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NUMERUS CLAUSUS AND THE DEVELOPMENT OF NEW REAL RIGHTS IN SOUTH AFRICA

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Introduction

Numerus clausus or a closed system is one of the basic principles of the law of property. The main aim of this principle is to attain certainty and predictability in the property sphere. Therefore this principle entails firstly, that only recognised real rights can be constituted (*Typenzwang*) and secondly that the content of a recognised real right is fairly rigid and not susceptible to radical change by the party (or parties) creating the specific right (*Typenfixierung*). Since the first step in the creation of a real right is the embodiment of the right in a notarial deed agreed to by the parties, the crucial question is whether an obligation agreed to as part of the content of a real right creates a real right binding on successors in title of the property concerned or creates only a personal obligation binding only on the present owner of the land burdened with the real right (servient land).

The answer to this question in South African law is complicated by at least three factors. Firstly, since South African law does not formally recognise the principle of *numerus clausus*, the two elements of this principle are intertwined which means that the question whether a particular right is real and registrable is closely connected with the content of that right. Secondly, although the principle of *numerus clausus* is not formally recognised, South African law is very cautious to recognise new real rights outside traditional categories with the consequence that the content of a new real right is strongly influenced by the content of the analogous real right, which provides the basis for its recognition. Thirdly, the question of whether a right is real or personal has become entangled with the logically different issue of what may competently be registered in the Deeds Office. Although the Registrar of Deeds is not allowed to register personal rights, personal rights are from time to time registered without it being clear whether such registration has proprietary consequences.

The aim of this paper is first, to provide a general background to the development of real rights in South Africa keeping in mind that South Africa is not impeded by a rigid principle of *numerus clausus* in the sense that the Deeds Registries Act contains a list of registrable rights.¹ Thereafter I shall provide a few illustrations of the recognition of new real rights within traditional categories before finally attempting to pull all the strings together and to provide a few tentative suggestions of how the present problem can be clarified.

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¹ Although s 3(1) of the Deeds Registries Act 47 of 1937 contains a list of real rights, provision is made in s 3(1)(r) for the registration of real rights not mentioned in the Act. Furthermore the definition of a real right in s 102 of the Act includes a right, which becomes real on registration.

The recognition of new real rights in South Africa

South African law as an uncodified system of private law inherited its basic circle of traditional real rights from Roman law. Roman law recognized only three types of proprietary interests namely ownership (*dominium*), servitudes (*servitutes*) and real security (*pignus* and *hypotheca*) with hereditary lease of land (*emphyteusis* or ‘erfpacht’) and the right of building on another’s land (*superficies* or ‘opstal’) as post-classical supplements. The reason for accepting a *numerus clausus* of real rights in Roman law was to avoid ownership of land being cluttered with a plethora of real rights binding all successors in title.² With the rise of feudalism during the Middle Ages a great variety of new burdens on land³ held by vassals were recognised in favour of feudal lords. The haphazard reception of some of these rights in Roman-Dutch law breached the *numerus clausus* since a closed list of what was received was never attempted. The most important categories of real rights recognized by the Roman-Dutch writers⁴ were ownership, possession,⁵ the right of an heir to an inheritance, servitudes, mortgage and pledge, *erfpacht* and *huisgebouwrecht* and *tiendrecht*, *cijnsen* and *tijnsen* (the right to a nominal tax)⁶, and with the acceptance of the maxim ‘*huur gaat voor koop*’ as applicable to houses and land (‘*huisen en landen*’), a new real right in favour of the lessee of land.⁷

While not transplanting the variety of burdens associated with feudalism, South Africa followed Roman-Dutch law in not formally recognizing a *numerus clausus* of real rights. In fact South Africa initially had a smaller circle of traditional real rights than Roman-Dutch law since possession⁸ was never uniformly recognized as a real right and with the introduction of the English system of administration of estates the traditional real right of an heir to claim the inheritance was transferred to

² See inter alia R Sohm *Institutes A Textbook of the History and System of Roman Private Law* 3 ed translated by JC Ledlie (1907) 338; J A C Thomas *Textbook of Roman Law* (1976) 195–210. Superficies and emphyteusis were forms of perpetual leases with regard to buildings and land. See W W Buckland *Text-book of Roman Law* 3 ed Stein (1965) 275–276.

³ See A S De Blécourt *Kort Begrip van het Oud-Vaderlands Burgerlijk Recht* 7 ed Fischer (1967) 94, who mentions 40 categories of real rights recognized under feudal law. See also Hugo Grotius *Inleidinge* 2. 3. 8, 2. 40. 1, 2. 46. 1; Johannes Voet *Commentarius ad Pandectas* 1. 8. 23; P van Warmelo ‘Real Rights’ 1959 *Acta Juridica* 84. Examples are the charges on land for safe escort, the right to collect an annuity on land sold, annual quitrents from land held on quitrent tenure, rights of hunting and fishing, rights to salt-pans and metal mines, rights to hearth-moneys, turf taxes, rights of reversion of land to particular families, and the so-called “naastingsrecht”, namely a type of right of pre-emption in favour of members of the family.

⁴ See inter alia Grotius *Inleidinge* 2. 1. 60, 2. 3. 8; Voet *Commentarius* 5. 2. 2; Ulricus Huber *Heedendaegshe Rechts-geleertheydt* 2. 2. 4, 2. 2. 17, 2. 36. 2; Dionysius Godefridus van der Keessel *Praelectiones ad Hugo Grotii Introductionem* 2. 1. 60; Johannes van der Linden *Koopmans Handboek* 1. 6. 2.

