

Praedial servitude rights attached to the land

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OUR panel has received a question from a reader who gains access to her property via a servitude road.

She is the servitude holder and says that the owner of the dominant land has since made it impossible for her to access her property due to excavations and building rubble. She wants to know what her rights are.

Warren Jack from the Warren Jack Property Group in Port Elizabeth says a servitude is a legal right which imposes a burden on immovable property, and which restricts the powers of the owner to some extent.

"The servitude can be registered in favour of another person, in which case it is referred to as a personal servitude," says Jack. "It can also be registered in favour of the owner of another property, in which case it is referred to as a praedial servitude."

"When dealing with a praedial servitude - as in the case of the reader - it does not matter whether the agreement to each party's rights was made by the current or previous owners," he says.

"The right attaches to the land itself and it exists irrespective of who the owners are at any given stage. The land owner is therefore entitled to exercise the right, or is bound to honour it, simply because he or she is the owner of the land."

By registering a servitude against a property, explains Jack, one cannot force the owner of the land to take certain actions in favour of the other property. "One can merely force the owner to refrain from taking certain actions."

"For instance, the reader's neighbour cannot be forced to build a road over his property for when she (the reader) is exercising her right of way. However, the neighbour can be

forced to refrain from erecting structures on that area of the land, because, in doing so, he would be making it impossible for the reader to exercise her right of way."

Grant Howard from Kaplan Blumberg attorneys in PE says there is an exception to this rule. According to him, the law also recognises a servitude that imposes an obligation on a person to take action in favour of another property, for instance maintenance of a wall that supports a structure on a neighbouring property.

"A servitude must be exercised in a reasonable manner, by having due regard for the rights and interests of the owner whose land is burdened by it," says Howard.

He says in order for the servitude to be binding on successors in title it must be registered in the Deeds Office. "If a servitude is not recorded in the Deeds Office, it usually

only binds the original parties to the agreement, although there are exceptions to this rule."

Howard says if the reader never registered the servitude of right of way against the neighbour's land, that she will - from a legal perspective - still be able to demand right of way over his property to gain access to a public road. According to him, this must be the shortest route causing the least inconvenience to the neighbour.

"The reader should contact her neighbour and demand that all the obstructions be removed so that she can exercise her right of way over the property," says Howard. "If the neighbour does not adhere to the reader's requests, she may consider enforcing her rights by way of a court order."

Send your property-related questions and comments to coetzee@fullstonem.com

