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# LAW OF PROPERTY AND SECURITY A

## 2010

### 1. INTRODUCTION

#### Overview

The Law of Property and Security A is a stand alone semester course that counts as a credit in the Faculty of Law for LLB2 as well as one of the courses for Legal Theory 3 in the Faculties of Humanities, Science and Commerce.

The purpose of the course is

- To provide the students with an understanding of the purpose, scope and development of the Law of Property.
- To familiarize students with the general principles of ownership and acquisition of real rights.
- To enable students to classify and distinguish real and personal (creditor's) rights.
- To introduce the concepts of expropriation and deprivation of property rights in terms of the Constitution of the Republic of South Africa 1996 and applicable case law.
- To introduce students to the sources of current law of property.
- To assist students in research and problem solving skills and the terminology commonly encountered in the law of property.

#### 1.2 Credit Value

10 Credits. This is calculated on the basis of 100 “notional hours” that a student would spend in lectures, learning for tests/exams over the semester.

#### 1.3 Assumptions of Prior Learning

- The student must be capable of communicating in written and spoken English.
- The student must be able to work/study independently and be capable of working in groups.

- The student must be able to read, analyse and extract principles from law reports, statutes and other sources.
- The student must know how and where to access resources (including electronic) such as textbooks, law reports and statutes in the Law Library.
- The student must be able to identify and apply legal principles to a set of facts.
- The student must have a working knowledge of legal referencing and be able to apply these to their written work.

## 2. OUTCOMES

### Critical Outcomes

Students will be able to:

- (a) identify and solve problems.
- (b) work in a team and individually.
- (c) collect, analyse and evaluate information from the various sources of law, as well as information conveyed in the lecture room.
- (d) Communicate effectively in class debates and written assignments.
- (e) Use technology in legal research.
- (f) Recognize problem-solving contexts involving the law of property.

### Specific Intended Outcomes

- (a) To understand the purpose, scope and development of the Law of Property.
- (b) To understand the principles of ownership and how real rights are acquired.
- (c) To distinguish between real and personal rights and demonstrate an understanding of the legal consequences arising from each.
- (d) To understand and explain the concepts of expropriation and deprivation
- (e) To apply the knowledge acquired during the course to solve practical problems arising from the holders of property rights.
- (f) To understand the extent to which the courts have succeeded in harmonizing the principles of the common law with the constitutional values of equality, equity and justice.

### 3. TEACHING METHODS

The teaching method will include, *inter alia*, the discussion of the law as contained in the main sources, namely textbooks, case law and legislation in *viva voce* lectures. Students will be expected to read chapter headings in advance, as they will be required to participate actively during the lecture

There is no comprehensive handout for the course but the students will be provided with a course outline. Students are expected to take their own notes during class. Supplementary material will also be supplied from time to time.

Students are expected to assume responsibility for their learning by reading ahead before each lecture and consolidating afterwards. Lectures are compulsory and a student may not miss more than **THREE** lectures without a valid Leave of Absence. Each of the topics indicated in the course content will require about three to four lectures. There is a heavy emphasis on the cases which are listed in the *Case book for students*.

### 4. RESOURCES

The core reading and study material for this course are the leading judgments on the aspects of the law of property to be studied. These cases may be found in the law reports, which may be accessed in the Law Library, both in paper and electronic form.

The prescribed textbooks are A J van der Walt and G J Pienaar *Introduction to the Law of Property* (5<sup>th</sup> edition), Juta & Co. 2006 and *Law of Property Casebook for Students* 6<sup>th</sup> edition, Juta.

Badenhorst *et al* Silberberg and Schoeman's *The Law of Property* (5<sup>th</sup> edition) 2006, Carey Miller with Anne Pope *Land Title in South Africa*, Juta,(2000), and AJ van der Walt *Constitutional Property law*, Juta & Co, (2005), five copies of the latter are available in the library.

