaar *Sectional Titles* 57.

²²⁸ Pienaar *Sectional Titles* 38.

²²⁹ Van der Merwe 1996 *Stell LR* 263.

²³⁰ An attachment to land is everything that is built on a piece of land.

²³¹ Refer to s 16 of the Act that indicates: "Save as otherwise provided in this Act or in any other law the ownership of land may be conveyed from one person to another only by means of a deed of transfer executed or attested by the registrar...". See also Van der Merwe 1989 *Sakereg* 396 and Odendaal 1977 *TSAR* 14 that refers to regulation 28(2) of the *DRA*.

²³² The historical development of sectional titles in South Africa is however, not the aim of this work. It will only be discussed in brief.

Initially, sectional title ownership as well as the legislation enacting it was met with a great deal of criticism and conflicting views.²³³ The main criticism centred on the hereto unknown concept of separate ownership of an attachment to land as opposed to the land itself. Cowan refers to the fact that South Africa opted for a dualistic system of sectional titles where two different kinds of ownership exist that are linked together, namely separate ownership of a defined section of a building or attachment, and co-ownership or joint ownership of the common property. This approach is contrary to the unitary system where only one kind of ownership is involved, namely ownership or co-ownership of the land together with the attachments to the land. In the case of sectional titles, the co-ownership relationship of sectional owners with the land and common property of the scheme was modified fundamentally: each co-owner, owns a specified section of the building with a separate right of occupancy and enjoyment in respect of such section, and the normal rule in accordance with co-ownership that it is readily dissoluble was modified by making it indissoluble, save in special circumstances. He avers that the Swiss and Austrian models follow the unitary system whereas the Dutch "hover uneasily between the two systems, tending however, to the unitary dispensation". He infers that the South African system is "dualistic", but "complicated".²³⁴ Currently, sectional title schemes in its totality are regulated statutorily by the *Sectional Titles Act* 95 of 1986 that came into operation on 1 June 1988 and has been amended regularly.²³⁵ These amendments will only be discussed in so far as it impacts on this study.

More than 40 years after the enactment of the 1971 *Sectional Titles Act* it is inarguable that sectional title ownership is part and parcel of the South African

²³³ De Wet and Tatham 1972 *De Rebus* 205-209; Cowan 1973 *CILSA* 36.

²³⁴ Cowan 1973 *CILSA* 37.

²³⁵ Refer to Van der Merwe *Sectional Titles* para 1.4 where he indicates that the 1986 Act streamlined the registration procedure and introduced some new concepts demanded by modern sectional ownership. According to Van der Merwe the next crucial development was the promulgation of the *STSMA* and the *CSOSA*. The new act deleted the management provisions in the *STA* and provided for it in the *STSMA*, while the *CSOSA* provide for a new dispute settlement mechanism to govern and monitor community schemes. This legislation came into operation in October 2016.

law. The challenge that remains is that the new concepts introduced by the 1971 Act and later refined by the 1986 Act need to be integrated with and enhanced by common law principles. This is not an impossible venture, as the legislature made use of concepts familiar to the property law principles when drafting the Act. Therefore, the *STA* should be interpreted against its historical context.

3.1.2 Historical context of sectional title legislation in South Africa

Even though sectional titles in South Africa are regulated by statute, the *STA* uses terminology borrowed from (Roman-Dutch) common law. However, with the establishment of sectional titles in South Africa, certain common law principles were deviated from. These include ownership of separate parts of a building, and the fact that a landowner cannot in principle exercise ownership of the air above or ground below his property. Despite these deviations, property law concepts referred to in the *STA* such as ownership, immovable property, *et cetera*, are still founded in common law. It would, therefore, be negligent to deny the relevance of the Roman-Dutch common law sources in any study regarding sectional titles. However, a complete historical discussion of the sources of the property law is not the aim of this study. Reference to the sources will, therefore, be cursory and mainly aimed at understanding and explaining the Roman-Dutch common law concepts applicable to the study of sectional titles.

According to Scott,²³⁶ property law is a "field of law which is still heavily dependent upon Roman-Dutch principles". This is echoed by Scott²³⁷ when she indicates that property law has an essentially Roman-Dutch nature. In one of the authoritative text books on property law in South Africa²³⁸ it is stated that the origin of property law (or law of things as it was then known) is to be found in the Roman and Germanic property law applicable in the province of Holland in the 17th century. According to Van Zyl certain portions of the Roman law of

²³⁶ Scott 2013 *THRHR* 239.

²³⁷ Scott 2014 *TSAR* 1.

²³⁸ Van Zyl *Roman Private Law* 127.

property which have become part of the South African private law in a virtually unaltered form constitute valid law today.²³⁹ These principles were developed further in the Roman-Dutch and South African law with only meagre influence by the English law such as aspects of neighbour law. Therefore, Roman law is still the most important source of property law in South Africa. The reason for this is that the dogmatic principles of Roman law are the foundation of property law in South Africa.²⁴⁰ Thomas, Van der Merwe and Stoop phrase it even stronger by indicating that "Roman law is the most important source of the modern South African law of things".²⁴¹ The concept of ownership and the distinction between ownership, possession and rights of a person other than the owner to his property is also still firmly based on the Roman law principles. The classification of things²⁴² in South Africa is based on the Roman law classification system. For this reason, reference to applicable Roman law principles will be made at relevant stages of this discussion. As part of the common law legacy, the influence of Germanic law is also evident in South Africa. However, although the common law principles still form the foundation of private law, especially property law in South Africa, these principles are in all circumstances subject to the *Constitution*. This means that common law principles will not summarily be applied, but will have to satisfy the test of constitutionality.²⁴³

Of similar importance is the influence of Germanic law that can be seen in the distinction between movable and immovable things. The harmonisation of some conflicting Roman and Germanic principles of the two aspects above was the contribution of the Roman-Dutch common law to South African property law. Any discussion or investigation of the property law should be done with these sources in mind. In this study, applicable Roman-Dutch common law principles

²³⁹ Van Zyl *Roman Private Law* 127.

²⁴⁰ Van der Merwe 1989 *Sakereg* 7. For a discussion of these principles refer to Van der Merwe 1989 *Sakereg* 7-8.

²⁴¹ Thomas, Van der Merwe and Stoop *Historical foundations* 133.

²⁴² Things are classified according to their nature for example, corporeal and incorporeal, single and composite, consumable and non-consumable and divisible and indivisible. Mostert *et al The Law of Property in South Africa* 32.

²⁴³ This is addressed in 3.1.3.

and concepts will be discussed in conjunction with the terminology in statutory provisions they have bearing on.

3.1.3 Context of sectional title legislation in a South African democracy

In terms of the South African legal system, it should be emphasised that neither legislation, nor the Roman-Dutch common law principles, could operate in isolation. This especially involves something as vital as property and the ownership thereof, the "ideological, political, economic and other relevant factors of life should form the background against which the law should be studied".²⁴⁴ Although not all of these factors will be discussed in detail in this study, the effect and impact thereof are undeniable in the interpretation by the courts in case law that developed sectional title law in South Africa as well as political and economic developments as a result of the enactment of the *Constitution*. Furthermore, Badenhorst, Pienaar and Mostert²⁴⁵ indicates that with the advent of the new constitutional order, an expansion and rearrangement of the existing sources of property law have taken place.²⁴⁶

First, the supremacy of the *Constitution* is paramount²⁴⁷ and will be dealt with in a separate subsection. Section 39(2) of the *Constitution* also provides for the interpretation of legislation or the development of the existing common law, statutory law and precedent to reflect the spirit, purport and objects of the Bill of Rights. This indicates firstly the constitutional acceptance of the existence and continuance of the application of common law principles.²⁴⁸ It is, therefore, clear that the sources of the law of property have been expanded and (although still based on Roman-Dutch common law) should be viewed through "a

²⁴⁴ Thomas, Van der Merwe and Stoop *Historical foundations* 6.

²⁴⁵ Badenhorst, Pienaar and Mostert *The Law of Property* 8.

²⁴⁶ It is also as a result of this development that the traditional concept of "law of things" has been amended to "law of property".

²⁴⁷ Refer to s 2 of the *Constitution* that reads: "This constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled." The next section refers in more detail to the constitutional aspects.

²⁴⁸ As well as an affirmation of the importance of the customary law.

constitutional prism".²⁴⁹ This means that although the property law consists of different sources, it does not entail:

... two systems of law...[but] only one which is shaped by the Constitution...and all law, including the common law, derives its force from the Constitution and is subject to the Constitution.²⁵⁰

3.1.3.1 Interpreting sectional title legislation in a constitutional framework

According to Van der Walt, legislation has to be interpreted to "promote the spirit, purport and objects of the Bill of Rights".²⁵¹ As sectional title schemes in their totality are ruled by legislation, it is important to initially provide the constitutional framework against which such legislation should be interpreted. Despite the general supremacy of the *Constitution*, Van der Walt argues that "promoting the spirit, purport and objects of the Bill of Rights" entails that a new single system of property law will need to be developed displaying the characteristics required to promote constitutional values.²⁵² Scott warns against an overly enthusiastic overhaul of the prevailing law and pleads for legal certainty to curb too drastic changes.²⁵³ However, Botha indicates that the phrasing of section 39(2), which deals with the interpretation of the *Constitution* and the development of the common law, indicates clearly that a contextual approach to statutory interpretation should be followed. He bases this point of view on *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*²⁵⁴ in which the court indicates:

The starting point in interpreting any legislation is the Constitution...first, the interpretation that is placed upon a statute must where possible be one that would advance at least an identifiable value enshrined in the Bill of Rights;...the emerging trend in statutory construction is to have regard to the context in which words occur...

²⁴⁹ Borrowed from the judgement of Langa DP in *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd; In re Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 1 SA 545 (CC) para 21.

²⁵⁰ *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte: President of South Africa* 2000 2 SA 674 CC at para 33 as quoted in De Vos *Constitutional Law* 584.

²⁵¹ Van der Walt *Property and Constitution* 26.

²⁵² Van der Walt *Property and Constitution* 32.

²⁵³ Scott 2014 *TSAR* 4.

²⁵⁴ 2004 4 SA 490 (CC) at paras 72, 80 and 90.

The effect of the *Constitution* on hermeneutics²⁵⁵ is undeniable, especially as section 39(2) indicates that the aims and purpose of legislation must be reviewed in the light of the Bill of Rights. In interpreting the *STA*, the *Constitution* will be the starting point.

Therefore, it is crucial to assess the influence and consequence of the *Constitution* on the interpretation of legislation when investigating the legal nature of sectional title ownership as it "sets out the framework of systemic qualities, features or characteristics of the property system" it proposes to promote. The courts will, therefore, always have to make value judgements during the application and interpretation of legislation based on constitutional values. In certain circumstances, this may be an "exercise in the balancing of conflicting values and rights" under the auspices of what is constitutionally permissible rather than a mechanical reiteration of what was "intended" by parliament.²⁵⁶

As sectional titles are governed by the *STA*, an investigation into sectional titles will, therefore, also not be complete should the basic principles of statutory interpretation not be borne in mind. Du Plessis argues that "the meaning is not discovered in a text, but is made in dealing with the text".²⁵⁷ According to section 2(2)(a) of Schedule 6 of the Transitional Arrangements the rules of statutory interpretation applies to legislation even though the *STA* (being in operation since 1987) will form part of the so-called "old order legislation".²⁵⁸ The *STA* is a parliamentary statute, and, therefore, the principles of statutory interpretation will be applicable in any dispute arising from the interpretation of the *STA*. Section 2(2)(b) of the Transitional Arrangements provide that all legislation in force when the *Constitution* took effect remain in force until declared unconstitutional, repealed or amended. The *STA* is, therefore, still in operation however, interpretation of the provisions should always be through

²⁵⁵ Hermeneutics is the technique, method and approach by which one interprets texts. Botha *Statutory Interpretation* 21.

²⁵⁶ Botha *Statutory Interpretation* 57.

²⁵⁷ Du Plessis 2001 *SALJ* 794.

²⁵⁸ Transitional arrangements.

the "constitutional prism". The purpose of statutory interpretation post-1994 is not merely to determine the legislature's intention as well as the purpose of the legislation, but to make "constitutional choices by balancing competing fundamental rights" and thereby make "value judgements based on a system of values extraneous to the constitutional test itself".²⁵⁹ Klinck refers to a practical inclusive method of interpretation that forms the basis of statutory interpretation in a post-1994 South Africa.²⁶⁰ Botha also refers to this and finds authority for this viewpoint in *Minister v Land Affairs v Slamdien*.²⁶¹ Herein, the court provides the following guidelines for the interpretation of a statute:²⁶²

- ascertain the meaning of a provision by an analysis of its purpose;
- determine the context of the provision according to its historical origins;
- contextualise the provision in terms of the statute as a whole including the objects and the values of the statute;
- contextualise the provision in terms of the part of the statute it appears in; and
- look at the precise wording of the statute.

In *Natal Joint Municipal Pension Fund v Endumeni Municipality*²⁶³ the Supreme Court of Appeal indicated that interpretation (of statutes) is the:

... process of attributing the meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence ...

The court provided three guidelines to be used when interpreting documents:

²⁵⁹ Botha *Statutory Interpretation* 53 where he quotes *S v Makwanyane* (CCT 3/94) [1995] ZACC 33; 1995 BCLR 665; 1995 3 SA 391; [1996] 2 CHRLD 164; 1995 2 SACR 1 (6 Junie 1995).

²⁶⁰ Klinck 2009 *IJRL* 653.

²⁶¹ 1999 4 BCLR 413 (LCC) 422 para 17; Botha *Statutory Interpretation* 60. He also refers to Du Plessis and Corder *SA's transitional bill of rights* 73-74.

²⁶² My summary.

²⁶³ 2012 4 SA 593 (SCA) para 18.

- the language must be interpreted by ordinary rules of grammar and syntax;
- the context in which the provision appears must be taken into account; and
- the apparent purpose to which it is directed within the material known to those responsible for its drafting, should be taken into account.

Besides the rules of statutory interpretation that should be considered when determining aspects relating to sectional titles, the "strong regulatory features"²⁶⁴ of the *STA* also provide little room for navigation within the application of the Act. The ambit and nature of rights are determined by the provisions of the *STA* rather than the common law. Only after determining these aspects can the legislation be given effect. However, in *Carmichele*²⁶⁵ the court cautioned against an overzealous effort to completely eradicate and overhaul the common law. The court found that although "the courts are under a general obligation to develop the common law, they do not have to carry out this exercise in each and every case." The court should however "be alert" to the norms set out in the *Constitution* and develop the common law in those instances where they are not consistent with this normative framework.²⁶⁶

After outlining the context against which sectional title ownership in South Africa exists and operates, the meaning of sectional ownership will now be investigated through a holistic approach that takes cognisance of all the pertinent sources of property law in South Africa.

²⁶⁴ The court was also led by the strong regulatory features of the *Mineral and Petroleum Resources Development Act 28 of 2002* in *Palala Resources (Pty) Ltd v Minister of Mineral Resources and Energy* case number 32179/13 ZAGPPHC delivered on 4 August 2014.

²⁶⁵ As referred to in De Vos *Constitutional Law* 342; *Carmichelle v Minister of Safety and Security* (CCT 48/00) [2001] ZACC 22; 2001 4 SA 938 (CC); 2001 BCLR 995 (CC).

²⁶⁶ De Vos *Constitutional Law* 342.

3.2 Meaning of ownership of a sectional title unit

3.2.1 Legislative provisions

In terms of sections 2(b) and (c) of the *Sectional Titles Act*, ownership of a sectional title unit consists of "individual ownership of a section together with an undivided bound common ownership share in the common property, determined by the participation quota".²⁶⁷

A sectional title unit is registered in the name of a person(s) and a certificate of registered title is issued that proves ownership of such a unit.²⁶⁸ However, a unit is a composite thing, comprising a section of the building and an undivided co-ownership share in the common property. In relation to the common property, the owner of a sectional title unit is co-owner in the form of bound common ownership²⁶⁹ together with other owners of units in the particular scheme.²⁷⁰ As the legislature makes use of common law concepts of ownership, it is imperative to investigate these common law concepts to come to a sound interpretation of the act.

3.2.2 A sectional title unit as immovable property

The legislature in the *STA* uses the term ownership to describe the relationship that a person will have over the sectional title unit.

The aim of this chapter is not to investigate the historical basis or the development of the concept of ownership in South African or in Roman-Dutch civil law, but to provide a cursory discussion of what is meant by ownership in the general South African context.

²⁶⁷ Pienaar *Sectional Titles* 22.

²⁶⁸ Pienaar *Sectional Titles* 124.

²⁶⁹ Pienaar *Sectional Titles* 31.

²⁷⁰ According to s 16 "The common property shall be owned by owners of sections jointly in undivided shares proportionate to the quotas of their respective sections as specified on the relevant sectional plan."

3.2.2.1 Ownership in general

The concept of ownership is firmly entrenched in South Africa as part of property law with the inception of Roman-Dutch law in South Africa.²⁷¹ According to Van Zyl,²⁷² in Roman law the right of ownership provided the owner (*dominus*) with the most comprehensive control over a thing as opposed to "lesser" rights such as possession or limited real rights. Van der Merwe²⁷³ indicates that Roman-Dutch jurists such as Grotius, Van Leeuwen and Van der Keessel described ownership as an absolute right that entitles the right holder to retrieve his thing from any person. However, he acknowledges that this description is too wide, and that rights other than ownership, such as limited real rights and personal rights may also be enforceable against the whole world. The distinction between ownership and limited real rights, according to Van der Merwe,²⁷⁴ is drawn by Grotius, who distinguished between ownership (*dominium*) and limited real rights or ownership that has been limited by real rights (*gebrecklicke eigendom*). Badenhorst, Pienaar and Mostert²⁷⁵ indicate that the two most influential definitions of ownership in South Africa are that of Grotius and Bartolus de Saxoferrato who defined ownership as "the right of disposal over a corporeal thing within the limits of the law".²⁷⁶

Although a concise definition of ownership is difficult to formulate,²⁷⁷ *Gien v Gier*²⁷⁸ is still used as authority by most academic authors to describe, if not define, ownership.²⁷⁹ In this case, the court noted that ownership is the "most complete real right that a person can have with regard to a thing".²⁸⁰ This is

²⁷¹ Badenhorst, Pienaar and Mostert *The Law of Property* 91.

²⁷² Van Zyl *Roman Private Law* 132.

²⁷³ Van der Merwe *Sakereg* 170 refers to Grotius 2 3 1, 4; Van der Keessel *Praelectiones* on Grotius 2 3 1.

²⁷⁴ Van der Merwe *Sakereg* 171 refers to Grotius 2 3 9-11, 2 33 1.

²⁷⁵ Badenhorst, Pienaar and Mostert *The Law of Property* 91.

²⁷⁶ Badenhorst, Pienaar and Mostert *The Law of Property* 91 refer to footnote 6.

²⁷⁷ Badenhorst, Pienaar and Mostert *The Law of Property* 93.

²⁷⁸ 1979 2 SA 1113 (T) at 1120 per Spoelstra JA "Eiendomsreg is die mees volledige saaklike reg wat 'n persoon ten opsigte van 'n saak kan hê."

²⁷⁹ Scott 2014 *TSAR* 20.

²⁸⁰ Translated by Van der Walt and Pienaar *Law of Property* 40.

interpreted by Badenhorst, Pienaar and Mostert²⁸¹ to mean that "ownership is the real right that potentially confers the most complete or comprehensive control over a thing ..." However, Visser makes specific reference to *Gien v Gien*, in which the court acknowledged that these absolute entitlements of the owner existed within the limitations of the law.²⁸² Visser further refers to *Regal v African Superslate (Pty) Ltd*²⁸³ where the restrictions by neighbour law were accepted. Visser argues that the South African common law in respect of the notion of ownership was heavily influenced by the highly individual theories of Germanic 19th century law.²⁸⁴ Cowan refers to *Johannesburg Council v Rand Townships Registrar*²⁸⁵ wherein the court quoted Savigny's definition of ownership as "the unrestricted and exclusive control which a person has over a thing".²⁸⁶

Furthermore, a changing social, economic and political milieu in South Africa impacted directly on the concept of ownership. Van der Merwe²⁸⁷ maintains that the traditional notion of ownership should be scrutinised and adapted to meet the needs of society in general. Scott²⁸⁸ argues based on an analysis of neighbour law cases that the content of ownership has not undergone radical changes under the new constitutional dispensation. In a more recent publication she maintains that the explanation in *Gien v Gien* is still relevant as well as a correct explanation of the nature of ownership, bearing in mind limitations by the law itself and rights of others.²⁸⁹ According to her, this was affirmed in

²⁸¹ Badenhorst, Pienaar and Mostert *The Law of Property* 91.

²⁸² "Hierdie op die oog af ongebonde vryheid is egter 'n halwe waarheid. Die absolute beskikkingsbevoegdheid van die eienaar bestaan binne die perke wat die reg daarop plaas." Visser 1985 *Acta Juridica* 47 and *Gien v Gien* 1979 2 SA 1113 (T) 1120C.

²⁸³ 1963 1 SA 102 (A) refer to in Visser 1985 *Acta Juridica* 47.

²⁸⁴ Visser 1985 *Acta Juridica* 48.

²⁸⁵ 1910 TPD 1314 at 1319.

²⁸⁶ Cowan 1973 *CILSA* 31.

²⁸⁷ Van der Merwe "Things" para 137.

²⁸⁸ Scott 2005 *Stell LR* 351.

²⁸⁹ However, as Mostert *et al The Law of Property in South Africa* 41 state the concept of ownership has never been absolute. Limitations have always been "part and parcel of the common concept of ownership". According to Badenhorst, Pienaar and Mostert *The Law of Property* 51 these limitations imposed on ownership actually determine the scope of the right of ownership. Therefore, it is important to note that the limitations imposed on ownership include public law limitations, restrictions imposed by the interest of neighbours as well as individual restrictions which may differ from one case to another for

*Minister of Minerals and Energy v Agri SA*²⁹⁰ in which the court found "(i)n general owners of property are free to do with it what they wish".²⁹¹ This is a perfunctory reference to the common law maxim *plena in re potestas*²⁹² that encapsulates the traditional conceptualisation of ownership. Scott maintains that the concept of ownership was not radically changed by the introduction of the *Constitution*, but rather that the *Constitution* strives to bestow ownership on as many persons as possible in South Africa. She bases this argument on her discussion of recent judgements in neighbour law cases and concludes that there is not a general tendency to deviate from the approach to ownership as formulated in *Gien v Gien*. She maintains that the emphasis still falls on the absoluteness of ownership and that very little deviation from established principles is shown in the recent case law that she discussed. Scott indicates that "the content of ownership has and will continue to change; and that changes will be determined by the society in which the definition operates".²⁹³ Without going into too much detail regarding this debate on the absoluteness of ownership, the premise that will be used in this dissertation is that ownership is the real right that provides the owner with the most complete right over a thing.²⁹⁴

instance limited real rights or personal rights. Depending on these rights, the principle of "elasticity of ownership" (see Badenhorst, Pienaar and Mostert *The Law of Property* 94) implies that ownership is more than the sum total of its entitlements.

²⁹⁰ 2012 3 All SA 266 SCA para 33.

²⁹¹ Scott 2014 *TSAR* 20.

²⁹² Translated as "the owner has the power to do as she pleases with the property owned." According to Pienaar this maxim encapsulates the entitlements of absolute control and disposal that an owner has over a thing. Pienaar 1986 *TSAR* 295-308. Pienaar also uses the terms unlimited and unrestricted entitlements of use and control over his property. Pienaar *Sectional Titles* 27. This concept will be discussed in more detail when individual ownership of a section is discussed.

²⁹³ This viewpoint is heavily criticised by Van der Walt *Law of Neighbours* 45 in footnote 115 who believes that this statement is both "profoundly formalist and deeply contradictory". Scott 2014 *TSAR* 20 replied to this criticism by Van der Walt by maintaining that her view point was echoed in the *Agri SA* case as mentioned above.

²⁹⁴ Visser 1985 *Acta Juridica* 43-48 argues that ownership in the South African context has never been an absolute right and that it has always had to yield to the demands placed on it by society. Lewis 1985 *Acta Juridica* 243-244; 248-249 and 260-262 argues that the right to use property has never been unfettered in Roman and Roman-Dutch law, as is evidenced by the restrictions placed on ownership entitlements by neighbour law.

Although this premise is acceptable, it needs to be borne in mind that the court found in *Port Elizabeth Municipality v Various Occupiers*²⁹⁵ that the judicial function will not be to "establish a hierarchical arrangement between the different interests involved", but rather to "balance out and reconcile ...opposed claims" by considering all interests involved. Therefore, the notion that ownership is the most complete real right to a thing, does not necessarily entail that someone with a "lesser" right, such as a personal right or a limited real right will always be in a weaker position. In constitutional South Africa, the hierarchical arrangements of rights, with ownership being ranked the highest of these rights, is transformed into a more lenient approach that takes other interests into account as well. The "ownership rights created by legislation with land, such as ownership of a sectional title unit" is property for purposes of section 25. Limited real rights are also seen as property for the purposes of section 25.²⁹⁶ However, Van der Walt argues that the decision of the court in *PE Municipality* signifies a "fundamental shift in thinking about section 25 and about property rights in general". He argues that the court in this case indicates a "fundamental shift from an abstract rights based to contextual non-hierarchical thinking about property rights".²⁹⁷ This viewpoint is accepted by Pienaar. He refers to it as the "ownership orientation model as opposed to the "fragmented use- rights model".²⁹⁸ Pienaar refers to this as the "property law dimension" and "fragmented or alternative forms of ownership".²⁹⁹ Pienaar argues that:

Ownership is not necessarily the strongest right, but one of the many rights to the property...and security may be based *inter alia* on legislation.³⁰⁰

Van der Walt argues that in constitutional property law, property is mostly regarded as an inherently limited right, while it is traditionally depicted as a fundamentally absolute right in private law.³⁰¹

²⁹⁵ 2005 1 SA 217 (CC).

²⁹⁶ Van der Walt *Constitutional Property Law* 139.

²⁹⁷ Van der Walt *Constitutional Property Law* 521.

²⁹⁸ Refer to para 2.5.5.

²⁹⁹ Pienaar *Land Reform* 340.

³⁰⁰ Pienaar 2015 *PELJ* 1484.

However, the individual ownership of a section still forms the basis of sectional titles ownership and bestows on the owner certain rights and duties. Consequently, the essence of ownership of a section in a sectional title scheme will come under scrutiny.

3.2.2.2 Individual ownership of a section

In section 1 of the *STA ownership* is not defined as such, although a definition of an *owner* is given. The *STA* defines an owner as follows:

...—**owner** means, in relation to-

- (a) immovable property, subject to paragraph (b), the **person registered as owner** or holder thereof...³⁰²

The *STA* merely indicates that "owned" and "ownership" have a corresponding meaning.

The *STSMA* has a broader definition of *owner*. The *STSMA* defines an owner as follows:

Owner, in relation to a unit or a section or an undivided share in the common property forming part of such a unit, means, subject to subsection (5), the person in whose name the unit is registered at a deeds registry in terms of the Sectional Titles Act or in whom ownership is vested by statute, including the trustee in an insolvent estate, the liquidator of a company or close corporation which is an owner, executor of an owner who has died, or the representative of an owner, who is a minor or of unsound mind, recognised by law, and owned or ownership have a corresponding meaning

³⁰¹ Van der Walt *Constitutional Property Law* 171.

³⁰² It also includes: "the trustee in an insolvent estate, the liquidator of a company or close corporation which is an owner, and the executor of an owner who has died, or the representative, recognised by law, of an owner who is a minor or of unsound mind or is otherwise under a disability, if such trustee, liquidator, executor or representative is acting within the scope of his or her authority; (b) immovable property and real rights in immovable property-

- (i) registered in the names of both spouses in a marriage in community of property, either one or both of the spouses;
- (ii) registered in the name of only one spouse and forming part of the joint estate of both spouses in a marriage in community of property, either one or both of the spouses."

Section 2 deals with "ownership and real rights in or over parts of buildings, and registration of title to ownership or other real rights in or over such parts" and continues to describe ownership in terms of sectional title as:

Notwithstanding anything to the contrary in any law or the common law contained-

- (a) a building or buildings comprised in a scheme and the land on which such building or buildings is or are situated, may be divided into sections and common property in accordance with the provisions of this Act.

Then the *STA* provides that "separate ownership in such sections or an undivided share therein may be acquired in accordance with the provisions of this Act". Although termed "ownership" in the Act, the "unlimited and unrestricted entitlements of use and control over his property" or so-called *plena in re potestas* is diluted by the joint exercise of entitlements by sectional owners or by rules enforced by the body corporate.³⁰³ For instance, although co-owner of a tennis court in a sectional title scheme, one needs to consider the needs of other co-owners and cannot use the tennis court exclusively. One also needs to use the court within the rules provided by the body corporate that may include restrictions on use at certain times of the day, or maybe on Sundays. Although you have co-ownership of the common property, it may be limited within the framework provided for by the *STA*.

Sectional title ownership is, therefore, a "creature of statute" that borrows all its entitlements, rights and duties from the Act. The legislator acknowledges that this "creation" defies common law concepts by including right at the beginning of the description of sectional title ownership the proviso "(n)otwithstanding anything to the contrary in any law or the common law contained". This creation caused confusion with traditional concepts of ownership in South Africa, such as the absoluteness of ownership as well as the fact that a completely new thing was introduced.

³⁰³ Pienaar *Sectional Titles* 27.

3.3 Nature of the thing (res) owned

The thing forming the object of sectional title ownership created a "new composite thing".³⁰⁴ This entails that a new form of immovable property was statutorily created by the introduction of sectional titles in South Africa. The nature of the thing created, as well as how to deal with the thing with regard to alienation and transfer, therefore, had to be determined. The legislator deemed it to be land in section 3(1) and therefore all legislation applicable to land was also made applicable with regard to sectional titles.³⁰⁵

3.3.1 A statutorily created composite thing

The *res*, forming the object of the sectional owner's right, is called a "unit" in the *STA*. In terms of section 1 a "unit" is defined as "a section together with its undivided share in the common property apportioned to that section in accordance with the quota of the section". This unit is a composite immovable thing consisting of two components, namely a section and an undivided share in the common property.³⁰⁶ This is a completely new statutorily created thing consisting of a corporeal thing and an incorporate thing - the undivided share in the common property.

A "section" is defined in terms of section 1 of the Act as "a section shown as such on the sectional plan". Accordingly, section 5 provides for the determination of the section on the sectional plan as a cubic entity with reference to the middle of the external floor, walls and ceilings thereof and to be distinguished by a number. The floor area should be measured up to the median line of its boundary walls, floor and ceiling, with the median lines of the boundary walls forming the vertical boundaries of the cubic entity and the median lines of the floor and ceiling respectively forming the horizontal

³⁰⁴ Pienaar *Sectional Titles* 59. states that the thing created is a new "composite ownership". But this refers to the new composite ownership also created by the Sectional Titles Act. This composite ownership consist of individual ownership of a section and an undivided co-ownership share in the common property

³⁰⁵ Pienaar *Sectional Titles* 59.

³⁰⁶ Pienaar *Sectional Titles* 59. Some authors identify a third element, namely membership of the body corporate. Refer to Van der Merwe *Sectional Titles* 2-3.

boundaries of the unit.³⁰⁷ According to Van der Merwe, this also leads to the creation of an entirely new form of "composite ownership", namely individual ownership of the specific section as well as joint ownership (together with other sectional owners) of the common property. The individual ownership of the section also provides the owner of such a section with the ability to encumber the property with limited real rights such as notarial leases, servitudes and mortgages.³⁰⁸

3.3.1.1 Classification of the *res* in sectional title ownership

The classification of this newly created *res* was controversial since many a common law principle had to be subjected to it. Furthermore, the classification of the *res* in terms of the common law classification also brought about certain problems. Whilst met with fervent criticism by some authors,³⁰⁹ others tried to incorporate it into our legal system.³¹⁰ This new "thing" that was created did not fit comfortably into any of the common law classifications of things.

3.3.1.2 Meaning of a thing (*res corporalis*)³¹¹

In common law, a thing is defined according to the following characteristics:

- i) corporeality;
- ii) external to humans (impersonal nature);
- iii) independence;
- iv) susceptible to human control;
- v) must be of use or value to human.³¹²

³⁰⁷ Pienaar *Sectional Titles* 60.

³⁰⁸ Van der Merwe *Sectional Titles* 1-30 (15) para 1.9.

³⁰⁹ De Wet and Tatham 1972 *De Rebus* 205-209.

³¹⁰ Van der Merwe 1974 *THRHR* 113-132.

³¹¹ Van der Merwe describes a thing as "*n selfstandige natuur- kultuurprodukt wat buite die mens geleë is, vir juridiese heerskappy vatbaar is en vir die mens van nut en waarde is*". Van der Merwe *Sakereg* 23. He further observes that independence is one of the characteristics of a thing and describes it as "a thing must be able to exist independently on its own and not be a part (bestanddeel) of another thing". Van der Merwe *Sakereg* 25; Badenhorst, Pienaar and Mostert *The Law of Property* 20 indicate that it must be an "independent entity in law".

³¹² Badenhorst, Pienaar and Mostert *The Law of Property* 14.

As early as 1974, Van der Merwe argued convincingly that a section in a sectional title scheme may not fit these characteristics, but due to economic and social needs the legislature decided to demarcate specific parts of an existing building as separate entities. He argued that it was within the realm of the legislature's competencies to do so. Furthermore, Van der Merwe indicates that these separate entities are corporeal, and have value and use to humans. However, he acknowledges that some question may arise as to whether a section is independent and susceptible to human control. He argued these problems related to the maxim *superficies solo cedit*³¹³ and acknowledges that this common law maxim cannot be applicable in sectional titles. Pienaar explains it further when he indicates quite succinctly that the owner of a sectional title unit is not the owner of the land, because the land belongs to the all the sectional owners of the sectional title community in a form of bound co-ownership.³¹⁴ In a later publication Van der Merwe states that prior to the introduction of sectional titles in South Africa, South African law did not "recognise separate ownership in a building or parts of a building".³¹⁵ According to Pienaar this is mainly because of the application in South African law of the Roman law maxim *superficies solo cedit (omne quod inaedificatur solo cedit)* which entails that the owner of a parcel of land is also owner of everything that is attached to the land.³¹⁶ Academic writers and practitioners alike have frowned upon this new development, especially regarding the fact that a new type of "thing" was created.³¹⁷ The fact that the object of ownership was not clearly defined³¹⁸ and a hereto inseparable thing (a building attached to land) was

³¹³ Refer to para 3.1.1 where this was discussed.

³¹⁴ Pienaar *Sectional Titles* 25.

³¹⁵ Van der Merwe *Sectional titles* para 1.4.

³¹⁶ The Roman law maxim "*cuius est solum eius est usque ad coelum*" which entails that a landowner can exercise ownership in the airspace above and the ground below property was also deviated from with the implementation of sectional titles in South Africa. For a full discussion refer to Pienaar *Sectional Titles* 22-27. Another Roman law maxim that was also influenced by the introduction of sectional titles was "*plena in re potestas*" that provides for an owner to have unlimited and unrestricted use of his property. Refer to Pienaar *Sectional titles* 27-30.

³¹⁷ De Wet and Tatham 1972 *De Rebus* 205 called the "section: that is bought in sectional title ownership a nebulous thing subject to deficiencies that the *Sectional Title Act* is ripely endowed with".

³¹⁸ De Wet and Tatham 1972 *De Rebus* 206.

separated,³¹⁹ were criticised. A more phlegmatic approach was followed by Van der Merwe in attempting to ascertain the dogmatic foundations of the Act.³²⁰ In his article he illuminates quite convincingly that the thing that is owned is a newly created composite thing. He argues that a completely new category of immovable property is developed by the legislature. This "thing" consists of a section, the apartment (flat) or business premises (office or shop) as the principal thing, and the undivided share in the common property as an essential accessory component in the form of an incorporeal thing.

3.3.2 Sectional title unit

The object of ownership is a unit, being a composite thing consisting of a section, which is the immovable property demarcated in terms of vertical and horizontal boundaries as the principal thing, together with an undivided co-ownership share in the common property as an incorporeal accessory to the section. It must be demarcated on the sectional plan. According to section 5 of the *STA*, a section must be defined "as a cubic entity with reference to the floor, wall and ceilings thereof and must be distinguished by number."³²¹ The floor area, ceiling and vertical walls are demarcated up to the median line, forming the vertical and horizontal boundaries. In the case of doors, windows and other structures built into the section's exterior walls, the median line would pass through such doors windows and structures.³²²

The undivided share in the common property is seen as an incorporeal thing that is attached to the principal thing as accessory. It consequently combines individual ownership of a section with an undivided co-ownership share in the common property.³²³ The common property consists of land included in the

³¹⁹ De Wet and Tatham 1972 *De Rebus* 209 went so far as to argue that the *Sectional Title Act* should never have come into existence "...moes nooit gemaak gewees het nie".

³²⁰ Van der Merwe 1974 *THRHR* 113-132.

³²¹ Pienaar *Sectional Titles* 59.

³²² *Sectional Titles Amendment Act* 33 of 2013; Van der Merwe 2011 *Stell LR* 119.

³²³ Mostert *et al The Law of Property in South Africa* 101.

scheme, parts of the building or buildings not included in the sections and land referred to in section 26.³²⁴

In terms of the common law classification of things according to their nature, things may be divided into singular (*res singularus*) and composite things (*res universalis*). In common law, composite things may further be divided into *universitates rerum cohaerentium*, things which form an organic or mechanical whole,³²⁵ or a *universitates rerum distantium* where things of a similar nature or a collection of things form a collection.³²⁶ A *universitas iuris*³²⁷ on the other hand is a collection of rights, for instance the assets in an estate.³²⁸ In the light of this common law classification of *res universalis*, it is difficult to classify a sectional title unit in any of these traditional categories. Although it is possible for a thing to be recognised and given legal effect (as is the case with sectional titles) without falling into the traditional classification of things, this is but one more example where the property law rules and principles were changed with the introduction of sectional titles in South Africa. This is also further evidence of the fact that, because a sectional title unit does not fit into the traditional classification of things, the rights, duties and entitlements are not as clearly defined as would have been necessary to have to fit into the existing classifications.

What also makes this a unique thing is the fact that the accessory thing is the co-ownership share in an immovable thing in the form of an incorporeal. Incorporeal things have recently been recognised and given more prominence in South African law.³²⁹ If a right relates to land, it is seen as an immovable incorporeal thing, and if it relates to a movable thing, it is seen as movable

³²⁴ Refer to s 1 of the *STA*. Land referred to in s 26 is any additional land acquired by the body corporate.

³²⁵ Where the accessory thing formed an independent thing at some stage.

³²⁶ For instance, a flock of sheep.

³²⁷ Van der Merwe *Sakereg* 38.

³²⁸ Although this composite thing is recognised as an entity in the law of contract the lack of identifiability or appropriability makes it difficult to regard it as a thing in terms of the law of property.

³²⁹ *Xsinet (Pty) Ltd v Telkom SA Ltd* 2002 3 SA 629 (C).

incorporeal.³³⁰ In the same argument the bound common ownership of the common property will be classified as an immovable incorporeal thing. Van der Merwe argues further that this thing was formed through *accessio*.³³¹ However, this statement is criticised by Pienaar who argues that the forming of the new composite thing is a statutory joining of a corporeal part (the section of the building) and the incorporeal accessory (the undivided co- ownership share in the common property).³³²

3.3.3 An undivided share of the common property

The owner of a sectional title unit obtains individual ownership of the section that could be an apartment or a commercial unit, but he obtains co-ownership of the common property together with all the other sectional owners. These two components are inextricably linked and cannot be alienated separately.³³³ The common property is made up of all the areas of the property that is not included in an individual owner's unit as indicated on the sectional plan and would refer to for instance staircases, hallways, store rooms, the roofs of the building and the land. Not only does this co-ownership of the common property restrict the owner's individual ownership of his section, but it also limits the exercise of a co-owner's entitlements to the common property.

3.3.4 The relationship between the section and the common property

Another feature applicable to the co-ownership of the common property is the fact that this ownership is held in the form of bound common ownership. Two forms of co-ownership are known in South Africa, namely bound common ownership and free co-ownership. According to Pienaar³³⁴ a statutory form of bound common ownership was created in the *STA*. The reason for this is that

³³⁰ For example a usufruct has been classified as an immovable thing. See Van der Merwe *Sakereg* 43.

³³¹ *Accessio* is a form of original acquisition of ownership that entails the permanent physical attachment of an immovable to another immovable, a movable to another movable and a movable to an immovable. Refer to Pienaar *Sectional Titles* 64.

³³² Pienaar *Sectional Titles* 64.

³³³ Van der Merwe *Sectional Titles* 2-3.

³³⁴ Pienaar *Sectional Titles* 31.

there exists an underlying legal relationship forming the basis of the co-ownership between the parties. This underlying legal relationship is the ownership of a section in the scheme tied to the co-ownership share in the common property. A section cannot be alienated without alienation of the undivided share in the common property as it forms an indivisible, composite immovable thing.³³⁵ This effectively precludes any possible continuance of co-ownership in the common property, after ownership of a section has been given up.

3.3.5 Unit as a "property right" constitutionally protected

Previously, objects of property rights were mainly described with reference to corporeality, with a few exceptions of incorporeal property mainly created by legislation.³³⁶ With the promulgation of the *Constitution*, this narrow interpretation of things as "predominantly corporeal" has been expanded by the introduction of a wider property concept. In terms of section 25 of the *Constitution*, provision is made for the protection of rights in addition to things as objects of property rights. The aim of section 25 is to revisit the previous description of corporeal objects as "dogmatically sound" as opposed to incorporeal objects as "dogmatically unsound", by widening the scope and protection offered by the *Constitution*.³³⁷ According to Van der Walt, this includes the protection of intangibles such as registered limited real rights that have been recognised as property rights in private law.³³⁸ However, constitutional law differs from private law in the sense that the content and scope of private law property rights differ from constitutional law. He explains that in private law, property rights are seen as fundamentally unlimited, whereas in constitutional law, property is regarded as "inherently limited". Although the "absoluteness" of private law rights is, according to Van der Walt, played down at present, the focus still remains on the protection of entitlements

³³⁵ This was discussed when the nature of the thing was determined.

³³⁶ Pienaar *Sectional Titles* 35.

³³⁷ Pienaar *Sectional Titles* 36.

³³⁸ Van der Walt *Constitutional Property Law* 114.

of the holder of the right.³³⁹ In constitutional law, however, because the right is seen as inherently limited, the focus is on the legitimacy of and effects of police power regulation of the use and exploitation of property.³⁴⁰ Pienaar³⁴¹ explains that in a constitutional era, it boils down to a balancing of different rights and interests. It is, therefore, clear that Roman-Dutch ownership principles will only prevail if they are compatible with constitutional values. Pienaar also claims that ownership of a sectional title unit is not based on the traditional common law principles of ownership of immovable property. However, he argues that the legislator is not bound by these principles, but rather by the constitutionality of the statutory creation of sectional titles.³⁴² This does not, however, negate the importance of determining the nature of the right that is dealt with, as the common law system of remedies to protect rights is still the vehicle used to gain access to courts in South Africa.

3.4 Limitation on ownership of a sectional title unit

Ownership is not absolute, but may be limited by, for instance, rights of third parties in terms of private law or statutory measures and rights of other owners.³⁴³ The sectional owner is also confronted by various limitations on ownership of his unit, as well as his co-ownership of the common property, *inter alia*:

- exclusive use rights;³⁴⁴
- the developer's right to extension,³⁴⁵
- other sectional owners' right to extension,³⁴⁶
- real security rights, rights of use or *habitation* and servitudes;

³³⁹ The principle of "absoluteness" was also discussed in more detail in the section on ownership in general.

³⁴⁰ Van der Walt *Constitutional Property Law* 169-171.

³⁴¹ Pienaar *Sectional Titles* 38.

³⁴² Pienaar *Sectional Titles* 41.

³⁴³ Pienaar *Sectional Titles* 3-4.

³⁴⁴ Refer to para 4.6.

³⁴⁵ Refer to para 4.5.

³⁴⁶ Refer to para 4.4.

- ancillary or subsidiary rights or entitlements flowing from the limited real right;
- creditor's rights of other owners.³⁴⁷

The first three of these rights which limits the owner's entitlements, will be discussed in depth in the next chapters. For the sake of clarity, some remarks on the mentioned limitations would however be beneficial at this stage.

Sectional owners' rights are firstly limited by the rights of other sectional owners. A sectional owner may use and enjoy his property if this does not infringe on the rights of others. An owner may also not abuse his rights or inconvenience his neighbours. This would occur where he makes structural changes inside his unit that may endanger the stability or structural soundness of neighbouring units.³⁴⁸ Existing servitudes, other real rights and restrictive conditions contained in the sectional plan will also limit an owner's entitlements.³⁴⁹ This cannot be excluded by the rules of the scheme.³⁵⁰

Regarding exclusive use areas and sections, owners are obliged to grant access to outsiders under certain conditions (for instance if authorised in writing by the body corporate, within reasonable hours, for general inspection and repair of communal pipes, wires, cables *et cetera*). Included in these conditions is also the servitude granting reciprocal passage. The owner has the obligation to carry out all work ordered by the local authority. He should keep his section in good repair and cannot allow it to go to rack and ruin. He may not use his section in such a way that it causes a nuisance. He may not use it for any other purpose as its destined use without permission for such a change of use. Furthermore, reciprocal servitudes for lateral and surface support exist for wires, pipes and sewage. The owner is also "not to deprive neighbouring sections or any other sections in the development of their necessary support".³⁵¹ The owner's

³⁴⁷ Refer to the applicants's founding affidavit on 37 in *Minister of Minerals and Energy v Agri SA* 2012 3 All SA 266 (SCA).

³⁴⁸ Van der Merwe *Sectional Titles* 8.2.2.1.

³⁴⁹ Van der Merwe *Sectional Titles* 8.2.2.2.

³⁵⁰ Van der Merwe *Sectional Titles* 8.2.2.3.

