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REAL ESTATE ALERT

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Registered Restrictive Conditions find a hole in courts' Omnipotence

Imagine having a condition in your title deed which dictates how you should use your property and imagine that you had no involvement in the inclusion of that condition. Surely there must be a way to have it removed, since you are the registered owner of the property to which it attaches? The recent judgment of *Frantrade Nineteen (Pty) Ltd & Others v Realty Corporation of South Africa Ltd & Others* [2019] ZAGPJHC 75 reminds us that this is not necessarily the case.

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Realty Corporation of South Africa (RCSA) had sold the property in question to Ohenimuri Golf and Country Club in 1918 and had simultaneously created a condition in the deed of transfer which stipulated that, subject to written consent from RCSA, the property could only be used or sold for the purposes of a golf and country club and could not be subdivided (Restrictive Condition). The Restrictive Condition was accordingly carried forward in all subsequent deeds of transfer and as such found its way into the title deed of the current owner, Frantrade Nineteen (Pty) Ltd (Frantrade) which took transfer of the property in 1998.

Frantrade applied to court for an order for the removal of the Restrictive Condition on the basis that:

1. the Restrictive Condition rendered the property 'useless' due to changed circumstances and an absence of interest in a golf course and country club by the surrounding community;
2. the Restrictive Condition stripped the property of its economic value and caused the property to be of no benefit to the owner or the surrounding community;

3. the Restrictive Condition was 'impossible' to observe due to a fire destroying the clubhouse; and
4. Frantrade was a 'beneficiary' as defined in the Immovable Property Act, No 94 of 1965 (IPA) and had standing to approach the court by virtue of being the owner of the property affected by the Restrictive Condition.

RCSA opposed the relief sought by Frantrade by relying primarily on the fact that Frantrade did not constitute a 'beneficiary' as per the definition provided in the IPA, which defines a 'beneficiary' as a holder by virtue of a will or other instrument, and that a title deed does not fall under the definition of 'other instrument'. The court agreed with this contention and had regard to s2 of IPA, which provides beneficiaries with the remedy of applying to court for the removal of conditions. In the court's view, this section has the purpose of protecting the rights of beneficiaries of land from owners of land. It was held that it would be counter-productive to provide the same remedies to beneficiaries and owners and as such 'beneficiary' could not possibly be interpreted to mean owner or title holder.

The court accepted an argument put forward by Frantrade that the Restrictive Condition constituted a personal servitude. Theoretically this would mean that the court may have the power to make an order doing away with the Restrictive Condition. However, the court quickly departed from this argument by reason of the consideration that registration of the Restrictive Condition at the deeds office resulted in attributing the Restrictive Condition with the status of a real right

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in favour of the person in whose favour it is registered, as such, being enforceable against the whole world.

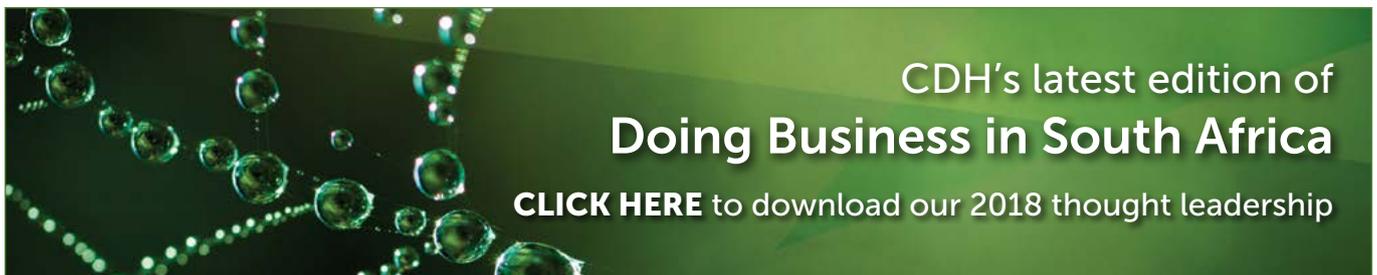
As a result, the court came to the conclusion that the only way for the Restrictive Condition to be removed from the title deed is to obtain the written consent of the person in whose favour it is registered, being RCSA in this case, but more importantly that Frantrade, as land owner (and not a beneficiary of the Restrictive Condition) had no standing to make the application to the court for the removal of the Restrictive Condition in the first place.

This judgment is a harsh reminder of the principle that the High Court does not possess inherent jurisdiction to make orders relating to the amendment or

removal of restrictive conditions over immovable property. It is thus important to have regard to the conditions contained in the title deed of a property before transfer is taken – in this case the court expressly remarked that Frantrade bought the property with full knowledge of the Restrictive Condition.

There is minimal scope for recourse against the seller/transferor or the person in whose favour the restrictive condition is registered once the property has been transferred and such a restrictive condition will persist until the earlier of (i) the beneficiary providing consent for the removal or (ii) the death of the beneficiary.

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