

JUDGMENT SUMMARY

FRANTRADE NINETEEN (PTY) LTD & OTHERS v REALTY CORPORATION OF SOUTH AFRICA LTD & OTHERS

Acquisition of property – servitudes – restrictive condition registered on property – restrictive condition that property is to be used for purpose of a Golf and Country Club – further that property may not be sub-divided and no portion or the whole of the property may be sold for purposes other than a Golf and Country Club without the consent in writing of the Corporation, being the respondent – restrictive condition being carried forward in all subsequent transfers of property – applicant acquiring ownership of property and seeking an order removing restrictive condition – applicant arguing restrictive condition is a personal servitude, therefore respondent has discretion to consent to the removal or cancellation of restrictive condition which discretion should be exercised reasonably – respondent refusing to consent – *locus standi* of applicant to bring application.

Question: whether applicant is a beneficiary as contemplated in Immovable Property (Removal or Modification of Restrictions) Act 94 of 1965 (the Act)

Held: It is trite that once a condition or a servitude is registered either notarial or as a condition of title in the title deed by the Registrar of Deeds, it bestows a real right to the person in whose favour it is registered. This right is absolute and prevails against the whole world.

Held: The Court has no inherent jurisdiction to remove, vary or suspend a restrictive condition of title. The rationale for this lies in the nature of a restrictive condition which, in essence, is a form of contractual stipulation in terms of which a transferor of land regulates the exercise of the transferee's dominium over the property. The condition of transfer of the land to the successor in title is endorsed upon the deeds and, by reason thereof, restricts the use to which the property may be put by succeeding successors in title. Such condition may also confer rights upon the holders of title to other properties by defining the relationship between portions of land or by conferring upon such other lot holders a right to enforce the restrictive condition applicable to the property in question in this respect such condition are in the nature of servitudes. Given the nature of these conditions of title and the rights that are thereby conferred they cannot be removed, varied or suspended except with the consent of all of the parties whose rights and interests are regulated thereby.

Held: The restrictive condition in the title deed is a personal servitude. Once it is registered by the Registrar of Deeds against the title deed, it becomes a real right in favour of the person in whose

favour it is registered. It is carried forward with every transfer unless the holder thereof consents to its removal or it is expunged by a particular event or the elapse of time. Therefore, it is not within the powers and function of the Court to unilaterally and without the consent of all the affected parties to make or break the contract that came into being when the personal servitude was registered.

Held: The respondent's refusal to consent to the removal of the restrictive condition from the title deed is fatal to the applicant's case.

Held further: The applicant is not a 'beneficiary' as envisaged in the Act. A beneficiary, according to the Act is '*any person entitled to a beneficial interest in immovable property under a will or other instrument or whose benefit in any immovable property is held in terms of a will or other instrument by a trustee, administrator or fiduciary without a beneficial interest*'. The applicant has an interest in the property by virtue of being the holder in title, it did not derive same through a will, codicil or any other testamentary document (as defined in the Wills Act). Its rights and interest in the property is limited by and subject to the servitude registered in favour of the respondent. The meaning to be ascribed to 'other instruments' should not be wider than as referenced in the Wills Act to other testamentary instruments since the words were used by the drafters of legislation when they were dealing with and referring to a will.