³⁵¹ Van der Merwe *Sectional Titles* paras 8.2.2.3, 8.2.2.4 and s 13 of the *STSMA*.

entitlements are also limited by the rules of the scheme.³⁵² As Van der Merwe aptly argues:

An equilibrium must be maintained between the rights of individual owners and the community to whom they all belong.³⁵³

The extension of the section in terms of section 24, the developer's right to extend the scheme in terms of section 25, and the exclusive use right in terms of section 27 of the act, are all limitations on the owner's co-ownership share of the common property. The problems surrounding these rights and their practical implications will form the focus of this study in the next two chapters.

3.5 Conclusion

It is clear from the discussion above that sectional titles are a fairly new, but well-entrenched development in the South African property law system. Although quite thoroughly regulated by legislation, one must take heed of the historical and constitutional context within which they operate. Currently, South African property law acknowledges the existence of this "creature of statute" and attempts are made to harmonise the statutory concepts within in common law classifications. This is done with the objective to determine the scope and ambit of the *dominium* of a sectional owner.

This ownership of a unit in a sectional title scheme is not unlimited, but rather restricted by the *STA* itself, rights of third parties and the neighbour law among others.³⁵⁴ In the same manner the co-ownership of the common property is also restricted by for instance granting of exclusive use areas to owners, granting of a limited real right of phased development to the developer and granting the owner the permission to extend his section. In the next chapter, these rights will come under intense scrutiny. The nature of these rights will be discussed as it had been developed in case law and through legislation. Consequently, certain problems that exist in practice regarding these rights will be addressed. With

³⁵² Section 10 of the *STSMA*.

³⁵³ Van der Merwe *Sectional Titles* 8.2.2.4.

³⁵⁴ Pienaar *Sectional Titles* 63.

the application of the subtraction test that was discussed in chapter two, an attempt will be made to classify these rights to alleviate some of the existing confusion.

CHAPTER 4

ROLE PLAYERS IN AND INSTRUMENTS OF SECTIONAL TITLE SCHEMES LIMITING AND EXTENDING OWNERSHIP

4.1 Introduction

In the previous chapter the main aspects of ownership of a sectional title unit was discussed, within the context of the regulatory nature of the sectional title legislation. The focus of that chapter was to establish the mechanics, procedures and functions of the object of sectional title ownership. In this chapter, the aim will be to pin down certain role players involved in sectional titles. Furthermore, the instruments of resolutions and rules used by the said role players to create, amend and terminate specific rights will be discussed. Finally, the extension of the section by the owner in terms of section 24, the extension of the scheme by the developer in terms of section 25 and the creation of exclusive use rights in terms of section 27 of the *STA* and section 10(7) and (8) of the *STSMMA* will be discussed briefly by referring to the statutory provisions, the process, the effect and uncertainties surrounding these rights. This chapter will lay the foundation for these rights. The subtraction test deals with the determination of the legal nature of rights for registration purposes. Although these rights have been classified in some instances as either real or personal through legislation and by case law, this classification is not so definite that no lacunae exist. This chapter will, however, not focus on these uncertainties, but will only aim to provide the basis from which these rights developed. These issues have a significant effect on the sectional title owners' rights as well as the entitlements of use and enjoyment of the common property.

In order to determine the extent of a sectional owner's entitlements to his property, it is important that the legal relationships involved should be clearly delineated. Not only will it have an impact on an owner's enjoyment of his sectional unit, but it will also impact financially on the other owners and holders

of, for instance, real security rights in the form of mortgages. The sectional owner's *dominium* is inherently limited due to the nature of sectional titles as "fragmented land tenure".³⁵⁵ The ownership of parts of a building leads to an increase in the density of the occupiers of the same property, forcing intensified application of neighbour law principles.³⁵⁶ According to the *STA*³⁵⁷ ownership of the section is limited by the enforcement of existing servitudes, real rights and restrictive conditions endorsed on the title deed or indicated on the sectional plan. Furthermore the practicalities of living in a building with shared drain pipes, electricity wiring, cables and ducts also forces implied servitudes for the maintenance and repair of these shared living conditions. Although legislation concerning sectional titles provides eloquent provisions for the establishment and management of sectional title ownership, all possible scenarios involved in the day-to-day running of a sectional title scheme cannot be addressed in legislation. Some of these scenarios will be discussed in the next chapter. What is, however, quite clearly defined in legislation is the nature of the relationship between the developer, the body corporate and the owner. The importance of establishing this relationship is because these are the main role players in creating, terminating and exercising the rights involved in sectional title ownership. As these roles may overlap, a clear delineation of the main role players is imperative.

4.2 The relationship between the developer, the body corporate and the sectional owner

The *STA* determines and regulates the relationship between the three main characters involved in sectional ownership, namely the developer, the owner and the body corporate. This simplifies the relationship, but also leaves space for some uncertainty to exist in this relationship. In the next section, these three

³⁵⁵ According to Pienaar *Sectional Titles* 13-22, "fragmented land tenure" developed from fragmented property holding that included shareholding in a share block company or long term lease agreements. With the introduction of sectional titles in South-Africa, "ownership" of a section of a building as opposed to a right of use (which was a personal right in the case of a share block scheme or a short term lease agreement) was possible.

³⁵⁶ Pienaar *Sectional Titles* 248; Badenhorst, Pienaar and Mostert *The Law of Property* 441.

³⁵⁷ Sections 11(2) and 11(3)(b).

role players will be described. The role of the developer will be discussed briefly, with specific reference to his role in the opening of the sectional title register and the inclusion of rules providing rights to sectional owners. The establishment of the body corporate and its influence on the rights of the developer will then be discussed.

4.2.1 The developer as initial creator of the sectional title scheme

According to section 1 of the *STSMA* the "developer" is described as:

... a person³⁵⁸ who is the registered owner of land, situated within the area of jurisdiction of a local authority, on which is situated or to be erected a building or buildings which he has divided or proposes to divide into two or more sections in terms of a scheme...

Without going into the details regarding the attributes that the piece of land should have, it is clear from the abovementioned definition that the developer is the initial sole owner of the piece of land which he proposes to develop. He, therefore, has the usual entitlements that an owner will have as indicated in the previous chapter, namely:

- the entitlement to use the thing;
- the entitlement to the fruits and income of the thing;
- the entitlement to consume or destroy the thing;
- the entitlement to possess the thing;
- the entitlement to dispose of the thing;
- the entitlement to claim the thing from an unlawful possessor; and
- the entitlement to resist an unlawful invasion.³⁵⁹

When a developer decides to develop the piece of land in a sectional title scheme, he also reconciles himself with the fact that he will no longer have these entitlements to the piece of land after the sectional title scheme has been registered. However, besides the financial gain he will receive from the

³⁵⁸ Not necessarily a natural person. It can be a juristic person in the form of a company as well.

³⁵⁹ Badenhorst, Pienaar and Mostert *The Law of Property* 94.

alienation of units of the scheme to individual owners, he still remains a member of the body corporate of the sectional title scheme until the last unit registered to his name has been alienated.³⁶⁰ The process that the developer has to follow to develop the scheme is in short:

- He needs to make sure that the land he intends to develop is within the jurisdiction of the local authority and is registered to his name.
- If the scheme needs to be established on more than one piece of land, he needs to ensure that the building is erected on one piece of land, or if erected on two pieces of land, such land should be contiguous, notarially tied and registered in the name of the same person. He needs to consolidate these pieces of land through either a notarial tie agreement or by following the process set out in section 4(2) of the *STA*.
- The developer then has to instruct an architect or surveyor to draft the sectional plan and ensure that it is not in contravention of any town-planning scheme, statutory plan or provisions. The sectional plan is a very important document and "forms the basis of the sectional title scheme",³⁶¹ because it delineates the units and common property after registration in a deeds registry as part of the process of opening a sectional title register. Furthermore it includes a schedule with a calculation of the participation quota of each unit. For this discussion, however, the most important function of the sectional plan is that it delineates exclusive use areas.³⁶² Therefore, the description and extent of a sectional title unit and exclusive use areas, if any are determined with reference to the sectional plan.
- Should the proposed scheme be for a building already occupied by tenants with lease agreements, the developer "must acquaint the tenants" of the proposed development and follow the procedures included in section 10 of

³⁶⁰ Pienaar *Sectional Titles* 88; Badenhorst, Pienaar and Mostert *The Law of Property* 447.

³⁶¹ Pienaar *Sectional Titles* 113; Badenhorst, Pienaar and Mostert *The Law of Property* 448.

³⁶² This will be discussed fully in para 4.6.

the *STA* that provides for tenant protection.³⁶³ Should the building deviate from applicable town planning schemes, statutory plans or local authority conditions, an application for condonation of such non-compliance should be made to the local authority and should be confirmed by the local authority through issuing a certificate. Such a certificate of condonation should be included in the application for opening of a sectional title register.³⁶⁴ This would for example be the case of a part of the building comprising the sectional title scheme is erected on an area in which a servitude in favour of the local authority has been registered. The sectional plan³⁶⁵ drafted by the architect or surveyor is then sent for approval by the Surveyor-General.

- Upon receiving the approval of the Surveyor-General, the sectional plan³⁶⁶ is then registered³⁶⁷ at the deeds registry while simultaneously an application for the opening of the sectional title scheme is lodged.³⁶⁸ The effect of the opening of the sectional title register and the registration of the sectional title scheme is that the title deed of the land is endorsed to indicate that the property is no longer held in the form of conventional land, but as sectional title. This registration also has the effect that the buildings and land shown on the sectional plan is now converted into sections and common property.³⁶⁹ What is also important to note here, especially regarding this study, is that the application to the deeds registry for the opening of the sectional title register should also include a

³⁶³ Van der Merwe *Sectional Titles* 6-3; Badenhorst, Pienaar and Mostert *The Law of Property* 449.

³⁶⁴ Refer to ss 7(2)(b) and 4(5) of the *STA*; Pienaar *Sectional Titles* 118.

³⁶⁵ At this stage, until it is approved by the Surveyor-General it is still referred to as the "draft sectional plan".

³⁶⁶ As well as a "schedule of servitudes and conditions that will be applicable to every sectional title deed even if not expressly referred to in the deed". Refer to Pienaar *Sectional Titles* 121.

³⁶⁷ According to Pienaar *Sectional Titles* 119 "The registered sectional plan forms the basis of ownership of a sectional title unit." A certificate of registered title for each unit is issued by the Registrar of Deeds in the name of the developer. The unit will then be transferred by the developer by means of a deed of transfer of sectional title.

³⁶⁸ It is important to note that a sectional title unit cannot be transferred before the registration of the sectional title scheme and the opening of the sectional title register.

³⁶⁹ Pienaar *Sectional Titles* 108-121; Badenhorst, Pienaar and Mostert *The Law of Property* 450-452.

certificate by the conveyancer stating that the rules prescribed in terms of section 10(2) of the *STSMA* and regulation 6(3) are applicable or a schedule of the rules substituted or amended. These rules are management and conduct rules and will be discussed in detail at 4.3. According to section 1 of the *STSMA* "rules" are defined as:

... in relation to a building or buildings which is divided into sections and common property, means the management rules and conduct rules referred to in section 10(2)(a) and (b) respectively.

The effect of the opening of a sectional title register is that a certificate of registered sectional title, in the name of the developer, is issued for every sectional title unit. The developer is then able to transfer the units by way of a sectional title deeds of transfer to third parties, who become sectional owners upon registration of units into their names.

As part of his responsibilities the developer has to set up the first general meeting of the body corporate, within sixty days of the establishment of the body corporate, by providing at least seven days written notice in advance of such a meeting. The functions of the developer decrease as the importance of the body corporate increases. The developer stays a member of the body corporate as long as he is the owner of a sectional title unit.³⁷⁰ When he ceases to be an owner, the only link that will remain with the development is if he reserved a right of extension of the scheme in terms of section 25 of the *STA*.³⁷¹ In what follows, the body corporate and its functions will be described ibriefly.

4.2.2 Body corporate as main management body of the sectional title scheme

The body corporate is a juristic person that is "deemed to be established" as soon as the first unit is transferred by the developer to a sectional owner.³⁷² It consists of all the sectional owners and membership is automatic and involuntary. An owner may not elect to not be a member of the body corporate.

³⁷⁰ Refer to s 34(2) of the *STA* and s 2(2) of the *STSMA*.

³⁷¹ This will be discussed in detail in para 4.5.

³⁷² Section 2(1) of the *STSMA*.

Neither may an owner continue to be a member once he has sold his unit.³⁷³

The main functions of the body corporate are *inter alia*:

- the duty to maintain the common property;
- to determine, collect and administer a fund for this purpose;
- to insure the buildings and common property;
- for the purpose of this study the main function is the fact that they may reflect and decide on unanimous and special resolutions.³⁷⁴

4.2.3 Sectional owner as co-owner of the common property

The sectional owner also becomes co-owner of an undivided share in the common property as soon as his unit is transferred into his name. He stays a co-owner for as long as he owns a unit in the sectional title scheme. An explanation of what the undivided share in the common property entails was described in the previous chapter. Ownership of a sectional title unit is transferred by the registration of a deed of transfer by following basically the same procedure as that of the transfer of ordinary land. The deed of transfer should also if applicable reflect whether a real right of extension in favour of the developer exists.³⁷⁵ According to Pienaar the endorsements on the certificates of registered sectional title (initially issued to the developer for every unit in the scheme upon opening of the sectional title register) include reference to mortgage bonds applicable to the unit, notarial leases, notarial deeds of limited real rights and certificates of real rights of exclusive use.³⁷⁶ These are all rights that limit an owner's entitlements to his unit. The subsequent transfers of the unit will be effected by deeds of transfer. The exclusive use rights are indicated

³⁷³ Pienaar *Sectional Titles* 147.

³⁷⁴ These resolutions are used *inter alia* for the creation and amendment of rights for instance for the determination of exclusive use rights in terms of s 27A of the *STA*. This will be discussed in more detail when s 10(7) and (8) rights are dealt with.

³⁷⁵ This is a right in terms of s 25 of the *STA*. It will be dealt with in a full discussion later on.

³⁷⁶ Pienaar *Sectional Titles* 138-139. It is exactly with these endorsements that problems in practice occur. This will be discussed in detail a bit later.

as part of the description of the legal cause for the transfer. The rights to exclusive use are transferred by means of notarial deed of cession.³⁷⁷

Thus far, the relationship between the owner, the body corporate and the developer was delineated. Subsequently certain rights against the scheme limiting the owner's entitlements toward the common property will be discussed. It is not within the scope of this study to focus on all the possible rights that may limit an owner's entitlements. Only a selected number of these rights will be dealt with as they pertain to the main research question. The selection is based on confusion created by these rights, especially regarding the practical implications of its application. Before the focus could fall on the creation and amendments of rights, the enforceability of these rights in the light of the *Constitution* needs to be clarified. The rights in general are created by either including it in the schedule when the sectional title register is opened or if the scheme is already functioning, by adopting unanimous or special resolutions.

4.3 Rules and resolutions as the tools to manage sectional title schemes

4.3.1 Legal nature of rules in general

According to section 10(2) two kinds of rules are prescribed, namely management and conduct rules.³⁷⁸ The rules governing the sectional title ownership are statutorily regulated. Section 10 of the *STSMA* provides the model rules for the scheme. Regulation 6(1) of the regulations of the *STSMA* indicates that:

Rules, as prescribed and as amended by a body corporate in accordance with section 10 of the Act, must be considered to be and interpreted as laws made by and for the body corporate of that scheme.

³⁷⁷ Refer to para 4.6.2.

³⁷⁸ Section 35(2) of the *STA*. Pienaar indicates that in some schemes a third category of rules, namely house rules are found. These rules are adopted by the body corporate or trustees and regulates trivial matters. However, as Pienaar acknowledges these rules are not provided for by the *STA* and, therefore, the enforcement of these rules may be problematic in practice. Pienaar *Sectional Titles* 203.

Van der Merwe indicates that one of the changes brought about by the *STSMA* is that rules that are "substituting, adding to, amending or repealing prescribed management or conduct rules by the developer or by a unanimous resolution of the body corporate" will have to be approved by the chief ombud. Upon the opening of the sectional title register a certificate by the conveyancer is included that states whether the model management and conduct rules provided for in the *STSMA* are applicable or which of them are amended by the developer and how.

Section 10(1) of the *STSMA*³⁷⁹ provides that:

A scheme shall as from the date of the establishment of the body corporate be regulated and managed, subject to the provisions of this Act, by means of rules.

Section 10(2) regulates that

The rules must provide for the regulation, management, administration, use and enjoyment of the sections and the common property...

The rules are prescribed in terms of section 10 of the *STSMA*. Sections 10(2)(a) and (b) determines that management and conduct rules:

... may subject to the approval of the chief ombud be substituted, added to, amended or repealed by the developer when submitting an application for the opening of a sectional title register, to the extent prescribed by regulation, and which rules may be substituted, added to, amended or repealed by unanimous resolution of the body corporate as prescribed;

Durham discusses how the rules made by the body corporate should be interpreted under the *STSMA*. Relying on section 10(3) of the *STSMA* she argues the the rules must be "reasonable and apply equally on all owners". She argues that there should be a rational basis for the interpretation of the rules and that it should be questioned "what would be appropriate and fair in the circumstances". She points out that this argument is strengthened by the fact that in terms of section 10(5)(b) the chief ombud may disapprove of a rule if this

³⁷⁹ Sections 10(1) and 10(2) of the *STSMA* provide the same as the indicated sections of the *STA* except for a few minor changes in the wording. Van der Merwe *Sectional Titles*1-63.

requirement is not met. She further relies on section 10(4) of the *ST SMA* and concludes that the rules of the scheme is binding towards the body corporate as well as all owners and occupiers of sections.³⁸⁰

The developer is prohibited to alter some particular rules altogether.³⁸¹ The management rules deal primarily with the management and administration of the scheme, whereas the conduct rules deal mainly with how occupiers should conduct themselves. Conduct rules determine, for instance, whether animals and pets are allowed in a sectional title scheme, the use of the property for residence and not business, the prohibition of the erection of washing lines on the premises etc. However, an exclusive use area may also be created in a conduct rule.³⁸² These rules provide structure to the use and enjoyment of the scheme in general by delineating entitlements of sectional owners. It regulates the relationship between sectional owners who must co-exist peacefully in a relative densely populated area. Every owner in a sectional title scheme is a member of the body corporate and is, therefore, bound by the rules of the body corporate.

The rules become enforceable on a sectional owner as soon as the unit is registered into his name. Upon registration of the unit into his name, the sectional owner automatically becomes a member of the body corporate and is, therefore, subject to the rules applicable in the scheme. This membership is not based on contract,³⁸³ but is statutorily prescribed. The owner may even be unaware of the rules and the fact that he is a member of the body corporate. Therefore, consensus is not a prerequisite for the rules to be applicable on the owner. These rules limit the owner's use and enjoyment of his unit and the

³⁸⁰ Durham 2016 www.paddocks.co.za/paddocks-press-newsletter/how-will-sectional-titles-scheme-rules-be-interpreted-when-the-sectional-titles-schemes-management-act-comes-into-effect/

³⁸¹ Badenhorst, Pienaar and Mostert *The Law of Property* 463. See now *ST SMA* Regulations reg 6(3).

³⁸² West 2012 *SADJ* 27 argues that an exclusive use area may be created in either management or conduct rules. See now s 10(7) and (8) of the *ST SMA*.

³⁸³ Pienaar *Sectional Titles* 198 refers to *Wijay Investments (Pty) Ltd v Body Corporate, Bryanston Crescent* 1984 2 SA 722 (T) where the court incorrectly held that the membership of the body corporate is based on contract.

common property, however, according to Pienaar it does not always amount to a "subtraction from the *dominium*". In some circumstances, a personal right is created that does not bind successors in title. According to *Wijay* the rules of a sectional title scheme are the domestic statutes of a body corporate that regulates conduct and behaviour of sectional owners.³⁸⁴ This decision is also criticised by Badenhorst, Pienaar and Mostert³⁸⁵ when they argue that the rules "differ considerably from an ordinary contract". It may for instance be amended by a special resolution of the body corporate. Furthermore the owner will automatically become a party to the contract upon registration of the unit in his name even if he is not aware of the content of the rules.

Another point of view is that the rules are "limited real rights analogous to urban servitudes."³⁸⁶ Van der Merwe argues that this viewpoint may hold water, but only in so far as it applies to conduct rules. However, as the management rules do not restrict the owner's use of the common property, this argument, according to Van der Merwe, is also flawed. This position was also held in *Wijay* based on the argument that management rules do not create new rights or expand ownership of one of the owners at the cost of another.³⁸⁷ Badenhorst, Pienaar and Mostert argue that this decision is questionable, because the publicity principle is upheld as the registrar (and since 2016 in terms of the *STSM* the ombud) receives notice of any changes to the rules. That indicates a similarity to restrictive conditions and servitudes. However, as these rules may be changed by a special resolution, this will differ from the principle that "real rights may be terminated only with the consent of all owners".³⁸⁸ Therefore, this view point is also problematic. Van der Merwe argues that another point of view is that the management rules are made by delegated legislative power.³⁸⁹ In terms of this argument the managing body of the sectional title scheme is

³⁸⁴ Para 727D-F referred to in Pienaar *Sectional Titles* 201; Badenhorst, Pienaar and Mostert *The Law of Property* 464.

³⁸⁵ Badenhorst, Pienaar and Mostert *The Law of Property* 464.

³⁸⁶ Van der Merwe *Sectional Titles* 13-31.

³⁸⁷ Paragraph 727G-728A referred to by Badenhorst, Pienaar and Mostert *The Law of Property* 464.

³⁸⁸ Badenhorst, Pienaar and Mostert *The Law of Property* 464.

³⁸⁹ Van der Merwe *Sectional Titles* 13-29 – 13-30.

equivalent to the local authority instituted by the state and, therefore, has a *quasi*-governmental status. Badenhorst, Pienaar and Mostert do not agree with this as there seems to be no statutory authority for this view point.³⁹⁰

According to Pienaar these rules are "the objective law of an autonomous statutory association determining the legal relationship between sectional owners' *inter se*, sectional owners and the body corporate and the body corporate *versus* third parties".³⁹¹ Pienaar³⁹² further indicates that these rights are mostly reciprocal personal rights; the object of the right being the reciprocal performance. He indicates that this performance may include the right to vote and to give an opinion at a meeting, the right to claim that means is utilised in accordance with constitution in the case of a company *et cetera*, and the right to legal relief in case of infringement of any of these rights. Although Pienaar in this instance refers to the private objective law applicable to sport clubs, churches and companies, he argues that the resolutions and rules in sectional title ownership fall within the same classification. It creates a bond of a private law communal nature, and is, therefore, considered positivised³⁹³ and forms the objective law of private law institutions. This is promulgated by members of the institution, and has legal authority on the members as well as third parties. Van der Merwe seems to agree with Pienaar that this view point is the most acceptable. He indicates that it is "an invention of the *quasi*-legislative power of a unique, autonomous, statutory association".³⁹⁴ Van der Merwe also affirms Pienaar's viewpoint and indicate that these rules "are seen as being the internal objective law of a private institution".³⁹⁵

Badenhorst, Pienaar and Mostert argue that although this view may provide for an explanation of the nature of the standard management and conduct rules, it

³⁹⁰ Badenhorst, Pienaar and Mostert *The Law of Property* 464.

³⁹¹ Pienaar *Sectional Titles* 201. Refer to Pienaar 1991 *THRHR* 411 where he states that Salmond calls private objective law "autonomous legislation" where all members are bound irrespective of whether they have consented thereto or not.

³⁹² Pienaar 1991 *THRHR* 412.

³⁹³ Pienaar 1991 *THRHR* 406.

³⁹⁴ Van der Merwe *Sectional Titles* 13-32.

³⁹⁵ Van der Merwe *Constitutionality of the rules* 124.

is not supported by judicial precedent. They further argue that the nature of the rules must be deduced from the act. They argue that the rules are part of the "innovative new statutory creation of sectional title". It is peculiar in nature and when the rules are interpreted cognisance should be taken of this fact.³⁹⁶

However, Badenhorst, Pienaar and Mostert's reservations about this standpoint that there is no legal precedent for it seem to have been addressed somewhat in the recent decision of *Willow Waters*.³⁹⁷ Although this case dealt primarily with the rules of a homeowner's association, the court found that the duties of homeowner's associations are similar to that of bodies corporate and municipalities to provide services to all their members. The court further found that "there is no material difference between homeowners' associations and bodies corporate in terms of their objects, activities and status."³⁹⁸ The court allowed the condition in a homeowner's association agreement to place an embargo on the transfer of property if the levies have not been paid up, as akin to the:

...embargos contained in s 118 of the *Local Government: Municipal Systems Act 32 of 2000 (the Municipal Systems Act)* and s 15B(3)(a)(i)(aa) of the *Sectional Titles Act 95 of 1986*.³⁹⁹

This position could be used as authority for Pienaar's viewpoint. If the court should decide to liken homeowner's associations' responsibilities and the nature of the conditions created to that of municipalities, it seems an acceptable deduction to make, that the duties and conditions of the body corporate of a sectional title scheme is also similar to that of the local authority. Therefore, the link between the local authority's power to make legislation and the body corporate's authority to enforce its rules does not seem far-fetched at all.

³⁹⁶ Badenhorst, Pienaar and Mostert *The Law of Property* 465.

³⁹⁷ Refer to para 2.5.3.

³⁹⁸ *Willow Waters* at para [27].

³⁹⁹ *Willow Waters* at para [24].

4.3.2 *Constitutionality of rules*

The question consequently arises whether this objective law of private institutions is conforming to the *Constitution*. Although it is not the aim of this study to do a comprehensive discussion of constitutional aspects of property law, the constitutionality of rules in sectional title schemes needs to be scrutinised as unconstitutionality will render these rules invalid.

The rules in this sense are either the model conduct and management rules prescribed by the *STSM Act*, or as substituted by the developer upon the opening of the sectional title register,⁴⁰⁰ or amended through the applicable resolutions taken by the body corporate.⁴⁰¹ Pienaar admits that these rules, because a number of them are statutorily prescribed, may be very restrictive in nature. This may lead to the question whether these restrictions would be tantamount to an arbitrary deprivation of property in terms of section 25 of the *Constitution*. Section 25(1) of the *Constitution* determines that:

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 section implies that state interference with property will only be permissible if authorised by a "properly promulgated and valid law"⁴⁰² It must be generally and equally applicable and ensure parity of treatment. The Constitutional Court in *First National Bank of South Africa t/a Wesbank v Minister of Finance*⁴⁰³ proposed that:

...certain steps should be followed when considering the constitutional validity of any limitation of property rights...⁴⁰⁴

⁴⁰⁰ In terms of s 10(2)(a) of the *STSM Act*.

⁴⁰¹ In terms of s 10(2)(b) of the *STSM Act*.

⁴⁰² Van der Walt *Constitutional Property Law* 232.

⁴⁰³ 2002 4 SA 768 (CC) (hereafter *FNB case*).

⁴⁰⁴ Van der Walt *Constitutional Property Law* 222.

The court found that when investigating the constitutional validity of any limitation on property, the requirements of section 25(1) should be dealt with first.⁴⁰⁵ The court found that:

If the deprivation infringes (limits) section 25 and cannot be justified, that is the end of the matter. The provision is unconstitutional.⁴⁰⁶

In an attempt to interpret *FNB*, Roux proposes that some questions should be posed to determine the validity of a limitation. These are *inter alia*:

- Is the interest at stake constitutionally protected?
- If so, does the legislation provide for deprivation or expropriation?
- If it provides for deprivation, does the legislation meet the requirements of section 25(1)?⁴⁰⁷

In answering the first question Pienaar clarifies that two categories of rules are introduced by sectional title legislation. The first category is rules that are compulsory in terms of legislation and can therefore not be amended by the developer. These rules are, therefore, "regulatory measures enforced by legislation and may result in a deprivation (regulation) of property or property rights".⁴⁰⁸ However, Pienaar argues that:

The management rules ...prescribed by legislation are of such a nature that the property rights of members... are restricted in the interest of the property community and are in general constitutionally permissible.⁴⁰⁹

Therefore, the limitation only has to be tested as to whether it is procedurally fair and not arbitrary.⁴¹⁰ The second category are the rules that are imposed by property communities and not the state, as additional restrictions by the adoption of new rules or the amendment of the statutorily created ones. These restrictions differ from the first category as they are imposed by a private body (the body corporate of the scheme) and not the state. Pienaar argues

⁴⁰⁵ *FNB* at para [60].

⁴⁰⁶ *FNB* at para [58].

⁴⁰⁷ Roux and Davis "Property" 20-20.

⁴⁰⁸ Pienaar *Sectional Titles* 45; Badenhorst, Pienaar and Mostert *The Law of Property* 463.

⁴⁰⁹ Pienaar *Sectional Titles* 46; Badenhorst, Pienaar and Mostert *The Law of Property* 465.

⁴¹⁰ Pienaar *Sectional Titles* 46.

convincingly that these rules, adopted by a "*quasi*-legislative function" of the body corporate as part of its "internal objective law" as prescribed by the *STA*, may be an example of the horizontal application of section 25(1) and as such "law of general application".⁴¹¹

Regarding the second question by Roux, the sectional owners' entitlements are limited by the enforcement of management and conduct rules. The rules will usually limit the owner's use and enjoyment of the property to such an extent that the owner is deprived of certain entitlements. Therefore, the answer is "yes" on the first two questions. When investigating whether these rules are a valid deprivation, it should be laws of general application and not be an arbitrary deprivation. Therefore, these rules should apply equally to all owners.⁴¹²

These deprivations would not be constitutional if they are in any way arbitrary. The deprivations will be arbitrary when they affect just one person or group of persons and are not generally applicable, or when there is no valid reason for them. Roux explains that "arbitrary" is not limited to non-rational deprivations in the sense that there is no rational connection between means and ends, but that it has been interpreted to refer to a broader principle for testing the act of deprivation.

According to Roux, the court in *FNB* further indicated that the legislative contexts, to which the prohibition against arbitrary deprivation has to be applied, as well as the nature and extent of the context must be considered.⁴¹³ In *FNB*, the court further indicated that when ownership of land is in question, "a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for deprivation".⁴¹⁴ Van der Walt explains it further by stating that it should be:

⁴¹¹ Pienaar *Sectional Titles* 46.

⁴¹² Pienaar *Sectional Titles* 46.

⁴¹³ Roux and Davis "Property" 20-21.

⁴¹⁴ *FNB* at paras [56-57].

... applied according to discernible standard, precise enough so that people can arrange their conduct to meet its standard and accessible in the sense that it is available to the public at large.⁴¹⁵

Pienaar argues that although some of the restrictions on use of sections and common property may be viewed as deprivations, they will normally fall within the ambit of constitutionally valid regulations. The content of ownership in a sectional title scheme is limited by management and conduct rules. The purpose of these rules is to provide for the management and administration of the scheme and the use and enjoyment of the sections and common property.⁴¹⁶ However, the purpose of these limitations are "necessary measures to maintain order in densely populated living and commercial environments".⁴¹⁷ Having said that, Pienaar cautions that it should constantly be scrutinised as to whether it is arbitrary or not. The test should always be whether these regulations are generally applicable on all owners and whether there is a valid reason for them. Without belabouring the question of whether section 25(1) of the *Constitution* is applicable only vertically (between the state and the individual) or also horizontally (between legal subjects on a more or less equal footing) it will suffice to say that restrictions that are not excessive in its regulation will not amount to an unconstitutional deprivation of property.⁴¹⁸

4.3.3 Amendment of rules

The model management and conduct rules may also be amended by resolutions passed by the body corporate of a sectional title scheme. The link between rules and resolutions is thus situated in the fact that the model conduct and management rules are amended through resolutions by the body corporate. Three types of resolutions are distinguished, namely unanimous resolutions, special resolutions and ordinary resolutions.⁴¹⁹

⁴¹⁵ Van der Walt *Constitutional Property Law* 232.

⁴¹⁶ Badenhorst, Pienaar and Mostert *The Law of Property* 462.

⁴¹⁷ Pienaar *Sectional Titles* 29.

⁴¹⁸ Pienaar *Sectional Titles* 47.

⁴¹⁹ Ordinary resolutions are not used to create rights of parties under discussion and will, therefore, not merit more attention.

According to the section 1 of the *STSMA* a special resolution is defined as a resolution:

- (a) Passed by at least 75% calculated both in value and in number, of the votes of members of a body corporate who are represented at a general meeting; or
- (b) Agreed to in writing by members of a body corporate holding at least 75 % calculated both in value and in number, of all the votes.

A unanimous resolution is defined as a resolution-

- (a) Passed unanimously by all the members of the body corporate at a meeting at which-
 - (i) At least 80 % calculated both in value and in number, of the votes of all the members of a body corporate are present or represented; and
 - (ii) All the members who cast their votes to do so in favour of the resolution; or
- (b) Agreed to in writing by all the members of the body corporate.

The application of rules and the use of special and unanimous resolutions are the tools used by the body corporate in the management of the sectional title scheme. The *STSMA* prescribes formally under which circumstances rules may be amended, terminated or created and which type of resolution should be taken.

4.3.4 Creation and amendment of certain rights through rules and resolutions

Certain rights may be created either by the developer when he opens the sectional title register, or by the body corporate when the sectional title scheme is already in existence. These rights may either be real rights and thus registered in a deeds registry, or personal rights not registered in a deeds registry. The focus of this study will not be on real security rights such as mortgages, primarily to provide financing for the purchase price. The focus of this study will rather be on the following rights that are found in sectional title ownership:

- The sectional owner's right to extend his section in terms of section 24 of the *STA*.

- The developer's right to extend the scheme in terms of section 25 of the *STA*.
- The sectional owner's right of exclusive use over a part of the common property in terms of section 27 of the *STA* and section 10(7) and (8) of the *STSMA*

What all these rights, that will be discussed individually, have in common, is that they are exercised on and binding the common property of the sectional title scheme. Therefore, all sectional owner's rights are influenced when these rights are created or changed, as all sectional owners are co-owners of the common property. This entails that, as co-owners, they will have the same rights of alienation as any group of bound common owners would have on property that they own, subject to the provisions of the *STA* and the rules of the scheme.⁴²⁰ In terms of section 17 of the *STA* this power, to alienate part of the common property, is also provided to sectional owners. This should be done by taking a resolution to do so.⁴²¹ Should the alienation of a part of the common property affect either the developer's right to extension or an exclusive use area of an owner, such a developer or owner must give consent that his right may be cancelled.⁴²² The transfer of a part of the common property will be effected by Registrar of Deeds when he registers such a transfer. That will be done by making the appropriate endorsement on the schedule of conditions.

4.4 Sectional owner's right to extend his section: section 24 of the STA

4.4.1 Introduction

The sectional owner is a role player and he may also enter into an agreement with the body corporate of the sectional title scheme that leads to him obtaining certain rights. One such relationship will exist if the sectional owner wishes to

⁴²⁰ Van der Merwe *Sectional Titles* 11-5.

⁴²¹ This is prescribed in the *STA* and normally requires, either a unanimous or a special resolution, by the general meeting of the body corporate. Refer to para 4.3.3.

⁴²² Van der Merwe *Sectional Titles* 11-6.

extend his section by adding floor space to it. An example of such an extension will be to enclose the patio space of a section to enlarge a living room, or to add a mezzanine floor within the section.⁴²³ This will influence the common property as it will diminish it in some instances, and always diminish the participation quotas of other sectional owners. The right to do so is provided for in section 24 of the *STA*. Durham indicates that an alteration that extend past the median line, as shown on the sectional plan, and results in extending the boundaries or floor area will involve section 24.⁴²⁴ This type of extension will be the focus of my investigation.

4.4.2 Provisions of section 24

Section 24(3) of the *STA* provides the following:

If an owner of a section proposes to extend the boundaries or floor area⁴²⁵ of his or her section, he or she shall with the approval of the body corporate, authorized by a special resolution of its members, cause the land surveyor or architect concerned to submit a draft sectional plan of the extension to the Surveyor-General for approval.⁴²⁶

4.4.3 Section 24 process

Van der Merwe indicates the procedure that should be followed to effect the extension of the section.

- A special resolution must be obtained. This is one of the additional powers bestowed upon the body corporate in terms of section 5(1)(h) of the *STSMA*. Maree argues that the use of the word "must" in section 5(1)(h) in the *STSMA* may be interpreted to mean that the body corporate does not

⁴²³ Durham 2016 www.paddocks.co.za/paddocks-press-newsletter/how-to-extend-your-section/.

⁴²⁴ Durham 2016 www.paddocks.co.za/paddocks-press-newsletter/how-to-extend-your-section/.

⁴²⁵ Refer to Maree 2002 *De Rebus* 2 where he applauds the change of the wording "extension of limits". Maree argues that before this amendment "crafty owners ...extend(ed) their floor areas by using existing volume, but without extending their horizontal boundaries, thus escaping any additional levy obligations".

⁴²⁶ Section 11 of the *Sectional Titles Amendment Bill* 623 of 2017 propose that subsection (3A) be added to provide for the application of subsection 3 "where a developer, prior to the establishment of a body corporate, intends to extend the boundaries or floor area of his or her section".

have the right to oppose such an application. However, it is doubtful whether that was the intention of the legislator to deprive the body corporate of this decision making power. This is contrary to all the other "powers of the body corporate" contained in section 5 of the *STSMA* where the word "may" is used. Furthermore Maree points out that the absence of any corresponding reference to the applicable section in the *STA* in section 5(1)(h), may create the mistaken impression that those provisions are not needed for the proper authorization, but only the consent of the body corporate. Durham indicates that the body corporate may, before giving consent, require proof that the local authority will approve the building plans.⁴²⁷

- The owner must cause the land surveyor or architect concerned to submit a draft sectional plan⁴²⁸ indicating the extension to the Surveyor-General for approval.
- In case of a deviation of more than ten per cent in the participation quota of the relevant section as a result of the extension, the mortgagee of each unit in the scheme must consent to the registration of the sectional plan of extension of the section;
- An application in terms of section 24(6) of the *STA*, is drafted accompanied by a transfer duty declaration by the conveyancer.
- Finally the Registrar must endorse the title deed of the unit and register the amended sectional plan of extension. In sectional titles, no servitudes or conditions are included in the certificate of registered titles. Therefore, any limitations on ownership will be endorsed against the title deed of the specific unit.⁴²⁹

⁴²⁷ Refer to Maree 2015 *De Rebus* 18 where he discusses the inclusion of this obligation in the *STSMA*. Durham 2016 www.paddocks.co.za/paddocks-press-newsletter/how-to-extend-your-section/.

⁴²⁸ In terms of *Registrar's Conference Resolution* 62/2009 a block plan must also be lodged if it has changed.

⁴²⁹ Pienaar *Sectional Titles* 21.

4.4.4 Effect

This effectively allows for the extension of a section by the owner of a unit, either horizontally or vertically.⁴³⁰ Only upon the registration of the amended sectional plan that indicate the extension will the extension be deemed to be part of the sectional plan of that specific unit in terms of section 24(8) of the *STA* and part of the sectional title deed. This is important as the basis of ownership in a sectional title unit is determined by the registered sectional plan and amended sectional plan.⁴³¹ Should the extension of the section encroach upon adjoining exclusive use areas, such an exclusive use area should be cancelled and a new exclusive use area should be registered in terms of section 27.⁴³² An owner's title to his unit and/or undivided share in the common property is subject to and benefited by servitudes and real rights.⁴³³

4.4.5 Uncertainties regarding the interpretation of section 24

Moore-Barnes warns against these additions being regarded as only enclosures or improvements. She adds that: "(A) new floor where before there was only air constitutes an extension of the floor area without any doubt!"⁴³⁴ This is especially important as the interpretation will have an impact on the participation quota of the unit (by increasing it) and on other units (by decreasing theirs). Although the explanation by Moore-Barnes may seem quite simple, in practice the uncertainty, especially surrounding the legal effect of the right, is more complicated. Consequently a few practical scenarios will be elucidated.⁴³⁵

⁴³⁰ Refer to West 1997 *De Rebus* 309 where he indicates the horizontal extension may be for instance by enclosing a balcony to add additional living space or vertical extension may be for instance by addition of living space on top of the existing section. Badenhorst, Pienaar and Mostert *The Law of Property* 480.

⁴³¹ Pienaar *Sectional Titles* 113.

⁴³² *Registrar's Conference Resolution 76/2012* in Registrar's Circular 3 of 2013.

⁴³³ Durham 2016 www.paddocks.co.za/paddocks-press-newsletter/how-to-extend-your-section/.

⁴³⁴ Moore-Barnes 2008 *SADJ* 7.

⁴³⁵ Refer to paras 5.2.2; 5.2.3; 5.2.4.

Firstly, the nature of the right will be explored. Whether a real right or a personal right is created through the resolution to approve the extension of the section will be investigated. Then the practical implications of the right will be scrutinised. The practical implementation of this section will have to be addressed, for instance in circumstances where the extension is a previous exclusive use area that is converted to form part of a section (for instance enclosing of a patio). The change in the nature of the right, from an exclusive use area to ownership of the extension, needs clarification. Finally, the effect on the co-ownership share in the common property will be discussed. The effect of the right on the position of the body corporate will consequently come under scrutiny. The common property will be decreasing in value because of this extension.

These uncertainties may be clarified if the nature and content of the right that is created through the acceptance of the special resolution by the body corporate, could be determined. The *STA* fails to characterise the right of extension of the section as either real or personal. Neither does it elucidate its content. The application of principles of property law and contract law on this right may provide more certainty regarding its legal effect as well as the rights and duties surrounding the creation of such an extension of a section. This will be addressed fully in the next chapter.

4.5 Developer's right to extension in terms of section 25 of the STA

4.5.1 Introduction

In the previous chapter the creation of the *res* in a sectional title scheme was discussed in detail.⁴³⁶ Previously in this chapter the role of the developer⁴³⁷ was also discussed thoroughly. To contextualise and demonstrate the developer's right to extension that is provided for in terms of section 25 of the *STA*, a short summary of these principles will be provided.

⁴³⁶ Refer to para 3.3.

⁴³⁷ Refer to para 4.2.1.

The legal nature of sectional title ownership is such that the *superficies solo cedit* maxim⁴³⁸ does not apply as in common law. That entails that in sectional title ownership the co-owners of the land are not the co-owners of all the attachments to the land, but all the sectional owners together are co-owners of the land itself. The owner of a section is only the owner of a specifically delineated part of the building that is shown as such on the sectional plan. All areas on the sectional plan that do not form part of sections form part of the common property and are held in co-ownership shares (a form of bound co-ownership) by all the sectional owners. That will imply that all sections belong to sectional owners and everything not part of a section is regarded as common property. This co-ownership relationship is based on the underlying legal relationship of ownership of a unit. The bound co-ownership consists of an undivided share in the common property based on the specific unit's participation quota. As indicated previously, the object of sectional title ownership is the section, together with an undivided share in the common property as a composite thing.⁴³⁹

4.5.2 Provisions of section 25

The legislator decided to create section 25 to provide the developer with a right to extend the sectional title scheme by addition of units and/or exclusive use areas to the sections at a later stage. This right was introduced in terms of section 25(1) of the *STA*. In the 1971 Act a similar right was created in terms of section 18 of the Act.⁴⁴⁰ The right is created from the outset when the developer, who is at that stage the owner of the land where the scheme is to be developed, applies for the opening of the sectional title register in the deeds registry. The right is reserved as a condition on the newly developed scheme through a certificate drafted by the conveyancer and filed, together with the application for the opening of the sectional title register. According to Lotz and

⁴³⁸ Refer to para 3.3.1.2.

⁴³⁹ Refer to para 3.3.1.

⁴⁴⁰ The interaction of the rights created in terms of s 18 of the 1971 Act and s 25 of the 1986 Act will be discussed with reference to case law in the next chapter.

Nagel the right in terms of section 25 is a right to urban immovable property. They further classify the thing (*res*) to be an incorporeal immovable thing.⁴⁴¹

Section 25(1) provides that a developer⁴⁴² may, when applying for the registration of a sectional plan:

...[r]eserve, in a condition imposed in terms of section 11(2), the right to erect, complete or include ... for his or her personal account-

- a) a building or buildings;
- b) a horizontal extension of an existing building;
- c) a vertical extension of an existing building; or
- d) exclusive use rights only

on a specified part of the common property.

This also includes the right to divide such buildings into sections or sections and common property and to delineate and provide exclusive use rights where needed to the newly developed units. This right of extension of the developer does not only include the right to build new buildings or make extensions to existing buildings, but also the right to so-called "convertible building space".⁴⁴³ In terms of the *Sectional Titles Amendment Act* of 2013⁴⁴⁴ the developer may exercise his right to extension by subdividing existing open spaces (common property) inside an existing building into sections. Therefore, the developer can for instance divide 18 storeys of a 20-storey building into units, reserve the top two storeys for later division and extend the scheme by developing the two top storeys later.⁴⁴⁵

Section 25 further provides that the part of the common property where the extension will take place, must be specified and that the period within which

⁴⁴¹ Lotz and Nagel 2007 *TSAR* 563.

⁴⁴² Refer to para 4.5 regarding the right of extension of the body corporate.

⁴⁴³ Refer to Van der Merwe *Sectional Titles* 12-14 where he explains that this is a concept borrowed from American condominium legislation.

⁴⁴⁴ 33 of 2013.

⁴⁴⁵ Refer to the discussion of *Oribel Properties 13 (Pty) Ltd v Blue Dot Properties 271 (Pty) Ltd* 2009 JOL 24392 WCC in the next chapter.

extensions would be completed must be stipulated.⁴⁴⁶ The right will lapse when the planned extension has been completed. A problem will arise though, when the development is not completed within the specified period. According to Van der Merwe⁴⁴⁷ the court does not have an inherent jurisdiction to extend the period for completion. Instead, if the period lapsed and the developer failed to complete the extension, the right of the developer is terminated and vests in the body corporate.⁴⁴⁸ However, this harsh situation was somewhat relieved by the *Sectional Titles Amendment Act* of 2013⁴⁴⁹ which allows the developer to extend the time by obtaining a unanimous resolution by the body corporate. Van der Merwe explains further that a bilateral notarial deed⁴⁵⁰ should be entered into by the bondholders and the holder of the right⁴⁵¹ before the initial period came to an end. However, as the body corporate needs to provide the developer with a unanimous resolution to extend the period, and will obtain the right to extend if the developer's time has run out, it is uncertain whether this relief has really improved the situation. The body corporate or some of its members may decide against allowing the extension of time, either to claim the right of extension for the body corporate itself or to not allow the extension at all in order to protect their undivided share in the common property. The fact that the right of the developer lapses if not exercised in time, also raises the question as to whether the right is subject to an extinctive condition, or whether it is actually

⁴⁴⁶ Van der Merwe *Sectional Titles* 12-32.

