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
Grants of farm land were originally made and villages were established on these farms, normally based around a church, which developed the farm into smaller plots, called “erven”.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 typography 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

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