

The enforceability of tenants' rights (part 1)

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1 *Introduction*

The purpose of the article is ultimately to align our current understanding of the nature of tenants' rights, according to basic common-law property principles, with their nature and role in the new constitutional dispensation. We consider this a worthwhile exercise in view of the question, emerging from constitutional law rather than property law or landlord-tenant law, whether the holders of short-term and unregistered long-term residential tenancies should enjoy the benefits of section 25(6) of the 1996 constitution. Section 25(6) provides that a person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an act of parliament, either to tenure which is legally secure or to comparable redress. If this provision applies to holders of short-term residential tenancies, tenants whose current position is particularly vulnerable because of past racial discrimination might be able to challenge current landlord-tenant legislation for being inadequate in view of the constitutional provision. Apartheid land laws reduced the majority of the urban black population to the status of tenants who occupied state housing with one of a range of very insecure permits. To the extent that newly promulgated landlord-tenant laws can be shown not to have improved the tenure security of the groups and individuals still affected by the socio-economic legacy of apartheid housing laws, it could be argued that the state is not fulfilling its obligations in terms of section 25(6). Similarly, tenants whose tenure is weak because of their general socio-economic status may argue that the state should provide access to housing for them in terms of section 26(2), including a landlord-tenant system that ensures secure tenure for socio-economically weak tenants.

Some commentators would argue that the land reform processes foreseen in sections 25 and 26 have nothing to do with the market-driven private-law-based relationships that make up landlord-tenant law, and that the nature of tenants' rights should be determined without reference to the constitution. We disagree with that view on first principles, particularly because of the clear implications of the principle of supremacy of the constitution¹ and the single-system-of-law principle formulated

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¹ S 2 of the Constitution of the Republic of South Africa, 1996 reads: "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

by the constitutional court.² We see no compelling reason why any section of the law, including the law regulating short-term tenancies, should be excluded from the impact of these principles. In our view, one way of starting to answer the questions posed by this debate is to determine what the nature of tenants' rights is in terms of the common law. For present purposes, our main goal is to assess the tenure security provided by the common law; the question whether current legislation does enough to support weak tenants in terms of the state's section 25 and 26 obligations is raised briefly in the conclusion but ultimately left for a later publication.

The nature of the rights held by tenants in terms of short-term and unregistered long-term leases is a contested issue and the source of much controversy and confusion in South African landlord-tenant law. The effect of uncertainty about these occupiers' rights becomes apparent once they are confronted with an allegedly stronger right, for instance where the leased premises are sold to a third party during the term of the lease. It is unclear whether these occupiers acquire property rights and thus whether their rights can be enforced against third parties who acquire property rights in the lease object. The nature of tenants' rights also has a direct impact on the availability of a remedy in the case where a third party infringes upon a tenant's right, because the character and strength of the tenant's remedy depend on the nature of her right. Uncertainty about this and related issues has resulted in conflicting opinions in the case law and the literature, combined with sometimes mystifying interpretations and applications of the *huur gaat voor koop* rule and the doctrine of notice. In our view, sound doctrinal appreciation of the nature of tenants' rights should have a direct bearing on the nature and application of the *huur gaat voor koop* rule and the doctrine of notice, since both these mechanisms have been developed (at least in part) to protect tenants in the kind of conflicts already alluded to. However, at the moment it is virtually impossible to deduce a rational and consistent explanation of the nature of tenants' rights from the inconsistent and sometimes conflicting ways in which the *huur gaat voor koop* rule and the doctrine of notice have been interpreted, applied and explained in the case law and literature.

Our point of departure in this article is that the issue should be clarified with reference to the fundamental principles of property law, above all the distinction between real and personal rights. Ignorance or misunderstanding of the fundamental principles and of the distinction between real and personal rights has contributed to the current confusion and contradictions. We therefore start out by briefly revisiting the basic principles. Against this backdrop, we then consider the origin, purpose and effect of the *huur gaat voor koop* rule and its impact on tenants' rights. In a brief overview of case law and literature we indicate that the purpose and effect of the rule is often misunderstood and that there is little agreement on its proper role and application. We refer back to the basic principles to suggest how the rule could be interpreted and applied to strengthen the rights of tenants, without undermining basic property law doctrine. We also consider the doctrine of notice in the light of fundamental property principles to determine the reason for its existence, its doctrinal explanation and the extent of its application. The article aims to show how inconsistent and conflicting interpretations and applications of the *huur gaat voor koop* rule and the doctrine of notice can be attributed to ignorance or

² *Pharmaceutical Manufacturers Association of South Africa in re ex parte President of the Republic of South Africa* 2000 2 SA 674 (CC): "There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control" (par 44).

misunderstanding of the fundamental distinction between real and personal rights in the landlord-tenant framework. However, we also argue that misrepresentation of tenants' rights is sometimes also influenced by other factors, including confusion of the basic principles regarding the acquisition of real rights with regard to movables and with regard to land; ignorance of differences between basic principles of South African and foreign (especially English) property law, and a lack of appreciation for the effect of legislation. Finally, we undertake a brief excursus into constitutional property law, arguing that tenants' rights can and should be described as property rights for constitutional purposes, even when they cannot be seen as real rights for purposes of private-law doctrine. We conclude that this observation has significant implications for the applicability of section 25(6) to tenants of residential property and therefore for the constitutional assessment of landlord-tenant legislation.

2 The distinction between real and personal rights

2.1 Introduction

The distinction between real and personal rights is fundamental to property law.³ It is settled doctrine that a real right or limited real right is a right in a thing,⁴ while a personal right is a right against a person, although a personal right can also (indirectly) pertain to a thing.⁵ All these rights are property rights for purposes of

³ Van der Merwe (with Pope) "Property" in Du Bois (ed) *Wille's Principles of South African Law* (2007) 405-428 mentions that the distinction derived from the Roman distinction between *actiones in rem* and *actiones in personam*, after which the distinction developed between real and personal rights, respectively. Van der Merwe (428) also mentions that the distinction between real and personal rights forms the basis for the distinction between the law of property and the law of obligations. See Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* (2006) 50 for a similar view. See also Van der Walt "Personal rights and limited real rights: an historical overview and analysis of contemporary problems related to the registrability of rights" 1992 *THRHR* 170. Van der Vyver "The doctrine of private-law rights" in Strauss (ed) *Huldigingsbundel vir WA Joubert* (1988) 201-246 argues that this distinction has become obsolete in South African law. In light of the other literature referred to above, it is clear that Van der Vyver's view is inspired by a particular terminological framework that does not find general support in case law or doctrine. It has been pointed out that Van der Vyver's view lacks authority – Van der Walt "Relatiewe saaklike regte?" 1986 *TSAR* 173.

⁴ Ownership is the only real right with regard to one's own property (*ius in re propria*), while a right in a thing belonging to another person is referred to as a limited real right (*ius in re aliena*) (Badenhorst, Pienaar and Mostert (n 3) 47; Van der Walt and Pienaar *Introduction to the Law of Property* (2009) 23). See Van der Walt (n 3 (1992)) 174 for a discussion of Hugo Donellus' contribution to the development of the distinction between ownership and limited real rights (*dominium* and *iura in rebus alienis*) in his *Commentarii de Iure Civili* lib 9 cap 13 par 1 (1589). The owner could diminish *dominium* by transferring certain rights, *iura in rebus alienis*, to other persons. For Roman-Dutch law, Grotius contributed the first step towards the current distinction between ownership and limited real rights in property, relying on the extent of the holder's entitlement to use the thing. In *Inleidinge tot de Hollandsche Rechtsgeleerdheid* (1619-1621, Dovring-Fischer-Meijers 1952) 2-33, Grotius describes the owner's right to use the thing as complete ("volledig"), while non-owners have only limited rights to use the owner's property. The distinction is projected onto the then still accepted medieval classification of *dominium directum* and *dominium utile*; see further Van der Walt "Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu" 1986 *THRHR* 305-317.

