

## **NOTE TO SA PROPERTY PRACTICE AND THE LAW**

### **REVISION SERVICE 20, 2014**

#### **SUMMARY OF MAIN CHANGES AND NEW DEVELOPMENTS INCLUDED IN REVISION SERVICE 20, 2014**

**Revision Service 20, 2014 incorporates all new property law developments up to 30 January 2014, including the following (figures in square brackets [ ] refer to the relevant page numbers in the book):**

#### **COURT CASES**

##### **Ownership**

In terms of section 4(1) of the National Building Regulations and Building Standards Act 103 of 1977 no person may without the municipality's written consent erect any building on a property which requires the submission of building plans and specifications. Contravention is an offence. If such building has been erected, with or without the municipality's approval, no person may use or occupy it unless a certificate of occupancy has been issued by the municipality. A municipality may obtain an interdict restraining the owner from using or occupying the building before such certificate has been issued.

*Berg River Municipality v Zelpy 2065 (Pty) Ltd 2013 (4) SA 154 (WCC) [17]*

##### **Registration of Transfer**

In terms of the Deeds Registries Act conveyancers accept responsibility for the correctness of the facts stated in the deeds or documents prepared by them in connection with any application they file in the deeds office. Mistakes which may lead to a transaction in the deeds office being delayed will almost inevitably cause adverse financial consequences for one or other of the parties to the transaction. This may expose the conveyancer to a claim for damages if any such mistake is attributable to his negligence. Accordingly, conveyancers should be fastidious in their work and take great care in the preparation of their documents.

*Margalit v Standard Bank of South Africa Ltd and Another 2013 (2) SA 466 (SCA) [81]*

##### **Rates and Service Charges**

In terms of section 96 of the Local Government Municipal Systems Act 32 of 2000 municipalities are obliged to collect moneys that become payable to them for property rates and taxes and for the provision of municipal services. They are assisted to fulfil that obligation in two ways: firstly, they are given security for repayment of the debt in that the amount due constitutes a charge upon the property concerned (section 118(3)); and, secondly, they are given the capacity to block the transfer of ownership of the property by refusing to issue a clearance certificate unless debts owing during the two years preceding the date of application for the certificate have been paid (section 118(1)). The security afforded by section 118(3) amounts to a lien having the effect of a tacit statutory hypothec and no limit is

Note–a

[SERVICE 20, 2014]

placed on its duration outside of insolvency. Its effect is to create in favour of a municipality a security for the payment of the prescribed municipal debts so that a municipality enjoys preference over a registered mortgage bond on the proceeds of the property. The right is not lost when the property is transferred to a purchaser. Nothing in section 118(3) empowers a municipality to refuse the issue of a clearance certificate under section 118(1) unless the transferring attorneys provide an undertaking that *all* arrears are to be paid within a reasonable time after transfer.

***City of Tshwane Metropolitan Municipality v Mathabathe and Another* 2013 (4) SA 319 (SCA) [86–1]**

### **Sectional Titles**

Section 27(1)(c) of the Sectional Titles Act 95 of 1986 stipulates that if a developer ceases to be a member of the body corporate any right to an exclusive use area still registered in his or her name vests in the body corporate. This means that if an owner purchased from the developer a unit and the right to an exclusive use area, but for some reason only the unit was transferred, the owner cannot claim transfer of the exclusive use area from the developer after the latter ceases to be a member of the body corporate. In such instances the body corporate is entitled in terms of section 27(1)(d) to apply to the Registrar for the issuing in its favour of a certificate of real right of exclusive use. If, despite the equity of the owner's case, the body corporate is then not willing or entitled to transfer the right of exclusive use to the owner free of charge, a Court cannot use section 33(1) of the Deeds Registries Act 47 of 1937 to deprive the body corporate of its ownership. This section provides that any person who has acquired the right to the ownership of immovable property and who is unable to procure registration thereof in his name in the usual manner, may apply to the Court for an order authorising the registration of such property in his name. The section does not come into play since the right to the ownership of the exclusive use area does not vest in the unit owner; it vests in the body corporate by virtue of section 27(1)(c) and the owner has no right to compel the body corporate to transfer the right of exclusive use to him. That aside, it cannot be said that the owner is unable to procure registration of transfer in the usual manner: the body corporate, having obtained a certificate of real right of exclusive use, is perfectly able to transfer it to the owner should it be willing to do so.

