

Legal Update

# Legislation relating to the real estate environment

Property Law



Paddocks



ESTATE AGENCY AFFAIRS BOARD  
OF SOUTH AFRICA

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# Property Law - Introduction

- What does “property” mean to you?
  - A thing that I own
  - A thing that is mine
  - A thing that I control and possess
  - A thing that I use and enjoy
- What does “property” mean to lawyers?
  - Law of Things
  - Rights
    - Real Rights
    - Limited Real Rights
    - Personal Rights

# Property Law - History

- South African law is based on a mix of different legal systems and traditions
- Our Common Law is based on Roman Law as practised in Holland at the time of the first European (Dutch) settlers at the Cape of Good Hope (1652 – 1795) – “Roman-Dutch Law”
- Our Common Law is also influenced by English Common Law during the British colonisation (1806)
- Our South African land registration system originates from Roman-Dutch Common Law as from 1529, when taxes were collected at the sale and mortgage of land
- In 1828, the office of the Registrar of Deeds was created

# Property Law – History (continued)

- Grants of farm land were originally made and villages were established on these farms, normally based around a church, which developed the farm into smaller plots, called “erven”. The church retained the land as “commonage”, which was later transferred to local authorities.
- In 1844 Advocates prepared Deeds, however following the introduction of examinations by the Supreme Court, preparation was done by “Conveyancers”, as we know them today.

# Property Law – Types of Title

- Conventional land
  - Nature
    - Land (above and below the earth)
      - *“cuius est solum eius est usque ad coelum”* and *“cuius est solum eius esse debet usque ad coelum”* – owner of land can (in principle) exercise ownership in air above and in ground below their property
    - Permanent improvements / attachments
      - *“superficies solo cedit (omne quod inaedificatur solo cedit)”* – the owner of a parcel of land (principal) is also owner of everything permanently attached (accessory) to the land by accession (*“accessio”*)
    - Accessory objects permanently attached

# Property Law – Types of Title (continued)

- Ownership
  - Conventional Title – registered title to surveyed pieces of land
  - Sectional Title (Fragmented property holding)
    - Sectional Titles Act 66 of 1971
      - In operation from 1973
      - Introduced horizontal strata (deviation from Common Law principles)
      - Defines “land” as a sectional title unit
      - “Section”; “Common Property”; “Body Corporate”; Exclusive Use Area”
    - Sectional Titles Act 95 of 1986 (in operation today)

# Property Law – Land Tenure

- Freehold / Full ownership
  - “*Plena in re potestas*” – owner’s unlimited and unrestricted entitlements of use and control over their property
  - Most complete / absolute right that a person can have in respect of a piece of land
  - Restricted only in so far as the rights of the owner over the land are subject to limitations created by Common Law principles, statutory provisions and other Limited Real Rights
- Quitrent / Erfpag
  - Land granted to individuals by the state
- Leasehold / Huurpag
  - Unlimited period or specified period



# Property Law – Real Rights

- Allocation, use and transfer of land
- “Legal relationships between persons with respect to land”
- Ownership – Case law: Gien v Gien 1979 (T)
  - Definition
    - The most complete real right a person can have with regard to a thing
  - Nature
    - Complete and absolute control over a thing, subject to limitations
- Section 25 (1) Constitution of the Republic of South Africa 108 of 1996
  - Right to property
  - Limitations / Restrictions must be reasonable, justifiable, not permit arbitrary deprivation of property and property rights

# Property Law – Limited Real Rights

- Possession
  - Independent right in land
  - Lawful or unlawful?
- Leases
  - Use and enjoyment of another's land for a specified period
  - Lease Agreements
  - Rental Housing Act 50 of 1999
- Servitudes (*"servitus"*)
  - Limited Real Right burdening another's property by restricting use and enjoyment of such owner in favour of another
  - Praedial Servitude
    - Dominant vs Servient land
    - Servitude of way
    - Servitude of water

# Property Law – Limited Real Rights (continued)

- Personal Servitude
  - Usufruct
  - Right of use (“*usus*”)
  - Right of habitation (“*habitatio*”)
- Real Security Rights
  - Holder of limited real right in property of another to secure payment of a debt by the owner of land
  - Mortgage bond

# Property Law – Ownership

- Assumptions
  - Possession (“*possessio*”)
    - Factual control (“*corpus*”) and will to possess (“*animus possidendi*”)
  - Use
  - Transfer
  - Protection
- Theoretical rights
  - Occupation and Possession
  - Use and Enjoyment
  - Taking Fruits
  - Encumbrance and Alienation
  - Consumption and Destruction

# Property Law – Limitations on Ownership

- Other Real Rights
  - Conditions
  - Statute
  - Agreement
  - Succession (Last Will and Testament)
- Personal Rights
- Statutes
- Neighbour Law
  - Nuisance
    - *“Sic utere tuo ut alienum non laedas”* – Land must be used in such a way that another person is not prejudiced or burdened
    - Reciprocal obligations of reasonable use and reasonable tolerance