⁵ Grotius (n 4) distinguished between *beheering* and *inschuld*, which corresponds to the later distinction between real and personal rights. *Beheering* is a patrimonial right that exists between a person and a thing, while *inschuld* is a patrimonial right that one person can enforce against another person. *Beheering* therefore represents a direct relationship between the person and the thing without the co-operation or participation of another person (Van der Walt (n 3 (1992)) 174-175). This distinction was confirmed by the seventeenth- and eighteenth-century German Pandectists. Brinz I *Lehrbuch der Pandekten* (1857) bk 3 prt 1 § 111 stated that personal rights merely bind the owner, but do not limit ownership itself. Windscheid I *Lehrbuch des Pandektenrechts* (1887) bk 2 par 38-39 contrasted

constitutional property law, even when they do not qualify as real rights in terms of private-law doctrine.⁶ In private law it is important to distinguish between real and personal rights, because the two categories are exercised, protected and acquired differently.⁷ However, in constitutional property law both real and personal rights could enjoy more or less the same constitutional protection, once they qualify as constitutional property. One can therefore distinguish between the narrower category of real rights and the wider category of property rights, which includes both real rights and at least some personal rights pertaining to property objects. For present purposes, the first question is whether tenants' rights are real rights or personal rights. In the final section of the article we return to the question whether tenants' rights are property rights.

The distinction between real rights and personal rights pertaining to property objects is troublesome, and several strategies have been proposed to make it more intelligible. Some of the differences between the two categories of rights are intuitively significant even though they are not dispositive. Generally, real rights can be enforced against all third parties, while personal rights can only be enforced against a specific person or persons who are bound by the obligation.⁸ It is also commonly accepted that proprietary remedies protect real rights, while contractual

limited real rights and personal rights with reference to the enforcement of the right, stating that the will of the holder of a real right is authoritative against all persons, while the will of the holder of a personal right is merely authoritative against a specific person for a specific performance (Van der Walt (n 3 (1992)) 177-178). For a different view see Van der Vyver (n 3) 244, arguing that a third party's entitlement to use or possess a thing constitutes the contents of the holder's right and if the object of the right is a thing, the right must always be a real right. See n 3 above on Van der Vyver's approach.

⁶ Van der Walt and Pienaar (n 4) 23. The concept "property" can cause confusion where the holder has a personal right in the thing. Even though she only has a personal right against the other party and not a real right, her right still pertains to the thing and should therefore form part of property law in the wide sense. Consequently, "property" includes personal rights ("persoonlike regte") and real rights ("saaklike regte"). This wider understanding of property (as opposed to real rights) is followed in constitutional property law and also forms the framework for private-law rights in modern Dutch and German law. For a different view see Van der Vyver (n 3) 231-232, who argues that rights in relation to a thing are referred to as a real rights and that property law, or the law of things, therefore governs the acquisition, contents, transfer and termination of real rights, while the law of obligations governs the acquisition, contents, transfer and termination of creditors' rights.

⁷ Mostert, Pope, Badenhorst, Freedman and Pienaar *The Principles of the Law of Property in South Africa* (2010) 46. However, Van der Vyver (n 3) 223 argues that "the distinction between real rights and personal rights has remained significant for purposes of deeds registration only".

⁸ Van der Merwe "Die aard en grondslag van die sogenaamde kennisleer in die Suid-Afrikaanse privaatreë" 1962 *THRHR* 155 173 argues strongly against the "traditional" view that real rights are stronger than personal rights merely because of the fact that the object of a real right is a thing, while the object of a personal right is a performance. Van der Merwe argues that as a result of the difference between the objects of the rights (real and personal) the holders' entitlements also differ. It follows that this should not necessarily mean that the holder of a real right can exercise and enforce her right against third parties, while the holder of a personal right is unable to do so. According to Van der Merwe the effect of a real right, namely to enable the holder of the right to enforce the right against successors in title, should also exist in the case where a holder of a personal right wishes to enforce her right. In response to this contention Lubbe "A doctrine in search of a theory: reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246 267 argues that such a "construction is, however, in itself contrary to accepted notions regarding the obligatory consequences of contracts".

(or delictual) remedies protect personal rights.⁹ Finally, real rights are transferred either through registration (in the case of immovable property) or delivery (in the case of movable property), while personal rights are transferred by cession.¹⁰

Nevertheless, it remains difficult to distinguish between real (more specifically limited real) rights and personal rights with regard to corporeal things, especially immovable corporeal things (land).¹¹ According to section 63(1) of the Deeds Registries Act 47 of 1937 only real rights in land may be registered, and the registrar of deeds is required to register real rights in land.¹² It follows that personal rights in land may not be registered and it is therefore important to distinguish between (especially limited) real rights and personal rights in land to determine whether they may be registered or not.¹³ The real difficulty with the distinction between real rights and personal rights is, for all practical purposes, restricted to instances where a use right with regard to someone else's land could be either a limited real right (in which case it has to be registered to establish the real right) or a personal right (in which case it may not be registered). When these use rights are created by contract or in a will it is not always easy to establish beforehand whether the right should fall into one or the other category. To deal with these situations, the case law and literature have devised a number of tests and theories.

2.2 Doctrinal approaches to the distinction

A number of theories and approaches have been developed in the literature and case law to distinguish between real and personal rights. The most important doctrinal theories are the classical theory and the personalist theory.¹⁴ In terms of the classical

⁹ The distinction between real and personal rights, as explained by Grotius, corresponds with the enforcement of the rights. If any person is in breach of a real right, the holder of the right would be able to institute a real remedy, because the remedy is aimed at the thing and not the person. A personal remedy can only be enforced against the contracting party if that person is in breach of the agreement – Van der Walt (n 3 (1992)) 176. This general distinction regarding the enforceability of real and personal rights seems to conflict with the post-realist view that all rights are rights against persons. According to this view, all rights should be viewed as relationships (Nedelsky "Reconceiving rights as relationship" 1993 *Review of Constitutional Studies* 1; see also in general Alexander "The social-obligation norm in American property law" 2009 *Cornell Law Review* 745). However, the notion of rights as relationship does not mean that all rights are rights *in rem*; it only indicates that even rights *in rem* are held and enforced against other persons. The post-realist view does not therefore really undermine the idea that some rights can be enforceable against just one particular person (personal) while others are enforceable against all successors in title (or "everybody").

¹⁰ Mostert *et al* (n 7) 47.

¹¹ Van der Walt and Pienaar (n 4) 25-26. Badenhorst, Pienaar and Mostert (n 3) 49 also mention that a closed system of real rights (*numerus clausus*) often encounters fewer difficulties with the distinction between real and personal rights because only a limited number of categories of real rights are acknowledged and accepted as real rights. The difficulty in distinguishing between real and personal rights is often caused by the creation of new limited real rights in land, usually by way of contract or will – Van der Walt (n 3 (1992)) 179.

¹² s 3(1)(r) of the act. See also Delpont and Olivier *Sakereg Vonnisbündel* (1985) 4-5 in this regard.

¹³ Mostert *et al* (n 7) 47 and Van der Walt and Pienaar (n 4) 27-28.

¹⁴ See also the view taken by continental lawyers as explained by Lewis "Real rights in land: a new look at an old subject" 1987 *SALJ* 599 611. According to Lewis these lawyers argue that "the distinctive characteristic of an interest in property is that it gives the holder an *immediate, independent* right to the thing." In this sense "immediate" concerns the fact that the holder of the right does not require any assistance from other parties, while "independent" refers to the fact that the holder's right will remain intact if ownership is transferred. According to Lewis, a more appropriate method to distinguish between real and personal rights is to determine whether the right "constitutes a right *in or to* the land, which is socially or 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" (614).

theory, a real right is concerned with the relationship between the person and the thing. A real right enables the holder of the right to control the thing within the boundaries of the right and there is a direct relationship between the holder of the right and the thing, because the thing is the object of the right.¹⁵ According to this theory, personal rights have a performance as the object of the right and there is a relationship between the subject and another person who must perform as prescribed by the right.¹⁶

The personalist theory distinguishes between real and personal rights in relation to the ways in which the rights are enforced. According to this theory, real rights are enforceable against all third parties (“the whole world”), while personal rights are only enforceable against a specific person (or persons), usually on the basis of a contract or other obligation.¹⁷ When the personalist theory claims that a real right can be enforced against the whole world or “everyone”, the point is usually in fact that the limited real right in question can be enforced against the current owner of the property and all her successors in title, whoever they happen to be and whether they knew of the existence of the right or not. The description of a real right in terms of the personalist theory should not be confused with the claim that the right is protected against interference by third or outside parties, because both real and personal rights are protected by law against outside interference.