⁵ Not all Roman-Dutch law writers treated possession as a category of a real right; see Ulricus Huber *Eunomia Romana ad I* 1. 2. 12; Van der Linden 1. 6. 2. Voet 6. 1. 1 treats *emphyteusis* as a form of beneficial ownership (*dominium utile*).

⁶ See also Marijke Reinsma *Het onderscheid tussen zakelijke en persoonlijke rechten met betrekking tot onroerend goed in het Zuidafrikaanse recht* (LLD thesis Vrije Universiteit Amsterdam 1970) 7–9.

⁷ See J C de Wet ‘Huur gaat voor Koop’ 1944 *THRHR* 166 at 190–192

⁸ On possession as a real right, see C G van der Merwe *Sakereg* 2 ed (1989) 91–92

the executor of the deceased estate.⁹ After the British Occupation of the Cape in 1806, although the property rights of the Cape colonists were guaranteed, the Roman-Dutch *erfpagrecht* became mixed up with the English form of land tenure perpetual quitrent and the Roman-Dutch *opstalreg* was apparently engulfed by the English form of land tenure leasehold. For the rest, the South African circle of real rights was extended whenever the need arose to elevate a specific right on land to the status and protection of a real right. This extension was initiated either by specific legislation or by the courts. Interestingly, both lawmakers moved closely within the framework of traditional categories.¹⁰

Development of new categories within the framework of servitudes

The most fertile sphere for the development of new real rights by the courts turned out to be within the framework of servitudes. Examples are the new typically South African praedial servitudes of trekpath and outspan, a category of irregular servitudes mixing the features of both praedial and personal servitudes and new types of personal servitudes.¹¹ In the most important decision on the ‘subtraction of the dominium’ test for recognising new real rights, *Lorentz v Melle*¹², the judge started by enquiring whether it was possible to classify the right in question namely to claim half of the profits in a future development on the land as a praedial servitude. For our purposes the development of mineral rights and the recognition of restrictive conditions in township developments as urban praedial servitudes is however the most significant.

The recognition of mineral rights as a separate real right in land alongside ownership in contravention of the *cuius est solum* rule was spearheaded by the Cape practice (following the British practice) of granting State land with the reservation of mineral rights in favour of the state, the overriding importance of mining to the South African economy after the discovery of diamonds and gold in South Africa in the second half of the 19th century and the fact that large mining companies needed security of title before investing in the expensive activities of prospecting for minerals and then mining them.¹³ Forced by economic realities, the English principle that land can be divided into horizontal layers was not accepted, and independent mineral rights

⁹ D Hutchinson et al *Wille's Principles of SA Law* 8ed (1991) 356 still considers the right of an heir to his inheritance as a real right; see also *Kelly v Estate Scallan* 1916 CPD 20. The Administration of Estates of Deceased Persons Ordinance 104 of 1833 (Cape) introduced the English system of administration of estates in the Cape in terms of which an executor administered the estate of a deceased. The Administration of Estates Act 24 of 1913, later superseded by the Administration of Estates Act 66 of 1965, extended this system to the whole of South Africa. On the death of the testator the heir only acquires the right to claim transfer of the inheritance; see *Estate Smith v Estate Follett* 1942 AD 364 at 367 and 383; *Ex parte Craig* 1946 WLD 475 478; *Greenberg v Estate Greenberg* 1955 3 SA 361 (A) 365 at 366; *Commissioner for Inland Revenue v Brooks* 1964 2 SA 566 (A) 573. Only an executor can vindicate property which form part of an inheritance: *Krige v Scoble* 1912 TPD 814 at 820; *Estate Smith v Estate Follett* at 367.

¹⁰ See also Marijke Reinsma op cit note 6 at 54-95.

¹¹ For a discussion of these servitudes, see C G van der Merwe op cit note 8 at 483-484, 496, 501-505 and 507.

¹² 1978 3 SA 1044 (T).

¹³ See C G van der Merwe op cit note 8 at 553; J R L Milton ‘Ownership’ in Reinhard Zimmermann & Daniel Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 681.

were since 1881 recognised in the *Zuid-Afrikaanse Republiek* of the Transvaal and later in the precursors of and the present Deeds Registries Act.¹⁴ The courts first classified mineral rights as quasi-servitudes¹⁵ and more particularly as quasi-personal servitudes.¹⁶ Only three South African cases up to now had the courage to take mineral rights out of the mould of servitudes and classify them as real rights *sui generis*.¹⁷ This classification allows mineral rights to have a *sui generis* content namely to be freely assignable and transmissible, not to be subject to the constraint of being exercised *salva rei substantia*, not terminated when the owner regains ownership of the land subject to mineral rights and creating the possibility of mortgaging a mineral right and of constituting a usufruct over mineral rights.¹⁸ Note that although the holder of a mineral right need not return the land after mining to the owner *salva rei substantia*, there is a positive duty on him to restore the agricultural potential of the land as far as possible.¹⁹

