

QUESTION

- (a) What requirements does a legal object have to comply with to qualify as a thing? Name and give a brief description of each. (10)

ANSWER

- (a) Corporeality: A legal object must be capable of sensory perception and must occupy space.
- (b) External to man: Man cannot be a legal object.
- (c) Independence: A thing must be a separate and distinct entity that exists independently.
- (d) Subject to human control: A thing must be susceptible of legal sovereignty as exercised by a legal subject.
- (e) Useful and valuable to man: if an object has no use or value for a legal subject no legal relationship can be established between the subject and that object. The value need not be economic - it may be sentimental value. (10)

QUESTION

Rearrange the two columns below in order that the examples listed correspond with the things in the first column. (10)

ANSWER

THINGS	EXAMPLES
a. Immovables (3)	(1) Key for a house
b. auxiliary things (1)	(2) Untamed animal
c. Consumables (9)	(3) Building
d. Non-negotiable things (5)	(4) Interest on capital
e. <i>Res nullius</i> (2)	(5) Human corpse
f. Accessory things (8)	(6) Oil tankship
g. Indivisible things (7)	(7) Oil painting
h. Fungibles (10)	(8) Brick built into a wall
i. Fruits (4)	(9) Litre of wine

QUESTION

Briefly define the following:

- (a) **Property**
- (b) **Property rights**
- (c) **Thing**
- (d) **Person**
- (e) **Remedy**

(10)

ANSWER

- a. *Property* is everything which can form part of a person's patrimony or estate, including corporeal things and incorporeal interests and rights.
- b. Property rights are any legally recognized claims or interests in property.
- c. A *thing* is a specific category of property, which is defined with reference to its characteristics as a corporeal object outside the human body, and an independent entity capable of being subjected to legal control by a legal subject for whom it has use and value.
- d. A *person* is a legal subject who can acquire and exercise rights and obligations in law.
- e. A *remedy* is a legal procedure provided by the legal order to protect a right against infringement or to control the effects of an unlawful act or situation. (10)

QUESTION

Briefly explain the different tests that can be used to determine whether a particular right is a real or a creditor's right. (10)

ANSWER

- a. *Classical theory*: distinguishes between real and creditor's rights by emphasising the nature of the object of each; real rights with regard to things and creditor's rights with regard to performances. (3)
- b. *Personalist theory*: distinguishes between real and creditor's rights on the basis of their enforcement. real rights are enforced against anybody and creditor's rights are enforced against a specific debtor. (3)
- c. *Subtraction from the dominium test*: devised by the courts to distinguish between real and creditor's rights on the basis that the former results in a diminution of or subtraction from the owner's ownership, whereas the latter results in an obligation resting on a specific debtor. This test was formulated in *Leahy v. Great Britain*. (4)

QUESTION

Rearrange the two columns below in order that the examples listed correspond with the things in the first column.

THINGS	EXAMPLES
a. Negotiable thing	1. Hand-woven table cloth
b. Divisible thing	2. Sectional title flat
c. Composite thing	3. Running water
d. Incorporeal thing	4. National Parks
e. Non-fungible thing	5. Wild animal
f. <i>Res communes omnium</i>	6. Tennis ball
g. Singular thing	7. Creditor's right
h. Non-consumable thing	8. Litre paraffin
i. <i>Res publica</i>	9. Motor car
j. Immovable thing	10. House

(10)

ANSWER

- (a) = (5) (Negotiable thing = wild animal)
 (b) = (8) (Divisible thing = litre paraffin)
 (c) = (9) (Composite thing = motor car)
 (d) = (7) (Incorporeal thing = creditor's right)
 (e) = (1) (Non-fungible thing = hand-woven table cloth)
 (f) = (3) (*Res communes omnium* = running water)
 (g) = (6) (Singular thing = tennis ball)
 (h) = (10) (Non-consumable thing = house)
 (i) = (4) (*Res publica* = National parks)
 (j) = (2) (Immovable thing = sectional title flat)

QUESTION

Mention four different types of rights in property and give an example of each.

(8)

ANSWER

1. Real right - house
2. Immaterial property right - copyright, trademark, copyright
3. Limited real right - servitude, usufruct, security right, mineral right
4. Creditor's right - contractual right, shares, suretyship, hire-purchase contract

QUESTION

Summarise the essential facts of each of the following cases in no more than 25 words each; and then state the ratio (argument supporting the decision) of each in no more than 25 words each.

(15)

ANSWER

- a) *Ex parte Geldenhuys* 1926 OPD 155

Facts: A mutual will determines that the surviving testator should divide the land in the estate in equal portions amongst the children when the oldest reaches the age of majority. The child drawing the portion with the homestead must pay a sum of money to the others.

Ratio: The test for a real right is whether the corresponding obligation is a burden upon the land, a subtraction from the dominium. The provisions regarding the subdivision of the land subtracts from co-owners' common law right to sub-divide property as they wish, and constitutes a real right. The provision to pay money to the other children is a burden upon the specific person only and is not a real right.

QUESTION

Explain in one short paragraph how the difficulty in distinguishing between real and personal rights can arise in a practical situation. Use an example to illustrate your explanation. (10)

ANSWER

- a. The problem with the distinction between real and personal rights is restricted to corporeal property
- b. The problem is usually restricted to limited real rights, since it is never difficult to distinguish ownership from a personal or creditor's right.
- c. The problem is largely restricted to immovable property, because real rights with regard to movables are transferred by delivery, which makes it fairly easy to distinguish a limited real right in movables from a personal right.
- d. The problem is usually restricted to rights created in a will or a contract, because these provisions in a will or a contract do not always make it adequately clear whether the rights created by them should be a limited real right or a creditor's right. As a rule, this problem will involve the question whether the right in question should be registered - in terms of the Deeds Registries Act all real rights with regard to immovable property have to be registered, whereas personal rights may not be registered. An example of a right which illustrates all the points above would be a provision in a will or a contract which provides that a certain person should receive a certain sum of money from the owner of land. If this provision creates a limited real right for the recipient of the sum of money it has to be registered against the title deed of the land; but if it creates no more than a creditor's right against the current owner of the land it may not be registered.

QUESTION

Study the facts of the following three prescribed cases in the prescribed casebook: (a) *ESKOM v Rollomatic Engineering (Edms) Bpk 1992 (A)*; (b) *Reck v Mills en 'n Ander 1990 (A)*. Explain, in a short paragraph each, whether the electricity towers in (a), the condenser in (b) satisfy all the requirements to qualify as movable things.

ANSWER

Characteristics of things

a Electricity towers:

- corporeality yes, no problem
- external to humans yes, no problem
- independence no, still attached to land
- juridical control yes, no problem
- use and value yes, no problem

Ship condenser

- corporeality yes, no problem
- external to humans yes, no problem
- independence no, still attached to ship
- juridical control yes, no problem
- use and value yes, no problem

QUESTION

Your client, Ms M Radebe, is the owner of a farm in Mpumalanga. She received an offer to purchase the farm, and now she consults you for legal advice. She thinks that the farm has excellent potential to be developed for ecotourism, and she wants the buyer to increase the offer by 25% to reflect the development potential of the farm. The purchaser is not quite convinced of the farm's development potential, and is therefore not willing to increase the offer. However, the purchaser is willing to conclude a separate contract to the effect that, if the farm is actually developed for eco-tourism at a later stage, he will share the nett profit of such development with Ms Radebe on a 50:50 basis. Ms Radebe is worried about the long-term security of such an offer, and although she thinks that the long-term profit sharing will probably earn more money, she thinks that a cash sum right now offers her more security. Can Ms Radebe accept the purchaser's profit-sharing offer and still enjoy long-term security? Advise her on this point and explain the possible benefits of your solution, with reference to applicable case law.

ANSWER

If Ms Radebe accepts the purchaser's offer, her right to share in the eventual profit of development is based on the separate contract with the purchaser. This is a creditor's right based upon contract. Creditor's rights can be enforced against the other contracting party only, and not against anybody else. In other words, if the purchaser should sell the farm to another person, Ms Radebe cannot enforce her right to profit-sharing against the new owner only against the original purchaser. What Ms Radebe wants is a right which can be enforced not only against the purchaser, but also against anybody else who might purchase the farm from him at a later stage (his successors in title). That is only possible with a real right in land, which has to be registered against the title deed of the farm, and which is then enforced against all later owners of the farm, even if they were unaware of the original contract. In this case the right runs with the land, and not with the contract.

The problem is, then, to provide Ms Radebe with a limited real right which secures her right to profit-sharing against later owners of the farm. That means she cannot accept the purchaser's offer unless the provision is also registered against the title deed of the farm as a limited real right. The immediate-cash option is only preferable to this one if the chances of development and of higher profits are slim. However, if the chances of development and of high profits are good, this option is better and still safe.

OWNERSHIP

QUESTION

Define the following (provide only a definition, not a discussion or an analysis of various categories, etc):

- a. **Ownership**
- b. **Bound common ownership**
- c. **Sectional title unit**
- d. **Common property (sectional title scheme)**
- e. **Participation quota (sectional title scheme)**
- f. **Management rules (sectional title scheme)**
- g. **Property time-sharing**
- h. **Shareblock scheme**
- i. **Housing development (retirement) scheme**
- j. **Expropriation**

ANSWER

- a. *Ownership* is an abstract legal relationship between the owner and the thing (in terms of which the owner acquires entitlements to use and enjoy the thing) and between the owner and other legal subjects (in terms of which the owner can expect others not to interfere with her entitlements)
- b. *Bound common ownership* is a form of co-ownership which is based upon an underlying legal relationship such as marriage or partnership, which means that the common owners cannot terminate or change their co-ownership as long as the underlying relationship still exists

A *sectional title unit* is described in the Sectional Titles Act as a composite immovable thing, consisting of a section of a building together with an undivided share in the common property, as apportioned on the basis of the participation quota.

The *common property* in a sectional title scheme consists of the land and all parts of the building(s) which are not part of the individual sections.

The *participation quota* is a percentage, calculated by dividing the floor area (measured to the centre of separating walls) of a section in a sectional title scheme by the total floor areas of all the sections together (calculated to four decimal points) and used to indicate a sectional title owner's undivided share in the common property (meeting and responsibility for levies).