Both these theories have been criticised,¹⁸ but they remain valuable when real rights are being distinguished from personal rights. The classical theory is valuable to the extent that it highlights an important distinction between real and personal rights, namely that real rights are characterised by a direct bond between the subject and the thing, while a personal right can only imply an indirect bond between a person and a thing, since the right has to be enforced via another person.¹⁹ The personalist theory also remains helpful, as it illustrates the difference between real and personal rights in relation to other persons, namely that the object of a personal

¹⁵ Badenhorst, Pienaar and Mostert (n 3) 50-51; Van der Walt and Pienaar (n 4) 28; Mostert *et al* (n 7) 45; Van der Merwe (n 3) 429 and Delpont and Olivier (n 12) 5. Van der Merwe (429) also mentions that a real right enables the holder of the right to control the thing without the co-operation of another person.

¹⁶ Van der Walt (n 3 (1992)) 184. See also Sonnekus *Sakereg Vonnisbundel* (1980) 3-4 where the author argues that this theory is too simplistic, as personal rights can also pertain to a thing even though the thing does not have to be the object of the right, for example a lease.

¹⁷ Badenhorst, Pienaar and Mostert (n 3) 51; Van der Walt and Pienaar (n 4) 28-29; Van der Merwe (n 3) 428 and Delpont and Olivier (n 12) 5.

¹⁸ Criticism against the classical theory includes the fact that real rights are not only exercised against a thing but also against persons. All persons should respect the existence of real rights, as it can generally be enforced against third persons (Van der Merwe (n 3) 429; Badenhorst, Pienaar and Mostert (n 3) 51 and Van der Walt (n 3 (1992)) 185). As was pointed out in the final sentence of the previous paragraph, this criticism is at least slightly beside the point, since protection against outside interference and the actual enforcement of the right are different things. See Van der Walt (n 3 (1992)) 185; Van der Merwe (n 3) 428-429 and Sonnekus (n 16) 3 for criticism against the personalist theory. The theory is generally criticised on the basis that not all real rights are absolute (Van der Walt (n 3 (1992)) 186) and that third parties must respect both real rights and personal rights (Van der Merwe (n 3) 428). Lewis (n 14) 612 criticises both the personalist theory and the view taken by continental lawyers where she states that it describes a characteristic feature of real rights, namely that real rights have immunity against divestment, but this feature is only present and identifiable once it is established that the right is real.

¹⁹ Van der Walt (n 3 (1992)) 185. Lubbe (n 8) 248 formulates what Badenhorst, Pienaar and Mostert (n 3) 54 refer to as the “combination test”: “Whereas real rights are portrayed as having as their object a thing, and entail ‘a relationship between a subject and a thing’, Personal rights are characterized as ‘a relationship between a subject and a person’, and have as objects some or other performance by that person.”

right involves a person who must give effect to an agreement, while a real right does not necessarily involve any other person and is not aimed at the performance of a specific person.²⁰ Both real and personal rights are protected from outside interference, but only limited real rights are enforceable against successors in title and the holder of a limited real right can therefore force any new owner of the object to give effect to the content of the holder's limited real right. If a third party interferes with a personal right, the holder of the right would be able to claim damages for any loss caused as a result of such interference. On the other hand, if a third party obstructs the entitlements of the holder of a limited real right, such holder would be entitled to reclaim restoration of the prior position, because her remedies differ from personal remedies in the sense that they are proprietary.²¹ Stated differently, personal rights and real rights are protected absolutely from outside interference,²² but only the holder of a limited real right can force any successor in title of the owner of the object to adhere to the extant limited real right.²³ In the context of land, the personalist theory is therefore helpful in differentiating between the enforcement of real and personal rights against successors in land.²⁴

In addition to the theories, the courts have developed an approach to distinguish between real and personal rights to determine whether a particular right (probably always a limited use right) in land may be registered or not. In *Ex parte Geldenhuys*²⁵ the court formulated the "subtraction from the *dominium*" test. The case concerned conditions with regard to the subdivision of co-owned land. The conditions were created in a will and the court had to decide whether these conditions established real or personal rights.²⁶ De Villiers JP formulated the distinction between real and personal rights as follows:

"[W]hen it is said that 'personal rights' cannot be registered against the title to the land, the reference is not to rights created in favour of a 'person', for such rights may be real rights against the land. The reference is to rights which are merely binding on the present owner of the land, and which thus do not bind the land, ... and do not bind the successors in title of the present owner. These are the 'personal rights' which are not registrable ... One has to look not so much to the right, but to the correlative obligation. If that obligation is a burden upon the land, a subtraction from the *dominium*, the corresponding right is real and registrable; if it is not such an obligation, but merely an obligation

²⁰ Van der Walt (n 3 (1992)) 187.

²¹ Badenhorst, Pienaar and Mostert (n 3) 51.

²² Van der Vyver (n 3) 237-238 correctly argues that all third parties must respect the holder of a personal right's object of his right in the sense that any person who interferes with the holder's right to performance by preventing the debtor from performing constitutes a delict. See also 211 where the author correctly states that all third parties must refrain from interfering ("obstruct or hamper the exercise of the entitlements included in the subject-object relationship") with the holder's right. The object of the holder's right must be respected by third parties. However, as is pointed out above, this does not mean that these rights are real rights because they are protected against interference by anyone; the distinction between real and personal rights refers to enforcement in a different sense.

²³ Van der Walt (n 3 (1992)) 188. See also Van der Vyver (n 3) 222-223 where the author refers to a number of early supreme court decisions that confirm this distinction. See for instance *Smith v Farrelly's Trustee* 1904 TS 949 and *United Building Society v Smookler's Trustees and Golombick's Trustee* 1906 TS 623. Van der Vyver argues that third parties' respect for a right, in other words the duty not to interfere with the right, and the holder's right to enforce his right against third parties, are difficult to distinguish (Van der Vyver (n 3) 223).

²⁴ Van der Walt (n 3 (1992)) 189.

²⁵ 1926 OPD 155.

²⁶ See *Ex parte Geldenhuys* (n 25) 162 for the facts of the case.

binding on some person or other, the corresponding right is a personal right, or right *in personam*, and it cannot as a rule be registered.”²⁷

On the basis of this test the court held that a condition in the will that limited the co-owners’ right to approach a court and divide the land between them subtracted from (limited) the co-owners’ normal right to subdivide the land. It therefore established a real right that was registrable.²⁸ According to the test, the effect of a limited real right is to diminish the owner’s ownership (*dominium*) over her property to the extent that the limited real right either confers certain entitlements, which usually rest with the owner, on the holder of the limited real right, or restricts the owner in exercising her full right of ownership.²⁹ However, not all restrictions of ownership amount to real rights and the mere limitation of ownership is therefore not a decisive factor to indicate the existence of a real right.³⁰ Sonnekus suggests that one also has to consider the nature of the object of the right and the origin of the right to determine whether the right is real or personal.³¹ The test for a real right is whether the right diminishes ownership (or burdens the land in the case of immovable property) to such an extent that a part of ownership has been transferred to another person, as opposed to a right that merely burdens the owner in his personal capacity.³²

The “subtraction from the *dominium* test” has been followed and developed in a number of cases.³³ Two of these cases are noteworthy, namely *Lorentz v Melle*³⁴ and *Pearly Beach Trust v Registrar of Deeds*.³⁵ In the *Lorentz* case the court had to decide whether a condition (as stipulated in a contract) that obliged one person to pay a sum of money to another person created a real or a personal right.³⁶ The court held that the obligation did amount to a subtraction from the *dominium*, but added that the obligation did not affect the owner’s right to use the land *in a physical sense*.³⁷ The essence of the decision was that the burden upon the land had to diminish ownership “in relation to the enjoyment of the land in the physical sense” to establish a subtraction from the *dominium*.³⁸ This requirement narrowed the subtraction from the *dominium* test as introduced in the *Geldenhuis* case to such an extent that a limited real right could only be created if it restricted the owner’s

²⁷ *Ex parte Geldenhuis* (n 25) 163-164.