## 5. STUDENT ASSESSMENT

Specific Outcomes	Assessment criteria	Assessment tasks
On the completion of the course the students should be able to: Understand and explain the meaning of property in the Constitutional sense, the difference between private law notions of property and constitutional property. Understand and explain the concept of new property.	What evidence must the student provide to show that they are competent? The student must be able to: -Describe the private law notion of property (the notion of a bundle of rights) and the constitutional property. -Describe the meaning of property in the property clause of the New Constitution. -Describe how the notion of the bundle of rights has been affected by legislation.	Write an essay, supported by authority. (See the FNB decision) explaining the approach of the Constitutional Court on the meaning of property.
Understand the sources of the law of property and the effect of recent legislation and the new Constitution on the Common law sources.	Discuss the effect of PIE on the Common Law remedy of <i>Rei Vindicatio</i> .	Write an essay, supported by authority, showing the impact of recent court decision on the common law principles.
Understand the concept of property and the concept of a thing.	Distinguish between real and personal rights.	Write an essay, supported by authority, explaining the tests for the registrability of rights.
Understand the notion of registrability of rights	Write a note on the legal significance of classification of property in our law.	Write an essay, supported by authority, explaining the legal significance of classification of property.
	Explain which rights are registrable.	Write an essay on the legal requirements for the registrability of rights.
Understand and	Demonstrate an	Write an essay

explain limitation of ownership.	understanding of the court decisions that have authoritatively dealt with the various categories of limitations of rights.	supported by authority on how the courts have applied the notion of neighbor law in determining the limitation of ownership.
Apply the knowledge acquired in this course to solve practical legal problems arising in the property context.	Identify the relevant legal problem or issue. State the relevant legal precedent with regard to that issue.	Write a case note in which a practical problem is analysed.

## 6. Assessment Strategy

The final mark for the course is compromised of the following components:

Examination:	out of 70 marks
Class work:	out of 30 marks
<b>Total:</b>	<b>100 marks</b>

### Tests

Will be out of 35 marks and students will write the test in the designated lecture period of 45 minutes. The test will contain questions equivalent to that which may be found in the June examination. The test is **COMPULSORY** and counts for half the class mark.

### Assignment

There is one assignment for this course that is submitted at the beginning of the second term. The assignment should not exceed 1000 words in length and comprises half of the class mark. The assignment is compulsory. No late assignments will be accepted for marking and will receive 0% unless the student has a written valid Leave of Absence.

### Examination

In June there will be two-hour paper that will be out of 70 marks. The class component will count 30 marks. There will be three questions on the paper and the student will have to choose two questions to answer. Each question carries 35 marks and they will require students to be able to explain legal rules and principles in a theoretical sense, to write a case note on leading precedents, as well as apply their knowledge to solving practical problems.

The examination is compulsory and an external examiner assesses the quality of both the examination paper and students' answers.

## **Evaluation**

The course is evaluated on a three year cycle and students evaluate by filling in a questionnaire that requires both quantitative and qualitative responses. The responses are processed by the Academic Development Centre who compiles a report highlighting weaknesses and strengths which is then sent to the lecturer concerned who in turn discusses the content with the Dean and Deputy Dean of the Faculty. The feedback and issues arising from the evaluation as well as the action taken to address them is given by either the Dean or Deputy Dean at the earliest opportunity.

## **7. COURSE OUTLINE**

### **7.1 Outline of the law of property**

7.1.1 Meaning, function and the changing face of the Law of Property.

### **7.2) Sources of the current law of property**

### **7.3)The legal concept of property**

- (a) Property as rights
- (b) Property as objects of rights
- (c) Concept of a thing

### **7.4) Classification of property**

- (a) Patrimonial rights and patrimonial objects
- (b) Classification of things

### **7.5 Rights**

- (a) Real rights and creditor's rights
  - The test for the registrability of rights. See Ntusi Mbodla: "The test for registrability of rights: What is the law after Cape Explosive Works?" (2002) 119 SALJ 277 and CG Van der Merwe "Numerus Clausus and the development of New Real rights in South Africa" (2002) 119 SALJ 802; A

Domanski “The recognition of new categories of real rights: Enter the contingency principle” 2004 T.H.RHR 673.