- f The *management rules* of a sectional title scheme are the rules, prescribed by regulation, in terms of which the body corporate and trustees manage the scheme.
- g *Property time-sharing* is a scheme, controlled by the Property Time-sharing Control Act, by which a group of people divide the right (real or creditor's rights) to use and occupy a building amongst themselves on the basis of specified time-slots of the year.
- h A *shareblock scheme* is a scheme, controlled by the Share Blocks Control Act, by which a person obtains the right (creditor's right) to use and occupy a part of a building on the basis of that person's shareholding in a shareblock company (which owns or rents the building).
- i A *housing development (retirement) scheme* is a scheme, controlled by the Housing Development Schemes for Retired Persons Act, by which a retired person (older than 50 years) acquires a housing interest (real right or creditor's right) to occupy a part of a building
- j *Expropriation* is an original form of acquisition, controlled by section 25 of the Constitution and an authorising law, by which the state acquires ownership or real rights, without the consent or cooperation of the former owner or holder, in the public interest and against compensation.

QUESTION

Distinguish between the following:

- a. a right and an entitlement
- b. bound common ownership and free co-ownership
- c. property time-sharing schemes based on sectional title and on shareblock respectively.
- d. accession and manufacture
- e. original and derivative acquisition of ownership
- f. causal and abstract systems of transfer of ownership
- g. negative and positive system of registration
- h. mixing and fusing
- i. accessory and auxiliary things
- j. unanimous and special resolutions (sectional title scheme)

ANSWER

- a. The difference between a *right* and an *entitlement* (in the field of property) is that the right is what one has with regard to a ~~thing~~ ^{thing} whereas the entitlement is what you can do with the thing because you have the right. Property rights such as ownership and limited real rights are explained in terms of the entitlement (use, disposal, etc.) they include.

- b. Both *bound common ownership* and *free co-ownership* are forms of co-ownership, which means that more than one person own the same thing in undivided shares. In the case of bound common ownership there is an underlying legal relationship such as marriage or partnership upon which the co-ownership relationship is founded, so that the co-owners cannot terminate or change their co-ownership while this underlying relationship still exists. In the case of free co-ownership there is no such underlying relationship.
- c. All property time-sharing schemes imply that a number of people divide (by way of a use agreement) the use and occupation of a part of a building (usually a flat or apartment) amongst themselves on the basis of specific periods of the year. If the scheme is based on *sectional title*, they will be co-owners of the sectional title unit and their respective use rights will be based on co-ownership. If the scheme is based on *shareblock*, they will all be shareholders in the shareblock company and their use rights would be based on the creditor's rights of shareholding.
- d. Both accession and manufacture are forms of original acquisition of ownership. The difference is that accession takes place when one thing is added permanently to another so that the one thing loses its independence and becomes part of the other, whereas in the case of manufacture something completely new is created using the materials or things of someone else. In the case of accession it will still be possible to identify the principal object to which other things have been attached, while it will be impossible to identify the former materials or things in the case of manufacture, where a completely new thing was created.
- e. *Original acquisition* of ownership means that ownership is acquired by operation of law and without the consent or cooperation of the former owner, if any, whereas derivative acquisition of ownership takes place with the consent and cooperation of the former owner, who transfers the property to the new owner.
- f. In a *causal system* of transfer of ownership the validity of the transfer is subject to the validity of the original contract (obligation-creating agreement), but in an *abstract system* ownership can be transferred validly even if the original contract is invalid, provided that the real agreement (actual delivery or registration together with the intention to transfer and accept ownership) is valid.
- g. In a *positive system* of registration the correctness of the registered information is guaranteed, but in a *negative system* it is not. The difference is that, in a negative system, one can be owner (or holder of a real right) even if the register does not reflect that, and conversely one may not be owner although the register states that one is.
- n. *Mixing and fusing* are both original forms of acquisition of ownership, and both involve the acquisition of ownership through a process by which someone else's property gets mixed up irreversibly with one's own. The difference is that mixing concerns solids and fusing concerns liquids (or solids in a liquid state).
- i. Both accessory and *auxiliary* things are movables which become permanent parts of another movable or immovable thing (principal) and lose their own independence. The difference is that accessories become part of the principal thing physically (a wheel attached to a car) while auxiliaries become part of the principal thing only by their use or purpose (the keys to a car).

- J The body corporate in a sectional title scheme can take either *unanimous or special resolutions*, depending on the requirements of the Sectional Titles Act. A unanimous resolution is taken unanimously by all members present at a general meeting where at least 80% (calculated in number and value) of all the members of the scheme are represented, or accepted in writing by all members of the scheme or their representatives. A special resolution is taken by at least 75% (calculated in number and value) of the members present at a general meeting, or accepted in writing by 75% of all the members.

QUESTION

Enumerate the requirements for the following remedies:

- a. *rei vindicatio*
- b. interdict
- c. *actio ad exhibendum*

ANSWER

Requirements

- a. *Rei vindicatio*:
 - the claimant is owner of the property
 - the property still exists and can be identified
 - the property is in the control of the defendant when the action is instituted
- b. Interdict:
 - the applicant has a clear right in the property
 - the respondent infringes upon that right in an ongoing or continuing way, or there is a reasonable expectation that such an infringement will occur in future, and it causes or will cause damage for the applicant
 - there is no other effective remedy available.
- c. *Actio ad exhibendum*:
 - the claimant was owner of the property when it was alienated or destroyed
 - the defendant was aware of the claimant's ownership
 - the defendant maliciously or fraudulently destroyed or alienated the property
 - the claimant suffered damage as a result

QUESTION

Briefly explain the following:

- a. how the rights and entitlements of an owner of immovable property are limited by various factors.
 - b. what forms a property time-sharing scheme may assume and what rights are acquired in each case.
-

- c. **the basic rule upon which all neighbour law is based.**
- d. **how ownership is acquired by way of expropriation, forfeiture and confiscation respectively and what the effect of the 1996 Constitution upon these forms of acquisition are.**
- e. **the requirements for a valid transfer of ownership of movables**
- f. **when an owner of a movable may be estopped from claiming the property with the *rei vindicatio*.**

ANSWER

a. Limitations on ownership of immoveables

The rights and entitlements of owners are never completely unrestricted. They can be restricted by:

- i. Legislation, such as the Physical Planning Act or the Expropriation Act.
- ii. Creditor's rights of third parties against the landowner, such as an unregistered permission to use a road over the land;
- iii. Limited real rights of third parties, such as a registered servitude or mortgage bond; and
- iv. Common-law provisions of neighbour law, such as the duty not to cause a nuisance or not to endanger the surface and lateral support of neighbouring properties. Restrictions in categories (i) and (iv) are general in that they usually affect all landowners alike, and they affect landowners as well as their successors in title. The important difference between restrictions in categories (ii) and (iii) is that restrictions in (ii) are personal, and they affect only the current landowner in her personal capacity; whereas restrictions in (iii) are real burdens which "run with the land" and affect the current landowner as well as successors in title.

b. Property time-sharing schemes

In terms of the Property Time-sharing Control Act a time sharing scheme may assume any of four different formats

- i. If the scheme is based on a sectional title scheme, the participants are co-owners of a particular sectional title unit (they all have a real right, namely co-ownership), who divide the use and occupation of the unit amongst themselves by way of a use agreement;
- ii. If the scheme is based on a shareblock scheme, the participants are all be shareholders (they all have creditor's rights) in the shareblock company (which owns or leases the property), and their rights of use and occupation in terms of the use agreement are based on their shareholding.

- iii. If the scheme is based on club membership, the participants are either co-owners (when the club is not a legal person) of the property (they have real rights, namely co-ownership), and their use rights are divided on the basis of a use agreement; or they are simply members (if the club is a legal person and owns the property) who derive their use rights (creditor's rights) from membership and owns the property) who derive their use rights (creditor's rights) from membership of the club;
- iv. Any other form (such as a scheme based on a long-term lease) which is permitted by the responsible minister by way of proclamation is also permissible, in which case the nature of the right (ownership, real right, creditor's right) would depend on the details of the scheme.

Basic rule of neighbour law

All of neighbour law is based on the rule of reasonable use, which is aimed at harmonizing the rights and interests of neighbours by establishing a balance of reciprocal rights and duties between them. This rule means that each landowner must use her land reasonably on the one hand, and that all neighbours must tolerate the effects of such use within reasonable limits. The reciprocal nature of this rule is most obvious from specific neighbour-law rules such as the duty to provide surface and lateral support just as one owner must use her land reasonably by not withdrawing support from neighbouring land, she also benefits from the duty of neighbours not to withdraw support from her land. In the same way, neighbours are expected to tolerate (within reasonable limits) the effects (noise, dust, pollution, flow of rainwater, shade of dropping leaves caused by trees) of such reasonable use of neighbouring land.

Expropriation, confiscation and forfeiture

Expropriation, confiscation and forfeiture are all original forms of acquisition of ownership (in other words ownership is acquired without the consent or cooperation of the previous owner) by the state. The difference between them are that expropriation is undertaken in order to acquire property (mostly land) for public purposes or in the public interest and against compensation, whereas confiscation (mostly of movables) usually takes place in an emergency situation and normally without compensation, and forfeiture is a criminal sanction which follows upon the illegal use of property. All three forms of original acquisition by the state are controlled by sections 25 and 36 of the Constitution, which provide that all deprivations of property have to take place in terms of a law of general application, that they may not be arbitrary, and they have to be reasonable and justifiable in terms of section 36. Special further requirements (for public purposes or in the public interest and against compensation) are specified for expropriation in terms of section 25.

Requirements for transfer of movables

In the prescribed *Concor* case a number of requirements for the valid transfer of ownership of movables are enumerated.

The movables must be negotiable.

- ii. The transferor must have the legal capacity to transfer ownership
- iii. The transferor must be the owner
- iv. The transferee must have the legal capacity to accept ownership
- v. The transferee or her agent must accept ownership
- vi. Transfer must be accompanied by some form of delivery of the movable
- vii. The delivery must assume the form of a valid real agreement, ie take place with the reciprocal intention of transferor and transferee to transfer and to accept ownership
- viii. There must be a legal cause for the transfer (either in the preceding contract or in the form of a valid real agreement)
- xi. If the transfer is based on sale the full purchase price must be paid or credit granted before transfer will take place

Estoppel against rei vindicatio

Estoppel is a defence against the *rei vindicatio*, and may be raised if the defendant can prove that:

- i. The owner of the property, ie the claimant
- ii. culpably (intentionally or negligently)
- iii. created the impression that ownership was transferred to another person or that such person had the power to transfer ownership
- iv. the defendant, relying on this impression
- v. obtained the property with the owner's intention
- vi. to her detriment or in a way that can cause damage for her unless the impression is upheld.