²⁸ *Ex parte Geldenhuis* (n 25) 165. The right to subdivide land held in free co-ownership forms part of the right of disposal, which is one of the co-owners’ entitlements.

²⁹ Badenhorst, Pienaar and Mostert (n 3) 56. See also Badenhorst and Coetser 1991 *De Jure* 375 381 and Sonnekus “Saaklike regte of vorderingsregte? – tradisionele toetse en ‘n petitio principii” 1991 *TSAR* 173 178 for criticism regarding the court’s application of the test.

³⁰ Sonnekus (n 29) 178 and Delpont and Olivier (n 12) 6.

³¹ Sonnekus (n 29) 179-180.

³² Van der Walt (n 3 (1992)) 181.

³³ See *Schwedhelm v Hauman* 1947 1 SA 127 (EC) 135; *Ex parte Pierce* 1950 3 SA 628 (O) 636D; *Fine Wool Products of South Africa Ltd v Director of Valuations* 1950 4 SA 490 (ED) 499A and *Hotel De Aar v Jonordon Investment (Edms) Bpk* 1972 2 SA 400 (A) 405D. Van der Walt and Pienaar (n 4) 35 mention that the older mining and mineral rights cases, such as *Registrar of Deeds (Transvaal) v The Ferreira Deep Ltd* 1930 AD 169 and *Odendaalsrus Gold, General Investments & Extensions Ltd v Registrar of Deeds* 1953 1 SA 600 (O), are useful in considering the test to distinguish between real and personal rights, but add that the rights pertaining to minerals and mining are uniquely classified as limited real rights in their specific context and should be analysed as such.

³⁴ 1978 3 SA 1044 (T).

³⁵ 1990 4 SA 614 (C).

³⁶ See 1045A-1048E for the facts of the case.

³⁷ 1052A-B, 1052E.

³⁸ 1052E.

right to the physical use of the property.³⁹ The result was that an obligation to pay a sum of money could never constitute a real right, and the decision also created the impression that the parties' intention to create a real right was irrelevant.⁴⁰ In the *Pearly Beach* case⁴¹ the court ignored the *Lorentz* decision and applied the subtraction from the *dominium* test as formulated in the *Geldenhuijs* case. Similar to the *Lorentz* case, the court had to decide whether a condition in a contract that obliged one person to pay a sum of money to another constituted a real right.⁴² The obligation entailed that the landowner had to "give up portion of the proceeds he receive[d] from either a grant of mineral rights ... or an alienation by way of expropriation or treaty in lieu thereof".⁴³ King J held that the condition placed a burden upon the owner to dispose of the property and obtain the full fruits of such disposition.⁴⁴ The right to dispose was held to form part of the owner's ownership rights, and the effect of the condition was said to limit this right. King J found that the condition constituted a real right because it limited the entitlement of disposal and was enforceable against successors in title.⁴⁵

It follows that the question whether a condition in a will or contract that obliges a person to pay a sum of money could qualify as a real right is currently still unanswered, because the *Geldenhuijs*, *Lorentz* and *Pearly Beach* cases, all decided in different high courts, namely the old Free State court, the old Transvaal court and the old Cape court, respectively, came to conflicting conclusions. It is therefore not surprising that in *Denel (Pty) Ltd v Cape Explosive Works Ltd*,⁴⁶ the former Transvaal court followed the *Lorentz* decision rather than the more recent *Pearly Beach* decision of the old Cape court.⁴⁷ In the supreme court of appeal,⁴⁸ Streicher JA was once again faced with the question whether certain conditions⁴⁹ in the deed of sale amounted to real or personal rights. Importantly, the conditions in this case indeed restricted the use of

³⁹ Van der Walt and Pienaar (n 4) 33. The authors also mention that this additional requirement is in conflict with various recognised limited real rights, including mortgage bonds and mineral rights (33). This narrow application of the test was confirmed in *Erlax Properties (Pty) Ltd v Registrar of Deeds* 1992 1 SA 879 (A) and *Cape Explosive Works Ltd v Denel (Pty) Ltd* 2001 3 SA 569 (SCA), but the apparent support for the stricter *Lorentz* test is more apparent than real because these cases involved physical restrictions and not payment of money.

⁴⁰ Van der Walt and Pienaar (n 4) 33.

⁴¹ (n 35).

⁴² See the *Pearly Beach* case (n 35) 614H-616A for the facts of the case.

⁴³ 616A-B.

⁴⁴ 617H-I.

⁴⁵ 617H-618D.

⁴⁶ 1999 2 SA 419 (T). Badenhorst "Registrability of rights in the deeds office" 2000 *THRHR* 499 502 explains the court's application of a two-stage test to determine whether a right is real or not. According to Hartzenberg J (435E-F), one should first determine whether the right is capable of being a real right. The subtraction from the *dominium* test is applied to determine whether the right is capable of being registered. The court referred to the *Lorentz* case where the court held that the right must curtail ownership in relation to the enjoyment of the land in the physical sense; and to the *Fine Wool Products* case, where the court decided that the obligation (right) must "run with the land". Once it is established that the right is capable of being registered, the next question is to determine the intention of the creator of the right. If both parties agree that the intention was to create a real right, then the right should be registered (436F-G). What is important from this decision is that one should look at the intention of the parties only once it is established that the right is capable of being registered (Badenhorst 508).

⁴⁷ Van der Walt and Pienaar (n 4) 35; Badenhorst, Pienaar and Mostert (n 3) 60-63.

⁴⁸ the *Denel* case (n 39). See a discussion of the case by Badenhorst "Erroneous omission of real rights from subsequent title deeds" 2001 *Obiter* 190. This case was confirmed in the recent case of *Janse van Rensburg v Koekemoer* 2010 JOL 26277 (GSJ).

⁴⁹ See the *Denel* case (n 39) 572G-575G for the facts of the case.

the property in the physical sense and allowed the seller (Cape Explosive Works) to repurchase the property in the case where the land was no longer used for the specified purpose, namely the development and manufacture of armaments. The conditions were therefore not concerned with an obligation to pay a sum of money. The court held that two requirements had to be satisfied to determine whether a right is real:

“(1) the intention of the person who creates the real right must be to bind not only the present owner of the land, but also his successors in title; and (2) the nature of the right or condition must be such that the registration of it results in a ‘subtraction from *dominium*’ of the land against which it is registered.”⁵⁰

This approach is in line with the *Geldenhuis* case to the extent that it gives meaning to the subtraction from the *dominium* test. *Dominium* should not be interpreted as mere “ownership”, but rather “ownership” of a specific piece of land (or thing). Part of the test is also to ask whether the right restricts ownership of the land (or thing) for a specific owner in her personal capacity or whether the right would similarly restrict successors’ ownership.⁵¹ The effect of a limited real right is to restrict ownership of the land (or thing) for the registered owner and for successors in title.⁵² A limited real right establishes a direct bond between the holder of the right and the thing, without the required participation (or performance) of any other person. A real right is enforceable against all third parties, because the thing (or land) itself is burdened. What is noteworthy about the *Denel* case is the emphasis placed on the intention of the parties,⁵³ similar to the *Pearly Beach* decision.⁵⁴ In the quoted passage above Streicher JA states that the person who creates the real right must intend to bind successors in title, which effectively means that the creator of the real right must also intend to create a real right. The *Denel* case concerned conditions that restricted the physical use of the property and did therefore not necessarily confirm the stricter *Lorentz* decision as far as the issue is payment of money.

2.3 The doctrinal distinction in landlord-tenant law

The preceding paragraphs highlight the doctrinal distinction between real and personal rights.⁵⁵ As was pointed out above, the issue is usually to determine whether

⁵⁰ the *Denel* case (n 39) 578D-E.

