

Servitudes and Encroachments

By **Frans Maletse** (Senior Associate),
and **Khanyisile Thobane** (Candidate Attorney)

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INTRODUCTION

Ownership affords an owner a complete real right that can be exercised. However, limitations to this right exist. Many are familiar with Constitutional limitations as well as Public law limitations (such as municipal by-laws and zoning restrictions). A third category of limitations is found in Private law moreover, Neighbour law which encompasses a collection of principles which regulate the relationship between neighbours.

SERVITUDES

A servitude is a limited real right that entitles its holder either to use and enjoy another person's property or to insist that the owner of the other property refrain from exercising certain entitlements over their property that they would have been able to exercise if the servitude did not exist. This means that the holder of the right is granted a limited right over the property¹. There are two types of servitudes, Personal and Praedial servitudes.

PERSONAL SERVITUDES

Personal servitudes are servitudes registered over immovable property in favour of an individual. An example of a personal servitude is a usufruct. Simply put a usufruct allows for the use and enjoyment of property owned by one in favour of another (the usufructuary): A husband dies and bequeaths his property to his children however he grants his wife a usufruct (the use and enjoyment) over the property where, upon her death, his children will become owners of the property.

PRAEDIAL SERVITUDES

Praedial servitudes are servitudes registered over one immovable property (the servient tenement) in favour of another immovable property (the dominant tenement). The servitude is registered as a condition against the title deed of the property in the Deeds Registry and will be binding on all current and future owners of those properties. This remains until it lapses (if subject to a certain time period) or cancelled by way of bilateral notarial deed.

An example of a praedial servitude is the right of the owner of the dominant tenement to prohibit buildings on the servient tenement from exceeding a certain height so as to not obscure a view or light.

ENCROACHMENTS

Encroachments occur when one owner uses their land in such a way that creates a permanent physical intrusion on the land of the neighbouring owner². Usually in these circumstances, the use of one landowner causes an emission of effects that invades the effected neighbour's property to such an extent that the proper use of their own property is affected. An example of an encroachment is if a fence or boundary wall of one property obtrudes onto another.

Encroachments can be categorised in the following ways under South African property law³:

1. Overhanging and encroachment of plants and trees
2. Minor and rather insignificant encroachment by buildings
3. Large and quite significant encroachment by buildings
4. Encroachment of rights

Once a homeowner is made aware of the encroachment they are obliged to resolve it either by way of removing/correcting it or registering an encroachment servitude. A homeowner who seeks to resolve an encroachment by way of registration of an encroachment servitude must have a Notarial Deed of Servitude signed by both parties and registered in the Deeds Registry. Parties must be cognisant of who must consent to this registration. The effected property owner must consent, as well as the consent of any person or legal entity whose rights will be infringed upon if a servitude is registered (such as a financial institution which holds a bond over the property or a municipality which already holds a servitude for sewerage pipes underground).

CONCLUSION

Registration of encroachments offer straightforward solutions to sometimes complex problems. It is, of course easier said than done as in reality, communication and interactions between neighbours may easily become stained and neighbourly etiquette is suddenly inconsequential. A discussion with a conveyancer can offer insight to the benefits or pitfalls of the registration of both personal and praedial servitudes.

¹G Muller et al, General Principles of South African Property law (LexisNexis 2019) pg 256

²Muller (n1 above) pg 87

³Muller (n1 above) pg 87



Frans Malete
(Senior Associate)



Khanyisile Thobane
(Candidate Attorney)