

Author: G Pienaar

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THE EFFECT OF THE ORIGINAL ACQUISITION OF OWNERSHIP OF IMMOVABLE PROPERTY ON EXISTING LIMITED REAL RIGHTS

G Pienaar*

1 Introduction

In the case of the derivative acquisition of ownership it is trite law that ownership of the property is transferred by the transferor to the new owner with the co-operation of the acquirer in terms of the real agreement between the parties.¹ A further requirement is that delivery in the case of movables or registration in a deeds registry in the case of immovables takes place as part of the *traditio* element of the transfer. Furthermore, the property is burdened by all limited real rights existing at the time of the transfer or *traditio*.² These principles are applicable to both movable and immovable property. As the ownership of the acquirer is derived from the ownership of the transferor, the transferor cannot transfer more rights than she has been entitled to exercise (*nemo plus iuris ad alium transferre potest, quam ipse habere*).³

The legal position in the case of the original acquisition of ownership is more complicated, as ownership is vested in the new owner by operation of law and not by transfer of the right by the previous owner. In South African law it is an accepted principle that *movable* property acquired in an original way is not burdened by any limited real rights, as previous limited real rights are extinguished on the vesting of ownership.⁴ The main reason for this is that it is normally required that limited real rights in respect of movables are exercised by means of physical control of the property, which control cannot be exercised by the holder of a limited real right in

* Gerrit Pienaar. B Jur et Com, LLB, LLD (PU for CHE). Research Associate and Professor in Private Law, North-West University, Potchefstroom. Email: gerrit.pienaar@nwu.ac.za.

¹ Van der Merwe *Sakereg* 216-217; Badenhorst, Pienaar and Mostert *Law of Property* 72-74; Sonnekus and Neels *Sakereg Vonnisbundel* 389-390.

² See Van der Merwe *Sakereg* 301-305 and Badenhorst, Pienaar and Mostert *Law of Property* 72-74 for the general principles of the transfer of ownership.

³ *I 2 1 42*; *D 21 2 64 4*, *41 1 20 pr*; *D 50 17 54*; De Groot *Inl 2 5 15*; Voet *Comm* 41 1 35 and 6.1.5; Van Leeuwen *RHR* 2 7 5; *Glathaar v Hussan* 1912 TPD 322 327; *Mngadi v Ntuli* 1981 3 SA 478 (D); *Barclays Nasionale Bank Bpk v Registrateur van Aktes, Transvaal* 1975 4 SA 936 (T) 942.

⁴ Van der Merwe *Sakereg* 216; Sonnekus and Neels *Sakereg Vonnisbundel* 309: "...vry van enige bestaande beletsels daarop..."; Badenhorst, Pienaar and Mostert *Law of Property* 137: "...his or her title is consequently not affected by infirmities in the title of the predecessor...".

circumstances where the property is in the physical control of the acquirer (*mobilia non habent sequelam*).⁵ Although it is assumed by some South African writers on the topic that ownership is acquired unburdened in the case of the original acquisition of *immovable* property also, it is not a foregone conclusion that this is in general the correct interpretation of the present legal position.⁶

This article deals with the effect of the original acquisition of ownership by means of prescription and expropriation on existing limited real rights to immovable property. These two forms of original acquisition of ownership are both regulated statutorily. The common law forms of original acquisition, namely *occupatio*, *accessio*, *specificatio* and *commixtio et confusio*, are in South African law applicable to movables only and are not applied in the case of the original acquisition of immovable property.⁷ *Alluvio*, *avulsio* and *insula nata in flumine* are common law forms of original acquisition of immovable property, but the probability that limited real rights might be affected by these forms of original acquisition is negligible. In the case of immovable property the statutory provisions regarding the South African negative deeds registration system is also a complicating factor which has to be taken into consideration.

In order to determine what the effect of the original acquisition of ownership of immovable property on existing limited real rights is, the following aspects will be examined: the nature of limited real rights to immovable property, with reference to the relationship between the owners and holders of limited real rights and the constitutional protection of limited real rights; limited real rights as a burden to the property; and the statutory provisions in the case of the original acquisition of immovable property by means of prescription and expropriation.

⁵ *Mutual Life Assurance Co v Hudson's Trustee* 1885 3 SC 264; the only exception where a limited real right to movables can be exercised without control is a notarial bond, which is a statutory exception. Tacit hypothecs must normally be perfected before they have real effect.

⁶ See paras 3 and 4 below.

⁷ See also fn 17 regarding the abandoning of ownership. In the case of other statutory forms of original acquisition of ownership of immovable property, eg the vesting of ownership in the liquidator of an insolvent estate in terms of s 20(1)(a) of the *Insolvency Act* 24 of 1936 and s 361(3) of the *Companies Act* 61 of 1973 (which is still applicable in terms of sch 5 para 9 of the *Companies Act* 71 of 2008), existing limited real rights do not fall away automatically.

2 Nature of limited real rights

2.1 Establishment and termination

In the case of immovable property most limited real rights are established and exercised by registration in an appropriate deeds registry.⁸ It is often stated that immovable property is acquired unburdened by limited real rights (even previously registered rights) in the case of original acquisition, and that all existing limited real rights fall away on acquisition of the property. This assumption is based on the fact that the main characteristic of the original acquisition of ownership is acquisition by operation of law, and not by co-operation with a previous owner, even in instances where there is a previous owner.⁹ There is no transfer of ownership from the previous owner, but a "new" right of ownership is vested in the acquirer.¹⁰ It is argued that this "new" right of ownership is unburdened by any previous restrictions or limitations which burdened the thing previously.¹¹ Therefore the principle of *prior in tempore potior in iure* is not applicable to previous limitations to or burdens on the property.¹²

My preliminary observation is that this assumption is based on the original acquisition of ownership of movable property, but that it is not supported by Roman-Dutch principles¹³ or the view of most of the Dutch commentators regarding the original acquisition of ownership of immovable property. Statutory provisions in respect of immovable property, including the principles of the South African deeds registration system, are not taken into account. The South African deeds registration system

⁸ Carey Miller and Pope *Land Title* 97-98; Badenhorst, Pienaar and Mostert *Law of Property* 65; s 63(1) of the *Deeds Registries Act* 47 of 1937; *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1918 AD 1 16; *Cape Explosive Works Ltd v Denel (Pty) Ltd* 2001 3 SA 569 (SCA) para 16. Some limited real rights and rights with real effect are not registered, eg statutory hypothecs and liens.

