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**SERVITUDES OVER IMMOVABLE
PROPERTY AND THEIR IMPLICATIONS**

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SERVITUDES OVER IMMOVABLE PROPERTY AND THEIR IMPLICATIONS

A Servitude is a limited real right in terms of which a burden is imposed on an immovable property restricting the rights, powers or liberties of its owner to a greater or lesser extent in favour of either another person or the owner of another property.

Servitudes are classified as either personal or praedial. A personal servitude entitles the holder of the real right to exercise some right in the property of another or to prohibit another from exercising a normal ownership right, whereas a praedial servitude is a real right entitling one piece of land from receiving the benefit of the right and the other piece of land being subject to the right.

PRAEDIAL SERVITUDES:

Praedial Servitudes are divided into rural and urban servitudes and as there is no legal significance in this distinction, certain servitudes may be both rural as well as urban.

The most important rural servitudes are: -

1. Rights of way: -

These may take the form of the right to walk across another person's land or to drive cattle or vehicles across it. The route of such right of way may be specified or granted in general terms, depending on the intention of the parties involved in the creation of the servitude.

2. Way of necessity:-

The consent of the owner whose property is subject to such servitude is not necessary and this servitude may be claimed as a right by an owner of land which is hemmed in by other land to such an extent that he or she has no direct or reasonably sufficient access to a public road and is therefore compelled to cross adjoining privately owned land.

3. Water Servitudes:-

This servitude generally grants the person holding the real right the right to draw water from the property over which the servitude is granted. It may also grant the person the right to lead the water across the land in furrows and pipes and also to discharge surplus water or to store water on it.

The principal urban servitudes are servitudes of light, of view, of projection, of affording support and of discharging water onto another's urban tenement. Restrictive conditions imposed on plots sold in a new township development are also classified as urban servitudes. With the modernisation of building methods and styles and the advent of planning law regulating the construction of buildings and general health matters, these servitudes became of minor importance.

The important urban servitudes are: -

1. Light, view:

A servitude of light is a right of access of light from another's land unimpeded by buildings or trees or both. A servitude of view is the right to an open view; this restricts the rights of the owner of the servient tenement to impede the view by buildings or trees or both. As in the case of a servitude of light, a servitude of prospect (view) may take the form of a right to prevent the owner of the other property from raising the height of buildings on his land.

Support: The servitude of support takes the form of either the right to require one's neighbour to support the weight of one's house or wall or the right to drive a beam into one's neighbour's building.

3. **Projection:** A servitude of projection is the right to have a balcony or another projection over a neighbour's land.

4. **Water:** An urban servitude of water may take the following forms:

- (a) The right to receipt or non-receipt of dripping rainwater
- (b) the right to receipt or non-receipt of water coming down in a stream and
- (c) the right to have an artificial pipe or canal crossing or issuing on a neighbour's land

5. **Restrictive conditions:** Restrictive conditions are by far the most important category of urban praedial servitudes.

Restrictive conditions create non-statutory limitations on the use of land inserted by the original township owner, in favour of each and every purchaser of land in the township, as part of a general township scheme and registered in the title deeds of the erven for the purpose of preserving the specific characteristics of the area.

The earliest and most common examples of restrictive conditions are the following:

- (a) Conditions prohibiting ownership or occupation by persons of specific race groups;
- (b) Conditions restricting the alienation and transfer of land to persons of certain race groups;
- (c) Restriction on the subdivision of land;
- (d) Conditions relating to the use to which the stands may be put; and
- (e) Conditions relating to the imposition of further conditions of title.

Restrictive covenants prohibiting ownership or occupation by persons of specific race groups have statutorily been deleted from title deeds, and are in any event in conflict with the Bill of Rights incorporated in the Constitution.

Conditions of title are statutory restrictions imposed on the owner of land in pursuance of specific township establishment legislation and registered against the title deeds of the erven for the reciprocal benefit of owners and for the purposes of retaining the specific character of the neighbourhood.

Conditions of title originating from township legislation usually include the following types of conditions:

- (a) The erf is subject to a servitude for sewerage or other purposes along one or two boundaries;
- (b) No building or other structure may be erected within the servitude area;
- (c) No large-rooted trees may be planted within the servitude area;

- (d) The local authority shall be entitled to deposit temporarily on the land adjoining the servitude such material as may be excavated during the construction, maintenance or removal of sewerage works;
- (e) Proposals to overcome detrimental soil conditions shall be contained in the building plans submitted for approval;
- (f) Screen walls or fences shall be erected and maintained to the satisfaction of the local authority;
- (g) The design of all structures and buildings to be erected shall be approved by a professional structural engineer;
- (h) Except with the written approval of the local authority the roofs of the buildings shall be of tiles, shingles, slate or thatch;
- (i) Neither the owner nor any other person shall have the right, save and except to prepare the erf for building purposes, to excavate therefrom any material without the written consent of the local authority;
- (j) The erf shall be used for the erection of a dwelling house only;
- (k) Not more than one dwelling house together with such outbuildings as are ordinarily required to be used in connection therewith shall be erected on the erf;
- (l) The erf is subject to a servitude for transformer purposes;
- (m) The erf is subject to a servitude for municipal purposes;
- (n) The making of bricks, tiles or earthenware pipes is prohibited; and
- (o) No shop, factory or industry may be erected on the erf.