***Mckersie v SDD Developments (Western Cape) (Pty) Ltd and Others* 2013 (5) SA 471 (WCC) [102–1]**

### **Fundamental Property Rights**

Section 26(3) of the Constitution provides that no person may be evicted from his home, or have his home demolished, without a Court order made after consideration of all relevant circumstances. Eviction is not confined to the expulsion of someone from their home; it can also consist in the diminution or obliteration of the incidents of occupation. By necessary implication section 26(3) also guarantees to any occupier peaceful and undisturbed occupation of their homes unless a Court order authorises interference. Accordingly, absent urgency or other exceptional circumstances, a municipality cannot without a Court order

Note–b

lawfully enter upon property on which a home is situated to carry out its statutory duties, in the face of the objection of the home occupier.

***Motswagae and Others v Rustenburg Local Municipality and Another 2013 (2) SA 613 (CC) [158–34-3]***

\*\*\*\*\*

Section 25(1) of the Constitution stipulates that ‘(n)o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property’. Subsection (2) states that property may be expropriated only in terms of law of general application for a public purpose or in the public interest, and subject to payment of compensation. A clause in a 20-year notarial lease agreement between a church (as owner and lessor of a property) and the State (as lessee) whereby the church must after expiry of the lease transfer the property to the State without any compensation, *prima facie* sanctions arbitrary deprivation of property and fails to meet the requirements of section 25(2) of the Constitution. Unless the deprivation can be justified on some basis, the clause would be invalid and unenforceable.

***Uniting Reformed Church, De Doorns v President of the Republic of South Africa and Others 2013 (5) SA 205 (WCC) [158–33]***

## **Contracts**

An agreement of sale of land on instalments can be set aside if the owner (*seller*) signed the agreement without reading it, but had actually approached the “purchaser” for a short term loan and the latter fraudulently misrepresented to the owner that the documents in question related to a loan agreement, while in fact they constituted an instalment sale agreement and a lease.

***Mkhwanazi v Quarterback Investment (Pty) Ltd and Another 2013 (2) SA 549 (GSJ) [167]***

## **Subdivision of Agricultural Land Act**

Sections 3(*d*) and (*e*) of the Subdivision of Agricultural Land Act 70 of 1970 stipulate that without the consent of the Minister of Agriculture no long lease in respect of a portion of agricultural land may be entered into, and no portion of agricultural land may be sold or advertised for sale (except for the purposes of a mine or if the transaction is excluded under section 2). The word ‘portion’ in this context means a piece of land that forms part of a property registered in the deeds registry, as opposed to the whole property as such. The prohibition is aimed at preventing physical fragmentation of the property, and the use of part of the property under a long lease.

***Adlem and Another v Arlow 2013 (3) SA 1 (SCA) [153]***

## **Sale of Land**

If an agreement of sale of land is void because the prescribed formalities have not been complied with, each party may reclaim from the other what he has performed under the void contract. If the buyer has taken possession of the property but transfer has not been passed, the seller may obtain an ejectment order based on his

ownership of the property. In such event the seller need not tender repayment of any portion of the purchase price received; it is for the buyer to raise the point that the seller must make a refund.

***Rhoode v De Kock and Another* 2013 (3) SA 123 (SCA) [219]**

\*\*\*\*\*

When a valid judgment is rescinded after a sale in execution had taken place the question arises whether or not the original owner (judgment debtor) may claim back the property from the purchaser. The legal position is as follows:

- If the judgment is rescinded before the purchaser has taken transfer, the owner is in principle entitled to claim recovery of the property following the rescission of the judgment.
- If the judgment is rescinded after registration of transfer the owner may claim back the property provided it can be established that the purchaser had prior to registration of transfer been aware of the proceedings instituted for the rescission of the judgment.
- Unless it can be established that the judgment and/or the sale in execution constituted a nullity, the property cannot be claimed back from a bona fide purchaser who had no knowledge of the judgment debtor's proceedings for the rescission of the judgment, or where transfer of ownership has been effected prior to the institution of the rescission proceedings.

***Knox NO v Mofokeng and Others* 2013 (4) SA 46 (GSJ) [228-5]**

\*\*\*\*\*

A house seller who is aware of structural defects in the roof and who knows that the repair work commissioned by him has not permanently solved the problem, must disclose this to the purchaser. If he fails to do so he cannot shield behind a voetstoots clause in the sale agreement to escape from his liability for latent defects. The purchaser is entitled to claim the difference between the purchase price of the house and its value with the defective roof. The cost of repairs may be used as a measure of the award to be made where the actual value cannot be determined, or is difficult to determine.