⁹ Sonnekus 2008 *TSAR* 697.

¹⁰ Van der Merwe *Sakereg* 216; Sonnekus 2008 *TSAR* 697.

¹¹ Van der Merwe *Sakereg* 216 refers to these limitations as "eienaardighede, verpligtinge of voordele", while Badenhorst, Pienaar and Mostert *Law of Property* 137 call it "infirmities in the title of the predecessor"; however, these authors are not prepared to include registered limited real rights over immovable property explicitly into the list of the limitations that fall away, *contra* Sonnekus 2008 *TSAR* 697, 699-700; also see para 3 below.

¹² Sonnekus 2008 *TSAR* 697, with reference to Snijders and Rank-Berenschot *Goederenrecht* para 244; Asser-Mijnssen, De Haan and Van Dam *Goederenrecht* para 192; *contra* Reehuis *et al Goederenrecht* paras 94 and 97; De Jong *Goederenrecht* para 92.

¹³ De Groot *Inl* 2 7; Marx 1994 *Obiter* 166; Reehuis *et al Goederenrecht* paras 94, 97; De Jong *Goederenrecht* para 92; see also para 2.2.2 below.

requires the formal cancellation of a registered limited real right, and until such formal cancellation occurs the right is enforceable, unless the owner of the property can prove that the registered right has lapsed.¹⁴ The fact that it is also a negative system 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.

2.2 Ownership as "mother" right?

2.2.1 Hierarchy of rights

Regarding the effect of a limited real right, a debatable point is whether a limited real right burdens the property itself or whether it is a burden on the ownership of the owner of the property.¹⁵ It is often argued that ownership is the "mother" right which is burdened by a (temporary) limited real right, and when the "mother" right falls away the limited real right also falls away, because it is as a burden attached to the "mother" right. This notion is by implication applicable not only to prescription and expropriation as forms of original acquisition of ownership where the property was owned previously, but also in the case of property that has been abandoned.¹⁶ According to this point of view the effect is that all registered limited real rights also fall away, because the "mother" right has been abandoned. However, this argument is substantiated neither by case law nor by academic writers.¹⁷ In the case of

¹⁴ *Deeds Registries Act* 47 of 1937 s 56(1); *Knysna Hotel CC v Coetzee* 1998 2 SA 743 (SCA) 753A-D; *Cape Explosive Works Ltd v Denel (Pty) Ltd* 2001 3 SA 569 (SCA) para 16; *Standard Bank van SA Bpk v Breitenbach* 1977 1 SA 151 (A) 156C-E; *Barclays Nasionale Bank Bpk v Registrateur van Aktes, Transvaal* 1975 4 SA 936 (T) 941B-E; also see para 4.1.1 below.

¹⁵ Sonnekus 2008 *TSAR* 697: "Die 'nuwe' reg wat gevestig word by oorspronklike wyses van regsverkryging, is nie onderworpe aan byvoorbeeld enige reeds bestaande beperkte saaklike reg nie, want 'n beperkte saaklike reg (*ius in re aliena*) kan slegs bestaan mits dit per definisie 'n ander reghebbende se eiendomsreg beperk."; also see Sonnekus 2008 *TSAR* 698.

¹⁶ Sonnekus 2008 *TSAR* 701-702.

¹⁷ Most academic writers in South Africa are of the opinion that immovable property does not become a *res nullius* by the owner's abandoning such property, as it then becomes state property: in this regard see Van der Merwe *Sakereg* 227; Carey Miller and Pope *Land Title* 58; Badenhorst, Pienaar and Mostert *Law of Property* 141. In *Minister van Landbou v Sonnendecker* 1979 2 SA 944 (A) it was held *obiter dicta* that the immovable property did not accrue to the state, but in this case the state could not prove that there was an intention to abandon the property. Also see *Meintjes v Coetzer* 2010 5 SA 186 (SCA), in which case the owner did not abandon her ownership of immovable property, but waived the right to reclaim the property which was transferred

expropriation and prescription as forms of original acquisition of ownership the property was not *res nullius* but was owned previously by an owner whose ownership has been terminated by the original acquisition of a "new" right of ownership by a subsequent owner by operation of law. It is comparable to the derivative acquisition of a "new" ownership by a subsequent owner because of a new subject-object relationship embodied in a new title deed (see in this regard para 3 below). The only difference is that in the case of derivative acquisition ownership is transferred in terms of a real agreement (the intention to transfer and accept ownership) instead of vesting in a new owner by operation of law.

Furthermore, the argument that ownership is the "mother" right and that all limited real rights burden the ownership of the owner and are inferior to and dependent on ownership is based on the theory of a hierarchy of property rights, with ownership as an absolute right at the pinnacle and all other rights and interests to immovable property regarded as inferior to ownership and in principle temporary. Van der Walt¹⁸ states in this regard that a distinction must be drawn between an "ownership orientation model" and a "fragmented use-rights model". In the former, ownership qualifies as the strongest right in the hierarchy of rights, and title is absolute in the sense that it has no natural ceiling and tends to resist regulation.¹⁹ In the "fragmented use-rights model" there is no hierarchy of rights, ownership is not necessarily the strongest right but one of many rights to the property, title and use are often separated, and security may be based *inter alia* on legislation. Van der Walt prefers the model of fragmented use-rights, as such rights tend to absorb regulation without any inherent structural power relations. In the present constitutional era the

fraudulently, and which property was never regarded as *res nullius*. Therefore, *occupatio* cannot be applied to obtain ownership of immovable property in an original way.

¹⁸ Van der Walt 1999 *Koers* 259, 267-269; Van der Walt 2002 *TSAR* 254, 258.