During the second half of the 19th century, South African courts also adopted the township development mechanism of restrictive covenants used in post Industrial Revolution Britain to regulate the chaotic expansion of towns like Johannesburg after the discovery of diamonds and gold.²⁰ Instead of accepting the alien concept of an equitable interest in land²¹, the South African courts moulded restrictive conditions in townships on the traditional concept of either a personal servitude or a praedial urban servitude depending on whether the original developer intended to favour himself or all the owners of erven in the township. To make doubly sure that restrictive conditions would be binding on successors in title the truly Roman-Dutch concept of *stipulatio alteri* was added. Examples of such conditions are that the erven in a particular township may only be used for residential purposes, that certain kinds of business or other activities are prohibited on all the erven in the township, that only one residence may be erected on an erf and that only certain types of building materials may be used on an erf. An important consequence of the derivation of restrictive conditions from English law and the fact that they were mostly classified as urban praedial servitudes was that in accordance with the principle of *servitus in faciendo consistere nequit*, restrictive conditions could never place a positive obligation on the owner of an erf.

¹⁴ See Resolution of the Volksraad of the Zuid-Afrikaanse Republiek of 8 November 1881 article 3 of Act 7 of 1883; s 30-32 of the Registration of Deeds and Titles Act 25 of 1909 (Transvaal); s 3(j), 13 and 41 of the Deeds Registries Act 13 of 1918 and ss 70 and 71 of the Deeds Registries Act 47 of 1937. For early decisions, see *Taylor v Van Jaarsveldt & Nellmapius* 1886 2 SAR 137; *McDonald v Versfeld* 1888 2 SAR 234.

¹⁵ *Coronation Collieries v Malan* 1911 TPD 577 at 591; *Rocher v Registrar of Deeds* 1911 TPD 311 at 316.

¹⁶ *Lazarus and Jackson v Wessels* 1903 TS 499 at 510; *Van Vuren & Others v Registrar of Deeds* 1907 TS 289 at 294-295; *Ex parte Marchini* 1964 1 SA 147 (T) 150; *Aussenkjer Diamante (Pty) Ltd v Namex (Pty) Ltd & another* 1980 3 SA 896 (SWA) 902-023.

¹⁷ *Ex parte Pierce & Others* 1950 3 SA 628 (O) at 634; *Erasmus v Afrikander Proprietary Mines Ltd* 1976 2 SA 950 (W) 956E; *Apex Mines Ltd v Administrator Transvaal* 1986 4 SA 581 (T) 590I-591C.

¹⁸ See C G van der Merwe op cit note 8 at 560-562.

¹⁹ See C G van der Merwe op cit note 564: he must exercise his mineral rights *civiliter modo*.

²⁰ See in general C G van der Merwe in W A Joubert (ed) *The Law of South Africa* first reissue Vol 24 Servitudes (2000) par 419

²¹ See *Tulk v Moxley* (1848) 2 Ph 774. See further AWB Simpson *Introduction to the History of Land Law* (1961) 238-243.

A South African doctoral thesis²² has, however, recently questioned whether restrictive conditions in townships have sufficient affinities with urban praedial servitudes to permit forcing them into the servitutorial mould. The main differences between restrictive conditions and praedial urban servitudes are the following: restrictive conditions are not constituted for the benefit of a particular plot of land but for the benefit of all the plots of land in the township; a general township scheme is a central requirement for the enforcement of restrictive conditions; restrictive conditions are reciprocal in the sense that all the plots of land in the township are simultaneously dominant and servient tenements; the notion of *utilitas* has a peculiar meaning in this sphere with the emphasis on the retention of the character of the neighbourhood or the reservation of the amenities of the particular township; the notion of *vicinitas* is not construed on the basis of the usefulness of the erven to one another but on whether they form part of the same township; the title deeds of the properties concerned do not indicate which plot of land is the dominant land; and the methods of extinction of restrictive conditions and urban servitudes differ.²³ Consequently, it is suggested that burdens placed on land should be construed as real rights *sui generis*. This would open the door for the recognition of positive obligations on the owners of erven in a township *qua* owners and not in their personal capacity. In the case of *Thompson v Port Elizabeth Municipality*²⁴ a condition compelling the erection of dwellings of not less than a certain value has been accepted as valid. Because of their affinity with other conditions in town planning schemes, it is suggested that restrictive conditions should be taken out of the realm of servitude law and placed in the sphere of planning law burdens imposed for the benefit of an entire community.²⁵

Development of new categories in the sphere of lease and leasehold

Like a number of traditional limited real rights, lease originates in contract but may, if certain requirements are fulfilled also have real effect against successors of the original lessor. This proprietary effect of lease had its origin in the maxim *huur gaat voor koop*, which was accepted in Roman-Dutch law²⁶ from Germanic law and Old Dutch customary and statutory rules.²⁷ The rationale for this rule was to protect the lessee of land and residential premises (*huisen en landen*) from eviction. It was

²² Jeannie van Wyk *Restrictive Conditions as Urban Land-Use Planning Instruments* (LLD University of South Africa 1990).

²³ See especially Jeannie van Wyk 'The Nature and Classification of Restrictive Conditions of Title' (1992) 25 *De Jure* 270 at 281-287.

²⁴ 1989 4 SA 765 (A) 770.

²⁵ This would give them the character of public law restrictions and thus place them in the same category as other conditions of title dealing *inter alia* with the provision of services in township developments.