⁴⁴⁷ Van der Merwe *Sectional Titles* 12-19.

⁴⁴⁸ The *Sectional Titles Amendment Bill* 632 of 2017 propose to amend s 15B (1) to include that the registrar should note such lapsing on the title deed on application by the developer or the body corporate if the developer is no longer in existence. The proposed amendment also indicate that in the event of the title deed of the right not being available, a "certificate by a conveyancer must be submitted to the effect that the title deed to such right is not available, whereupon the registrar must endorse the deed registry duplicate thereof" and should the original be found a similar endorsement should be made upon that. This procedure, especially the fact that the conveyancer should certify that the original title deed of the right is not available is criticized by the Law Society of South Africa. They propose that the developer of someone from the body corporate should rather supply an affidavit to this extent. Manyathi-Jele 2017 *De Rebus* 19.

⁴⁴⁹ 33 of 2013.

⁴⁵⁰ Section 6 of the *Sectional Titles Amendment Bill* 623 of 2017 proposes that written consent of the holder has been obtained before the right is transferred. Manyathi-Jele argues that as a bilateral deed of cession is in any event needed this proposal does not really make sense. Refer to Manyathi-Jele 2017 *De Rebus* 19.

⁴⁵¹ The developer, or if he sold it, the new holder of the right.

transferred to the body corporate on lapsing. Furthermore, as the right is actually registered in the deeds office, being a limited real right, whether the lapse of time is sufficient to effect the transfer of the right to the body corporate. Therefore, although the right is stipulated in significant detail in the Act, the combined effect of the statutory principles and the common law position leaves some uncertainty. Neither are the rights and duties of the holder of the right clear. This will be addressed through the discussion of case law involving the right of extension of the developer in subsequent chapters.⁴⁵²

4.5.3 Section 25 process

The creation of the right will take place when the developer, through the conveyancer and as prescribed by section 25(1) of the *STA*, reserves the right to extend the sectional title scheme. This process will be initiated when he applies to the Registrar of Deeds for the opening of the sectional title register of the scheme. The conveyancer must submit a certificate of real right reserved in terms of section 25(1) to the Registrar of Deeds, together with the abovementioned application. The Registrar will endorse this certificate. The right is reserved "by means of a registrable condition" against the certificates of registered sectional title in the name of the developer.⁴⁵³ According to Van der Merwe⁴⁵⁴ this will be in respect of any reservation made by a developer to develop the scheme in phases. It will also include the right to issue exclusive use rights for all the units that will be developed as part of the extension of the scheme. The *STA* provides strict formalities that must be adhered to when the process for the reservation of the right is initiated.⁴⁵⁵ In terms of section 25(2) in addition to the application indicated above, the following documents should also accompany such an application:

⁴⁵² Refer to para 5.3.2.3, eg *SP & C Catering Investments (Pty) Ltd v Body Corporate of Waterfront Mews* 2010 4 SA 104 (SCA).

⁴⁵³ Pienaar *Sectional Titles* 261.

⁴⁵⁴ Van der Merwe *Sectional Titles* 6-24.

⁴⁵⁵ The developer had to register plans that indicate what the extensions should look like. The discussion of cases regarding registration of plans of extension that differ from the original reserved right such as *Rosepark Admin CC v The Registrar of Deeds Cape Town* 5522/2011 and *PCL Trust v Registrar of Deeds* 2011 3 SA 342 (O) will be discussed in the next chapter.

- A plan to scale of the building or buildings on which-
 - the part of the common property affected by the reservation;
 - the siting, height and coverage of all buildings;
 - the entrances and exits to the land;
 - the building restriction areas, if any;
 - the parking areas; and
 - the typical elevation treatment of all buildings, are indicated.
- A plan to scale showing the manner in which the building or buildings are to be divided into a section or sections and exclusive use areas or the manner in which the common property is to be made subject to the rights of exclusive use areas only.
- A schedule indicating the estimated participation quotas of all the units in the scheme after such unit or units have been added to the scheme.
- Particulars of any substantial difference between the materials to be used in the construction of the building or buildings and those used in the construction of the existing building or buildings.
- The certificate of real right which is to be issued in terms of section 12(1)(e); and
- Other documents as may be prescribed.

All these prescriptions seem to indicate that the reservation to extend by the developer is clearly defined and provided for. However, the situation is not so simple. This is mainly because the *STA* provides for other means of obtaining the right as well. Firstly, section 25(6) provides for the right of extension, if it was not reserved initially by the developer or has lapsed,⁴⁵⁶ to vest in the body corporate. Secondly, section 25(6A) provides for the possibility that a developer may apply to the Registrar of Deeds for the registration of the right of extension if he failed to reserve the right in terms of section 25(1) and before the body corporate has been established. These additions lead to various possible circumstances when the right could have been created. It also leaves more than one possibility as to how the right may be terminated or come to an end.

⁴⁵⁶ Refer to para 5.3.3.2.

4.5.4 Effect

After reservation of the right in a deeds registry, it provides the developer with a statutorily created limited real right to develop future units in the scheme. In terms of section 25(4)(a) the right of extension of the developer "shall for all purposes be deemed to be a right to immovable property which admits of being mortgaged". This right is reserved from the outset when the sectional title register is opened. Furthermore, it provides the developer with the right to phased development even if he does not own any units in the scheme any longer. He is thus, essentially provided with a right to build (in future) on someone else's land (the common property owned by the body corporate). The right of the developer does not only affect the owners of units, but also holders of other limited real rights, for example real security in the form of mortgages, as the thing (*res*) that forms the object of the right comprises of the unit as well as an undivided share in the common property. Therefore, the developer's right to extend the scheme will have a direct influence on the sectional owner's share in the common property as soon as the right is exercised by the developer. This right of extension may also be transferred. Section 25(4)(b) provides that it "may be transferred by the registration of a notarial deed of cession in respect of the whole, a portion or a share in such right".⁴⁵⁷ When the right is created as well as who the holder of the right is, is therefore, dependant on the facts of each circumstance.

4.5.5 Right of extension of the body corporate

As indicated previously⁴⁵⁸ section 25(6) makes provision for the right of extension to "vest" in the body corporate in two circumstances:

- a. If no such a reservation of the right was made by the developer. This will, therefore, be when a "new" right of extension is created by the body corporate.

⁴⁵⁷ Refer to para 5.3.2.2 and s 18(a) of the *Sectional Titles Amendment Act* 44 of 1997.

⁴⁵⁸ Refer to para 4.3 above.

- b. If such a reservation by the developer was made, but has lapsed.⁴⁵⁹ This will be when the developer has not exercised the right within a prescribed period of time or he did not receive an extension of time by the body corporate as provided for in section 25(1). This right will automatically vest in the body corporate.⁴⁶⁰ The body corporate should similarly to the developer, comply with the requirements set out in section 25(2).⁴⁶¹ The body corporate will then also acquire a certificate of real right to extend the scheme. Registrar's Conference Resolution 65/2009 indicates "when a body corporate obtains a certificate of real right as contemplated in section 25(6), such a right must be specified for a specific period of time". According to Van der Merwe this resolution also provide that this right is only for a specified term.⁴⁶²

4.5.6 Uncertainties regarding the interpretation of section 25

Although the Act provides strict requirements for the reservation and exercise of the right of extension of the developer, the position is by far not as clear cut as it may seem. The following uncertainties that exist regarding the right will be investigated:

- The legal nature of the right;
- The entitlements provided to the right holder (the developer or in some instances the body corporate);
- The duties of the right holder
- *The legal nature of the right*

The legal nature of the right has been clarified to some extent in the *STA* as a limited real right. However, this was not the case from the outset. In the case of

⁴⁵⁹ This is also provided for in s 5 of the *STSMA*.

⁴⁶⁰ Refer to Van der Merwe *Sectional titles* 12-22 and footnote 57 where he refers to *Torgos (Pty) Ltd v Body Corporate of Anchors Aweigh* 2006 3 SA 369 (W) para 58.

⁴⁶¹ As indicated in para 4.5.3 above.

⁴⁶² Refer to Van der Merwe *Sectional titles* 12-22 and RCR 65/2009 which indicate "when a body corporate obtains a certificate of real right as contemplated in s 25(6), such a right must be specified for a specific period of time".

Erlax the court had to grapple with this question. In the next chapter, the journey toward more legal certainty regarding the right of extension of the developer will be traced through case law.

- *Entitlements provided to and duties of the right holder*

The developer's right to extension stretches only so far as the approved plans. However section 25(13) of the *STA* determines that:

A developer or his or her successor in title who exercises a reserved right referred to in subsection (1), or a body corporate exercising the right referred to in subsection (6), shall be obliged to erect and divide the building or buildings into sections and to delineate areas of the common property subject to rights of exclusive use strictly in accordance with the documents referred to in subsection (2), due regard being had to changed circumstances which would make strict compliance impracticable, and an owner of a unit in the scheme who is prejudiced by his or her failure to comply in this manner, may apply to the Court, whereupon the Court may order proper compliance with the terms of the reservation, or grant such other relief, including damages, as the Court may deem fit.

The interpretation of "changed circumstances" by the courts have also lead to a fair amount of litigation. This development as well as the practical implications of the courts' interpretation will be traced in case law in a subsequent chapter 5. The fact that the developer only possesses the right for a specific period of time also bore the brunt of litigation. So too, the fact that the developer may divide the right or transfer the right. The position held by courts in this regard, will be scrutinised in the next chapter. Finally, a limitation on the entitlement of use and enjoyment of the property came under scrutiny. The SCA made quite a significant ruling in this regard. This development will also be discussed in the next chapter.

- *Duties involved in the holdership of the right*

The duties imposed on the holder of the right are also not clearly illuminated. Although it can be found when sifting through different legislative pieces, it is not summarised in such a way that it creates legal certainty. Examples of such duties to be found in somewhat random legislation will be pointed out in the next chapter.

The abovementioned uncertainties will be addressed in the next chapter. The application of case law as well as common law principles and the subtraction test, where applicable, will be employed to provide a clearer understanding of the right of extension provided by section 25.

4.6 Rights of exclusive use of parts of the common property in terms of section 27 of the STA and section 10(7) and (8) of the STSMA.

4.6.1 Introduction

The *STA* only allows for individual ownership of a unit that is delineated according to its walls, ceilings and floor. Furthermore non-contiguous parts of buildings such as storerooms, garages and servants' quarters may also be included as part of a unit, if it is so indicated on the sectional plan.⁴⁶³ However, other parts of the building or buildings needed for the use and enjoyment of the property are often not included as part of the units on the sectional plan. This may for instance be parking bays, balconies, courtyards, patios, and so forth which are not included in the sectional plan as part of the unit. In order to provide the owner of a unit with the proper use and enjoyment of such spaces, the legislator created so called exclusive areas in section 27 of the *STA*.⁴⁶⁴ These spaces form part of the common property, but it may be allocated for the exclusive use of the owner of a specific section. The right is registered as a real right of exclusive use and the owner is provided with a certificate proclaiming the real right of exclusive use.⁴⁶⁵ These areas still form part of the common property under the control of the body corporate, but are reserved for the exclusive use of a specific owner. The sectional owner obtains a real right to that specific part of the common property. The owner may be forced to make

⁴⁶³ Pienaar *Sectional Titles* 60.

⁴⁶⁴ According to Van der Merwe *Sectional Titles* 11-21, the 1971 Act did not make provision of exclusive use areas on common property. Developers used mechanisms such as servitudes or notarial leases to reserve exclusive use areas for themselves. They also then proceeded to lease this out to owners in the scheme. They were even allowed to sell these exclusive use areas to outsiders who had no other interest in the scheme.

⁴⁶⁵ Pienaar *Sectional Titles* 74.

additional contributions to the levy fund if needed for insurance, taxes and maintenance of the levy fund. According to Van der Merwe, the reason for providing for these rights in the *STA* was to provide the security of title to the holder.⁴⁶⁶

4.6.2 Establishing, transferring and lapsing of exclusive use rights as limited real rights

Section 1 of the *STA* defines exclusive use areas as:

... a part or parts of the common property for the exclusive use by the owner or owners of one or more sections.⁴⁶⁷

Section 27(1) of the *STA* prescribes the procedure for the establishment of the exclusive use areas. It stipulates that the developer must, upon application for the opening the sectional title plan, include a schedule that delineates the exclusive use areas. It does not, however, stipulate that a specific exclusive use area should be allocated to a specific unit. In practice, a specific exclusive use area is often indicated on a sectional plan as allocated to a specific unit, for example a garden area adjacent to a section. Section 27(1)(b) further provides that the right to the exclusive use will be ceded by the developer to the owner of a unit, by the registering a unilateral notarial deed in favour of such an owner.

However, the *STA* also makes provision for other ways of establishing exclusive use areas. Pienaar⁴⁶⁸ summarises the other ways in which exclusive use areas may be established besides the one mentioned above. Firstly, it may be reserved by the developer after the sectional title register has been opened, but before the body corporate has been established.⁴⁶⁹ The developer should then apply for a certificate of limited real right of exclusive use of a specific unit. The

⁴⁶⁶ Van der Merwe 1988 *De Rebus* 831.

⁴⁶⁷ GN 623 in GG 40951 of 30 June 2017 (*Sectional Titles Amendment Bill 623 of 2017*) proposes to amend the definition of an exclusive use area to also make provision for the use of the exclusive use area by lawful occupiers.

⁴⁶⁸ Pienaar *Sectional Titles* 76.

⁴⁶⁹ This is, therefore, in the timeline before the first unit has been transferred to another person. Refer to para 4.5.3.

STA also requires the written permission of the mortgagee of the specific unit. The limited real right of exclusive use is also transferred to the owner of the unit by means of a notarial deed of cession. Should the occasion arise for the establishment of an exclusive use area whilst the scheme is already up and running, the *STA* provides for the possibility that the body corporate may apply to the Surveyor-General to indicate on the sectional plan where exclusive use areas may be found. This application by the body corporate must be sanctioned by means of a unanimous resolution.⁴⁷⁰ This right of exclusive use is also ceded notarially to the relevant owner by the body corporate. Finally, Pienaar mentions exclusive use areas that came into existence contractually or by amendment of the rules under the 1971 Act. This basically provides legal effect to these types of exclusive use rights that existed before the 1986 Act. These rights will also be ceded by the body corporate upon application from the sectional owner. Grové,⁴⁷¹ furthermore, indicates that section 25(1) also makes provision for the creation of exclusive use areas as part of the developer's right of extension. He may extend the scheme by adding exclusive use areas only.

Section 27(1)(c) of the *STA* provides that:

If a developer ceases to be a member of the body corporate ... any right to an exclusive use area still registered in his or her name vests in the body corporate free from any mortgage bond.⁴⁷²

Section 27(4) also makes provision for the owner of a unit with an exclusive use right to "transfer his or her interest in such right to the owner of another unit in the scheme" through registration of a notarial deed of cession between the parties in the deeds office. Only an owner of a unit may be the right holder of an exclusive use area as provided for in section 27 of the *STA*. According to Van

⁴⁷⁰ Refer to para 4.3.3.

⁴⁷¹ Grové 2013 <http://www.ghostdigest.co.za/articles/creation-of-euas/54354>.

⁴⁷² This situation was not successfully addressed with the inclusion of s 27 in the initial version of the *STA*. In 1988 already Van der Merwe lamented the fact that developers kept exclusive use areas for their own benefit although they did not own a unit in the complex any longer and then failed to take responsibility for the upkeep and maintenance of said exclusive use areas. Refer to Van der Merwe 1988 *De Rebus* 831. *McKersie v SDD Developments (Western Cape) (Pty) Ltd* 2013 5 SA 471 (WCC) will be discussed in the next chapter regarding the vesting of the right of exclusive use in the body corporate. Refer to para 5.4.2.3.

der Merwe, it was possible before 2003, for an owner to sell his unit without simultaneously ceding the exclusive use area. This position has, however, been amended by the *Sectional Titles Amendment Act* 29 of 2003.⁴⁷³ In terms of the 2003 amendment section 27(4)(b) determines that any such right still registered to the name of an owner when he ceased to be a member of the body corporate will vest in the body corporate free from any mortgage bond. In the *Sectional Titles Amendment Act* 10 of 2011 this now also includes any other registered real right.⁴⁷⁴

The reason behind this is probably to assist in a situation, where the exclusive use area was mistakenly not transferred from one owner to another. Say for instance the exclusive use right was held by A, but mistakenly not transferred to B. B had in the meantime sold the property to C and C to D. When D realises that the exclusive use right has not been transferred to him, he must now find all the previous owners and request A to cede the right to B, B to C and then only will he receive transfer of the exclusive use right. In order to address this untenable situation the right vests in the body corporate should the holder of the right not be an owner in the scheme any longer. They can then cede the right to D.⁴⁷⁵

Although the reasoning behind the vesting of the exclusive use right in the body corporate should the holder of the right no longer be a member of the body corporate,⁴⁷⁶ is understandable, certain uncertainties still exist. Say for instance the holder of the right of exclusive use dies of natural causes he will no longer be a member of the body corporate. It would be unthinkable that the legislator

⁴⁷³ Van der Merwe *Sectional Titles* 11-24. Refer also to Mostert 2002 *Stell LR* 268 where she discusses the problems surrounding exclusive use areas that are not formally linked to specific units.

⁴⁷⁴ Van der Merwe 2011 *Stell LR* 129.

⁴⁷⁵ Van der Merwe *Sectional Titles* 11-25.

⁴⁷⁶ In terms of s 36(2) of the *STA* "any other member of the body corporate shall cease to be a member thereof *when he ceases to be the owner of a unit* in the scheme in question". (Own emphasis.) The use of "ceases to be an owner of a unit" is a clumsy wording in the Act. A lot of uncertainty would have been alleviated had the legislator rather used "if the holder of the right is not an owner of a unit any longer".

intended for such an exclusive use right to vest in the body corporate.⁴⁷⁷ The right should together with all the other assets of the deceased automatically vest in the executor of the deceased's estate.⁴⁷⁸

According to West, the cession of the exclusive use right from the developer to the owner is done by means of a unilateral deed of cession, whereas the cession of an owner of a unit to another owner of a unit is done through a bilateral deed of cession.⁴⁷⁹ Gerke argues that the cession of the exclusive use area from the body corporate to the owner, will also be in the form of a bilateral notarial cession, but that the cession from a current owner to the new owner who bought his unit will be in the form of a unilateral cession. He bases his argument on the fact that section 27(2) indicates a notarial cession "entered into by the parties". He further indicates that section 27(4) does not prescribe a bilateral agreement in "all cases". He argues that he successfully registered these cessions in such a manner.⁴⁸⁰ However, it seems as if West's viewpoint is currently the accepted position in practice.⁴⁸¹

Section 27(5) determines that the right to exclusive use may be terminated by registering a notarial deed of cancellation.⁴⁸² This deed should be drawn up between the owner and the body corporate. The mortgagee of the owner's unit must give written consent for such cancellation and the body corporate must be authorised by a special resolution of its members.⁴⁸³

4.6.3 Exclusive use areas as limited real rights

In terms of section 27(6) the right to exclusive use registered to the owner of a unit is deemed to be:

⁴⁷⁷ Van der Merwe sketches a similar situation in *Sectional Titles* 11-26.

⁴⁷⁸ Van der Merwe *Sectional Titles* 11-37.

⁴⁷⁹ West 1994 *Conveyancing Bulletin* 3.

⁴⁸⁰ Gerke 1997 *Property Law Digest* np.

⁴⁸¹ Pienaar 2010 *Sectional Titles* 79.

⁴⁸² Section 14 of the *Sectional Titles Amendment Bill* 623 of 2017 proposes that this right if held by the developer may be cancelled by him "prior to the establishment of a body corporate, with the written consent of the mortgagee of the exclusive use area" by means of a unilateral deed of cession.

⁴⁸³ Refer to para 4.3.3.

...a right to immovable property over which a mortgage bond, lease contract or personal servitude of usufruct, *usus* or *habitatio* may be registered.

As the holder of the right is provided with a certificate of real right of urban immovable property, it may be enforced against the world at large.⁴⁸⁴ It provides the holder of the right "with a sense of security regarding the use of parking bays, garden areas et cetera to the exclusion of all others, sectional owners and outsiders alike.⁴⁸⁵ It may also be mortgaged.⁴⁸⁶ However, Van der Merwe states convincingly that, as the mortgage may be cancelled without the consent of the mortgage holder in this instance, it is doubtful whether financial institutions will consider the use of an exclusive use area as security for a mortgage bond.⁴⁸⁷ Section 27(5) also provides that the exclusive use area is given to the owner for a specific purpose. This may also hamper the owner's use and enjoyment of the exclusive use area.

4.6.4 Rule-based or so called "non-genuine rights of exclusive use"

Section 27A of the *STA* previously provided for the obtaining of rights of exclusive use and enjoyment of the common property, by means of rules registered by either the developer or the body corporate.⁴⁸⁸ The creation of exclusive use areas by means of management rules, was initially statutorily provided for by the *Sectional Titles Amendment Act 29* of 2003 which Act introduced section 27A. These rights are neither registered in the deeds registry as real rights, nor are they indicated on the sectional plan. The fact that these rights are not "deemed rights to immovable property" is emphasised by section 27A(a) which determines that these rules may not create rights contemplated in section 27(6). Section 27(6) determines that:

⁴⁸⁴ Van der Merwe *Sectional Titles* 11-55.

⁴⁸⁵ Mostert 2002 *Stell LR* 275.

⁴⁸⁶ Pienaar *Sectional Titles* 80; Van der Merwe *Sectional Titles* 11-33. According to the *Sectional Titles Amendment Act 6* of 2006 the definition of "sectional mortgage bond" in s 1 was extended to include interests in an exclusive use area that may be mortgaged.

⁴⁸⁷ Van der Merwe *Sectional Titles* 11-25.

⁴⁸⁸ "Section 27A was repealed by item 12 of the Schedule to the *STSM*A, but re-enacted in ss 10(7) and (8) of the *STSM*A". Van der Merwe *Sectional Titles* 11-53.

A right to the exclusive use of a part of the common property registered in favour of an owner of a section, shall for all purposes be deemed to be a right to immovable property...

Section 27A was repealed and re-enacted in sections 10(7) and 10(8) of the *STSMA*.⁴⁸⁹ Section 10(7) of the *STSMA* determines that a developer or a body corporate may make management or conduct rules which confer rights of exclusive use and enjoyment of parts of the common property upon members of the body corporate. Section 10(8) determines that the rules referred to in section 10(7) should include a layout plan which clearly indicates the locality and purpose of the proposed exclusive use area. However, neither section 10(7) nor 10(8) provide distinctly that the right created is not a right as contemplated in section 27(6) as was the case with section 27A(a). The absence of such a direct prohibition may open the door in future for the rights created in terms of section 27(6) to be deemed "rights to immovable property". The current situation, though is that these rights may not be registered in the deeds office.

The inclusion of the specific reference to "management and conduct rules" in section 10(7) echoes West's⁴⁹⁰ previous argument, that exclusive use rights in terms of the previous section 27A (which has been repealed) could be created by management and conduct rules. In the case of the creation of the exclusive use area in a management rule a unanimous resolution is needed, whereas a special resolution is needed in the case of the creation of the right in a conduct rule. Van der Merwe points out that owners who acquire exclusive use rights in terms of conduct rules, would have less protection of their rights as the rules can be changed through special resolution instead of unanimous resolution.⁴⁹¹ These rights are also in favour of a specific owner, but are not classified as real rights. According to Pienaar⁴⁹² these rights are sometimes referred to as "non-genuine rights of exclusive use". Van der Merwe⁴⁹³ used this term in a case

⁴⁸⁹ The "non genuine exclusive use rights" initially created by s 27A of the *STA* and currently created and provided for by s 10(7) and 10(8) of the *STSMA* will hereafter be referred to as s 10(7) and (8) rights.

⁴⁹⁰ West 2012 *SADJ* 27.

⁴⁹¹ Van der Merwe *Sectional Titles* 11-53.

⁴⁹² Pienaar *Sectional Titles* 77.

⁴⁹³ Van der Merwe 1997 *THRHR* 327.

discussion⁴⁹⁴ and indicated the support by the court for the so called "rules method". He indicates that should this method be accepted it would be a cheaper and less cumbersome method of establishing exclusive use areas. Maree, on the other hand, uses the term "minor exclusive use areas".⁴⁹⁵ Pienaar further indicates that the requirements for the obtaining or establishment of these rights are:

- The rules must include a layout plan to scale on which the locality of the area is indicated.
- The area must be distinctly numbered.
- The purpose for which it may be used must be clearly indicated.
- A schedule indicating to which owner every such part is allocated must be kept.

These rights are not indicated on the sectional plan, but merely on a layout plan. Neither are they registered in the deeds registry.⁴⁹⁶ Therefore, these rights are not real rights, but rather personal rights enforceable against the sectional owners and the body corporate. Ideally these exclusive use areas should be allocated by the body corporate to a specific unit and such allocation should be kept on record. This is, however, not always the case in practice.

In summary, it seems apt to mention that Van der Merwe draws a few distinctions between registered exclusive use rights in terms of the *STA* section 27(1) and rule-based exclusive use rights in terms of sections 10(7) and 10(8) of the *STSMA*:

- The technical requirements for establishment differ and they are delineated differently.
- The right in terms of the rules is not a real right, but a personal right

⁴⁹⁴ *Pineleigh CC, Zackon, Zeiss and Cauchois v McGrath, McGrath NO, Body Corporate of Pineleigh, Registrar of Deeds, Surveyor-General* 1994-05-05 case no 74/94 SE.

⁴⁹⁵ Maree 2008 *De Rebus* 44.

⁴⁹⁶ However, according to Moore there is a duty on the conveyancer to "properly and accurately represent what is the subject matter of the sale" and the exclusive use area created in terms of section 27A is "part of the subject matter of the sale". Refer to Moore 2013 *Ghost Digest* 1.

- The registered real right of exclusive use is transferred by notarial deed of cession whereas the personal right is transferred automatically with the transfer of the unit or by amendment of the rules.
- Should the registered real right of exclusive use not be transferred when the unit is transferred, it will vest in the body corporate, however, the personal right will remain linked to the particular owner of the unit.⁴⁹⁷

4.6.5 *Uncertainties regarding the interpretation of section 27*

- The legal nature of the right as limited real right

Although the right is classified in terms of the *STA* as a limited real right this does not clear up all uncertainties. There is no *numerus clausus* of real rights and real rights may be created by legislation, in which case they are applicable notwithstanding the requirements of the "subtraction from the *dominium* test", or by agreement. In this case they are registrable in a deeds registry as limited real rights only when complying with the requirements of the "subtraction" test. However, these newly created real rights are usually categorised as either praedial or personal servitudes.⁴⁹⁸ Whether these rights fit into those categories, however, is questionable. The debate regarding this newly formed limited real right will be tracked in the next section to come to a better understanding of what the real effect of this limited real right is.

- The entitlements and duties of the holder of the right

As the right of exclusive use in terms of section 27(1) and (2) is statutorily created, the entitlements of the right are also not as clear cut. This relates to the necessity to define the content of the right. A few examples regarding the purpose of the exclusive use area, the maintenance of it and any financial liability flowing from the exercise of the right will be discussed with reference to case law.⁴⁹⁹

⁴⁹⁷ Van der Merwe *Sectional Titles* 11-55 to 11-57.

⁴⁹⁸ Mostert 2002 *Stell LR* 279.

⁴⁹⁹ Refer to para 5.4.3.

- The lapsing of the right if the owner sells his unit

The non-transfer of the right leads to litigation that shed important light on the uncertainties still existing regarding exclusive use rights. This will be dealt with in the next chapter. The mortgage bond is cancelled without the consent of the mortgagee.⁵⁰⁰

- The legal nature of section 10(7) and 10(8) rights

Finally the legal nature of the "non-genuine exclusive use areas" will be investigated. The fact that these rights are classified as personal rights will be critically discussed. The application of the "subtraction from the *dominium*" test will be employed here to further investigate these rights.

4.7 Conclusion

It is clear that the nature of these rights discussed above, lead to legal uncertainty and causes problems in practice. It is also clear that the categorisation of these rights of the owners or the developer as either real or personal rights will influence the owner's *dominium* of his unit in a sectional title scheme. Depending on the determination of the nature of the right successors in title may also be bound.⁵⁰¹ Furthermore the content of these rights need to be determined as it will affect the co-owners' share in the common property. In some instances, case law and amendment to legislation have addressed some of the uncertainties. In other instances, the problems are addressed by Conference Resolutions of Registrars of Deeds. In the next chapter a systematic investigation of relevant case law, the application of common law principles and the opinion of academic writers will be undertaken to bring some clarity. The systematisation of the rights in this manner would lead to recommendations to address the contentious issues mentioned above. Finally, the application of the subtraction test in applicable circumstances will provide clarity as to the legal nature of these rights.

⁵⁰⁰ Pienaar 2010 *Sectional Titles* 79.

⁵⁰¹ Should the right be classified as a real right, successors in title will be bound.

CHAPTER 5

A CRITICAL DISCUSSION OF CERTAIN RIGHTS CREATED IN SECTIONAL OWNERSHIP WITH SPECIAL REFERENCE TO THE "SUBTRACTION FROM THE DOMINIUM TEST"

5.1 Introduction

The rights created for owners in terms of sections 24 and 27 of the *STA*, section 10(7) and (8) of the *STSMA* and the developer in terms of section 25 of the *STA* were discussed in the previous chapter. In that chapter, the legislative background of these rights was sketched with reference to the role players and procedures involved in the creation, amendment and termination of these rights. The statutory provisions, process and effect of each of these rights were illuminated. Some uncertainties relating to the legal effect and the practical implementation of these rights were identified. In this chapter, these uncertainties will be expanded upon. This chapter will constitute a more thorough investigation into the theoretical uncertainties identified in the previous chapter, and substantial recommendations of possible solutions to clarify the uncertainties will be made. A discussion of the relevant legal developments to seek the balance between the entitlements of the right holders and the entitlements in terms of the sectional owners' share in the common property that is affected by the exercise of these rights will be made. The analysis will include case law, opinions of legal writers and practitioners and some Conference Resolutions by Registrars of Deeds. In an attempt to determine a balance between the rights of parties involved, the application of private law principles on existing uncertainties, specifically the requirements of the subtraction test, will be undertaken.

In determining the legal effect of the rights, as well as the entitlements and duties of the right holder, it will become clear how the categorisation of these will influence the entitlements in terms of a sectional owner's co-ownership share in the common property.

5.2 Sectional owner's right to extend his section in terms of section 24 of the STA

5.2.1 Introduction

The significance of a discussion of section 24 for this study is firstly to determine what the legal nature is of the right created by the special resolution of the body corporate to allow an extension of a section in terms of section 24. Secondly, the practical implications of such an extension will be investigated. Finally, it will be illustrated how the creation and implementation of this right influences the sectional owners' co-ownership share in the common property. This investigation will lead to more clarity with regard to the legal position of the owner of a section who applied for the extension of his section, as well as the legal position of the co-owners as this application impacts directly on their co-ownership share in the common property.

5.2.2 Legal nature of the right

It may seem obvious that the right created in terms of section 24 by a special resolution of the body corporate provides the holder of the right (the owner of the section) with a creditor's right until the extension has been approved by the Surveyor-General and the amended sectional plan has subsequently been registered in the deeds registry.⁵⁰² By registration, the ownership of the extended section is formalised in the name of the sectional owner. Although no property transfer by deed of transfer will take place, the title deed of the section is endorsed to reflect the extension of the section so that the extension forms part of the section from the date of endorsement. The transfer transaction is thus in the form of an endorsement of the title deed of the section referring to the amended sectional plan and participation schedule. The effect of the endorsement will be that the ownership of the extended part of the section vests in the sectional owner through the transfer of the ownership of that part of the common property by the body corporate.

⁵⁰² Refer to para 4.3.5.3.

A dissection of the transactions leading to the ultimate acquisition of ownership brings about clarity regarding the specific legal nature of the right. Initially the right is created in the obligatory agreement. This is the adoption of a special resolution by the body corporate upon application by the owner. The agreement "does not vest the legal title ... in the beneficiary".⁵⁰³ It actually creates a creditor's right by which the owner can now claim "the performance of the contract by delivery of the (real right)".⁵⁰⁴ The creditor's right created by the adoption of the special resolution by the body corporate does not include a right to the part of the land upon which the extension is erected, but rather the right to eventually receive an enlarged section in terms of the amended sectional plan. Physical proof for this argument may be found on the amended sectional plan which will now reflect the extension as part of the section. That being the case, the object of the right is a performance and the corresponding right has to be a creditor's right (*ius in personam ad rem acquirendam*)⁵⁰⁵ up until registration.

The importance of ascertaining the nature of the right is to determine what type of security the right holder will have. One of the characteristics of the right is that although the holder obtains a creditor's right, it is actually conditional. The holder has the obligation to see to the practical extension of a building and section in accordance with the special resolution. The only obligation on the body corporate is to sign the necessary documents to enable the registration of the extension of the section, once the right holder has performed his duties in terms of the agreement.

This right, therefore, places many obligations and all the risks on the holder of the right. These include the financial responsibility involved in physically extending a building to which the holder of the right does not hold the title deed of the land on which the extension is affected. Furthermore, due to the legal

⁵⁰³ Laurens *Saaklike regte* 254.

⁵⁰⁴ Refer to Laurens *Saaklike regte* 254 where he discusses the case of *Willoughby's Consolidate v Cophall Stores* 1918 AD 1 16.

⁵⁰⁵ This position is also confirmed by the fact that the banks are hesitant to provide credit for the building of such an extension.

nature of this right, the holder will be unable to access credit on the basis of the registration of a mortgage bond in order to finance the extension. It also exposes the holder of the right to at least a temporary loss of practical creditworthiness. From the moment at which the holder physically extends the building until registration thereof, the creditor's right is both tenuous and fragile in nature. This tenuous and fragile nature is illustrated by the risk faced by the holder of an attachment of part of the common property in the scheme, of which the land to which the right of extension applies, forms part. Such attachment, ordinarily based on a court order, could be based on either any debt of the Body Corporate, or even the debt that a sectional owner owes to the local authority in respect of unpaid municipal services or rates and taxes. Section 15(1)(a) of the *STSM*⁵⁰⁶ implies that in the event of any money owed by the Body Corporate, all members of the Body Corporate are jointly and severally responsible for payment. This has the effect that any creditor of the Body Corporate, after following due process, may attach units of sectional owners, which includes the sections as well as the undivided share in the common property attached to the sections. In respect of unpaid rates, service charges and municipal taxes, a local authority may also attach the undivided share in the common property in a scheme along with the attachment of a specific unit in the scheme. This right to attach the common property follows from the specific manner in which the unit is defined in the *STA*, namely as a section together with an undivided share of the common property in terms of the quota allocated to that section. The effect of such attachment is that registration of the extension of the unit will be prevented for as long as the attachment of an undivided share of the common property is in place. This exposes the holder of the right to extend to the risk of incurring all costs related to the extension without being able to exercise the right to register the extension – as a result of the unpaid debts of other owners in the scheme or the Body Corporate.

⁵⁰⁶ Section 47(1) of the *STA*.

This brings one to the questions of how and when this creditor's right against the body corporate is replaced by ownership of the extended part of the section in the sectional owner in question. On investigation, the distinction between real and personal rights, which forms the focus of this study, becomes relevant again. Laurens, in his discussion of the function of registration and especially the relevance of the specific time of registration refers to *Registrar of Deeds v Ferreira Deep*⁵⁰⁷ where the court described the legal position as follows:

As contracts, with few exceptions, give rise to only personal rights, this class of right, although relating to immovable property, is a personal right until registration when it is *converted* into a real right by such registration.

Laurens criticizes this decision on the basis that it leaves the impression that a certain class of *jura in personam ad rem aquiredam* are registrable.⁵⁰⁸ He refers to Van Warmelo and Reinsma who also criticize the court's interpretation that a personal right is "converted" to a real right upon registration.⁵⁰⁹ A more sound explanation is offered by Laurens when he states that a *jus in personam ad rem aquiredam* is simply a creditor's right against someone in terms of which that person should deliver (transfer) a thing or a real right. Upon the delivery of the thing (in the case of immovable property by registration), the creditor's right is discharged. Therefore, the creditor's right is extinguished and is not transformed into a new type of right.⁵¹⁰

In applying this theoretical background to the case at hand, it seems that the right is seen as a creditor's right up until registration of the revised sectional plan, at which stage the creditor's right is extinguished and the real right, in this case ownership, comes into existence. The owner who applies for the extension of his section is a co-owner of a specific undivided share in the common property. This right is both indivisible and undivided.⁵¹¹ This position differs from the transfer of ownership to a co-owner of a piece of land registered in the land

⁵⁰⁷ 1930 AD 169 on 180.

⁵⁰⁸ Laurens *Saaklike regte* 109.

⁵⁰⁹ Laurens *Saaklike regte* 114. Refer to para 2.5.3.

⁵¹⁰ Laurens *Saaklike regte* 114.

⁵¹¹ Pienaar 2010 *Sectional Titles* 62, 32.

register. Although the co-ownership share in the common property is held in bound common ownership, this transfer differs from an ordinary bound common ownership transfer. The most important difference relevant to this study is that the co-owner in the usual bound common ownership relationship may not alienate or encumber his share in the common property without the consent of the bound common owners. However, this is not the case in sectional title ownership. In this instance, the owner will alienate his share of the common property together with the sale of the unit.⁵¹² In terms of the right of extension in terms of section 24, the owner will in effect sell his share of the common property on the part that is extended onto the common property to himself. In the instance under discussion, the owner will in actual fact, wear two hats in these circumstances, one being as co-owner of the common property, the other as individual owner who will benefit from the transfer. This explanation will prove beneficial to clarify certain problems that may arise in practice.

One such a problem occurs in the event that the registration of the amended sectional plan is not performed correctly in the deeds office. The question needs to be asked as to how the position of the buyer of a unit (of which the extended section forms part) will be influenced should the owner, for instance, sell the unit, but the extended section has never been registered as part of the section as per section 24. The buyer will see an enclosed balcony and expect it to be part of the section, when, in actual fact, it is not. The new owner would probably claim performance, namely that the previous owner should request the body corporate to apply to the deeds office for rectification of the mistake.. However, as the previous buyer is no longer an owner of the unit, the effect of the application for rectification of the sectional plan in terms of section 14(1) of the *STA* is uncertain.

The *STA* is silent on whether the right created by the special resolution will still vest in the original owner despite him no longer being a member of the body corporate, or whether it would remain vested in the body corporate if such an

⁵¹² Pienaar 2010 *Sectional Titles* 32.

owner has sold his unit before completing the section 24(6) application. This leads to a further uncertainty as to whether the new owner will be able to accept the transfer in his name from the body corporate or whether the effect of the resolution is terminated if the initial applicant did not follow through with the transaction. A practical solution would be for the new owner to apply to the body corporate for a duplicate special resolution after becoming owner in order to correct the mistaken position. However, it is debateable whether this resolution taken after the fact by the body corporate will be a special resolution in the technical sense. It seems as if the body corporate will neither have the discretion to deny the resolution nor to determine afresh whether the resolution is in its best interest. It will probably be mala fide of the body corporate to deny such a second application. Should such permission be withheld by the body corporate, section 6(9) of the *STSMA* will allow the aggrieved owner to approach the chief ombud for relief. The circumstances of this resolution will, therefore, be different from the initial special resolution that was mistakenly not effected through registration in the sense that the body corporate will be "forced" to take the second special resolution. This will, however, not be the case if the original owner enclosed the balcony without first obtaining the special resolution by the body corporate. In both circumstances, the new owner would then probably be entitled to claim any additional costs as damages from the previous owner.

The inclusion of a section similar to section 27(4)(b) which allows for an exclusive use right that was not properly transferred by the developer before exiting the scheme to vest in the body corporate, will probably alleviate this situation. Alternatively, the new owner will have to apply for a new special resolution to allow the extension afresh.

5.2.3 Practical implications of the right

In circumstances where the extension is a previous exclusive use area that is converted to form part of a section (for instance the enclosure of an exclusive use balcony), the change in the nature of the right from a right of exclusive use

to an ownership right in an extended section needs clarification. If the exclusive use area was created as a limited real right and ceded by the developer to the sectional owner, the application for the extension of the section in terms of section 24(6) should also include an application for the cancellation of such a limited real right. This will probably serve the publicity principle sufficiently. However, if the exclusive use area was not created in terms of section 27(1), but rather in terms of the previous section 27A (now section 10(7) and (8) of the *STSM Act*), it will have the effect that a personal right (of exclusive use) is cancelled by agreement and a right to ownership of the extended area is transferred by means of an endorsement in the deed office from the body corporate to the owner of the (extended) section. It is, therefore, suggested that the resolution passed by the body corporate to allow the extension should also indicate that previous agreement is being cancelled, and upon transfer of the extended part to the owner of the section, the exclusive use area will not form part of the common property any longer. This entails that should the extension of the section include part of an adjoining exclusive use area, the existing exclusive use area needs to be cancelled and a new exclusive use area needs to be registered. If the section and exclusive use area are owned by the same person, the amendments must be shown on the sectional plan.⁵¹³

5.2.4 Co-ownership share in the common property

As the sectional owners, and not the body corporate are the owners in undivided shares of the common property the body corporate will normally not receive any money for the loss of part of the common property in the event of the extension of the section. This will usually be addressed by the increase in levy that will be paid by the sectional owner of the enlarged section. Even though as we have seen that no transfer is involved in an extension of a section,, a transfer duty receipt still needs to be submitted with the application to the deeds registry. RCR 40/1989 confirms that a transfer duty receipt must be lodged if the floor area of the section is increased. Currently the practice

⁵¹³ Refer to RCR 76/2012. There is only one sectional plan for the scheme containing different sheets. Pienaar 2010 *Sectional Titles* 114.

(where no selling price is involved) is that the conveyancer will declare a minimal amount (for example R100,00) as the value of the transaction. The reason for this is that should the increased value of the extended section be stated as below market value, South African Revenue Service (SARS) may view it as a donation and claim donation tax from the body corporate. As a result of the directive from SARS that it will accept a declaration that the value of the transaction is merely R100.00, currently no transfer duty is payable in practice on these transactions.⁵¹⁴ However, if SARS decides, especially in areas where the property is extremely valuable, that the increased levy is not sufficient compensation for the loss of part of the common property, the extension will be viewed as a donation and donation tax will be claimed from the body corporate. SARS has discretion in terms of the *Transfer Duty Act*⁵¹⁵ to either insist on the furnishing of independent valuations of any property which is alienated for the purposes of transfer duty, or in extreme circumstances, to do its own valuation of a property to be transferred before issuing a transfer duty assessment. Theoretically, SARS may in the normal course of things take a decision to implement a narrower approach towards the value of these transactions. For example, if a unit on the ground level of a complex in Clifton is sold for 30 million rand, and the floor area of the section is extended by 50m², it is clear that the value of the property concerned has been increased by far more than R100.00. It may be only a matter of time before SARS regards these acquisitions as an opportunity to bolster the funds of the *fiscus*. The fact that it is theoretically already regarded by SARS as an acquisition of property, elucidates this aspect of the legal nature of the right.

5.2.5 Conclusion

From the above discussion, it is clear that the legal nature of the right created by the special resolution of the body corporate to allow an owner to extend his section, presents a specific set of problems and uncertainties. Although the

⁵¹⁴ All transactions with a value of less than R700 000 is currently taxed for transfer duty practices at a rate of 0%. Refer to SARS website at <http://www.sars.gov.za/TaxTypes/TransferDuty/Pages/Transfer-Duty-Payment-Rates.aspx>.

⁵¹⁵ Act 40 of 1989. Also refer to West 1997 *De Rebus* 309.

application of certain common law principles such as the distinction between real and personal rights may alleviate some of these, a clearer phrasing of the legal position needs to be done by the legislature.

5.3 Developer's right to extension in terms of section 25 of the Sectional Titles Act

5.3.1 Introduction

Although statutorily created and apparently graphically defined, a significant number of decisions concerning the developer's right of extension of the scheme have seen the light. Initially, the focus was on whether the right could be classified as a real right or a personal right. As the nature of the right was initially not defined by legislation, the court applied the common law subtraction test to solve the problem. Consequently, when legislation cleared up this uncertainty in section 4 of the *STA*, the finer classification of the right as a limited real right was dealt with by the court. The dubious classification of the right as a personal servitude led extensive criticism by academics. The content of the right was also investigated by the court. However, the rights and duties of the right holder (namely the developer or the body corporate) led to even more litigation. These developments of the right of extension in terms of section 25 will consequently be tracked in case law in as far as it could contribute towards the solution to the uncertainties briefly illustrated in the previous chapter, namely:

- the legal nature of the right;
- the entitlements provided to the right holder (the developer or in some instances the body corporate);
- the duties of the right holder.

5.3.2 Legal nature of the right

5.3.2.1 Application of the subtraction test to determine whether the right is a real or a personal right

The legal nature of sectional title ownership is not subject to the maxim *superficies solo cedit* rule as applied in common law.⁵¹⁶ As indicated in Chapter 3,⁵¹⁷ the object of ownership of a unit is twofold, namely: a section, which is demarcated in terms of its vertical and horizontal boundaries inside the building as well as an undivided co-ownership share in the common property. It is on the common property that the developer may register a right of extension as a right to immovable property,⁵¹⁸ which may be transferred by the registration of a notarial deed of cession.⁵¹⁹ Initially, it was uncertain whether the right should be classified as a limited real right or as a personal right. *Erlax* was discussed previously⁵²⁰ mainly with the focus of its contribution to the discussion surrounding the subtraction test. In the *Erlax* case, the court applied the subtraction from the *dominium* test and determined the right to be a real right by nature as it intended to bind successors in title⁵²¹ and since it diminished the undivided co-ownership share in the common property co-owned by the sectional owners.⁵²² This part of the judgement has been addressed previously⁵²³ and will not be discussed further here, save to mention that the application of the subtraction test was correct, as was the classification of the right as a limited real right. The application of the subtraction test is referred to in passing in *Oribel Properties 13 (Pty) Ltd v Blue Dot Properties 271 (Pty) Ltd*,⁵²⁴ where the court found that the exercise of the right was a "diminution of

⁵¹⁶ Refer to para 3.3.1.2.