¹⁹ Van der Walt 1999 *Koers* 268 critically states: "That in turn means that land rights ideally have to assume the form either of ownership or of rights that derive from, depend upon and are weaker than ownership. Because of the underlying hierarchy of power, the owner's security of tenure depends upon the law's recognition of title, while all other rights are either secure because of the temporary creation of limited real rights from the 'mother right', ownership, or they are insecure because they do not include title. This situation obviously upholds the hierarchies of rights and the underlying hierarchies of power..."

absoluteness of ownership is either rejected or regarded as a historical overstatement, even in private law relationships.²⁰

2.2.2 Historical development

There is no indication in either Roman or Roman-Dutch sources that ownership is the "mother" right on which limited real rights are based. In Roman law Gaius used the term *duplex dominium*,²¹ which is regarded as the foundation or prefiguration of the (later) medieval distinction between *dominium directum* and *dominium utile*.²² Both *dominium directum* and *dominium utile* were seen as different forms of *dominium*, without any indication that the one was regarded as superior to or the "mother" right of the other.²³ In Roman-Dutch law Grotius²⁴ distinguished between complete ownership (*volle eigendom*) and incomplete ownership (*gebreckelicke eigendom*) to distinguish between ownership and limited rights to property (most of which are recognised as limited real rights in modern civil law systems).²⁵ Many South African writers indicate their support for the idea that ownership as an absolute and individualistic right is not derived from Roman-Dutch sources but from the Pandectist interpretation of Roman texts.²⁶

2.2.3 Constitutional development

The idea of ownership as an absolute and superior right has also been rejected by the South African constitutional court and the supreme court of appeal in cases where the balancing of interests between landowners and the unlawful occupiers of immovable

²⁰ Van der Walt *Constitutional Property Law* 171; *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC) para 33. Also see para 2.2.2 below.

²¹ G 1.54.

²² The rights of persons who do not have *dominium directum*, some of which developed into what are recognised as limited real rights in modern civil law systems.

²³ See in particular the Roman and Roman-Dutch sources cited by Visser 1985 *Acta Juridica* 39-41 and Van der Walt and Kleyn "Duplex Dominium" 217-243.

²⁴ De Groot *Inl* 2 3 10.

²⁵ De Groot *Inl* 2 33 1 states that the term "incomplete ownership" is applied to the right of any person who does not have complete ownership. In the context of servitudes he refers to the right of the person who has to submit to the servitude as *eigendom*, and the right of the holder of the servitude as *gerechtigheid*, which is a form of incomplete ownership; see Visser 1985 *Acta Juridica* 40; Van der Walt 1992 *SAJHR* 433 calls it the "debunking of the traditional ownership paradigm".

²⁶ Visser 1985 *Acta Juridica* 46-48; Van der Walt and Kleyn "Duplex Dominium" 247-248; also Feenstra 1976 *Rechtsmagazyn Themis* 276.

property had to be adjudicated. These limitations on ownership were sanctioned in a constitutional context by the balancing of the interests of landowners and occupiers in terms of the constitutional protection of the occupiers' right to housing in terms of section 26(3).²⁷ However, it was clearly stated that ownership may also in other contexts be regarded as one of many competing property rights, albeit not necessarily the most absolute or the strongest right.²⁸ Some see this as a serious deviation from common law principles, but even in terms of common law principles ownership was not always regarded as the strongest or most absolute right, *eg* in the case of the *huur gaat voor koop* rule or real security rights.²⁹ In *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service*,³⁰ *Port Elizabeth Municipality v Various Occupiers*³¹ and *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government*³² it was emphasised that ownership is not an absolute right.³³ This is also applicable to private law relationships based on Roman-Dutch principles or statutory law, especially the relationship between ownership and other property rights, as all law (statutory, common and customary law) is as "part of the amalgam of South African law" subject to constitutional scrutiny.³⁴ Therefore, the notion that ownership is the "mother" right and all other

²⁷ In terms of s 26(3) of the *Constitution* no one may be evicted from their home or have their home demolished without a court order made after considering all the relevant circumstances; see the case law and literature cited by Van der Walt *Constitutional Property Law* 522-528.

²⁸ *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service* 2002 4 SA 768 (CC) (*FNB case*) 794C; *Van der Merwe v Taylor* 2008 1 SA 1 (CC) para 26; *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC) para 33.

²⁹ See fn 26 above.

³⁰ *FNB case* para 50: "The purpose of s 25 has to be seen both as protecting existing private property rights as well as serving the public interest, mainly in the sphere of land reform but not limited thereto, and also as striking a proportionate balance between these two functions." Also see para 2.3 below regarding the nature of limited real rights as constitutional property.

³¹ *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 10; also see *Ndlovu v Ngcobo*; *Bekker v Jika* 2003 1 SA 113 (SCA) paras 65-67.

³² *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC) para 33.

³³ *FNB case* paras 50, 51. Also see Van der Walt *Constitutional Property Law* 108-109.

³⁴ *Alexkor (Pty) Ltd v Richtersveld Community* 2004 5 SA 460 (CC) para 51; *Ex parte President of the RSA: In re Pharmaceutical Manufacturers Association of South Africa* 2000 2 SA 674 (CC) para 44. The reference to "law of general application" in ss 25(1) and (2) of the *Constitution* includes statutory, common and customary law; also see Lewis 1992 *SAJHR* 397-399; Roux "Property" ch 46 2-5, 9-11, 23-25; Van der Walt *Constitutional Property Law* 108.

rights to property are dependent on ownership does not fit in well with the present constitutional concept of property.³⁵

2.3 Limited real rights as constitutional property

The constitutional concept "property" was not defined comprehensively in the *FNB* case,³⁶ allowing for the development of this concept in individual cases according to constitutional principles.³⁷ "Property" in terms of section 25 of the *Constitution* may according to the context in which the term is used refer to the objects of property rights as well as rights in property, both of which are constitutionally protected.³⁸ Although ownership of immovable and movable property was specifically mentioned by the constitutional court,³⁹ a range of objects and rights have since been identified as "property" for the purpose of constitutional protection in terms of section 25, including rights in property and incorporeal things.⁴⁰ Limited real rights to immovable property in particular, either statutory or in terms of common law, constitute constitutional property in the form of incorporeal immovable property.⁴¹ Registered mortgage bonds and servitudes (such as a usufruct) are examples of incorporeal immovable things that are constitutionally protected as "property" within the scope of section 25.⁴² Being property itself, it is not dependent on ownership as a "mother" right in order to be constitutionally protected. The argument that (constitutionally protected) limited real rights to immovable property fall away automatically on the

³⁵ Badenhorst, Pienaar and Mostert *Law of Property* 65; Van der Walt 1999 *Koers* 259 ff; Pienaar "Fragmented Use-rights" 108-112.