QUESTION

Ms Mary Msimang concludes an agreement with Mr John Fourie to buy two windmills from him. At the moment when they conclude the contract the windmills are still on Mr Fourie's farm, where they are attached to massive concrete slabs next to a dam. When Mr Fourie accepts payment for the windmills from Ms Msimang, he points the windmills out to her and says: "There are your windmills. You can come and collect them any time." A month later, when Ms Msimang arrives at the farm to collect the windmills, she finds out that Mr Fourie's farm has been sold to a Ms Buntj Beavis, who refuses her entry to the farm, claiming that the windmills now belong to her and that she is not interested in selling them. Mr Fourie has emigrated to Malawi. Advise Ms Msimang with regard to her rights and possible remedies. Refer to relevant case law where applicable.

ANSWER

Question : **What are Ms Msimang's rights; what are her possible remedies? (with reference to case law!)**

The Issue : Ms Msimang can obviously not rely on any action against Mr Fourie - he is gone. The issue is whether she can somehow force the new landowner, Ms Beavis, to allow her to remove the windmills.

Legal question : Is the new landowner, Ms Beavis, bound to honour the sale which took place between Mr Fourie and Ms Msimang? Since only real rights are enforced against "the whole world" or successors in title, the question is whether Ms Msimang acquired a real right which she can enforce against Ms Beavis. The only real right in issue would be ownership of the windmills. If Ms Msimang acquired ownership of the windmills, she can claim them from Ms Beavis (or at least get a court order to allow her to remove them from Ms Beavis' property); if not, she possibly has no claim. The remedy which one would use to claim your property from someone else *rei vindicatio*, **so the question is whether Ms Msimang can use the *rei vindicatio* to force Ms Beavis to allow her to remove the windmills.**

Remedy : **to succeed with the *rei vindicatio*, Ms Msimang has to prove that:**

- she is owner of the windmills
- the windmills still exist and are identifiable
- the windmills are in Ms Beavis' control

The last requirement is obviously not a problem, so the focus should be on the first two, which actually go together. The windmills clearly still exist, but the question is whether they are separate, identifiable movables which exist independently. If they do Ms Msimang only has to prove that she acquired ownership. If we assume for a moment that the windmills do exist independently, the relevant requirements for proof of ownership would be:

proof of payment (no problem according to the facts)

proof of delivery, which should be no problem because delivery could have taken place

with the long hand here they were pointed out and she was placed in a position where she could remove them at her leisure. The only real problem is that her ability to remove them was later terminated by ms Beavis

In conclusion one could say that Ms Msimang can prove all three requirements if one assumes that the windmills were separate, independent movables. That is the next part of the problem.

Movables: The last question is whether the windmills were independent movables which never formed part of the land, or perhaps attachments which formed part of the land. If they were movables Ms Msimang can argue that they were delivered to her by the long hand, she acquired ownership, and she can succeed with the *rei vindicatio* against Ms Beavis. If they were attachments they always formed part of the land, then they could not have been delivered by the long hand before they were detached from the land, and then they could not have been sold or transferred to her. They therefore still form part of the land belonging to Ms Beavis, and the *rei vindicatio* must fail.

Accession: The final problem is, therefore, whether the windmills were attached permanently to the land so that they lost their independence and became part of the land. This question is usually answered with reference to three factors

- nature and purpose of the windmills
- manner and degree of attachment
- intention of the annexor

The three factors were applied inconsistently in a number of cases, but in the *Sumatie* case it was said that all the surrounding factors and circumstances have to be taken into account together. Although the intention aspect was emphasized in the most recent case (*Konstanz Properties*) the court left the possibility open that the more inclusive approach of *Sumatie* might still be followed in future. In terms of this approach one might say that:

- the nature and purpose of windmills are not necessarily indicative of permanent attachment, since they are bought and sold in the market.
- the manner and degree of attachment might indicate permanent attachment, but even this is not conclusive, because removal from the concrete blocks will not really damage the land in any way.
- the actions of the annexor, Mr Fourie, seem to indicate that he regarded the windmills as movables which could be removed quite easily.

It is possible to argue that the windmills were not attached permanently, that they retained their individual and independent existence as movables, and that they were sold and delivered to Ms Msimang, who can therefore succeed with the *rei vindicatio* against Ms Beavis.

QUESTION

Mr John Hlope bought a car from Corny Cars. The instalment payment scheme in terms of which the car was bought stipulates that ownership is not transferred upon delivery, but reserved to the seller pending payment of the last instalment. Before payment of the final instalment Mr Hlope sells and delivers the car to Ms Jessica Jones. Subsequently, Corny Cars claims the car back from Ms Jones, averring that the last payment has not been paid. Mr Hlope, who in the meantime has had second thoughts about selling the car, pays the final instalment to Corny Cars, and then claims the car back from Ms Jones, stating that he had become owner upon payment of the final instalment, that the sale to Ms Jones was invalid and that he wants his car back. Advise Ms Jones of her rights. (10)

ANSWER

Question : What are Ms Jones' rights against the claim of Mr Hlope? (Note that the claim of Corny Cars would have fallen away when they received Mr Hlope's payment).

Legal Question : Does Ms Jones have a valid defence against Mr Hlope's claim (which presumably is the *rei vindicatio*)? Mr Hlope can only succeed with the *rei vindicatio* if he can prove ownership.

Ownership : One of the possible defences against the *rei vindicatio* is that the claimant is actually not the owner of the property in question. Mr Hlope would only have become owner upon payment of the last instalment, as provided in the contract of sale between himself and Corny Cars. When he sold the car to Ms Jones the last instalment had not been paid yet, and therefore he could not have been owner then.

Mr Hlope's case is that he became owner when he paid the last instalment subsequent to the claim from Corny Cars. This is only possible if delivery from Corny Cars to him (which, together with payment, is a requirement for transfer of movables) took place by way of delivery with the short hand (he already had control and merely changes the intention with which he holds). However, in *Inte Plus v Scheelke* it was decided that delivery with a short hand is only possible if the prospective transferee was in actual control (possession) of the property at the time when the delivery was supposed to take place (i.e. when the last instalment was paid). Since Mr Hlope was not in possession at that stage, ownership could only possibly have been transferred by way of another form of delivery, attornment, for which the requirements (especially the requirement that there had to be a tripartite agreement that the actual holder, Ms Jones, would at some stage hold for Mr Hlope and not for Corny Cars) were not present. As a result Mr Hlope never acquired ownership when he paid the last instalment, and consequently his *rei vindicatio* has to fail, as he cannot prove ownership.

OWNERSHIP

QUESTION

Complete the following quotation by filling in the missing words. Underline the words you fill in. Identify the quotation by noting its source.

(4)

ANSWER

"Ownership is the most complete real right that a person can have with regard to a thing. The point of departure is that a person, as far as an immovable is concerned, can do with and on his property as he likes. However, this apparent unlimited freedom is a half-truth. The absolute entitlements exists within the boundaries of the law. These restrictions can emerge from either objective law or from the restrictions placed upon it by the rights of others. For this reason no owner ever has the unlimited right to exercise his entitlements in absolute freedom and in his own discretion." (From. *Gien v Gien*).

(5)

QUESTION

Name the most important entitlements usually associated with ownership and define each entitlement in one short sentence.

(5)

ANSWER

- a. **Control:** entitlement to hold the thing physically or to control its physical whereabouts
- b. **Use:** entitlement to use the thing and derive benefit from its use
- c. **Encumberment:** entitlement to burden the thing with limited real rights
- d. **Alienation:** entitlement to transfer or sell the thing to someone else
- e. **Vindication:** entitlement to claim the thing from whoever holds it

(5)

QUESTION

Define each of the following forms of original acquisition of ownership in one short sentence.

(10)

ANSWER

- a. **Appropriation:** unilateral appropriation of corporeal thing owned by nobody with the intention to acquire ownership.
- b. **Accession:** takes place when two or more corporeals combine or are combined so that one loses its physical or economic independence and becomes part of the other.
- c. **Manufacture:** when a person creates a new thing using another's materials or thing without permission.
- d. **Mixing and fusing:** when solids (mixing) or fluids (fusing) belonging to more than one owner are mixed or fused without the permission of the owners so that they are not easily divided.
- e. **Acquisition of fruits:** fruits usually belong to the owner of the principal, but can be acquired by another through separation from the principal or through collection after separation.
- f. **Treasure trove:** acquisition through finding of a valuable which was hidden for so long that it is impossible to determine its ownership.
- g. **Expropriation:** original acquisition of property by expropriating authority in terms of a statute, without permission of the owner but against compensation.
- h. **Forfeiture:** property is acquired by the state when forfeited in terms of legislation when used or possessed illegally
- i. **Confiscation:** property is acquired by the state when confiscated against compensation in terms of legislation when used or required in a national emergency.

QUESTION

Complete the following table by filling in the second and third columns. (10)

ANSWER

Remedy	What is claimed?	Requirements
<i>Rei vindicatio</i>	a. return of the thing	a. ownership b. thing exists c. controlled by defendant
<i>Actio ad exhibendum</i>	a. compensation	a. thing was destroyed or alienated on purpose b. <i>mala fides</i> c. ownership
<i>Actio legis Aquiliae</i>	a. damages	a. unlawful and culpable act b. causing c. damage for owner
Enrichment action	a. compensation for unjustified enrichment	a. enrichment b. impoverished c. unjustified

(10)

QUESTION

Explain, in one short sentence each, how ownership is terminated in each of the following cases:

(7)

ANSWER

- a. **Transfer:** ownership is transferred by the owner (who loses it) to another (who gains it)
- b. **Abandonment:** ownership is terminated when the owner abandons physical control and the intention to own.
- c. **Death of the owner:** ownership is terminated when the owner dies and ceases to be a legal subject.
- d. **Accession:** ownership is terminated by operation of law when the thing accedes to another thing in such a way that it loses its independent existence as a legal object
- e. **Insolvency:** ownership is transferred by operation of law to the master and curator of the insolvent estate upon sequestration
- f. **Forfeiture:** ownership is terminated by operation of law when it is declared forfeit in terms of a statute.

- g. **Expropriation:** ownership is terminated upon expropriation when the expropriator acquires original ownership in terms of a statute.

