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Articles and Recent Cases:

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We trust that you will find the content of this email flyer to be of interest.

1. Changing face of our law (Law of Servitudes)

Servitudes are a right which one property owner holds over a neighbouring property. A common example is a right of passage or pipeline or stormwater servitudes. The servitudes are registered against the title deeds and binding on successive owners in perpetuity.

In the recent case of *Linvestment CC vs Hammerlsey (SCA)* February 2008 the Supreme Court of Appeal had to grapple with whether a property owner could vary the terms of a registered servitude without the consent of the holder of the servitude.

The facts of the case are that the appellant applied to Court for an order amending the path of an existing servitude over its property and tendered to pay all costs related thereto to ensure that the amendment of the servitude did not inconvenience or prejudice the respondent.

The respondent refused to agree to proposed servitude amendment and maintained that as a matter of law once a servitude had been registered in the title deeds it was not capable of variation without the consent of both property owners.

The Supreme Court of Appeal (in the form of Judge Jonathan Heher JA) concluded Roman and Roman Dutch authorities held that a registered servitude could not be changed without the mutual consent of both property owners.

Nevertheless the Court accepted the duty and challenge that it was obliged to make and modernise the law from time to time and said that :

"The interests of justice do indeed require a change in our established law on the subject. The rigid enforcement of a servitude where the sanctity of a contract or the strict terms of the grant benefit neither party but, on the contrary, operate prejudicially on the one of them, seems to me indefensible. Servitudes are, by their nature, often the creation of preceding generations devised in another time to serve ends which must now be satisfied in a different environment".

The Court further concluded asking the rhetorical question that:

"Why should a present owner, on no rational ground, be entitled to rely on the sanctity of a contract or a grant of prescriptive acquisition to which he was not ever privy?"

In summary, the Court decided that it is in the interest of justice and in line of international trends to follow a more flexible legal approach and held that if the proposed change is reasonable then the Court may vary or modify the terms of a registered servitude without the consent of the property owner who enjoys the benefit of the servitude.

What comes from this case is that if there is a registered servitude which is operating in a prejudicial and unreasonable manner against a property owner over which it is registered, he may now seek the assistance of the Court. The law is never static!

Andrew Donnelly

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2. Living Together Unmarried – Is it worthwhile?

Nowadays, a large proportion of couples involved in permanent or long-term relationships choose to cohabit before marriage, or not to marry at all. Often this arrangement can lead to the joint acquisition of assets, movable and immovable, as well as the pooling of finances. But what happens when these “partnerships” terminate, be it on death or separation? What happens to the partners' shared financial interests and property? Is there a duty on either party to maintain the other? On death does the deceased's partner have an entitlement to a share in his/her estate?

The draft Domestic Partnerships Bill which is still to be finalised, seeks to address these and other issues arising from two people living together without being married to each other. Contrary to popular belief, there is no such thing as a “common law” marriage in South Africa, and this legislation aims to provide for the legal recognition and consequences of what this Bill terms “a domestic partnership,” or what is more commonly known as living together or cohabiting.

Registered domestic partnerships

The new Bill provides for two different types of domestic partnerships. The first is a registered domestic partnership. This is concluded by two persons over the age of eighteen years and is concluded similarly to that of a marriage, before a person qualified as a registration officer, and once the prescribed documents have been signed a registration certificate is then issued to the parties. A registered domestic partnership provides automatically for a duty of support

between the parties, and this is defined in the Bill as providing for the partner's basic living expenses while the partnership exists.

There is no general community of property in a registered domestic partnership, unlike that of a marriage. However should the parties wish to have their joint or separate property or any of the financial matters pertaining to their partnership regulated, then they are able, in terms of Section 8 of the Bill, to enter into a registered domestic partnership agreement to regulate these matters.

Some other advantages of a registered domestic partnership proposed by this Bill, include that there is a limitation in terms of Section 10 of the Bill, on disposal of any joint property acquired between the parties, in that written consent of the registered partner is required to sell, donate, mortgage, let or lease the joint property. Furthermore, registered partners, in terms of Section 11 of the Bill, have the right to occupy the family home irrespective of which partner owns or rents the property.

Unregistered domestic partnerships

Unregistered partners on the other hand are not given the above rights. However, they are entitled in terms of Section 26 of the Bill, to apply to court on the termination of an unregistered domestic partnership, to have the rights of a registered partnership made an order of court, for example an order made for maintenance payable to one partner by the other, an order for intestate succession of the one parties estate or a property division of the unregistered domestic partnership. Importantly the court must take into account all circumstances surrounding the partnership before coming to a decision on any of these issues, and its decision must be equitable and just, to both parties.

It remains to be seen how the courts will adjudicate on these matters considering that there is no actual criteria mentioned in the definition of a registered or unregistered domestic partnership in the Bill. For example the duration of the partnership is not defined in the Bill, and this leaves the door open to couples who have been together for only a short period of time to apply to court for the division of their property which could result in the court rolls being clogged with unnecessary litigation. There is also no mention of constructive notice to creditors in the Bill, which could also prove to be problematic from a commercial perspective.

So, for those men or women who think that not committing themselves to a marriage gives them a way out in terms of keeping their finances independent from their partner, or not having to run the risk of an open-ended maintenance claim on termination of the relationship,

they will definitely need to start rethinking their positions more carefully. It appears from this piece of legislation that they might be better off in a more regulated partnership such as a registered domestic partnership, or even, as daunting as it might seem, a marriage.

Candice Eve

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3. The importance of being certified

Despite a recent court victory for estate agents, it is still imperative for all estate agents to have valid Fidelity Fund certificates if they want to ensure that they are entitled to commission. The Supreme Court of Appeal recently held in *Jean Jacques Taljaad v TL Botha Properties* that where an estate agent performs in terms of her mandate and is paid a commission they are entitled to retain that commission even if she are not in possession of a valid Fidelity Fund certificate.