# Property Law – Limitations on Ownership (continued)

- Reasonable man – Prinsloo v Shaw 1938 (A) – “normal man of sound and liberal tastes and habits”
- Reasonableness – Rand Waterraad v Bothma 1997 (O)
  - Repetitive or continuous
  - Unusual activity
  - Considered nuisance to “normal person”
  - Location, zoning, habits, effect on health
- Encroachments
  - Types
    - Overhanging or protruding roofs and balconies and physically intruding/encroaching buildings

# Property Law – Limitations on Ownership (continued)

- Overhanging and encroaching trees
- Encroachment on rights
- Remedies
  - Removal of encroachment
  - Compensation to owner
  - Transfer to encroacher and compensation to owner
  - Termination of occupation by encroacher and compensation and compensation by owner to encroacher
- Lateral Support
  - Owner of land entitled to have natural condition, position and topography of land preserved

# Property Law – Limitations on Ownership (continued)

- Sectional Title – lateral and subjacent support
- Natural flow of water
  - Allow water to flow naturally from one piece of land to another according to undisturbed topography of land ie: owner of lower land must allow water to drain or flow from neighbouring higher land
- Avoidance of danger
- Special Sectional Title restrictions
  - Sectional Titles Act 95 of 1986 and Regulations



# Property Law – Removal of Restrictions

- Immovable Property (Removal or Modification of Restrictions) Act 94 of 1965
  - Inheritance of property subject to restrictive condition
- Removal of Restrictions Act 84 of 1967
  - Subdivision of land
  - Land use restrictions
  - Building restrictions
    - National Building Regulations and Building Standards Act 103 of 1977

# Property Law – Protection

- Real remedies
  - High Court
    - Urgency
    - Prohibitory / Mandatory Interdict
    - Declaratory Order
    - Spoliation Order
  - Ejectment
    - Unlawful possession
    - The Prevention of Illegal Eviction from an Unlawful Occupation of Land Act 19 of 1998
- Delictual remedies
  - Recovery of damages suffered
- Enrichment remedies
  - Compensation for unjustified enrichment

# Property Law – Certainty

- Rights vesting in a person other than the registered owner
  - Prescription
    - Prescription Act 68 of 1969
    - Requirements
      - Possession of someone else's property
      - Exercise of servitude
      - Continuously for more than 30 years
      - Without force (*"nec vi"*)
      - Openly (*"nec clam"*)
      - Without owner's consent (*"nec precario"*)
  - Expropriation
    - Expropriation Act 63 of 1975
    - Ownership of land vests in public interest in expropriator

# Property Law – Certainty

- Previous owner's ownership terminated by consent
  - Payment of compensation
- Statutory vesting
- Marriage in community of property
- Insolvency
  - Insolvency Act 24 of 1936
- Death
- Abandonment

# Property Law – Shared Ownership

- Co-ownership (*“communio”*)
  - *“Communio est mater rixarum”* – co-ownership is the mother of all disputes
  - Rights to partition
    - No co-owner is obliged to remain a co-owner against their will
    - Agreement / Arbitrator / *“actio communi dividundo”*
  - Statement of co-owned shares
  - Common Law rules
    - Reasonable use of land
    - No interference or prevention of use of land by another
    - Third parties
    - Share of profits

# Property Law – Shared Ownership (continued)

- Joint exercise of maintenance and proportional contribution to other costs
- Undivided share
- Marriage in community of property
  - Spousal consent
    - “Marital power of husband” - abolished
  - Automatic vesting and dissolution
  - Property excluded from community

# Property Law – Shared Ownership (continued)

- Partnership
  - Deeds Registry
  - Joint ventures
- Time-sharing
  - Property Time-sharing Control Act 75 of 1983
  - Facilities, floating and pooling
  - Legal basis
  - Operation

# Property Law – Indirect and Linked Ownership

- Companies
  - Companies Act of 71 of 2008
  - Non-profit “NPC”
  - Profit
    - Public “Ltd”
    - Private “(Pty) Ltd”
    - Personal liability “Inc.”
    - Partnership
    - Trust
    - Sole Proprietorship
    - External / Foreign
    - Cooperatives
    - State-owned “SOC Ltd”
- Close Corporations
  - Close Corporations Act 69 of 1984



# Property Law – Indirect and Linked Ownership (continued)

- Trusts
  - Master of the High Court
- Share block Companies
  - Share Block Control Act 59 of 1980
  - Shareholders
  - Personal Rights
- Unincorporated Associations
- Cluster and Homeowners' Associations
  - Registered in terms of the Companies Act
  - Established in terms of the Land Use Planning Ordinance 15 of 1985 (Western Province)
- Communal Property Associations
  - Communal Property Associations Act 28 of 1996
- Time-sharing use rights
  - Property Time-sharing Control Act 75 of 1983

# Property Law – Conclusion

Thank you for your time today. I will now take any questions you may have.

Should you have any queries, please do not hesitate to contact us on 021 686 3950 or email [consulting@paddocks.co.za](mailto:consulting@paddocks.co.za)

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