(7)

QUESTION

Define the following in your own words in one short sentence each:

- a. **Sectional title unit**
- b. **Common property**
- c. **Participation quota**
- d. **Body corporate**
- e. **Management rules**
- f. **Conduct rules**
- g. **Share block scheme**
- h. **Property time-sharing scheme**

(8)

ANSWER

- a. **Sectional title unit:** section of a building, together with an undivided share in the common property.
- b. **Common property:** the land and all parts of the building not included in the individual sections.
- c. **Participation quota:** a ratio determined by dividing the floor area of one section by the total floor of all sections together, accurate to four decimal places.
- d. **Body corporate:** a legal person created when the developer sells the first unit to a person other than the developer, and of which all owners are members
- e. **Management rules:** rules concerning the management and control of the sectional title scheme by the body corporate and the trustees.
- f. **Conduct rules:** rules concerned with the conduct of all owners and inhabitants of the sectional title scheme
- g. **Share block scheme:** scheme in terms of which a shareholder in the share block company acquires a use right determined by his shareholding and pertaining to a building or complex owned or leased by the company
- h. **Property time-sharing scheme:** scheme in terms of which the time-share holder acquires a use right pertaining to the time-share building or complex for a certain fixed period of the year

(8)

QUESTION

Mention the criteria that are employed in South African law to determine whether a movable thing has lost its independence and acceded to an immovable in terms of industrial accession. Distinguish between the different approaches that have been followed concerning these criteria in each of the following cases:

- (a) *Standard-Vacuum Refining Co of SA Pty Ltd v Durban City Council* 1961 (2) SA 669 (A)
- (b) *Theatre Investments Pty Ltd v Butcher Brothers* 1978 (3) SA 682 (A)
- (c) *Konstanz Properties (Pty) Ltd v W.M. Spilhaus (WP) Bpk* 1996 (3) SA 1

APPLICATION

- a. *Standard-Vacuum Refining Co of SA Pty Ltd v Durban City Council* 1961 (2) SA 669 (A)

The court stated the three criteria, and indicated that the third one is most important, i.e. the intention of the person who attaches the thing. The first two principles are applied in order to ascertain whether the intention was to attach permanently or not. In other words, one has to look at the physical features to determine if the thing has been attached permanently. If they produce an uncertain result in the sense that from an examination of such features, no inference can be drawn that the attachment was made with an intention of permanency, or otherwise, the intention of the annexor may be decisive. The court came to the conclusion that in the case the physical features support the inference that the attachment was intended to be permanent.

- b. *Theatre Investment Pty Ltd v Butcher Brothers* 1978 (3) SA 682 (A)

In this case the court actually applied the third criterion with reference to the *Standard-Vacuum* case as the generally accepted test to determine whether a movable has acceded to an immovable. The annexor's intention to annex the movable permanently can be determined from numerous sources, inter alia the annexor's own evidence as to the intention, the nature of the movable and of the immovable, the manner of annexation and the cause for and circumstances giving rise to such annexation. In the absence of direct evidence concerning the annexor's intention the court considered the nature of the equipment in question, the manner and circumstances of its annexation and other factors such as the fact that the chairs were specifically designed for use in the theatre, the terms of the contract and the fact that it was envisaged that the property will be used for at least fifty years.

- (c) *Konstanz Properties (Pty) Ltd v W.M. Spilhaus (WP) Bpk* 1996 (3) SA 1

In this case the court decided that the annexor's intention to annex the movable was decisive and that in the circumstances the intention of the system did not have to be proved. This was because the movable was specifically designed for use in the theatre.

QUESTION

X and Y are co-owners of a farm. Z is the owner of a neighbouring farm. The co-owners X and Y built a private road over their farm to transport vegetables from the farm to the market but Y also uses the road to transport vegetables on a contract basis from Z's farm across the common property of X and Y to the market. He (Y) also gave Z permission to use the road across the common property of X and Y. X alleges that Y's use of the farm road is unreasonable and disproportionate to his share. Advise X with regard to the remedies and principles concerning free co-ownership, specifically with regard to common property.

ANSWER

A co-owner who violates his entitlement to use in terms of his ownership share by using the thing unreasonably, can be prohibited from doing so by means of an interdict instituted by other co-owners. The question in this instance is whether Y used his entitlements reasonably, and proportionately his share.

- a) Each co-owner may use the common property in accordance with the use intended for it (a road may therefore be used for transportation as intended), as long as such use does not infringe upon the right of other co-owners to make similar use of the property.
- b) Each co-owner's use of the common property must be commensurate with her undivided share in the common property, which also means that a co-owner cannot grant

All co-owners are entitled to the use and enjoyment of the things according to their shares in the joint property. This means that no co-owners may abuse the things or may exercise his entitlement in such a way that it does not correspond with the extent of his share in the property. In *Erasmus v Afrivander Proprietary Mines* it was held that the norm whether there was an encroachment upon the rights of the co-owners should be determined by means of the criterion of reasonableness. It must therefore be determined whether the co-owners use the thing for a purpose other than that for which it was suitable and to the detriment of the other co-owners. It is an indication of unreasonableness if the co-owner allows a third party to use or exploit the thing compare *Pretorius v Neft and Glas*.

The injured co-owners may rely on the following remedies:

- a) An interdict to forbid the injurious practice - *Pretorius v Neft and Glas*.

b) Damages -

actio communi dividuina This action is a delictual nature namely for the division of the common property and for compensation of damage suffered by the co-owner as a result of the common property. It is a delictual action which is based on the fact that the co-owner has suffered damage as a result of the common property.

QUESTION

Explain the most important principles with regard to overhanging branches and leaves, and illustrate your explanation by indicating how these principles were applied in *Malherbe v Ceres Municipality 1951 (4) SA 510 (A)*.

ANSWER

The rules concerning overhanging branches and leaves form part of the law relating to encroachments, which governs the mutual rights and obligations of the owners or users of neighbouring land. Neighbour law forms part of the natural limitations and restrictions of ownership, in that it determines how an owner's right to use her land is limited by the corresponding rights of neighbouring landowners. In this regard the general principle of reasonable use forms the basis of the whole body of neighbour law.

The general principle regarding encroachment is that no owner is entitled to allow parts of buildings or plants on her property to encroach on neighbouring land. If this does happen the encroachment may form a nuisance, and then she is responsible for removing it on request.

The general remedies regarding encroaching overhanging branches and leaves are not the same as in the case of encroaching buildings, as it is easier to cut off an overhanging branch than an encroaching building. Generally the rule is that a landowner can request a neighbour to cut off and remove any branches and leaves that overhang from her property. If the neighbour does not comply within a reasonable time, the owner can either approach the court for a removal order or remove the encroaching branches and leaves herself. In the last-mentioned instance she can request the neighbour to remove the branches and leaves that were cut off, since she is only entitled to keep the discarded branches and leaves if the neighbour agrees or fails to remove them.

In the *Malherbe* case a landowner complained that leaves from trees planted on the pavement by the local authority constituted a nuisance on his property. Although the case was decided on the basis of nuisance, it is an important source of principles regarding encroaching leaves and branches. The most important principle laid down by the court is the main principle of neighbour law in general, namely reasonable use. It was decided that normal and reasonable use of property does not usually give rise to an action for nuisance, even if it does constitute a certain measure of inconvenience, since neighbours are mutually required to tolerate a certain measure of inconvenience caused by the normal and reasonable use of their respective properties. It was decided that it was perfectly normal and reasonable for a local government to plant trees on pavements and that in itself could not give rise to a nuisance. Neighbours are required to tolerate a certain number of leaves blown in from trees to overhang their own properties, especially if they allow the neighbour's trees which overhang their own property. If they are not prepared to accept such an arrangement, they must, when requested by the neighbour, remove the overhanging branches and leaves themselves. It was also decided that a local authority is not liable for nuisance if it plants trees on pavements.

QUESTION

X buys a motor car from Y. The motor car is delivered and the purchase price is paid in full. One week later X discovers that she can buy the same type of car from Z for a much lower price. She also finds out that the contract between herself and Y was invalid. Can X return the case to Y and claim her money back? Discuss with reference to the various theories regarding the transfer of ownership. (10)

ANSWER:

Since the decision in *Commissioner of Customs and Excise v Randles, Brothers and Hudson* the abstract system of transfer of ownership has been followed in South African law:

This decision means that invalidity of the preceding legal transaction (from which the obligation to transfer derives) does not necessarily make the transfer of ownership void, and that ownership can still be transferred on the basis of a valid real agreement to transfer and accept ownership, together with delivery (of movables or registration of immovables), despite the fact that the preceding transaction is void.

The fact that X acquired ownership of the car does not mean that the invalidity of the contract has no effect on the legal position of the parties. X will, however, have to make use of the remedy afforded in the law of contract. (10)

POSSESSION & HOLDERSHIP

QUESTION

In addition to the physical element a mental element is required for the establishment of control. The mental element or intention to control consists of different aspects. Name these aspects and shortly state what each entails. (10)

ANSWER

- (a) **Mental capacity:** The legal subject must have the requisite mental faculties to form a legally recognised intention.
- (b) **Conscious control:** A person cannot hold or possess something without consciously exercising physical control over the thing.
- (c) **A specific mental intention:** The person must have a specific intention regarding his control over the thing. This intention depends on the previous two requirements. In addition she has to deliberately direct her intention towards the thing. The intention can take one of two forms: intention to hold as if she is owner; or intention to hold for own benefit, but not as owner. (10)

QUESTION

Enumerate the purpose and requirements of each of the following remedies:

- (i) Declaratory order
(ii) Interdict
(iii) *Mandament van spolie* (spoliation remedy)
(iv) Possessory action
(v) *Aquilian* action for damages

(20)

ANSWER

1. Declaratory order

Purpose: The purpose of this remedy, as far as the law of property is concerned, is to define the rights and obligations of parties regarding their control over a thing by means of a clear and authoritative court order.

- Requirements:**
- (a) The applicant must prove an interest in an existing, future or even contingent, but nonetheless real, right or obligation regarding the thing.
 - (b) In addition, the applicant must convince the court that the circumstances are of such a nature that the court is constrained to exercise its discretion and issue the order.

2. Interdict

Purpose: The purpose of the interdict is to end or prevent the disadvantages which result from the respondent's action

- Requirements:**
- (a) The applicant must have a clear right in terms of substantive law.
 - (b) The applicant must demonstrate that the respondent has infringed upon this clear right unlawfully and on a continuing basis, or that there is a reasonable expectation that the respondent will do so in future, and that the applicant will suffer damage as a result of the infringement
 - (c) No other effective remedy by means of which the applicant can protect his right must be available.

3. Mandament van spolie (spoliation remedy)

Purpose: To restore control of a thing without investigating the merits

- Requirements:**
- (a) The applicant should have had peaceful and undisturbed control of the thing before the disturbance took place
 - (b) The respondent should have taken or destroyed the control of the applicant unlawfully

Possessory action

Purpose: The purpose of the possessory remedy is to enable the claimant to recover a thing or its value (by way of damages) from a defendant who has disturbed the claimant's control by removing or damaging the thing, while he has a lesser right to the thing than the claimant

- Requirements:**
- (a) The claimant has a real right to the thing or control of the thing, and this right is stronger than that of the defendant. Proof of ownership is not required, but the claimant's right must be stronger than that of the defendant.
 - (b) The defendant is in control of the thing or is responsible for its removal from the claimant's control. Proof of spoliation is not required.
 - (c) If the claimant wants to recover damages he must satisfy the usual requirements of a *delictual* claim for damages.