³⁶ *FNB* case para 51.

³⁷ Van der Walt *Constitutional Property Law* 108, referring especially to ss 7(1), 36(1) and 39(1) and (2) of the *Constitution*.

³⁸ Badenhorst, Pienaar and Mostert *Law of Property* 65; Van der Walt 1999 *Koers* 259 ff; Pienaar "Fragmented Use-rights" 108-112.

³⁹ *FNB* case para 51.

⁴⁰ Lewis 1992 *SAJHR* 397-399; Roux "Property" ch 46 2-5, 9-11, 23-25; Van der Walt *Constitutional Property Law* 108, 138-143.

⁴¹ Badenhorst, Pienaar and Mostert *Law of Property* 35-38; Brits *Mortgage Foreclosure* 41-42, 333-334; also see *Willow Waters Homeowners Association (Pty) Ltd v Koka* 2015 5 SA 303 (SCA) paras 14, 15.

⁴² Van der Walt *Constitutional Property Law* 140; Badenhorst, Pienaar and Mostert *Law of Property* 536; Brits *Mortgage Foreclosure* 333-334. In *Ex parte Optimal Property Solutions CC* 2003 2 SA 136 (C) it was held that the removal or deletion of a registered praedial servitude without the servitude holder's consent or a court order constitutes a deprivation of property.

original vesting of ownership in a new owner is therefore subject to constitutional scrutiny, if such a principle is based on common law or statutory law.

Any statutory or common law⁴³ provision depriving a person of property arbitrarily or in a procedurally unfair manner⁴⁴ (section 25(1)) or without just and equitable compensation⁴⁵ (sections 25(2) and (3)) is deemed unconstitutional and might be declared invalid unless, in some instances, it has passed the second stage analysis required by the proportionality test in terms of section 36(1).⁴⁶ In order to comply with the non-arbitrariness test, it must be determined whether the interference with property rights amounts to non-arbitrary deprivation of property in a specific instance.⁴⁷ In the *FNB*-case it was held that a deprivation is arbitrary if there is not sufficient reason for the particular deprivation or if it is procedurally unfair.⁴⁸ In establishing whether there is sufficient reason for the deprivation of real security or other limited real rights in the case of the original acquisition of the burdened property, two of the aspects stated in the *FNB*-case must be considered. Firstly, does the purpose of the deprivation justify the extent of the deprivation suffered by the holder of the rights; and secondly, do the means employed justify the ends sought? It is submitted that in the case of the original acquisition of burdened immovable property there is not a sufficient *nexus* between the deprivation (the means used) and the reason for the deprivation (the ends achieved) and that such a deprivation may be arbitrary. The reason for the deprivation is based on the principles regarding the original acquisition of movables, which reason is not applicable to immovables (see paragraph 1 above regarding physical control as a requirement in the case of movables and the application of the *mobilia non habent sequelam* principle). For instance, why should a registered right of way over a farm, which was exercised continuously, lapse on the original acquisition of the farm by prescription?

⁴³ This is also applicable to common law principles. The common law forms part of the "amalgam of South African law" bound by the *Constitution* as the supreme law: in this regard see *Ex parte President of the RSA: In re Pharmaceutical Manufacturers Association of South Africa* 2000 2 SA 674 (CC) para 44.

⁴⁴ For the meaning of "arbitrarily" see *FNB* case para 100.

⁴⁵ For the meaning of "just compensation" see Du Plessis *Compensation for Expropriation* 238-264.

⁴⁶ Van der Walt *Constitutional Property Law* 284-285 indicates that the application of the proportionality test will not be applicable in all instances; Brits *Mortgage Foreclosure* 329-338.

⁴⁷ Roux "Property" 26-2 – 26-5; Van der Walt *Constitutional Property Law* 245-248.

⁴⁸ *FNB* case para 100.

Both real security rights and servitudes are limited real rights with substantial values to the right-holder. It has to be determined whether the lapsing of these constitutionally protected property rights serves a valid and legitimate public purpose and clearly has a justifiable impact on the deprived rights-holders by balancing the rights of the rights-holders with those of the new owner.⁴⁹ It is submitted that, if such a principle exists in respect of immovable property, it will constitute an arbitrary deprivation of property. This is not necessarily the case with movable property, as different principles in respect of original acquisition are applied.

South African legislation with regard to prescription and expropriation of immovable property provide for the retention of or compensation for limited real rights when the burdened property is acquired by a new owner, and comply therefore with the non-arbitrariness test, as will be discussed at para 4 below. This principle is also applicable to the statutory vesting of immovable property in the name of the liquidator of an insolvent estate in terms of the *Insolvency Act* 24 of 1936 and the *Companies Act* 71 of 2008, where legislation provides for compensation for limited real rights registered over immovable property.⁵⁰ Therefore, in South African law no general rule has been established that limited real rights to immovable property are extinguished automatically or without compensation on the original acquisition of ownership of the burdened property.

3 Limited real rights as a burden on the property

A limited real right is a *ius in re aliena* based on two relationships: a subject-object relationship between a person and a thing, meaning that the subject is in a direct relationship to exercise entitlements over the thing without the interaction of the owner;⁵¹ and a subject-subject relationship between the right-holder and all third

⁴⁹ *FNB* case paras 100(a), (c) and (d) and (f).

⁵⁰ Section 20(1)(a) of the *Insolvency Act* 24 of 1936 and and s 361(3) of the *Companies Act* 61 of 1973 (which is still applicable in terms of sch 5 para 9 of the *Companies Act* 71 of 2008). Also see fn 7 above.