⁵¹⁷ Refer to para 3.4.2.

⁵¹⁸ Section 25(4)(a) of the *STA*.

⁵¹⁹ Section 25(4)(b) of the *STA*.

⁵²⁰ Refer to para 2.5.3.

⁵²¹ Section 885C of *Erlax*.

⁵²² Section 886E of *Erlax*.

⁵²³ Refer to para 2.5.3.

⁵²⁴ 2009 SA All 454 (SCA) (hereafter the *Oribel* case).

rights of sectional owners".⁵²⁵ A similar comment was made in *SP & C Catering Investments (Pty) Ltd v Body Corporate of Waterfront Mews*⁵²⁶ where the court acknowledged that the right of extension of the developer did indeed fit the requirements of the test. Referring to the court *a quo* the court affirmed:

I simply cannot see how a court, without express statutory authorisation, make an order that will have the effect of adding to someone's real right and at the same time subtracting from someone else's real right.⁵²⁷

Therefore, by utilising the subtraction test in *Erlax*, the court came to the correct conclusion that the right of extension of the developer is a limited real right.

5.3.2.2 Classification of the right of extension as a personal servitude, a praedial servitude or a sui generis limited real right

In the latter part of the *Erlax* judgement, the court attempted to shed more light on the "nature of the real right" in question⁵²⁸ The court followed the traditional approach by classifying the right as a servitude, either praedial or personal.⁵²⁹ The developer retained a unit in the scheme,⁵³⁰ namely unit 7. The court, therefore, initially considered whether the right of extension could be classified as a praedial servitude with unit 7 being the dominant tenement as its ownership is settled on Erlax. Joubert JA rejected that the right in question is a praedial servitude as "no reference was either expressly or impliedly"⁵³¹ made to a dominant tenement neither does the right confer any economic benefit or

⁵²⁵ Refer to the *Oribel* case at para [17]. Refer also to Van der Merwe *Sectional Titles 12-26(7)*.

⁵²⁶ 2010 4 SA 104 (SCA) (hereafter *SP & C Catering* case).

⁵²⁷ Paragraph 106[5] of the *SP & C Catering* case.

⁵²⁸ Section 885G of *Erlax*.

⁵²⁹ Van Wyk 1993 *THRHR* 140 argues that in terms of the traditional approach new developments are placed in existing categories of limited real rights as opposed to "other categories of limited real rights to be created to accommodate new developments".

⁵³⁰ In terms of s 18 of the *STA* of 1971, the developer was not allowed to continue as the holder of the right of extension if he did not own a unit in the scheme any longer. Refer to s 18(1) "...the developer or, if the developer has ceased to have any share in the common property...". This is not the case with s 25 of the 1886 *STA*.

⁵³¹ Section 885F of *Erlax*.

advantage on a unit as dominant tenement".⁵³² Subsequently, the court examined whether the right was a personal servitude in favour of Erlax. The court determined that the right could be classified as a personal servitude in favour of Erlax as developer. The court came to this conclusion by determining that Erlax would be entitled to deal with the newly developed units "for his own and exclusive benefit and account"⁵³³ and that the right "was inseparably attached to Erlax *qua* developer".⁵³⁴ In coming to this conclusion, the court had to consider the principle of *nulla res sua servit*⁵³⁵ as Erlax was an owner of a unit and, therefore, co-owner of the common property over which the servitude existed. The court succinctly reasoned that:

... since the common property ... is indivisible among the initial eight units, it follows that the personal servitude of ...the developer can exist over the entire common property as servient land *irrespective of the fact that Erlax is also the owner of unit No7 which is entitled to an undivided share in the common property*.⁵³⁶

The court then proceeded to find that Erlax was entitled to obtain a certificate of registered real right under section 64(1) of the *DRA*.⁵³⁷ Although *Erlax* contributed immensely to clarifying the right of extension, the court's decision to classify the right as a personal servitude bore the brunt of criticism.

Van der Merwe contends that the right of extension cannot be a personal servitude. He is of the opinion that it is "simply not a real right that cleaves to a particular person in order to afford him a certain advantage".⁵³⁸ Van Wyk also does not agree with Joubert JA's classification of the right as a personal

⁵³² Section 886C of *Erlax*; Van Wyk 1993 *THRHR* 140-141 argues that the fact that there are not two pieces of land involved will also prevent the right from being classified as a praedial servitude. She agrees with the judgement that the right provides no benefit on any unit ad a dominant tenement. She further points out that the right only exist until the extension is completed and, therefore, also does not confirm to the requirement that the right should have a permanent application, the so-called "*perpetua causa*" principle.

⁵³³ Section 887B of *Erlax*.

⁵³⁴ Section 887C of *Erlax*.

⁵³⁵ A person cannot have a servitude over his own property. See s 887F of *Erlax*. The court refers to De Groot 2.37.2, among others. Refer to Badenhorst, Pienaar and Mostert *The Law of Property* 323 where they indicate this decision as authority that a person may hold a servitude over property of which is he co-owner.

⁵³⁶ Section 887G-H of *Erlax*. My emphasis.

⁵³⁷ Section 888I of *Erlax*.

⁵³⁸ Van der Merwe 1992 *Annual Survey* 169.

servitude.⁵³⁹ Van Wyk argues that the "background, nature, purpose and field of application of personal servitudes differ so much from these rights of extension that the latter can hardly be classified as a personal servitude".⁵⁴⁰ Both Van der Merwe and Van Wyk point out that the purpose of a personal servitude, namely to use and enjoy someone else's property, does not correspond with that of the right of extension, namely to build a sectional titles scheme in phases.⁵⁴¹

Van Wyk, referring to Van der Merwe, indicates that although South African law recognizes no *numerus clausus*⁵⁴² of personal servitudes, the field of application and the content of personal servitudes is very limited. This argument is echoed by Van der Merwe when he states that the purpose of a personal servitude is to entitle a person in his personal capacity to use and enjoy the property of another person for his life time. Although the holder of the personal servitude may alienate rights inherent to the servitude, the servitude itself will terminate at his death.⁵⁴³ Van Wyk also argues that the right should be recognized for what it is and "not (to) be forced into an existing mould into which it does not fit comfortably." She, therefore, concludes that Joubert JA's approach to classify this right as a personal servitude is questionable, but argues that this right should be seen as "some new type of limited real right" akin to conditions of title in townships whereby purchasers of erven may be limited in the way they may develop an erf.⁵⁴⁴ In Van Wyk's view the process that should be followed to determine the classification of a right should be to identify the type of right, then determine whether it fits into one of the existing categories, and if not, to provide a new classification.⁵⁴⁵ Pienaar agrees with his academic colleagues. He argues that although the right has the characteristics of a servitude, it cannot be classified as either a personal or a praedial servitude. He contends that there

⁵³⁹ Van Wyk 1993 *THRHR* 140.

⁵⁴⁰ Van Wyk 1993 *THRHR* 142.

⁵⁴¹ Van Wyk 1993 *THRHR* 145; Van der Merwe *Sectional Titles* 12-34.

⁵⁴² Refer to para 2.3.1.

⁵⁴³ Van der Merwe *Sectional Titles* 12-34.

⁵⁴⁴ Van Wyk 1993 *THRHR* 143; Van der Merwe *Sectional Titles* 12-34. In this passage Van der Merwe explains the aim or purpose of the right "to enable the developer to obtain a mortgageable asset for the purpose of financing further phases for his own account".

⁵⁴⁵ Van Wyk 1993 *THRHR* 145.

is no dominant tenement and, therefore, the right cannot be a praedial servitude.⁵⁴⁶

Erlax necessitated the 1997 amendment of the *STA*.⁵⁴⁷ In terms of the Amendment Act, the right developer's right of extension of the scheme may now be transferred. This amendment nullified the argument for the classification of the right as a personal servitude due to its inalienability as decided in *Erlax*.⁵⁴⁸ Furthermore, the right may now, in terms of section 25(5) be exercised by the developer or his successor in title, even if he has no other interest in the common property. Van der Merwe points out that this is "in direct conflict with the characteristic of inalienability inherent in personal servitudes".⁵⁴⁹ A further distinction from a personal servitude according to Van der Merwe, is the fact that if the developer's right of extension lapses, it does not perish but rather vests in the body corporate.⁵⁵⁰ Van Wyk concludes her criticism of the *Erlax* case by referring to the anomaly of trying to fit the right of extension into a personal servitude hole as trying to fit a square peg in a round hole. According to Van Wyk, the right is a square peg that does not fit into the "round personal servitude hole".⁵⁵¹ Badenhorst, Pienaar and Mostert also concludes that the right does not fit the classification of a personal servitude and further likens it to an exclusive use right in terms of section 27, being a statutory real right *sui generis* "which cannot be explained in ordinary

⁵⁴⁶ Pienaar *Sectional Titles* 263.

⁵⁴⁷ The *Sectional Titles Amendment Act* 15 of 1993 provided in s 4 for the amendment of s 60 of the *STA* to allow the continuance of a right of extension in terms of s 18 of the 1971 Act and for the fact that such a right is deemed to be a "right to urban immovable property which admits of being mortgaged". Pienaar *Sectional Titles* 263 refers to s 18(a) of the *Sectional Titles Amendment Act* 44 of 1997 which determines that the right "may be transferred by the registration of a notarial deed of cession in respect of the whole, a portion or a share in such right".

⁵⁴⁸ Refer to Van der Merwe *Sectional Titles* 12-34 where he indicates that "the fact that the right can be transferred is in direct conflict with the characteristic of inalienability inherent in a personal servitude." Lotz and Nagel 2007 *TSAR* 563 refer to this viewpoint and confirm that the right is a *sui generis* statutory limited real right on urban immovable property. However, when discussing the *merx* in the case of the right being alienated they claim the right to be a personal servitude. Lotz and Nagel 2007 *TSAR* 564. However, they acknowledge that the classification, content and nature of the right is still under speculation. Lotz and Nagel 2007 *TSAR* 567.

⁵⁴⁹ Van der Merwe *Sectional Titles* 12-34.

⁵⁵⁰ Van der Merwe *Sectional Titles* 12-34.

⁵⁵¹ Van Wyk 1993 *THRHR* 144.

private law terms".⁵⁵² Pienaar⁵⁵³ argues that although the right is recognised in the *Sectional Titles Amendment Act* 44 of 1997 as a limited real right, it is a *sui generis* statutory limited real right that does not fit into the existing categories of limited real rights in South Africa.⁵⁵⁴ This sentiment is echoed by other academics,⁵⁵⁵ mainly with reference to the *Erlax* case.

However, nearly two decades after the *Erlax* decision, the classification of the right as a personal servitude still seems to haunt the courts. In *Croxford Trading 7 (Pty) Ltd v Body Corporate of the Inyoni Rocks Cabanas Scheme No 551/1978*,⁵⁵⁶ the court referred to *SP & C Catering* and indicated that in that case the "court appeared to accept that the right of extension under the 1986 Act was a personal servitude".⁵⁵⁷ However, it seems as if some development in this regard was admitted to. Although the court did not dwell on the "proper classification of the right",⁵⁵⁸ it referred to Badenhorst, Pienaar and Mostert⁵⁵⁹ and *LAWSA*⁵⁶⁰ in their description of the case as a limited real right *sui generis*. The court went so far as to determine that the right is "unique" with "peculiar characteristics"⁵⁶¹ created by statute.⁵⁶²

This case dealt with the right of extension of the developer granted to him in terms of section 18 of the *STA* of 1971.⁵⁶³ The legal position of existing rights of extension in terms the *STA* of 1971 was addressed in the *Sectional Titles*

⁵⁵² Badenhorst, Pienaar and Mostert *The Law of Property* 458.

⁵⁵³ Pienaar *Sectional Titles* 263.

⁵⁵⁴ Van der Merwe *Sakereg* 69 classifies servitudes, mineral rights and real security rights such as mortgage and pledge as categories of limited real rights in South Africa.

⁵⁵⁵ Refer to Van Wyk 1993 *THRHR* 140 as well as Van der Merwe 1992 *Annual Survey* 169.

⁵⁵⁶ [2011] JOL 27508 (SCA) (hereafter *Croxford Trading* case).

⁵⁵⁷ *Croxford Trading* at para [18].

⁵⁵⁸ *Croxford Trading* at para [17].

⁵⁵⁹ Badenhorst, Pienaar and Mostert *The Law of Property* 458.

⁵⁶⁰ Van der Merwe "Things" para 270.

⁵⁶¹ Refer to Van der Merwe *Sectional Titles* 12-32 where he echoes this sentiment.

⁵⁶² *Croxford Trading* at para [17].

⁵⁶³ *Sectional Titles Amendment Act* 44 of 1997. S 18(a) of the 1997 Act proceeded to amend s 25(4)(b). This amendment indicates that the right "(b) may be transferred by the registration of a notarial deed of cession in respect of the whole, a portion or a share in such right: Provided that in the case of a cession affecting only a portion of the land comprising the scheme only such portion shall be identified to the satisfaction of the Surveyor-General."

*Amendment Act 44 of 1997.*⁵⁶⁴ With the commencement of this Act on 3 October 1997, the developer who held a right in terms of section 18 of the 1971 Act, could apply for a certificate of registered real right.⁵⁶⁵ In order to receive such a certificate, the developer had to show that the right vested in him and that he had the consent of all owners of sections in the scheme as well as all mortgage creditors. The developer had to apply for such a certificate by 31 December 2001. If the developer did not apply for the certificate of real right, the right of extension lapsed and vested in the body corporate.⁵⁶⁶

The developer transferred his last unit in the scheme in 2003 and only later (in 2004) the right of extension was transferred to the first appellant in terms of a deed of cession. At the time of the registration of this deed of cession, the developer was no longer an owner of a unit in the scheme and subsequently had no interest in the common property. In terms of section 18 of the *STA* of 1971, the right of extension could only be exercised by the developer if it owned at least one unit in the scheme. However, this distinction between the *STA* and the 1971 *STA* is not the focus of this study. The importance of this judgement for this study is rather the reference made by the court on the nature of the right of extension. The court indicated that the right of extension in terms of the 1971 *STA* was "akin to a personal servitude"⁵⁶⁷ as both a personal servitude and the right of extension in terms of the 1971 *STA* were not transferable. The appellants in this matter argued that as the right of extension was consequently made transferable, it was not akin to a personal servitude, but the equivalent of a praedial servitude that is transferable.⁵⁶⁸

⁵⁶⁴ *Sectional Titles Amendment Act 44 of 1997*. S 18(a) of the 1997 Act proceeded to amend s 25(4)(b). This amendment indicates that the right "(b) may be transferred by the registration of a notarial deed of cession in respect of the whole, a portion or a share in such right: Provided that in the case of a cession affecting only a portion of the land comprising the scheme only such portion shall be identified to the satisfaction of the Surveyor-General."

⁵⁶⁵ Van der Merwe *Sectional Titles* 12-29.

⁵⁶⁶ Van der Merwe *Sectional Titles* 12-30. The initial period for such an application was 3 October 1999, but this was extended.

⁵⁶⁷ See para [3] 3. This position was changed by the Sectional Titles Amendment Act 15 of 1993. Subsequently the right of extension may be transferred.

⁵⁶⁸ *Croxford Trading* at para [16].

Although the classification of the right of extension in *Erlax* as a personal servitude was based mostly on the inalienability of the right which has since been amended as the right is now transferable, the court continued to refer to the right as a personal servitude,⁵⁶⁹ both in *SP & C Catering* and *Croxford Trading*. Therefore, these cases contribute indirectly to the determination of the legal nature of the right of extension. Unfortunately, a thorough examination of the legal nature of the right has not been done by the court. Most cases rather focus on the results and practical implication of the exercise of the right. Perhaps Van der Merwe's contention (based on the view of Van Wyk) that the right may be:

... likened to conditions of title in a township development in terms of which purchasers of erven in townships consent to limitation on the manner in which the erven may be developed ...⁵⁷⁰

is the closest we will get to a proper explanation of the legal nature of this right.

5.3.2.3 Content of the right of extension

The courts did, however, did try to explain the "content of the right". In *Oribel*, the court indicated that there was no other right of extension other than on the plans.⁵⁷¹ In *SP & C Catering* the court summarised the content of the right as follows:

It is a right to construct the additional buildings, or extend existing ones, on common property, to divide them into sections and to confer exclusive use in respect of them. That is the content of the right⁵⁷²

In *Oribel*, the court found that the developer's right to extend the scheme involved a "diminution" of the rights of sectional owners, especially the rights of ownership of an undivided share in the common property.⁵⁷³ The right of extension is an asset in the estate of the developer. The developer may not

⁵⁶⁹ Van der Merwe *Sectional Titles* 12-38.

⁵⁷⁰ Van der Merwe *Sectional Titles* 12-36.

⁵⁷¹ Van der Merwe *Sectional Titles* 12-26(8) also indicate that to ascertain the content of the right, one needs to refer to the plans.

⁵⁷² *SP & C Catering* at 108[9].

⁵⁷³ Refer to *Oribel* at [17].

infringe on the owner's enjoyment of his section. The developer should act reasonably and not cause unreasonable noise or inconvenience. He should comply strictly with the plans that were submitted. He may erect buildings, add exclusive use areas and divide buildings into sections. He may sell new units for his own account.⁵⁷⁴

Although the developer is bound by the documents submitted at the time of the reservation of the right, the developer has reasonably far reaching entitlements with regard to this right. The developer's right of extension continues even if all units have been alienated.⁵⁷⁵ However, some of these entitlements lead to uncertainty that have had to be addressed by the courts on more than one occasion.

5.3.3 Entitlements provided to the right holder

5.3.3.1 Developer's right stretches only as far as the approved plans⁵⁷⁶ except in cases of "changed circumstances"

The developer or his successor in title has to comply strictly with the documents⁵⁷⁷ submitted when the right of extension was reserved. Due regard to "changed circumstances" which would make strict compliance "impracticable" may be taken into account and soften the position for the developer. Several cases dealt with the developer applying for relief in terms of "changed circumstances" in terms of section 25(13) of the *STA*. In *Knoetze v Saddlewood*⁵⁷⁸ "a "fairly flexible" interpretation of "changed circumstances" was given.⁵⁷⁹ The facts were, in short, that the plaintiff bought a unit in the first phase of a development in a sectional title scheme in Jeffrey's Bay. The development was done in three phases and consisted of 15 double-storey units which were sea-facing. The first phase was right at the back of the land and the

⁵⁷⁴ Van der Merwe *Sectional Titles* 12-46.

⁵⁷⁵ Refer to para 4.2.1.

⁵⁷⁶ Refer to para 4.5.2.

⁵⁷⁷ Refer to para 4.5.2.

⁵⁷⁸ [2001] 1 All SA 42 (SE).

⁵⁷⁹ Van der Merwe *Sectional Titles* 12-56.

second and third phases were to be developed in front of it. At the time of purchase by the plaintiff, construction of the two other phases had not yet commenced. The plaintiff approached the court for an order of cancellation of the agreement of sale. She cited as reasons for this application the fact that the developer did not comply strictly with the provisions of section 25 and acted contrary to the annexed plans and specifications. Her main arguments were based on the fact that the second phase would influence her sea view and the erection of single storey instead of double-storey units would affect the "homogenous style between the buildings in phase one and two".⁵⁸⁰ The defendant claimed that "changed circumstance" as envisaged in section 25(13) made the strict compliance with the approved plans and specification impracticable. He based his argument on the following:

- strict compliance would have severely limited the sea view of the plaintiff;
- it was no longer economically viable to build double storey units that were strictly compliant to the specifications; and
- strict compliance would have been "impossible "or at least "highly impractical" when taking into account the natural slope of the land on which the development was done.⁵⁸¹

The court held that the phrase, "changed circumstances", should be interpreted for the benefit of the developer and would necessitate a "reduction in the protection previously enjoyed by purchasers".⁵⁸² The court, furthermore, held that a wide interpretation should be given to the word "impracticability" as the purpose of section 25(13) was to "remove disadvantages encountered by developers".⁵⁸³ The court deliberated on the specific facts of the case which will not be dealt with in detail here. However, the court accepted "changed circumstances" to include changes in market conditions and the commercial

⁵⁸⁰ *Knoetze v Saddlewood* [2001] 1 All SA 42 (SE) at 45. See also Van der Merwe *Sectional Titles* 12-57.

⁵⁸¹ *Knoetze v Saddlewood* [2001] 1 All SA 42 (SE) at 46. See also Van der Merwe *Sectional Titles* 12-57.

⁵⁸² Van der Merwe *Sectional Titles* 12-58.

⁵⁸³ Van der Merwe *Sectional Titles* 12-58.

reality that a developer will not build units that he will be unable to sell.⁵⁸⁴ The court, therefore, held that upon the evidence; "changed circumstances" did exist and, therefore, strict compliance with the specifications were impracticable and denied the plaintiff the right to cancel the contract of sale.

Another case that dealt with "changed circumstances" was *SP & C Catering*. In this case the developer's counsel relied on section 25(13) of the *STA* and specifically *Knoetze v Saddlewood*.⁵⁸⁵ The argument was based on the premise that, although the subsection requires the developer to carry out his right "strictly in accordance with the documents referred to in subsection (2)" the right of extension may be extended with "regard being had to changed circumstances";⁵⁸⁶ especially if the delay was through no fault of the developer. They used this argument to propose that if the delay was beyond the developer's control, the reserved right would not lapse at the end of the specified period, but may be "discretionally extended by the court".⁵⁸⁷ They proposed that should the court "not (be) satisfied that the delay is due to 'changed circumstances' it may *declare* that the developer is not entitled to the extension".⁵⁸⁸ The court found that this "contention is tantamount to a submission that the right was one in perpetuity, subject to the exercise by the court of a discretion to declare it terminated". This contention was rejected by the court as "riddled with flaws".⁵⁸⁹ The court found that the contention that the developer was "deprived" of his right "confuses the developer's obligations to effect the scheme extension with is registered entitlement to do so."⁵⁹⁰ The court, furthermore, distinguished this right from the obligation which it defined as "to perform the work which is defined in section 25(13)".⁵⁹¹ The court interpreted section 25(13) as "designed to enable unit owners to enforce

⁵⁸⁴ *Knoetze v Saddlewood* [2001] 1 All SA 42 (SE) at 48. See also Van der Merwe *Sectional Titles* 12-60 and in footnote 226.

⁵⁸⁵ 2001 1 All SA 42 (SE) at 47.

⁵⁸⁶ *SP & C Catering* at 107 [8].

⁵⁸⁷ *SP & C Catering* at 108 [8].

⁵⁸⁸ *SP & C Catering* at 108[8].

⁵⁸⁹ *SP & C Catering* at 108[9].

⁵⁹⁰ *SP & C Catering* at 108[9].

⁵⁹¹ *SP & C Catering* at 108[9].

compliance by the developer with the specifications". The court, furthermore, interpreted the intention of the legislature that section 25(13) was merely to provide the developer the opportunity to "justify non-compliance with his original specifications".⁵⁹²

In *Oribel*, a right of extension of the developer in terms of section 25 was indicated on the plan as to be exercised on the "plant area" adjacent to one of the sections (section 401). This plant area was basically an empty column that extended upwards past this particular unit. Initially a contract was entered into by the developer and the owner of the section adjacent to the open plant area. However, the developer later sold the right of extension to the owner of another section (section 302) in the scheme. The developer argued that the refusal to pay for the plant area in terms of the initial agreement "constituted 'changed circumstances' as envisaged in section 25(13) justifying 'incorporation' of the plant area in the unit below".⁵⁹³ Upon appeal the appellant sought an interdict prohibiting the transfer of the right of extension by the developer to the owner of section 302, as well as an order for the demolition of the brick wall that was erected on the boundary of the plant area and section 401. Upon investigation of the evidence placed before it, the court found that the plant area was not sold, but remained part of the common property.⁵⁹⁴ However, the plans submitted and the negotiations between the parties "demonstrate the intention that the plant area would be 'extended' into section 401 or that the exclusive use of that area would be made available to the owner of section 401".⁵⁹⁵ The court did not make a finding on whether "financial considerations may bring about a change in circumstances",⁵⁹⁶ but rather ruled that the developer should "strictly" comply with the proposed plan filed in terms of section 25(2) as this plan gives "content" to the right of extension that existed.⁵⁹⁷ Therefore, the court decided that the developer was

⁵⁹² *SP & C Catering* at 108 [9].

⁵⁹³ *Oribel* at [13].

⁵⁹⁴ *Oribel* at [14].

⁵⁹⁵ *Oribel* at [15].

⁵⁹⁶ *Oribel* at [19].

⁵⁹⁷ *Oribel* at [17].

prohibited from transferring the right to exclusive use to anyone other than the owner of section 401.⁵⁹⁸ According to Van der Merwe the intended extension "approximates a creation of an exclusive use area". However, the reservation of a right to extension by the developer only allowed the creation of exclusive use areas only after the *Sectional Titles Amendment Act* 11 of 2010. In terms of this Act the developer's right of extension was broadened in two ways:

- (i) It now allowed the addition of exclusive use areas only, which provided the developer with more time to subdivide: for instance, a basement into garages.
- (ii) It allowed the developer to exercise his right inside an existing building, therefore, open spaces may be reserved to be used later.⁵⁹⁹

This did not exist at the time of *Oribel*. According to Van der Merwe, this is actually what the developer wanted to do in that case.⁶⁰⁰ Before then it could not be created without the development of a section as well or in isolation.⁶⁰¹ Van der Merwe points out that they actually wanted "convertible building space"; for instance, the extension of section 401 instead of the extension of the scheme. They should, therefore, have applied in terms of section 24 of the *STA* for the extension of the section and did not comply with the requirements of section 25.

Although this case has a very complicated set of facts, its main contribution to this study lies in the fact that the court indicated that the content of the right of extension is limited to the plans that are submitted at the outset and that "changed circumstances" does not excuse a developer from complying with these plans, but only from complying "strictly".⁶⁰²

⁵⁹⁸ The court ordered that the wall should not be demolished as the applicant could not prove that the wall "infringed any of their rights of ownership". *Oribel* at [25].

⁵⁹⁹ Van der Merwe *Sectional Titles* 12-17 and 12-18.

⁶⁰⁰ Van der Merwe *Sectional Titles* 12-26(9).

⁶⁰¹ Van der Merwe *Sectional Titles* 12-26(10).

⁶⁰² *Oribel* at [19].

The third case that dealt with "changed circumstances" was the case of *Dolphin Whisper Trading 10 (Pty) Ltd v Registrar of Deeds*.⁶⁰³ In this case a property developer applied to court to set aside the refusal of the Registrar of Deeds, to register sectional plans of an extension of a sectional title scheme and to extend the sectional titles scheme to include new sections. The order sought, was to set aside the Registrar's decision to refuse the registration and to order the Registrar to register the sectional plan and extend the sectional title register. The scheme was developed to take place in eight phases. Phases one and two were flats and garages that were sold together as a section.⁶⁰⁴ With the implementation of phases three and four the developer decided to separate the flat and garage and sell it as two units. The Registrar refused to register it as such. The developer pleaded "changed circumstances" relying on section 25(13) as a reason for the deviation of the original plan. The changed circumstances argued by the applicant were "changes in the current property market".⁶⁰⁵ The changed plans that now indicate garages, as further sections, was argued to be a "mere technicality"⁶⁰⁶ and compelled an amendment of the participation quota schedule as well.⁶⁰⁷ The court referred to *Knoetze v Saddlewood*⁶⁰⁸ where the term "changed circumstances" was held to be:

... wide enough to embrace changed market conditions having regard to the commercial context of the legislation and further that it was not confined to a physical state of affairs.

The court also found that:

Where, however, it is not practical to do so (i.e. complete the building with strict adherence to the initial plan) because of the existence of "changed circumstances" the Court may, on application by a developer, condone non-compliance with the provisions of the Act.⁶⁰⁹

⁶⁰³ Western Cape High Court (unreported) case number 20645/08 (23 March 2009) (hereafter the *Dolphin Whisper* case).

⁶⁰⁴ Except that this extension was done in terms of s 24(6) of the *STA*.

⁶⁰⁵ *Dolphin Whisper* at [33].

⁶⁰⁶ *Dolphin Whisper* at [37].

⁶⁰⁷ *Dolphin Whisper* at [36].

⁶⁰⁸ 2001 1 All SA 42 (SE) in *Dolphin Whisper* at [39].

⁶⁰⁹ *Dolphin Whisper* at [42].

The court found that there was an onus on the developer to indicate what constituted the so-called changed circumstances that he was relying on. However, as no evidence of such was provided in this case⁶¹⁰ and no factual circumstances were described,⁶¹¹ the application was dismissed.⁶¹² This decision, and especially the part where the court found "on application by a developer", lead to the acceptance of RCR 2/2009. The query was whether the case of *Dolphin Whisper* in effect nullified RCR 10/2005 and RCR 4/1994 where the practice of examiners "not to establish whether the right of extension is a deviation from the plans lodged in terms of section 25(13), should be discontinued". RCR 2/2009 was accepted which indicates:

Where the registrar of deeds determines that there is a deviation from the section 25(2) plans, such a deviation must be sanctioned by an order of court.⁶¹³

This placed a huge burden on developers to have all changed circumstances sanctioned by a court order. Eventually it lead to *PCL Trust v Registrateur van Aktes*.⁶¹⁴ This was a kind of "class action" where declaratory orders were sought regarding the strict compliance decreed by the Act and the reliance of the Registrar of Deeds on *Dolphin Whisper*.⁶¹⁵ The court referred to RCR 2/2009 following *Dolphin Whisper* where any deviation from the sectional plan that was registered with the opening of the sectional title register, should be sanctioned by a court order.⁶¹⁶ However, in the case at hand, the court found that the *STA* did not specifically require such a court order for registration to take place. Neither did the *STA* place a burden on the Registrar of Deeds to either approve or deny sectional title plans. The court clarified the position that the obligation

⁶¹⁰ *Dolphin Whisper* at [47].

⁶¹¹ *Dolphin Whisper* at [48].

⁶¹² *Dolphin Whisper* at [50].

⁶¹³ This resolution lead to a lively discussion on the practitioner's website Ghost Digest. Refer to <http://www.ghostdigest.co.za/articles/total-recall/52434>, <http://www.ghostdigest.co.za/articles/total-recall-a-response-1/53602>, <http://www.ghostdigest.co.za/articles/total-recall-a-response-2/53747>, <http://www.ghostdigest.co.za/articles/total-recall-a-response-3/53767> and <http://www.ghostdigest.co.za/articles/total-recall-a-response-4/53769>.

⁶¹⁴ 2011 3 SA 342 (O) (hereafter *PCL Trust*).

⁶¹⁵ Refer to para 5.3.3.1.

⁶¹⁶ Paragraph 345 of *PCL Trust*.

to determine whether any deviations from the plan exist, did not rest on the Registrar of deeds, but on the Surveyor General instead.⁶¹⁷ The court indicated that the only possible burden in this regard that may rest on the Registrar of Deeds would be in terms of section 25(11) which determines that the Registrar should register the sectional plan of extension "(w)hen the requirements of this section and of any other law has been complied with". This should, however, be interpreted in light of the duties of the Registrar, namely to ensure that a reliable and credible register of registrable rights are held. The court interpreted this duty to entail that the registrar should ensure that all the formal requirements for such a registration are in place. The court found that this duty did not entail an investigation or adjudication of the lawfulness of the underlying transaction that lead to the request for registration. The court indicated further that section 25(13) made provision for legal relief of an owner who was prejudiced by the non-compliance with the registered sectional plan. The court held that there was no stipulation that required the developer to apply to court for pre- sanctioning a diversion from the plan. The court, therefore, deviated from *Dolphin Whisper* in this regard. The court amplified this decision by indicating that strict compliance with this decision in *Dolphin Whisper* will place a "crippling effect" on the whole economic sector involved that could not have been the intention of the legislator. The court further elucidated that the plans that were deviated from, should still comply with building regulations and still had to be approved by the Surveyor General and the local authority. Only existing owners may be influenced by such deviation subject to the relief as provided for in terms of section 25(13).⁶¹⁸ The court further concluded that there was no onus on the Registrar to compare the plans in order to determine whether any deviation existed. Such an onus would rather be within the ambit of the duties of the Surveyor General or the current owners who may be influenced by it. RCR 12/2011 proceeded to amend RCR 2/2009 and confirmed that "it is not the duty of a registrar of deeds to enforce compliance with regard

⁶¹⁷ Paragraph 346 of *PCL Trust*.

⁶¹⁸ At 345 of *PCL Trust*.

to deviations" as long as the extension is still within the "physical boundaries" of the reserved right.

5.3.3.2 The right is granted for a specific period of time

The developer has to indicate at the time when the right of extension is reserved, the period of time within the further extensions of the scheme should take place. As these documents are registered in the deeds registry, the developer must comply strictly with these provisions, also regarding the provision of the time period allowed to complete the additional extension. As indicated above, in *SP & C Catering*, an application was made to the High Court to extend the time period within which the developer was allowed to complete the proposed development of additional phases of a sectional title scheme. This right by the developer was reserved upon the opening of the sectional title scheme. The application was opposed by 16 unit owners. The High Court dismissed the application on the ground that it did not have the jurisdiction to grant an extension of the time period. However, the applicant was granted leave to petition the SCA. The SCA investigated the provisions of section 25(1) of the *STA* which provides that the developer should at the time of the reservation of the right stipulate the time period that he will need to complete the phased development. No time limit was indicated in the *STA* in relation to this period. Therefore, the developer was "at liberty to fix the period to meet his own requirements and future plans".⁶¹⁹ In the initial application to the court of first instance the application was based on the so-called "inherent" jurisdiction of the High Court since the right was one to "immovable property".⁶²⁰

Subsequently, the developer's counsel argued that section 25(6), which provides for the vesting of the right of extension in the body corporate after the proposed time has lapsed, should not be "treated as a 'guillotine' which terminated the reserved right *automatically* on the expiry of the ten year

⁶¹⁹ *SP & C Catering* at 105 [2].

⁶²⁰ *SP & C Catering* at 106 [4].

period".⁶²¹ They argued that such an interpretation of section 25(6) would be classified as a "deprivation of property" in violation of section 25(1) of the *Constitution*.⁶²² However, the court rejected this contention based on the fact that the developer himself decided upon the time frame.⁶²³

The court ultimately found that the High Court decision was correct and that the court has no statutory or other authorisation to extend the time frame for the developer to complete the proposed phased development. Therefore, the developer's right will lapse when the time indicated at the reservation lapses.⁶²⁴ Furthermore it indicates that the right lapses automatically upon the expiration of time and that the initial time period is decided by the developer. The developer then has as only one option, to enter into an agreement with the body corporate and obtain the written consent of all owners and sectional mortgagees.⁶²⁵

However, this right is not perpetual. In *SP & C Catering* the court rejected the applicability of this characteristic of a praedial servitude to a developer's right of extension.⁶²⁶ It was held in this case that the right automatically expires at the end of the time for which it was reserved. In *Torgos* the court held that should the time have lapsed the right automatically vests in the body corporate. As an asset in the estate of the developer it will be ceded to the body corporate upon expiration of time and the liquidator should cancel all bonds on it. Van der Merwe argues that if the right lapses and vests in the body corporate it:

⁶²¹ *SP & C Catering* at 107 [7].

⁶²² *SP & C Catering* at 107 [7]; refer 3.2.2.1.

⁶²³ *SP & C Catering* at 108 [9].

⁶²⁴ In this case the developer also argued that the court will have the jurisdiction to grant an extension of the time period based on s 25(13) which refer to 'changed circumstances' that should be regarded by the court. However, the SCA rejected this argument and opted not to interpret s 25(13) so widely as to make provision for its application in this matter.

⁶²⁵ Pienaar *Sectional Titles* 262.

⁶²⁶ *SP & C Catering* at 108[8].

... is not that particular right as defined in the paperwork lodged by the developer for this purpose. It is an abstract right to extend the scheme which means that the body corporate must start the section 25 process again.⁶²⁷

The developer may extend the duration of the right, after it has lapsed. By the adoption of a unanimous resolution of the body corporate coupled with the written consent of all bondholders.⁶²⁸ However, Van der Merwe is not convinced that this will really assist the developer. He argues that it may be difficult for the developer to obtain a unanimous resolution as the body corporate stand to obtain the right after it has lapsed.⁶²⁹ The registrar of Deeds may cancel the right by means of an endorsement made on the sectional plan. Should a body corporate be in place already, the notarial deed of cancellation will have to be a bilateral action including the body corporate.⁶³⁰

5.3.3.3 Developer may transfer the right

The developer may transfer the right by means of a notarial deed of session in respect of the whole, a portion or a share of such a right.⁶³¹ It may only be ceded for the remainder of the term for which it was granted.⁶³²

In *Torgos (Pty) Ltd v Body Corporate of Anchors Aweigh* the developer was a close corporation that was liquidated. The rights and obligations of the close corporation vested in the liquidator (the second respondent). One of the rights that vested in the liquidator was the right of extension in terms of section 25 of the *STA*. The right of extension was registered for 5 years and lapsed in 2001.⁶³³ The body corporate entered into an agreement with the applicant in terms of which the right of extension was ceded to the applicant. The liquidator would cancel all bonds on the property, transfer all sectional units to the body corporate and pay a certain amount of money as settlement of any debt owed

⁶²⁷ Van der Merwe *Sectional Titles* 12-47.

⁶²⁸ Van der Merwe *Sectional Titles* 12-20.

⁶²⁹ Van der Merwe *Sectional Titles* 12-20.

⁶³⁰ Van der Merwe *Sectional Titles* 12-43; s 15B(1)(d) of the *STA*.

⁶³¹ Van der Merwe 12-26(13).

⁶³² Van der Merwe *Sectional Titles* 12-26(11).

⁶³³ *Torgos (Pty) Ltd v Body Corporate of Anchors Aweigh* 2006 3 SA 369 (W) at para [21].

to the body corporate.⁶³⁴ However, the validity of the agreement between the body corporate and the purchaser came under scrutiny. Upon investigation of the facts, the court came to the conclusion that the persons who entered into the agreement with the applicant on behalf of the body corporate was not properly authorised to do so.⁶³⁵ However, upon the application of the *Turquand* rule⁶³⁶ the court found that the applicant acted in good faith and had, therefore, no knowledge as to the missing authorisation of the actions by the parties who negotiated on behalf of the body corporate. The court found that the body corporate is bound by the act performed by the trustees "within the scope of their actual authority".⁶³⁷ Delport questions the application of the *Turquand* rule in this respect. Although he agrees with the decision arrived by the court, he finds the application of the *Turquand* rule in this instance confusing.⁶³⁸ Delport argues that the court did not interpret the *Turquand* rule correctly. It does not provide that "third parties dealing with the directors may assume that those statutory requirements have in fact been observed".⁶³⁹ Therefore, if statutory prerequisites (in this case as provided for in the *STA*) are in place, the *Turquand* rule cannot be used to "negate the provisions".⁶⁴⁰ However, of more interest to this study is the interpretation of section 25(6) of the *STA* which determines:

(T)he body corporate shall only exercise or alienate or transfer such right ...

The use of "alienate" or "transfer" was interpreted by the court in this case. The court found that "alienate" meant the "taking away of the right through sale or cession", whereas "transfer" entails the "formal act required by statute", for instance the registration of the right. The court found that despite this

⁶³⁴ *Torgos (Pty) Ltd v Body Corporate of Anchors Aweigh* 2006 3 SA 369 (W) at para [22].

⁶³⁵ *Torgos (Pty) Ltd v Body Corporate of Anchors Aweigh* 2006 3 SA 369 (W) at para [52].

⁶³⁶ *Torgos (Pty) Ltd v Body Corporate of Anchors Aweigh* 2006 3 SA 369 (W) at para [61]. The *Turquand* rule is developed in the *Royal British Bank v Turquand* (1856) 6 E&B 327. It was confirmed in *The Mine Workers Union v Prinsloo* 1948 3 SA 831 (A). In the latter it was held that "a person dealing with a corporation is bound by the terms of the statutes or constitution governing its constitutional power, but that the necessary acts of internal management of the corporation are presumed to have been performed". Refer to Claassen 2015 www.mylexisnexus.co.za/Index.aspx.

⁶³⁷ *Torgos (Pty) Ltd v Body Corporate of Anchors Aweigh* 2006 3 SA 369 (W) at para [65].

⁶³⁸ Delport 2006 *Obiter* 574.

⁶³⁹ Delport 2006 *Obiter* 575.

⁶⁴⁰ Delport 2006 *Obiter* 576.

distinction the written consent is needed for both actions. The actions taken without consent could not later be ratified.⁶⁴¹ Should the body corporate act as the developer the case of *Torgos* held that consent from the body corporate for both the "alienation" and "transfer" of the right should be obtained.⁶⁴²

The developer may extend the time of the right after it has lapsed with a unanimous resolution of the body corporate as well as all mortgagees.⁶⁴³ However, Van der Merwe is not convinced that this will really assist the developer. He argues that it may be difficult for the developer to obtain a unanimous resolution as the body corporate stand to obtain the right after it has lapsed.⁶⁴⁴ The Registrar of Deeds may cancel the right by means of an endorsement made on the sectional plan. Should a body corporate be in place already, the notarial deed of cancellation will have to be a bilateral action including the body corporate.⁶⁴⁵

5.3.3.4 The developer may divide the right

The developer may also divide the right. He has the option to transfer the right of extension in respect of a portion of land. Therefore, the developer may cede portions of the right of extension to more than one smaller developer. In terms of the *Sectional Titles Amendment Act* 6 of 2006⁶⁴⁶ the developer may also obtain certificates of registered real right and apply right from the start for separate certificates for each defined portion.⁶⁴⁷ The option to divide the right extension in respect of a portion of land now opens the possibility to alienate a share in a specific portion of land only to a purchaser⁶⁴⁸ as long as these

⁶⁴¹ Van der Merwe *Sectional Titles* 12-28.

⁶⁴² Van der Merwe *Sectional Titles* 12-28.

⁶⁴³ See s 8(b)(1) of the *Sectional Titles Amendment Act* 11 of 2010 as well as Van der Merwe *Sectional Titles* 12-20.

⁶⁴⁴ Van der Merwe *Sectional Titles* 12-20.

⁶⁴⁵ Van der Merwe *Sectional Titles* 12-43 and s 15B(1)(d).

⁶⁴⁶ *Sectional Titles Amendment Act* 6 of 2006. S 2 of the 2006 Act amended s 15B(5) of the *STA*.

⁶⁴⁷ Van der Merwe *Sectional Titles* 12-26(14).

⁶⁴⁸ Van der Merwe *Sectional Titles* 12-26(15). See also Van der Merwe *Sectional Titles* 12-26(12).

portions are clearly identified on the sectional plan of extension.⁶⁴⁹ This position allows for many developers which will lessen the financial burden on one developer as the burden and responsibilities are spread. In terms of the *Sectional Titles Amendment Act 11 of 2010*⁶⁵⁰, the developer from the start, may apply for separate certificates of real right to extension, namely a certificate for each defined portion. This results in the option to obtain separate certificates for each portion of the right. Consequently, developers now have a:

- choice of either separate certificates for each portion of the right simultaneously, with the reservation of the right on the opening of the sectional title register.
- or obtain one certificate for the whole of the right and if subdivision of the right is required, to obtain separate certificates and cede from the parent title of the right.⁶⁵¹

According to Van der Merwe the provision of several certificates in respect of the right to extension will now allow so called "plot and plan" developments. Van der Merwe argues convincingly that the inclusion of the plural form "certificates" indicate that such a right may be divided. This entails that the developer will be allowed to divide his real right of extension into shares or even, according to Van der Merwe, into "various rights pertaining to delineated portions of the common property or dividing his real right of exclusive use into undivided shares". However, as Van der Merwe correctly indicates this leads to dogmatic concerns of a fractionalisation of what is already a derivative right.⁶⁵² This will, in practice, allow the developer to sell off the plan of a section as well as a portion of the section 25 right that allows for the development of that section. The developer will, therefore, instead of selling a section to the purchaser, reserve the right to extension and then proceed to alienate a share of extension to the purchaser. However, this share is undivided. This will limit the financial responsibility of the developer and keep the purchase price low.

⁶⁴⁹ Van der Merwe *Sectional Titles* 12-26(16).

⁶⁵⁰ *Sectional Titles Amendment Act 11 of 2010*.

⁶⁵¹ Section 3 of the *Sectional Titles Amendment Act 11 of 2010*.

⁶⁵² Van der Merwe *2011 Stell LR* 122.

The siting of the different portions (on which the purchaser is allowed to build) must be clearly indicated on the sectional plan. The purchaser receives his share of the right of extension through cession and then mortgage it. Although this provision allows for more economical developments the legal implications and the legal position of the parties should something within the transaction go wrong, is by no means clarified.

5.3.3.5 The right does not include the right of use and enjoyment of the fruits of the property

Van der Merwe succinctly argues that this right is not a personal servitude of usufruct. He bases this argument on the fact that the portion of the common property over which the right is reserved remains under the management and administration of the body corporate. Van der Merwe contends that this right differs from the rights pertaining to exclusive use areas which may be burdened by a usufruct. This right is only mortgageable and alienable.⁶⁵³ In *Body Corporate of Savannah Park v Brainwave Projects 1147 CC*⁶⁵⁴ the developer's right to extend the sectional title scheme in terms of section 25(1) of the *STA* came under renewed scrutiny by the SCA, more specifically, whether the right of the developer to extend the scheme included the entitlement of use and enjoyment and benefit from the fruits of the property. D (developer), the first respondent, concluded a lease agreement with the company (V), (the second respondent) in terms of which V could erect a cellular telephone mast on a specified portion of the developer's property upon payment of a rental amount. A section 25 right was reserved over the portion of the common property to use for phased development that included the part of the property on which the mast was built.⁶⁵⁵ The appellant (the body corporate) argued that in terms of section 25(4) of the *STA*, the developer's right of extension did not entitle him to the exclusive use and enjoyment, of for instance fruits of that specified part of the common property. This was akin to having no usufructuary rights over

⁶⁵³ Van der Merwe *Sectional Titles* 12-42.

⁶⁵⁴ 2012 1 All SA 367 SCA.