5. Acquilian action for damages.

Purpose: To compensate patrimonial loss caused by the defendant.

- Requirements:**
- (a) Claimant has a patrimonial loss caused by the defendant.
 - (b) The patrimonial interest suffered damage as a result of an unlawful and culpable act of the defendant.
 - (c) The unlawful and culpable act of the defendant and the damage to claimant's interest caused patrimonial loss for the claimant.

(20)

QUESTION

Briefly explain the indications that facilitate the interpretation of the physical control element of possession and holdership.

ANSWER

The physical element of control is common to possession and holdership and is described as the *corpus* element. This refers to the actual or factual physical or tangible control which the controller has to have over the thing before it assumes importance for the law of property. Physical control in this sense is a factual and perceptible state of affairs, which must be determined by observation and the use of factual criteria.

In the evaluation of physical control by means of these indicators the following aspects must be taken into account:

The nature of the thing

The extent of physical control required in a specific case is determined partially by the nature of the thing concerned because the nature of each thing is an important factor which determines the scope and possibility of control over that thing. The most important result of this principle is that the extent of actual and immediate physical contact required between the controller and the thing is larger in the case of movables than in the case of immovables.

The purpose of the thing

In addition to the nature or physical attributes of the thing, the purpose for which it is used, its destination and the way in which it is used are factors, which must also be taken into account when it has to be determined whether or not physical control over the thing exists. A case in point is the example of the farmer visiting parts of his farm only occasionally, as happens on summer and winter farms which are only cultivated during a certain season. Since the purpose or normal use of things like these require that they only be used at specific times, this use and actual physical presence during those times will be sufficient.

Indicators and custom

Indicators which derive from legal custom imply that the generally accepted uses and customs with regard to farms, ships and building premises must be taken into account when the presence or absence of physical control is in dispute. These indicators are nothing more than the customs and uses which are generally followed with regard to the control and use of a certain type of thing. Commercial use and custom will play an important role in determining the effectiveness of control in each case.

Comprehensive control

As indicated, the application of legal indicators deriving from custom usually implies, specifically in those cases where the control of large, unmanageable or immovable things are concerned, that control need not be comprehensive to be effective.

Continuous control

On the grounds of the same indicators the physical presence or control of the controller need not necessarily be continuous. Once physical control has been established, temporary interruptions thereof will not necessarily imply that control has been lost.

Personal control

Control need not be exercised personally, but can be acquired and exercised by an agent, for and on behalf of the controller. In this way an employee can have control over a lawnmower for and on behalf of his employer, in the same way that a butler has control for and on behalf of the owner of an umbrella.

Effective control

All the abovementioned considerations and the application of the indicators there culminate in one concept which contains the essence of the matter: the basic requirement is that control over the things must be effective. Effective control means that the controller should be in a stronger and closer relationship of physical control than any other legal subject. When his control is interrupted for a short while the controller should be able to resume his control without reference to anybody else. This implies that nobody else should have established a stronger bond with regard to the thing.

QUESTION

Name and explain the different ways in which possession and holdership are terminated.

(10)

ANSWER

a. Death of the subject

A person's possession or holdership of a thing is lost when that person dies, because both the corporeal and mental elements of control are terminated when the person is dead.

b. Object destroyed or lost

Possession and holdership are lost when the thing which is possessed or held is destroyed or lost permanently, because the corporeal element of control is thereby terminated.

c. Corporeal element terminated

Possession or holdership is lost when the possessor or holder permanently loses or abandons the corporeal element of physical control

d. Mental element terminated

Possession or holdership is terminated when the mental element of control is lost permanently.

e. Transfer of control

Possession or holdership of an object is lost when control of the object is transferred to someone else by one of the derivative methods. In order to transfer control to someone else it is necessary that physical control must be transferred to the other person, coupled with the reciprocal intention to transfer and to accept whatever right to the object is transferred. Ownership or lawful holdership

loss through operation of law

QUESTION

Distinguish between possession and holdership with reference to the different aspects of the mental element.

ANSWER

Possession and holdership are forms of control of corporal things. They are distinguished on the basis of the lawfulness of the control and the controller's mental attitude. In this question we are concerned only with the mental attitude. The controller's mental attitude refers firstly to the question whether the controller is acting as owner or as controller of property which belongs to another, and secondly, only in the cases of unlawful control, to the question whether or not the controller is aware of the unlawfulness of the control.

The mental attitude or intention with which a person can control a thing can be divided into the:

- (a) intention of the owner; or
 - (b) intention to hold for one's own benefit.
- a) If the controller's attitude is that the thing belongs to herself, it is called the intention to hold for one's own benefit.

The Prescription Act 68 of 1969 provides a very good definition of the "intention of an owner". Possession is defined as open corporeal control of a thing with a specific intention, namely "as if he were the owner".

The situations should be distinguished here: It is obvious that the owner of a thing controls it with this intention, but this is irrelevant, since in this case it does not determine the implications of her right. We are here interested in the

position of the person who exercises control with the intention of an owner, while she is not in fact the owner - this is an **unlawful possessor**.

The unlawful possessor can act either in good faith or in bad faith. She acts in good faith if she honestly, but mistakenly believes to be the owner, while the unlawful possessor in bad faith is aware of the fact that she is not owner. A good example of an unlawful possessor is the thief.

The intention to hold a thing for one's own benefit is based on the assumption that someone else is the actual owner, that the holder is aware of this, but that she holds the thing for her own benefit. Usually, but not necessarily, such holdership is based on the permission of the owner, for example, the pledgee who holds the thing with the permission of the owner for her own benefit, or the tenant who holds the thing for her own benefit. The latter is usually based on the permission of the owner, but it can also be based on the owner's negligence. The latter is usually based on the owner's negligence, but it can also be based on the owner's intention. The latter is usually based on the owner's intention, but it can also be based on the owner's negligence. The latter is usually based on the owner's intention, but it can also be based on the owner's negligence.

Here one should also distinguish the position of someone who holds a thing belonging to another for her own benefit and one who holds or possesses on behalf of another, i.e. as agent for her principal.

It is not possible to change the nature of control by changing one's intention. Such a change in intention can only be recognized and given effect to if it is also established and publicized in outward actions.

Therefore, depending on whether the controller has the intention of an owner or to hold for one's benefit, we are dealing with possession or holdership.

QUESTION

Is it possible for the holder of a servitude to make use of the *mandament van spolie* by proving his right to the servitude?

ANSWER

The *mandament van spolie* is a summary remedy, usually issued upon urgent application, aimed at restoring control of property to the applicant from whom it was taken by unlawful self-help, without investigating the merits of the applicator's control.

The requirements for this remedy are:

- (1) The applicant should have had peaceful and undisturbed control of the thing before disturbance took place.
- (2) The respondent should have taken or destroyed the control of the applicant unlawfully.

The way in which the question is asked requires us to look at the first requirement only. The first question which arises then concerns the requirement of control. In other words, is it possible to control a right (incorporeal thing), such as a servitude. What the applicant must prove in cases like the one under discussion, is actual use of the servitude instead of actual control of a corporeal thing. The applicant does not have to prove the existence of the servitude, but must prove actions which are normally associated with the exercise of a servitude.

The reason why the applicant does not have to prove the existence of the servitude can be found in the nature of the remedy. It is a summary remedy aimed at restoring control of property, without investigating the merits of the applicant's control was lawful or not in terms of servitude, but merely whether he had control over the thing. This remedy is aimed at restoring the status quo ante and preventing persons from self-help and taking the law into their own hands.

According to the law it is not necessary for a servitude holder to prove the existence of the servitude. He must only prove that he has exercised the servitude in a way which is normally associated with the exercise of a servitude.

POSSESSION AND HOLDERSHIP
ASSIGNMENT QUESTIONS

QUESTION

In *Clifford v Farinha* several remedies that might have assisted the plaintiff were not available. Discuss the various reasons why each of these remedies was not available as well as other remedies that might have been relevant, but were not considered by the court at all.

NOTE: Include a paragraph outline that demonstrates the planning of your final answer.

ANSWER

Paragraph outline

INDEX

- Par 1: rei vindicatio
- Par 2: actio ad exhibendum
- Par 3: actio legis aquiliae
- Par 4: Mandament van spolie
- Par 5: Possessory action

The following remedies were discussed by the court:

a **Rei vindicatio**

The requirements for this action are:

- i) The claimant must prove his/her ownership of the thing
- ii The thing must still be in existence and identifiable
- iii The claimant must prove that the thing was in the control of the defendant when the action was instituted

The defendant must prove that he/she acquired the thing in good faith and for value and that he/she has not acquired it from a person who is not a bona fide purchaser for value.

Actio ad exhibendum

Requirements:

- i) The thing must have been lost, destroyed or alienated on purpose
- ii The defendant must have been in possession of the thing at the time of the loss
- iii The claimant must prove that he/she has a right in the thing

"The remedy known as the actio ad exhibendum is also not available to the plaintiff since the defendant was not proven voluntarily to have parted with possession of the vehicle, and the loss thereof was also not alleged nor proven to have been caused intentionally, or indeed negligently."- requirements ii. not proved.

Actio legis Aquiliae

Requirements:

- i. Claimant has a patrimonial interest in the thing or its control
- ii. A patrimonial interest suffered damage as a result of an unlawful and culpable act of the defendant.
- iii. The unlawful and culpable act of the defendant and the damage to claimants interest caused patrimonial loss for the claimant

" No case for Aquilian liability has been made out in the absence of any allegation or proof that the loss of the vehicle was caused by the fault of the dependant".- requirement iii) not proved.

Two remedies that might have been relevant but that were not considered by the court:

(d) Mandament van spolie (spoliation remedy)

Requirements:

- i) The applicant should have had peaceful and undisturbed control of the before the disturbance took place.
- ii) The respondent should have taken or destroyed the control of the applicant unlawfully.

Availability:

The remedy would probably not have been available, because it is usually accepted that permanent loss of the thing is a complete defence against this remedy.

Possessory action

Requirements:

- i. The claimant has a real right to the thing or control of the thing, and this right is stronger than that of defendant. Proof of ownership is not required but the claimant must have a stronger claim than that of the defendant

(ii) The defendant is in control of the thing or is responsible for its removal from the claimants control. Proof of spoliation is not required.

(iii) If the claimant wants to recover damages he must satisfy the usual requirements of a delictual claim for damages.

