

1. Define huur gaat voor koop

Once the tenant has taken control he/she acquires a limited real right over the leased property for the duration of the lease and will be protected by the “*huur gaat voor koop*” rule. This means that a new owner of the leased property will be bound by the lease as soon as the leased property has been registered in his/her name. This is the case irrespective of whether the new owner was aware of the existence of the lease.

2. Define a lease. (6)

A lease is defined as

- a reciprocal agreement
- between one party, the lessor,
- and another party, the lessee,
- in terms of which the lessor binds himself
- to give the lessee the temporary use and enjoyment of the thing (land),
- wholly or in part,
- in return for the payment of monetary remuneration (rent) by the lessee

3. Define a notarial bond. (6)

- A document attested to
 - before a notary and
 - registered in the deeds registry
 - in terms of which the mortgagor
 - grants a mortgage over his movable property (specifically or in general)
 - in favour of the mortgagee.
- A notarial mortgage bond is generally referred to as a "notarial bond".

4. Define servient tenement (2)

- It is the premises over which a praedial or a personal servitude is exercised (2)

5. Define a dominant tenement

The premises in favour of which a praedial servitude is exercised (2)

6. Define a Protest

- Protest is the formal written report by a notary in which he states that the bill was dishonoured, and
 - that the holder intends to claim the amount of the bill together with all costs that he had to incur in respect thereof.
- The Act provides that, if a notary is not available, a local property owner or family head may submit in the presence of two witnesses a certificate of refusal, which will have the same operation as a formal protest.

7. Does the Consumer Protection Act 68 of 2008 have any effect on the huur gaat voor koop rule?

- a. The purchaser or creditor who has not been duly informed of a lease need not acknowledge the rights of the lessee of an unregistered lease on the land. – Consumer Protection Act 68 of 2008.
- b. These provisions invalidate the protection a lessee of an unregistered lease enjoyed under the “*huur gaat voor koop*” rule.
- c. The notary must take full cognizance of the provisions of this Act.

8. Define an antenuptial contract. (6)

- An antenuptial contract is a written contract
- executed and attested by a notary.
- In such a contract two parties who are by law competent to enter into a marriage
- or a civil union,
- and who have the intention to enter into a marriage with each other,
- or enter into such a union with each other,
- regulate the matrimonial property dispensation of the proposed marriage or union,
- with the main aim of excluding the community of property
- and the community of profit and loss in the proposed marriage or union.
- The antenuptial contract has to be registered in the deeds office to be enforceable against third parties.

9. You as notary executed an antenuptial contract for a betrothed couple before their marriage. However, you failed to register the contract within three months of the execution date.

How will you handle the situation? (5)

Postnuptial registration of an antenuptial contract executed before solemnisation of the marriage in terms of section 87(1) of the Deeds Act

- In this case the contract was executed before the marriage, but it was not registered within the prescribed three months after solemnisation of the marriage.
- The parties may then apply to the High Court for extension of the period within which the contract has to be registered.
- The application has to be accompanied by a declaration under oath by the notary confirming that the contract was executed before solemnisation of the marriage.
- The High Court may then extend the period for registration.
- The original contract executed before the marriage, and not a new contract, then has to be registered within the extended period.

10. Briefly discuss the guidelines laid down in Ex parte Oxford (1920 CPD 367) for an application to register a postnuptial contract. (6)

- In *Ex parte Oxford* (1920 CPD 367) the court laid down the following guidelines for an application to register a postnuptial contract:

1. There must be **affidavit** signed by both parties.
2. Before the solemnisation of the marriage both parties must have made a **binding agreement**, either express or tacit, to marry out of community of property.
3. There must be good reasons why the parties did not have the agreement **executed by a notary and registered** in the deeds office.
4. The parties must have made the application as **soon as possible** after realising that they had been married in community of property.
5. The application must be accompanied by a **copy of the contract**.
6. The **rights of creditors** have to be protected when this order is made.

11. Briefly discuss the requirements for an application to modify spouses matrimonial property dispensation in terms of section 21 of the Matrimonial Property Act. (3)

Spouses may jointly bring an application to the High Court to modify their matrimonial property dispensation. The spouses have to convince the court that

1. there is a good and justifiable reason for the application (In *Ex parte Coetzee et Uxor* 1984 2 SA 363 WLD the father of one of the spouses and the minister insisted that they marry in terms of a specific matrimonial property dispensation namely, out of community of property. The court accepted that as good reason for modifying this dispensation to a marriage in community of property).
2. the creditors of both spouses were notified of the proposed modification of the matrimonial property dispensation
3. no other person will be prejudiced by the modification

12. Two minors approach you, as notary, to urgently draft an antenuptial contract for them. Their parents cannot be present, and there are no witnesses available. Explain the legal position in respect of the execution and registration of the contract, as well as the proposed marriage. (5)

- Each of the minors must be assisted by a parent or a guardian at the signing of the antenuptial contract (1).
- If the parents or guardians cannot be physically present, a written consent to enter into the antenuptial contract shall suffice (1).
- Without such assistance the antenuptial contract is void and the resulting marriage would be entered into in community of property (1).
- The contract cannot be ratified after the marriage or the coming of age of the minors (1).
- The registrar of deeds has discretion to dispense with the requirement that the contract must be signed by two witnesses for the purpose of registration (1).

13. X, the holder of a usufruct over a farm, concludes an agreement with Y in terms of which Y leases the usufruct from X. You are approached to draft the deed of lease and to have it registered.

Advise the parties on the legal position with regard to the contract. (3)

- *Inter partes* the lease contract will be valid (½).
- It is however not possible to register the lease contract (½)
- because section 3(1)(p) of the Deeds Act empowers the registrar to register leases only over land (½).
- As a usufruct is a limited real right which attaches to the person of the holder of the usufruct, it is not the usufruct itself that is being leased (½)
- but only the entitlements of the lease (½).
- Should the usufruct for some reason or other lapse (e.g. by waiver or death of the holder) the lease will automatically be terminated.
- The lessee will have no claim to the land or to continuation of the lease (½)

14. May the Registrar of Deeds register a short-term lease over movable and immovable property? (4)

- The Deeds Act does not contain any prescription on the form or format for a lease in order to be acceptable for registration, apart from providing that it has to be attested by a notary (s 3(1)(p) and 77(1)).
- Section 3(1)(p) authorises the Registrar to register notarial leases of land.
- The section does not distinguish between a short-term and a long term lease.
- The lease could thus be either long or short-term.
- The only requirement is that it has to be a lease of land and attested by a notary.
- A valid lease of movable property or of a servitude, such as usufruct, can thus not be registered in the deeds office.
- Section 82 of the Deeds Act provides for the registration of a notarial bond over a registered lease and sub-lease.
- As notarial bonds can only be registered over movables, this implies a registered short-term lease.
- A registered long-term lease can only be hypothecated by an ordinary mortgage bond because in terms of section 102 it is defined as immovable.