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REAL ESTATE ALERT

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ROOM FOR DEVELOPMENT: THE TRANSFERABILITY OF PERSONAL SERVITUDES

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A servitude, as defined by Voet, is a right belonging to one person in the property of another, entitling the former to exercise some right or benefit in the property or to prohibit the latter from exercising one or more of his normal rights of ownership. A praedial servitude is a registered servitude which one property (the dominant property) has over another (the servient property). Therefore, a praedial servitude is a servitude in favour of another piece of land. The burden on the servient property is automatically transferred to the new owner when the land is transferred and is therefore enforceable against the owner of the servient tenement and all his successors in title.

Personal servitudes are limited to the lifetime of a natural person, and in the case of a juristic person, limited to its continued existence, up to a maximum period of 100 years.

A personal servitude on the other hand is a real right granting the holder thereof in his personal capacity the right to do something on someone else's property, or to prevent a landowner from exercising some or other ordinary power as the owner thereon. The distinguishing feature between praedial and personal servitudes lies in the mention of a dominant tenement, rather than a particular person. In the event of doubt, there is a rebuttable presumption that a servitude is a personal servitude.

Personal servitudes are limited to the lifetime of a natural person, and in the case of a juristic person, limited to its continued existence, up to a maximum period of 100 years. Due to the limited nature of the personal servitude, it is only logical that it is not transferable. The right is therefore inseparably attached to the beneficiary.

This rule stems back to our Roman and Roman-Dutch Law roots, where personal servitudes *par excellence*, that is the *usus*, usufruct and *habitatio*, were regarded as inalienable by Justinian's law, the Roman jurists as well as various Roman-Dutch writers.

Section 66 of the Deeds Registries Act gives statutory effect to the common law principles by providing that "no personal servitude of usufruct, usus or habitatio purporting to extend beyond the lifetime of the person in whose favour it is created, shall be registered" and "nor may a transfer or cession of such personal servitude to any person other than the owner of the land encumbered thereby be registered".

This principle was also confirmed in *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* and in *Durban City Council v Woodhaven Ltd and Others*. The court in Durban City Council considered counsel's submission that certain rights under a personal servitude could be rendered alienable in terms of the agreement constituting the servitude, but it was unprepared to develop the law in this regard and deemed it not yet necessary to make that decision.

In *Bhamjee v Mergold Beleggings (Edms) Bpk*, the court referred to a passage in Hall and Kellaway's "Servitudes" which states that "the idea that personal servitudes are inalienable and that they die with the holder appears to be an inheritance from

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Roman law ..., but the development of mining and mineral rights during modern times has made this doctrine untenable, and the alienability of personal servitudes has become entirely a matter of the intention of the contracting parties." The court accepted the notion that, for argument's sake, a personal servitude can be worded so as to endure for an indeterminate period in favour of the first beneficiary and its successors in title. In this case however, the servitude in issue was not found to have such an intention.

More recently in *Resnekov v Cohen*, the court distinguished between a personal and a praedial servitude. It confirmed that a personal servitude is inseparably attached to the beneficiary and cannot be transmitted or alienated. The servitude concerned was a personal servitude because it made specific mention of a particular person and not a dominant tenement. The court in *Resnekov* was also faced with the submission that personal servitudes could be worded in such a way as to be rendered transferable, but again it refused to develop the law in this regard. It found that the opinion of Hall and Kellaway mentioned in the *Bhamjee* decision has not been followed by courts and found its reliance on mineral rights unsustainable "because mineral rights are both transferable and inheritable".

Van der Merwe is of the opinion that these judgments have left room for our courts to develop the law in this regard. He states that our courts could possibly be persuaded to create new law to render certain personal servitudes transferable. However, this should happen only where, as in the case of mineral rights, there is a "clear commercial or other need for such recognition".

Sonnekus' view is that one cannot decide to make something transferable which is by nature non-transferable. The scenario where a holder of a personal servitude wishes to transfer the right to another person can only be remedied in two ways: either by concluding a new agreement with the owner of the servient tenement to bring about the registration of a new servitude or, in the event that no consensus is reached between the parties, by the local authority using its powers under the relevant expropriation laws. In the latter approach, however, one will have to take consideration of the underlying compensation provisions and this approach may therefore not have any tactical or financial benefits.

It is clear that when these issues have arisen in litigation, they are often irregular personal servitudes, more of the nature of "urban praedial" servitudes, rather than the personal servitudes of the *usus*, usufruct and *habitatio*. Urban praedial servitudes refer to rights of the holder to, for instance, have pipes or electrical cables installed over the servient tenement, or to influence the normal flow of rain water. Van der Walt recognises that they are personal servitudes which resemble praedial servitudes but reinforces the notion that if they vest in the holder in his personal capacity and not in his capacity as owner of a dominant tenement, they are personal servitudes.

Van der Merwe also recognises this and mentions that this sort of servitude seems to lack the benefit to a person and thus its nature may render it "virtually perpetual". He expresses the opinion that it may be time in our law to recognise these servitudes as being of a *sui generis* character instead of forcing them into the

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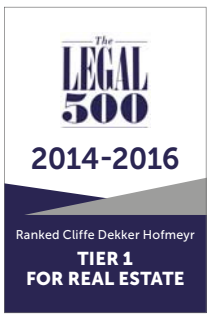
The abovementioned case law certainly suggests such a likelihood. This could also lead to the creation of a new sui generis class or category of personal servitudes which are transferable.

mould of personal servitudes. Sonnekus warns, however, that the problems encountered by the transferability of these servitudes cannot be overcome by classifying them as public servitudes. Public servitudes are not limited real rights – they are public utilities which do not form a part of any individual's estate.

The principle that personal servitudes, where there is no mention of a dominant tenement, may not be ceded or assigned, even if worded to be in favour of a particular person "and his successors in title and assigns", is still firmly in place in our law. There does, however, seem to be authority for the possibility that such a servitude may be interpreted by our courts to be transferable in limited circumstances. The abovementioned case law certainly suggests such a likelihood. This could also lead to the creation of a new *sui generis* class or category of personal servitudes which are transferable. Such an interpretation, together with the appropriate surrounding facts and commercial circumstances, could potentially lead a court to fundamentally develop our law in this area.

Fatima Gattoo and Melissa Franks



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