⁶⁵⁵ *Body Corporate of Savannah v Brainwave Projects 1147 CC* 2012 1 All SA 367 SCA at [2].

the common property until or unless the relevant plan was registered and the unit containing the mast was included in the sectional title register and held out as personal property of the developer.⁶⁵⁶

As it was not registered as such, that specified part still formed part of the common property and was under the control and administration of the body corporate to act with in the interest of its members. Furthermore, the body corporate argued that the developer could not lease out the property nor receive an income from the lease of the property without their consent. They, therefore, requested an order that he pay over all the profits from the lease.⁶⁵⁷ The developer, however, argued that his right of extension entitled him not merely to mortgage and alienate the right, but also to lease the land over which the right is reserved. This argument was upheld by the court *a quo*.⁶⁵⁸ On appeal the court found that the narrow question which had to be answered in this case was whether the right of extension included a usufruct within its ambit, which necessitated a consideration of the nature of the right.

The court, confirmed on registration the right registered became a limited real right in terms of section 25(4)(a) that was capable of being mortgaged as well as transferred through notarial cession.⁶⁵⁹ In determining whether the developer's right of extension entitled him to the proceeds of a lease on the common property, the court found that the developer did not have a usufruct (a personal servitude) over that portion of the common property. The court also indicated that the description of the right as a right to immovable property for all purposes, did not include the leasing of a unit (as would be the case of a usufruct) or give the developer a right to exploit the unit commercially before completion.⁶⁶⁰ The court then referred to the amendment of the *STA* in 2010 that indicated the developer had the right of extension by the addition of the rights of exclusive use only of the common property. The court decided that this

⁶⁵⁶ *Body Corporate of Savannah v Brainwave Projects 1147 CC 2012 1 All SA 367 SCA at [7].*

⁶⁵⁷ *Body Corporate of Savannah v Brainwave Projects 1147 CC 2012 1 All SA 367 SCA at [7].*

⁶⁵⁸ *Body Corporate of Savannah v Brainwave Projects 1147 CC 2012 1 All SA 367 SCA at [8].*

⁶⁵⁹ *Body Corporate of Savannah v Brainwave Projects 1147 CC 2012 1 All SA 367 SCA at [9].*

⁶⁶⁰ *Body Corporate of Savannah v Brainwave Projects 1147 CC 2012 1 All SA 367 SCA at [13].*

was an indication of a change of intention on the part of the legislature and came to this conclusion by inferring the purpose of this amendment was "to allow the developer to exercise the exclusive use right of such a section of the common property over which the extension right was reserved, but only for the limited period mentioned".⁶⁶¹ Finally, it concluded that this amendment by the legislator indicated a strong intention NOT to have an unlimited right of use for the developer before such an amendment was made. The court upheld the appeal and substituted the order of the High Court. The court directed the developer to disclose all income received from the lease transaction since the establishment of the body corporate and pay it as well as interest over to the body corporate and refrain from entering into similar agreements in future.⁶⁶²

In his discussion of this case, Van der Merwe referred to the court's interpretation of this 2010 amendment. He argues convincingly, that the reasoning by the court is not justified mainly because the aim of the amendment was to provide the developer with the right to **grant** exclusive use rights to owners, and not the right to **exercise** exclusive use rights over it. Although, through unconvincing reasoning, the court came to the correct decision, namely that the developer's right to extension does not include the right of use and the enjoyment of fruits of the property. Furthermore, the court unambiguously stated that the developer's right is a limited real right that may be transferred and mortgaged.⁶⁶³

5.3.4 Duties of the developer

Besides the duties as indicated in previous chapters; to have the right registered as per the *STA* the developer; also has additional duties. In terms of the *Local Government Property Rates Act*,⁶⁶⁴ the developer should make a reasonable contribution to the rates and taxes owed to the municipality. Although only

⁶⁶¹ *Body Corporate of Savannah v Brainwave Projects 1147 CC 2012 1 All SA 367 SCA* at [14].

⁶⁶² *Body Corporate of Savannah v Brainwave Projects 1147 CC and Others 2012 1 All SA 367 SCA* at [19].

⁶⁶³ Van der Merwe *Sectional Titles* 12-42.

⁶⁶⁴ Act 6 of 2004; Van der Merwe *Sectional Titles* 12-22.

sections and not the right of extension itself is currently taxed by the municipality, the body corporate has the function to require in terms of section 3(1)(d) of the *STSMA* from the developer who is entitled to extend the scheme in terms of a right reserved in section 25(1) of the *STA*, to make such reasonable contribution to the funds as may be necessary to defray the cost of rates and taxes, insurance and maintenance of the part or parts of the common property affected by the reservation, including a contribution for the provision of electricity and water and other expenses and costs in respect of and attributable to the relevant part or parts. He needs further to obtain a rates clearance certificate for cession of the right as it is included in the definition of "property" in the act.⁶⁶⁵ The *STSMA* requires a certificate of a conveyancer that moneys payable to the body corporate is up to date, however, no such certificate is needed for a rates clearance.⁶⁶⁶ The developer should also disclose the right of extension to each purchaser otherwise the agreement of sale may be voidable at the choice of the purchaser.

5.3.5 Conclusion

Although statutorily prescribed, case law (by often applying common law principles) has brought a clearer understanding of certain aspects regarding the rights of the developer (or the body corporate) who has reserved a right of extension of the scheme. From the abovementioned discussions, the following conclusions can be drawn:

It is a *sui generis*, limited real right created by legislation with its own unique and peculiar characteristics. It does not fit into the traditional classification of either a praedial or personal servitude, although it does show some similarities with both. It is only granted for a specific period of time and should be exercised strictly with reference to the plans that were submitted at the time of reservation of the right. Should this be "impracticable" due to "changed circumstances" the developer may make changes. Any aggrieved owner or

⁶⁶⁵ Van der Merwe *Sectional Titles* 12-26(11).

⁶⁶⁶ Van der Merwe *Sectional Titles* 12-26(12); s 8(g) of the *STSMA* amended s 25(4A) of the *STA*.

other right holder may approach the court for relief in this regard. The lapsing of the time for which the right exists cannot be extended by the court. However, this does not boil down to a deprivation of the right in terms of section 25 of the *Constitution*. The developer may also mortgage the right, divide the right and transfer the right. Any transfer will only be for the remainder of the period that the right was initially reserved for. However, although the developer has these extensive entitlements, this does not allow him to benefit from the fruits of the right in case of a rental agreement. Should the right of the developer lapse, it vests in the body corporate.

5.4 Exclusive use areas in terms of section 27(1) of the STA and section 10(7) and (8) of the STSMA

5.4.1 Introduction

The establishment, lapsing and terminating of exclusive use rights as provided for by legislation, have been explained in the previous chapter. In that chapter, uncertainties that still exist in the practical implementation of these rights have been pointed out. Consequently, these uncertainties will be enlightened by investigating case law and the opinion of academic writers.

The following uncertainties were identified regarding exclusive use areas in the previous chapter:

- the legal nature of the right;
- the entitlements and duties of the holder of the right;
- the legal nature of section 10(7) and (8) rights.

5.4.2 Legal nature of the right

5.4.2.1 Classification as limited real right

As with the developer's right of extension in terms of section 25 of the *STA* the main problem regarding an exclusive use right being termed a limited real right

is according to Pienaar,⁶⁶⁷ the fact that the common law prescribed that limited real rights are supposed to be exercised over the property of another person. In this instance, the right of exclusive use is granted over the common property of which the owner is a bound co-owner of an undivided share, and it is a common law principle that an owner cannot exercise a limited real right over his own property. As indicated in a previous chapter⁶⁶⁸ newly created limited real rights are usually categorised as either *ius in re propria* or *ius in re aliena*. The reason for this is that different consequences are attached to the different categories. It may also have an effect on the selling price of a unit, the amount payable on levies, the marketability of the scheme and the rights and duties of the recipients of the rights.⁶⁶⁹ However, according to Mostert the structure of sectional title law does not provide for exclusive use rights to fall in either category. She bases her argument on the following:

- The rights of exclusive use do not confer the same extensive entitlements as *dominium* would.
- The rights are also not specifically over someone else's thing as the holder of the rights is also a co-owner of the common property over which the right is exercised.⁶⁷⁰

Mostert, therefore, argues that the *STA* created a "statutory real right *sui generis*".⁶⁷¹ One of the implications of rights of exclusive use being categorised as limited real rights is alluded to by Pienaar. He indicates that the registration of the right of exclusive use against all the bound co-owners (binding all the bound co-owners of the common property) would be "contrary to normal deeds registration procedure". He, therefore, proposes that the right should be classified as a statutory limited real right as it cannot be defined as a form of

⁶⁶⁷ Pienaar *Sectional Titles* 77.

⁶⁶⁸ Refer to para 2.1.

⁶⁶⁹ Mostert 2002 *Stell LR* 266.

⁶⁷⁰ Mostert refers to the fact that this is in contravention of the maxim *nemini res sua servit*. Van der Merwe *Sakereg* 462.

⁶⁷¹ Mostert 2002 *Stell LR* 277.

dominium.⁶⁷² This right is an exception to the common law rule that a limited real right may only be obtained over the property of another person.

The question as to the type of limited real right created, was addressed, especially in the period of the so-called "de-linking", when an exclusive use area was not necessarily linked to a specific section from the start.⁶⁷³ Rossouw and Van Huyssteen argued that the right that was created was a praedial servitude.⁶⁷⁴ Christie, however argues that these rights are "*quasi*-personal servitudes" that "encompass all the features of personal servitudes".⁶⁷⁵ Kilbourn goes further by likening the right to a usufruct. She bases her argument on the fact that the holder of the exclusive use right, does not have ownership of the exclusive use area, but that another person holds bare *dominium* in the property, although all the rights of use, enjoyment and alienation associated with ownership are at the disposal of the right holder.⁶⁷⁶ This argument is flawed, however, as bare dominium is not held by someone else. Her argument ignores the fact that the right holder of the exclusive use right, is also a co-owner in bound co-ownership of the common property. This is exactly what makes the right so distinct. Although a limited real right, it is held partly over one's property. Van der Merwe argues that these rights are neither praedial nor personal in nature, "but should be classified in the same manner as mineral rights, entitling the holder to use the (common) property of another in a specified manner".⁶⁷⁷ He further indicates that the right is "a new kind of limited real right introduced by the *STA*". He maintains that the land is in some instances an accessory part of a section, and for other purposes isolated from the section with the result that other real rights may be created against the land in favour of the section.⁶⁷⁸ This statement, however, is problematic as the land

⁶⁷² Pienaar *Sectional Titles* 78.

⁶⁷³ Refer to para 4.6.2.

⁶⁷⁴ Rossouw and Van Huyssteen 1995 *De Rebus* 109.

⁶⁷⁵ Christie 2005 *De Rebus* 22.

⁶⁷⁶ Kilbourn 2008 *Property Law Digest* 13.

⁶⁷⁷ Van der Merwe *Sectional Titles* 11-55 in endnote 288.

⁶⁷⁸ Van der Merwe *Sectional Titles* 11-58.

itself is not the accessory thing. An incorporeal thing, namely the undivided share in the common property, is the accessory thing.⁶⁷⁹

It is, therefore, quite clear that this right, although classified as a limited real right, does not display the characteristics usually associated with limited real rights. In *Body Corporate of the Solidatus Scheme No SS 23/90 v De Waal*⁶⁸⁰ the court attempted to describe the "novel concept of exclusive use areas" and found that:

These rights are so closely akin to full ownership as to be virtually indistinguishable...they can be sold and transferred, given as security for a loan and protected presumably by interdict from encroachment.

Maree criticises the court's interpretation of the right as "closely akin to full ownership". He draws a distinction between exclusive use rights and ownership on the following grounds:

- the mechanism of transfer differs;
- it is not held under a title deed but created in the rules;
- it is capable of being cancelled;
- the duty to maintain rests on the body corporate;
- there is a more flexible calculation of the levies collected; and
- the structural manner may be altered without written consent of the trustees.⁶⁸¹

From the abovementioned debate, it is clear that exclusive use rights do not fit in the mould of a personal servitude, a praedial servitude, or ownership. This is, therefore, indeed a "novel concept" as indicated in *Solidatus* and cannot be defined in common law terms. It is a *sui generis* limited real right created by statute.

⁶⁷⁹ Refer to para 3.3.1.2.

⁶⁸⁰ 1997 3 All SA 91 (T).

⁶⁸¹ Maree 2002b *De Rebus* 54.

5.4.2.2 The determination of the right as limited real right

It is not always clear from the outset, especially in the first transactions after the opening of the sectional title scheme, whether the rights created in the sectional title scheme are limited real rights, or exclusive use rights in terms of section 10(7) and 10(8) of the *STSM*A. This specific issue came under scrutiny in *KMatt Properties (Pty) Ltd v Sandton Square Portion 8 (Pty) Ltd*.⁶⁸²

In this case the applicant bought a sectional title unit comprising a section, an undivided share in the common property and the exclusive use of two parking bays.⁶⁸³ The applicant contended that the developer should have reserved the right of exclusive use to the parking bays in terms of section 27(1) at the time of the sectional title registration and afterward should have ceded the exclusive use rights to the applicant in terms of a unilateral notarial deed of cession. The applicant consequently brought the application to compel the developer to attend to this.⁶⁸⁴ However, the first respondent (the developer) argued that the rights of the applicant was granted in terms of section the previous section 27A of the *STA* and, therefore, need not be registered.⁶⁸⁵ Consequently the court had to determine whether the exclusive use rights of the parking bays were granted in terms of sections 27(1) or the previous section 27A of the *STA*. The answer to this question required the interpretation of the the agreement between the parties.

The court indicated that:

The applicants rights and the first respondent's corresponding obligations in terms of the agreement accordingly entails an interpretation of the relevant clauses of the agreement against the legislative background of the applicable provisions of the Act⁶⁸⁶

⁶⁸² 2007 5 SA 475 (W) (hereafter *KMatt*). This right may also be fractionalized in undivided shares to more than one owner. Refer to Van der Merwe *Sectional Titles* 11-34.

⁶⁸³ *KMatt* at [1-2].

⁶⁸⁴ *KMatt* at [3].

⁶⁸⁵ *KMatt* at [5].

⁶⁸⁶ *KMatt* at [6].

Upon interpreting the relative sections of the *STA* the court defined what ownership of the common property that is transferred entails as follows:

Ownership of the undivided share in the common property is, however, transferred subject to rights of exclusive use of parts of the common property which may be reserved to other owners of other sections.⁶⁸⁷

The court further interpreted the reservation of exclusive use rights to "represent a distinct transaction" either in terms of section 27(1) or the previous section 27A of the *STA*.⁶⁸⁸ The court found that the exclusive use right in terms of section 27(1) occurs by notarial unilateral deed of cession. However, the rights reserved in terms of section 27A (now in terms of section 10(7) and (8) of the *STSMA*) are:

... reserved to the owner of a particular section in terms of management rules and are, therefore, automatically transferred along with the relevant section.⁶⁸⁹

This exclusive use right in terms of section 10(7) and (8) of the *STSMA* should not be deemed a limited real right and cannot form the object of a separate mortgage bond. However, it:

... attaches to the unit to which it has been allocated and, therefore, forms an integral part of the security of the holder of the mortgage bond registered over the unit.⁶⁹⁰✓

The court explained that the reservation of the right in the management rules provide "full protection" to the holder of such a right, as its holder has the right of veto, should the right come under threat.⁶⁹¹ After listing the relevant clauses in the agreement the court found that the exclusive use areas created, "in terms of the agreement", was in terms of section the previous section 27A of the *STA* and not in terms of section 27(1). The main reason for this is that the

⁶⁸⁷ *KMatt* at [19.1].

⁶⁸⁸ *KMatt* at [19.2].

⁶⁸⁹ *KMatt* at [19.3].

⁶⁹⁰ *KMatt* at [20].

⁶⁹¹ *KMatt* at [21-22].

agreement indicated that the "provisions ...are to be provided for and incorporated in terms of the management rules".⁶⁹²

Although the final decision by the court resulted in the correct outcome, the decision by the court to interpret the agreement between the parties, to determine whether a limited real right or a personal right has been created, is confusing. This leads to an assumption that the parties can come to some kind of agreement, as to whether the purported exclusive use rights should be established as registered exclusive use areas in terms of section 27(1) of the *STA* or as rule-based exclusive use areas in terms of the previous section 27A (now section 10(7) and (8) of the *STSMA*). Should the exclusive use right be created in terms of section 27(1), it will be registered as a limited real right. Limited real rights on immovable property are only created by registration. However, should it be decided to create exclusive use rights in terms of the previous section 27A, a personal right is created by the adoption of the unanimous resolution and the subsequent contract. The developer decides from the outset (when the application for the opening of the sectional title is lodged) in which format the exclusive use rights will be created. Therefore, the contract between the developer and the buyer is a confirmation of the unanimous resolution from which certain rights will flow. The agreement between the developer and the buyer is, therefore, just a confirmation of the intention of the developer, (that is statutorily provided for in terms of section 27 and section 27A), to create either the limited real right, or the personal right. Secondly, the premise that a contract may later change the nature of a personal right to that of a real right is impossible in South African law.⁶⁹³

With the statutory creation of the limited real right, the relevance and application of the subtraction test, to determine whether a real right or a personal right is created, becomes moot. However, it is important on a dogmatic level to keep the common law principles of property law in mind. It is, therefore, crucial that the legislature does not create limited real rights that

⁶⁹² *KMatt* at [36.13-36.14].

⁶⁹³ Sonnekus 2015 *TSAR* 409.

completely disregard the basic principles set out in the subtraction test haphazardly. Sonnekus does not agree with this application of the subtraction test in a similar matter.⁶⁹⁴ Legal certainty can only be obtained if established legal principles are applied.⁶⁹⁵ He argues that the haphazard establishment of limited real rights, contrary to property law principles, leads to legal uncertainty. He warns that the creation of such a neologism at the discretion of and upon the consensus of the parties should be guarded against. He maintains that, should this practice be allowed, the effort and trouble of creating rights in the *STA* may be of no value.⁶⁹⁶ A similar position is held by Wallis when addressing certainty in commercial contracts. He contends that:

... to overturn well-established rules affecting commercial matters in summary fashion, without input from the parties most affected thereby, promotes uncertainty and renders the law unpredictable.⁶⁹⁷

Nevertheless, it seems as if in the sphere of exclusive use rights, the basic principles of the subtraction test were applied. The first part of the subtraction test is adhered to, namely that the right is created with the intention to bind not only the present (surrounding) owners, but also their successors in title. The purpose of exclusive use areas is to serve the specific section for a prolonged period of time, even though the exclusive use area is not usually registered against the specific section that it serves.⁶⁹⁸ The second part of the test is also met, namely the nature of the right or condition must be such, that the registration of it results in a "subtraction from the dominium" of the land against which it is registered. As Mostert correctly argues:

... Exclusive use rights do, however, result in a diminution of the general use and enjoyment of all the joint owners with regard to the common property.⁶⁹⁹

⁶⁹⁴ Refer to para 2.5.3.

⁶⁹⁵ Sonnekus 2015 *TSAR* 405.

⁶⁹⁶ Sonnekus 2015 *TSAR* 409. Also refer to para 2.5.3.

⁶⁹⁷ Wallis "Commercial certainty and constitutionalism" 21.

⁶⁹⁸ Refer to Christie's suggestion for a better procedure in para 5.4.2.3.

⁶⁹⁹ Mostert 2002 *Stell LR* 275.

It is, therefore, clear that the creation of exclusive use rights in terms of section 27(1) as well as in terms of the previous section 27A of the *STA* is not incompatible with the principles set out in the subtraction test.

5.4.2.3 Registration as limited real right

Although section 27(1) rights are established as limited real rights by endorsement of the sectional title deed and registration of the notarial deed of cession, these rights are not always recorded against the property or the person of the owner in the deeds registry computer data base. Maree indicates that not all exclusive use areas are formally tied to a section. He gives the example that a remote parking bay may serve any section, whereas a private garden could serve only one section⁷⁰⁰ Pienaar warns that this may lead to the lengthy and expensive procedure of deed searches.⁷⁰¹ Christie suggests a solution could be to merely endorse it against the holding title of a specific section.⁷⁰² This is usually the case except for the exceptions referred to by Maree.

Unfortunately, in these circumstances where the right is not registered against a specific unit, it leaves the possibility that either the developer or an owner of more than one unit, may reserve the exclusive use area (such as a parking bay) for his personal use when selling off the unit for which the exclusive use area was initially established. This will only be possible if such an owner or developer still owns another unit in the scheme, because section 27(4)(b) provides that if an owner ceases to be an owner all exclusive use rights still registered to his name will vest in the body corporate. Consequently, as the limited real right is registered in the owner's name and not endorsed against a specific unit, there is no prohibition against such an eventuality. However, the initial intention with the creation of the exclusive use area was that it should serve a specific unit. A similar scenario is possible if the right is created and vests in the body corporate. Van der Merwe sketches the scenario that, because the exclusive use area is not linked to a specific section, something as private as a backyard

⁷⁰⁰ Maree 2002a *De Rebus* 1.

⁷⁰¹ Pienaar *Sectional Titles* 80.

⁷⁰² Christie 2005 *De Rebus* 24.

garden or parking space could be sold to the highest bidder by the body corporate. He suggests that the more sensible thing to do would be to cede a closely linked exclusive use area to the transferee against payment.⁷⁰³

Unfortunately, as this is not currently the position in terms of the *STA*. The right is sometimes erroneously not transferred to a subsequent owner, when the ownership of a specific section which the right is supposed to serve, is transferred. This has led to litigation, notably in *McKersie v SDD Developments (Western Cape) (Pty) Ltd*.⁷⁰⁴ This case dealt with an unopposed rule *nisi* on the return day seeking a declaratory order for the following:

- that the applicant is the owner of a specific exclusive use area,
- a directive to the Registrar of Deeds to register such exclusive use right in the applicant's name.⁷⁰⁵

The sectional title scheme in this case was established in 1998.⁷⁰⁶ SDD was the developer who sold a section and an exclusive use area (a parking bay) to the owner (Humphrey), from whom the applicant had bought it. The section was registered, but the right to exclusive use of the parking bay was not. However, transfer duty was paid on the full purchase price, (which was for the section and the parking bay).⁷⁰⁷ The applicant discovered this a few years later. He could not obtain transfer of the exclusive use right from Humphrey, as it was not transferred to him either.⁷⁰⁸ The exclusive use right was never transferred from the developer and, therefore, as the developer ceased to be a member of the body corporate, the right subsequently vested in the body corporate.⁷⁰⁹ The court found that the holding of an exclusive use right does not "strictly constitute ownership of immovable property". However, as the registered⁷¹⁰

⁷⁰³ Van der Merwe *Sectional Titles* 11-31.

⁷⁰⁴ 2013 5 SA 471 (WCC).

⁷⁰⁵ *McKersie v SDD Developments (Western Cape) (Pty) Ltd* 2013 5 SA 471 (WCC) at [2].

⁷⁰⁶ *McKersie v SDD Developments (Western Cape) (Pty) Ltd* 2013 5 SA 471 (WCC) at [4].

⁷⁰⁷ *McKersie v SDD Developments (Western Cape) (Pty) Ltd* 2013 5 SA 471 (WCC) at [5].

⁷⁰⁸ *McKersie v SDD Developments (Western Cape) (Pty) Ltd* 2013 5 SA 471 (WCC) at [6].

⁷⁰⁹ *McKersie v SDD Developments (Western Cape) (Pty) Ltd* 2013 5 SA 471 (WCC) at [20].

⁷¹⁰ Section 90 of the *DRA*.

right is deemed to be a right to immovable property and the *DRA*⁷¹¹ includes the holder of a real right in immovable property in its definition of "owner". This right may be deemed "ownership" in terms of section 33 of the *DRA*. This will entail that the applicant may apply to the court for the registration of the right. However, the court found that the application of section 27(1)(c) had the effect that the body corporate became owner of the parking bay after the developer ceased to be the owner of a section.⁷¹² Therefore, the body corporate should apply for a certificate of real right of exclusive use of the parking bay and then transfer it to the applicant.⁷¹³

Consequently, the court in *McKersie* found that the vesting of the right of exclusive use in the body corporate in terms of section 27(1)(c)⁷¹⁴ allows an easier procedure for a transfer of the right to the legitimate holder. This case clarified the procedure to be followed in circumstances where the right was erroneously not transferred when the transfer of the section took place. Although this has alleviated the position to a certain extent, Christie argues that since a unanimous resolution by the body corporate is needed for this transfer to take place, it may still be "time consuming and costly". He suggests further that, as exclusive use areas should be disclosed on transfer duty receipts and certificates, this may delay the matter even further. He suggests that a solution to this problem would be to treat exclusive use areas as conditions of title and that this endorsement can then be carried forward.⁷¹⁵ The right vests in the

⁷¹¹ In terms of s 27(6) of the *STA*.

⁷¹² *McKersie v SDD Developments (Western Cape) (Pty) Ltd* 2013 5 SA 471 (WCC) at [35].

⁷¹³ Van der Merwe *Sectional Titles* 11-25.

⁷¹⁴ Section 27(1)(c) indicates that "if the developer ceases to be a member of the body corporate ...any right to an exclusive use area still registered in his or her name vests in the body corporate free from any mortgage bond". The body corporate should then apply to the registrar for a certificate of registered real right of exclusive use in its favour and submit a certificate of compliance with any law dealing with vesting as per s 27(1)(d).

⁷¹⁵ Christie maintains that this is not a statutory duty clearly places on the body corporate, so it leaves the possibility of the body corporate refusing or being tardy to apply for this certificate. Christie 2005 *De Rebus* 24. However, this argument has been addressed with the 2010 amendment of the *STA*. Van der Merwe 2011 *Stell LR* 129. Maree contends that a similar duty as placed on the developer in s 27(1)(b) should also be placed on the body corporate. Maree furthermore argues that although this solution will solve the problems mentioned above, this measure is however "drastic" and "appears to ride roughshod over the rights of bond holders and the principles underlying our land registration system". He also argues that the application procedure of the body corporate for a certificate of

body corporate free from mortgage. Consequently, in such cases, the mortgagee loses his real security and will only have a personal claim against the debtor. It is, therefore, doubtful whether the exclusive use right because of such an eventuality will be considered as a proper security for the purpose of a mortgage.⁷¹⁶ Therefore, although an owner may pay more for a unit with a garage than one without one, the market value of the unit will not be a reliable reflection of the mortgage value of the unit.

The one positive aspect of the inclusion of section 27(1)(c), is that the developer could not keep an exclusive use area after he has sold the last unit, and by doing so extort money from an owner or a body corporate. Neither can a non-owner own an exclusive use area. Fortunately, the position of bond holders was also addressed by section 9(b) of the *Sectional Titles Amendment Act* 11 of 2010 that now provides in section 27(4)(b):

If an owner ceases to be a member of the body corporate as contemplated in section 36(2), any right to an exclusive use area still registered in his or her name vests in the body corporate free from any mortgage bond or registered real right.

Unfortunately, by not specifying that a specific exclusive use area is linked to a specific unit, the position regarding the erroneous non-transfer of such an exclusive use right is still a possibility. The only concession that the legislator made to remedy this position, was to have the right vest in the body corporate. Although this amendment simplified the solution to the incumbent owner, it is firstly an indication of the multitude of problems that exist regarding the transfer of exclusive use rights and secondly evidence of another disorderly way of addressing unforeseen problems with sectional title ownership- a further blow to legal uncertainty.

registered real right should also include a notification procedure to bond holders of the cancellation of the mortgage. Maree 2002a *De Rebus* 1.

⁷¹⁶ Van der Merwe *Sectional Titles* 11-25.

5.4.3 Entitlements and duties of the holder of the right

The rights and duties of the holder of a right of exclusive use is not clearly indicated in the *STA*. Kelly tries to enumerate the entitlements of the right holder. He argues that an owner can use, enjoy and benefit from a part of property that is co-owned by all owners in the scheme.⁷¹⁷ For instance the question of who is responsible for any maintenance or damage in an exclusive use area, may lead to disputes. The owner may argue that he pays an additional levy so the body corporate should fix any problems. Section 13(1)(c) of the *STSMA* requires that an owner must "maintain and repair his section" but regarding exclusive use areas an owner must keep it "in a clean and neat condition".⁷¹⁸ The exclusive use area, although reserved for his use is still part of the common property. However, the body corporate may hold a different view-point. They may feel that had the owner not acted in a specific manner the damage or maintenance to the exclusive use area would not have happened. They may even argue that the owner does not pay enough into the levy fund to make provision for the dangers inherent in his use of the exclusive use area.⁷¹⁹ Section 27(5) also provides that the exclusive use area is given to the owner for a specific purpose. This may also hamper the owner's use and enjoyment of the exclusive use area. Kelly indicates that the use restrictions exist predominantly as members joined the community because of its nature. Therefore, it must be ensured that parts of the scheme are not used for different purposes.⁷²⁰ Van der Merwe indicates that the purpose for which the exclusive use right will be used, must be clearly indicated on the sectional plan.⁷²¹

The entitlements and duties of holders of exclusive use rights came under scrutiny in case law, mainly because of the burden of maintenance of the exclusive use area. The duty to maintain the exclusive use area was addressed

⁷¹⁷ Kelly 2015 www.paddocks.co.za/.../responsibilities-in-regard-to-exclusive-use-areas-in-sectional-titles...

⁷¹⁸ S 44(1)(c) of the *STA* contained the same provision.

⁷¹⁹ For example, if the owner has a thatched lapa that may cause a fire hazard.

⁷²⁰ Kelly 2015 www.paddocks.co.za/.../responsibilities-in-regard-to-exclusive-use-areas-in-sectional-titles...

⁷²¹ Van der Merwe *Sectional Titles* 11-23 to 11-24.

in *Body Corporate of the Solidatus Scheme No SS 23/90 v De Waal*.⁷²² In this case a residential sectional title scheme, with a separate building containing parking bays, the issue in dispute was due to water leakage experienced on the balconies of the residential units and at the building housing the parking bays during rain. This happened due to poor design and craftsmanship when the buildings were erected. The parking bays were created in terms of section 27(1) of the *STA* and ceded to the relevant owners.⁷²³ A quotation was obtained to address the issue and a general meeting was held to approve the quotation by a voting margin of thirty-nine to six (39/6). A special levy against the holders of the rights to the parking bays was also approved to finance the waterproofing of the exclusive use areas. However, the owners of the exclusive use areas refused to pay these levies and argued that their "maintenance" responsibility of the exclusive use areas did not include the repair of faulty workmanship. The trustees brought an application for a declaratory order to address the impasse.⁷²⁴

The court referred to section 37(1)(a-b), which determine that special levies may be claimed from holders of exclusive use rights. The court then proceeded to set out the definition of an exclusive use area in terms of section 1 of the *STA*.⁷²⁵ Exclusive use areas were described as although technically part of the common property, the use is reserved for one owner. In terms of section 27(6) it is a right to urban immovable property. As such it may also be sold and transferred to other owners and be offered as security for a bond. The court describes that the *nudum dominium*, remains vested in the body corporate that enables inspection and maintenance in terms of section 44(1)(a).⁷²⁶ The court furthermore clarified the concept of maintenance and observed that "extensive repair work and replacement of materials could fall within the ambit of the concept 'maintenance'". The court's conclusion that the right of exclusive use is "closely akin to full ownership, as to be virtually indistinguishable" has come

⁷²² 1997 3 All SA 91 (T).

⁷²³ *Body Corporate of the Solidatus Scheme No SS 23/90 v De Waal* 1997 3 All SA 91 (T) 93.

⁷²⁴ *Body Corporate of the Solidatus Scheme SS 23/90 v De Waal* 1997 3 All SA 91 (T) at 94.

⁷²⁵ *Body Corporate of the Solidatus Scheme SS 23/90 v De Waal* 1997 3 All SA 91 (T) at 95.

⁷²⁶ *Body Corporate of the Solidatus Scheme SS 23/90 v De Waal* 1997 3 All SA 91 (T) at 96.

under heavy criticism by academics and practitioners alike. Maree criticised this and avers that the court should have rather emphasised the limits of an owner's liability, for the cost of the maintenance of exclusive use areas.⁷²⁷

The court concluded that the legislature intended to place the burden of upkeep where the benefit lay and, therefore, found that the holders of the exclusive use rights should take responsibility for the payment of the special levy for the repair and waterproofing of the balconies.⁷²⁸ Kilbourn argues that this case brought about legal certainty to owners:

...that the costs of extensive repairs to exclusive use areas occasioned by faulty workmanship of a developer will be borne by the holder of the right to the exclusive use area.

She mentions that since the holder of the right enjoys and benefits from the exclusive use area, this judgement seems fair.⁷²⁹ Others disagree with Kilbourn's view. Van der Merwe described the effect of the judgement as "somewhat harsh", whereas Maree's criticism of *Solidatus* is much stronger. He argues that the decision to hold the owner of the exclusive use area responsible for structural defects is unfair, seeing that an owner is not even responsible for structural defects that may exist in the building of which his section forms a part.⁷³⁰ Maree argues that the structural defects should be addressed by the trustees and comes to the conclusion that exclusive use areas are "quasi common property" and that the duty to maintain it rests on the body corporate.⁷³¹

A further case that dealt with a dispute regarding the maintenance of an exclusive use area is *Herald Investments Share block (Pty) Ltd v Meer; Meer v Body Corporate Belmont Arcade*.⁷³² This case dealt with a dispute over the maintenance of lifts that only served some floors. The exclusive use rights to

⁷²⁷ Maree 2002b *De Rebus* 42.

⁷²⁸ *Body Corporate of the Solidatus Scheme SS 23/90 v De Waal* 1997 3 All SA 91 (T) at 99.

⁷²⁹ Kilbourn 2005 *Property Law Digest* 15.

⁷³⁰ Maree 2002b *De Rebus* 54.

⁷³¹ Maree 2006 *Property Law Digest* 12-13.

⁷³² 2010 JOL 26130 (KZD).

the lifts were held in terms of the 1971 Act. Although the 1971 *STA* did not make provision for the establishment of exclusive use areas,⁷³³ these rights were created by the enactment of rules made under the 1971 Act when the need arose. The 1986 *STA* however, formalised the process with the introduction of section 27 and allowed pre-existing exclusive use rights to be "converted" to section 27 rights.⁷³⁴ With the implementation of the section 27A rights, (now established in terms of section 10(7) and 10(8) of the *STSMA*), the position was that two sets of rights existed that were created by rules. Regarding the maintenance of the common property, the court found that the liability to pay costs for maintaining an exclusive use area, rested on the person vested with the right, irrespective of whether the exclusive use rights arose by registration or, in terms of the rules.⁷³⁵ The court also indicated that the body corporate could create exclusive use rights, falling outside provisions of the act, as long as it was provided for in a contract concluded with the unanimous consent of all the members.⁷³⁶ The court scrutinised the agreement and came to the conclusion that the exclusive use rights pertaining to the use of the lifts were created outside the sources of both the 1971 and the 1986 *STA*. Therefore, the cost for maintaining the lifts had to be shared by all the sectional owners.⁷³⁷

The final case that should be discussed regarding maintenance of exclusive use areas is that of *De la Harpe v Body Corporate Bella Toscana*.⁷³⁸ This case dealt with the maintenance of a fence wall enclosing a garden as exclusive use area. The applicant submitted that the wall formed part of the common property and the body corporate should pay for the maintenance. The respondent on the

⁷³³ *Herald Investments Share block (Pty) Ltd v Meer, Meer v Body Corporate of Belmont Arcade* 2010 JOL 26130 (KZD) at [12].

⁷³⁴ *Herald Investments Share block (Pty) Ltd v Meer, Meer v Body Corporate of Belmont Arcade* 2010 JOL 26130 (KZD) at [14].

⁷³⁵ *Herald Investments Share block (Pty) Ltd v Meer, Meer v Body Corporate of Belmont Arcade* 2010 JOL 26130 (KZD) at [26].

⁷³⁶ *Herald Investments Share block (Pty) Ltd v Meer, Meer v Body Corporate of Belmont Arcade* 2010 JOL 26130 (KZD) at [27].

⁷³⁷ *Herald Investments Share block (Pty) Ltd v Meer, Meer v Body Corporate of Belmont Arcade* 2010 JOL 26130 (KZD) at [29].

⁷³⁸ (10088/2013) [2014] ZAKZDHC 63.

other hand submitted that the wall is part of the exclusive use area and that the applicant should pay for the repair of the wall.⁷³⁹ The respondent furthermore submitted that the applicant should demolish the wall and rebuild it. The applicant, on the other hand, lodged an application that an administrator should be appointed to see to the repair of the wall, as the body corporate refused to do so. It was common cause that the wall had cracks due to poor workmanship. The initial claim by the body corporate to the insurance was dismissed, due to the fact that the wall was not built in terms of building regulations.⁷⁴⁰

The section and exclusive use area were registered in the applicant's name and the extent of the garden was indicated on the plan with a dotted line.⁷⁴¹ The respondent claimed that this was not properly defined and, therefore, the applicant's claim was not clear from the papers and should be dismissed. However, this argument did not hold water and was rejected by the court. The court referred to the *Solidatus* case where the court:

... concluded that the rights of exclusive use areas are so closely akin to ownership as to be virtually indistinguishable...⁷⁴²

The court also found that the applicant was solely responsible for the costs of the repair and maintenance of the wall "as she is the one deriving a benefit from it".⁷⁴³ Maree indicates with reference to *Solidatus* that the body corporate could not be held responsible for all structural defects. He indicates that in circumstances where:

... the structure forms part of an exclusive use area and exists solely for the purpose of exclusive use, not as integral part of the building supporting or protecting other sections or common property...

the body corporate should not be held liable for the maintenance.⁷⁴⁴ That is not the case here as the owner did nothing to weaken the wall, for example by

⁷³⁹ *De la Harpe v Body Corporate Bella Toscana* (10088/2013) [2014] ZAKZDHC 63 at [2].

⁷⁴⁰ *De la Harpe v Body Corporate Bella Toscana* (10088/2013) [2014] ZAKZDHC 63 at [7].

⁷⁴¹ *De la Harpe v Body Corporate Bella Toscana* (10088/2013) [2014] ZAKZDHC 63 at [13].

⁷⁴² *De la Harpe v Body Corporate Bella Toscana* (10088/2013) [2014] ZAKZDHC 63 at [43].

⁷⁴³ *De la Harpe v Body Corporate Bella Toscana* (10088/2013) [2014] ZAKZDHC 63 at [44].

⁷⁴⁴ Maree 2002b *De Rebus* 55.

building a braai or laying paving. Kelly also does not agree with the decision. However, he bases his criticism on where the wall was physically situated. He indicates that the court should have determined exactly where the wall was situated, whether inside the exclusive use area, completely outside the exclusive use area or partly inside and partly outside the exclusive use area.⁷⁴⁵ He suggests that, had that been the case, the principles set out in the *STA* regulating who should carry out and pay for the work could have been applied. Van der Merwe refers to section 6(d) of the *Sectional Titles Amendment Regulation* of 2012 which substituted rule 70(b) and indicates an owner should "maintain adequately any improvement" on an exclusive use area. In terms of section 44(1)(c) of the *STA*, the exclusive use area must be kept in a clean and neat condition. This does not provide a statutory duty to maintain and repair it. However, it seems as if by implication, the additional duty of special levies for holders of exclusive use rights do ascribe maintenance obligations on them. Van der Merwe concludes that section 44(1)(c) should be amended to include for the maintenance and repair of exclusive use areas as well. This seems to be the way that the courts should interpret the maintenance duty of the holders of exclusive use rights at this stage.⁷⁴⁶

It seems that as a result *Solidatus*, the duty to maintain the exclusive use area will rest mainly on the holder of the right, despite the fact that the maintenance may be required, due to pre-existing structural defects and poor workmanship. This position seems to be overly harsh on these holders. Van der Merwe proposes that this goes beyond the scope of ordinary maintenance and should be dealt with by the body corporate.⁷⁴⁷

⁷⁴⁵ Van der Merwe *Sectional Titles* 11-23. The boundary between exclusive use areas and common property is the median line of the dividing floor, wall ceiling or fence.

⁷⁴⁶ Van der Merwe *Sectional Titles* 11-40 where he discusses the case of *Bella Toscana*. In terms of Annexure 1 of the *STSM*A Regulations management rule 31(1) an additional burden is placed on owners to "share maintenance repair and replacement" of water-heating installation on exclusive use areas.

⁷⁴⁷ Van der Merwe *Sectional Titles* 11-43.

5.4.4 Legal nature of rule-based or non-genuine exclusive use rights

These rights are not regarded as limited real rights, but only personal rights.⁷⁴⁸ Warner argues that section 27A rights (now held in terms of section 10(7) and (8) of the *STSM Act*) are not real rights at all. They may be seen as "quasi real rights" in that they survive the death of the right holder, but they are not registrable real rights.⁷⁴⁹

Developers are opting for this manner to create exclusive use areas (instead of delineating it on the sectional plan as required by section 27(1)), because of the simplicity and cost effectiveness of the creation of exclusive use rights in such a manner.⁷⁵⁰ Another reason for the creation of section 10(7) exclusive use rights was to address the inadequate situation in respect of non-formalised and informal establishment of exclusive use areas. These rights are even more tenuous when they are only established through use or custom ("gebruik"). In some instances, it is difficult to find any trace of these rights, because the records of the resolutions and minutes of meetings are not always meticulously kept by bodies corporate. However, these rights cannot be registered against the title deed of a specific sectional title unit in terms of section 63(1) of the *DRA*, which determines that only real rights may be registered. They are not connected to a section on the sectional plan and will not have the advantage of automatically binding successors in title, (subsequent owners) in the same way as limited real rights. Because the rules of the scheme must be obeyed by all members, present owners and their successors are bound by these rules. Although this eventuality does not change the nature of the right to a real right, the creditor's right may then be ceded to subsequent owners in terms of the resolution.

Although these rights have monetary implications (*e.g.* a unit with a garage is more expensive), their establishment and, transfer are less formal and the

⁷⁴⁸ Grové 2012 *SADJ* 11.

⁷⁴⁹ Warner 2005 [http://bwpubs.uovs.ac.za/nxt/gateway.dll?f=multiview\\$mh=1000\\$mkb=512\\$ch=1\\$d=jc\(9e...\)](http://bwpubs.uovs.ac.za/nxt/gateway.dll?f=multiview$mh=1000$mkb=512$ch=1$d=jc(9e...)).

⁷⁵⁰ Kilbourn 2005 *Property Law Digest* 10. She avers that it is "less expensive and less hassle" and a "short cut route".

protection afforded by these rights are much weaker than the protection that is provided in the case of limited real rights. Maree indicates that in practice the limited real right, (in terms of section 27(1)), does not afford greater security or enhance the market value of the property, as opposed to the right created in terms of section 27A (now in terms of section 10(7) and (8) of the *STSM*). Neither does it increase the value of a section in order to obtain a mortgage loan.⁷⁵¹

A possible solution could be addressed in the transfer documents. Kelly advises that when marketing the sale of a sectional title unit, it is important to determine the type of exclusive use right involved.⁷⁵² According to Moore there is a duty on the conveyancer to "properly and accurately represent what is the subject matter of the sale" and the exclusive use area created in terms of section 27A, (now in terms of section 10(7) and (8) of the *STSM*) is "part of the subject matter of the sale".⁷⁵³ This means that the unregistered exclusive use area should be indicated and described fully in the contract of sale. A proper description of the thing to be sold (*merx*) may provide a possible solution to address uncertainties experienced in this regard.⁷⁵⁴ According to Glover this is one of the common law *essentialia* of the contract of sale.⁷⁵⁵ A further requirement is that the thing must be defined and ascertainable.⁷⁵⁶ Therefore, a proper description of the object of the sale is in any event required for the validity of the contract of sale. Should there be uncertainty as to what is being sold, it may lead to litigation. The importance of the description of the *merx* came to the fore in *Erf 441 Robertsville Property CC v New Market Developments (Pty) Ltd.*⁷⁵⁷ Although this case did not deal with the uncertainties surrounding the description of exclusive use areas in contracts of sale as discussed in this passage, the principles set therein is important for this study.

⁷⁵¹ Maree 2008 *De Rebus* 44.

⁷⁵² Kelly 2015 www.paddocks.co.za/.../responsibilities-in-regard-to-exclusive-use-areas-in-sectional-t...

⁷⁵³ Moore 2013 *Ghost Digest* 1.

⁷⁵⁴ Glover and Kerr *Law of sale and lease* 3.

⁷⁵⁵ Glover and Kerr *Law of sale and lease* 5.

⁷⁵⁶ Glover and Kerr *Law of sale and lease* 37.

⁷⁵⁷ 2007 2 SA 179 (W).

The court dismissed the argument by the respondent that the property in this case was not adequately described and found that "the *merx* could be identified without recourse to the parties as to their negotiations".⁷⁵⁸ In his discussion of the case, Delpont argues that as section 3(4) of the *STA* deems the thing to be sold "land", the provisions of the *Alienation of Land Act*⁷⁵⁹ must be adhered to. He further argues that this Act does not require faultless description of the property sold, coached in meticulously accurate terms. However, it does demand "some degree of accuracy in this regard".⁷⁶⁰ This argument of Delpont supports the viewpoint, held in this thesis, that an accurate description of exclusive use areas as part of the description of the *merx* in a contract of sale would alleviate many of the current uncertainties experienced in practice.

KMatt raised another interesting question. In this case the first respondent issued a counter-application for termination of the agreement on the ground that the applicant had repudiated the agreement, by "seeking to enforce rights and impose obligations on the first respondent, for which the agreement makes no provision."⁷⁶¹ The court dismissed this counter-application mainly because of jurisdictional issues.⁷⁶² This raises the crucial issue of the essential requirement for a contract of sale is an agreement on the thing to be sold.⁷⁶³ In a blog for practitioners Moore⁷⁶⁴ raised the question as to what extent there is an obligation on the conveyancing attorney to properly and accurately represent the subject matter in the contract of sale. Although referring specifically to rule-based exclusive use rights created in terms of section 27A, the question may also apply to registered exclusive use areas created in terms of section 27(1). This would mean that the unregistered as well as registered exclusive use area should be indicated and described fully in the contract of sale.

⁷⁵⁸ *Erf 441 Robertsville Property CC v New Market Developments (Pty) Ltd* 2007 2 SA 179 (W) para 181I.

⁷⁵⁹ Act 69 of 1971.

⁷⁶⁰ Delpont 2008 *Obiter* 87.