- Registration of rights other than real rights.

## **7.6 Acquisition of real rights: General principles**

## **7.7 Ownership: General principles**

- The concept of ownership
- Co-ownership
- Limitation on ownership
- Original acquisition of ownership
- Protection of ownership
- Termination of ownership

## **Distribution of lectures**

### **Lecture No 1**

#### **Definitional issues:**

- (a) An overview of the purpose of the law of property and the meaning of property.
- (b) The private law notion of property: the notion of the bundle of rights and what it entails. The following cases will be used as illustration:  
*Gien v Gien* 1979 (2) SA 1113 (T); *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 (3) SA 1151 (CC); *Geyser v Msunduzi Municipality* 2003 (3) BCLR 235(N); *First National bank* 2002 (4) SA 768 (CC) and *Diepsloot Residents and Owners Association*.

### **Lecture No 2**

#### **Meaning of property**

#### **2.1.1 Property in the context of the property clause (section 25 of the Constitution).**

Negative protection of property. In terms of section 25(1) of the Constitution of the Republic of South Africa, 1996 no one may be deprived of property except in terms of law general application and no law may permit arbitrary deprivation of property. See Ackerman J’s comment on this negative protection of property in para 48 of the *First National Bank of SA Ltd t/a as Wesbank v Commissioner for SARS* 2002 (4) SA 768 (CC).

On the meaning of property see para 51 of the First National Bank case. The meaning of property is relevant in considering the infringement of property rights for purposes of s 25 (1). See the analysis of this phenomenon in paragraph 46 of the First National Bank case and the interpretation of section 25 (1).

### **2.1.2 Deprivation of property right:**

What constitutes deprivation of property? See paragraph 57 of the First National Bank case. See how the statement of law contained in that paragraph was qualified by the same Court in *Mkotwana v Nelson Mandela Metropolitan Municipality and Another* 2005 (2) SA BCLR 150 (CC).

### **2.1.3 Seizures of property and sales in execution**

As instances of deprivation of property for purposes of section 25. See the following cases: *Lesapho v North West Agricultural Bank* 1999 (12) BCLR 1420 (CC). *Zondi v MEC for Traditional and local, government* 2005 (4) BCLR 347 (CC) and *Prophet v National Director of Public Prosecutions* 2006 1 SA 38 (SCA). See how Mpathi DP as he then was made use of FNB case in dealing with deprivation of property in terms of Chapter 6 of the Prevention of Organized Crime Act 121 of 1998.

### **2.1.4 Arbitrary deprivation of property.**

What constitutes arbitrary deprivation of property? See paragraph 67 of the FNB case. The rationality and proportionality analysis. See also Ackerman J's analysis in paragraph 100 of the FNB case.

## **Lecture No 3**

### **3.1 Expropriation**

Section 25 (2) of the Constitution permits expropriation of property only in terms of law of general application

- (a) For a public purpose or in public interest
- (b) Subject to compensation

#### **3.1.2 General principles relating to expropriation and procedural issues**

### **3.2 Compensation in the event of expropriation:**

*City of Cape Town v Helderberg Park Development (Pty) Ltd* 2007 (1) SA 1 (SCA).



### **3.3 Constructive expropriation:**

Steinberg v South Peninsula Municipality 2001 (4) SA 1243(SCA). See again the discussion in 1993 SAJHR 388 for the legal position in the US.

### **4. Persons and Institutions bound by the right to property.**

See again section 8 (2) of the 1996 Constitution and the FNB case.