***Banda and Another v Van Der Spuy and Another* 2013 (4) SA 77 (SCA) [224-1]**

\*\*\*\*\*

In terms of section 2(1) of the Alienation of Land Act 68 of 1981 an alienation of land must be signed 'by the parties thereto'. On a proper interpretation of this phrase it necessarily relates to the true parties to the agreement. This means that the true parties must be identified in the agreement and the signatures must be those of the true parties. Accordingly, if a document purporting to be an agreement of sale of land states the name of a purchaser who in fact is not the true purchaser, the agreement is invalid. Being invalid it is not capable of rectification.

***Osborne and Another v West Dunes Properties 176 (Pty) Ltd and Others* 2013 (6) SA 105 (WCC) [215; 218-2]**

\*\*\*\*\*

Note-d

A structure erected without an approved building plan and not meeting the required building standards constitutes a latent defect. However, the seller of a property on which such structure is present is protected from liability for such defect by a *voetstoots* clause in the agreement of sale, unless it can be established that the seller knew of the defect and fraudulently concealed it to mislead the buyer.

***Haviside v Heydricks and Another* 2014 (1) SA 235 (KZP) [224–1]**

\*\*\*\*\*

An agreement of sale of land often stipulates that the purchaser is to pay a deposit to the conveyancer, such deposit to be kept in trust and released to the seller only after registration of transfer. This does not necessarily mean that payment by the buyer to the conveyancer constitutes payment to the seller. Whether the conveyancer was the agent of the seller for receiving payment of the purchase price from the purchaser in this instance depends solely on the terms of the deed of sale. If the conveyancer misappropriates the deposit and he was not the seller's agent for receiving the purchase price, the seller may continue to look to the buyer for payment of the full purchase price.

***Minister of Agriculture and Land Affairs and Another v De Klerk and Others* 2014 (1) SA 212 (SCA) [222]**

### **Restitution of Land Rights**

Section 33(eC) of the Restitution of Land Rights Act 22 of 1994 stipulates that the Land Claims Court must have regard to 'changes over time in the value of money' in cases where the Court considers making an order for equitable redress in the form of financial compensation. The Act does not prescribe the method to be applied to determine 'changes over time in the value of money'. Accordingly, the Department of Land Affairs and the Land Claims Court must consider all the options available and determine an appropriate method, having regard to the relevant provisions of the Restitution Act. Depending on the circumstances the consumer price index (CPI) could be applied to adjust any under-compensation received by a claimant. The CPI is an official government statistic published monthly in the Government Gazette, and there is no need for expert evidence to prove it — a Court is entitled to take judicial notice thereof.

***Farjas (Pty) Ltd v Minister of Agriculture And Land Affairs and Others, and Another Case* 2013 (3) SA 263 (SCA) [158–10-2]**

\*\*\*\*\*

In terms of section 34(1) of the Restitution of Land Rights Act 22 of 1994 any national, provincial or local government body may, in respect of land which is owned by it or falls within its area of jurisdiction, apply to the Land Claims Court for an order that the land in question or any rights in it should not be restored to any claimant or prospective claimant. If the application succeeds a successful claimant would be entitled only to monetary or other equitable redress but not to the actual restoration of the land. A non-restoration order is invasive of restitution rights, and for that reason the Act (section 34(6)) stipulates that it may be made only if the Court is satisfied that

- (a) it is in the public interest that the rights in question should not be restored to any claimant; and
- (b) the public or any substantial part thereof will suffer substantial prejudice unless the order is made.

The Court must make a value judgment on what is in the public interest and what is substantially prejudicial. The outcome of the value judgment will depend on an assessment of all the facts. This means that a public body seeking a non-restoration order must adduce the facts necessary to enable a Court to exercise a value judgment of where the public interest lies in relation to the particular land sought to be restored. Whilst a claimant for restitution of land rights is not always entitled to restoration of rights in the land claimed, restoration of the land claimed must enjoy preference when feasible.