⁵¹ See Van der Walt (n 3 (1992)) 181 for a similar viewpoint.

⁵² Mostert *et al* (n 7) 50 explain that “the right must be intended to bind successors in title, and it must also amount to a ‘subtraction from the *dominium*’; where ownership entitlements must be diminished by the granting of the right” to qualify as a real right. However, the authors argue that these requirements must both be satisfied for it to amount to a real right.

⁵³ In the *Denel* case (n 39) 579C-D the court decided that the conditions could not be separated and were intended to bind the transferee and successors in title. These conditions also burdened the land and therefore constituted a real right. See also Mostert *et al* (n 7) 54 where the authors contend that the intention of the parties to create a real right is just as important as applying the subtraction from the *dominium* test. This view was also expressed by Delpont and Olivier (n 12) 6.

⁵⁴ (n 35).

⁵⁵ It has been noted above that this problem mostly concerns limited real rights in land, since real rights in movables are usually created and transferred through delivery: Van der Walt and Pienaar (n 4) 35; Mostert *et al* (n 7) 47. See also Delpont and Olivier (n 12) 2, who maintain that registration is necessary to establish a limited real right in immovable property, but there are a number of exceptions to this rule, of which a short-term tenancy and prescription are arguably examples. In these cases mere possession is sufficient to give effect to a limited real right. For a different view see Sonnekus “Herklassifikasie van die aard van die huurder se reg?” 1987 *TSAR* 223 228, who indicates that limited real rights are established through either possession in the case of movables or registration in the case of immovables. However, a limited real right can also be established through possession in the case of original acquisition.

a particular use right regarding land may be registered or not, since section 63(1) of the Deeds Registries Act 47 of 1937 states that only real rights in land may be registered.⁵⁶ The argument becomes somewhat circular because a real right in land is created only when the right is registered.⁵⁷ Real rights in land must be registered to acquire the status of real rights,⁵⁸ but only real rights in land may be registered. The registrar of deeds is statutorily obliged to register real rights in land.⁵⁹ Real rights in land, including ownership and limited real rights, are registered firstly to indicate the formal transfer of such rights in land and secondly to provide a public record of real rights in land.⁶⁰ The enforcement of real rights can cause harm to *bona fide* third parties and it is therefore necessary to publicise the existence of all real rights.⁶¹

The distinction between use rights in land that will be real rights once registered (and that therefore have to be registered) and those that will merely be personal rights even when registered by mistake (and that therefore may not be registered) is somewhat confusing and complicated, but not implausible. Relying on the courts' subtraction from the *dominium* test, amplified by considerations from the doctrinal tests and case law, it should usually be possible to determine with reasonable accuracy whether a particular right should be registered or not. In this process, the nature and extent of the use, the effect it will have on the landowner's use of her land, the intention of the parties and other considerations may come into the picture. Although the picture is complex and blurry in places, it is not a complete muddle. Generally speaking, we tend to agree with Sonnekus that real rights in land are created either originally (through prescription or expropriation), when registration is not required, or derivatively, when registration is always required. In the absence of registration, limited real rights in land cannot be created or transferred derivatively. This is true both when the right as such was arguably not capable of registration

⁵⁶ Badenhorst, Pienaar and Mostert (n 3) 65 correctly mention that the act makes provision for a limited number of exceptions; see 66-69 in this regard. Van der Merwe (n 3) 444 confirms that a personal right does not change its character and become a real right once it is mistakenly registered. See also Sonnekus (n 55) 225; the *Lorentz* case (n 34) 1049-1050 and the *Denel* case (n 46) 436.

⁵⁷ Mostert *et al* (n 7) 57 state that "registration of real rights in land is one of the requirements of the creation and transfer of such rights and has the effect of advertising or announcing the existence of the real right." At 58 the authors mention that acquisitive prescription is an exception to this rule. Sonnekus (n 29) 180 mentions that real rights come into existence either through original forms of acquisition (for example prescription) or derivative acquisition. When a real right in immovable property is transferred through derivative acquisition, registration is required, while mere occupation is required to create a real right in the case of prescription.

⁵⁸ Sonnekus (n 55) 229-232 correctly argues that all real rights in immovables that are acquired through derivative acquisition must be registered to be regarded as real rights. Registration is considered the "ontstaansbron" (origin) for the derivative creation of a real right in land. See Lewis (n 14) 601 for a similar argument. Lewis correctly points out that almost all real rights (even ownership) originate in contract, but remain personal prior to registration or delivery. Van der Vyver (n 3) 238 explains that the right remains personal prior to registration, although this does not necessarily mean that the right cannot be enforced against third parties who interfere with the right. This view is unconvincing, as was pointed out above. However, the author acknowledges that the personal right will terminate if it conflicts with a succeeding real right. See 238-239 for an example in this regard. See Van der Merwe (n 8) 164 for a different view. Van der Merwe contends that a successor in title must respect a prior personal right (with or without knowledge of the existing right), because the new owner's entitlements have been burdened by the preceding owner as a result of the contract between the preceding owner and the holder of the personal right. The new owner cannot exercise an entitlement that rests with the holder of the personal right. This view is also contested and generally not accepted; see above.

⁵⁹ s 3(1)(r) of the Deeds Registries Act 47 of 1937. See also Badenhorst, Pienaar and Mostert (n 3) 65.

⁶⁰ Badenhorst, Pienaar and Mostert (n 3) 65.

⁶¹ Mostert *et al* (n 7) 56.

(the physical impairment issue in the *Lorentz* case), but also when the parties merely failed to proceed with registration.

However, the generally accepted principles which relate to the distinction between real and personal rights are to a certain extent ignored in the landlord-tenant framework, causing a great deal of confusion in the literature and case law. In general, application of the fundamental principles should not create big problems in the landlord-tenant context, because tenants' rights, being physical use rights, will always at least establish the kind of physical burden on the owner's right that is required in terms of the strict *Lorentz* test. For purposes of the landlord-tenant context, the troublesome debate about the correctness of the *Lorentz* and *Pearly Beach* decisions is therefore irrelevant. In principle, the *Lorentz* argument does therefore not mean that tenants' rights may not be registered. In fact, tenants' rights are in practice not registered for a number of reasons. Firstly, as far as short-term tenancies are concerned, registration is usually simply too cumbersome and expensive to justify in the face of a relatively inexpensive, intentionally short-term agreement. Furthermore, both short- and long-term tenancies are sometimes not registered because they relate to a part of a property (a room in the house or a flat or a house on the land), which excludes registration because of the rule that only rights in land can be registered and not rights in undivided portions of land.⁶² The issue is therefore not whether tenants' rights may be registered, but whether the fact of non-registration in practice establishes that tenants' rights are necessarily personal rights.

This question is important, because it has a bearing on the relative weakness of tenants' rights. This is evident in the case where a tenant's right conflicts with a stronger third party right, for instance where the property changes hands during the term of the lease. To briefly highlight the main issues, one should distinguish between short- and long-term leases. This distinction is important for a number of reasons, especially in consideration of the enforceability and registration of leases. Long-term leases⁶³ may be and are usually registered. It is generally accepted that registered long-term leases create limited real rights in land that are enforceable against all third parties, including new owners.⁶⁴ Long-term tenants are protected

⁶² See s 63(1) of the Deeds Registries Act 47 of 1937 and the interpretation of this provision in *Kain v Khan* 1986 4 SA 251 (C) 253B-D. See also *Rosen v Rand Townships Registrar* 1939 WLD 5; Pienaar *Sectional Titles Fragmented Property Schemes* (2010) 14 where the author states that "[r]egistration is, however, possible only in the case of individualised property units such as residential stands, farms or business premises, and not in the case of fragmented property holding as a lease agreement in respect of a part of the property is not registrable in a deeds registry." Pienaar also mentions that short-term leases are generally not registrable in a deeds registry. This view is in line with s 63 of the Deeds Registries Act, as it provides that personal rights in land may generally not be registered. One should note that long-term leases that burden a sectional title unit can be registered if the unit forms part of a registered sectional plan; see Pienaar ch 3 for more detail.