²⁶ The full implications of this rule were not fully explored by the Roman-Dutch writers. See Voet *Commentarius* 19. 2. 19; Schorer *Aantekeninge* note 398; Abraham à Wesel *Tractatus De Remissione Mercedis* in *Opera Omnia* 1. 19 and 20. The following writers recognized that the effect of the rule was to create a real right in favour of the lessee: Grotius *Inleidinge* 2. 44. 9 and 3. 19. 16; Simon van Leeuwen *Costumen, Keuren ende Ordonnantien van Rijnland* ad art 97; Van der Keessel *Praelectiones ad Grotius* 2. 44. 9.

²⁷ Local Keuren which contained this rule are Rynland, Amsterdam, Haarlem, Middelburg and Zieriksee. See further H D J Bodenstein *Huur van Huizen en Landen volgens het Hedendaagsch Romeinnsch-Hollandsch Recht* (doctoral thesis Leiden 1907) 132ff; W E Cooper *Landlord and Tenant* 2 ed (1994) 275.

considered inequitable that a lessee who has made himself comfortable in a house for a period of years be evicted at the whim of the lessor selling the house.²⁸ A distinction was made between long leases and short leases. A long lease only has proprietary effect on being registered, whereas entering into occupation of the land establishes a real right in a short lease.²⁹ South African law has accorded lessees of land the full proprietary protection of a real right exercisable against third party intruders in addition to applicable possessory remedies.³⁰ More importantly for our purpose, it is generally accepted that the express or implied terms of the contract of lease are inextricably intertwined with the real right. This means that the purchaser of leased land acquires a series of personal obligations *inter alia* the duty to maintain the property for as long as he remains owner of the land.³¹ On the other hand the duty of the lessee to use the land *salva rei substantia* (with the retention of its substance) remains owed to whoever is the owner-lessor.³²

In addition to lease of land, South African law has since the British occupation accepted that state grants of land could also be in the form of the purely English 99-years leasehold with the state remaining the reversionary owner.³³ These leaseholds trickled down to a few isolated cases after statutes were passed to provide for the conversion of leaseholds to ownership.³⁴ It, however received a short new lease of life in 1978 when the apartheid government in order to promote political stability searched for a mechanism to render the tenure of urban Blacks in large cities like Soweto next to Johannesburg more secure. Under the apartheid system, Blacks in white urban areas were regarded as temporary sojourners who needed either a permit or certificate of occupation to occupy sites in these areas.³⁵ Since the granting of ownership was in direct conflict with the apartheid policy, the South African legislator seized upon leasehold and introduced a form of statutory leasehold in 1978³⁶, which was confirmed and liberalized by the Black Communities Development Act of 1984.³⁷ In terms of this Act ‘competent’ Blacks could apply to the relevant local authority for the registration of leasehold on the site they were occupying. Although the site remained the property of the local authority, a certificate of registration

²⁸ See A P L Nelissen *Huur en Vervreemding* (doctoral thesis Leiden 1880) 170: ‘‘Bij de ontwikkeling van de huur kwam de ondoelmatigheid van de ‘koop breekt huur’ aan het licht. Dat in de strenge toepassing van dezen regel een groote harheid lag, viel bovendien moeilijk te ontkennen. Gaf men eenmaal den huurder recht op de zaak, althans zoolang deze onder den verhuurder bleef, ‘t scheen onbillijk, dat door eene willekeurige daad des verhuurders de huurder van zijn right verstoken bleef. Onbillijk, dat een huurder, die voor een tijd van eenige jaren eene woning heeft gehuurd en juis met de oog op deze termijn alles comfortable had ingericht, van den eene dag op de anderen tot ontruimen zou kunnen worden gedwongen.’

²⁹ See generally C G van der Merwe op cit note 8 at 597-598.

³⁰ See W E Cooper op cit note 27 at 277ff; Carole Lewis ‘Real Rights in Land: A New Look at an Old Subject’ (1987) 104 *SALJ* 599

³¹ See W E Cooper op cit note 27 at 294-298; C G van der Merwe op cit n 8 at 598-600; Kenneth Reid ‘Obligations and Property: Exploring the Border’ 1999 *Acta Juridica* 228, 239-240.

³² C G van der Merwe op cit note 8 at 601.

³³ See C G van der Merwe op cit note 8 at 590-591

³⁴ Conversion of Leasehold to Freehold Act 61 of 1952; Kimberley Leasehold Conversion to Freehold Act 40 of 1961.

³⁵ See in general C G van der Merwe and J M Pienaar ‘Land Reform in South Africa’ in Paul Jackson and David Wilde (eds) *The Reform of Property Law* (1997) 340-342.

³⁶ Blacks (Urban Areas) Amendment Act 97 of 1978, s 6A.