⁷⁶¹ *KMatt* at [8].

⁷⁶² The agreement between the parties included a clause that refers any but urgent relief to arbitration. Refer to *KMatt* at [39] and [48].

⁷⁶³ Glover and Kerr *Law of sale and lease* 3.

⁷⁶⁴ Moore 2013 *Ghost Digest* 1.

This is a clear indication of the uncertainties that currently exist in practice regarding, not only the nature of rule-based exclusive use areas, but also regarding the responsibility of conveyancers concerning contracts of sale that include these exclusive use areas.

5.4.5 Conclusion

Although exclusive use rights have been statutorily prescribed in detail and amended regularly, it seems that the legislature cannot keep up with the demands of practice. This leads to uncertainty regarding the exercise and content of these rights. Without being overly pessimistic and dramatic, it seems as if the legal uncertainty surrounding the practical effects of exclusive use rights, may well hamper litigation and prevent case law to provide more legal certainty in future. This is compounded by the coming into effect of the *STSMA* and especially the *Community Schemes Ombud Service Act* on 7 October 2016. The latter is introduced specifically to provide a more effective and affordable dispute resolution mechanism in sectional titles schemes. Although adjudicators are compelled to give reasons for their awards, this would unfortunately especially initially not have the same precedential force of setting of binding legal precedents that will usually lead to more legal certainty.⁷⁶⁵

5.5 General conclusion

The aim of this chapter was to explain the uncertainties illuminated in the previous chapter, specifically surrounding the implementation and practical implications of sections 24, 25, 27 of the *STA* and section 10(7) and (8) of the *STSMA*. The legal developments surrounding these rights were discussed with specific focus on case law, certain common law principles and the interpretation of these cases and principles by academic scholars. The main cause of the uncertainties discussed regarding each of the sections seems to be that the legislature had failed to accurately formulate the legal effect of the rights created by these sections. This problem is compounded by the fact that the

⁷⁶⁵ Pienaar *Sectional Titles* 225.

common law principles surrounding the distinction between real and personal rights, has been handled in a relatively haphazard fashion in the manner that the courts applied the subtraction test.

The next apparent problem surrounding these rights is the fact that the rights and duties involved in the exercise of these rights, are also not clearly described in sectional title legislation. The general property law principles are of little help to provide clarity, as sectional titles in themselves, are a diversion from the common law principles applicable to property law. Despite numerous amendments to the legislation, certain practical implications still seem to come to the fore on a regular basis. The interpretation of the *STA* by the courts also does not provide clarity in all circumstances.

This conundrum brings to mind some statements by Wallis JA in a paper addressing commercial certainty that seems applicable here. Firstly, Wallis JA states that:

A rule of law based solely on judicial discretion and a sense of reasonableness is no rule of law at all.

Secondly,

Litigants will not turn to the courts if they are uncertain of the law that will be applied to their disputes.⁷⁶⁶

It, therefore, seems prudent to look beyond South Africa, to the legal position surrounding similar rights in other jurisdictions. Consequently, in the next chapter the legal position in New South Wales in Australia, as well as the Netherlands, will be investigated specifically with the focus on the problems and uncertainties dealt with in this chapter.

⁷⁶⁶ Wallis "Commercial certainty and constitutionalism" 25.

CHAPTER 6

THE LEGAL EFFECT OF SPECIFIC RIGHTS IN THE CASE OF STRATA TITLES AND *APPARTEMENTSRECHT*

6.1 Introduction

This chapter will focus on aspects of strata titles in New South Wales, Australia and *appartementsrecht* in the Netherlands. This chapter will initially investigate the legal nature of strata titles and how the right to extend the section, the right to phased development and the right to exclusive use of the common property are structured in strata title legislation. This chapter will, furthermore, investigate the legal nature of apartment ownership and the object of the right in terms of *appartementsrecht* legislation in order to determine what the nature of rights of apartment owners to the section, and the right of exclusive use of for instance a private garden is. The reasoning behind the selection of these jurisdictions will be addressed when dealing with each jurisdiction.

6.2 New South Wales strata titles system

The strata titles system in New South Wales is the equivalent of the sectional title system in South Africa. The concept of sectional title ownership was introduced in South Africa in 1973. It was heavily influenced by the *Conveyancing (Strata Titles) Act 17 of 1961*⁷⁶⁷ of New South Wales. Pienaar argues that there are marked differences between the South African sectional title system and the strata title system in New South Wales. However, he suggests that it is worthwhile to investigate the strata titles system to find legal comparisons with South Africa as it is more developed than the South African system.⁷⁶⁸ Van der Merwe goes so far as to state that the *NSWCSTA* is seen as the direct predecessor of the *STA*.⁷⁶⁹ Cowan avers that the *NSWCSTA* was

⁷⁶⁷ Hereafter referred to as the *NSWCSTA*.

⁷⁶⁸ Pienaar 2012 *Sectional Titles* 18.

⁷⁶⁹ Van der Merwe 1974 *THRHR* 113.

"extensively used" to develop sectional title legislation in South Africa.⁷⁷⁰ In the light of the similarities between the two systems it would, therefore, be apt to investigate the strata titles system, in order to ascertain whether similar concerns than the ones raised in the previous chapter are present in that system and if so, whether any solutions to these challenges have been found that may be applicable to the South African situation. As with sectional titles in South Africa, strata title law is also very technical and complicated. The objective of this chapter is, therefore, limited to only the specific aspects in strata title law that may contribute to the specific aims of this study, and will by no means attempt to provide an in depth study of strata titles. The first part of this chapter will focus on a broad introduction to the strata title system, as well as a brief discussion of the differences between strata titles and sectional titles. Consequently, the strata system will be investigated to determine whether similar concerns regarding the extension of a section, phased development and exclusive use areas exist within the strata title system and whether there are any alternative proposals found in literature that may be followed to solve the challenges elucidated in the previous chapter.

6.3 A general introduction to strata titles

According to Everton-Moore *et al*, strata title legislation developed as an *ad hoc* solution to emerging trends in urbanisation and the need to regulate this is imperative.⁷⁷¹ It owes its origin to the desire to facilitate easier investment into this form of housing.⁷⁷² Troy *et al* argue that:

Strata titling involves the individual ownership of a vertical subdivision with a series of rights normally associated with private property attached, with a simultaneous share in the collective ownership of common property conferring a series of rights and responsibilities in regard to the common property onto individual lot owners.⁷⁷³

⁷⁷⁰ Cowan 1973 *CILSA* 11.

⁷⁷¹ Everton-Moore *et al* 2006 *APLJ* 2.

⁷⁷² Troy *et al* 2017 *Housing studies* 7.

⁷⁷³ Troy *et al* 2017 *Housing studies* 2.

For this reason, it is sometimes referred to as "dualistic ownership".⁷⁷⁴

6.3.1 *Applicable strata title legislation in New South Wales*

In New South Wales strata title legislation is currently based on three legislative frameworks:

- The initial subdivision and subsequent sale of land had been regulated by the *Strata Schemes (Freehold Development) Act* 68 of 1973 (NSW) or the *Strata Schemes (Leasehold Development) Act* 219 of 1986 (NSW). In terms of the leasehold strata scheme, all lots and common property may be subject to a lease or leases in terms of section 11 of the Act. In terms of the freehold strata scheme no lots or common property are subject to leases. For the purposes of this study, the emphasis will fall on freehold strata title schemes. These acts were repealed by section 203 of the *Strata Schemes Development Act* 51 of 2015 with effect from 30 November 2016, which together with its regulations, now regulates freehold or leasehold developments. It also introduced a strata renewal process which allows owners to facilitate the collective sale or redevelopment of their strata scheme with a 75% voting majority.⁷⁷⁵
- The management of schemes and resolution of disputes are regulated by the *Strata Schemes Management Act* 50 of 2015 as well as its regulations which repealed the *Strata Schemes Management Act* 138 of 1996 (NSW) and the *Strata Schemes Management Regulation* 2010 (NSW) as of 30 November 2016. This Act also regulates practicalities, for instance the election and nomination of a strata committee (previously known as an executive committee), as well as model rules and by-laws specifically designed for different types of schemes. The 1996 predecessor of this Act limited the powers of the developer and vested the management of the scheme in the owners' corporation.⁷⁷⁶ Similar to the South African

⁷⁷⁴ Easthope and Randolph 2016 *Environment and Planning* 1830.

⁷⁷⁵ Registrar General NSW Circular 2016/01.

⁷⁷⁶ Everton-Moore *et al* 2006 *APLJ* 12.

situation, the owners' corporation may delegate its powers and functions as well as those of the strata committee to a managing agent.⁷⁷⁷

- The actions of strata community managing agents and onsite residential property managers are regulated by the *Property Stock and Business Agents Act* 66 of 2002 (NSW). This legislation is not of major importance to this study.⁷⁷⁸

6.3.2 General property law principles in New South Wales relevant to this study

6.3.2.1 Proprietary rights and the *numerus clausus* principle

In this section, some general property law principles applicable in New South Wales and relevant to this study will be investigated. Firstly, it needs to be determined whether the same distinction between real and personal rights exists in this jurisdiction⁷⁷⁹ and consequently, how this distinction is implemented.

Proprietary rights are distinguished from personal rights in that personal rights "have no inherent relationship with land".⁷⁸⁰ Proprietary rights are conceptually the same as real rights in South African law. In Australia only a limited number of proprietary rights on land are recognised. They are divided into three categories:

- Those that confer possession, for instance, the fee simple, life interest and leasehold.
- Servitudes that include easements and restrictive covenants.⁷⁸¹
- Security interests such as mortgages.⁷⁸²

⁷⁷⁷ *Strata Schemes Management Act* 138 of 1996 (NSW) ss 28 and 29.

⁷⁷⁸ Everton-Moore *et al* 2006 *APLJ* 10-11.

⁷⁷⁹ As in South Africa, refer to Chapter 2.

⁷⁸⁰ Butt *Land Law* 440.

⁷⁸¹ The covenant runs with the land and may be enforced by subsequent owners. Refer to Butt *Land Law* 701-702. Black J explains it in *Adrienne Ryan v Margaret Mary Sutherland* [2011] NSWSC 1397. A negative covenant is determined whether it can be complied with by complete inaction (para 25). A positive covenant is not enforceable against a non-party successor in title (para 24).

For the relevance of this study the focus will be on easements. In New South Wales, an easement is described as:

... a proprietary right enjoyed by an owner of land to carry out some limited activity on land owned by another person.⁷⁸³

It is also more narrowly defined as:

... a right annexed to land to utilise other land of different ownership in a particular manner...or to prevent the owner of the other land from utilising his land in a particular manner.⁷⁸⁴

One of the requirements, for an easement to be valid, is that the grantor of the easement must be able to grant the easement and the grantee must be able to receive it. That in effect means that the question should be answered, "could a conveyancer draft it?" Furthermore, it is a requirement that the easement should not be "too vague or indefinite".⁷⁸⁵ Another requirement for an easement that is especially relevant to this study is that a right granted in terms of an easement may not "amount to proprietorship or possession of the servient land".⁷⁸⁶ Butt argues, based on case law, that:

... there can be no easement where the right claimed amounts to a right to possess or exclusively use the servient land, or even to share possession or exclusive use with the servient owner.⁷⁸⁷

The basic principles guiding easements are similar to the South African position. What differs in the Australian system, as compared to the South African system, however, is that the *numerus clausus* principle is applicable in contemporary Australian property law.⁷⁸⁸ Sherry argues that the *numerus clausus* principle

⁷⁸² Edgeworth 2006 *Monash ULR* 389.

⁷⁸³ Butt *Land Law* 439.

⁷⁸⁴ *Halsbury's Law of England* in Butt *Land Law* 441.

⁷⁸⁵ Butt *Land Law* 446.

⁷⁸⁶ Butt *Land Law* 447.

⁷⁸⁷ Butt *Land Law* 447. This requirement is important for this study as it is one of the main reasons that common property use rights are not considered easements. Refer to Sherry 2009 *Bond Law Review* 174. This will be discussed in para 6.3.6.

⁷⁸⁸ In South Africa no closed list of limited real rights exist. Refer to para 2.3.1.

... prevents private citizens dreaming up any property entitlements they desire, which in turn prevents predecessors from determining land use in future.⁷⁸⁹

Edgeworth identifies two important rationales for the continued application of the *numerus clausus* principle:

- It withholds the recognition of completely new rights; and
- "policing the boundaries of existing interests" in order to prevent an "expansion to include new types of rights".⁷⁹⁰

Sherry summarises Edgeworth's viewpoint as follows:

- It frees land from multiple obligations and restrictions that can be put on its use.
- A "proliferation of the number and range of rights" will make the conveyancing process "more complex, time-consuming and hazardous".⁷⁹¹

Edgeworth argues that the common law follows a "stringent" approach to property rights, especially if these rights are over land. The principle also entails that land owners are not at liberty to "customise" land rights to suit their particular needs. He argues that in terms of this principle, any new rights that are created "must fit within the firmly established pigeonholes" of which the law only permits a small number.⁷⁹² This is as opposed to the more liberal approach followed in South Africa where Van Wyk uses a similar analogy, but argues that a limited real right should not be forced into a mould that does not fit.⁷⁹³ Sherry argues that the economic explanation of the principle is to relieve purchasers of the burden of understanding idiosyncratic agreements that long gone

⁷⁸⁹ Sherry 2013 *UNSWLJ* 314.

⁷⁹⁰ Edgeworth 2006 *Monash ULR* 390.

⁷⁹¹ Sherry 2009 *Bond Law Review* 174.

⁷⁹² Edgeworth 2006 *Monash ULR* 387. See also Sherry 2013 *UNSWLJ* 290.

⁷⁹³ Refer to para 5.3.2.2 where Van Wyk argues "the right is a square peg that does not fit into a 'round personal servitude hole'".

predecessors might have made. She argues that "too many complications spoil the property market".⁷⁹⁴

In his historical study of the *numerus clausus* principle, Edgeworth refers to Merrill and Smith's discussion of the principle where they argued that courts treated the:

... previously recognised forms of property as a closed list that can be modified only by the legislature.⁷⁹⁵

However, Edgeworth laments that case law suggests that this development is very slow. He indicates that the reason for the conservative approach could be *inter alia* that should land be shackled by too many burdens, it would spell out a return to the feudal system. He also indicates that it could place a heavy burden on the conveyancing process and bring its efficiency into question.

Edgeworth does, however, refer to the English case of *Tulk v Moxhay*⁷⁹⁶ which is seen as a case that "shunned" the *numerus clausus* principle. He argues that this case is an example of:

... how contractual rights leaped the fence to become property rights, and ...how they have done so in ways that are eminently consistent with public interest.⁷⁹⁷

In this case, the court created a "novel proprietary interest" in order to avoid an "adverse economic impact" of not granting the right.⁷⁹⁸ However, the influence of the rather generous outcome of this decision was curtailed by *Hill v Tupper*⁷⁹⁹ where the adverse effect on successors in title to ascertain the details of their right, "seem(ed) to tip the scales against the recognition of new interests".⁸⁰⁰

⁷⁹⁴ Sherry 2013 *UNSWLJ* 291.

⁷⁹⁵ Edgeworth 2006 *Monash ULR* 391.

⁷⁹⁶ (1848) 2 Ph 774; 41 ER 1143.

⁷⁹⁷ Edgeworth 2006 *Monash ULR* 395.

⁷⁹⁸ Edgeworth 2006 *Monash ULR* 396.

⁷⁹⁹ (1863) 2 H & C 121, 159 ER 51.

⁸⁰⁰ Edgeworth 2006 *Monash ULR* 397.

Edgeworth argues that consequent case law showed a trend towards reverting back to the more conservative approach followed in *Keppell v Bailey*.⁸⁰¹

As property law rights are capable of binding third parties (successors in title) the *numerus clausus* principle prevents the creation of property rights that do not fit neatly into the existing categories of property rights.⁸⁰² It stipulates that there are limited interests in land.⁸⁰³ Edgeworth maintains that the *numerus clausus* principle applies regardless of the terms of any agreement that the parties may reach and that the contractual arrangements of such an agreement will be irrelevant when dealing with property rights.⁸⁰⁴ Edgeworth argues that the court found:

Although it was perfectly acceptable for the parties to bind themselves contractually to this arrangement, it would be contrary to public policy to allow them to change the character of the land by such an agreement so as to bind all persons not party to it.⁸⁰⁵

Sherry argues that unlike contract law which allows parties to negotiate contractual terms as they wish, land law does not allow landowners:

... to customise land rights, in the sense of re-working them in an entirely novel way to suit the particular individual needs and circumstances.⁸⁰⁶

Edgeworth explains his argument by relying on the following citation:

It must not, therefore, be supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner. It is clearly inconvenient both to the science of the law and to the public weal that such a latitude should be given.⁸⁰⁷

Sherry also refers to *Hill v Tupper* where the court found a new species of incorporeal hereditament cannot be created at the will and pleasure of the

⁸⁰¹ Edgeworth 2006 *Monash ULR* 399.

⁸⁰² Edgeworth 2006 *Monash ULR* 388.

⁸⁰³ Sherry 2013 *UNSWLJ* 290.

⁸⁰⁴ Edgeworth 2006 *Monash ULR* 387.

⁸⁰⁵ Edgeworth 2006 *Monash ULR* 392.

⁸⁰⁶ Sherry 2013 *UNSWLJ* 290.

⁸⁰⁷ Edgeworth 2006 *Monash ULR* 392, Sherry 2013 *UNSWLJ* 290.

owner of the property.⁸⁰⁸ Edgeworth argues that it would be detrimental and confusing, should parties be allowed to invent new modes of holding and enjoying real property. However, Edgeworth accedes that this cautionary approach to create interests outside the *numerus clausus*:

... should not be taken to imply that there is no scope to accommodate novelty in the creation of property rights.⁸⁰⁹

He also admits that the need for the strict application of the *numerus clausus* principle lessens where effective recordation of interests in land is done in a land register, which is easily and cheaply accessible, which is the case in Australia with a well-developed and maintained system of title registration.⁸¹⁰

Edgeworth further accepts that the Torrens system can allow "a much wider range of interests in land" with only a minimal additional cost to successors in title.⁸¹¹ Therefore, it seems as if the possibility is left open that the Torrens system is more dynamic in allowing the creation of property rights outside the stringent categories. This brings to mind *Clos Farming Estates Pty Ltd v Easton*.⁸¹² This case dealt with a novel easement that was created beyond the existing categories of property rights. In this case farmland was developed as an estate with eighty residential and eight other lots, created with an "elaborate scheme of easements and restrictions directed towards creating and continuing an estate" owned by different proprietors.⁸¹³ The estate was consequently also still farmed by the owner of lot 86 which was centrally located and non-residential. The validity of an easement allowing a vineyard was in question.⁸¹⁴ The court found that there was a limit on "the kinds of rights which may be created by easements and which may exist perpetually". The court also found that there was a long standing:

⁸⁰⁸ Sherry 2013 *UNSWLJ* 290.

⁸⁰⁹ Edgeworth 2006 *Monash ULR* 393.

⁸¹⁰ Edgeworth 2006 *Monash ULR* 389; Sherry 2009 *Bond Law Review* 176.

⁸¹¹ Edgeworth 2006 *Monash ULR* 406; Sherry 2009 *Bond Law Review* 174.

⁸¹² 2001 NSWSC 525 (2001).

⁸¹³ *Clos Farming Estate Pty Ltd v Easton* 2001 NSWSC 525 (2001) at para 1.

⁸¹⁴ *Clos Farming Estate Pty Ltd v Easton* 2001 NSWSC 525 (2001) at para 5.

... resistance to restrictions on use and alienation of land and on the wishes of property owners to limit the rights of their successors, to restrict alienation and to devise new forms by which to do so.⁸¹⁵

The court found that this showed a "disposition against permitting the creation of new forms of landholding and new restrictions on ownership".⁸¹⁶

Edgeworth discusses other cases, as well and comes to the conclusion that Australian courts have "strongly resisted invitations to expand the range of proprietary interests in land".⁸¹⁷ He avers that the main arguments for the strict application of the *numerus clausus* principle has in any event been largely removed by the Torrens registration system. However, although he admits that judges have a role in developing the law, where authorities are unclear, he does caution that "property rights should not be routinely modified, revised or added to, by judges", but should rather be dealt with by the legislature.⁸¹⁸ Sherry argues that the *numerus clausus* principle relieves purchasers of the burden of finding and understanding agreements of predecessors.⁸¹⁹ The Torrens system will consequently be discussed briefly.

6.3.2.2 The Torrens system

Strata title legislation will only apply to land held under the "Torrens system".⁸²⁰ The Torrens Register differs from the General Register of Deeds. The instruments⁸²¹ affecting Torrens title land is recorded in the Torrens Register. It is impossible to register instruments affecting Torrens title in the General Register.⁸²² In strata titles it provides for the grant of a separate Torrens title for

⁸¹⁵ *Clos Farming Estate Pty Ltd v Easton* 2001 NSWSC 525 (2001) at para 15.

⁸¹⁶ *Clos Farming Estate Pty Ltd v Easton* 2001 NSWSC 525 (2001) at para 15.

⁸¹⁷ Edgeworth 2006 *Monash ULR* 417; Sherry *Strata title property rights* 54.

⁸¹⁸ Edgeworth 2006 *Monash ULR* 418.

⁸¹⁹ Sherry 2013 *UNSWLJ* 291. This need to modify property rights, coupled with the cautionary resistance to expand the range of proprietary interests in land is similar to the point of view held by South African academics and discussed in 2.5.3.

⁸²⁰ Gray *et al* 2010 *Property Law in New South Wales* 427.

⁸²¹ An instrument is defined in s 3(1) of *the Real Property Act* as: Any grant, certificate of title, conveyance, assurance, deed, map, plan, will, probate, or exemplification of will, or any other document in writing relating to the disposition, devolution or acquisition of land or evidencing title thereto.

⁸²² Butt *Land Law* 724.

individual parts of a building.⁸²³ The Torrens system was introduced in South Australia by the *Real Property Act* 15 of 1858 and came into operation there on 1 July 1858.⁸²⁴ The current legislation regulating the Torrens system is the *Real Properties Act* of 1900.⁸²⁵

The intricacies of the Torrens system are not the focus of this study. However, what is important for this study is that the Torrens system proposes "a system of 'independent titles'". This means in essence that each time property is transferred, it is "surrendered to the Crown which would re-grant the order to purchase". The practical effect of this system is that it will abolish the need for an investigation as to all the previous conditions held on the property.⁸²⁶ The Torrens legislation applicable in New South Wales "retains the essential elements" of the original precedent. Butt refers to case law⁸²⁷ which held that "(t)he cardinal principle of the statute is that the Register is everything". He avers that the Register is both "conclusive and exhaustive" which means that searches and investigations beyond the Register would be unnecessary.⁸²⁸ The registration under the Torrens system is not derivative, but the registration vests the title in the proprietor.⁸²⁹ In the case of land held under the Torrens system there is only one title deed, namely the folio of the Torrens Register for the land.⁸³⁰ The folio is a record containing the description of land as well as interests in land.⁸³¹ Title under the Torrens system derives from the Registrar General's act in registering the instrument. Therefore, the registration is the source of the title. It confers on the person registered as the proprietor a title that did not previously exist. On registration the previous title is extinguished and a new title is certified.⁸³² The title denotes and proves ownership of the

⁸²³ Butt *Land Law* 854.

⁸²⁴ Butt *Land Law* 745.

⁸²⁵ Butt *Land Law* 746.

⁸²⁶ Butt 2012 *ALJ* 159.

⁸²⁷ Butt *Land Law* 750 in footnote 73.

⁸²⁸ Butt *Land Law* 750.

⁸²⁹ Butt *Land Law* 755.

⁸³⁰ Butt *Land Law* 698.

⁸³¹ Butt *Land Law* 748; Sherry *Strata title property rights* 130.

⁸³² Butt *Land Law* 751.

land in the folio.⁸³³ The validity of an instrument does not depend on its registration.⁸³⁴ The Torrens system functions as a positive registration system that guarantees the title of the holder.⁸³⁵ The Registrar may also accept a dealing that contains errors or omissions.⁸³⁶ Upon registration, the dealing has the effect of a deed.⁸³⁷ This means it is "the most solemn form of document a party can make".⁸³⁸ A deed needs to be signed, sealed and delivered and will only then have a binding effect and parties cannot then withdraw from it.⁸³⁹ In identifying a document as a deed, it should be taken into account that all deeds should comply with common law and statutory formalities. However, even if the document in question does comply with that requirement, it does not necessarily mean it is a deed. Whether an instrument is a deed will depend on whether the parties intended it to be so. This intention is determined by considering the form, substance and object of the instrument. The factors that will be used to determine the intention of the parties will include:

- Whether the instrument reflects the phraseology and structure commonly found in deeds;
- Whether it is cast in the most solemn form of documentation appropriate for that ... transaction⁸⁴⁰

The subjective intent of the parties will be relevant.

The Torrens system is, therefore, a positive registration system as opposed to the South African registration system which is a negative registration system. According to Pienaar a negative registration system:

⁸³³ Butt *Land Law* 698.

⁸³⁴ Butt *Land Law* 725.

⁸³⁵ As opposed to the "old system" where registration did not cure defects in title. Refer to Butt *Land Law* 743.

⁸³⁶ Butt *Land Law* 749. In s 3(1) of the *Real Property Act* of 1900 a dealing is defined as: "Any instrument other than a grant or caveat which is registrable or capable of being made registrable under the provisions of this Act, or in respect of which any recording in the Register is by this or any other Act or any Act of the Parliament of the Commonwealth required or permitted to be made."

⁸³⁷ Butt *Land Law* 750.

⁸³⁸ Butt *Land Law* 731.

⁸³⁹ Butt *Land Law* 737.

⁸⁴⁰ Butt *Land Law* 740.

... implies that in the case of the limited real right being cancelled by mistake, such a right is still enforceable by obtaining a court order to rectify the wrong information in the deeds registry.⁸⁴¹

6.3.2.3 The principle of indefeasibility of title

The conclusiveness of the Register grants an "indefeasible" title to each new purchaser.⁸⁴² This would entail a single certificate of title that reflects all the transactions of land. It also entails that a title cannot be set aside because of an existing defect before the interest was registered. Section 42(1) of the *Real Property Act* of 1900 determines that "the registered proprietor for the time being of any estate or interest in land" that is recorded in a folio will have priority, notwithstanding the existence of any other person or interest. The indefeasibility of title is explained by Butt by means of an example dealt with in *Gibbs v Messer*.⁸⁴³ Butt explains it as follows:

B forged A's signature to a transfer in favour of X, a fictitious person. Transfer was registered, X's name being entered as a registered proprietor. B then forged a mortgage from X to C (a real person), who took for value and without fraud and became registered as mortgagee.⁸⁴⁴

In the abovementioned case, the Privy Council found that C did not obtain indefeasible title. However, despite the case not being formally overruled, Butt argues that Australia currently⁸⁴⁵ uses the system of immediate indefeasibility that provides a proprietor with indefeasibility of title despite having dealt with a fictitious proprietor in the case of fraud.⁸⁴⁶ The protection is also provided to holders of lesser rights in the property such as mortgagees, chargee, lessees and so forth. They will all fall within the definition of "registered proprietor".⁸⁴⁷ This will entail that the indefeasibility of title will also be applicable for holders of

⁸⁴¹ Pienaar 2015 *PELJ* 1483.

⁸⁴² Butt *Land Law* 744.

⁸⁴³ [1891] AC 248 in Butt *Land Law* 753.

⁸⁴⁴ Butt *Land Law* 753.

⁸⁴⁵ Refer to Butt *Land Law* 754 where he argues that s 3(1) of the *Real Property Act* has been amended in 2002 to confirm this.

⁸⁴⁶ Butt *Land law* 754.

⁸⁴⁷ Butt *Land Law* 752.

easements⁸⁴⁸ and other proprietary rights. An "indefeasible title" to an interest, will mean that the "title cannot be set aside on the ground of a defect, existing in the title before the interest was registered".⁸⁴⁹ This principle will become relevant when the enforcement of by-laws in strata title schemes will be discussed later in this chapter.⁸⁵⁰

6.3.3 Relevant terminology in strata titles

6.3.3.1 The lot

The basic conceptualisation of strata title is very similar to the South African position. The legislation created a form of individual ownership of over a vertical subdivision as well as joint ownership of the common property.⁸⁵¹

The strata plan which includes a location plan, delineating the perimeter of the land as well as the location of the buildings on the land, and the floor plan delineating the outline and position of lots, is used to determine the thing (*res*) that is owned.⁸⁵² Similar to the participation quota schedule found in South Africa, the "schedule of unit entitlement" will determine voting rights and the amount of levies payable for the upkeep of the scheme.⁸⁵³

A "lot" is somewhat similar to a "section"⁸⁵⁴ found in sectional titles. It is defined as:

... in relation to a strata scheme, ... one or more cubic spaces shown as a lot on a floor plan relating to the scheme, but does not include any common

⁸⁴⁸ An easement is defined by *Halsbury's Laws of England* in Butt *Land Law* 441 as "a right annexed to land to utilize other land of different ownership in a particular manner (not involving the taking of any part of the natural produce of the land or a part of its soil) or to prevent the owner of the other land from utilizing his land in a particular manner." This is similar to a servitude in South African law.

⁸⁴⁹ Butt *Land Law* 752.

⁸⁵⁰ Refer to para 6.3.3.3.

⁸⁵¹ Troy *et al* 2017 *Housing studies* 3.

⁸⁵² Butt *Land Law* 858. Refer to para 3.3 for the South African position.

⁸⁵³ Gray *et al Property Law in New South Wales* 427. Refer to para 3.2.1 for the South African position.

⁸⁵⁴ Refer to para 3.3.1.

infrastructure, unless the common infrastructure is described on the plan, in the way prescribed by the regulations, as a part of the lot.⁸⁵⁵

However, one of the marked differences between the two systems is the description of the thing.⁸⁵⁶ Gray provides a simpler definition of "a lot", namely:

... one or more cubic spaces bounded by the inner surface of the wall, or the upper surface of any floor and the lower surface of any ceiling of a unit in a scheme.⁸⁵⁷

From this definition, it is clear that the NSW strata title system describes an "enclosed airspace"⁸⁵⁸ instead of a "cubic entity" or "structural cubic space".⁸⁵⁹ The owner in strata title is not the owner to the middle of the divisionary wall, floor or ceiling as in South Africa, but these are seen as part of the common property. The owner is literally just the owner of the enclosed airspace inside the floor, walls and ceiling. This description of the lot effectively places the burden on the owner to take care of the maintenance of the inner space of the lot, for instance the painting of the inner walls, the carpets, tiles and ceilings. This description has led to an interesting interpretation regarding the duty of maintenance of the inner surface of the lot. In *The Owners SP 35042 v Seiwa Australia Pty Ltd*⁸⁶⁰ the court found that if the tiles on the floor had been laid before the plan was registered, the inner boundary of the lot included the upper surface of the floor tiles, but did not extend to the space below the tiles. A defect in the membrane between the concrete floor and the tile would then form part of the common property, hence the responsibility of the owners'

⁸⁵⁵ Section 4 of the *Strata Schemes Development Act (SSDA)* 51 of 2015.

⁸⁵⁶ Refer to para 3.3 for the South African position.

⁸⁵⁷ According to Gray *et al Property Law in New South Wales* 427, "surface" has been described to mean the "internal skin" of the wall, floor or ceiling.

⁸⁵⁸ A description similar to the South African position namely "(T)he boundaries of a lot may be defined 'by reference to a wall floor and ceiling': is given slight attention by Butt. However, he does not elaborate on the circumstances where this description will be used. He merely indicates that it is "rarely done". Butt *Land Law* 859.

⁸⁵⁹ Pienaar 2012 *Sectional Titles* 18; Gray *et al Property Law in New South Wales* 427.

⁸⁶⁰ [2007] NSWCA 272 in Gray *et al Property Law in New South Wales* 427. Also refer to Andreone 2007 www.francescoandreone.com; Myers 2007 *Management Rights NSW* np.

corporation. However, if a fixture is attached to the boundary wall, it will form part of the lot.⁸⁶¹

6.3.3.2 The common property

The *SSDA* defines the terminology in section 4. The common property is defined as:

... any part of a parcel that is not comprised in a lot (including any common infrastructure that is not part of a lot).

The common infrastructure is defined as:

- (a) the cubic space occupied by a vertical structural member of a building, other than a wall, or
- (b) the pipes, wires, cables or ducts that are not for the exclusive benefit of one lot and are:
 - (i) in a building in relation to which a plan for registration as a strata plan was lodged with the Registrar-General before 1 March 1986, or
 - (ii) otherwise—in a building or in a part of a parcel that is not a building, or
- (c) the cubic space enclosed by a structure enclosing pipes, wires, cables or ducts referred to in paragraph (b).⁸⁶²

Upon registration, a separate certificate of title is created in favour of the owners' corporation⁸⁶³ in relation to the common property. The certificate of title is a copy of the folio of the Register of a specific piece of land.⁸⁶⁴ It will show the alterations made to the folio. The owners' corporation "holds" the common property as "agent" for the owners of the lots (usually referred to as the proprietors),⁸⁶⁵ but may deal with it only as far as the act allows. The owners of the lots are, therefore, "equitable tenants in common".⁸⁶⁶ Tenancy in common is a form of co-ownership where each has a proportionate interest in the land,

⁸⁶¹ Gray *et al Property Law in New South Wales* 427.

⁸⁶² Section 4 of *SSDA*.

⁸⁶³ A body similar to the general meeting in the South African system.

⁸⁶⁴ Butt *Land Law* 748.

⁸⁶⁵ Gray *et al Property Law in New South Wales* 429.

⁸⁶⁶ Butt *Land Law* 861.

although the property is not divided.⁸⁶⁷ This will entail that the owners of lots will all own a proportionate interest in the property with which they may deal in a manner they see fit.

However, in terms of section 28(2) of the *SSDA* an owner's interest in the common property cannot be dealt with separately from the dealings with the lot.⁸⁶⁸ The nature of common property was dealt with in *Houghton v Immer (No 155) Pty Ltd*.⁸⁶⁹ This case addressed the development of two penthouses which were effected by subdividing lot 5 and "the common property on and above the former roof to create two penthouse lots".⁸⁷⁰ This development was authorised by the passing of a special resolution. The resolution also authorised the body corporate to transfer its interests in the penthouse lots derived from common property for \$1. This resolution was possible as the owners of lot 5 held 80% of the aggregate unit entitlements. Although this case mainly dealt with the fact that the minority owners were financially prejudiced by the special resolution, the main importance of this case for the purposes of this study is the fact that the court clarified the legal nature of the common property in this case.

The court found:

Since common property is the land in the parcel that is not comprised in a lot, lots and common property are mutually exclusive.⁸⁷¹

The court found that in the event of a lot being developed on the common property, such common property will cease to exist when the plan is registered. In this specific case, the common property was developed by the body corporate. The court found that as soon as the lots were created and the common property ceased to exist, the ownership vested in the body corporate

⁸⁶⁷ Butt *Land Law* 223.

⁸⁶⁸ In South Africa it is held as a form of bound common ownership. Refer to para 3.3.4.

⁸⁶⁹ 1997 WL 1880931 (1997) at 5.

⁸⁷⁰ *Houghton v Immer (No 155) Pty Ltd* 1997 WL 1880931 (1997) at 1.

⁸⁷¹ *Houghton v Immer (No 155) Pty Ltd* 1997 WL 1880931 (1997) at 5.

beneficially and the body corporate is no longer only the "agent" of proprietors.⁸⁷²

The court also addressed the nature of the owner's right to the common property in *Young and 1 Others v Owners Strata Plan No 3529*.⁸⁷³ The court looked at section 20 of the *Strata Schemes (Freehold Development) Act* which determines that the body corporate holds the common property as an agent for a proprietor.⁸⁷⁴ The court also interpreted this statutory provision to mean that:

... the relevant rights of the plaintiffs in the common property are proprietary; they are rights owned by them beneficially as tenants in common in the common property.⁸⁷⁵

The court clarified the content of the rights by finding that the content is delineated by the by-laws. It clarified that the by-laws:

... define the nature of its use and enjoyment, any constraints upon it and any condition applicable such as payment of maintenance and the like.⁸⁷⁶

However, the court confirms that the owner's right to the common property:

... nonetheless remain proprietary in nature, though their detailed articulation stems from the by-laws.⁸⁷⁷

The court expanded on this explanation and indicate that in this case, where the exclusive possession of the swimming pool came into dispute:

The present right ... can be described as a valuable proprietary right in relation to a share in the common property...though its delineation be the subject of by-laws pursuant to statute.⁸⁷⁸

The court clearly stated that it did not "accept" that the legal nature of the plaintiff's right in the common property is only contractual in nature as would be

⁸⁷² *Houghton v Immer (No 155) Pty Ltd* 1997 WL 1880931 (1997) at 5.

⁸⁷³ [2001] NSWSC 1135 in Sherry 2009 *Bond Law Review* 162.

⁸⁷⁴ *Young and 1 Others v Owners Strata Plan No 3529* [2001] NSWSC 1135 at 13.

⁸⁷⁵ *Young and 1 Others v Owners Strata Plan No 3529* [2001] NSWSC 1135 at 14.

⁸⁷⁶ *Young and 1 Others v Owners Strata Plan No 3529* [2001] NSWSC 1135 at 15.

⁸⁷⁷ *Young and 1 Others v Owners Strata Plan No 3529* [2001] NSWSC 1135 at 15.

⁸⁷⁸ *Young and 1 Others v Owners Strata Plan No 3529* [2001] NSWSC 1135 at 15.

the right of the holder of an exclusive use right be.⁸⁷⁹ The system to describe the interests in common property differ from the position in South Africa. Whilst also a real right, it is formulated by focussing on the object of the right. In South Africa, the object is formed by means of a statutory joining of a corporeal part of a building (the section) and the incorporeal bound common ownership share in the common property.⁸⁸⁰

One of the entitlements of the owners' corporation is to create by-laws, covenants and easements pertaining to the common property.⁸⁸¹

6.3.3.3 By-laws in strata titles

Of significant importance to this research is the concept of by-laws in strata title. By-laws fulfil the same role in strata titles as resolutions do in sectional titles.⁸⁸² In terms of the *SSMA* and the *SSDA* by-laws means "the by-laws in force for the scheme".⁸⁸³ Sherry argues that legislation automatically creates a body corporate, mini-government, which enforces by-laws in *quasi*-public impersonal capacity.⁸⁸⁴ She also argues that by-laws are creatures of statute and *sui generis*.⁸⁸⁵ With the commencement of the *SSMA*, owners' corporations have until 30 November 2017 to amend current by-laws applicable to strata title schemes.⁸⁸⁶

Section 134 of the *SSMA* deals with the transitional arrangements relating to the introduction of new legislation. According to section 135(1), by-laws for a strata scheme will bind:

... the owners corporation and the owners of lots in the strata scheme and any mortgagee or covenant chargee in possession, or tenant or occupier, of

⁸⁷⁹ *Young and 1 Others v Owners Strata Plan No 3529* [2001] NSWSC 1135 at 18.

⁸⁸⁰ Pienaar 2012 *Sectional Titles* 64.

⁸⁸¹ Gray *et al Property Law in New South Wales* 430; s 34 of the *SSDA* and s 143 of the *SSMA*.

⁸⁸² Refer to para 4.3.

⁸⁸³ Section 4(10) of the *SSMA* and s 4(1) of the *SSDA*.

⁸⁸⁴ Sherry 2013 *UNSWLJ* 301. Refer to para 4.3.1 for the legal nature of rules in South Africa.

⁸⁸⁵ Sherry 2013 *ALJ* 399. Refer also to Sherry *Strata title property rights* 157 at footnote 42 where she refers to *Chauhan v Jaynree Services Pty Ltd* [2008] NSWSC 969 at [42].

⁸⁸⁶ Fair Trading - Major changes to strata laws.

a lot to the same extent as if the by-laws:

- (a) had been signed and sealed by the owners corporation and each owner and each such mortgagee, covenant chargee, tenant and occupier...

The addition of section 135(1)(a) has the effect that it is accepted that the person in question is familiar with the by-law. In terms of section 178(2)(e) the by-laws are entered on the strata roll as evidence of "the by-laws for the time being in force for the strata scheme". A by-law is only enforceable if it is registered and the right holder must be an owner.⁸⁸⁷ Butt argues that if the by-law is recorded in the folio it is sufficient for the exercise of the right. The specific entitlement that the by-law provides for, need not be recorded.⁸⁸⁸ It grants special privileges or exclusive use over parts of the common property to the exclusion of other owners.⁸⁸⁹ It may be made, amended or repealed through special resolution.⁸⁹⁰ It will continue "after changes to ownerships of lots".⁸⁹¹ It "unerringly runs with the land".⁸⁹² In terms of section 47 of the *SSMA* a by-law will be valid if it relates to the "control, management, administration, use or enjoyment of the lots or the lots and the common property". It may not interfere with the existing common property rights by-laws as indicated on the sketch plan.⁸⁹³ Bugden states that by-laws are conferred, subject to terms and conditions and may be terminated if the holder of the right breaches the condition. It can be identified with reference to the plan and should either be included in the minute book of the body corporate or annexed to the notification and then it forms part of the public record and is permanently reserved.⁸⁹⁴

⁸⁸⁷ Pobi 2013 http://www.pobilawyers.com.au/wp-content/uploads/2013/10/Strata-by-laws-fundamentals_NSW-Young-Lawyers.pdf para 7.1 (c) and (h).

⁸⁸⁸ Butt 2007 *ALJ* 12.

⁸⁸⁹ Pobi 2013 http://www.pobilawyers.com.au/wp-content/uploads/2013/10/Strata-by-laws-fundamentals_NSW-Young-Lawyers.pdf para 5.4.

⁸⁹⁰ Pobi 2013 http://www.pobilawyers.com.au/wp-content/uploads/2013/10/Strata-by-laws-fundamentals_NSW-Young-Lawyers.pdf para 5.8.

⁸⁹¹ Pobi 2013 http://www.pobilawyers.com.au/wp-content/uploads/2013/10/Strata-by-laws-fundamentals_NSW-Young-Lawyers.pdf para 5.5.

⁸⁹² Sherry 2013 *UNSWLJ* 300.

⁸⁹³ Pobi 2013 http://www.pobilawyers.com.au/wp-content/uploads/2013/10/Strata-by-laws-fundamentals_NSW-Young-Lawyers.pdf para 6.3.

⁸⁹⁴ Bugden *Management Practice* 213-214.

6.3.4 Extension of lots

6.3.4.1 Introduction

The previous chapter introduced the extension of a sectional title section in terms of section 24 of the *STA* as one of the problem areas forming the focus of this research.⁸⁹⁵ In that discussion, the legal effect of the right was investigated. It was argued that the right remains a creditor's right up until the necessary endorsement to the title deed has been made.⁸⁹⁶ The fragility of this position and the possible problems regarding the security of this right was discussed in some detail. Furthermore, the substantial responsibilities on the right holder despite the fragile and tenuous nature of the right were discussed.⁸⁹⁷ The effect of this extension on the co-ownership of common property and the possible problems relating to a possible sale of the section were also addressed.⁸⁹⁸ In this chapter, as with the other rights discussed in chapter 5, a comparative analysis with the position in strata titles in New South Wales will be attempted in an effort to determine whether similar problems exist and whether replicable solutions are offered in that legal system.

6.3.4.2 Alteration of the building affecting the lot boundary

The closest correlation with the provisions found in section 24 of the *STA*⁸⁹⁹ is to be found in division 4 of the *SSDA*.⁹⁰⁰ The extension of the boundaries of the lot that is similar to the extension of a section in terms of section 24 of the *STA*, is dealt with in section 19 of the Act. It determines that that section will be applicable when a building of a strata scheme is altered:

- (a) by demolishing a wall, floor, ceiling or common infrastructure, and a boundary of a lot was, immediately before the alteration:

⁸⁹⁵ Refer to para 5.2.

⁸⁹⁶ Refer to para 5.2.2.

⁸⁹⁷ Refer to para 5.2.3.

⁸⁹⁸ Refer to para 5.2.4.

⁸⁹⁹ Refer to para 4.4.

⁹⁰⁰ An initial investigation into ss 109 and 110 of the *SSMA* was discarded as this only dealt with minor cosmetic renovations that an owner may make inside his lot such as painting, laying carpet and replacing wardrobes et cetera.

- (i) the inner surface or any part of the wall, the upper surface or any part of the floor or the under surface or any part of the ceiling, or
 - (ii) defined in terms of or by reference to the wall, floor, ceiling or common infrastructure, or
- (b) by constructing a wall, floor or ceiling so that a boundary of a lot coincides with the inner surface or any part of the wall, the upper surface or any part of the floor or the under surface or any part of the ceiling.

In terms of section 19(2) the owner of the lot must lodge a plan, that complies with subsection 3, within one month of such an alteration having been completed. It should be accompanied by a certificate of title for the common property in the strata scheme if the common property is affected.⁹⁰¹ The plan must define the base line after the alteration and a registered land surveyor must certify whether it encroaches on a public place⁹⁰² and if so, that an easement exists.⁹⁰³ The certificate of a registered land surveyor must certify that:

... any wall, floor or ceiling referred to in subsection (1)(b) is *wholly within the perimeter of the parcel*.⁹⁰⁴

The interpretation of "wholly within the perimeter of the parcel" will for this study be interpreted to mean within the parcel of the strata title scheme, as opposed to within the perimeter of a specific lot.

Should the alteration encroach upon a public space (such as a side walk), the building alteration plan showing the encroachment should be registered by the Registrar-General and a copy should be provided to the local council.⁹⁰⁵ The plan must be signed by the proprietor of the land, the owners' corporation, the registered mortgagees and chargees or covenant charges.⁹⁰⁶ This requirement may, however, be waived by the Registrar-General.⁹⁰⁷

⁹⁰¹ Section 21(1) of the *SSDA*.

⁹⁰² Outside the "parcel of land" or erf in terms of s 19(4)(a)(ii).

⁹⁰³ Section 19(4) of the *SSDA*.

⁹⁰⁴ My italics. Refer to s 19(4) of the *SSDA*.

⁹⁰⁵ Sections 20(1) and 20(2)(a) of the *SSDA*.

⁹⁰⁶ Sections 22(1)-(3) of the *SSDA*.

⁹⁰⁷ Section 22(4) of the *SSDA*.