⁵¹ *Mutual Life Assurance Co v Hudson's Trustee* 1885 SC 264: "[T]he first mortgage bond passed in favour of the applicant must be admitted to rank as preferent. *It is a claim upon the land itself, which differs in this respect from movables in regard to which the rule is mobilia non habent sequelam*" [my emphasis]; *Barclays Nasionale Bank Bpk v Registrateur van Aktes, Transvaal* 1975 4 SA 936 (T) 941A.

parties, including the owner of the thing, who must respect the entitlements of the holder of the limited real right.⁵² The owner does not transfer any entitlements to the right-holder, but the owner's entitlements are limited in a specific way (in accordance with the specific limited real right) by the exercise of independent entitlements by the right-holder connected to the limited real right, be it a real security right, the right to use the thing, or the right to the proceeds of the thing.⁵³ Therefore, the essential characteristic of a limited real right is that it is not based on the ownership of the owner of the property as the "mother" right, but it is a separate real right which exists independently from the ownership of the owner.⁵⁴

In South African law the establishment, nature and effect of limited real rights to immovable property are closely connected to the requirements of the South African deeds registration system. In case law the nature and effect of limited real rights are described as part of the requirements for the subtraction from the *dominium* test, which is used to determine if a right of a non-owner, either to use the immovable property physically or as the object of real security, or to be entitled to the proceeds of the property, can be registered in a deeds registry as a limited real right in favour of the non-owner.⁵⁵

In case law a distinction is made between the *essence* and the *effect* of a limited real right. The *locus classicus* for the subtraction test is *Ex parte Geldenhuys*,⁵⁶ where it was held "that only real rights can be registered against the title deed of land, *i.e.*, such rights as constitute *a burden upon the servient land*, and *are a deduction from the dominium*".⁵⁷ Further on the judge found that "servitudes are '*praedial*' because they are constituted in favour of a particular piece of land; but all servitudes are real

⁵² Lubbe 1997 *Acta Juridica* 248; *Erlax Properties (Pty) Ltd v Registrar of Deeds* 1992 1 SA 879 (A) 884I-885B.

⁵³ The so-called "bundle of sticks" theory has been refuted authoritatively in South African law; see Van der Merwe *Sakereg* 174; Sonnekus and Neels *Sakereg Vonnisbundel* 249.

⁵⁴ See para 2.3 above.

⁵⁵ Van der Merwe *Sakereg* 70-83; Badenhorst, Pienaar and Mostert *Law of Property* 55-65; Sonnekus and Neels *Sakereg Vonnisbundel* 102-104, 112-120; Carey Miller and Pope *Land Title* 97-110. In terms of s 63(1) of the *Deeds Registration Act* 47 of 1937 only limited real rights which burden an immovable and not personal rights against the owner of the immovable are registrable in a deeds registry.

⁵⁶ *Ex parte Geldenhuys* 1926 OPD 155 (hereafter *Geldenhuys* case).

⁵⁷ *Geldenhuys* case 162 (my emphasis); also see *Hollins v Registrar of Deeds* 1904 TS 603.

rights and *burdens upon the land which is subject to them*".⁵⁸ It was also held: "These limitations moreover, in my opinion form a real burden, *jus in re*, on each undivided share, and *not merely an obligation on the person of each child*."⁵⁹ In the context of this case the *essence* of a limited real right is that it burdens the immovable property as object (and not a specific owner), but the *effect* of the burden upon the immovable is a subtraction from the *dominium* of the owner (and all subsequent owners), which constitutes a limitation on the owner's entitlements. The limitation on the owner's entitlements is not the essence of a limited real right, because personal rights and statutory measures can also limit an owner's entitlements. The essence of a limited real right is that it is a real burden to the property, enforceable not only against a specific owner but against the present owner and all subsequent owners.⁶⁰

This principle is also stated clearly in *Lorentz v Melle*,⁶¹ where it was held that the "*essence of a praedial servitude [is] that it burdens the land to which it relates and that it provides some permanent advantage to the dominant land (as distinct from serving the personal benefit of the owner thereof)*". It was furthermore held that not all rights, in this case the right to receive part of the profits realised by subdividing and developing the property, amount to a subtraction from the *dominium*, because in the circumstances of this case the owner's entitlements were curtailed, but "not to the enjoyment of the land in a physical sense".⁶² However, the requirement of a burden upon the property in the sense of a limitation of the owner's physical use of the property was not stated explicitly in the *Geldenhuis* case, nor was this aspect confirmed by the appellate division in the recent decision of *Cape Explosive Works Ltd v Denel (Pty) Ltd*.⁶³

⁵⁸ *Geldenhuis* case 163 (my emphasis).

⁵⁹ *Geldenhuis* case 165 (my emphasis), referring to the undivided co-ownership share.

⁶⁰ *Geldenhuis* case 164.

⁶¹ *Lorentz v Melle* 1978 3 SA 1044 (T) 1049F-G (my emphasis). On 1029C it is stated that "it diminishes an owner's *dominium* in the thing, but *this is only the effect of the real burden on the property*, being a right belonging to one person in the property of another entitling the former either to exercise some right or benefit in the property or to prohibit the latter from exercising one or other of his normal rights of ownership" (my emphasis).

⁶² *Lorentz v Melle* 1978 3 SA 1044 (T) 1052E-F.

⁶³ *Cape Explosive Works Ltd v Denel (Pty)* 2001 3 SA 569 (SCA); also see *Willow Waters Homeowners Association (Pty) Ltd v Koka* 2015 5 SA 303 (SCA) paras 16, 22.

In *Pearly Beach Trust v Registrar of Deeds*⁶⁴ it was held that a condition in a deed of sale obliging the owner and his successors in title to pay over part of the proceeds of the property to a non-owner constituted a limited real right upon registration of the condition in a deeds registry. Although the court rejected the requirement of a burden to the property in a physical sense, the reference to the limitation of the owner's entitlements (a subtraction from the *dominium*) was again the *effect* of the limited real right, while the *essence* of the right was the constitution of "a charge on the property which is binding on successive owners".⁶⁵ This was confirmed in *Erlax Properties (Pty) Ltd v Registrar of Deeds*,⁶⁶ where it was held:

[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 of the right a direct power or absolute control over the thing. The content of the absolute control may vary depending on various real rights which may range from full ownership to *jura in re aliena* and other real rights.

As clearly indicated by case law, the essence of a limited real right is to burden the property, while the effect is that the entitlements of the owner of the property (and any subsequent owner) are limited. The existence of a limited real right is therefore based on the fact that it is a burden on the land (a subject-object relationship), and not its limitation of the owner's entitlements. As a requirement for the subtraction from the *dominium* test, this is an effect of a limited real right but not its essence, as personal rights and statutory measures can also limit the entitlements of an owner without being classified as limited real rights.⁶⁷

It is sometimes stated that a *res nullius* cannot be the object of a limited real right, as it is a requirement of the subtraction test that the entitlements of an owner must be limited by a limited real right.⁶⁸ However, as indicated above, the essence of a limited

⁶⁴ *Pearly Beach Trust v Registrar of Deeds* 1990 4 SA 614 (C).