⁶³ Badenhorst, Pienaar and Mostert (n 3) 430 explain, with reference to s 1(2)(a) of the Formalities in Respect of Leases of Land Act 18 of 1969, that "[a] long lease is a lease for a period of not less than ten years or which has been concluded for the natural life of the lessee or any other person mentioned in the lease, or which is renewable from time to time at the will of the lessee indefinitely or for periods which, together with the first period of the lease, amount in all to not less than ten years".

⁶⁴ Formalities in Respect of Leases of Land Act 18 of 1969; Bradfield and Lehmann *Principles of the Law of Sale & Lease* (2010) 105 and Cooper *Landlord and Tenant* (1994) 276-277, 281. The initial opinion of Wille *Landlord and Tenant in South Africa* (1927) 79-83 was that the lease would be binding on both onerous successors (a successor who gave value for the item (282) and gratuitous successors (a successor who gave no value for the item) (Kerr *The Law of Sale and Lease* (1984) 185). Later on Kerr formulated a different opinion and contended that the lease had to be registered to give effect to the *huur gaat voor koop* rule, which grants tenure security for the tenant (278).

for the full term of the lease against successors in title and all creditors, provided that the lease is registered against the title deed of the leased property.⁶⁵ The limited real right that a long-term tenant acquires upon registration is in accordance with the generally accepted rules and principles that govern the acquisition, transfer and exercise of real rights. This area of law is therefore not problematic.

However, the right of a long-term tenant is uncertain where the lease is for some reason not registered. Section 1 of the Formalities in Respect of Leases of Land Act regulates the position where the lease is not registered, although the nature and extent of the application of the doctrine of notice and the *huur gaat voor koop* rule remain unclear in these cases. We return to these instances below.⁶⁶ The rights of short-term tenants are also unclear, particularly because these leases are usually not registered. The issue is therefore again to determine the nature of the tenants' rights in terms of an unregistered lease. We return to these issues below.⁶⁷

In our view, the confusion and uncertainty regarding the rights of long-term tenants (where the right has not been registered for some reason) and short-term tenants (where the right is never registered) developed as a result of disregard of fundamental property law principles, particularly the principles concerning the distinction between real and personal rights, combined with a misconceived understanding of both the *huur gaat voor koop* rule and the doctrine of notice. In what follows we consider the true purpose and effect of the *huur gaat voor koop* rule and the doctrine of notice in the context of unregistered tenancies. In the process we occasionally return to the fundamental principles to point out how lack of clarity about them (for example the difference between derivative acquisition of real rights in immovable and movable property, through registration and delivery respectively, and between original and derivative acquisition of real rights in land, through occupation and registration respectively) helped to compound the confusion.

3 *Huur gaat voor koop*

3.1 Origin and development of the rule

To correctly understand and appreciate the role and application of the *huur gaat voor koop* rule in the protection of tenants' rights one should first consider the origin of and the initial role that the rule played, if at all, in Roman law and Roman-Dutch law. Schrage's extensive discussion of the sources of this rule is a valuable source, as it explores the question to what extent third parties used to be and still are bound by a lease in Roman, Roman-Dutch and modern Dutch law.⁶⁸ Roman law distinguished between *agere in rem* and *agere in personam*, which resembles the current distinction between rights *in rem* (real rights) and rights *in personam* (personal rights). In terms

⁶⁵ Bradfield and Lehmann (n 64) 105; Badenhorst, Pienaar and Mostert (n 3) 430 and Van der Walt and Pienaar (n 4) 291.

⁶⁶ The nature and extent of tenure protection for long-term tenants is discussed in 6 below.

⁶⁷ The nature of short-term tenancies is discussed in 5 below.

⁶⁸ Schrage *Koop Breekt Geen Huur* (1984) 2. The author undertakes this enquiry to give clarity regarding the position of the landlord in Dutch law where the landlord sold the leased property during the term of the lease. Schrage's work is more specifically aimed at investigating the obligations in terms of the lease that are conferred from the previous owner to the new owner (3). Even though the work of Schrage is aimed at providing answers in Dutch landlord-tenant law, the historical analysis of the *huur gaat voor koop* rule as explained by Schrage remains relevant for South African property law and more specifically the application of the rule in modern South African property law.

of a lease, the tenant acquired an *actio in personam* and not an *actio in rem*.⁶⁹ If the tenant's right to use and enjoy the property was obstructed by either the landowner or a third party, the tenant could rely on the *actio conducti* and force the landlord to adhere to his responsibilities in terms of the lease. However, the tenant did not have any direct right or action available to prevent the obstruction. The tenant could not claim restitution either, because he did not have an *actio in rem*. A tenant was therefore described as unprotected and basically without rights.⁷⁰

Schrage explains that in the Middle Ages the law distinguished between long-term and short-term leases. A short-term lease was generally defined as a lease for a definite period, while a long-term lease did not have an expiry date (*huur voor eeuwig*).⁷¹ The tenant in terms of a short-term lease did not acquire a *ius in rem* and the relationship between landlord and tenant was regulated through personal actions, as opposed to real actions, because the tenant did not acquire a substantive, independent (*zelfstandig*) title in the property that he could enforce. However, a number of exceptions undermined the practical effect of the rule that the tenant enjoyed no protection. On the basis of prior possession the short-term tenant could at most enforce a possessory interdict (*bezitsinterdict*) against third parties, although the interdicts were admittedly possessory and not proprietary remedies.⁷² In addition to the interdicts, Schrage mentions an exception where successors in title, more specifically particular title (*bijzondere titel*), had to accept the presence of the short-term lessee.⁷³ In other instances, the landlord who sold the property to a third party during the term of the lease could include a provision in the sale agreement that obliged the new owner to accept the lease. In such a case the landlord protected

⁶⁹ Schrage (n 68) 5. The distinction between *agere in rem* and *agere in personam* was important to the extent that the holder of the right's entitlements differed depending on what right he held. For a similar view see Van der Merwe *Sakereg* (1989) 596; Hugo and Simpson "Lease" in Zimmermann, Visser and Reid (eds) *Mixed Legal Systems in Comparative Perspective* (2004) 301-303. De Wet mentions that in Roman law the nature of a lease was purely contractual, although it bound the universal successors (*titulo universali*) of both the lessee and the lessor ("Huur gaat voor koop" 1944 *THRHR* 74-75, 166, 226). However, the lease did not bind successors *titulo singulari* – the new owner or legatee. De Wet mentions that the long-term tenant acquired an *actio in rem*, which he could enforce against all successors, including a new owner (76). Bradfield and Lehmann (n 64) 103 agree with De Wet that universal successors (successors in rights and duties) had to give effect to the lease.

⁷⁰ Schrage (n 68) 7. Schrage describes the position of the tenant as "onbeskermd" (unprotected) and "regteloo" (without rights). However, the tenant was not entirely without rights, as he could subtract an amount of the rent as compensation where the landlord did not give effect to his responsibilities in terms of the lease. See also Schrage (n 68) 9-12 for a discussion of French, German and Austrian law during this period. In French law the tenant acquired a personal right, because long-term leases were generally forbidden as it resembled feudal law. The lease could also not be registered until 1955. The rights of tenants therefore remained personal and could not be registered to acquire the status of a real right (Schrage (n 68) 9-10). In German law the tenant acquired possession of the leased premises and was therefore a mere possessor (*besitzer*). According to the *BGB* the tenant did not acquire a real right (Schrage (n 68) 10). In Austrian law the rights of tenants were perceived as real upon registration of the lease. Once the lease was registered, successors in title had to respect the lease for the remaining period as indicated on the register (Schrage (n 68) 11).

⁷¹ Schrage (n 68) 14-15. De Wet (n 69) 86 refers to Bartolus *ad D* 19 2 32, who explained that a successor *singularis* was not bound to the lease, although this rule only applied to a lease for a period of less than ten years. If the lease was for ten years or more, the tenant acquired *utile dominium*: *D* 6 3 and *D* 43 18 1. According to De Wet's reading of Bartolus, a long-term lease was for ten years or more and the long-term tenant acquired a real right, which he could enforce against all successors.