The issuing of Fidelity Fund certificates to estate agents by the Estate Agents' Affairs Board is currently a hot topic with many agents complaining of delays in obtaining their certificates. The Estate Agents' Affairs Board has countered by claiming that many agents have not complied with their requirements or have failed to make payment of their registration fees.

While the debate continues the practical implications are that if the estate agent does not have a valid certificate she is hit by section 34A of the Estate Agents' Affairs Act. This states that an estate agent is not entitled to remuneration or other payment in respect of or arising out of the performance of any act by an estate agent if she did not have a valid Fidelity Fund certificate at the time. The failure to have the necessary certificate is a bar to the estate agent claiming commission where a purchaser refuses to pay the commission. If an agent pursues her commission by way of a summons and does not make the allegation that she has complied with the Act, an exception can be taken to the summons by the purchaser and a failure by the estate agent to prove that she had the certificate at the material time will result in her claim for commission being dismissed.

The case of *Jean Jacques Taljaad v TL Botha Properties* is relevant, however, if an agent without the requisite certificate receives payment of commission. The court held that the provisions of the Act do not give rise to a claim for a refund where commission is paid and it is then established that the agent did not have a valid Fidelity Fund certificate. The court held

that the Legislature's intention was to punish non-compliant agents, rather than to benefit the client and that it did not render invalid the mandate given.

Despite this decision giving some relief to estate agents, you must bear in mind that a failure to have a valid Fidelity Fund certificate could result in criminal charges and sanction. In the circumstances, and when faced with the alternatives, it is best for an estate agent to set aside the time, deal with the Estate Agents' Affairs Board, and ensure that the necessary certificate is obtained.

Judy von Klemperer

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4. Pitfalls to avoid when reviving collapsed sales

Sales of fixed property frequently have inserted in them conditions which, if not fulfilled, render the whole agreement void. Such conditions are normally inserted for the benefit of the Purchaser e.g. that the sale is subject to the Purchaser obtaining mortgage finance within a specified period. According to South African law if the condition is not fulfilled within the stipulated period, the sale agreement lapses unless the parties agree to extend the period for the fulfilment of the condition prior to the date by which the condition was supposed to have been fulfilled.

It often suits both the Purchaser and the Seller to ignore the condition and to treat the agreement as valid and enforceable despite non-fulfilment of the condition. This may occur, for instance, where the Purchaser is able to obtain the necessary mortgage finance after the specified date.

In the recent case of *Fairoaks Investment Holdings v Oliver and Others* the Purchaser of property, after the agreement had failed by reason of the non-fulfilment of the condition within the period specified, offered through it's attorney to reinstate the agreement on substantially the same terms as the initial agreement. The Seller agreed to the Purchaser's proposal. There was, however, one material variation from the original agreement in that the Purchaser's attorneys letter, which conveyed the Purchaser's offer to revive the sale, did not specify a date by which the condition (rezoning of the property) was to be effected. After initially agreeing to revive the sale agreement, the Seller had second thoughts and refused to transfer the property into the name of the Purchaser.

The Purchaser brought an action to compel performance of the sale agreement. The Seller took the point that although there had been an agreement to revive the initial sale, the agreement to revive was itself an agreement subject to the provisions of the Alienation of Land Act No. 68 of 1981 which requires all of the material terms of an agreement in respect of the alienation of land to be in writing and signed by the parties or their duly authorised representative. The Seller argued that because the reviving agreement did not specify the new date by which the condition was to be fulfilled, the agreement was unenforceable. The Court agreed with the contention and the claim for performance under the revived sale agreement failed.

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5. Meaningful engagement before Eviction

In the Constitutional Court case of *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg, Rand Properties (Pty) Ltd, Minister of Trade and Industry, and the President of the Republic of South Africa with the Centre on Housing Rights and Evictions and the Community Law Centre, University of Western Cape as amici curiae*, more than 400 occupiers residing in derelict buildings in the inner city of Johannesburg applied for leave to appeal against the decision of the Supreme Court of Appeal which ordered their eviction due to the buildings they occupied being unsafe and unhealthy. Occupiers who complied with certain requirements were ordered by the City to be provided with temporary accommodation in a nearby settlement area. The High Court had held in favour of the occupiers and interdicted their eviction due to the City's housing programme being inadequate.

The Constitutional Court in coming to its conclusion had to consider the right to housing enshrined in section 26 of the Constitution read with the decision of *Government of the Republic of South Africa v Grootboom* where it was stated, "Section 26, read in the context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the State in all circumstances and with particular regard to human dignity." Therefore an obligation is imposed on the City by the Constitution due to the fundamental right to dignity and right to life.

Due to this obligation the Constitutional Court in the present case issued an interim order, thereby giving the Municipality and the occupiers time to engage meaningfully with each other as no engagement efforts were made by the city prior to bringing the Eviction Application, despite the city being fully aware that people would be rendered homeless as a result of their application. Only once reasonable efforts of engagement fail can the municipality proceed with the eviction however homelessness which will occur must be taken into account and the city's capacity to remedy this problem.

The Constitutional Court also considered the constitutional validity of Section 12(6) of the National Building Regulations and Building Standards Act 103 of 1977, which makes it a criminal offence for people to continue to occupying a building after a notice has been issued to vacate. The court decided that any provision that compels people to leave their home due to a threat of criminal sanctions, in the absence of a court order is contrary to the right to Housing in section 26(3) of the Constitution.

The occupiers succeeded in their appeal and the decision of the Supreme Court of appeals was set aside with the City being liable for the costs thereof.

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