⁶⁵ *Pearly Beach Trust v Registrar of Deeds* 1990 4 SA 614 (C) 618A-B. Also see *NG Kerk, Aberdeen v Land and Agricultural Bank of SA* 1934 2 PH M36 (C); *Odendaalsrus Gold, General Investments and Extensions Ltd v Registrar of Deeds* 1953 1 SA 600 (O); and *Mergold Beleggings (Edms) Bpk v Bhamjee* 1983 1 SA 663 (T).

⁶⁶ *Erlax Properties (Pty) Ltd v Registrar of Deeds* 1992 1 SA 879 (A) 884I-885B; also see *Cape Explosive Works Ltd v Denel (Pty) Ltd* 2001 3 SA 569 (SCA) 12; *Willow Waters Homeowners Association (Pty) Ltd v Koka* 2015 5 SA 303 (SCA) paras 16, 22.

⁶⁷ *Contra* Sonnekus 2008 TSAR 697-698.

⁶⁸ Sonnekus 2008 TSAR 698.

real right is to burden the property, and not the ownership of an owner. It is also a moot point in South African law whether immovable property can be *res nullius*.⁶⁹ Furthermore, the "new" ownership in the case of the original acquisition of ownership is not obtained or exercised in respect of a *res nullius*. Ownership is obtained by expropriation and prescription in respect of property which has been owned up to the moment of the vesting of the "new" ownership by another person, and was burdened before acquisition by a limited real right already.⁷⁰ In the case of prescription and expropriation the only difference from derivative acquisition is that the previous owner does not transfer ownership to the new owner, but a "new" ownership is vested by operation of law. The "new ownership" argument could perhaps be used in the case where ownership of a *res nullius* is acquired, but in the case of the original acquisition by prescription or expropriation the immovable is not a *res nullius*; the previous owner's ownership is terminated, and the new owner acquires ownership immediately by operation of law. This is comparable to the situation where ownership is terminated and immediately thereafter acquired in a derivative way, with the only difference being that the ownership is transferred in such instance, resulting in a new subject-object relationship.

4 Statutory provisions

The principles of and requirements for the original acquisition of ownership of immovables by prescription and expropriation are prescribed statutorily. The purpose of this part is to indicate that existing limited real rights are not automatically extinguished by original acquisition in the case of prescription and expropriation.

⁶⁹ See fn 17 above.

⁷⁰ Immovable property does not become a *res nullius* by the owner's abandoning such property, as it then becomes state property: in this regard see Van der Merwe *Sakereg* 227; Carey Miller and Pope *Land Title* 58; Badenhorst, Pienaar and Mostert *Law of Property* 141; in *Minister van Landbou v Sonnendecker* 1979 2 SA 944 (A) it was held *obiter dicta* that the immovable property did not accrue to the state, but in this case the state could not prove that there was an intention to abandon the property.

4.1 Prescription

4.1.1 Deeds registration requirements

In the case of prescription the possessor becomes the owner of the immovable property by operation of law as soon as the period of prescription has expired.⁷¹ However, as a result of the South African negative deeds registration system the property is still registered in the name of the previous owner.⁷² If the entire property acquired by prescription had been held by the previous owner in accordance with a registered land surveyor's map referred to in the title deed, an application to rectify the title deed to reflect the name and particulars of the new owner has to be submitted to a high court with jurisdiction over the matter.⁷³ The rectification of the title in the deeds registry will then take place after the procedure set by the court order has been followed (normally a rule *nisi* is made, followed by a final court order). The rectification is made by the Registrar of Deeds in terms of the court order and the procedure prescribed by the *Deeds Registries Act*.⁷⁴

If only a part of the property has been obtained by prescription, it is uncertain, in the case of agricultural land, whether or not the new owner has to submit an application for the subdivision of the land at the Department of Agriculture.⁷⁵ However, the new owner has to obtain an amended land survey map at the Chief Land Surveyor after a court order for the amendment of the deeds records has been obtained from the

⁷¹ For the common law and statutory requirements of prescription, see Van der Merwe *Sakereg* 268-290; Badenhorst, Pienaar and Mostert *Law of Property* 173-174; Carey Miller and Pope *Land Title* 194-196; *Prescription Act* 68 of 1969 ss 1-5.

⁷² *Knysna Hotel CC v Coetzee* 1998 2 SA 743 (SCA) 753A-D; *Cape Explosive Works Ltd v Denel (Pty) Ltd* 2001 3 SA 569 (SCA) para 16.

⁷³ Section 33(1) *Deeds Registries Act* 47 of 1937; this is only to rectify the title in the deeds registry, as the new owner has already obtained ownership at the date of expiry of the prescription period. For the procedure to apply for rectification, see Carey Miller and Pope *Land Title* 196-204; West *Practitioner's Guide to Conveyancing* 16.

⁷⁴ Sections 33(5) and (6) *Deeds Registries Act* 47 of 1937.

⁷⁵ The *Subdivision of Agricultural Land* 70 of 1970 s 3 does not explicitly prohibit or authorise the common law acquisition of an unsurveyed tract of agricultural land. Sonnekus and Neels *Sakereg Vonnisbundel* 309 submit that the application of the *Subdivision Act* is excluded in the case of original acquisition; also see *Du Toit v Furstenberg* 1957 1 SA 501 (O). However, in this case the prescription was completed before the promulgation of the *Subdivision Act* in 1971, rendering the application for subdivision unnecessary in terms of ss 2 and 3(c) of the Act. The position regarding the necessity to obtain the Department of Agriculture's permission to subdivide is therefore uncertain at this stage.

applicable division of the high court, as registration in a deeds registry can take place only in accordance with a registered land surveyor's map, diagram or general plan approved in terms of the *Land Survey Act* 8 of 1997. The Registrar of Deeds will rectify the deeds records by registering a draft deed of transfer of the property into the name of the new owner, stating as *causa* for the transfer in the recital of the deed "prescription in terms of a court order" and reflecting the terms of the court order.⁷⁶ The registration of title in the name of the new owner does not cancel any of the existing registered limited real rights over the property, unless such a cancellation is ordered by the court. Normally this is not ordered automatically unless the rights themselves have been extinguished by prescription.⁷⁷ The statutory provisions embodied in section 33(8) clearly require that the registrar must endorse upon the title deed of the new owner any servitude, bond or other encumbrance previously registered against the title deed. Furthermore, the new owner's title to the property may be annulled, limited or altered on every ground on which his predecessor's title would have been liable to be annulled, limited or altered "if such property has been transferred to such person in the ordinary course".⁷⁸