³⁷ See also Conversion of Certain Land to Leasehold Act 81 of 1988.

entitled the holder to most of the entitlements of the holder of a real right: he could erect, occupy, alter or demolish buildings on the site, establish a mortgage, usufruct or other real right on the leasehold, sublet, alienate or transmit it to his or her heirs. To encourage survey and the preparation of proper diagrams of sites the rights of alienation of leaseholders of unsurveyed sites were curtailed and they were given a period of four years to complete the necessary surveys. These leaseholds could initially only be acquired by so-called competent persons³⁸ which depended on 10 years of employment in White South Africa and registration occurred in special registers created by Regulations under the Act.³⁹ The relevant Act was amended in 1986 to allow Blacks to obtain ownership in Black areas or to convert leasehold to ownership.⁴⁰ Although the Abolition of Racially Based Land Measures Act of 1991 abolished most of the parent statutes, the sections of the Acts dealing with these matters were retained.⁴¹

In terms of the new constitutional land reform programme with its objectives of restitution, redistribution and tenure reform, two traditional forms of tenancy namely labour tenancy and sharecropping have been identified in the Restitution of Land Rights Act⁴² of 1994 as an interest in land that is open to restitution. The system of labour tenancy that allowed black families to live on and exploit certain parts of white-owned farms in return of labour in lieu of rent was abolished by legislation in 1964.⁴³ Sharecropping allowed Blacks to reside and work on parts of white-owned land with the white owner providing the seed and the parties sharing the crop in terms of an agreed arrangement. This system was effectively abolished by the Natives Land Act of 1913⁴⁴ when Blacks were not longer allowed rights in land in white areas. The Land Reform (Labour Tenants) Act of 1996⁴⁵ grants security of tenure to persons falling into the category of labour tenants and enables them to apply for ownership of a portion of the farm.⁴⁶ Disposed sharecroppers can in terms of the Restitution of Land Rights Act apply to be restored to their former position or to be granted equitable relief.⁴⁷ Note that a vast majority of Black workers on farms would not fall into these categories and has to seek protection under a sophisticated system of labour law rather than rely on any kind of security of tenure.⁴⁸

Development of new categories in the sphere of ownership

³⁸ S 1 read with s 52(1).

³⁹ Act 97 of 1978 s 6B.

⁴⁰ Black Communities Development Amendment Act 74 of 1986 s 57A and 57D.

⁴¹ Act 108 of 1991 retaining s 52-57 and s 57A.

⁴² Act 22 of 1994. See in general D L Carey Miller and Anne Pope *Land Title in South Africa* (2000) 567-575; C G van der Merwe and J M Pienaar op cit note 35 at 361-363.

⁴³ In 1964 the Native Trust and Land Act 18 of 1936 was substantially amended by the Bantu Laws Amendment Act 42 of 1964 to abolish the system. In *De Jager v Sisana* 1930 AD 71 at 85 it was held that these contracts were innominate contracts that did not give rise to real rights in land.

⁴⁴ Act 27 of 1913.

⁴⁵ Act 3 of 1996

⁴⁶ S 16(1) of the Act. See D L Carey Miller and Anne Pope op cit not 42 at 585-587; D L Carey Miller 'A New Property' (1999) 103 *SALJ* 752; C G van der Merwe and J M Pienaar op cit note 35 at 360-361.

⁴⁷ Act 22 of 1994 s 35 read with s 33.

⁴⁸ D L Carey Miller and Anne Pope op cit note 42 at 585-586.

The Sectional Titles Act was promulgated in 1971⁴⁹ to provide urgently needed residential accommodation for all income levels within commuting distance of centres of employment not sufficiently catered for by existing share-block schemes.⁵⁰ In doing so the legislators opted not for a scheme like the Dutch *appartementeneigendom* where individual ownership of apartments is carved out of the co-ownership of the whole building, but created a completely new composite *res* consisting of an individual apartment together with an undivided share in the common property of the scheme which is registrable in a specially devised sectional title register kept in the existing deeds registries.⁵¹ The creation of such a new unit involved a breach of the maxim *superficies solo cedit* and the concomitant doctrine of components (*Bestandteilslehre*).⁵² Traditionalists argued that a building is inseparably fused to the land and that subdivision of the building into various units is an attempt to divide something that is by its very nature indivisible. They warned that the fragmentation of the ownership of a building would ultimately lead to the destruction of an important economic asset. This view rests on the assumption that the purpose of the division of the building is to physically divide the building into portions that can be removed, leaving what remains of the building in an uninhabitable state. However, the Sectional Titles Act does not envisage a physical division of the building but only notional demarcation of units for exclusive ownership, leaving the building physically intact. Far from destroying the physical unity of the land and the building, the Sectional Titles Act allows exploitation of the land and the building to its full economic potential.⁵³ Note that the Act acknowledges the destructible features of the building by placing a positive duty on sectional owners to maintain their sections in a proper state of repair, by creating statutory implied servitudes of lateral and subjacent support and by designating most structural parts of the building as common property.⁵⁴

The Development and Facilitation Act of 1995⁵⁵ is one of the most important mechanisms by which the new government aims to achieve its programme of land reform. This Act is mainly aimed at the speedy and efficient release of land in both rural and urban areas for development by a fast-track process as an alternative to the current time-consuming procedures. Central to this process is the introduction of an entirely new type of ownership namely ‘initial ownership’. This concept envisages the introduction of security of tenure at a much earlier stage of the land development process by providing for the registration of a type of interim ownership called initial ownership as soon as a development plan and a layout plan is lodged with the Registrar of Deeds. The holder of a certificate of initial ownership is entitled to occupy and use the site, to encumber his initial ownership by means of a mortgage or a personal servitude, to sell and transfer the right and finally to convert it into full

⁴⁹ Act 66 of 1971 replaced by the Sectional Titles Act 95 of 1986.

⁵⁰ For the aims of sectional ownership, see C G van der Merwe *Sectional Titles, Share Blocks and Time-sharing* Vol I *Sectional Titles* (loose-leaf 1995-) 1-9.

