

REAL ESTATE

PRAEDIAL SERVITUDES:
USE IT OR LOSE IT!

PRAEDIAL SERVITUDES: USE IT OR LOSE IT!

It is not surprising that many title deed conditions refer to praedial servitudes, many of which were registered decades ago to regulate development of our cities while they were still in their infancy. The matter of *Pickard v Stein and Others 2015 (1) SA 439 (GJ)* illustrates how times have changed.

In the *Pickard case*, the Court considered whether a praedial servitude of light had been abandoned or had simply fallen away. For those in need of a refresher: a praedial servitude is a real right registered in favour of the property, and not, as is the case of a personal servitude, a real right in favour of a person.

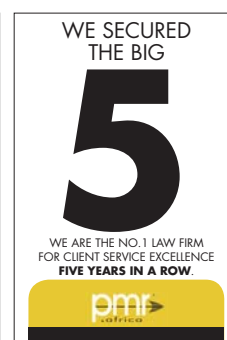
The facts of the matter were as follows: Pickard requested Stein to consent to the cancellation of a praedial servitude of light, which was registered in favour of Stein's property. In terms of the servitude, the owner of Pickard's property was prevented from erecting any structures, fences or planting any vegetation exceeding a particular height along part of their common boundary. Despite the servitude being registered in favour of her property, Stein and her predecessors in title grew trees and shrubs along the relevant boundary, exceeding the height limitations prescribed by the servitude. Initially, Stein consented to the cancellation provided that Pickard and Beira (Pickard sold the servient tenement to Beira) build a brick wall on top of the existing boundary wall. Beira duly built the wall, however, a dispute arose which led to an application being launched by Pickard.

The Court noted that the requirement of utility is well established in our law. This requirement means that a praedial servitude is not validly created unless it provides a distinct benefit or advantage to the dominant tenement. However, the Court acknowledged that it is less clear whether a servitude falls away if the utility provided by that servitude no longer exists. The Court considered s173 of the Constitution which confers an inherent power on the high courts to develop the common law if the interests of justice so require. With

this in mind, the Court held that if the utility that a praedial servitude previously provided to the dominant tenement had permanently ceased, the servitude itself would be extinguished. This conclusion proved academic because the Court found that no evidence had been presented in this case to show that the servitude had lost its utility.

The Court explained that a servitude may be cancelled if it has been abandoned, whether expressly or tacitly and thus went on to consider whether Stein had abandoned the servitude. Tacit abandonment can be inferred by the conduct of the relevant owners, ie it must be bilateral. In respect of the vegetation, the Court was not persuaded that Stein had abandoned the servitude by allowing the trees and shrubs to grow. On the other hand, the Court was of the view that the erection of the wall 'necessarily and naturally' obstructed all the components of the servitude and it was clear that the erection of the wall impacted dramatically on the light flowing into Stein's property. The wall was a solid brick wall and was in direct conflict with the requirements set out in the deed of transfer. The Court accordingly found that Stein had abandoned her real right when she gave Pickard and Beira the right to build the wall. As such, the Court ordered the cancellation of the servitude. This decision serves as a valuable reminder that real rights created by a servitude are not absolute and that they may be cancelled if it can be shown that the dominant land owner had abandoned those rights.

Christelle Wood is a candidate attorney. The article was verified by Nayna Parbhoo, Partner and Janke Strydom, Associate.



CONTACT US

For more information about our Real Estate practice and services, please contact:



Attie Pretorius
National Practice Head
Director
T +27 (0)11 562 1101
E attie.pretorius@dlacdh.com



Andrew Heiberg
Regional Practice Head
Director
T +27 (0)21 481 6317
E andrew.heiberg@dlacdh.com



Allison Alexander
Director
T +27 (0)21 481 6403
E allison.alexander@dlacdh.com



Mike Collins
Director
T +27 (0)21 481 6401
E mike.collins@dlacdh.com



Lucia Erasmus
Director
T +27 (0)11 562 1082
E lucia.erasmus@dlacdh.com



Simone Franks
Director
T +27 (0)21 670 7462
E simone.franks@dlacdh.com



Daniel Fyfer
Director
T +27 (0)21 405 6084
E daniel.fyfer@dlacdh.com



Simone Immelman
Director
T +27 (0)21 405 6078
E simone.immelman@dlacdh.com



Rekha Jaga
Director
T +27 (0)21 481 6382
E rekha.jaga@dlacdh.com



Len Kruger
Director
T +27 (0)11 562 1049
E len.kruger@dlacdh.com



Nayna Parbhoo
Director
T +27 (0)11 562 1701
E nayna.parbhoo@dlacdh.com



Muriel Serfontein
Director
T +27 (0)11 562 1237
E muriel.serfontein@dlacdh.com



Fatima Valli-Gattoo
Director
T +27 (0)11 562 1236
E fatima.gattoo@dlacdh.com



John Webber
Director
T +27 (0)11 562 1444
E john.webber@dlacdh.com



Muhammad Ziyaad Gattoo
Director
T +27 (0)11 562 1174
E muhammad.gattoo@dlacdh.com



Hugh Jackson
Executive Consultant
T +27 (0)11 562 1088
E hugh.jackson@dlacdh.com



Bronwyn Brown
Senior Associate
T +27 (0)11 562 1235
E bronwyn.brown@dlacdh.com

Samantha Kelly
Associate
T +27 (0)11 562 1160
E samantha.kelly@dlacdh.com

Vicky Meerkotter
Associate
T +27 (0)11 562 1596
E vicky.meerkotter@dlacdh.com

Janke Strydom
Associate
T +27 (0)11 562 1613
E janke.strydom@dlacdh.com

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

BBBEE STATUS: LEVEL TWO CONTRIBUTOR

JOHANNESBURG

1 Protea Place Sandton Johannesburg 2196, Private Bag X40 Benmore 2010 South Africa
Dx 154 Randburg and Dx 42 Johannesburg
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@dlacdh.com

CAPE TOWN

11 Buitengracht Street Cape Town 8001, PO Box 695 Cape Town 8000 South Africa
Dx 5 Cape Town
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@dlacdh.com

cliffedekkerhofmeyr.com

Cliffe Dekker Hofmeyr is a member of DLA Piper Group, an alliance of legal practices.

©2015 0433/MAY