4.1.2 Accessory principle

A registered mortgage bond will have been extinguished by prescription if no mortgage installments in respect of the principal debt have been received or demanded, or legal action has been taken by the mortgagee for the preceding period of 30 years. Normally the mortgagee would have taken some action to interrupt the

⁷⁶ *Deeds Regulations* Form H, which provides for title conditions and limited real rights to be carried over to the new title deed. In *Pienaar v Rabie* 19833 SA 126 (A) the court ordered that the part of the adjacent farm which has been obtained by prescription has to be consolidated with the acquirer's existing farm; this implies new land surveyor's maps to be registered at the Surveyor-General before the amendment in the deeds registry will be allowed.

⁷⁷ Section 33(8) *Deeds Registries Act* 47 of 1937: "Subject to the terms of any order made under this section any deed of transfer passed in pursuance of such order shall be passed subject to every condition, servitude, bond or encumbrance to which, according to the records of the deeds registry, the property to which the application relates, is subject, and the registrar shall, in connection with such condition, servitude, bond or other encumbrance, make the usual and proper entries and endorsements upon or in respect of such deed of transfer in his registry, before such deed is delivered to the applicant"; also see Van der Merwe *Sakereg* 288-289; Badenhorst, Pienaar and Mostert *Law of Property* 172-173; Carey Miller and Pope *Land Title* 204-206; Southwood *Compulsory Acquisition* 130-131.

⁷⁸ Section 33(9) *Deeds Registries Act* 47 of 1937.

period of prescription.⁷⁹ In the case of an existing mortgage bond that has not been extinguished by prescription and has been endorsed against the property in terms of section 33(8), the question arises whether or not the requirements of the accessory principle have been fulfilled,⁸⁰ rendering the property executable in the hand of the new owner.

The application of the accessory principle requires that a valid principal debt exist for the enforcement of a mortgage bond, and in this instance the principal debt exists between the previous owner and the mortgagee. It is submitted that this situation is analogous to the derivate acquisition of ownership of a property mortgaged with a bond that has not been cancelled by mistake or has been cancelled without the consent of the mortgagee and in contradiction of the provisions of section 56(1) of the *Deeds Registry Act* on transfer of the property.⁸¹ In *Barclays Nasionale Bank Bpk v Registrateur van Aktes, Transvaal*⁸² a mortgaged property was transferred after the mortgage bond was cancelled by mistake without the consent of the mortgagee as required by section 56(1). The court held that the property was executable in the hands of the new owner, because the registered mortgage bond constituted a real burden against the property which is enforceable against any owner of the property.⁸³ It was further held that there was still a valid principal debt between the previous owner and the mortgagee and that the mortgage bond burdening the property as object was executable as a real burden against the property, although it was registered in the name of the new owner. The same was held in *Standard Bank van SA Bpk v Breitenbach*,⁸⁴ where a property was transferred without the cancellation of an existing

⁷⁹ Section 4 *Prescription Act* 68 of 1969.

⁸⁰ In terms of the accessory principles a mortgage bond is enforceable only if a valid principal debt exists at the date of enforcement; Van der Merwe *Sakereg* 613; Badenhorst, Pienaar and Mostert *Law of Property* 358-359; Carey Miller and Pope *Land Title* 205.

⁸¹ Section 56(1) of the *Deeds Registries Act* 47 of 1937 requires that in the case of the derivate acquisition of ownership all existing mortgage bonds over the property must be cancelled with the consent of the mortgagee before transfer may take place. Also see Van der Merwe *Sakereg* 613 and *Barclays Bank DCO v Tarajia Estates (Pty) Ltd* 1966 1 SA 420 (T) 423 regarding the continued existence of the principal debt after the expropriation of the immovable.

⁸² *Barclays Nasionale Bank Bpk v Registrateur van Aktes, Transvaal* 1975 4 SA 936 (T) 941E-942A.

⁸³ In *Barclays Nasionale Bank Bpk v Registrateur van Aktes, Transvaal* 1975 4 SA 936 (T) 941A the court referred to the *dictum* in *Mutual Life Assurance Co v Hudson's Trustee* 1885 3 SC 264: "It is a claim upon the land itself, which differs in this respect from movables in regards to which the rule is *mobililia non habent sequelam*".

⁸⁴ *Standard Bank van SA Bpk v Breitenbach* 1977 1 SA 151 (A) 156C-E.

mortgage bond. The existing bond endorsed against the title deed of the property was granted by the previous owner in terms of a valid principal debt which still existed at the time of the transfer to the new owner, and it was held that the property be executable in the hands of the new because it constituted a real burden upon the property. These cases dealt with the effect of existing real security over immovables in the case of the derivative acquisition of ownership, but there is no reason why the principle cannot be applicable to real security in terms of a valid principal debt between the mortgagee and the previous owner in the case of the original acquisition of immovables in terms of the provisions of sections 33(8) and (9).

4.1.3 Real burden

The application of the accessory principle is an indication that, despite the procedure prescribed by section 56(1) of the *Deeds Registries Act* to ensure that all existing bonds be cancelled on the transfer of the property, the legal nature of real security rights is to burden the security object and not the ownership of a specific owner, as indicated by the provisions of section 33(8) and (9). The function of section 56(1) is to prescribe a certain procedure and not to change the legal nature of limited real rights, especially real security rights. In the light of the foregoing statutory provisions and case law it is clear that mortgage bonds and servitudes are not cancelled automatically on the original acquisition of the immovable property.⁸⁵ It is questionable whether a court would order the cancellation of an existing mortgage bond burdening the property while a valid principal debt is still in force, although between the previous owner and the mortgagee. This is analogous to the endorsement of the title in favour of a spouse in the case of a marriage in community of property entered into after the property was registered in the name of one of the spouses, where registered mortgage bonds and servitudes are not cancelled but are enforceable against the property, and in the case of real security in terms of the valid principal debt by one of the spouses.⁸⁶

⁸⁵ Also see the provisions of ss 90(1)(a) and (b) of the *Deeds Registries Act* 47 of 1937, limiting the cancellation of servitudes and registered leases by the registrar to circumstances where it was provided in the registered deed that the right will lapse upon the non-payment of agreed instalments only.