Availability:

Plaintiff can probably meet the requirements, but the action would only be useful to recover damages, and it was established that the requirements for Aquilian liability could not be proven because defendant was not causally responsible for the loss. 157

TOTAL:

100

LIMITED REAL RIGHTS

QUESTION

Define the following briefly:

- a. Limited real right
- b. Restrictive condition
- c. Usufruct
- d. Way of necessity
- e. Covering bond
- f. *Pactum commissorium*
- g. Judicial pledge
- h. House property in customary law
- i. Labour tenancy
- j. Minerals

ANSWER

- a. A *limited real right* is a real right in property which belongs to someone else.
- b. A *restrictive condition* is a limitation (which may be a limited real right), deriving from contract, will or statute (and which may be registered against the land) upon the entitlements of a landowner.
- c. A *usufruct* is a personal servitude over movable or immovable property, which grants the usufructuary the right to use the property (including the fruits), subject to the duty to return the property substantially intact to the owner upon termination of the usufruct.

A *way of necessity* is a praedial servitude in the form of a right of way, which is granted by court order to a landowner who has no access to a public road, and which allows the landlocked owner to use a road over neighbouring land to gain access to the nearest public road.

A *covering bond* is a mortgage registered as security for a future debt or future debts in general, and it grants continuous covering security to a maximum debt as specified in the bond.

- f. A *pactum commissorium* is a (often unenforceable) condition in a mortgage or pledge agreement in terms of which it is said that ownership of the security object will pass to the creditor automatically if the principal debt is not paid in full
- g. A *judicial pledge* is a real security right created by law, which secures a creditor's claim against a debtor by obtaining a writ of execution and attachment of the property.
- h. *House property in customary law* is property which accrues to a specific house (consisting of a specific wife and her children), and which has to be used for the benefit of that house
- i. *Labour tenancy* is a form of land-use deriving from a labour contract with regard to agricultural land: in terms of which the labourer acquires the right to occupy and use land for residential and other purposes in lieu of (part of the) wages.
- f. *Minerals* are defined and interpreted with reference to each specific law or contract, but in the Minerals Act 50 of 1991 they are defined as materials in a solid, liquid or gaseous form, found naturally in or on the earth or in water, and formed through geological processes, excluding water, but including sand, stone, rock, gravel and clay and soil other than topsoil.

QUESTION

Distinguish briefly between:

- a. praedial and personal servitudes
- b. personal servitudes and personal rights
- c. pledge and notarial bond over movables
- d. enrichment lien and debtor-creditor lien
- e. salvage lien and improvement lien

ANSWER

- a. Both *praedial* and *personal servitudes* are limited real rights which entitle the holders thereof to some use entitlements with regard to the property of someone else: but a praedial servitude can only be established with regard to land and always accrues to the owner of the dominant tenement in her capacity as owner of the dominant tenement, whereas personal servitudes can be established with regard to movables and immoveables, do not require a dominant tenement and accrue to the holders thereof in their personal capacities

A *personal servitude* is a real right and not a *personal right*: in the former, the term 'personal' refers to the fact that it benefits a specific person only, in the latter it refers to the fact that it can be enforced against a specific person only

- c. Both a *pledge* and a *notarial bond* establish real security rights over movables; but in the former case delivery of the movable is required; in the latter a fiction of delivery is employed to establish the real security without actual delivery, provided the requirements of the Security by Means of Movable Property Act 57 of 1993 are satisfied.
- d. Both *enrichment liens* and *debtor-creditor liens* are real security rights of retention (the holder can retain control of the property until the debt is paid) granted by law to secure payment of a principal debt; but the former secures a debt arising from unjustified enrichment, and the latter a contractual debt.
- e. Both *salvage liens* and *improvement liens* are rights of retention which secure payment of a principal debt deriving from unjustified enrichment; the difference is that the former relates to necessary improvements or expenses and the latter to useful expenses or improvements

QUESTION

Enumerate briefly:

- a. Guidelines laid down in *Van Rensburg v Coetzee 1979 (A)* for an application to court for a right of way of necessity. (3)
- b. The functions of a mortgage bond. (3)
- c. Ways of separating mineral rights from landownership. (4)

ANSWER

- a. Guidelines laid down in *Van Rensburg v Coetzee 1979 (A)* for an application to court for a right of way of necessity:
- the landowner must have no or insufficient access to a public road (landlocked)
 - the court can order a temporary or a permanent way of necessity depending on the need
 - the way of necessity is established over the land where it causes the least amount of damage or the smallest burden for the servient land.
 - the route and width of the road is also established with reference to the least possible damage and the smallest possible burden for the servient land
 - compensation is payable for a permanent way of necessity but not for a temporary emergency way of necessity.
- registration is not required and the limited real right is vested by court order but registration is advised for: legal certainty

(3)

b. Functions of a mortgage bond:

- it confirms the limited real right of the creditor against the property of the debtor as security for payment of the principal debt.
- it serves as written acknowledgement of the principal debt.
- it records the conditions regarding interest, payment, term and default of the principal debt.

c. Ways of separating mineral rights from landownership:

- notarial cession of mineral rights
- reservation of mineral rights in deed of transfer of land
- exclusion of mineral rights in deed of subdivision of land
- division of mineral rights held in undivided shares by co-owners of land
- reservation of mineral rights in establishment of township on land
- exclusion of mineral rights upon expropriation of land
- acquisition of separate certificate of mineral rights by landowner.

(4)

QUESTION

Explain the following briefly:

- a. How the doctrine of knowledge functions with regard to an unregistered servitude agreement regarding land. (4)
- b. The security established by a notarial bond over movables in terms of the Security by Means of Movable Property Act 57 of 1993.
- c. When the property of a third party (not the lessee) can be subject to the landlord's tacit hypothec.
- d. How customary land-use rights have been affected by the *apartheid* policy, and the effect of the Constitution on this situation. (4)
- e. The *huur gaat voor koop* rule. (4)
-

ANSWER

a Doctrine of knowledge: (*Grant v Stonestreet and Hassam v Shaboodien cases*)

- a limited real right (servitude, mortgage) over immovable property must generally be registered to establish it as a real right; before registration there are only personal (contractual) rights.
- personal rights are generally enforced against the other contract party only, and therefore not against a new landowner if the land is sold before registration

in terms of the doctrine of knowledge the new landowner is held to the contract (and thus forced to cooperate in having the servitude or mortgage bond registered, whereby a limited real rights is created) if she was aware of the existence of the contractual right when she bought the property.

- this is done to prevent fraud, because if the new owner could pretend that she were unaware of the personal right she would be defrauding the beneficiary of the limited real right. (4)

b Security of notarial bond over movables:

- generally real security over movables is only established through delivery of a pledge object to the pledgee.
- the Security by means of Movable Property Act 57 of 1993 allows for real security by way of a fictitious pledge, without delivery of the movables.
- the Act relates only to corporeal movable property which is described in the notarial bond in such a way that it can be identified

if a notarial bond over such movables is registered it provides the mortgagee with real security as if the movables had been pledged and delivered.

(4)

c Landlord's tacit hypothec over property of third parties

- normally landlord's tacit hypothec vests over movables of lessee on premises as soon as rental is in arrears, but in *Bloemfontein Municipality* case this was extended to property of third parties on the premises if certain requirements are met

property must be on premises with knowledge of the actual owner (third party)

property must be on premises with degree of permanency and not temporarily

property must be on premises for use of lessee

landlord must be unaware of fact that property belongs to third party and not to lessee (4)

Customary land-use rights and *apartheid*, effect of the Constitution:

- customary land-use rights have been curtailed and changed by apartheid laws, generally devalued
 - main results were overcrowding, lack of security in land-rights, no development of stable land-use patterns, even traditional customary land use rights were undermined and hollowed out, eg: by homeland policy and migrant labour system
- constitution requires maintenance and improvement of customary law to fit in with ideals of Constitution.
- this requires improvement of customary land-use rights through courts and legislation, improvement of security, restitution, redistribution as foreseen in RDP
- certain new laws (Labour Tenants, Restitution of Land Rights, Communal Property) have already been introduced. (4)

Huur op lat voor koop rule (Genna-Wae case)

- short-term lessee does not have limited real right which is valid against new owners, so that lessee can in principle be evicted by every new landowner
 - to improve situation the rule was formulated, means that sale of leased land does not terminate the lease
 - the new owner is substituted for the old lessor by operation of law.
 - the new owner acquires all the rights and duties of the old lessor, including the duty to allow the lessee to continue the lease as long as she pays the rent and observe all her obligations under the lease
- the lessee is also bound by the lease and cannot select to terminate the lease when the property is sold. (2)

QUESTION

Mr John Mahlaba concludes an agreement with his neighbour, Ms Jenny Johnson, in terms of which Ms Johnson acquires the right to use a dirt road over Mr Mahlaba's farm. This road allows Ms Johnson to take a short cut from her own house to a dam on a distant part of her own farm, instead of travelling the long way over her own land. The intention of the parties is that the agreement shall eventually be registered as a praedial servitude, but before registration takes place Ms Johnson dies. Her son, who inherited the farm, wants to use the road over Mr Mahlaba's farm as an access road from the national road to the dam, where he wants to develop a recreational resort for motor-boat enthusiasts. While the attorneys are still

struggling with Ms Johnson's estate, Mr Mahlaba sells his farm to a Ms Yengeni, who refuses to allow Mr Johnson to use the road. Ms Yengeni locks the gate giving access to the road from the Mahlaba farm, and then asks you for legal advice. Refer to case law in your explanation. (15)

ANSWER

In this section you can explain that there is no servitude prior to registration, and that Ms Johnson acquired nothing but personal rights deriving from the agreement. These rights do not establish real burdens upon the land itself and are enforced against Mr Mahlaba only; therefore new owners like Ms Yengeni are not bound. The exception is the doctrine of knowledge, which means that Ms Yengeni could be bound to the contract as if she were a party to it if she knew about it before buying the property - explain this aspect in full. The implication is, if she had knowledge, that she will be bound to cooperate in registering the servitude as intended. (*Grant v Stonestreet and Hassam v Shaboodien*). (Doctrine of Constructive Notice/knowledge)

Exercise:

Even if Mr Johnson can prove a right to have the servitude registered he may only use it in a manner which is reasonable and commensurate with the original servitude. You can discuss this question briefly: is the intended use of Mr Johnson reasonable in view of the servitude agreement? (*Brink v Van Niekerk*)

QUESTION 7

A client of your firm, Ms Mokoena, asks for your advice. She is the owner and manager of a transport firm that specialises in transporting heavy machinery in the Gauteng area. At the beginning of 1995 she bought a new truck for the business from Monster Motors. Since she did not have the ready cash to pay for the truck, she agreed to sell her other two trucks (which have been paid for in full already) to Monster Motors, who then leased these two trucks back to her at a fixed rental per month. The purchase price of the two older trucks was then used to pay for the new truck, and the monthly rental of the two old trucks

constituted repayment of the sum involved plus interest. Both parties were happy with this arrangement, and the business was going well, until Ms Mokoena discovered that Monster Motors was in danger of going bankrupt. She is worried that she might lose the two trucks. Advise her of her legal position, with reference to case law.

