



Schaëfer
I N C O R P O R A T E D



Servitudes

SERVITUDES OVER IMMOVABLE PROPERTY AND HOW IT AFFECTS A PROPERTY TRANSACTION

Why is it relevant to property transactions?

Due to the nature of a servitude as being a **real right**, a servitude is always **registered** over a property.

It imposes a **burden on the property** over which it is registered and restricts the owner's rights in favor of another property or another person. The property over which it is registered can also be **entitled** to certain rights over another property. Thus, if you **do not deal with the servitude**, the transfer of the property cannot be finalized.

How do you know if a servitude is registered over a property?

1. **DEEDS SEARCH**- it can be registered as an endorsement over the property and is normally registered as a document with a K no. This means a Notarial deed, separate from the title deed contains the details of the servitude. Therefore by merely perusing the title deed you will not necessarily obtain the details of the servitude;
2. **TITLE DEED**- you need to peruse the title deed to know whether there are any servitudes registered over the property to be dealt with.

How you deal with the servitude depends on the type of servitude:

Servitudes are classified as either **personal or praedial**. You first need to understand the two main types in order to understand the relevance thereof and how to deal with it:

A personal servitude

This servitude is imposed over a property in favour of a **person**.

This person is then entitled to **exercise some right** in the property over which it is registered or it **prohibit the owner from exercising a normal ownership** right in favour of another.

Important to understand is that a personal servitude **cannot be transferred**. They may be constituted for a **fixed term of years or be granted until the happening of a future event or for the lifetime of the beneficiary**, but not beyond his or her death.

The main three personal servitudes are: usufruct, use and habitation:

What is a Usufruct?

In the case of properties, it is a **real right** in terms of which the owner of the property (the grantor) confers on the **"usufructuary"** the **right to use and enjoy** the property over which it is registered.

It furthermore **extends to the accessories** of the thing that is subject thereto. A usufruct over a farm, for example, will normally extend not only to all buildings but presumably also to the livestock, farming equipment and the furniture in the homestead, provided of course a contrary intention does not appear from the will or agreement, as the case may be.

As the usufructuary is only entitled to the **use and enjoyment** of the property he or she does **not acquire the ownership** over it, though he or she is of course entitled to its **possession**.

The usufructuary has no entitlement to **consume and destroy the thing** and is obliged to preserve its substance.

But he or she has the right to take, consume or alienate **its fruits**, whether they are natural, industrial or civil. The obligation to preserve the substance of the property means that the usufructuary is **bound to maintain it and to defray the costs of all current repairs** necessary to keep it in good order and condition, fair wear and tear only excepted, and all rates and taxes.

As the usufructuary is not the owner of the property that is the subject matter of his or her right, he or she **cannot alienate or encumber it**.

Nor may he or she **alienate the real right of usufruct** as a personal servitude is inseparably linked to its holder. In practice you find clients selling their property to use the funds to build a granny flat at the back of their children's houses- if that is the case, advise them to have a usufruct registered over their children's houses to safeguard their interest;

In practice you sometimes find in a will a property bequeath to a spouse with a usufruct in favour of a parent or children.

What is a servitude of "use"?

A servitude of use **resembles a usufruct**, but the holder's rights are far more **restricted**.

He or she may possess and use the thing to which the right relates if it is a movable and **occupy it** together with his or her family and visitors if it relates to land.

The holder may take the **fruits of the thing** for his or her **daily needs** as well as for the daily needs of his or her household, but nothing in excess of that. The holder **cannot sell any fruits**.

Nor may he or she **grant a lease** in respect of a building, though this rule is subject to a number of exceptions. His or her use must be **without detriment to the substance of the property** and he or she may be required to give security for the due fulfillment of his or her obligations.

What is a servitude of "habitation"?

It confers on its holder the **right to dwell in the house** of another together with his or her family **without detriment to the substance of the property**.

Unlike a servitude of use, it carries with it the **right to grant a lease** or sublease to others.

A praedial servitude

This servitude is a **real right registered over the property** and it is not registered in favour of a person but **in favour of another property/land**. Two properties therefor involved, the one receiving a benefit and the other subject thereto.

Examples of rural praedial servitudes that one may find are:

1. Right of way

These may take the form of the right to walk across another person's land or to drive cattle or vehicles across it.

2. Way of necessity

This servitude may be claimed as a right by an owner of land which is hemmed in by other land to such an extent that he or she has no direct or reasonably sufficient access to a public road and is therefore compelled to cross adjoining privately owned land.

3. Water servitudes

This servitude generally grants the person holding the real right the right to draw water from the property over which the servitude is granted. It may also grant the person the right to lead the water across the land in furrows and pipes and also to discharge surplus water or to store water on it.

4. Restrictive conditions

If restrictive conditions are imposed over plots sold in a new township development are also classified as urban servitudes.

As a result of modern building methods and town planning laws which regulates the construction of buildings and general health matters, these servitudes became of minor importance.