## **Lecture No 4**

### **4.1 Law of property and the law of things.**

In the past this branch of law was known as the law of things. Now there has been a shift from things to property. The latter is said to refer to a wide variety of assets that make up a person's estate or belongings and which serve as objects of the rights that such a person exercises in respect thereof. The former is said to denote the object of a right in the restricted meaning of referring only to corporeal or material objects – the law relating to these concepts should have a corresponding meaning.

### **4.2 Social function and substance of the law of property**

The law of property seeks to ensure that the right of ownership is not used in a manner that is injurious to other members of society, for example, restrictions placed on the owner's ability to erect buildings on his or her land in public interest e.g. Town Planning and Township Ordinances; anti-pollution regulations, factory regulations, sanitary regulations etc.

- Limitations may be imposed by private law in the interest of neighbours e.g. the law relating to nuisance. Roux in the article referred to earlier discusses a number of foreign cases where the courts considered individual court challenges against state limitations on the use of private property where the claimants perceived the limitations as amounting to uncompensated expropriations. See pages 452 and 457.

### **4.3 Changing face of the law of property**

#### **4.3.1 Emergence of a new property law framework**

See in this regard the following recent publications: D L Carey Miller "A New Property," (1999) 116 SALJ 749 at 751 and Theunis Roux "Continuity AND Change in a Transforming Legal Order: The impact of section 26(3) of the Constitution on South African law" (2004) 121 SALJ 466 and Karrisha Pillay "Property v Housing Rights: Balancing the interests in

eviction cases” (2004) 5 E S R Review p16. The latter is a comment on *Port Elizabeth Municipality v Various Occupiers* CCT 53/03, a Judgment handed down on 1 October 2004. Carey Miller (1999) at 751 is of the view that changes to established property law and instances of new exceptions to its principles occur in the context of the reform legislation. The author refers to the new property concepts of “initial ownership” and “beneficial occupation” referred to in the Development Facilitation Act 67 of 1995. The Bill of Rights introduced the notion of access to property as a fundamental human right.

Section 26 of the new Constitution is important in this regard. It guarantees everyone the right to have access to adequate housing.

Section 26(3) prohibits the eviction of a person from their home or has their home demolished without an order of court made after considering all the relevant circumstances.

This section impacts negatively on the common law right of the owner to evict someone from his property (e.g. a lessee in the case of holding over). There are certain procedural safeguards, which have been introduced by PIE.

Badenhorst et al at page 8 think that recent decision of the Supreme Court of appeal in *Ndlovu v Ngcobo*; *Bekker v Jika* [2002] 4 ALL SA 384 (SCA) and *Brisley v Drotsky* 2002 (4) SA 1 (SCA) may result in the creation of new rights in property in the broad sense. It is doubtful whether the *Brisley* case had this effect. The latter concerned with the holding over after the termination of a lease. *Ndlovu* case was another instance of holding over after termination of a lease. The *Bekker* component of the case concerned the person who had defaulted in his mortgage bond and refused to vacate the premises to allow the new owner to take occupation. The provisions of PIE were invoked in defence of the continued occupation.

The problem seems to centre around the procedural requirements to be observed in the enforcement of the rights of ownership. A good example of this kind of case is provided in *Modderklip Boedery (Pty) Ltd v Modder East Squatters and Another* 2001 (4) SA 385 (w) where the police refused to assist the owner in removing thousands of land invaders from his farm. The owner in the *Modderklip* case alleged that the squatters had infringed several of his constitutional rights protected in Chapter 2 of the new Constitution. One of these rights was section 25 (1) right, namely a guarantee against arbitrary deprivation of property except in terms of law of general application. See also the *First National Bank of SA Ltd t/a Wesbank v Commissioner of the South African Revenue Services* 2002 (7) BCLR 702 (cc) par 50. In the above case the Constitutional Court held that any interference with the use, enjoyment or exploitation of private property

is a deprivation of that property in the constitutional sense (para 57). The court said that deprivation is a wide concept, encompassing expropriations. All expropriations are deprivations but not all deprivations will have the effect of expropriating property..." See also the comments made by Roux (2002) at 452 on the distinction between deprivation and expropriation in the context of the cases discussed therein. Although the Constitutional Court in the FNB case cautioned against any wide definition of property, Roux feels that the more widely the courts define constitutional property, the more carefully tailored the definition of expropriation has to be. See his reference to the Zimbabwe case of *Hewlett v Minister of Finance and Another* 1982 (1) SA 490 (25). See also useful comment on the FNB case by Anton Kok 2004 T.H.R.H.R 683.