⁵¹ For innovations under the Sectional Titles Act, see C G van der Merwe op cit note 50 at 1-25 – 1-27.

⁵² C G van der Merwe op cit note 50 at 2-5.

⁵³ C G van der Merwe op cit note 50 at 2-5 – 2-8.

⁵⁴ Sectional Titles act 95 of 1986 s 44(1)(c), 28 and 1 s v ‘common property’ respectively.

⁵⁵ Act 67 of 1995. See in general D L Carey Miller and Anne Pope op cit note 42 at 580-582; D L Carey Miller op cit note 46 at 753-754; C G van der Merwe and J M Pienaar op cit note 35 at 368-371.

ownership when the ordinary conditions of demarcation and services are met.⁵⁶ The Act expressly prohibits the sale or further encumbrance of the *land* as opposed to the initial ownership⁵⁷ and distinct from other real rights it is open to cancellation without an order of court. The definition of ‘immovable property’ in section 102 of the Deeds Registries Act is amended to include a right of initial ownership as contemplated in the Development Facilitation Act. In the final analysis, a right of initial ownership is no more than ownership in name and anticipation without affecting the unitary concept of ownership as the absolute and final proprietary right. It is however real in the sense that it is directly enforceable against third parties and gives preference on insolvency or a sale in execution.⁵⁸

The 1973 amendment of the Deeds Registries Act

In 1973 section 63⁵⁹ of the Deeds Registries Act that prohibits the registration of personal rights, was amended⁶⁰ to facilitate the registration of rights and conditions contained in deeds constituting real rights. Distinct from the position in the Netherlands, the South African Registrars of Deeds do not register only rights but the entire notarial deed with contains not only conditions constituting rights. Under a proviso added to section 63, the Registrar of Deeds is allowed to register certain (personal) rights including the right to oblige a person to perform a positive duty if such a condition or right is in his opinion “complementary or otherwise ancillary” to a registrable condition. Although this proviso has a wider application, it found its most dynamic application in the sphere of praedial servitudes where the imposition of positive duties on the owner of the servient tenement was considered to be in direct conflict with the overriding principle *servitus in faciendo consistere nequit*. Commentators seem to agree that this proviso does not undermine the passivity principle but merely provides a practical solution to the problems encountered in cases such as *Schwedhelm vs Hauman* and *Van der Merwe v Wiese*.⁶¹ The question for decision there was whether the owner of the servient land can in terms of a servitude of drawing water (*servitus aquaehaustus*) be compelled to perform a positive duty in the form of maintaining the network of pipes which supply the water to the dominant land. Although the Registrar of Deeds is now allowed to register a deed of servitude which, like these deeds, contain positive obligations for the owner of the servient tenement, the mere act of registration does not necessarily convert such conditions

⁵⁶ S 62 and 38(1).

⁵⁷ S 62(5)(a).

⁵⁸ See also D L Carey Miller op cit note 46 at 754.

⁵⁹ S 63 of the Act reads: “No deed, or condition in a deed, purporting to create or embodying any personal right, and no condition which does not restrict the exercise of any right of ownership in respect of immovable property, shall be capable of registration” This legislatively confirms the so-called “subtraction of the dominium test for distinguishing between real and personal rights.” For a good treatment of this section, see D L Carey Miller and Anne Pope op cit note 42 at 96-98.

⁶⁰ By Act 62 of 1973 s 10.

⁶¹ 1947 1 SA 127 (E) and 1948 4 SA 8 (C) respectively. In the *Schwedhelm* case at 37 these burdens were considered in conflict with the above requirement on the policy ground that ‘it may be contrary to public policy for the owner of land to impose at his caprice real burdens on his property of a character unknown to the law and to purport to bind all future owners of the property in perpetuity.’

into real rights.⁶² The result is apparently that only the party who initially undertakes to perform these positive duties will be *contractually* bound to do so and that the positive obligation will not devolve as part of the servitude on the successive owners of the servient land. A subsequent purchaser of the servient land will thus only be bound if he expressly assumes these obligations⁶³ or (apparently) if he buys the land with full knowledge of the content of the servitude.⁶⁴ How far the fact that the undertaking by the initial owner to honour the positive obligations has been registered would facilitate the proof of such knowledge is still open to question. In a recent decision⁶⁵ the court held that knowledge of the undertaking of the original owner, even if coupled with knowledge that the original owner intended that his successors in title should be bound by his undertaking, would not necessarily saddle the subsequent purchaser with these obligations. This view is in my submission too extreme. The fact that documents registered in the deeds office are supposed to be public should play a role in this regard.⁶⁶ To summarise: the positive duties incorporated in the deed of servitude do not gain a real or servituted character by being registered and the proviso facilitating such registration does not negate the requirement of passivity.