***Kwalindile Community v King Sabata Dalindyebo Municipality and Others* 2013 (6) SA 193 (CC) [158–10-3]**

### **Extension of Security of Tenure Act**

In terms of section 6(2)(d) of the Extension of Security of Tenure Act 62 of 1997 an occupier has the right 'to family life in accordance with the culture of that family', balanced with the rights of the owner or person in charge. Living a family life may mean the occupier living with his or her spouse or partner only, or living with one or more of his or her children, or with one or more members of his or her extended family, depending upon what the result is when one balances the occupier's living, with any one or more of those persons, with what the owner of the land is also entitled to. If, in a particular case, the balancing produces a result that is unjust and inequitable to the owner of the land, the occupier's right to family life may be appropriately limited. If, however, the occupier were to live with his or her spouse or partner and with one, two or more of his children or other members of the extended family and this would not result in any injustice or unfairness and inequity to the owner of the land, the occupier would be entitled to live with those members of his or her family. The purpose of s 6(2)(d) is to enable occupiers to live as full a family life as possible, including engaging in cultural activities or practices, as long as that does not offend the equitable balance of the occupier's rights with the rights of the landowner as required by s 6(2)(d).

***Hattingh and Others v Juta* 2013 (3) SA 275 (CC) [158–36-2]**

### **Prevention of Illegal Eviction from and unlawful occupation of Land Act**

If an ex-husband and father seeks to evict his former wife and minor children from the home they continued to occupy after the divorce, the rights and interests of the children loom large in determining whether the eviction would be just and equitable. The father's duty to maintain his children includes the duty to provide a roof over their heads, and it can never be just and equitable to evict them and their mother if the eviction would render them homeless. A case of this nature calls for a solution by way of mediation and engagement between the parties and a Court

Note–f

will be slow to grant an eviction order if none of these options were exploited in an attempt to resolve the matter.

***Arendse v Arendse and Others* 2013 (3) SA 347 (WCC) [158–48-5]**

\*\*\*\*\*

The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 does not apply where the property occupied by an unlawful occupier is not the latter's home. Accordingly, if pending divorce proceedings a married woman leaves the family home, establishes a home elsewhere for herself and returns to the family home only sporadically and for short periods, the family home is no longer her home. Should she unexpectedly move in again years later after the divorce without the consent of her former husband who now occupies the house with a new family, she cannot claim the protection of the Act. The former husband may use the *mandament van spolie* to reclaim undisturbed possession of the house.

***Afzal v Kalim* 2013 (6) SA 176 (ECP) [158–46]**

### **Housing Consumers Protection Measures Act**

Section 10 of the Housing Consumers Protection Measures Act 95 of 1998 prohibits any unregistered home builder from receiving any consideration in respect of the sale or construction of a home. If a dispute about payment between a housing consumer and an unregistered home builder is referred to arbitration and the arbitrator makes an award in favour of the latter, the award cannot be made an order of Court since the Court would then be asked to make an order in conflict with section 10. It may well be that the arbitration is void.

***Hubbard v Cool Ideas 1186 CC* 2013 (5) SA 112 (SCA) [158–48-10]**

### **Lease**

- If a tenant fails to vacate the premises at termination of the lease the landlord may claim damages for 'holding over'. This is merely a convenient label describing the conduct entitling the landlord to claim damages. The ordinary measure of the amount payable for holding over is the 'market rental value' of the premises and not the rental that was payable under the cancelled lease. The rental payable under the lease is no more than evidential material as to market related rental for the purposes of a holding over claim.
- A holding over claim can be based on delict or breach of contract—the result will remain the same provided the ordinary measure of damages is claimed. An action based on unjust enrichment is also viable, but this is cumbersome because of the method for computing damages with the risk of recovering less than a market related rental.
- Damages claimable for holding over are not confined to the rental market value. Other forms of pecuniary loss, including liquidated charges and disbursements, are recoverable. Accordingly, in cases of commercial leases where the unlawful occupier continues to trade from the premises after termination of the lease there is no reason in principle why management and other levies, charges for

Note to Revision Service 20, 2014

---

electricity and water for which the landlord is liable in respect of the premises, and other operational costs including marketing costs, should not be recoverable.

***Hyprop Investments Ltd and Another v NCS Carriers and Forwarding CC and Another 2013 (4) SA 607 (GSJ) [264–8–1]***

### LEGISLATION

The Consumer Protection Act 68 of 2008 incorporated into —

- (a) Chapter 11: Property Syndication Schemes
- (b) Chapter 12: General Principles of Contract
- (c) Chapter 13: Purchase and Sale of Immovable Property
- (d) Chapter 15: Lease of Immovable Property

Note–*h*

[SERVICE 20, 2014]