



Property Services

Cox Yeats is a leading and dynamic commercial law firm where the partners of Cox Yeats are represented by some of South Africa's top lawyers in their fields of expertise.

Our specialist property team combines their knowledge and experience of property law and conveyancing with innovative ideas to maximise profit potential.

Services include:

- Acquisition, sale and transfer of commercial, industrial and residential properties;
- Township developments;
- Sectional title developments;
- Commercial, industrial and residential leases;
- Commercial and residential mortgages

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Integrity PERSONALISED
 INNOVATION Individuality
 CREATIVE DYNAMIC
 Adaptability

CANCELLATION OF ABANDONED SERVITUDES

It is not uncommon for a property to be subject to a servitude in favour of a neighbouring property. A servitude can take a number of forms, amongst others, a right of way servitude giving the holder of the servitude the right to cross the other property or a pipeline servitude giving the holder of the servitude the right to run pipes over the other property. A servitude can also restrain the owner of the other property from doing certain things, for example from selling the property without the consent of the holder of the servitude or preventing the owner of the property from erecting buildings, structures or planting trees that rise above a certain height.

The holders of servitudes must be wary of the risk that their servitude may fall away if the benefit the servitude afforded them has permanently ceased, or the servitude may be cancelled if they abandon or fail to use the servitude. This was illustrated in the recent case of *Pickard v Stein and Others* 2015 91 SA 439 (GJ) (the "Pickard Case"). Pickard and Stein owned neighbouring properties. Pickard's property was higher than Stein's. A servitude of light had been registered over Pickard's property, in favour of Stein's property. The owner of Pickard's property was not permitted to build any structures or plant any vegetation on Pickard's property which exceeded 0,91 metres in height or to erect any fence on the servitude area running along the boundary of Pickard's property, other than a wire mesh fence not exceeding 1,22 metres in height in order not to prevent light reaching Stein's property.

Over the years Stein, and prior owners of Stein's property, had allowed trees and shrubs to grow on Stein's property along the boundary with Pickard's property. They were between 5,5 and 10 metres in height. When Pickard's property was subdivided, Stein insisted on another boundary wall being built on top of the existing boundary wall to maintain her security and privacy. Pickard thereafter sought to have the servitude cancelled on the basis that Stein had consensually or unilaterally abandoned the servitude by allowing the trees and shrubs to grow along the boundary and by insisting the building of a higher wall along the boundary. Alternatively, it was argued the servitude had fallen away as the utility of the servitude of light had itself fallen away due to the modern demand for security and privacy.

The High Court held that if the utility that a servitude provided to a property had permanently ceased, the servitude would fall away. In addition, a servitude may be cancelled if it is abandoned by the holder through conduct. The Court held that Stein's conduct in allowing vegetation to grow along the boundary to a height in excess of that permitted by the servitude restriction and by permitting the wall to be constructed, Stein had abandoned the servitude. The Court ordered the Registrar of Deeds to cancel and delete the servitude from the title deeds of Pickard's property and Stein's property.

The Pickard Case is a sobering reminder to the holders of servitudes that the fact a servitude is registered in favour of their property does not necessarily mean their rights are absolute. If the reason for the servitude no longer exists, or by their conduct they could be seen to have abandoned their rights in terms of the servitude, the owner of the property over which the servitude is registered may be entitled to have the servitude cancelled. Each case will have to be determined based on the particular facts.

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If you require assistance or advice regarding property matters, our specialist property team can advise you. Contact us on 031-5368500 or email Robin Westley (rwestley@coxyeats.co.za), Roger Green (rgreen@coxyeats.co.za), Carol McDonald (cmcdonald@coxyeats.co.za), Thabo Vilakazi (tvilakazi@coxyeats.co.za) or Kim Edwards (kedwards@coxyeats.co.za).