Preregistration of contract of sale of land

⁶² M J de Waal ‘Servitudes’ in Reinhard Zimmermann and Daniel Visser (eds) *Southern Cross* (1996) 803; D Kleyn and A Boraine *Property Silberberg and Schoeman’s The Law of Property* 3 ed (1992) 379; C G van der Merwe op cit note 8 at 477. This view was confirmed in *Low Water Properties (Pty) Ltd v Wahloo Sand CC* 1999 1 SA 655 (SE) at 662F/G-H/I: ‘the amendment to s 63(1) retained the section as it previously read but added only the proviso. It is significant that the proviso does not allow the registration of personal rights per se. It merely authorises the registration of the deeds although it contains such conditions, provided the conditions are complementary or otherwise ancillary to a registrable condition or right contained or conferred in the deed. Taking into account the history of the matter it appears to me that the reason for adding this proviso was to accommodate situations such as the one with which the court was faced in *Ex parte Geldenhuis* and to authorise the practice, which the Registrar of Deeds began to follow. There is, in my view, nothing in the section as it presently stands which can lead one to the conclusion that it was the intention of the Legislature to elevate personal rights by their registration to real rights over land.’ See also the more detailed arguments by HR Hahlo 1948 *Annual Survey of South African Law* 94 - 95: ‘[I]t would be most unfortunate if burdens which are excluded from the category of servitudes should be admitted into the class of real rights via the backdoor of registration. It is a sound common sense rule of Roman law that the circle of real rights must be narrowly circumscribed. Once personal rights are permitted to acquire the effect of real rights by registration, there is always the danger that, in the course of time, the ownership of land will become cluttered up with multifarious burdens of all kinds. The position thus created, while fertile ground for litigation, would not be in the interests of the community.’

⁶³ *Low Water Properties (Pty) Ltd & Another v Wahloo Sand CC* 1999 1 SA 655 (SE) 664I-J. See the discussion of this case by Ntusi Mbodla ‘Does Registration of a Personal Right change its Character to that of a Real right?’ (1999) 116 *SALJ* 485.

⁶⁴ See M J de Waal *Die Vereistes vir die Vestiging van Grondserwitutein die Suid-Afrikaanse Reg* (doctoral thesis Stellenbosch 1989) 289 and op cit note 62 at 803 note 149

⁶⁵ *Low Water Properties (Pty) Ltd & Another v Wahloo Sand CC* 1999 1 SA 655 (SE) 664I-J

⁶⁶ Note that South African practitioners have not until now availed themselves of the Dutch practice of fortifying these positive conditions with penalty clauses in so-called *kettingbedingen* in an effort to compel sellers of land to force their successors in title to assume these positive duties. Note further that the South African doctrine of notice fulfils the purpose of the Dutch principle of good faith (*goede trouw*) in deciding whether successors in title should be saddled with duties undertaken by their predecessors.

Following deeds registry practice, the Deeds Registries Act⁶⁷ does not contain a *numerus clausus* of real rights but makes provision in section 102 for the registration of ‘any right, which becomes real on registration’. This apparently refers to so-called *iura in personam ad rem acquirendam*. Note however that it does not refer to personal rights in terms of an agreement to register a servitude or to transfer property. In such cases registration simultaneously extinguishes the personal right and creates a new real right.⁶⁸ It rather refers to certain personal rights like rights of pre-emption (*‘voorkoopsreg’*) and rights of retraction or reversionary rights (*‘terugvallingsregte’*), which are registered in spite of their personal character.⁶⁹ Despite the clear wording of the Act, the better view is that these rights remain personal even after registration. Registration do, however, have certain real effects in that the Registrar would be reluctant to register any new rights which conflict with the registered right and that the fact of registration would facilitate the application of the doctrine of notice to protect the holder of the right against successors in title with knowledge of the registered right.⁷⁰

The Alienation of Land Act 68 of 1981 has introduced a procedure to protect purchasers of land on instalments who would normally only be entitled to registration once the full price have been paid and would thus run the risk of the seller becoming insolvent before such an event. The Act makes provision for the recording (not registration) of the contract of sale on instalments by the registrar concerned by means of an endorsement on the deeds registry copy of the title deed of that land. This procedure applies to the sale of residential land where the price is being paid in more than two instalments over a period exceeding one year. The seller is obliged to cause the contract to be recorded within three months from the date of the contract, failing which the purchaser may either do so himself or cancel the contact. The effect of such recording is that the purchaser is given the right in the event of the insolvency of the seller or the attachment of the property in execution to claim registration of the land in his name on payment of the outstanding balance (or the amount outstanding on a previously registered mortgage bond).⁷¹ Alternatively, if the land is sold in execution or on insolvency, the purchaser is given a preferential claim on the proceeds of the sale.⁷² This preferential claim ranks prior to a subsequently registered mortgage and defeats future sales by the seller since the registrar may not register a transfer of that land to any person other than the purchaser unless such recording is first cancelled. From the above it is clear that this statutory right of the purchaser embodies the main characteristics of a real right namely protection against third parties, preference on insolvency and the application of the *prior in tempore* principle. Thus another real right sui generis was born out of the need to improve the disadvantageous position of a certain category of persons.⁷³

Onera realia

⁶⁷ Act 47 of 1937.

⁶⁸ See D Kleyn and A Boraine op cit note 62 at 59-60.

⁶⁹ See in general D L Carey-Miller and Anne Pope op cit note 42 at 107-109.

⁷⁰ See D Kleyn and A Boraine op cit note 62 at 60-62.

⁷¹ s 22.

⁷² s 20 (5) especially s 20 (5)(a) (ii).

⁷³ See Kenneth Reid op cit note 31 at 243-244 who states that this right approximates the *Vormerkung* and the wider *Anwartschaftsrecht* in § 883 of the German Civil Code.

