

Real Estate Law

ALERT

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Alternatives to purchasing immovable property in South Africa

Despite the failure by Parliament to successfully pass the Constitution Eighteenth Amendment Bill, 2021 (the Bill), aimed specifically at making provision for land expropriation without compensation, the Justice and Correctional Services Minister, Ronald Lamola, stated during the debate before voting on the Bill that several other bills are already before Parliament or yet to be introduced which will be used to give practical effect to the issue of accelerated land reform.

This policy position, combined with the precarious fiscal conditions in which many property owners find themselves, has left South African property owners, contemplating their land use and ownership options in structuring their financial affairs.

The purpose of this article is to briefly unpack some alternatives to property ownership while still affording security in carrying out commercial affairs. Although this is by no means an exhaustive analysis, our focus will be on the registration and use of personal or praedial servitudes and long-term leases over immovable property to in effect reap some rewards afforded by ownership.

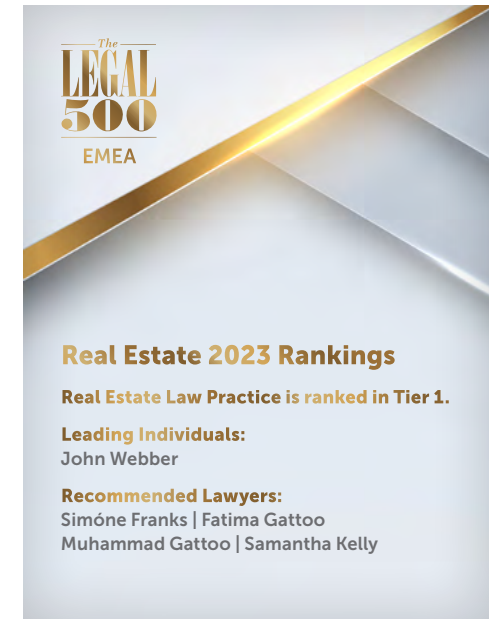
Servitudes

One does not necessarily have to own immovable property to be afforded certain rights and entitlements to the use and enjoyment of the property. The content of such rights and entitlements will, however, differ depending on the selected option.

An example is the use of servitudes. Servitudes are limited real rights which are registrable over an immovable property at the Deeds Office by means of a notarial deed, the most common being personal or praedial servitudes.

With respect to agricultural land, in terms of section 6A of the Subdivision of Agricultural Land Act 70 of 1970 (Act), servitudes over agricultural land may not be registered without ministerial consent unless they fall within the exceptions listed in section 6A.

The exceptions listed in section 6A include servitudes on agricultural land which relate to a right of way, aqueduct, pipeline or conducting of electricity with a width not exceeding 15m; a servitude which is supplementary to the listed servitudes not exceeding 225m², which adjoins the area of any of the aforesaid servitudes; and a usufruct over the whole of the agricultural land in favour of one person or in favour of that person and their spouse if they are married in community of property.



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Although personal and praedial servitudes are both registrable over immovable property, a personal servitude is registered in favour of a specific person or legal entity and is usually created for a specific period or for the lifetime of the beneficiary. Furthermore, a personal servitude cannot be transferred.

The most widely used personal servitude is the **usufruct**, which entitles one to use and enjoy the property of another and its fruits for a specified period or their lifetime, and where the usufructuary is a juristic person, the usufruct is terminated upon dissolution of the juristic entity or the lapse of 100 years. After this period, the property is to be returned in the condition in which it was found, bearing in mind fair wear and tear.

Another example of a personal servitude is that of use (**usus**). This closely resembles a usufruct, but the holders' rights are more restricted in that the holders of the servitude of use may use and possess the immovable property but may not make use of the fruits in excess of what they need, nor can they sell any of the fruit nor grant a lease over the property, which a usufructuary would be entitled to do.

The most restricted personal servitude is the **habitatio** which only allows the holder of the right to occupy the property.

In contrast to a personal servitude, a praedial servitude is created by granting rights and entitlements over one property in favour of another property, and consequently the rights and entitlements attach to the land

and not to a person. As the servitude attaches to the land and not to a person, the rights and entitlements can therefore be transferred to the successors in title of the land until the servitude is either cancelled or lapses.

