PROPERTY RIGHTS / SERVITUDES

The purpose of this article is to give a brief explanation of servitudes. In order to understand servitudes it is necessary to first understand the nature of real and personal rights.

REAL RIGHTS VS PERSONAL RIGHTS
The best way to understand these rights is to look at an example. Assuming the owner of Property A needs to drive over Property B in order to gain access to his property, and the owners of properties A and B reach an agreement that the owner of Property A may drive over Property B for the purposes of this access. This agreement is reduced to writing by the parties.

The right that owner of Property A has is a personal right which is enforceable only against the owner of Property B. This right is personal and may not be enforced against any third parties.

Should this right however be registered against the title deeds to the properties in the Deeds Registry, such right becomes a real right in that the right now attaches to the properties and is now enforceable against the owner of Property B and any subsequent owners. It becomes part of the title deed conditions. A real right is thus enforceable against everyone while a personal right may be enforced only against the person contracted with.

LIMITED REAL RIGHTS
The full rights of ownership that a property owner has may be limited by the existence of limited real rights.

A limited real right grants to the holder of that right a limited right over the property. An example of a limited real right is the example above, being a right of way servitude. Property A has a limited real right registered over Property B and thus the property ownership rights in Property B have been limited.

A further example of a limited real right is a mortgage bond which is registered over a property in the Deeds Registry.

SERVITUDES
Two types of servitudes are discussed here, Personal servitudes and Praedial servitudes.

Personal servitudes are servitudes registered over immovable property in favour of an individual. An example of a personal servitude is a usufruct. The best example of this is where A dies and bequeaths his property to his children but grants his wife a usufruct over the property until her death. The property is registered in the name of the children but subject to the usufruct. The wife may thus use the property until her death whereafter the children will have full rights of ownership. The usufruct automatically terminates on her death.

Praedial servitudes are servitudes registered over one immovable property (the dominant tenement) in favour of another immovable property (the servient tenement). The servitude is registered as a condition against the title deeds to the property in the Deeds Registry and is binding on all current and subsequent owners of those properties.

An example is the right of way servitude described above.

ENCROACHMENT SERVITUDES
It often happens that walls between properties are built in the wrong place or skew, either deliberately in order to avoid cutting down a tree for example or simply in error.

When this happens, this is known as an encroachment. Should the seller of a property be aware that his property encroaches on his neighbour’s property or the neighbour’s property encroaches on his property, that seller will be obliged to either disclose the encroachment in writing to any purchaser or to regulate the encroachment.
The encroachment can be regulated either by moving the incorrectly positioned wall to the correct position, or by registering an encroachment servitude.

An encroachment servitude is an agreement entered into between the two property owners that the boundary of one property may encroach on the other. The agreement is embodied in a notarial deed of servitude which is signed by both parties and registered in the Deeds Registry. The consequences of this are the same as the right of way servitude example above in that on registration, the right becomes binding on current and all future owners of the property.

In order to register the encroachment servitude, the Deeds Registry will require that the exact position of the encroachment be accurately described. If the encroachment a straight line for example capable of being described on an existing SG diagram, this will be accepted by the Deeds Registry. Should the line of the servitude however be irregular, a new SG diagram depicting the line will be required.

Where necessary a land surveyor is instructed to measure the encroachment, draft a diagram and have this approved by the Surveyor General’s Office. This diagram is lodged in the Deeds Registry.

The encroachment servitude can be registered simultaneously with transfer of the property on sale and should not delay the transfer to a great extent if properly dealt with. If the property is not being sold and the encroachment servitude is being registered on its own in the deeds office, any existing bondholders will have to consent to the registration of the servitude.

**BARE DOMINION / USUS**

Property rights can be divided in *bare dominium* rights and *usus* rights. The former are the bare rights of ownership and the latter is the right to use the property. Together they constitute the full basket of ownership rights.

In the example above dealing with a Usufruct, the children are the *bare dominium* owners and the wife of the deceased owns the *usus*.

It is possible to calculate the value of the *bare dominium* rights and *usus* by utilising tables for this purpose available at SARS. The value is calculated by looking at the age of the usufructuary holder and the extent to which the rights of *usus* detracts from the full rights of ownership.

Subject to the terms of the Usufructuary rights, the two rights may be sold together. An agreement of sale will describe the Sellers as the *bare dominium* sellers and the Usufructuary sellers. They must be separately described. The respective sellers will be entitled to the proceeds of sale (subject to the terms of the will or agreement creating the usufruct), in proportion to the value of the respective rights. The respective sellers will further be liable for capital gains tax on the same basis.

**SUBDIVISIONS AND SERVITUDES**

When the city council consents to the subdivision of a property they will more often than not require certain servitudes to be registered as part of providing the Regulation 38 certificate which is required to lodge and register a subdivision in the deeds office.

These servitudes may be in favour of the city council itself or between the new portions that are being created. These will be set out in the conditions of subdivision which are attached to the consent to subdivide.

Examples of the most common servitudes required by the city council include: right of way servitudes in favour of other portions and the city council, municipal services servitudes and what it colloquially called the 2m omnibus servitude.