From these examples it is clear that restrictive conditions can play a definite role in determining the character of a specific township, and that they have certain economic implications.

Praedial servitudes may be changed or modified in one of the following ways:

- (a) By agreement;
- (b) By application to court, either ex parte or on notice;
- (c) In terms of the Immovable Property (Removal or Modification of Restrictions) Act 78 a beneficiary, interested in immovable property subject to any restriction imposed by means of a will or other instrument, may apply to the High Court for its removal or modification;
- (d) the Administrator has the power to alter, remove or suspend certain restrictions or obligations binding an owner of land situated in his or her province;
- (e) the Minister of Public Works may, in terms of the State Land Disposal Act, 81 consent to the amendment or cancellation of any condition embodied or registered in a title deed;
- (f) in terms of the Subdivision of Agricultural Land Act 82 the Minister of Agriculture may impose, cancel or vary conditions imposed by him or her;
- (g) in terms of the Development Facilitation Act, 83 servitudes and restrictive conditions may be suspended and removed by a tribunal, if necessary for land development and where suspension of these servitudes and restrictive conditions would unnecessarily delay the development of the land;
- (h) Where a less formal township is envisaged or established, the Premier may suspend servitudes and conditions of title where these servitudes or conditions are inconsistent
With the development of the land or cancellation of the servitude or condition in accordance with formal procedure will delay the opening of the township;
- (i) In terms of the Advertising on Roads and Ribbon Development Act, 85 upon written application by the registered owner of land the Registrar of Deeds is under certain circumstances empowered to cancel a condition inserted in the title deed;

- (j) Provision is made in the Transfer of Certain Rural Areas Act 86 for the removal of restrictive conditions which relate to the period for which a land right was granted or the alienation or transfer of land; and
- (k) Provincial legislation contains (or will contain) procedures to remove restrictions on the subdivision of land or the purposes for which the land may be used.

PERSONAL SERVITUDES:

As has already been pointed out, personal servitudes are established in favour of particular persons over things and may confer a variety of benefits on their holders. They are real rights; however they cannot be transferred. They may be constituted for a fixed term of years or be granted until the happening of a future event or for the lifetime of the beneficiary, but not beyond his or her death.

The main three personal servitudes are: usufruct, use and habitation

A usufruct may be defined as a real right in terms of which the owner of a thing (often referred to as the grantor) confers on the "usufructuary" the right to use and enjoy the thing to which the usufruct relates. A usufruct may be constituted over a collection of things such as a herd of cattle or flock of sheep and even over the entire estate of the grantor. It furthermore extends to the accessories of the thing that is subject thereto. A usufruct over a farm, for example, will normally extend not only to all buildings but presumably also to the livestock, farming equipment and the furniture in the homestead, provided of course a contrary intention does not appear from the will or agreement, as the case may be.

As the usufructuary is only entitled to the use and enjoyment of the property he or she does not acquire the ownership over it, though he or she is of course entitled to its possession. The usufructuary has no entitlement to consume and destroy the thing and is obliged to preserve its substance. But he or she has the right to take, consume or alienate its fruits, whether they are natural, industrial or civil. The obligation to preserve the substance of the property means that the usufructuary is bound to maintain it and to defray the costs of all current repairs necessary to keep it in good order and condition, fair wear and tear only excepted, and all rates and taxes.

As the usufructuary is not the owner of the property that is the subject matter of his or her right, he or she cannot alienate or encumber it. Nor may he or she alienate the real right of usufruct as a personal servitude is inseparably linked to its holder.

A servitude of use resembles a usufruct, but the holder's rights are far more restricted. He or she may possess and use the thing to which the right relates if it is a movable and occupy it together with his or her family and visitors if it relates to land. The holder may take the fruits of the thing for his or her daily needs as well as for the daily needs of his or her household, but nothing in excess of that. The holder cannot sell any fruits. Nor may he or she grant a lease in respect of a building, though this rule is subject to a number of exceptions. His or her use must be without detriment to the substance of the property and he or she may be required to give security for the due fulfillment of his or her obligations.

Finally, the servitude of habitation confers on its holder the right to dwell in the house of another together with his or her family without detriment to the

substance of the property. Unlike a servitude of use, it carries with it the right to grant a lease or sublease to others.

As in the case of praedial servitudes, personal servitudes are normally created by agreement between the owners of the respective properties, followed by registration. Registration either takes place by means of a reservation in a deed of transfer, in the circumstances envisaged in section 67 of the Deeds Registries Act 47 of 1937, or by the registration of a notarial deed accompanied by an appropriate endorsement against the title deed of the property in respect of which the servitude is granted.

As with the praedial servitude, a personal servitude can be cancelled by notarial agreement between the owner of land encumbered by the servitude and the holder of the servitude by Bilateral Notarial Deed of Cancellation or Unilateral Notarial Deed of Cancellation, if no obligation is imposed. A personal servitude also lapses where it is granted for a specific period only or on the death of the holder of the servitude.