Despite these rather cryptic provisions, the strata title legislation and the Australian law in general are, however, silent on any further questions relating to the alteration of the boundaries of the lot. Neither the co-ownership of common property that may be affected, nor the legal nature of the right is addressed in legislation or the most prominent academic literature regarding strata titles. It may, therefore, be concluded that the law relating to this particular topic causes fewer difficulties in New South Wales than in South Africa.⁹⁰⁸ A reason for this may be that the legal nature of the right in terms of what may be registered, or not, does not play such an important role in the Australian registration system as in that of South Africa, specifically due to the Torrens system discussed above. It is, therefore, quite frustrating to admit that possible solutions to the difficulties surrounding section 24 extensions in South Africa will not be solved by applying principles of the strata title system.

6.3.5 Staged development

6.3.5.1 Introduction

The extension of a sectional title scheme in terms of section 25 of the *STA* is similar to the staged development in the strata title system. Butt proclaims that "any system permitting staged development must protect the rights of existing owners".⁹⁰⁹ It must, however, according to Butt, also protect the right of the developer to proceed with the development as planned.⁹¹⁰ The *SSDA* provide for the development of strata title schemes as well as staged development. This is done by a developer. A developer is defined as the person who, for the time being, is:

- (a) the original owner of the strata scheme, or
- (b) a person, other than the original owner, who is the owner of a development lot within the strata plan.⁹¹¹

⁹⁰⁸ Refer to para 4.4.5.

⁹⁰⁹ Butt *Land Law* 882.

⁹¹⁰ Butt *Land Law* 882.

⁹¹¹ Section 4 of the *SSDA*.

During the initial stages, the developer is responsible for all the duties of the owners' corporation as well as the design and quality of the building.⁹¹² This leaves the developer in a very powerful position that may lead to a negligent and apathetic attitude toward fixing any building defects.⁹¹³

According to this Act, staged development consist of:

- (a) the progressive improvement of the parcel by the construction of buildings or the carrying out of works on development lots, and
- (b) the subsequent subdivision of each development lot and the consequential adjustment of the unit entitlement of lots in the scheme.⁹¹⁴

In order to successfully lodge an application for the approval of the strata development in stages, the developer should complete a disclosure document, the strata development contract. This should include the concept plan that complies with the relevant development contract, a description of the land, and also an indication of land that is proposed to be added at a later time.⁹¹⁵ The lots that are earmarked for the development should be earmarked on the strata plan as development lots.⁹¹⁶ A development lot:

... means a lot in a strata plan or strata plan of subdivision that is identified by a strata development contract as a lot that is to be the subject of a strata plan of subdivision under the development scheme for the contract⁹¹⁷

Part 5 of the *SSDA* deals with staged development.⁹¹⁸ In terms of section 73(3) of the *SSDA* the development is carried out subject to the strata development contract that describes:

- (a) any proposed development that the developer for the development lot warrants will be carried out and may be compelled to carry out (**warranted development**), and

⁹¹² Easthope and Randolph 2016 *Environment and Planning* 1832. This is similar to the South African position. Refer to para 4.2.1.

⁹¹³ Easthope and Randolph 2016 *Environment and Planning* 1840.

⁹¹⁴ Section 73(1) of the *SSDA*.

⁹¹⁵ Edgeworth *et al Australian Property Law* 625 as well as ss 14(1-3) and 76(4) of the *SSDA*.

⁹¹⁶ Butt *Land Law* 882; s 10(c)(i) of the *SSDA*.

⁹¹⁷ Section 4 of the *SSDA*.

⁹¹⁸ Refer to para 4.5.2 for the South African position.

- (b) any other proposed development that the developer will be authorised but cannot be compelled to carry out (*authorised proposals*).

They are referred to as "permitted development" because the owners' corporation and other interested parties must allow it.⁹¹⁹ The right obtained by the developer is called the "development concern". This right entitles the developer to the following:

- (a) doing any of the following in accordance with the contract:
 - (i) erecting structures, carrying out works or effecting other improvements,
 - (ii) creating easements, dedicating land, making by-laws or entering into covenants or management or other agreements,
 - (iii) creating or using common property,
 - (iv) adding land to the parcel,
 - (v) using water, sewerage, drainage, gas, electricity, oil, garbage, conditioned air, telephone or other services available to the parcel, or installing additional services,
 - (vi) providing and using means of access or egress to or from a development lot, or to or from common property,
 - (vii) subdivision of a development lot, or excising a development lot from the parcel, and
- (b) carrying out any other development that is permitted to be carried out because it is included in the contract.⁹²⁰

This indicates that the developer has limited and specifically prescribed entitlements that will not include use and enjoyment. A development concern does, however, not entitle the developer to subdivide the common property or to amend the strata development contract, even though such an amendment may relate to the development concern.⁹²¹ This does entail that a decision about the development concern need not be supported by a unanimous or special resolution of the owners' corporation.⁹²²

⁹¹⁹ Section 73(4) of the *SSDA*.

⁹²⁰ Section 74(1)(a) of the *SSDA*.

⁹²¹ Section 74(2) of the *SSDA*.

⁹²² Section 87(2) of the *SSDA*.

6.3.5.2 Legal nature of the right

The strata development contract has the effect of an agreement under seal or a deed between the developer, the proprietors of lots (both present and future), mortgagees, lessees and occupiers.⁹²³ It may not be excluded, modified or varied by contract and it does not merge with the transfer of a lot.⁹²⁴ The Registrar General will register it and record the existence of the contract against the folio of the register for the common property. Once registered, it may only be varied in accordance with the act.⁹²⁵ The strata development contract may be amended by the developer. Should it include architectural or landscaping design changes, it is only lawful if approved by planning authority and supported by a unanimous resolution of the owners' corporation. The amendment will only come into effect if it is in compliance with the act, registered and not inconsistent with the registered strata management statement.⁹²⁶ Should it not be an architectural or design change, it only needs to be approved by the planning committee. The owner and other interested parties are only given notice of the proposed changes.⁹²⁷ The developer may also seek approval by the Land and Environmental Court if the owners' corporation or other interested parties have refused.⁹²⁸ The *SSDA* also makes provision for the application for legal assistance by the owners' corporation should they want to defend an application by the developer to amend or extend the applications.⁹²⁹ It both allows and compels the developer to complete the development in the manner stipulated in the contract. This must be done within a 10-year time frame from the date that the contract is registered.⁹³⁰ Upon

⁹²³ Refer to para 5.3.2 for the South African position.

⁹²⁴ Sections 81(1) and 81(7)-(8) of the *SSDA*. See also Edgeworth *et al Australian Property Law* 625.

⁹²⁵ Sections 79 and 80 of the *SSDA*. See also Butt *Land Law* 883 and Edgeworth *et al Australian Property Law* 625.

⁹²⁶ Section 84(1-3) of the *SSDA*.

⁹²⁷ Section 84(4) of the *SSDA*.

⁹²⁸ Sections 86 and 92 of the *SSDA*.

⁹²⁹ Section 93-97 of the *SSDA*.

⁹³⁰ Section 76(3) of the *SSDA*.

application by any interested party, the court may extend this time frame.⁹³¹

The development scheme will be concluded in the following circumstances:

- When the consent is revoked, or
- If the last undivided development lot is subdivided; or
- In case notice by all interested parties is registered; or
- The conclusion time arrives⁹³²
- By court order.⁹³³

The conclusion of the development scheme is also recorded by the Registrar General in the folio.⁹³⁴ The folio contains a description of the land, a description of the proprietor, other particulars that the Registrar General may want to include, as well as any other estates or interests that affect the land.⁹³⁵ The interests in land is recorded on the certificate of title of such a piece of land. The certificate of title is updated regularly to show all registered dealings with the land. After registration of the dealing, it has the effect of a deed.⁹³⁶ This will entail that the right of the developer to develop the strata title scheme in stages is also registered against the folio of the scheme. This position is similar to the South African position where the right to extend the sectional title scheme in terms of section 25 of the *STA* is registered in the Deeds Registry.

However, what is not clear from the legislation or literature is whether this right is proprietary in nature. As the Torrens system of registration is positive in nature, the registration of the right will provide the developer with legal certainty regarding the existence of his right. The publicity principle is also met as the right is registered against the certificate of title of the strata scheme. Therefore, third parties and buyers will be able to have knowledge of the existence of such a right. The content of the right to staged development is,

⁹³¹ Section 92 of the *SSDA*.

⁹³² The conclusion time is the time indicated in the contract or if the time has been extended in terms of s 92, such extended time.

⁹³³ Section 89 of the *SSDA*.

⁹³⁴ Section 91 of the *SSDA*.

⁹³⁵ *Gray et al Property Law in New South Wales* 308.

⁹³⁶ Refer to para 6.3.2.2.

similar to the position in South Africa,⁹³⁷ clearly explained in the *SSDA*. The developer is only allowed permitted development as described earlier. Should he seek to amend the strata development contract it must also be done with the added approval of the owners' corporation in terms of a unanimous resolution. The position regarding "changed circumstances" applicable to changes in the South African context is not evident from a study of the legislation of New South Wales. As is the case in South Africa, this right is only given for a certain period of time, which can be extended upon application. In terms of the definition of a developer, it seems as if this right may be transferred as well.

The fact that the *SSDA* only makes provision for a "development concern," suggests that this right is not divisible and consequently will not make provision for plot and plan development (as Van der Merwe suggested will be possible in South Africa after the 2011 amendment).⁹³⁸ As development concern and permitted development are clearly prescribed in the act, this right also does not provide the developer with use and enjoyment entitlements in the strata scheme. However, little heed is paid to the *legal nature* of the right in New South Wales, due to the fact that the right may be registered in the Torrens register irrespective of whether it constitutes a real or personal right. Furthermore, the fact that the *numerus clausus* principle is applicable makes it doubtful whether this right will be seen as a servitude of any kind. The academic debate regarding the legal nature of the rights is, therefore, not as relevant in New South Wales as it is in South Africa. The duties of the developer are also clearly indicated through the strata development contract that has to be registered and adhered to. Part 2 of the *SSMA* focusses wholly on building defects of building work carried out on common property and lots.⁹³⁹ Section 194 demands that the developer, as part of his obligations, should appoint at his cost,⁹⁴⁰ a qualified independent⁹⁴¹ building inspector to inspect the buildings

⁹³⁷ Paragraph 5.3.2.3.

⁹³⁸ Refer to para 5.3.3.4.

⁹³⁹ Section 191 of the *SSMA*.

⁹⁴⁰ Section 204 of the *SSMA*.

⁹⁴¹ Section 197 of the *SSMA*.

and provide a written report to the secretary. Any defects reported by the inspector should be rectified in terms of section 206 of the *SSMA*.

6.3.6 *Common property rights by-laws*

6.3.6.1 Background

The importance of by-laws for this study is found therein that they are the mechanism used for creating exclusive use of a part of the common property to a specific owner of a specific lot. This is similar to the creation of exclusive use areas in sectional title legislation in terms of section 27 of the *STA*. Section 142 of the *SSMA* provides for "common property rights by-law". This is a by-law that confers on an owner of a lot in a strata title scheme:

- (a) a right of exclusive use and enjoyment of the whole or any specified part of the common property, or
- (b) special privileges in respect of the whole or any specified part of the common property (including, for example, a licence to use the whole or any specified part of the common property in a particular manner or for particular purposes), or that changes such a by-law.

These by-laws were, according to previous legislation, known as exclusive use by-laws. In terms of section 143(1) of the *SSMA* an owners corporation may make a common property rights by-law only with the written consent of "each owner on whom the by-law confers rights or special privileges". These by-laws may be subject to conditions specified in the by-law, for instance the payment of money as determined by the owners' corporation.⁹⁴² It also allows for the creation of a common property rights by-law if the person on whom the right of exclusive use and enjoyment is being conferred upon, already had such a privilege before the creation of the by-law.⁹⁴³ This by-law is created in terms of a special resolution and the written consent of owners who are negatively affected by its establishment.⁹⁴⁴

⁹⁴² Section 143(2) of the *SSMA*.

⁹⁴³ Section 143(3) of the *SSMA*.

⁹⁴⁴ Refer to the case of *Young* as well as Sherry's discussion on the interpretation of the consent needed. Refer to para 6.3.3.2.

The consent needed by the owners in creating common property rights by-laws came under scrutiny in *Young and 1 Others v The Owners SP 3529 and 2 Others*,⁹⁴⁵ where a by-law was in dispute.⁹⁴⁶ The by-law entailed that if passed, it would deny both the plaintiffs (who owned garages only), and owners of new lots, any entitlement to the common property and use of the swimming pool.⁹⁴⁷ The situation pre-1987 was that unanimous consent was needed, but currently a special resolution and the consent of the "owners concerned" is needed. The defendant argued that "owners concerned" should be interpreted to mean those who acquire new rights and maintenance obligations. The court found that an interpretation of legislation should necessarily include that the consent of someone whose rights are negatively affected, needs to be obtained. A contrary interpretation would be "absurd and unreasonable". Therefore, "concerned owners" should include "those who would lose rights to the common property".⁹⁴⁸ The court also found that the reason why a unanimous consent was no longer needed, was probably because the legislature wanted to alleviate the problem of a veto right of a "vexatious lot holder".⁹⁴⁹

In a discussion of the case, Sherry argues that the uncertainty surrounding whose consent is needed, is a result of the legislature not indicating this information expressly. She laments the fact that the attention of the legislature was rightly focused on facilitating harmonious living, but "insufficient attention was given to how these laws interact with fundamental principles of property". She argues that *Young* is an example of such inattention. When investigating general property law, one group of owners (tenants in common) in bound common ownership, cannot take another's rights for themselves.⁹⁵⁰ However, it seems possible that in the absence of "very clear words and intent," such a construction is possible in strata title because "concerned owners" is not aptly clarified. This argument indicates that the creation of the by-laws, especially

⁹⁴⁵ [2001] NSWSC 1135; Sherry 2009 *Bond Law review* 164.

⁹⁴⁶ Refer to para 6.3.3.2.

⁹⁴⁷ *Young and 1 Others v The Owners SP 3529 and 2 Others* [2001] NSWSC 1135 at [2].

⁹⁴⁸ Sherry 2009 *Bond Law Review* 164.

⁹⁴⁹ Sherry 2009 *Bond Law Review* 164.

⁹⁵⁰ Sherry 2009 *Bond Law Review* 164.

common property rights by-laws, also leads to uncertainty in this jurisdiction. It seems as if the lack of a proper clarification of the parties who need to consent to the creation of the by-law, may have the effect that some owners may be prejudiced without the power to have their say in the creation of the by-law. The fact that these by-laws also bind successors in title make this aspect even more problematic.⁹⁵¹ It appears as if the main objective focus of the legislature when drafting this was to ensure that the person in whose favour the by-law was created would be part of the process and would be aware of his increased maintenance responsibility. However, less attention was given to the owners who would forfeit their entitlements to the common property because of the creation of the by-law. Their consent was not needed. Fortunately, according to Sherry, it seems that strata title residents do not realise this potential power.⁹⁵²

In terms of section 144, an arrangement regarding the responsibility of maintenance and upkeep of the common property subject to the common property rights by-law, must be agreed upon and included in the drafting of the by-law. This responsibility may either stay with the owners' corporation, or it may be transferred to the holder of the right. If it is placed on the owner, it absolves the owners' corporation from that responsibility.⁹⁵³ Should owners share a "common property right", the share of their contribution towards the maintenance would be dependent on their unit entitlement.⁹⁵⁴

According to section 145(1) of the *SSMA* a common property right by-law is binding on "owners for the time being". What is meant by "for the time being" is not clear from a reading of the act. However, from Sherry's discussion of Tate, it is clear that this right is transferred to successors in title.⁹⁵⁵ The holder of the right should pay "money" to the owners' corporation in terms of section 145(2) and 145(3). The new owner, together with the previous owners, is jointly and severally liable to pay "money" to the owners' corporation. This refers to the

⁹⁵¹ Refer to para 6.3.6.3.

⁹⁵² Sherry 2009 *Bond Law Review* 167.

⁹⁵³ Section 144(3) of the *SSMA*.

⁹⁵⁴ Section 144(2) of the *SSMA*.

⁹⁵⁵ Sherry *Strata title property rights* 149.

money for the maintenance of the common property rights by-law as described in section 144. The Strata Schemes Management Regulations that came into force together with the *SSMA* on 1 December 2016, provide a detailed list of the responsibilities of owners' corporations, as well as lot owners, for the maintenance of the buildings.⁹⁵⁶

Section 149 makes provision for an application to a Tribunal⁹⁵⁷ should the establishment of the common property rights by-law be refused unreasonably by the owners' corporation. The owners' corporation on the other hand may apply for an order should the owner in whose favour the common property rights by-law is to be established unreasonably refuses to accept the terms of the by-law. An application may also be made by the owners' corporation should they wish to repeal a common property rights by-law and this is unreasonably refused by the owner. The Tribunal may also make an order upon application of an interested person, should it deem the conditions relating to the maintenance of the common property rights by-law to be unjust.⁹⁵⁸ The measures taken into account when making this order would be to take into account:

- The interests of all owners in the use and enjoyment of their lots;
- The rights and reasonable expectations of an owner who benefits from the common property rights by-law.⁹⁵⁹

6.3.6.2 Legal nature of common property rights by-laws

The legal nature of common property rights by-laws came under scrutiny in various cases relevant to the current jurisdiction under discussion. Academics, like Butt, hold that a common property rights by-law (exclusive use by-law) does not create an interest in land "in any technical sense". He argues that the right that is created is purely statutory.⁹⁶⁰ Pobi, a practitioner, agrees with Butt on this point. He argues that common property rights by-laws are contractual

⁹⁵⁶ *Fair Trading* Appendix 2 36-38.

⁹⁵⁷ This is the Civil and Administrative Tribunal according to the definition in s 4 of the *SSMA*.

⁹⁵⁸ Section 149(1)(a)-(c) of the *SSMA*.

⁹⁵⁹ Section 149(2)(a)-(b) of the *SSMA*.

⁹⁶⁰ Butt *Land Law* 872.

and not proprietary. He goes so far as to warn practitioners that as these rights are not proprietary rights, the owners have a limited capacity over these rights, for instance it is not possible to grant a lease over an exclusive use area.⁹⁶¹ Butt and Pobi base their assertion on *North Wind Pty Ltd v Proprietor Strata Plan 3143*.⁹⁶² In this case, the plaintiff was the proprietor of a lot in the strata plan. A by-law was created under the 1973 Act providing the plaintiff with an exclusive use area over part of the common property.⁹⁶³ The defendant erected structures affecting the airspace above this exclusive use area and the plaintiff approached the court for a restraining order to stop the defendant from encroaching on such airspace.⁹⁶⁴ The court indicated that the question was whether it would have jurisdiction in the instance where a statute created an obligation and enforced a performance.⁹⁶⁵ The court found that in order to answer this question, it had to determine whether the right that is created by statute, is a novel right or a "right known to the common law".⁹⁶⁶ The court held that council:

... could not place the right within any known category of real property interests, and I think there is no such category, for the reason that the right is not an interest in land in any sense known to common law.⁹⁶⁷

The court, therefore, held that by-laws have effect as covenants and the reference to mutual covenants showed that the Act intends that the by-laws shall have contractual effect.⁹⁶⁸

Although this case should have settled this dispute, Sherry's and Edgeworth's discussions of subsequent case law show that the position is not so clear cut as

⁹⁶¹ Pobi 2013 http://www.pobilawyers.com.au/wp-content/uploads/2013/10/Strata-by-laws-fundamentals_NSW-Young-Lawyers.pdf para 5.1.

⁹⁶² [1981] NSWLR 809.

⁹⁶³ *North Wind Pty Ltd v Proprietor Strata Plan 3143* [1981] NSWLR 809 at 810F.

⁹⁶⁴ *North Wind Pty Ltd v Proprietor Strata Plan 3143* [1981] NSWLR 809 at 810E.

⁹⁶⁵ *North Wind Pty Ltd v Proprietor Strata Plan 3143* [1981] NSWLR 809 at 811B.

⁹⁶⁶ *North Wind Pty Ltd v Proprietor Strata Plan 3143* [1981] NSWLR 809 at 812A.

⁹⁶⁷ *North Wind Pty Ltd v Proprietor Strata Plan 3143* [1981] NSWLR 809 at 814A.

⁹⁶⁸ *North Wind Pty Ltd v Proprietor Strata Plan 3143* [1981] NSWLR 809 at 814D.

it may seem. Sherry discusses *Owners of Strata Plan No 3397 v Tate*⁹⁶⁹ where the court identified two characteristics of by-laws, namely that by-laws are:

- delegated legislation, being instruments 'made under an Act' and thus should be interpreted according to principles of statutory interpretation⁹⁷⁰
- "statutory contract(s), deemed to exist by statute and ... covenant provisions of corporations' law..."⁹⁷¹

In this case the court found that the by-law:

... conferred a proprietorial estate upon the proprietor ... and, conversely, deprived the remaining proprietors in the strata scheme of the proprietary interest they had hitherto had in that part of the common property. The proprietorial nature of the by-law was indicated by its registration.⁹⁷²

The court went so far as to suggest in this case that the functioning of the by-laws is akin to "giving another the equivalent of property rights".⁹⁷³ However, the court interpreted the by-law in this case as a commercial contract.⁹⁷⁴

6.3.6.3 Entitlements and duties of the holder of the right

This indicates that the legislation and the judiciary have provided by-laws an extremely wide ambit. The entitlements and duties of the holder of the right are, therefore, also open for interpretation. Sherry argues that although by-laws are property regulations, the legislature has opted for a freedom of contract ethos.⁹⁷⁵ Sherry argues that this "expansive definition of by-law" has consistently been supported by the courts.⁹⁷⁶ This approach has eradicated much of the protection provided by property doctrines.⁹⁷⁷

⁹⁶⁹ [2007] NSWCA 207.

⁹⁷⁰ Sherry 2009 *Bond Law Review* 178.

⁹⁷¹ Sherry 2009 *Bond Law Review* 179; Sherry *Strata title property rights* 157.

⁹⁷² *Owners of Strata Plan No 3397 v Tate* [2007] NSWCA 207 at para [76] and quoted by Sherry 2009 *Bond Law Review* 179-180.

⁹⁷³ Sherry 2009 *Bond Law Review* 171.

⁹⁷⁴ Sherry *Strata title property rights* 149.

⁹⁷⁵ Sherry *Strata title property rights* 130.

⁹⁷⁶ Sherry 2013 *UNSWLJ* 302.

⁹⁷⁷ Sherry 2013 *UNSWLJ* 304.

Sherry discusses *White v Betalli*,⁹⁷⁸ according to whose facts, a strata scheme was situated on a riverfront. A common property by-law allowed a lot owner to store watercraft within the boundaries of another lot owner.⁹⁷⁹ The created by-law related to private property and not to the common property. The plaintiff argued that the by-law created an easement. This argument was rejected by the court.⁹⁸⁰ According to Sherry, some disagreement exists as to whether the interest created an easement. According to the one school of thought, the right was in its nature an easement, whereas the other school of thought argued that the right offended one of the crucial elements of an easement, namely granting rights of exclusive possession. Sherry argues that the Act only allowed for easements being created over common property and not over private property.⁹⁸¹ She also laments the fact that the court seemed to have abandoned its usual practice in strata title disputes regarding easements and covenants, namely to attempt to craft rules and limitations. Instead, the court applied a "simplistic statutory rule that a by-law need only relate to the use or enjoyment of a lot or common property". This resulted in a "peculiar, misconceived and potentially intrusive by-law to be valid".⁹⁸²

The case of *Clos Farming Estate* discussed above bears some relevance here.⁹⁸³

In this case the court found that:

Strata title legislation allows for the creation of an infinite variety of rights through by-laws and to the extent that these rights create proprietary interests, they do not need to fall within the existing categories of property rights.⁹⁸⁴

Sherry indicates that this interpretation would entail that strata titles legislation eradicates the *numerus clausus* principle.⁹⁸⁵ One of the reasons argued by Edgeworth, why the *numerus clausus* principle should not become obsolete in

⁹⁷⁸ (2007) 71 NSWLR 381.

⁹⁷⁹ *White v Betalli* [2007] NSWSCA 243 in Sherry 2009 *Bond Law Review* 174. Refer also to Sherry *Strata title property rights* 126.

⁹⁸⁰ *White v Betalli* [2007] NSWSCA 243 at [32] and [207].

⁹⁸¹ Sherry *Strata title property rights* 128.

⁹⁸² Sherry *Strata title property rights* 130.

⁹⁸³ Refer to para 6.3.2.1.

⁹⁸⁴ Sherry 2009 *Bond Law Review* 174.

⁹⁸⁵ Sherry 2009 *Bond Law Review* 174.

Australia, is that the adding of a number of rights will complicate the conveyancing process.⁹⁸⁶ He admits that this is less of a burden if land is held under the Torrens system as is the case with strata titles.⁹⁸⁷ Sherry expands on this argument and points out that by-laws are registered dealings (actually it only comes into effect when registered) and, therefore, easily accessible for prospective buyers. However, she does admit that although the by-laws are readily accessible, it does not necessarily mean that all prospective buyers will go to the trouble to investigate them, especially as they are usually "voluminous". In accordance with the positive registration system in effect in Australia, Sherry admits that although registration gives effect to by-laws, if they have not been "lawfully made", "registration of the by-law does not produce the same certainty" as it would with other interests.⁹⁸⁸ Sherry argues that as by-laws can be positive and negative in nature, it may create a proprietary interest that does not comply with the *numerus clausus* principle. She points out that while purchasers may be aware of existing by-laws which are clearly recorded on the Torrens register, they cannot be aware of potential by-laws their neighbours may create in the future with the appropriate majority.⁹⁸⁹

The first principle identified by Edgeworth, for the retention of the *numerus clausus* principle, is according to Sherry more of a concern in strata titles. This principle is that land should be freed from multiple obligations and restrictions limiting the use of land. Although Edgeworth admits that the stringency of the *numerus clausus* principle should be relaxed, he does argue for the subsequent changes to be "incremental". Edgeworth proposes a "public benefit test" for the recognition of new interests of future owners to guard against a "shackling of land with 'fanciful obligations' ".⁹⁹⁰ He also proposes that these changes should not be made by the judiciary, but rather by the legislature. However, Sherry argues that this approach does not seem to be in effect regarding strata title

⁹⁸⁶ Edgeworth 2006 *Monash ULR* 400.

⁹⁸⁷ Edgeworth 2006 *Monash ULR* 406.

⁹⁸⁸ Sherry 2009 *Bond Law Review* 175.

⁹⁸⁹ Sherry 2013 *UNSWLJ* 302.

⁹⁹⁰ Sherry 2009 *Bond Law Review* 176.

legislation, but that there are "almost no limits on the content and quantity of by-laws". This provides private citizens with

... a *carte blanche* to create and burden property with whatever rights and restrictions that currently take their fancy.⁹⁹¹

This is a very wide entitlement granted to owners' corporations, especially considering that the only requirement for a by-law to be valid is that it should relate to lots or common property.⁹⁹² Sherry argues that there is an "enormous inconsistency in judicial interpretation" of by-laws. Based on *White v Betalli*, common property rights by-laws are acknowledged to be proprietary interests. However, in *Tate* they were interpreted as commercial contracts. Sherry criticised this viewpoint, as it does not give consideration to the fact that by doing so, the contract was effectively enforced against persons who may have not been parties to the contract.⁹⁹³ She submits that they are a form of delegated legislation, but definitely also interest in land.⁹⁹⁴ She goes so far as to submit that "while by-laws may begin their life as contractual agreements, they do not remain so".⁹⁹⁵ She argues in her criticism of *Tate* that by-laws are not contracts, but statutory property rights.⁹⁹⁶

As strata titles do not exist in isolation, Sherry correctly argues for the interpretation of strata titles against the framework of general property principles. This would result in by-laws being interpreted in the same manner as "interests in the Torrens register". She argues that it would be unreasonable to expect a prospective purchaser to ascertain the circumstances that lead to the creation of the by-law, and furthermore, such a burden would also be contrary to the Torrens principles.⁹⁹⁷ This argument is reminiscent of the main argument

⁹⁹¹ Sherry 2009 *Bond Law Review* 177.

⁹⁹² Sherry 2013 *UNSWLJ* 303.

⁹⁹³ Sherry *Strata title property rights* 149.

⁹⁹⁴ Sherry 2013 *ALJ* 401 in footnote 50.

⁹⁹⁵ Sherry 2013 *ALJ* 402.

⁹⁹⁶ Sherry *Strata title property rights* 149.

⁹⁹⁷ Sherry 2009 *Bond Law Review* 180.

made by Sherry - that the current way in which strata title legislation is being interpreted brings into question the indefeasibility of strata titles.⁹⁹⁸

Sherry concludes by pointing out that the strata title legislation is insufficient in recognising the differences between by-laws. Some by-laws create proprietary interests that consequently deprive other owners of an interest in land.⁹⁹⁹ The fact that this can be done without obtaining the consent of affected owners is a cause for concern.¹⁰⁰⁰ A by-law "entrenches many in perpetuity".¹⁰⁰¹ Sherry argues that by-laws create an open-ended bundle of property rights. Too many restrictions against free and democratic values may have the effect that no one wants to buy such land.¹⁰⁰² She cautions against too much fragmentation of ownership through by-laws, as it may even lead to the land being unusable, especially if owners cannot agree on its use. In extreme cases, it may become underused or dysfunctional.¹⁰⁰³ She further argues that the implementation of existing property law principles will set "boundary rules" which will prevent too many individuals with veto rights over a single piece of land. As pointed out, the effect of the *numerus clausus* principle will prevent a predecessor to determine land use in the future.¹⁰⁰⁴ However, as the court allows a broad ambit of by-laws and allows an expansive by-law making power, they actually create "an open-ended bundle of property rights".¹⁰⁰⁵ Sherry advocates that although there are modern demands for a more flexible law, it should not allow initial owners or developers' unlimited freedom to burden land with many restrictions and obligations. The judiciary should rather assure the economic viability of land.¹⁰⁰⁶

⁹⁹⁸ Sherry 2009 *Bond Law Review* 161.

⁹⁹⁹ Sherry 2009 *Bond Law Review* 180. Refer also to Sherry *Strata title property rights* 157 at footnote 42.

¹⁰⁰⁰ Sherry 2009 *Bond Law Review* 181.

¹⁰⁰¹ Sherry 2013 *UNSWLJ* 306.

¹⁰⁰² Sherry 2013 *UNSWLJ* 315.

¹⁰⁰³ Sherry 2013 *UNSWLJ* 306.

¹⁰⁰⁴ Refer to para 6.3.2.1.

¹⁰⁰⁵ Sherry 2013 *UNSWLJ* 314.

¹⁰⁰⁶ Sherry *Strata title property rights* 154.

She cautions that this trend may have severe economic consequences. Land may become unsaleable if burdened with by-laws that are too strict.¹⁰⁰⁷

6.3.6.4 Conclusion

From the discussion above a few important conclusions can be drawn. Firstly, all by-laws in strata titles in New South Wales are registered. However, this does not necessarily determine the legal nature of the right as the registration of the rights of extension of the unit, the scheme and exclusive use rights that form the focus of this study would in South Africa. The reason for this is that there is not a restriction on the registration of personal rights in New South Wales (as is the case in South Africa). Therefore, a study of the legal position in New South Wales does not really provide answers to this aspect of the current study. As common property use by-laws are registered, the question as to whether the rights created are real or personal is not as relevant in Australian law as it is in South African law. It does, however, ensure better publicity regarding the content of the particular by-law. As owners of lots know or ought to know about the existence of the by-laws, the by-laws are also applicable to successors in title.

Whether by-laws are real rights or merely commercial contracts binding people by virtue of their ownership in land is still uncertain as case law on the matter differs. Even the application of the *numerus clausus* principle hampering the creation of real rights at random, does not seem to curtail the establishment of new by-laws by owners' corporations. It, therefore, seems as if by-laws, especially the ones creating exclusive use, also cause a lot of uncertainty in Australia. It is acknowledged that by-laws do not fit comfortably within the known common law principles and are, therefore, *sui generis*.¹⁰⁰⁸

The fact that by-laws are interpreted widely by the courts seems to be a cause for concern. Not only does it negate common law principles such as the *numerus clausus* and indefeasibility of title, but it allows a staggering freedom

¹⁰⁰⁷ Sherry 2013 *UNSWLJ* 315.

¹⁰⁰⁸ Refer to para 6.3.3.2.

to owners' corporations to bind lot owners and successors in title.¹⁰⁰⁹ Although the property law systems in South Africa and New South Wales differ in some respects, the similarities between the strata title and sectional title systems do allow for an applicable comparison to be done. The emphasis on the nature of the right is not as relevant in New South Wales due to the fact that the distinction between real and personal rights is not as important as in South African property law. Furthermore, by-laws may be also registered so it is publicly obtainable.

What may be replicable in South Africa is the stringent system of minute keeping and registration and publication of by-laws and rules in New South Wales. This position is addressed to some extent in the *CSOSA* which provides that the rules of the scheme need to be approved and retained by the chief ombud and kept by the body corporate.¹⁰¹⁰ Furthermore, the detailed lists of responsibilities set out in the regulations in the New South Wales legislation may avert disputes regarding the maintenance and repairs of exclusive use areas. The fact that a Tribunal is also in operation to settle disputes in a more cost-effective manner has been replicated in South Africa with the establishment of the community schemes ombud service. Although the by-laws may not always be read by prospective buyers, at least they are contained in an accessible objective document.

6.4 Dutch Appartementsrechten

6.4.1 Introduction

The second part of this chapter will deal with a comparison between aspects of the South African sectional title system and the Dutch *Appartementsrechten* regarding the object of the right and the nature of apartment ownership, as well as, the development of apartment ownership and the exclusive use area. The reason why this jurisdiction has been chosen is because of the significant influence that the Dutch legal system has had on South African common law

¹⁰⁰⁹ Refer to para 6.3.4.

¹⁰¹⁰ Van der Merwe *Sectional Titles* 1-64.

principles, especially the South African property law. Although now codified, the principles of Roman and Germanic property law were transferred through the Dutch system (in the form of Roman Dutch law) to South Africa. Therefore, the South African and Dutch systems have the same roots. The South African and Dutch systems share similar basic principles, for example the clear distinction between ownership and limited real rights,¹⁰¹¹ the distinction between movable and immovable things¹⁰¹² and the *numerus clausus* principle of a certain number of closed systems.

As indicated previously, South Africa does not have a *numerus clausus* of limited real rights. It does, however, have a *numerus clausus* of forms of original acquisition of ownership.¹⁰¹³ It is, therefore, prudent to investigate the Dutch *Appartementsrechten* system to determine the nature of ownership of an apartment as well as the nature of the object that is owned. Due to the similarities of the two property systems, this investigation may lead to more clarity regarding uncertainties in the South African system.

According to Reehuis *et al*, a need for statutory regulation was needed after the Second World War. The *Apartment Act*¹⁰¹⁴ of 1952 was included in the *Dutch Civil Code*.¹⁰¹⁵ It was the first such regulation in the Netherlands to provide for a new form of co-ownership. It created a legal structure that would provide "stable and financeable rights of entitlement to apartments".¹⁰¹⁶ This Act was amended in 1972 by introducing new regulations. Book 5 of the *DCC* deals with real rights and Book 5 title 3 deals with ownership of immovable property. The creation of this right is not provided for in Book 3, which deals with the acquisition and loss of property, but is dealt with in a separate book.¹⁰¹⁷ In

¹⁰¹¹ Van der Merwe *Sakereg* 7; Reehuis *et al Nederlands Burgerlijk recht* 2012 paras 12, 21 and 462.

¹⁰¹² Van der Merwe *Sakereg* 8.

¹⁰¹³ Refer to para 2.3.1; Van der Merwe *Sakereg* 11.

¹⁰¹⁴ *Appartementen Wet*.

¹⁰¹⁵ Van Dam, Mijnsen and Van Velten *Asser's Goederenrecht* 356 (hereafter referred to as *DCC*).

¹⁰¹⁶ Vegter, Verstappen and Vonck "Apartment Ownership Associations" 3.

¹⁰¹⁷ Reehuis *et al Goederenrecht* 540; Mertens, Venemans and Verdoes Kleijn *Vernieuwd appartementsrecht* 1.

1992, it was included in title 9 of the fifth book in the *DCC* as *Appartementsrechten*.¹⁰¹⁸

6.4.2 *The object of the right and the nature of apartment ownership*

The object¹⁰¹⁹ of the right is the part of the building over which ownership exists. It is seen as an independent or separate thing and a new legal figure.¹⁰²⁰ In Dutch property law, this type of horizontal ownership is a divergence from the *superficies solo cedit* principle applicable in South Africa.¹⁰²¹ The general rule of *superficies solo cedit* is also applicable in Dutch Law, except if excluded by relevant legislation.¹⁰²²

This form of ownership also includes shops and offices, a section of a building or even a piece of land.¹⁰²³ Reehuis *et al* describe it as a peculiar real right providing enjoyment.¹⁰²⁴ The property must be suitable to be used as separate units for it to be possible to divide. This also is a peculiar form of co-ownership.¹⁰²⁵ The definition of *appartementsrecht* is complicated.¹⁰²⁶ It is created by statute as "independent *registergoed*"¹⁰²⁷ (immovable property) consisting of three components:

- Co-ownership of specific property that is common property for the use of all owners;

¹⁰¹⁸ Reehuis *et al Goederenrecht* 537; Van Dam, Mijnsen and Van Velten *Asser's Goederenrecht* 357.

¹⁰¹⁹ Reehuis *et al Nederlands Burgerlijk recht* para 6 refer to the object of the right as a "thing".

¹⁰²⁰ Van Dam, Mijnsen and Van Velten *Asser's Goederenrecht* 360, 364. Van Dam, Mijnsen and Van Velten calls it a new "*rechtsvorm*".

¹⁰²¹ Refer to para 3.3.1.2.

¹⁰²² Van Dam, Mijnsen and Van Velten *Asser's Goederenrecht* 357.

¹⁰²³ Van Dam, Mijnsen and Van Velten *Asser's Goederenrecht* 365.

¹⁰²⁴ He calls it "*een bijzonder- zakelijk genotsrecht*" in Reehuis *et al Goederenrecht* 538.

¹⁰²⁵ "*Een bijzondere vorm van gemeenschap*" in Reehuis *et al Goederenrecht* 538; Mertens, Venemans and Verdoes Kleijn *Vernieuwd appartementsrecht* 19; Van Dam, Mijnsen and Van Velten *Asser's Goederenrecht* 366-367.

¹⁰²⁶ Van Dam, Mijnsen and Van Velten *Asser's Goederenrecht* 367.

¹⁰²⁷ Section 117:1. Reehuis *et al Nederlands Burgerlijk recht* para 11 describes it as property that needs to be written into the public registers for transfer or vesting of the right to be valid. The requirements for property to be deemed "registergoed" are: There must be a valid register that it may be written into, it must be a public register and the right must be entered into the register for it to vest in the owner. "*constitutief zijn*". See also Van Dam, Mijnsen and Van Velten *Asser's Goederenrecht* 365.

- An exclusive use right of a section of a building which may include the exclusive use of a certain part of land for instance a garden; and
- Membership of the *Vereniging van Appartementseigenare* (owners' corporation).¹⁰²⁸

Co-ownership of the specific property forms the principal thing with the exclusive use right of a section being the accessory. The co-ownership of the property is the *moederrecht* which is the more comprehensive right.¹⁰²⁹ The right to exclusive use is the accessory and, therefore, the limited real right.¹⁰³⁰ The exclusive use right of part of a building does not exist independently. It is an accessory right to the co-ownership of the land and building.¹⁰³¹ Van Dam, Mijnsen and Van Velten argue that the legislator initially considered to provide the holder with full ownership of the *appartement*, but decided that such a construction could be misleading as it provides prominence to the ownership of the unit, instead of focussing on the co-ownership aspects and the responsibilities relating thereto. They wanted the main focus to be on the co-ownership of the common property, so that became the principal thing with the right to exclusive use of a specific apartment as the accessory thing. The ownership of a specific section is converted into an exclusive use right to the apartment that is *vastgekoppeld* (firmly attached to) the co-ownership of the whole building, as well as the land connected to it.¹⁰³² The dependent nature of this right means that it cannot be transferred on its own. The exclusive use right to the relevant section of the building may be leased, however. This may also include the lease of a garden that is part of the exclusive use of the section.¹⁰³³ The Dutch method of constructing the composite thing differs vastly from the South African position where the principal thing is the unit and the accessory thing is the co-ownership share in the common property. It is debateable

¹⁰²⁸ Refer to para 3.2 for South African position.

¹⁰²⁹ It is bound common ownership in South Africa. Refer to para 3.3.4.

¹⁰³⁰ Snijders and Rank-Berenschot *Goederentecht* 40.

¹⁰³¹ Refer to para 3.3.2 for the South African position.

¹⁰³² Van Dam, Mijnsen and Van Velten *Asser's Goederenrecht* 366-367.

¹⁰³³ Van Dam, Mijnsen and Van Velten *Asser's Goederenrecht* 368.

whether this construction lead to a more certain legal position, specifically when exclusive use areas, such as garages, gardens and balconies come into play.¹⁰³⁴

The three components form a so-called "trinity" which creates a *sui generis rechts instituut* (legal figure) with peculiar characteristics. It is an independent peculiar right.¹⁰³⁵ The use right is not ownership, but of proprietary nature.¹⁰³⁶ One of the advantages of this legal figure is that it creates a statutorily regulated real right.¹⁰³⁷ The combination of entitlements in *appartementsrecht* creates the independent real right.¹⁰³⁸ The initial ownership of a building and land disintegrates into a number of different new real use rights. Collectively, these rights will form the full ownership.¹⁰³⁹ The independent immovable property is replaced by *appartementsrechten*. *Appartementsrecht* comes into existence when the information is recorded in the *akte van splitsing* (deed of subdivision) in the public register.¹⁰⁴⁰ Although the owner is called *appartementseigenaar* (apartment owner), there is strictly speaking no ownership of a flat or apartment. It is also not the same as other *genotsrechten* (use rights).¹⁰⁴¹ It is an independent real right that may be transferred and mortgaged. Should the property be sold, the owners' corporation needs to be informed of the identity of the new owner.¹⁰⁴² Every owner is entitled to a share in ownership of the whole complex.¹⁰⁴³ This is a form of bound common ownership or *gemeenschap*. This form of co-ownership is constructed by legislation and consist of co-ownership of the building and the land to which the

¹⁰³⁴ See para 6.4.4.

¹⁰³⁵ "*Selfstandige eigen-aardig recht*" Reehuis *et al Goederenrecht* 539; Mertens, Venemans and Verdoes Kleijn *Vernieuwd appartementsrecht* 26.

¹⁰³⁶ Van Dam, Mijnsen and Van Velten *Asser's Goederenrecht* 367.

¹⁰³⁷ Van Dam, Mijnsen and Van Velten *Asser's Goederenrecht* 365.

¹⁰³⁸ Van Dam, Mijnsen and Van Velten *Asser's Goederenrecht* 371. Van Dam, Mijnsen and Van Velten argue that this is the reason why the 1972 amendment to legislation changed the word *appartement* to *appartementsrecht*.

¹⁰³⁹ Van Dam, Mijnsen and Van Velten *Asser's Goederenrecht* 371.

¹⁰⁴⁰ Mertens, Venemans and Verdoes Kleijn *Vernieuwd appartementsrecht* 26.

¹⁰⁴¹ Reehuis *et al Goederenrecht* 538. See also Van Dam, Mijnsen and Van Velten *Asser's Goederenrecht* 375. Van Dam, Mijnsen and Van Velten argue that it is too cumbersome to refer to the holder of the *appartementsrecht*.

¹⁰⁴² Reehuis *et al Goederenrecht* 550.

¹⁰⁴³ Vegter, Verstappen and Vonck "Apartment Ownership Associations" 6.

building is attached.¹⁰⁴⁴ Should someone become the owner of more than one apartment, mixing does not take place. The *appartementsrecht* on an individual apartment continues until it is transferred to someone else. The transferee would then be "owner" of a certain number of apartments. According to Vegter, Verstappen and Vonck a title to an apartment includes a share in the whole property.¹⁰⁴⁵ Vegter, Verstappen and Vonck explain it as follows:

The apartment owners legally own the whole building and the land together; every participant is entitled to a share in the right of ownership. Each share grants the owner the exclusive right to make use of an apartment in the building. All owners of apartment rights, who together are the co-owners of the building and the land beneath the building, have the decision-making power.¹⁰⁴⁶

The owners' corporation comes into existence¹⁰⁴⁷ by operation of law and all owners are members of this body until they cease to be owners. This body will have control over the common property and will have to establish a reserve fund for the maintenance of the common property.¹⁰⁴⁸

6.4.3 Development of apartment ownership

The division of ownership of a building in apartments is called *splitsing* and takes place in terms of the provisions of section 109.¹⁰⁴⁹ The building that is to be divided into apartment ownership must be in existence.¹⁰⁵⁰ The developer must be the owner of the land if he wants to develop it.¹⁰⁵¹ This is a legal action with its own characteristics. It neither constitutes the vesting of a limited real right nor the transfer of a right. It is rather a transformation of ownership to a new real right (*appartementsrecht*) that is permitted by legislation. Section

¹⁰⁴⁴ Van Dam, Mijnsen and Van Velten *Asser's Goederenrecht* 499.

¹⁰⁴⁵ Vegter, Verstappen and Vonck "Apartment Ownership Associations" 4.

¹⁰⁴⁶ Vegter, Verstappen and Vonck "Apartment Ownership Associations" 2.

¹⁰⁴⁷ With the registration of the *akte van splitsing*. Van Dam, Mijnsen and Van Velten *Asser's Goederenrecht* 369.

¹⁰⁴⁸ Reehuis *et al Goederenrecht* 552-553; Mertens, Venemans and Verdoes Kleijn *Vernieuwd appartementsrecht* 26.

¹⁰⁴⁹ Refer to para 4.5 for the South African position.

¹⁰⁵⁰ Van Dam, Mijnsen and Van Velten *Asser's Goederenrecht* 377.

¹⁰⁵¹ Van Dam, Mijnsen and Van Velten *Asser's Goederenrecht* 411.