⁷² Schrage (n 68) 15. Schrage explains that the short-term tenant acquired protected possession (*beschermd bezit*) and acquisitive possession (*verjaringsbezit*).

⁷³ Schrage (n 68) 17: where the person who acquired the right purchased from the state selling in execution.

the lessee by forcing the new owner to accept the lease, but the new owner had to agree to this provision.⁷⁴ Although short-term tenants did not enjoy substantive protection against successors in title,⁷⁵ they could claim compensation from the original landlord where successors in title refused to acknowledge the lease. The basis for the compensation claim was breach of contract. In due course, successors in title preferred to accept the occupying tenant than act in conflict with the existing lease, albeit that the reason for this development was financial rather than legal.⁷⁶ Schrage concludes that the predominant rule during the Middle Ages was that sale took preference over lease (*koop breekt huur*), but points out that in practice this rule was hardly ever applied as a result of the exceptions to it. The overall effect of the numerous exceptions to the rule (*koop breekt huur*) was that successors in title (specifically particular title) in fact had to accept the lease and the rule therefore in practice transformed into “*koop breekt geen huur*”.⁷⁷ Contrary to the position of the short-term tenant, the long-term tenant acquired a real right in medieval law (*dominium utile*), which could be enforced against third parties.⁷⁸

Schrage explains with reference to Groenewegen⁷⁹ that the *koop breekt geen huur* rule was applied in Holland and other parts of the Netherlands through the construction of the *huur gaet voor koop* rule that protected the tenant against successors in title.⁸⁰ As a result of the Roman law influence in the customary law (*inheemse reg*) of the Netherlands, the rule became known as *huur gaet voor koop* and applied to both long- and short-term leases.⁸¹ The *huur gaet voor koop* rule

⁷⁴ Schrage (n 68) 17-18 mentions that the new owner was forced to give effect to the lease if he agreed to it.

⁷⁵ See De Wet (n 69) 169 where he refers to Germanic law in the Netherlands, specifically Schulin 1920 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germ Abt* 41, 127 and his theory that alienation of the leased property did not end the lease and that this rule applied to both long and short leases. Accordingly, the *huur gaet voor koop* rule applied to both long and short leases, provided that the tenant was in occupation of the leased premises (De Wet (n 69) 170).

⁷⁶ Schrage (n 68) 18.

⁷⁷ Schrage (n 68) 20. This rule translates to “sale never takes preference over lease”.

⁷⁸ Schrage (n 68) 15.

⁷⁹ See also De Wet (n 69) 182-183 where he refers to Groenewegen *ad C* 4 65 9 in *De Legibus Abrogatis* (1649) and the distinction he made between long and short leases. According to De Wet's interpretation of Groenewegen, a long lease was similar to a sale and therefore had to be agreed *coram iudice rei sitae* (before a judge in the place where the thing is situated). The *huur gaet voor koop* rule was not that important with regard to long leases, which depended on the way in which they were agreed to, namely before a judge. Importantly, it was trite law during this period that a long lease awarded the tenant a real right. Bradfield and Lehmann (n 64) 103 agree that a long-term tenant was protected for the entire period of the lease if it was entered into *coram lege loci*. The fact that long-term leases entered into before a judge were seen and treated as real rights is unsurprising, considering the existence until the seventeenth century of the medieval category of *dominium utile*, a form of ownership. For a different opinion, see De Wet (n 69) 183 where the author refers to Voet *ad Inst* 3 25 6 n 4 and his view that all leases (long and short) had to be agreed *coram lege* to give effect to the *huur gaet voor koop* rule.

⁸⁰ Schrage (n 68) 23. Schrage mentions that Groenewegen referred to Neostadius and Hugo de Groot as authority when introducing this rule. According to Voet, the rule applied not only to successors in title, but also to usufruct and other successors under particular title (24).

⁸¹ Schrage (n 68) 24. The predominant rule in Roman law was *koop breekt huur*, except in the case of a long-term lease. Schrage explains that the *huur gaet voor koop* rule applied in Holland and other parts of the Netherlands. The aim of the rule was to give preference to the lease (both long- and short-term leases) where the leased property was sold during the term of the lease. Importantly, Voet *Compendium Juris* (1731) 19 2 was of the opinion that the *huur gaet voor koop* rule applied only to short-term tenants, because a long-term tenant acquired a real right in any event, which he could enforce against all successors. In such a case the *huur gaet voor koop* rule would be irrelevant (De Wet (n 69) 184-185). Bradfield and Lehmann (n 64) 103 agree and add that if the long-term lease was

applied to successors in general, including a usufructuary.⁸² Schrage concludes that in terms of this rule the effect of a lease was explained with reference to the entitlements of a landowner. When the landowner concluded a lease he in effect alienated a certain entitlement, namely the right to use and enjoy his property, to the tenant. During the term of the lease it was legally incorrect to obstruct the tenant's right to use and enjoy the leased property, as this entitlement now rested with the tenant. Schrage points out that the landowner could not confer more rights than that which he held. It follows that where the landowner sold the property to a third party during the term of the lease, the new landowner was unable to obstruct the tenant's right to use and enjoy the leased property, because this entitlement still rested with the tenant and was never conveyed from the original landowner to the purchaser.⁸³ Doctrinally, this explanation is based on the assumption that the granting of a lease vested a real right in the tenant, based on a logic that is not all that different from the South African courts' subtraction from the *dominium* test. Its logic makes sense in the case of long-term leases, especially in view of the fact that *dominium utile* was seen as a form of ownership until at least the time of Grotius and Huber, but its application to short-term leases is remarkable.

What is clear from Schrage's contribution is that the *huur gaat voor koop* rule developed from a number of exceptions to the Roman law rule that *koop breekt huur*. The exceptions to the *koop breekt huur* rule and the development of the later *huur gaat voor koop* rule in local law provided tenants with stronger rights against successors in title than one would expect purely on the basis of the rule. Since the Middle Ages the point of departure was that long-term tenants acquired real rights, while short-term tenants acquired personal rights.⁸⁴ Initially, the rules (and exceptions) developed to provide some protection for short-term tenants who were unable to enforce their rights against third parties, while long-term tenants acquired real rights and could therefore enforce their rights against all third parties for the entire period of the lease. In due course, the *huur gaat voor koop* rule applied to both long- and short-term tenants. Importantly, the *huur gaat voor koop* rule developed

not entered into *coram lege loci*, the tenant would be able to enforce the tenancy against a successor in title for the maximum period of a short-term lease, provided the tenant was in occupation when the successor acquired the right. De Wet and Van Wyk *De Wet en Yeats Die Suid-Afrikaanse Kontrakereg en Handelsreg* (1978) 330, on the other hand, imply that the effect of the *huur gaat voor koop* rule in Roman-Dutch law was to create real rights for tenants in general. However, the authors argue that in modern South African law the tenant's real right does not come into existence as a result of the contractual agreement, but rather through either the act of occupation (short-term lease) or registration (long-term lease).

⁸² Schrage (n 68) 27; Bradfield and Lehmann (n 64) 103. Van der Merwe (n 69) 596 points out that the rule applied to successors in general and not only to purchasers. Van der Merwe also mentions that the result of the rule was to provide the tenant with a real right, although this view is not shared by Schrage. See also Van der Merwe (n 3) 431. According to Voet, the *huur gaat voor koop* rule applied to the successor in title and all other successors *titulo singulari*, including a usufructuary, a legatee and a donee (De Wet (n 69) 186).

⁸³ Schrage (n 68) 26.

