Unit 2: REAL RIGHTS AND PERSONAL RIGHTS

- Importance of distinction
- Forms of real rights
- Cases where distinction is problematic
- Theoretical approaches
- “Subtraction from the dominium”- test
Prescribed work

This unit is based on Chapter 3 of the prescribed text book as well as the cases of:

• Ex parte Geldenhuys 1926(OPD)155[2]
• Cape Explosive Works Ltd & A v Denel & O 2001 (3) SA 569 (SCA)
• Pearly Beach Trust v Registrar of Deeds 1990 (4)SA 614 (C) [1]

as in case book
LEARNING OUTCOMES

After studying this unit the learner must be able to:

• **Explain** the basis of the distinction between real rights in terms of the **classical and personalist theories**, including criticism of these theories.

• **Explain** the basis of the distinction between real rights and personal rights in terms of the ‘**subtraction of the dominium**’ – test, with reference to case law.

• **Differentiate** between ownership and limited real rights.

• **Differentiate** between an **obligation-creating agreement and a real agreement** with the help of an example.
BACKGROUND

- Importance of distinction
  - Acquisition, exercise and protection differs
  - See example of assets
- Forms of real rights
  - "rights in property" created by Constitution
  - Ownership most complete real right
  - Limited real right
  - Limited right to specified uses of someone else’s property
  - E.g. servitudes, real security rights
  - Problem only regarding limited real right
Cases when distinction is problematic

- limited real right v personal right
- corporeal property
- immovable property
- created in a will or contract
THEORETICAL APPROACHES

- **Classical theory**
  - look at object of right: thing v performance
  - real right: right of a person in a thing
  - personal right: right of person against person

- **Personalist theory**
  - Way they are enforced
  - Real right: absolute - against the whole world
  - Personal right: relative – specific person
Ex parte Geldenhuys

SUBTRACTION FROM THE

DOMINIUM-TEST

• Problems with registration of rights
  – time and manner of subdivision
  – (co-owners freedom to decide how and when to subdivide)
  – payment of money

• Formulation of the subtraction test
  – nature and effect of obligation
  – intention merely a clue
SUBTRACTION FROM THE DOMINIO-TEST (continued)

- real right: “burden upon land”
  - Diminishes ownership (co-owners normal entitlements to subdivide)
  - in capacity as owner, subsequent owners are bound
- personal right: ”burden upon person”
  - In personal capacity (once off payment to reset the balance)
  - Successors in title not bound
- obligation to pay money
- intention of the parties important clue
Lorentz v Melle

• according to contract divided into 3
• township development
• application: must restrict owner’s physical use of land
• Narrower and more restricted application of test
• obligations to pay money
  - never a real right
  - must restrict physical use of land
• intention of parties disregarded (refer Denel)
Pearly Beach Trust v Registrar of Deeds

• Application
  - traditional application of test
  - restricts right to dispose of property and enjoy full fruits of such disposal
• obligation to pay money: criticized
  – direct product of land
  – reduce owner’s benefit of use and enjoyment
• intention of the parties
  - weight attached
Cape Explosive Works Ltd & A v Denel & O

• Facts
  – Condition 1 use restricted
  – Condition 2 inform and repurchase
• Real agreement (did you know what you bought?/ 2\textsuperscript{nd} condition not transferred/ both rescinded on some part of the land)
  – Negative registration system
  – Omission does not negate condition
Application of test

• Requirements for real right
  - intention of creator to bind successors in title
  - nature of the right must be a “subtraction from the dominium”
• 2 conditions seen as a whole (closely bound)
• Judgement: real right created
Unit Assessment

- Indicate in what manner
  - a) the personalist theory
  - b) and the classical theory distinguishes between real and personal rights. Do either of these theories provide satisfactory results in practice?
- What are the main arguments for and against recognising an obligation to pay money as a limited right? In your answer refer to case law.
- Explain the formulation of the subtraction from the dominium test with reference to the case of Ex parte Geldenuys 1926(O).
Can the following provisions be registered? Give reasons for your answer and refer to case law.

- The provision in a deed of transfer that the seller and his legal successors will have the right to use a dirt road on the buyer’s adjacent piece of land.
- A provision in a will that the testator’s oldest son will have a right of usufruct on his farm.
- A provision in a contract of sale in terms of which the purchaser had to inform the seller if the land was no longer used for the stated purpose, so that the seller could exercise their right of first refusal to repurchase the land.