Examples of urban praedial servitudes are: -

1. Light,view:

- A servitude of light is a right of access of light from another's land unimpeded by buildings or trees or both.
- A servitude of view is the right to an open view; this restricts the rights of the owner of the servient tenement to impede the view by buildings or trees or both.
- Both may take the form of a right to prevent the owner of the other property from raising the height of buildings on his land.

2. Support:

The servitude of support takes the form of either the right to require one's neighbor to support the weight of one's house or wall or the right to drive a beam into one's neighbor's building.

3. Projection:

A servitude of projection is the right to have a balcony or another projection over a neighbor's land.

4. Water:

An urban servitude of water may take the following forms:

- (a) The right to receipt or non-receipt of dripping rainwater
- (b) the right to receipt or non-receipt of water coming down in a stream and
- (c) the right to have an artificial pipe or canal crossing or issuing on a neighbor's land

5. Restrictive conditions:

Restrictive conditions are by far the most important category of urban praedial servitudes. Restrictive conditions create non-statutory limitations on the use of land inserted by the original township owner, in favour of each and every purchaser of land in the township, as part of a general township scheme and registered in the title deeds of the erven for the purpose of preserving the specific characteristics of the area.

The earliest and most common examples of restrictive conditions are the following:

- (A) Restriction on the subdivision of land;
- (B) Conditions relating to the use to which the stands may be put; and
- (C) Conditions relating to the imposition of further conditions of title.

Conditions of title originating from township legislation usually include the following types of conditions:

- (a) The erf is subject to a servitude for sewerage or other purposes along one or two boundaries;
- (b) No building or other structure may be erected within the servitude area;
- (c) No large-rooted trees may be planted within the servitude area;
- (d) The erf shall be used for the erection of a dwelling house only;
- (e) Not more than one dwelling house together with such outbuildings as are ordinarily required to be used in connection therewith shall be erected on the erf

Purpose of restrictive conditions in title deeds

From these examples it is clear that restrictive conditions can play a definite role in determining the character of a specific township, and that they have certain economic implications.

How are servitudes created?

Both praedial servitudes and personal servitudes are normally created by agreement between the owners of the respective properties, followed by registration.

If you as agent want to ensure that a servitude (for instance a usufruct) is registered, you bring it in as a special condition in the contract. "this contract is subject to the registration of a personal servitude of usufruct to be registered over the property by the purchaser in favour of....."

The conveyancer will then bring this condition forward in the power of attorney to pass transfer and from there as a condition in the title deed in terms of section 67 of the Deeds Registries Act 1937.

If the property is already registered in the name of the purchaser or the one granting the servitude, then you need to register a notarial deed accompanied by an appropriate endorsement against the title deed of the property in respect of which the servitude is granted.

How are servitudes cancelled?

Both praedial servitudes and personal servitudes can be cancelled by notarial agreement between the owner of land encumbered by the servitude and the holder of the servitude by Bilateral Notarial Deed of Cancellation (i.e. in the case of a usufruct, both the owner and the usufruct must sign for the cancellation) or Unilateral Notarial Deed of Cancellation, if no obligation is imposed.

A personal servitude also lapses where it is granted for a specific period only or on the death of the holder of the servitude. An application is lodged in the deeds office with a copy of the death certificate to cancel the personal servitude.

When a servitude is cancelled, a transfer duty receipt needs to be lodged due to the fact that the cancellation of a servitude over a property increases the value of the property and thereby attracts transfer duty in certain circumstances.

How are praedial servitudes for instance restrictive conditions of title, changed or cancelled?

- (a) By agreement;
- (b) By application to court, either ex parte or on notice;
- (c) In terms of the Immovable Property (Removal or Modification of Restrictions) Act 78, a beneficiary, interested in immovable property subject to any restriction imposed by means of a will or other instrument, may apply to the High Court for its removal or modification;
And also in terms of the SPUMA Act.
- (d) the Administrator has the power to alter, remove or suspend certain restrictions or obligations binding an owner of land situated in his or her province; the Minister of Public Works may, in terms of the State Land Disposal
- (e) Act, 81 consent to the amendment or cancellation of any condition embodied or registered in a title deed;
- (f) In terms of the Subdivision of Agricultural Land Act 82 the Minister of Agriculture may impose, cancel or vary conditions imposed by him or her; (g) in terms of the Development Facilitation Act, 83 servitudes and restrictive conditions may be suspended and removed by a tribunal, if necessary for land development and where suspension of these servitudes and restrictive conditions would unnecessarily delay the development of the land;
- (h) Where a less formal township is envisaged or established, the Premier may suspend servitudes and conditions of title where these servitudes or conditions are inconsistent.
- (i) With the development of the land or cancellation of the servitude or condition in accordance with formal procedure will delay the opening of the township;
- (j) In terms of the Advertising on Roads and Ribbon Development Act, 85 upon written application by the registered owner of land the Registrar of Deeds is under certain circumstances empowered to cancel a condition inserted in the title deed;
- (k) Provision is made in the Transfer of Certain Rural Areas Act 86 for the removal of restrictive conditions which relate to the period for which a land right was granted or the alienation or transfer of land; and
- (l) Provincial legislation contains (or will contain) procedures to remove restrictions on the subdivision of land or the purposes for which the land may be used.