⁸⁴ De Wet (n 69) 192 refers to Voet's conclusion that a long-term lease had to be concluded *coram lege* to inform and protect third parties, while a short-term tenant was protected by the *huur gaat voor koop* rule, provided that he occupied the premises. De Wet suggests that Voet was unclear regarding the right of the long-term tenant, but it is unconvincing to argue that Voet would suggest that the long-term tenant acquired a mere personal right if the right had to be concluded *coram lege* to protect third parties. Logically, third parties would have to be protected against real rights, because a long-term tenant's real right would trump conflicting third party rights. This is also in line with Voet's previously mentioned suggestion that the *huur gaat voor koop* rule applied only to short-term tenants. Short-term tenants did not acquire real rights (like long-term tenants) and were therefore protected against third parties.

as an exception to the general rule that a third party with a stronger right could obstruct the tenant's weaker right. The short-term tenant's right remained personal throughout the lease and at no point transformed into a real right as a result of the operation of the *huur gaat voor koop* rule.⁸⁵ The purpose and effect of the *huur gaat voor koop* rule was to allow the lease to continue for the agreed period in the case where this personal right was opposed by a stronger third party right.

3.2 Application in modern South African law

The *huur gaat voor koop* rule was adopted in South Africa at the end of the eighteenth century.⁸⁶ The rule literally means "lease takes precedence over sale", which implies that the tenant can continue to occupy the leased premises upon alienation of the property if she is in occupation of the property and continues to pay the agreed rent. The tenant's occupation right does not come to an end as a result of the landlord's decision to alienate the property and she can enforce her tenancy rights against the new owner for the remainder of the lease period. The purchaser is prohibited from terminating the tenancy and evicting the tenant other than on the terms of the lease between the tenant and the original owner.⁸⁷ The purchaser in fact replaces the existing owner, steps into his shoes as new landlord and obtains all rights and obligations as stipulated in the lease.⁸⁸ The purchaser therefore entirely replaces the previous owner regarding the contractual relationship with the tenant.⁸⁹

In *Mignoel Properties (Pty) Ltd v Kneebone*⁹⁰ Friedman AJA found that the previous owner is *ex lege* replaced by the purchaser. Accordingly, no cession of

⁸⁵ See De Wet (n 69) 193, 249 for a different opinion. De Wet argues that the tenant's real right is a use right for the period of the agreed lease. Once the contractual lease expires, the real right ceases to exist. Curiously, De Wet mentions that the tenant's right to use the leased premises is a real right to the extent that it burdens only the premises, not the land in general (De Wet (n 69) 250).

⁸⁶ In *Genna-Wae Properties (Pty) Ltd v Medio-Tronics (Natal) (Pty) Ltd* 1995 2 SA 926 (A) 931H the court explained the history of the rule and concluded that as a result of tenants' weak tenure rights in Roman law, which is evident in the case where the leased property was sold during the term of the lease, the law adopted the rule *huur gaat voor koop* in certain parts of the Netherlands and the principle became part of Roman-Dutch law. The rule was adopted in South Africa and applies to land and buildings (the *Genna-Wae Properties* case 932D-G). According to Kritzinger "May a lessee discontinue the lease on the sale of the leased property? Is *Genna-Wae* here to stay?" 1994 *SALJ* 221 222, the *huur gaat voor koop* rule "is not based on legal principle but is merely an expression embodying the general effect which custom and legislation had introduced into the law governing the lease of lands and houses".

⁸⁷ the *Genna-Wae Properties* case (n 86) 932D-G.

⁸⁸ the *Genna-Wae Properties* case (n 86) 932G-H. See also Bradfield and Lehmann (n 64) 106: the new owner becomes entitled to the rent, while he also becomes the lessee's debtor. The relationship between the original owner and lessee automatically comes to an end. This proposition might seem to contravene the basic principles of the law of obligations, but is in fact justifiable (Bradfield and Lehmann (n 64) 107). Van Loggerenberg "Kontraksoorname en die vervanging van huurders en verhuurders" 1982 *Obiter* 8 14-15 convincingly argues that the effect of the *huur gaat voor koop* rule is a *kontraksvervanging* (contractual replacement) by operation of law, which is justifiable on grounds of reasonableness. See De Wet and Van Wyk (n 81) 334 for a contrary opinion: a mere substitution of the previous owner (and landlord) through operation of law is contrary to the general principles of the law of obligations and cession is necessary to transfer the owner's rights, while delegation is necessary to transfer the owner's duties. Accordingly, so the argument goes, the original owner would remain liable as debtor in terms of the lease to the tenant until the tenant agrees that the original owner can delegate his obligations to his successor in title.

⁸⁹ the *Genna-Wae Properties* case (n 86) 932G-H. This was confirmed in *Sasfin Bank Ltd v Soho Unit 14 CC t/a Aventura Eiland* 2006 4 SA 513 (T) 520C-D; *SA Breweries Ltd v Van Zyl* 2006 1 SA 197 (SCA) 201F-G.

⁹⁰ 1989 4 SA 1042 (A).

rights or assignment of obligations is necessary, which means that the original contract continues.⁹¹ Consequently, tenure security is afforded to tenants in general and not by means of legislation.⁹² As a result of this rule it seems that the tenant can enforce her right of occupation against the successor in title and other third parties. However, if the leased premises are sold to abide by a prior real right, such as a mortgage,⁹³ and the holder of the real right did not consent to the lease, the property would be “put up for sale first subject to the lease and thereafter, if the amount bid on the first occasion was not sufficient to cover the bond, free of the lease.”⁹⁴ In the latter case the lease would automatically terminate and the trustee would claim ejectment of the tenant. Kerr mentioned that if the tenant’s real right was prior to the mortgage, such a right would appear incontrovertible.⁹⁵

In *Spearhead Property Holdings Ltd v E and D Motors (Pty) Ltd*⁹⁶ the court had to determine the extent of the application of the *huur gaat voor koop* rule. The question was whether the lessee’s option to purchase the property formed part of its protection under the scope of the *huur gaat voor koop* rule. With reference to the *Mignoel Properties* and *Genna-Wae Properties* cases, the court found that the basic aim of the *huur gaat voor koop* rule is to protect the tenant’s occupation right and the purchaser is bound by this rule “regardless of whether he has notice of the existence or the terms of the prior lease”.⁹⁷ The court adopted an objective approach to the enquiry, considered the basic aim of the *huur gaat voor koop* rule and decided that the lessee’s option to purchase the property is not a “collateral right” that forms an integral part of the lessee’s occupation right.⁹⁸ It follows that the effect of the *huur gaat voor koop* rule, “which does not have its origins in one or other of the recognised principles of contract”⁹⁹ but rather in the law of things, is to provide tenure security for tenants in the case where the tenant’s occupation right comes into conflict with a stronger third party right. The original lease, as agreed to between the original landlord and tenant, automatically continues by operation of law for the remainder of the lease period. Importantly, in light of recent case law it appears that the terms of the lease that are integral to the lessee’s right of occupation would bind the successor. This implies that some terms of the contract, such as an option to purchase the property, which is an additional personal right that is unrelated to the tenant’s occupation right, would not bind the successor because they are not included in the effect of the rule.

[to be concluded]

⁹¹ the *Mignoel Properties* case (n 90) 1050J-1051B.

⁹² Wille (n 64) 79.

⁹³ According to Kerr (n 64) 318 the mortgagee can choose, if he prefers, to sell the property. If it is the mortgagee’s choice not to realise his security (for his own benefit), the property would remain unsold, and the lease would remain intact and would bind the purchaser if the property is sold for the benefit of other creditors.

⁹⁴ Kerr *The Law of Lease* (1976) 184-185. If the first sale does not bring a satisfactory result, the trustee, acting on behalf of the creditors, can cancel the lease by himself and claim ejectment of the tenant prior to the second sale. Cooper (n 64) 323 agrees, stating that if a prior real right vested in the property, the property can be sold free of the lease, depending on the amount of the bid.

⁹⁵ Kerr (n 64) 318. See *Velcich v Land and Agricultural Bank of South Africa* 1996 1 SA 17 (A) in this regard.

⁹⁶ 2009 All SA 417 (SCA).

⁹⁷ the *Spearhead Property Holdings* case (n 96) par 52.

⁹⁸ the *Spearhead Property Holdings* case (n 96) par 52. It is noteworthy that the court referred to the lessee’s occupation right as a real right.

⁹⁹ the *Spearhead Property Holdings* case (n 96) par 52.