ANSWER

QUESTION:

Advise Ms Mokoena of her rights, with reference to case law.

Legal question:

- a. What is the legal relationship between Ms Mokoena and Monster Motors with regard to the two older trucks?
- b. More particularly, did Monster Motors acquire ownership of these trucks?
- c. Will Ms Mokoena lose the trucks if Monster Motors are liquidated?

Pledge:

The first real issue is the nature of the transaction by which Ms Mokoena and Monster Motors structured the financing of the purchase of the third truck. The question is whether she really sold (and delivered by *constitutum possessorium*) the trucks and then leased them back, or whether it is perhaps a simulated transaction which hides from view the real transaction, which is a moneylending transaction, secured by a pledge without delivery. If it was a sale Monster Motors are the owners of the trucks and she is no more than a lessee, who will have no right to the trucks if Monster Motors is liquidated. If it was a simulated transaction the court will acknowledge the real underlying transaction, which was a moneylending transaction, secured by way of an invalid pledge (without delivery). In that case Ms Mokoena remained the owner and can defend herself against the liquidators, especially if she can repay the loan. In other words, the question indirectly concerns the requirements for a valid pledge. Discuss the issues more fully with reference to the *Quenty's Motors* case, in which the courts' general mistrust of delivery by way of *constitutio possessorium* or a pledge is explained more fully.

BRIEF ANSWER

The legal issue in this question is whether ownership in the two trucks has been transferred from Ms Mokoena to Monster Motors. On the facts the only possible way in which ownership can be transferred is by means of constructive delivery in the form of *constitutio possessorium*. Ownership is transferred without the things (ie: the two trucks) being actually delivered to the transferee. Transfer takes place merely by means of a change of intention of the two parties in respect of ownership. The things remain in the possession of the previous owner (Ms Mokoena) who exercises physical control for and on behalf of the new owner (Monster Motors). The main problem with *constitutio possessorium* is that it can result in a simulated contract of sale. Examining the facts, it appears that Ms Mokoena and Monster Motors have entered into a simulated contract of sale. The true intention of the parties was to enter into a pledge agreement. However a necessary condition of pledge requires actual physical delivery. By disguising the contract of

pledge as a simulated contract of sale, the parties intend to pass the requirement of actual physical delivery of the things (the two trucks) by representing it as delivery by *constitutio in rem*. According to *Vasco Dry Cleaners v Twycross 1979 A* and *Quenty's Motors (Pty) Ltd v Standard Credit Corporation 1994 (A)* the courts will not recognise simulated contracts of sale and will look behind such contracts to the true intention of the parties. The true intention of the parties in the problem case is to enter into a contract of pledge, therefore no ownership has been transferred from Ms Mokoena to Monster Motors. If Monster Motors goes bankrupt, Ms Mokoena can recover her two trucks with a *rei vindicatio*.

QUESTION

Your client Mr Muller was involved in an accident in which his classic Volkswagen Beetle was damaged extensively. The car is insured with Super Hassles Insurance Co, who agreed to have the car repaired by Crash Kings CC, a repair company who offered the lowest quote for the repairs. Mr Muller took the car to Crash Kings CC, gave them instructions to do the repairs, and collected the car two weeks later with the cheque from Super Hassles Co. While collecting the car Mr Muller noticed that Crash Kings CC were stocking lovely new aluminium rims for Volkswagens, and he instructed them to fit the car with new rims. However, in the meantime Super Hassles Co discovered that Mr Muller's insurance premiums were not fully paid, and they cancelled the insurance policy and collected the car (with the new rims, which they paid for to get the car) from Crash Kings CC. Mr Muller wants to reclaim the car from Super Hassles Co, but they claim to be exercising an enrichment lien for necessary improvements to the car. Advise Mr Muller of his rights, with reference to case law.

ANSWER

QUESTION:

Advise Mr Muller of his rights, with reference to case law.

Legal Question:

- a Can Mr Muller reclaim his car?
- b Can Super Hassles reply with a claim to an enrichment lien?

Owner's claim:

Can Mr Muller claim the car back? He will use the *rei vindicatio* - note the requirements: briefly. He should be able to prove all the requirements.

Defence:

Can Super Hassles establish an enrichment lien? Here you have to discuss a number of points:

- (i) What is an enrichment lien, and what does it mean?
- (ii) What are the requirements?

(iii) Does Super Hassles satisfy the requirements? The main requirement is that there must be proof of enrichment for a claim to an enrichment lien, and here the cases of *Singh v Santam Insurance* and *Buzzard Electrical* are both important to indicate that Super Hassles cannot prove enrichment while they were in control, or at least not enrichment at their expense, or at least that the enrichment there might have been (the new rims) were the result of luxurious improvements contracted for by Mr Muller and for which he is liable to pay. The relevant case law indicates all the issues and provide the answers, and a full discussion of the issues with reference to the *Singh* case should be sufficient. (*Singh v Santam Insurance* and *Buzzard Electrical* cases).

BRIEF ANSWER

An enrichment lien is a lien which secures payment of a debt incurred by way of unjustified enrichment and which is therefore a real burden on the property and can be enforced against the owner. In *Brooklyn House Furnishers v Knoetze and Sons 1970 35A (A)* three kinds of enrichment liens can be distinguished -

- a. Salvage liens incurred for necessary expenses (a real right)
- b. Improvement liens incurred for useful expenses (a real right)
- c. Debtor-Creditor liens incurred for luxury expenses (a personal or creditors right).

The facts of the problem are similar to *Singh v Santam Insurance 1997 (A)*. Superior Hassles Insurance Co will be denied their claim based on an improvement lien since they were not in control or possession of the car when the repairs were effected. No further repairs were incurred once the insurance company obtained control of the car and therefore Superior Hassles cannot establish a salvage lien for necessary expenses. Superior Hassles might be able to claim for the expense incurred on the new aluminium tires as these are luxury expenses and therefore a debtor-creditor lien based on a contractual agreement.



LIMITED REAL RIGHTS
ASSIGNMENT QUESTIONS

QUESTION

X is the owner of a piece of land with no direct access to any public road. X, however, has temporary access to the public road by way of a farm road that crosses Y's land. Y plans to erect stables on the land across this farm road. This will have the effect that in future X will have no access to the outside world. X wants to apply for a way of necessity over Y's land. You are X's lawyer. Advise her in this regard with reference to case law.

NOTE: Include a paragraph outline that demonstrates the planning of your final answer. Right at the outset you should state in one short sentence the legal question or problem. (15)

ANSWER

Paragraph outline

Intro

Par 1 Facts of Van Rensburg case

Par 2 Facts of Van Rensburg case

Par 3 Application to facts of problem

Concl

ANSWER

If a landowner does not have access to a public road and the existing access is essentially insufficient, he can ask the court to grant him a way of necessity. The basis of the court's power to grant such an order can be found in the fact that the owner of so-called land locked property has a claim to such a link with the nearest public road.

In the Van Rensburg case the facts are similar to the facts given in the question. In the Van Rensburg case the appellant is a farmer and owner of a farm which has no direct access to either of the two public roads in the vicinity. Temporary access to one of the roads was terminated, and the appellant applied for a right of way of necessity over the land of the respondent. Initially the application was dismissed. In this authoritative decision on appeal the court sets out the principles and procedures governing this kind of servitude.

In Van Rensburg V Coetzee the following important guidelines regarding way of necessity were established:

- a Registration of a right of way of necessity against the title deed of the encumbered land over which the way of necessity must be granted can only be done on the basis of a court order

- (b) Trespassing on another's land prior to the granting of an order of court (which authorises the way of necessity), is unlawful.
- (c) A way of necessity can be established for use in emergency situations only (ius viae precario) or use on a continuous basis (ius viae plenum). In the latter case compensation will have to be paid.
- d. With the identification of the tenement to be burdened by the way of necessity, the principle of ter naaste lage en minster schade applies, in other words, the least burdensome route over the nearest land between the land-locked tenement and the public road must be chosen.
- e. The same principle applies with regard to the determination of the route and the width of the way.
- f. Reasonable compensation must be paid in the case of a ius viae plenum (a way of necessity used on a continuous basis).
- g. Although registration is not a constitutive requirement either for the establishment of the way of necessity or for enforceability against third parties, the court recommends that it be done.
- h. A plaintiff must prove necessity and reasons why the way of necessity should encumber the defendant's land and must also present evidence concerning the motivated width of the claimed way, the recommended
- i. After the court has decided that there is indeed necessity, it will determine the width of the way of necessity concerned as well as fair compensation.

In the light of the above, a way of necessity can be established for use in emergency situations or for use on a continuous basis. In the latter case compensation will be paid.

QUESTION

X leases a house from Y. In the premises of X, the following things are present:

- (a) a CD player that X bought and has paid off - worth R1000,00
- (b) a computer that belongs to X's employer, Q, and that he was using at home without Q's permission - worth R2000,00
- (c) an antique statue that X built into the entrance hall without Y's knowledge - worth R 500,00.
- (d) a lounge suite that X is borrowing from his sister for an indefinite period-worth R500-00

(e) a set of golf clubs belonging to X's son - worth R500-00

(f) a racing bike that X won at a marathon - worth R1000-00

X is four months behind with the payment of the monthly rent of R1000-00. You are Y's lawyer. Advise her about her rights and remedies, with references to case law.

NOTE: Include a paragraph that demonstrates the planning of your final answer. Right at the outset you should state, in one short sentence, the legal question or problem

ANSWER

Legal question

What things can be the object of a tacit hypothec of a lessor?

Paragraph outline

Intro legal question

Par 1 What is a tacit hypothec of the lessor?

Par 2 Application

ANSWER

The legal question that needs to be answered here is: What things can be the object of a tacit hypothec of a lessor?

The tacit hypothec of the lessor is granted by operation of law and is created whenever and as soon as the lessee is ⁱⁿ arrears with the payment of rental. The hypothec applies to rental in arrears only, and as soon as it is paid the hypothec is terminated automatically. All the lessee's movables *invecta et illata* present on the leased premises form the object of the hypothec. If the property of the lessee is insufficient to cover the rental in arrears, the property of third parties present on the premises is also affected by the hypothec. The following requirements for the application of the hypothec to the property of the third parties were enumerated in *Blenfontein Municipality v Jackson*.

in arrears

- a The property must be on the premises with the consent explicit or implied of the third party.
- b The presence of the property on the leased premises must not be of a merely temporary nature.
- c The property must be there for the use of the lessee himself and not that of his family or his guests.
- d The lessor must not have waived his right to the property.