On the interpretation, application and limitation of property rights see generally AJ van der Walt Constitutional Property Law pp 18 – 56.

## Lecture No 5

### 5.1 Common Law

Common law as a source of the law property refers to the principles of Roman-Dutch law that have been retained. These principles come from three distinct sources:

- (a) Roman law (distinction between ownership and possession, ownership and limited real rights, the notion of dominium etc.)
- (b) Germanic customary law as modified in the 16<sup>th</sup> and 17<sup>th</sup> centuries (distinction between movables and immovables, the system of land registration and the development of the institution of notarial bonds etc.)
- (c) English law (99 year leasehold, the recognition of attornment as a mode of delivery of movables). The common law principles, however, have to be harmonized with the objects of s 39(2) of the Bill of Rights see *Kusa Kusa CC v Mbele* 2003 (2) BCLR 222 (LCC) where Gildenhys AJ made the following remarks: "under the common law, an owner of land is entitled to apply to court for an eviction order by simply alleging his ownership of the land and stating that someone else in occupation of the land [*Graham v Ridley* 1931 TPD 476; *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20A).

The Constitution and post-apartheid land reform legislation placed restrictions on the common law right of eviction, and in some cases

overrode the common law ..." par 4. See also the cases referred to at page 7 of the Handout.

## 5.2 Legislation

The following statutes are important:

- (a) Expropriation Act 63 of 1975 and its application in *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2007 (1) SA 1 (SCA);
- (b) The Deeds of Registries Act 47 of 1937;
- (c) The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) and

One most important feature of the post-apartheid legislation dealing with the law of property is the introduction of the notion of justice and equity. See comments in this regard in *ABSA Bank v Murray and Another* 2004 (1) BCLR 10(C).

## 5.3 Case Law

There is a growing body of case law affecting the law of property. See, in addition to the cases already referred to, the following: *Modeler East Squatters Greater Benoni City Council and others v Modderklip Boedery (Pty) Ltd* case no. 187/03 and 213/03 judgment handed down by the Supreme Court of Appeal on 27 May 2004; *Transkei Public Servants Association v Government of the Republic of South Africa* 1995 (-) BCLR 1235 (TK). Other cases are noted in the casebook. The judgment of the Constitutional Court in *President of the Republic of South Africa and Another v Modderklip Boedery (Pty) Ltd* 2005 (5) SA 3 (CC) is noted at page 403 of the Casebook.

## 5.4 Constitution

The post-apartheid legislation relating to property is rooted in ss 25 and 26 of the Constitution. The Constitution of the Republic of South Africa 1996 has had a huge impact on the law of property. The emphasis is on the promotion of the "spirit, purport and the objects of the Bill of Rights" (s 39(2) of the final Constitution.)

## Lecture No 6

### 6.1 The legal concept of property.

### **Property as rights**

“Property then encompasses at least the real rights recognised by the law of property, rights such as ownership, mortgage, lease, servitude, mineral rights, liens. It also encompasses at least some of the component rights, making up what is termed the ‘bundle of rights that constitutes plenary ownership’... Iain Currie & Johan de Waal, *The Bill of Rights Handbook*, Fifth Edition (2005) at p 538.

See also the various kinds of rights noted by AJ van der Walt and GJ Pienaar *Introduction to the law of Property*, Fourth Edition, Juta (2002) p 15. See also the following sources: Silberberg and Schoeman’s *The Law of Property*, Fourth Edition edited by Badenhorst, Pienaar and Mostert p 19, Van der Merwe vol 27 *LAWSA*.