⁸⁶ Section 17(4) *Deeds Registries Act* 47 of 1937.

Although the provisions of sections 33(8) and (9) are pre-constitutional, they are in line with the protection of property in terms of section 25(1) of the *Constitution*.⁸⁷ Real security rights can be classified as protected "constitutional property".⁸⁸ Any legislation infringing on such security rights arbitrarily or in a procedurally unfair manner will constitute a deprivation of property, unless reasonable grounds can be established.⁸⁹

4.2 Expropriation

In the case of expropriation, the ownership of an immovable is vested in the state, an organ of state or a statutory body which is entitled to obtain ownership in terms of statutory provisions without the co-operation of the previous owner.⁹⁰ Because a real agreement is lacking, it is regarded as a form of original acquisition of ownership. The *Expropriation Act*⁹¹ specifically provides that the expropriated land remains subject to all registered limited real rights in favour of third parties, except mortgage bonds, unless such rights have also been expropriated in terms of the Act.⁹² Therefore, it is clear that existing limited real rights are not extinguished automatically on expropriation, but are enforceable against the new owner after expropriation, unless the limited real rights have been expropriated separately.

In the case of registered mortgage bonds or existing liens over a property, section 19(1) stipulates that no compensation is paid out to the owner of the property unless an agreement has been reached between the owner and the mortgagee or holder of the lien regarding the payment of the outstanding balance of the principal debt to

⁸⁷ *Constitution of the Republic of South Africa*, 1996.

⁸⁸ Van der Walt *Constitutional Property Law* 140; Badenhorst, Pienaar and Mostert *Law of Property* 536; Brits *Mortgage Foreclosure* 333-334.

⁸⁹ See para 2.3 above.

⁹⁰ For an exposition of the bodies entitled to the acquisition of ownership by expropriation, see Southwood *Compulsory Acquisition* ch 3; Gildenhuis *Onteieningsreg* ch 3; Du Plessis *Compensation for Expropriation* 34; also ss 2, 3 and 5 *Expropriation Act* 63 of 1975.

⁹¹ Section 8(1) *Expropriation Act* 63 of 1975; also see s 7(1) and Southwood *Compulsory Acquisition* 60-61 and Gildenhuis *Onteieningsreg* 193, 196-198 for the procedure to expropriate registered limited real rights.

⁹² Section 8(1)(a) *Expropriation Act* 63 of 1975 and s 31(4)(b) *Deeds Registries Act* 47 of 1937; the prescribed form of the deed is *Deeds Regulations* Form G, which provides for title conditions and limited real rights to be carried over to the new title deed; West *Practitioner's Guide to Conveyancing* 16-17; also *Durban City Council v Molliere* 1953 4 SA 312 (N); *Malherbe v Van Rensburg* 1970 4 SA 67 (C) 82D-83A.

such a third party.⁹³ If the owner or mortgagee or holder of a lien fails to agree upon the portion of the compensation payable to such a third party, the matter is referred to a high court with jurisdiction over the matter to determine which portion of the compensation is payable to the holder of the mortgage or the holder of the lien.⁹⁴ The real security right of the mortgagee is not extinguished automatically on expropriation, but it is protected by the expropriation procedure. This is comparable to the vesting of a judicial pledge on the execution of the pledge object.⁹⁵

Therefore, it is clear that in the case of expropriation the property does not vest unburdened in the name of the expropriator, but is burdened by limited real rights (unless they also are expropriated) or with the burden in the form of a duty by the owner to compensate mortgagees or lien holders before the owner may receive any compensation.

5 Conclusion

The assumption that limited real rights fall away or are terminated on the original acquisition of the burdened immovable property and that the new owner incurs no responsibilities in respect of such limited real rights is not based on statutory measures. The main problem with such an assumption is that the principles of the original acquisition of movables are often applied to the original acquisition of immovables, mainly because there was not a clear distinction between the acquisition of movables and immovables in Roman law.⁹⁶ The reason for the termination of limited real rights in the case of the original acquisition of movables is based on control. In most instances control is required for the exercise of limited real rights over movables, and control is also a requirement in the case of *traditio* of movables.⁹⁷ Therefore it is clear that all limited real rights fall away to fulfill the control requirement for the original acquisition of movables (*mobilis non habent sequelam*). The same principle is

⁹³ Section 19(1) *Expropriation Act* 63 of 1975. Also see Van der Merwe *Sakereg* 613 and *Barclays Bank DCO v Tarajia Estates (Pty) Ltd* 1966 1 SA 420 (T) 423 regarding the continued protection of the principal debt after expropriation of the immovable.

⁹⁴ Section 19(3) *Expropriation Act* 63 of 1975.

⁹⁵ Van der Merwe *Sakereg* 708-711; Badenhorst, Pienaar and Mostert *Law of Property* 407-408.

⁹⁶ Van der Merwe *Sakereg* 301.

⁹⁷ The only statutory exception is a notarial bond in terms of the *Security by Means of Movable Property Act* 57 of 1993.

not applicable in the case of immovable property acquired by means of original acquisition, where the limited real rights are not automatically extinguished.⁹⁸

Furthermore, limited real rights as independent property are now protected by section 25 of the *Constitution*. The pre-constitutional statutory provisions for the continued existence of limited real rights in the case of expropriation and prescription are in line with these constitutional provisions. These statutory provisions clearly state that in the case of expropriation and prescription existing limited real rights survive the original acquisition of immovable property and either remain enforceable or the right-holder can use the burdened property (or its proceeds) as security for compensation.

⁹⁸ *Mutual Life Assurance Co v Hudson's Trustee* 1885 SC 264: "It is a claim upon the land itself, which differs in this respect from movables in regards to which the rule is *mobilia non habent sequelam*".

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LIST OF ABBREVIATIONS

SAJHR	South African Journal on Human Rights
TSAR	Tydskrif vir die Suid-Afrikaanse Reg