The lessor may attach a) and (b) but seeing that the rental in arrears exceeds the value of these objects, Y may also attach movable property of third parties present on the premises, subject to the requirements as set out in the Bloemfontein case.

The following items mentioned in the question cannot be attached, for the reason given in each case:

- b) The computer is on the premises without the owner's permission and Y cannot attach it.
- c) Y may only attach movables, and the statue seems to be built into the house permanently.
- d) The things must be on the premises on a permanent basis, thus Y cannot attach the lounge suite, which was borrowed from X's sister.
- e) The things must be on the premises for the use of the lessee. Y cannot attach the property of X's son.

QUESTION

X grants her neighbour Y the right to use a short cut dirt road over X's land to the national road. The agreement is never registered. Y sells her land to a building contractor. As Z's business grows, her lorries damage the dirt road over X's land, and Z demands that X maintain the road. Discuss the rights and duties of X and Z in full.

ANSWER

In the case of unregistered servituted agreement there are problems with regard to both the legal nature of the rights concerned and their legal consequences. In the case where Y (the owner of a future dominant tenement), and X (the owner of the future servient tenement) conclude a servituted agreement that is not subsequently registered, the following can occur:

- 1. Inter partes X is bound by the agreement and she is obliged to endure Y's exercise of her entitlement, to co-operate in the registration of the servitude and to compensate Y for damages (if any) which may result from her refusal to do so.
- 2. Where Y sells her land before registration to Z, X is not bound as set out in 1, above, since there is no servituted agreement between X and Z. However, should X sell her land before registration to Z who has no knowledge of the servituted agreement (a situation that is not envisaged in the question), Z would not have been bound as set out in 1, above. Should Z, however, have had actual or constructive knowledge of the agreement, she would have been bound in terms of the doctrine of knowledge.

3. Where X sells her land before registration to Z who has knowledge of the agreement, Z would be bound in terms of the doctrine of knowledge.

4. Where X sells her land before registration to Z who has knowledge of the agreement, Z would be bound in terms of the doctrine of knowledge.

- a. An order to compel the owner of the future servient tenement to co-operate in the registration procedure.
- b. An order to compel him to grant servitude entitlements to the owner of the future dominant tenement in the meantime.
- c. A delictual claim for damages.

The buyer of the future dominant tenement, who only becomes aware of the unregistered encumbrance after she has concluded the contract of sale, has two choices:

- a. She can enforce the contract of sale and claim compensation.
- b. She can cancel the contract of sale and claim damages.

QUESTION

The requirements for the application of a landlord's hypothec to property belonging to third parties were set out *Bloemfontein Municipality v Jackson* 1929 AD 266. Briefly explain these requirements. (10)

ANSWER

This decision sets out the requirements for the enforcement of a landlord's tacit hypothec for rent in arrears with regard to movables not belonging to the lessee: (a) the goods must be on the premises with the (explicit or implied) consent of the third party of whom they belong; (b) the intention must be that they should remain there permanently or indefinitely and not merely temporarily; (c) the property should be on the premises for the use of the lessee; (d) the lessor must be unaware of the fact that the property does not belong to the lessee, and the owner, being in a position to inform the landlord of his ownership, must fail to do so.

In this case the court decides that the implied consent of the owner of the furniture must be deduced from the fact that it failed to force the purchaser to keep it informed of the address at which the furniture is kept, and its failure to take steps to protect its own interests in the furniture under the circumstances indicating that it should have been aware of the removal of the furniture from the original premises and of the purchaser's financial difficulties. The court also finds that property bought in terms of a hire-purchase contract and kept on the leased premises may be presumed to be there permanently or indefinitely, since it is destined to become the property of the hire purchaser.

QUESTION

Name the main similarities and difference between praedial servitudes and personal servitudes.

ANSWER

The main similarities between praedial servitudes and personal servitudes are:

- a The holder of the servitude acquires a limited real right which he can enforce against third parties with, among others, a real remedy.
- b No positive act can be demanded from the owner of the encumbered thing.
- c Nobody can obtain a servitude on his own land.
- d According to the maxim *servitus esse non potest* (a servitude cannot be the object of another servitude) the holder of the servitude cannot transfer his limited real right to a third party.
- e Servitudinal entitlements must be exercised reasonably (*civiter modo*). The criterion is that of a reasonable man (*bonus paterfamilias*).

The main differences between praedial servitudes and personal servitudes are the following:

- a In the case of praedial servitudes two tenements are involved: the dominant tenement and the servient tenement.
- b In the case of praedial servitudes the holder of the servitude obtains the limited real right in his capacity as the owner of the land, and in the case of personal servitudes he obtains it in his personal capacity and his ownership of the land is irrelevant.
- c Praedial servitudes can only be established with regard to immovables whereas personal servitudes can be established with regard to movables and immovables.
- d When the ownership of the servient tenement is transferred the burdenance deriving from the praedial servitude passes automatically to the new owner; in the same way the limited real right which can transfer passes to the new owner of the dominant tenement.

Praedial servitudes are in principle perpetual, but personal servitudes (except for the *usufructus*) lapse upon the death of the entitled person. The *usufructus* lapses after a hundred years or, in the case of a servitude, subject to a condition, after a shorter period.

QUESTION

Answer the following questions regarding mineral rights.

- (a) What are mineral rights?
- (b) Enumerate six methods whereby mineral rights can be acquired independently of ownership of the land in question.
- (c) How does the transfer of mineral rights take place?

ANSWER

(a) Mineral rights are limited real rights that entitle the holder thereof to prospect for the mineral in question, to mine it and dispose of it at will once it is separated from the land in which it was found.

(b) The *Deeds Registries Act 47 of 1937* provides for five methods whereby mineral rights can be acquired independently of ownership of the land in question.

(1) Cession of the mineral rights from the landowner to a third party by means of a notarial deed (section 70(1)).

(2) Reservation of mineral rights in deed of transfer in favour of the transferor (section 71).

3 Exclusion of mineral rights in deed of subdivision of land in co-ownership (section 73).

4 Division by means of notarial deed of mineral rights owned by undivided shares by a number of people (section 73(1)).

5 Acquisition of a certificate of mineral rights by the landowner with regard to all mineral rights held in terms of the title deed declaring him to be the registered landowner (section 70(5)).

6 Preservation at the time of township establishment (section 70(2)).

Exclusion of mineral rights at the time of expropriation of the land concerned (section 70(3)).

Transfer of mineral rights to a third party by a notary public or a magistrate, or by a court of law, if the mineral rights are already vested in the landowner, or if the mineral rights are already vested in the landowner, or if the mineral rights are already vested in the landowner.

QUESTION

Answer the following questions regarding usufruct.

- (a) Define usufruct.
- (b) What is the content of usufruct?
- (c) Enumerate five obligations of the usufructuary.
- (d) How can usufruct be established?

ANSWER

- a. Usufruct is a personal servitude which grants the usufructuary a limited real right to use the thing of another and the fruits thereof with the obligation to eventually return the thing essentially intact to the owner.
- (b). The usufructuary is entitled to use and enjoy the thing. by collecting (*perceptio*) the natural fruits of the thing (for example the fruit from trees or the wool of sheep or a crop from the fields) he becomes the owner thereof. If he has a usufruct on an investment, he becomes the owner of interest merely by separation (*separatio*) interest is known as civil fruits (*fructus civilis*). In contrast to inconsumables where the usufructuary only becomes the owner after collecting the fruits (*perceptio*) he becomes the owner of consumables (for example a flock of sheep) at the moment when the usufruct is created.
- c. The usufructuary has the following obligations.
 - i. After the usufruct has lapsed, he must return the thing to the owner substantially intact. This maxim (*Salva rerum substantia*) implies that the thing must be delivered in its original form. In the case of the consumables (*res consumptibiles*) like the flock of sheep. The obligation to return implies that things of equal quality and quantity be returned to the owner.
 - ii. He has to maintain the thing with the necessary *curam invidiam modo*.
 - iii. He must draw up an inventory of all the things subject to the usufruct.
 - v. The owner can exempt of the usufructuary, either at the establishment of the usufruct or subsequently by private security. This guarantees that the usufructuary will be able to return the thing intact after the usufruct has lapsed.

He is responsible for all expenses necessary for the maintenance of the usufruct object. In this regard it is sometimes said that he must act like a *bonus paterfamilias*. This includes all expenses necessary for the safekeeping and maintenance of the thing (that is, both necessary and useful expenses), for example rates, painting of a house and veterinary costs in the case of livestock. He himself is responsible for luxury expenses such as a swimming pool on a farm. Only in this case of extraordinary expenses (*graviores expenses* - like rebuilding walls which were disintegrating) will the usufructuary have an enrichment claim against the owner. If, however, the owner agreed to these expenses even before they were incurred, they can simply be claimed when the usufruct lapses.

d There are mainly six ways in which servitudes can be established.

- i Registration in terms of the Deeds Registries Act 47 of 1937.
- ii Prescription in terms of the Prescription Act 63 of 1969.
- iii An order of court.
- iv A state grant
- v Statutory expropriation by a competent authority.
- vi Delivery in the case of a personal servitude over movables

LAND AND REFORM

QUESTION

Name and explain the different land reform programmes of the government very briefly.

ANSWER

The Restitution of Land Rights Act 92 of 1994. This act was promulgated in terms of Sections 211-213 of the 1996 Constitution. It is aimed at restoring land rights to people that were dispossessed after 1994 in terms of the old apartheid policy. Section 211 makes provision for a Commission on the Restitution of Land Rights which will investigate and identify land claims and advise on the way in which these claims can be solved. The Commission is to be made up of members that represent the land of the people of compensation of land is considered to be impossible or not desirable to do so. The and

The Development Facilitation Bill of 1994. The aim of this bill is to promote the redistribution of land. This will be done by making land available more quickly and cheaply. The bill attempts to do this by taking into account the various factors pertaining to physical planning. These factors include among others, matters pertaining to land tenure, conservation, procedures for the development of land and so on.

The White Paper on Housing of 1994. This White Paper set out a broad policy framework for the provision of housing in the future. It also touches on land reform matters. A white paper is a policy document in which a government explains its policy on a specific issue before it is passed as an act.

The Land Reform Pilot Programme of 1995. This programme is the first step undertaken by the government towards the redistribution of land. In every province a piece of land is given to a participating community. The community is then assisted with the planning and the creation of an infrastructure.