Examples of the most common forms of praedial servitudes include a right of way, a pipeline servitude or a servitude allowing the right to draw and transport water. Such rights can therefore afford one the use and enjoyment of another's property without the need to own the land, or they can be an additional source of income for landowners.

Long-term leases

Another commercially viable option with the necessary protection of making use of immovable property without necessarily owning it is through the use of a long-term lease.



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A long-term lease, which can range from anything between a period of 10 to 99 years and is registrable at the Deeds Office, affords the lessee a limited real right over the property for the duration of the lease.

With respect to long-term leases over agricultural land, it is important to note that in terms of section 3(d) of the Act, no lease shall be entered into, unless the Minister of Agriculture has consented in writing thereto, in respect of a portion of agricultural land of which: the period is 10 years or longer; or is for the natural life of the lessee or any other person mentioned in the lease; or which is renewable from time to time at the will of the lessee either by the continuation of the original lease or by entering into a new lease indefinitely or for periods which together with the first period of the lease amounts in all to not less than 10 years.

Failure to comply with obtaining such ministerial consent results in the lease agreement being void.

Where a long-term lease has been validly concluded and the necessary consents obtained, the failure to register such a long-term lease at the Deeds Office will not invalidate the lease agreement. The benefit of registration of such a lease agreement is that it offers the parties additional protection in that the lease will also be valid against the creditors and successors in title of the lessor.

Conclusion

Although ownership is the strongest entitlement to property, it is by no means the only method of enjoying some of the rights and entitlements to immovable property and, depending on one's requirements, there are various alternatives that could be used to achieve some of the advantages of ownership without some of its burdens, especially in our current climate of policy uncertainty in light of the current land debate.

[Lulama Lobola and Simone Franks](#)



Going back to basics: The importance of reducing the essential terms of a sale of property agreement to writing

The recent judgment of *Cooper N O and Another v Curro Heights Properties (Pty) Ltd* (1300/2021) [2023] ZASCA 66 (16 May 2023) once again highlights the importance of reducing the essential terms of a sale of property agreement to writing.

In this matter, the parties concluded a sale of property agreement in respect of four erven. One of the erven included in the sale was a road erf which provided access to various other neighbouring properties.

Several months after the sale agreement was concluded, and upon further investigation by the purchaser in the transaction, it transpired that part of the road erf extended into the adjacent nature reserve and, therefore, would vest in the purchaser if it were transferred to it. It was suggested that the road erf be subdivided so that the road portion that extended to the adjacent nature reserve be excluded from the sale. The negotiations might or might not have resulted in an informal arrangement or even an oral agreement, but no formal written agreement or addendum was ever concluded and signed by or on behalf of the parties regarding the subdivision of the road erf.

Several years later, the purchaser failed to meet its obligations in terms of the sale agreement (including the subdivision of the road erf) and the seller proceeded to cancel the sale so that it could sell to a third party. It was argued that the seller intended to sell the entire road erf; whereas the purchaser only intended to purchase the subdivided portion of the road erf.

The court considered the provisions of section 2(1) of the Alienation of Land Act 68 of 1981 (Act). Section 2(1) requires the whole contract, including the material terms of a contract of sale, to be reduced to writing signed by or on behalf of the parties. The material terms of the contract are not confined to those prescribing the *essentialia* of a contract of sale, namely the parties to the contract, the *merx* (i.e. the subject matter) and the purchase price, but also any other material terms of the contract. Whether a term constitutes a material

term is determined with reference to its effect on the rights and obligations of the parties. In this case, it was held that the contemplated subdivision materially affected the rights and obligations of the parties and should have been reduced to writing and signed by the parties. The agreement lacked any reference to subdivision (or related issues such as which party would be liable for the costs of subdivision, which party would attend to the subdivision process, and so on).

As such, the court held that the written sale of land agreement concluded between the parties was void *ab initio* due to non-compliance with section 2(1) of the Act and for lack of consensus between the parties in respect of material terms.

This case is a reminder to go back to basics and reduce all material terms to writing and have the parties sign them.

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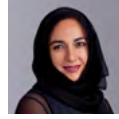
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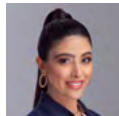
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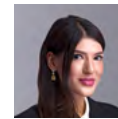
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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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