## **6.2 Definition of a right and bearers of rights.**

See the FNB case.

## **6.3 Property as objects of rights:**

Badenhorst *et al* p 21.

## **Lecture No 7**

### **7.1 Things: Van de Walt and Pienaar p 14 – 16.**

### **7.2 Characteristics of a thing**

- Corporeality
- External to humans
- Independence
- Subject to juridical control
- Useful and valuable to humans

### **7.3 Classification of things:**

See generally Badenhorst *et al* and Van de Walt and Pienaar.

## **Lecture No 8**

### **8.1 Registrability of Rights**

Ex Parte Geldenhuys 1926 OPD 155 and the other cases noted in the prescribed textbooks. See also Van de Walt Casebook for Students of law of Property. Students are required to study the provisions of s 63 (1) of Deeds Registries Act 47 of 1937 and exceptions referred to in s 63 (2). See also Van der Merwe Volume 27 LAWSA paragraph 45. The following cases should be studied and compared: *Lorentz v Melle & others* 1978 (3) SA 1044 (T), *Pearly Beach Trust v Registrar of Deeds* 1990 (4) SA 614 (C), *Cape Explosives Works Ltd and Another v Denel (Pty) Ltd and others* 2001 (3) SA 569 (SCA), *Fine Work Products of South Africa Ltd v Director of Valuations* 1950 (4) SA 490 (D) and *Kain v Khan* 1986 (4) SA 251 (C).

### **8.2 Registration of personal rights.**

See Badenhorst *et al* (ed) Silberberg & Schoeman's *The Law of Property* 6<sup>th</sup> Edition.

## Lecture No 9

### Acquisition of real rights: General Principles

- Principle of *numerus clausus*
- Absolute character of real rights. See the legal effect of legislation such as P/E and ESTA on *rei vindicatio*
- Publicity principle and the doctrine of notice. See the case of *Fre's (Pty) Ltd v Ries* 1957 (3) SA 575 (A).
- Specificity principle. See also the case of *Kain v Khan* 1986 (4) SA 251 (C).
- Transmissibility
- Abstract principle. See Silberberg and Schoeman's *The Law of Property* 4 ed on distinction between abstract and causal theories of transfer p 82

## Lecture No 10

### Modes of acquisition: original and derivative methods

- Essential elements in the transfer of real rights
- The doctrine of notice and its application Silberberg and Schoeman's *The Law of Property* p 87-92, a recent case on the application of the doctrine of notice on double sale is that of *De Villiers v Potgieter and Others* NNO 2007 (2) SA 311 (SCA).

## Lecture No 11

### Concept of Ownership

- See chapter 6 of *Badenhorst et al.*
- Limitation of ownership. This refers to public law and private law limitations. The leading cases in this area are noted in Silberberg & Schoeman's *The Law of Property*. See also the case of *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA) (on the right of owner of land to lateral and surface support – mining activities).  
Recent cases on abatement of nuisance include: *Laskey and Another v Showzone CC and Others* 2007 (2) SA 48 (C) and *Allaclas Investments (Pty) Ltd and Another v Milnerton Golf Club* 2007 (2) SA 40 (C)

## **Lecture No 12**

### **Co-Ownership**

See generally chapter 7 of Silberberg and Schoeman's *The Law of Property and Van der Walt & Pienaar* (2005).

## **Lecture No 13**

Original acquisition of ownership. See generally chapter 8 of Badenhorst et al (eds) Silberberg & Schoeman's *The Law of Property 6<sup>th</sup> Edition*. See the recent case of *South African National Parks v Weyer Henderson and others* 2007 3 SA 109 (SE) on acquisitive prescription.

## **Lecture No 14**

### **Derivative Acquisition**

See chapter 11 of *Badenhorst et al*.

## **Lecture No 15**

### **Protection and loss of ownership.**

- Legal remedies