A final group of personal rights that are sometimes deemed to be registrable are the so-called *onera realia*, which acquires real effect on registration.⁷⁴ Although uncertainty surrounds the precise nature of *onera realia*, they are sometimes described as real burdens of Germanic origin which impose personal obligations on the owner of land qua landowner for example where the state grants land to a person subject to the condition that if the land is not developed in a certain manner the land will revert to the state.⁷⁵ The registration of such a burden against the land undoubtedly restricts the owner in the unfettered exercise of his ownership and constitutes for that reason alone a real right. Another example of *onera realia* known to Roman-Dutch law was the obligation imposed on certain landowners to pay annuities or a portion of the proceeds of the land to another person.⁷⁶ The courts are however, reluctant to register burdens, which impose positive obligations on successive owners of land.⁷⁷

Conclusion

In the light of the foregoing, I would like to suggest the following tentative conclusions. First, although real rights in land (proprietary interests in land) have certain traditional characteristics, they need not necessarily have exactly the same content: their content may differ in view of their peculiar origin and purpose. Second, the notion that the content of a real right could never include a personal obligation on the owner of the servient erf to do something positive has developed in the sphere of praedial servitudes with its attachment to the notion of *servitus in faciendo consistere nequit*. Although the fact that the South African courts initially endeavoured to bring all new real rights within the ambit of servitudes explains the purported extension of this principle to other real rights, such extension is not necessarily warranted. This is true in the case of lease where the lessor (owner of the servient land) still retains the obligation to maintain the property in a good state of repair. Thirdly, it must be kept in mind that an exception was always allowed in the case of the servitudes of support where the owner of the servient tenement was under a positive obligation to provide the necessary support to make the servitude effective. This notion could perhaps be extended to cover all cases where support is needed for efficiency. Fourthly, in my submission the time is ripe to draw a clearer distinction between title conditions imposed for the sake of orderly township development and traditional real rights. This will probably lead to the realization that in the case of the former the imposition of reciprocal positive obligations on all the erven in the township is to be welcomed in

⁷⁴ See De Villiers CJ in *Registrar of Deeds (Tvl) v The Ferreira Deep Ltd* 1930 AD 169 at 180; in respect of *onera realia*, see also *Hollins v Registrar of Deeds* 1904 TS 603 607; *Ex parte Geldenhuys* 1926 OPD 155; *Mare v Grobler* 1930 TPD 632 639; *Ex parte Jerrard* 1934 WLD 87 92; *Schwedhelm v Hauman* 1947 1 SA 127 (EDL) 137; *Nel v Commissioner for Inland Revenue* 1960 1 SA 227 (A) 232.

⁷⁵ See *Benoni Town Council v Minister of Agricultural Credit and Land Tenure* 1978 1 SA 978 (T) where it was decided that the donor can reclaim land which has been exploited contrary to a *modus* which rests on the land.

⁷⁶ Cf the following passage from Voet *Commentarius* 8 3 12: ‘Apart from this it can happen that the owner of some landed property is bound in favour of another such property to furnish osiers or reeds every year, and yet such a class of obligation is not on that account to be classed among servitudes.’

⁷⁷ See the discussion of the ‘subtraction of the dominium’ test in C G van der Merwe op cit note 8 at 70-83 and most recently in W A Joubert (ed) *The Law of South Africa* Vol 27 Things First Reissue (2001) par 48.

the interest of orderly development and improved neighbourhood amenities. Fifthly, in recognizing new real rights we should not so easily accept that the recognition of a plethora of real rights would automatically lead to commercial sterilization⁷⁸ of a particular piece of landed property. This is illustrated by the notion of sectional titles where the recognition of a multitude of ownership rights led to the best possible exploitation of a property asset situated in a central location in the provision of much needed residential accommodation. Having said this, it should be realised that the South African land reform programme can only be accommodated if the recognition of new real rights is based on social policies rather than a market driven economy.⁷⁹ Finally, an encouraging feature of the South African involvement in the creation and extinction of categories of real rights is that South Africa has in spite of justifiable emotional and political undertones always regarded a unitary system of ownership as the pinnacle of genuine security of title.⁸⁰ This is illustrated by the way in which several ownership-like rights such as hereditary lease (*erfpag*) and its English-based counterpart perpetual quitrent and building rights (*opstalreg*) and its English-based counterpart 99-years leasehold have steadily been upgraded to ownership. The same is fortunately also true for the most important constitutional land reform measures as illustrated by the possibility created for certain labour tenants to acquire title to portions of land as restitution for title lost by discriminatory measures as well as by the fact that initial ownership is purely preliminary in nature with the holder waiting in the wings for his inchoate ownership to be upgraded to full ownership as soon as the prerequisites for security of title namely demarcation and services have been complied with. Could this all be the manifestations of an inherent dynamism to keep the magic circle of categories of real rights as small and as intact as possible?

⁷⁸ This phrase was borrowed from a lecture delivered by Professor Kenneth Reid at the Conference on Real rights in Utrecht on 15 June 2001.

⁷⁹ See already Carole Lewis op cit note 30 at 614-615 especially at 614: 'Perhaps the criteria for determining whether a right should be registrable against title should, then, be whether it constitutes a right *in* or *to* the land, which is socially and economically desirable in the interests of the landowner and the community in which the land is situate, *and*, most importantly, which will enhance the proper exploitation of the land.'

⁸⁰ See the White Paper on South African Land Policy, April 1997, 4.19 and 6.15.3; D L Carey Miller and Anne Pope op cit note 42 at 566-567 and 588-589.