106(3) also provides for the subdivision of the right.¹⁰⁵² In terms of section 106:5 the owner is the holder of the real right. The DCC does not make specific reference to a right of extension of the apartment complex as seen in South Africa and New South Wales.

6.4.4 *The privé gedeelte (private portion)*

The use right on an individual apartment is called a *privé gedeelte*.¹⁰⁵³ Section 34 of the model rules permits the exclusive use by the owner or someone to whom he has given permission to use the private portion. Although no formal definition for *privé gedeelte* exists,¹⁰⁵⁴ the *privé gedeelte* must not only be meant to be used separately¹⁰⁵⁵ but also able to be used separately.¹⁰⁵⁶ The *privé gedeelte* usually includes the living area (which may be on for example the sixth floor of a building consisting of a kitchen, living quarters, toilet, passage and bathroom¹⁰⁵⁷), storage space in the cellar and a garage outside the building. The *privé gedeelte* does not have to form a continuous whole. For instance, someone may have as part of his *privé gedeelte* the use of a separate garage, an attic or a basement.¹⁰⁵⁸ This *privé gedeelte* may also include a garden, a pool and a parking space. This all fall under one *appartementsrecht*.¹⁰⁵⁹ It must have independent access.¹⁰⁶⁰ This entails that it should not be accessed through another apartment. Mertens, Venemans and Verdoes Kleijn discuss the possibility of the parking area (even if not a garage, but only an area delineated by permanent painted lines) may be seen as an independent *privé gedeelte* that may be subject to an individual *appartementsrecht*. Currently, it is seen as an accessory thing to the *privé*

¹⁰⁵² Reehuis *et al Goederenrecht* 540.

¹⁰⁵³ Refer to para 3.2.2.2 where the individual ownership of a section as is the South African position, is discussed.

¹⁰⁵⁴ Mertens, Venemans and Verdoes Kleijn *Vernieuwd appartementsrecht* 67; Van Dam, Mijnsen and Van Velten *Asser's Goederenrecht* 376.

¹⁰⁵⁵ Mertens, Venemans and Verdoes Kleijn *Vernieuwd appartementsrecht* 63.

¹⁰⁵⁶ Mertens, Venemans and Verdoes Kleijn *Vernieuwd appartementsrecht* 66; Van Dam, Mijnsen and Van Velten *Asser's Goederenrecht* 377.

¹⁰⁵⁷ Mertens, Venemans and Verdoes Kleijn *Vernieuwd appartementsrecht* 67.

¹⁰⁵⁸ Van Dam, Mijnsen and Van Velten *Asser's Goederenrecht* 377.

¹⁰⁵⁹ Mertens, Venemans and Verdoes Kleijn *Vernieuwd appartementsrecht* 66.

¹⁰⁶⁰ Mertens, Venemans and Verdoes Kleijn *Vernieuwd appartementsrecht* 67 refer to it as "*blijkens hun inrigting bested zijn of worden*" in terms of section 5:106(3) of the DCC.

gedeelte. He comes to the conclusion that it is a possibility, although the DCC does not provide for it currently.¹⁰⁶¹ This position is also discussed by Van Dam, Mijnsen and Van Velten who indicate that a garage and parking space may also form the object of an *appartementsrecht*.¹⁰⁶² Therefore, instead of individual ownership of the section and exclusive use of gardens, garages et cetera, in the Dutch *appartementsrecht* exclusive use is given on the section as well and the exclusive use to gardens and garages are given as accessory exclusive use rights over the *privè gedeelte*. This argument will have the effect that an accessory right is given on an accessory right. Although this position is also possible in South Africa, for instance when a real security right is given on a usufruct, it is a very cumbersome approach to the ownership of apartment ownership in the Netherlands. One of the marked differences with the South African system is that these are all seen as limited real rights. Therefore, the non-genuine exclusive use rights as found in South Africa are not discernible in the Dutch context.¹⁰⁶³

6.4.5 Common property

Everything that is not part of an owner's *privè gedeelte*, is common property.¹⁰⁶⁴ This must be clearly indicated on the sketch plan. Section 9 under number 423 of the model rules indicates specifically in detail what is common property and what forms part of the *privè gedeelte*.¹⁰⁶⁵ The roof does not form part of the section, so the owner will not be allowed to extend his section by building onto the roof. The same goes for the ground underneath the section.¹⁰⁶⁶ Section 10(2) of the model rules indicate that a maintenance plan must be implemented for several years and the collection of levies should cater for such long-term maintenance of the building.

¹⁰⁶¹ Mertens, Venemans and Verdoes Kleijn *Vernieuwd appartementsrecht* 62-63.

¹⁰⁶² Van Dam, Mijnsen and Van Velten *Asser's Goederenrecht* 379.

¹⁰⁶³ Refer to para 4.6.4.

¹⁰⁶⁴ Refer to para 3.3 for the South African position. Refer to Mertens, Venemans and Verdoes Kleijn *Vernieuwd appartementsrecht* 130.

¹⁰⁶⁵ Van Dam, Mijnsen and Van Velten *Asser's Goederenrecht* 376-377.

¹⁰⁶⁶ Van Dam, Mijnsen and Van Velten *Asser's Goederenrecht* 377-378.

In terms of section 5 subsection 109 a notarial deed is drafted. It should include a detailed outline of the location of the property. The separate sections must be clearly described with the sketch plan indicating individual sections (*privè gedeelte*) and common sections. There are also *model reglemente* (model rules) applicable to all owners. These *reglemente* are seen as the constitution of the building. All the individual *privè gedeeltes* must be shown clearly on the *splitsingstekening* (sketch plan).¹⁰⁶⁷ The function of the sketch plan is to indicate the boundaries of the *privè gedeeltes*. Section 17 of the model rules provide an indication of what forms part of sections and what is considered common property.

6.4.6 Changes to the *privè gedeelte*

In terms of section 18 of the model rules the VVE has to decide in the instance of uncertainty whether a part of the building is common property or a *privè gedeelte*.¹⁰⁶⁸ In terms of sections 118 and 119 of the fifth book title 9, the individual apartment may be changed as long as it does not prejudice the other owners.¹⁰⁶⁹ In terms of section 7 of the model rules, any alterations, whether internally or externally made to the building, should be pursuant to regulations, by-laws or resolutions adopted by the VVE. The public permits needed must also be seen to. In terms of section 23(1), the VVE has to give permission for any alterations to be made. In terms of section 23(2) this may include taking out a separating wall between two sections and joining it together as one. The maintenance of the private sections is the responsibility of the individual owners of the *appartementsrecht*. Such maintenance includes the painting, wallpapering, tiling and ceiling of the unit, but does not include protruding balconies, nor plastering and doors or the unblocking of sanitary equipment. Section 28(6) specifically determines that broken windows is the owner's responsibility. Section 31 of the model rules determines that, should a section

¹⁰⁶⁷ Van Dam, Mijnsen and Van Velten *Asser's Goederenrecht* 369. S 9 of the general regulations also indicate the importance of the sketch plan.

¹⁰⁶⁸ Mertens, Venemans and Verdoes Kleijn *Vernieuwd appartementsrecht* 131. Refer to 4.4 for the South African position.

¹⁰⁶⁹ Reehuis *et al Goederenrecht* 551.

include a garden, the owner must maintain it for his own account. The same applies to private roof terraces and balconies. These may only be used for the purpose for which it was designed.

The *kader van de splitsing* (plan of subdivision) may also include a parking area as part of a section. If the property has not been built yet, the right will be created as soon as the *akte van splitsing* has been recorded in the public registers.¹⁰⁷⁰ The *splitsingsakte* provides a picture of the property so that if these rights are amended, so too must the deed. For it to be valid, it should be registered in the *kadaster* (deeds registry).¹⁰⁷¹ The *splitsingsakte* may be amended if a section is extended. This is a so-called *beskikkingshandeling* (entitlement to dispose) that will need unanimous approval by the owners' corporation. Reehuis *et al* argue that such permission may be problematic to obtain, especially in large complexes.¹⁰⁷² Since 2005, section 5 subsection 109 determines that if a limited real right is created on the property, an 80% permission by the owners' corporation is required. Should this permission be withheld without reasonable grounds, recourse to court is available.¹⁰⁷³ As the owner of the *appartementsrecht* only have a real right of use and not ownership of his section, the extension of the section will also amount to merely extending his exclusive use right and not to ownership, as is the case in South Africa. It also seems as if the possibility to enclose a balcony will not be allowed as the specific exclusive use right may only be used as initially intended. The possibility exists though that this may be allowed by the owners' corporation.

6.4.7 Use of the *privè gedeelte*

The model rules also include *welstandbepalingen* (conduct rules). In terms of these, an owner may be prohibited from the use of his section and the common

¹⁰⁷⁰ Reehuis *et al Goederenrecht* 541.

¹⁰⁷¹ Reehuis *et al Goederenrecht* 554; Van Dam, Mijnsen and Van Velten *Asser's Goederenrecht* 423.

¹⁰⁷² Reehuis *et al Goederenrecht* 547.

¹⁰⁷³ Reehuis *et al Goederenrecht* 554; Van Dam, Mijnsen and Van Velten *Asser's Goederenrecht* 425.

property,¹⁰⁷⁴ should he not conduct himself appropriately.¹⁰⁷⁵ Section 39(2) of the model rules provide that an owner may be barred from the exclusive use of the section in question. The reasons for denying someone access should be valid.¹⁰⁷⁶

Therefore, the VVE (body corporate) seemingly possesses extensive powers. A proposed new owner should also apply for permission to buy into a scheme. The *splittingsreglement* must indicate in what circumstances the application may be denied. The character and monetary value of a scheme may, therefore, be influenced by the decisions of the owners' corporation. The reasons may not amount to any form of discrimination, however. Furthermore, the owners' corporation may also take financial criteria into account when deciding whether to give a proposed new owner permission to live on the property. The reason for this is to determine whether the owner will be able to make his contribution towards the common expenses of the scheme. Should an owner or proposed owner be dissatisfied with the decision of the owners' corporation, he or she will have recourse to court.

The transfer of the apartment right is provided for in section 40 of the model rules. The VVE must provide a statement regarding the owner's levy contributions to the notary involved with the transfer. This statement should include a summary of the extent of the owner's contribution to the reserve fund. This is an extensive power that is given to the owners' corporation and differs in this respect from the South African position. Although it will keep owners' behaviour in check, it is doubtful whether such a regulation will be allowed in South Africa in light of the fact that the owner in South Africa obtains individual

¹⁰⁷⁴ In terms of section 5:112(4) refer to Mertens, Venemans and Verdoes Kleijn *Vernieuwd appartementsrecht* 143.

¹⁰⁷⁵ Reehuis *et al Goederenrecht* 544; Van Dam, Mijnsen and Van Velten *Asser's Goederenrecht* 451.

¹⁰⁷⁶ Mertens, Venemans and Verdoes Kleijn *Vernieuwd appartementsrecht* 143 refer to the valid reasons as "*gewichtige redener*".

ownership of his section and this ownership is protected in terms of the South African Constitution.¹⁰⁷⁷

The result of the division of the property will be that the property will be subdivided into equal shares. However, the floor size of the sections will, as in the South African and New South Wales contexts, determine the percentage of an owner's responsibility towards the financial contributions and the weight of his vote on the body corporate. Should the sections differ in size, the *akte van splitsing* should also include another document that sets out how the division in percentages of the different sections are to be made.¹⁰⁷⁸ In terms of section 14 of the model rules, the owners are jointly and severally liable for the debts of the complex.

6.4.8 Conclusion

Although this position is quite dissimilar to the South African position, where individual ownership of the sectional title unit is given, a few important and relevant pointers can be taken from the Dutch position. Firstly, it is acknowledged from the outset that an *appartementsrecht* is a *sui generis* and peculiar right. There is no indication that despite a stricter application¹⁰⁷⁹ of the *numerus clausus* principle in property law than in South Africa this new development was not forced into one of the existing legal figures (as South African academics and courts have been trying to do for years).¹⁰⁸⁰ Secondly, because the *sui generis* and peculiar nature of this legal figure was acknowledged, Dutch authorities could focus on the peculiar characteristics which this right will entail. This is definitely an aspect from which South African law may benefit. Instead of trying to fit this new development into existing legal figures, it is suggested rather to acknowledge its peculiarity and determine the characteristics unique to it. Pienaar seems to be of a similar opinion. He argues that the construction of the section as corporeal that is statutorily joined with

¹⁰⁷⁷ Refer to para 3.1.3.

¹⁰⁷⁸ Reehuis *et al Goederenrecht* 545-547; Van Dam, Mijnsen and Van Velten *Asser's Goederenrecht* 453.

¹⁰⁷⁹ Refer to para 2.5.3.

¹⁰⁸⁰ Refer to para 3.3.1.1.

the undivided share of the common property was a novel idea in South Africa.¹⁰⁸¹ Finally, as the *appartementsrecht* is seen as a form of co-ownership, whereas the exclusive use of the *privè gedeelte* is perceived only as the secondary factor, the detailed description of common property and the duties and rights of owners regarding common property may also be of use in South Africa.

6.5 General conclusion of chapter

In this chapter, two foreign jurisdictions were investigated. Firstly, the strata title system in New South Wales, Australia has a very similar system of apartment ownership, but a very dissimilar property law system than that of South Africa. Secondly, the system of *appartementsrecht* of the Netherlands was investigated. Although vastly different from the South African position, it does share its property law roots with those of South Africa.

From these jurisdictions, the paramount importance of particular and detailed legislation is evident. Furthermore, as both jurisdictions implement a *numerus clausus* of limited real rights, the question as to the particular nature of the rights inherent to strata titles and *appartementsrecht* is of little academic concern. The peculiar and individualistic nature of these rights as creatures of statute is sufficiently acknowledged. The simplification of only creating exclusive use rights in the deeds office may seem extravagant from a cost perspective, but is laudable for creating legal certainty and maybe explicable in two first world countries. The more cost-effective creation of "non-genuine" exclusive use areas as found in South Africa, is probably a result of the economic difficulties faced by a developing economy.

¹⁰⁸¹ Pienaar *Sectional Titles* 64.

CHAPTER 7

CONCLUSION

It has been argued in this thesis that the introduction of sectional titles in South Africa has led to significant development of the property law with a new form of land ownership which allows persons to acquire ownership of a part of a building.¹⁰⁸² This new form of ownership also creates the opportunity for sectional owners and the developer to acquire new forms of rights with regard to their sections and the common property and the sectional titles scheme. These are *inter alia*, the right of the owner to extend the section in terms of section 24 of the *STA*, the right of the developer to extend the sectional title scheme in terms of section 25 of the *STA* and the right of an owner to the exclusive use of part of the common property in terms of section 27. These rights which are specific to sectional title ownership have formed the main focus of this research. Herein lies the contribution this thesis has aimed to make to jurisprudence: to establish the legal effect of these rights.

As indicated in chapter 1, the main purpose of this research was to determine the legal effect of these rights.¹⁰⁸³ To achieve this, it was firstly imperative to distinguish between real and personal rights. Although some of the rights are statutorily-created limited real rights, such as the developer's right of extension and exclusive use areas created in terms of section 27(1) of the *STA*, the rights and duties created by these rights are not as clear. Therefore, in this thesis, the search for the limitations that these rights place on the sectional title owner's entitlements was an important objective.¹⁰⁸⁴ The development of the research with these objectives in mind, took the format of a critical analysis of the law as it stands at the moment. The distinction between real and personal rights formed the initial context for the quest of the legal effect of these rights.¹⁰⁸⁵ This distinction was investigated as it determines the legal nature of rights such

¹⁰⁸² Refer to para 3.2.2.2.

¹⁰⁸³ Refer to para 1.2.

¹⁰⁸⁴ Refer to para 1.2.

¹⁰⁸⁵ Refer to para 1.5.

as the rights in terms of sections 24, 25, 27 and section 10(7) and (8) of the *STSMA*.¹⁰⁸⁶

In chapter 2 the historical foundation for the establishment and recognition of limited real rights in the South African property law was established. This chapter contributed to the overall research by supplying essential background information on the flawed - but currently used - subtraction test to distinguish between real and personal rights. The importance of this distinction in the overall study is that it is and should be used for any rights that are newly created and of which the legal nature still should be determined. The problem with the distinction between real and personal rights is the fact that no closed number of limited real rights or *numerus clausus* exist in South Africa.¹⁰⁸⁷ Therefore, new real rights can be created every day. To provide context to the development in this area of the law, the initial unsatisfactory application of the classical¹⁰⁸⁸ and personalist¹⁰⁸⁹ theories to determine the nature of a right in the case of uncertainty was pointed out as well as the justified criticism thereof. The implementation and development of the subtraction test in South African case law have been used in trying to address this problem,¹⁰⁹⁰ but with limited success.

This test is definitely not flawless. Besides the fact that the test proved to be inconsistent in determining whether the payment of a sum of money is a real or personal right, the broader application of the test in more recent case law also causes uncertainty. This is evident from the criticism by legal writers such as Sonnekus. In *Erlax*, the court was more preoccupied with deciding which of the traditional categories of limited real rights the right would fit into, than whether a real or personal right has been created. In a pursuit of legal certainty regarding the entitlements and effect of rights created in sectional title

¹⁰⁸⁶ Before the right of extension of the developer and the exclusive use right in terms of s 27(1) was statutorily regulated as limited real rights, in both cases the subtraction test was used to establish what the legal nature of the rights were.

¹⁰⁸⁷ Refer to para 2.3.1.

¹⁰⁸⁸ Refer to para 2.4.2.

¹⁰⁸⁹ Refer to para 2.4.3.

¹⁰⁹⁰ Refer to para 2.5.1.

ownership, the determination of the legal nature of such rights is indispensable. It is clear from the discussion of *Erlax* and *DeneI* that although real rights have traditional characteristics, the content may differ due to the purpose for which it was created.¹⁰⁹¹ After the discussion of *Willow Waters* it became clear that the courts are following a broad approach to the acceptance of new real rights created in new legal phenomena. Although, with the creation of new real rights, their legal nature seems to cause problems as was seen with the discussion of the legal nature of the developer's right to extend the scheme.¹⁰⁹² However, it does seem as if the application of the subtraction test in the *Willow Waters* case will allow even more freedom for the creation of limited real rights. The untenable situation may occur that, as homeowner's associations are not statutorily regulated, a right similar to one in sectional titles, for instance a rule-based exclusive use right in terms of section 10(7) and (8) of the *STSM*, could be classified as a limited real right by the court, although not identified as such in terms of sectional title legislation.

The criticism by jurists such as Sonnekus¹⁰⁹³ that such a haphazard application of the subtraction test should be warned against, therefore, seems apt. Tuba and Freedman's hesitance to accept the broad application of the subtraction test also cannot be argued with. Therefore, although it seems possible that new rights created in sectional titles may be classified as real rights, these real rights will not have to fit into the traditional categories of limited real rights. Both Sonnekus and Freedman argue that a reaffirmation of the *numerus clausus* principle may not be so bad in light of the court's broadening application of the subtraction test. They offer legal certainty as the reason for such an argument. However, in light of *Willow Waters* it seems as if such a notion may fall on deaf ears. It can be seen from the court's decision in *Willow Waters* that the broader application of the subtraction test which realises limited real rights not necessarily within the traditional categories of limited real rights, seem to be the current position. The judgement in *Willow Waters* will have a long-reaching

¹⁰⁹¹ Refer to para 2.5.5.

¹⁰⁹² Refer to para 5.3.2.2.

¹⁰⁹³ Refer to para 2.5.3.

effect on the distinction between real and personal rights. However, besides the broad application of the test, what is cause for concern is that the court came to this conclusion in an abrupt and cryptic judgement. It is lamentable that the reasoning behind the court's interpretation of the test is not absolutely clear. That makes the legal position even more uncertain for future cases, as a clear and concise argument, especially for the interpretation of the intention principle was not made. Fortunately, the real rights discussed in this study were statutorily created. That makes the true discovery of the content of the wider concept of the determination of the legal effect of the right, as offered in this thesis, even more applicable. The characteristics of the right are as important. On the basis of this assertion it is argued that the investigation into the legal effect of the right should not come to an end with the deliberation whether a real or personal right is created. The rights and duties inherent in that right should also be pursued.

Chapter 3 of this thesis served as the theoretical, historical and contextual background to the legal nature of sectional ownership in South Africa and, therefore, creates a proper context for an investigation into the creation of specific rights. It was argued that although sectional titles deviates from common law principles and is statutorily regulated, the concepts used in the legislation, are still heavily dependent on the common law.¹⁰⁹⁴ The position that legislation exists within a constitutional democracy was investigated¹⁰⁹⁵ and that the common law should be viewed through "a constitutional prism" and that all law is subject to the *Constitution*.¹⁰⁹⁶ It has been proposed that the starting point of interpreting any legislation should be the *Constitution*.¹⁰⁹⁷ Therefore, the interpretation of the *STA* should promote the spirit and purport of the *Constitution*. The rights created by the *STA* should also be interpreted with that in mind. Consequently, the interpretation of the *STA* was scrutinized from a hermeneutical point of view. It was argued that words should be given its

¹⁰⁹⁴ Refer to para 3.1.2.

¹⁰⁹⁵ Refer to para 3.1.3.

¹⁰⁹⁶ Refer to para 3.1.3.

¹⁰⁹⁷ Refer to para 3.1.3.1.

ordinary grammatical meaning. The context and the purpose for the legislation should be taken into account.¹⁰⁹⁸ However, it was further submitted that the regulatory nature of the *STA* does not provide too much room for navigation, and that the character and nature of rights are largely prescribed by the *STA*. This leaves little leeway for a different or extended interpretation of the rights. The contribution that this chapter made to the research was to provide the contextual and legislative foundation for the thing over which the rights which forms the core of this research is held. Furthermore, the implications of the *Constitution*, which forms the blueprint of all legislation was investigated.

Consequently, an investigation into the thing owned, the entitlements of the owner and the limitation on the owner's rights by other parties were focused on. The meaning of ownership of a sectional title unit was also explored, in order to establish what the effect of the rights under investigation will be on the entitlements of a sectional title owner.¹⁰⁹⁹ The concept of ownership in sectional title schemes was investigated by addressing the ownership concept in general. This discussion delved into the common law concepts of ownership. The research revealed that the concept of ownership has not been radically changed and that it is still the real right that provides the owner with the most complete right over a thing. It was acknowledged that it may be limited by legislation and the rights of others. However, what should be borne in mind is that the court in *Port Elizabeth Municipality v Various Occupiers* found that the "hierarchical arrangement" of rights should be moved away from and all interests involved should be taken into account. It was, therefore, submitted that someone with a "lesser right" such as a limited real right or a personal right is not necessarily in a weaker position.¹¹⁰⁰ This may lead to the weakening of an owner's position, as the strengthening of the rights of others will inevitably lead to a weakening of the owner's position.

¹⁰⁹⁸ Refer to para 3.1.3.1.

¹⁰⁹⁹ Refer to para 3.2. The co-ownership of the common property is influenced by the rights under discussion.

¹¹⁰⁰ Refer to para 3.2.2.1.

Subsequently, the nature of the *res* owned was addressed by dissecting the components it consists of. An investigation into the nature of the thing owned clarified specifically how the entitlements of the owner are affected by the rights under discussion. Furthermore, in determining the nature of the thing owned, the context was provided for the rights that are granted over this thing. Firstly the fact that the *res* is a statutorily created composite thing was emphasized.¹¹⁰¹ It was argued that the "thing" created does not fit completely into the common law classification of things. It was submitted that the inception of sectional titles created a completely new category of immovable property comprising of different components. These components are the section¹¹⁰² and the undivided share of the common property.¹¹⁰³ Following the developments by the introduction of a constitutional dispensation, the ownership of the unit as a "property right" has to be balanced with the rights of other parties, such as the developer, or other owners. It was argued that ownership may be limited by for instance the right of the developer to extend the scheme, the owner's right to extend the section and exclusive use rights over the common property.¹¹⁰⁴ The way in which the right is construed, makes the ownership of the unit the principal thing with the undivided share in the common property, the accessory. It is with this accessory part, however, that the rights forming the focus of this thesis deal with. The right to co-ownership of the common property is the right that is limited by sections 24, 25, 27 and section 10(7) and (8) of the *STSMA*. It is, therefore, part of this critical analysis to determine to what extent this ownership will be limited. The reason why this is important is to determine the effect of the rights under discussion. The effect of these rights can be measured against the limitations that they place on the entitlements of sectional owners to the common property.

Chapter 4 involved a critical analysis of relevant sectional title legislation. In this chapter the main role players in sectional titles, namely the developer, the body

¹¹⁰¹ Refer to para 3.3.

¹¹⁰² Refer to para 3.3.2.

¹¹⁰³ Refer to para 3.3.3.

¹¹⁰⁴ Refer to para 3.4.

corporate and the sectional owner were examined, and their various roles scrutinised. The developer's right to extend the scheme is one of the main focus areas of this research. Therefore, his role in the establishment of the scheme was important to establish. Then the body corporate as main management organ of the scheme was dealt with shortly.¹¹⁰⁵ The body corporate will determine how and to what extent the rights under discussion may be exercised. The final role player that came under investigation in chapter 4 was the owner of the sectional title unit specifically in his capacity as co-owner of the common property, as this the part of his ownership that is influenced by the exercise of the rights under discussion.¹¹⁰⁶

Subsequent to the discussion of the role players, some important instruments involved in sectional titles were explored. The rules and resolutions came under intense scrutiny as these are the tools to manage the sectional title scheme. The legal nature of the rules was investigated.¹¹⁰⁷ The question was addressed in what way the relevant rules are reconcilable with the *Constitution*. It was argued that rules should not excessively regulate the owners' entitlements in such a way that it amounts to a deprivation of property.¹¹⁰⁸ Furthermore, it was argued that Pienaar's viewpoint is correct that the rules are "the objective law of an autonomous statutory association". The reason for this viewpoint, as argued in Chapter 4 hereof, was supported in *Willow Waters*,¹¹⁰⁸ where the court likened the duties of homeowner's associations with those of bodies' corporate and local authorities. It is submitted that with the court's decision to liken homeowner's associations' responsibilities with those of municipalities, it is an acceptable deduction to make that the duties and conditions are also similar to those of the local authority. It has been argued that this is proof of a link between the local authority's power to make legislation and the body corporate's authority to

¹¹⁰⁵ Refer to para 4.2.2.

¹¹⁰⁶ Refer to para 4.2.3.

¹¹⁰⁷ Refer to para 4.3.1.

¹¹⁰⁸ Refer to para 4.3.2.

enforce its rules. This argument aims to contribute to the debate regarding the legal nature of rules.¹¹⁰⁹

The abovementioned discussions laid the foundation for the main purpose of Chapter 4: to critically explore the rights created by sections 24, 25, 27 of the *STA* and section 10(7) and (8) of the *STSMA*. In order to understand the content of these rights, the legislative provisions establishing these rights were investigated first. The practical process to implement these rights was consequently discussed as some of the uncertainties involving these rights stem from just that. Finally, the effect of these rights was illuminated. In terms of section 24 it was found that although the process for extension of the section has been established, it is still uncertain at which specific moment the right over the extended part of the common property is established, especially if the extension is done over a part that used to be an exclusive use area. It has been established, and is submitted, that the *STA* does not clearly elucidate the content of the right or shed light on its legal effect.

Regarding the developer's right to extend the section, the legislative foundation of this right was thoroughly investigated to provide context for the uncertainties that still exist regarding this right. The fact that the right can be obtained by other means as well, such as vesting in the body corporate after the developer's right has lapsed leads to concern. It is submitted that the varied ways in which this right can be created, brings into question when it would be terminated.¹¹¹⁰ It is submitted that in this case the right should also be for a specific period of time.¹¹¹¹ The effect of this right was established in order to demonstrate which rights may be limited by the exercise of this right.¹¹¹²

Consequently, the third right which constitutes the focus of this study, namely that of exclusive use, came under scrutiny. As with sections 24 and 25 rights, this rights in terms of section 27 and section 10(7) and (8) of the *STSMA* were

¹¹⁰⁹ Refer to para 4.3.1.

¹¹¹⁰ Refer to para 4.5.3.

¹¹¹¹ Refer to para 4.5.5.

¹¹¹² Refer to para 4.5.4.

also dissected in terms of its legislative underpinnings. The problems with the establishment and transfer of exclusive use rights were pointed out, especially surrounding the transfer of exclusive use rights that sometimes would be omitted when the unit is transferred. This would be mainly in cases where the exclusive use right is not connected to a specific section. It was submitted that the reason why the *STA* was amended in 2003 to determine that only an owner may be the holder of the exclusive use right in the complex, and any exclusive use rights of a person no longer an owner vests in the body corporate, is probably to rectify the previously uncertain position that an exclusive use right can be held by a non-owner. The amendment also addressed the problem of an exclusive use right not being transferred from one owner to another. However, it is submitted that this would not be the case when an owner dies of natural causes, but that the right should vest in the executor of the deceased estate. The fact that the exclusive use right is transferred by a unilateral deed of cession was also illuminated.¹¹¹³ It was argued that although the right is a limited real right that may be mortgaged, the security that this right will provide for a possible mortgage is debatable.¹¹¹⁴ Non-genuine exclusive use rights were investigated. It was argued that as these rights are not registered, the only way to keep record of these rights is on the minutes of the body corporate. However, this has been shown to be a significant problem as the records are not always meticulously kept.¹¹¹⁵

It was shown in Chapter 5 when investigating the legal effect of the right of extension of a section¹¹¹⁶ that the special resolution allowing the extension created an obligatory agreement, which does not vest the legal title in the beneficiary, but creates a creditor's right to performance by the body corporate. This is significant, because a creditor's right is a less secure right than a limited real right. It was argued that this creates a problem. Although performance by the body corporate is needed, the only obligation on the body corporate is to

¹¹¹³ Refer to para 4.6.2.

¹¹¹⁴ Refer to para 4.6.3.

¹¹¹⁵ Refer to para 4.6.4.

¹¹¹⁶ Refer to para 5.2.2.

sign the transfer documents. This places the holder of the right at the mercy of the body corporate and at risk to extend a section with the financial costs involved without having ownership over such land. It furthermore creates the problem that the holder of the right will have trouble accessing credit for the extension. Through the application of common law principles it was established in this thesis that the creditor's right against the body corporate becomes ownership of the extended part of the section at time of registration. The practical implications of this right, especially if the extension took place on a previously reserved exclusive use area, have come under the spotlight.¹¹¹⁷ The recommendation was made that the resolution passed by the body corporate to allow for the extension to take place, should indicate new arrangements regarding the position of the exclusive use area. However, it was pointed out that should it be a non-genuine exclusive use area, in effect as a personal right it will be cancelled by agreement and ownership of that part of the common property will be transferred by means of endorsement. It is submitted that the cancellation of the exclusive use right and the fact that upon transfer ownership of this previous exclusive use area should be set out clearly in the special resolution.¹¹¹⁸

Furthermore it is worrying that the *STA* is silent on whether the right will vest in the owner if he sells the section before the completion of the section 24(6) application. It is recommended that the new owner should apply to the body corporate for a duplicate special resolution and that the body corporate would not have a discretion, but to provide such a duplicate resolution. It is further suggested that such a refusal by the body corporate will allow the owner to approach the chief ombud in terms of section 6(9) of the *STSMa*. It is further recommended that a clause similar to section 27(4)(b) which allows for the right if not transferred before the section has been sold to vest in the body corporate will should be included to address this problem in section 24.¹¹¹⁹

¹¹¹⁷ Refer to para 5.2.3.

¹¹¹⁸ Refer to para 5.2.3.

¹¹¹⁹ Refer to para 5.2.2.

Subsequently, the effect of this extension of the section on the co-ownership share in the common property came under scrutiny, especially regarding the practical implications of these transactions in terms of SARS requirements.¹¹²⁰ Although the body corporate currently does not receive any compensation for the loss of the part of the common property, especially with the way in which property's value has escalated, it is only a matter of time before SARS decides not to accept this transaction as a non-taxable transaction and claim transfer duty on it. The fact that SARS regards this as "an acquisition of property", also indicates that by nature this right is such an acquisition. This is correct, as it does not belong to the common owners any longer, so it must have been "acquired" by the new owner.¹¹²¹

The developer's right to extend the sectional title scheme was scrutinized in Chapter 5 as well.¹¹²² The problems brought about by the search for the legal nature of this right¹¹²³ in the light of the application of the subtraction test, were illuminated until the legislature confirmed its nature as a limited real right in 1997.¹¹²⁴ However, the right does not fit into the usual categories of limited real rights and has unique characteristics. In order to bring about some clarification regarding the rights and duties of this right, the content¹¹²⁵ of the right as well as the rights¹¹²⁶ and duties¹¹²⁷ were discussed with the aid of relevant case law and legal writings. It was established that the right in question is *sui generis*, with some individualistic characteristics.¹¹²⁸ Although this right is legislatively classified as a limited real right, it does not fit into the traditional categories of limited real rights accepted in South Africa. The fact that it is a *sui generis*, statutorily-created limited real right, seems to be accepted.¹¹²⁹ This is a valid argument as it is clear from the discussions that although the right is definitely a

¹¹²⁰ Refer to para 5.2.4.

¹¹²¹ Refer to para 5.2.4.

¹¹²² Refer to para 5.3.

¹¹²³ Refer to para 5.3.2.

¹¹²⁴ Refer to para 5.3.2.1.

¹¹²⁵ Refer to para 5.3.2.3.

¹¹²⁶ Refer to para 5.3.3.

¹¹²⁷ Refer to para 5.3.4.

¹¹²⁸ Refer to paras 5.3.2.2 and 5.3.5.

¹¹²⁹ Refer to paras 5.3.2.2 and 5.3.5.

limited real right, it does not fit into the traditional categories of limited real rights. It was also established that other characteristics of the right¹¹³⁰ in question are that it is granted for a specific period of time, its exercise is restricted to the approved plans that may only be changed upon application and that it is transferable and does not include any benefit to the holder of the right from the fruit of the property. An additional duty demands that the developer should make a contribution to the rates and taxes owed to the municipality. This section served as an investigation into the legal character of the right in order to determine what the entitlements and duties involved in it are.

Chapter 5 was concluded with a discussion of the right of exclusive use to a part of the common property. The distinction between this right as a newly created limited real right as opposed to the right in terms of section 10(7) and (8) of the *STSMA* (which provides only a creditor's right) was highlighted.¹¹³¹ It was indicated that the limited real right to exclusive use of the common property is an exception to the common law principle that a limited real right may only be obtained over another person's property. Although the debate as to what type of limited real right has been created was discussed, it is submitted that this is a statutorily created *sui generis* limited real right that does not fit into the traditional categories of limited real rights.¹¹³²

Regarding the question whether limited real rights or creditor's rights were used to create exclusive use rights, relevant case law, including *KMatt Properties*, was discussed.¹¹³³ It was argued that statute will currently prescribe whether a limited real right or a creditor's right was created. However, it was also argued that the legislator should keep the property law principles in mind even when creating new limited real rights. The creation of limited real rights at the whim of parties and only upon their consensus, may create potential problems and should be warned against. I submit that property law principles should be adhered to when new rights are created, or else it would most probably lead to

¹¹³⁰ Refer to para 5.3.5.

¹¹³¹ Refer to para 5.4.2.1.

¹¹³² Refer to para 5.4.2.1.

¹¹³³ Refer to para 5.4.2.2.

legal uncertainty which is obviously undesirable. However, in this instance it was found that the creation of exclusive use rights as limited real rights is in accordance with the application of the subtraction test. What also caused uncertainty was the fact that the limited real right was not always linked to a specific section. This has been highlighted in the relevant chapter hereof. Besides the fact that this sometimes leads to the non-transfer of an exclusive use right linked to a unit, it may also have the effect that a unit that used to have an exclusive use right will not have one any longer if the owner decides to keep it. Since the inception of section 27(1)(c), fortunately this may only be the case as long as the owner still owns another unit in the complex. What is submitted in this regard, is that the exclusive use right should be linked to a specific unit in order to ensure that it is not mistakenly or deliberately failed to be transferred along with the unit.¹¹³⁴

Regarding owners' rights and duties with regard to exclusive use areas, it is submitted with reference to cases such as *Solidatus*, *Herald Investments* and *De la Harpe*, that the current position is that the duty to maintain the exclusive use area will rest mainly on the holder of the right, even though some of the problems may be as a result of pre-existing structural defects. Such a heavy burden on the owner would be unreasonable and should rather be addressed by the body corporate.¹¹³⁵ As far as non-genuine exclusive use rights are concerned, it was established that although regulated by legislation, the demands of practice still lead to uncertainty regarding aspects such as whether a limited real right or a creditor's right was created and consequently sold.¹¹³⁶ One of the solutions proposed to address this problem was that the contract should indicate clearly what the nature of the specific exclusive use area is.¹¹³⁷

It is submitted that, despite regular amendments, the legislature cannot seem to keep up with the demands from practice in this regard. Therefore, these rights are still shrouded in a lot of uncertainty. The fact that disputes will, in

¹¹³⁴ Refer to para 5.4.2.3.

¹¹³⁵ Refer to para 5.4.3.

¹¹³⁶ Refer to para 5.4.4.

¹¹³⁷ Refer to para 5.4.4.

terms of the *CSOSA*, now mostly be dealt with by the ombud, introduces the additional problem that these rights will not be clarified through legal precedents.

Chapter 6 served as a comparative study to the equivalent fragmented property systems in New South Wales and the Netherlands. The value of investigating these two vastly different systems lies in the lessons that the South African system as a younger fragmented property system, can learn from them. However, the unique position that South Africa, as a developing economy, finds itself in, must be kept in mind, especially regarding cost implications, in any proposed amendments to the South African position.

Strata titles and its general statutory legislation were firstly introduced.¹¹³⁸ Although the South African sectional title was heavily influenced by the New South Wales strata title system, some major differences do exist. Although the strata title legislation is similar to the South African position, the fact that the property law system is very dissimilar posed a problem for this research.

The fact that the New South Wales system follows the *numerus clausus* principle of the recognition of a limited number of limited real rights, differ from the South African system.¹¹³⁹ Furthermore, the Torrens system¹¹⁴⁰ as a positive registration system and the principle of indefeasibility of title that is guaranteed,¹¹⁴¹ also differ from the negative South African registration system. The description of the *res* as a "lot" encompassing a "cubic space" or a system of "enclosed airspace"¹¹⁴² is dissimilar to the South African position. In the latter the description of a section entails that it includes a cubic entity with reference to the wall, floor and ceiling thereof. The description of common property, however, is quite similar.¹¹⁴³ Nevertheless, despite the dissimilarities the regulation and general management are fairly similar. A thorough investigation

¹¹³⁸ Refer to paras 6.2 and 6.3.

¹¹³⁹ Refer to para 6.3.2.1.

¹¹⁴⁰ Refer to para 6.3.2.2.

¹¹⁴¹ Refer to para 6.3.2.3.

¹¹⁴² Refer to para 6.3.3.1.

¹¹⁴³ Refer to para 6.3.3.2.

was made into by-laws that is the equivalent of the resolutions in sectional title legislation.¹¹⁴⁴ Consequently the equivalents of sections 24, 25 and 27 of the *STA* were investigated. Section 19 of the *SSDA* is the equivalent of section 24 of the *STA*. It was concluded that the absence of literature and case law on this matter is an indication that fewer problems are experienced in this instance than in its South African counterpart.¹¹⁴⁵ The right of extension of the scheme by the developer that is dealt with in section 25 of the *STA*, finds its equivalent in the *SSDA*.¹¹⁴⁶ The legislative provisions of this right was investigated and its legal nature was expanded upon. However, as the Torrens system is a positive registration system, it was concluded that this will provide certainty of title to the developer and a great deal of investigation into the right is also, therefore, not the principal research area in strata title.¹¹⁴⁷ What does cause uncertainty and has also been discussed to a great degree in this chapter is the common property rights by-laws.¹¹⁴⁸ The determination of the legal nature¹¹⁴⁹ and scope¹¹⁵⁰ of by-laws, was discussed in detail. Case law where this phenomenon caused uncertainty was investigated as well as legal writings of academic researchers. The conclusion was drawn that the nature of and entitlements provided by by-laws are still also not settled in New South Wales strata title law. However, the important guidance that can be taken from the Australian position is that the particular and detailed legislation is evident. The fact that all by-laws are registered and that, therefore, there is not the similar problem with some exclusive use-rights being unregistered is laudable. The fact that by-laws are also interpreted broadly seems to be a problem in Australia as well.¹¹⁵¹

Subsequently the *Dutch appartementsrechten* came under scrutiny. This jurisdiction's similar common law foundation to the South African property law system made it a valuable comparison. The legislative foundation for

¹¹⁴⁴ Refer to para 6.3.3.3.

¹¹⁴⁵ Refer to para 6.3.4.2.

¹¹⁴⁶ Refer to para 6.3.5.1.

¹¹⁴⁷ Refer to para 6.3.5.2.

¹¹⁴⁸ Refer to para 6.3.6.

¹¹⁴⁹ Refer to para 6.3.6.2.

¹¹⁵⁰ Refer to para 6.3.6.3.

¹¹⁵¹ Refer to para 6.3.6.3.

appartementsrecht was firstly investigated¹¹⁵² and the object of the right as well as its nature were explored.¹¹⁵³ A vast difference between the Dutch system and the South African system, namely the different description of the object of the right, was analysed.¹¹⁵⁴

The Dutch construction of the object of the *appartementsrecht* regarding the incorporeal ownership of the common property as the principal thing with the right of use of the apartment (the *privè gedeelte*) as an accessory leads to complications and uncertainty. It transpires that exclusive use of areas such as gardens or parking garages will lead to the untenable situation of providing an accessory right on an accessory right (the *privè gedeelte*).¹¹⁵⁵ It is submitted that the South African system, although flawed, provides a stronger and more certain right than its Dutch counterpart. The legal nature of the common property was consequently investigated, as were the changes to the *privè gedeelte* in terms of section 18 of the model rules.¹¹⁵⁶ The use of the *privè gedeelte* was discussed.¹¹⁵⁷ Although it was acknowledged that a dissimilar construction of *appartementsrecht* and sectional title exist, what is important is that in the Dutch system the *sui generis* and peculiar nature of the *appartementsrecht* concept, has been acknowledged from the outset. The research focused rather on explaining the content of this newly created real right, than trying to fit it into existing common law moulds.¹¹⁵⁸ It was also found that the legislation regarding *appartementsrecht* is also very detailed. What is admirable about both the Australian and Dutch systems is that it recognised the rights created specific to their equivalent of sectional titles as *sui generis*¹¹⁵⁹ and did not try to fit it within the traditional categories of limited real rights. This is somehow ironic as both countries have a *numerus clausus* of limited real rights. They should, therefore, one may think, be more hesitant to classify a newly

¹¹⁵² Refer to para 6.4.1.

¹¹⁵³ Refer to para 6.4.2.

¹¹⁵⁴ Refer to para 6.4.2.

¹¹⁵⁵ Refer to para 6.4.4.

¹¹⁵⁶ Refer to para 6.4.6.

¹¹⁵⁷ Refer to para 6.4.7.

¹¹⁵⁸ Refer to para 6.4.8.

¹¹⁵⁹ Refer to paras 6.3.6.4 and 6.4.8.

created right as *sui generis*. This is something that South African authorities should certainly consider.

The main purpose of this thesis was to determine the legal character of rights created in terms of sections 24, 25, 27 of the *STA* and section 10(7) and (8) of the *STSMA*. The initial investigation provided the context of the distinction between real and personal rights in South Africa. When looking at the legal foundation of these rights in terms of the working of sectional titles that was laid down, it is important to know and has been discussed in this thesis that although property law is still heavily dependent upon Roman-Dutch principles,¹¹⁶⁰ the "constitutional prism"¹¹⁶¹ through which the provisions of the *STA* should be viewed is undeniable. On the same note it is important to realise that the entitlements of the owner of a sectional title unit may be limited by the exercise of the rights under discussion.¹¹⁶²

Subsequently, the creation of these rights were investigated by focussing on the legislative provisions. The uncertainty surrounding the legal nature of these rights were illuminated. The development of these rights through legislative amendments and case law was pointed out. The problems surrounding the determination of the legal effect of section 24 right were laid bare.¹¹⁶³ It is evident from this discussion that problems exist around the practical implications of the right.¹¹⁶⁴ The legislator needs to phrase this section more clearly.¹¹⁶⁵ The right of exclusive use of a part of the common property in terms of section 27 of the *STA* and section 10(7) and (8) of the *STSMA* is divided into two categories. The one, classified as real in terms of legislation, the other, not.¹¹⁶⁶ Although these rights are described in legislation in detail, the exercise and content of the rights are still not clear. The uncertainty that this will create in

¹¹⁶⁰ Refer to para 3.1.2.

¹¹⁶¹ Refer to para 3.1.3.1.

¹¹⁶² Refer to para 3.5.

¹¹⁶³ Refer to para 5.2.5.

¹¹⁶⁴ Refer to paras 5.2.3 and 5.2.4.

¹¹⁶⁵ Refer to para 5.2.5.

¹¹⁶⁶ Refer to paras 5.4.2.1 and 5.4.2.2.

practice was illuminated in this thesis, especially in the light of the creation of an ombud service that will hamper litigation that may clarify the position.¹¹⁶⁷

Sherry states:

Strata and community title are here to stay... However, when using legislation to create novel forms of property which accommodate high density development, we must be conscious of the ways in which we are straying from orthodox rules of property and the consequences of that divergence.¹¹⁶⁸

I have to agree with this statement. Sectional titles are also here to stay. However, any new development should adhere as far as possible to the common law principles of property law. Although the law is a dynamic system that has to grow with the needs of the community, the common law principles should be acknowledged as the backbone to the property law that provides legal certainty when legislation is silent.

The aim of this thesis was to paint a clearer picture of the rights created in terms of sections 24, 25, 27 of the *STA* and section 10(7) and (8) of the *STSMA*. The legal nature in terms of whether these rights were real or personal was clarified. However, the study went wider to incorporate an investigation into the legal effect of these rights, including the rights and duties involved in the exercise of these rights. This thesis, therefore, contributed to the knowledge base regarding these rights that are specific to sectional tiles. As a result a clearer picture now exists of what the entitlements of owners of sectional titles entail, specifically regarding their undivided share in the common property.

¹¹⁶⁷ Refer to para 5.4.5.

¹¹⁶⁸ Sherry 2013 *UNSWLJ* 314.

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