

## **WHEN GOODWILL BETWEEN FAMILY TURNS SOUR - EVICTION**

Eviction applications frequently pit the two sides of our society against one another. The applicant is invariably the property owner who has the resources necessary to access the civil justice system. The Respondent or unlawful occupier – often a person with little to no access to the resources necessary to oppose it.

What is often less debated, is a situation involving family members, where a family member allows another to occupy a property. These are not recorded in writing and do not always follow the correct processes. This causes massive problems in the family and also for future owners of the property.

In *Philander v Makiet and Others*,<sup>1</sup> concerned an appeal against the refusal to issue out an eviction order. This matter involved an agreement between family members.

### ***Facts of the matter***

The first Respondent asserted that his rights to reside on the property had been granted to him by the former owner of the property.

It is not in dispute that the appellant purchased the property from Mr Langeveldt and that the said Mr Langeveldt was the first Respondent's uncle. The first Respondent initially resided in the property with his mother. The latter had sought to obtain ownership of this property from the third Respondent. I pause to mention that this property is what is colloquially known as an 'RDP' house. It is in my view, common cause, that Mr Langeveldt '*provided*' the first Respondent, and by implication, the second Respondent, the right to *occupy* the property.

This was in the form of a personal right, akin to that of a '*precarium*' to reside in the property.

During subsequent argument before us, it emerged that the appellant became aware of the first Respondent's occupation of the property during November of 2018 after the property was registered into his name.

A '*precarium*' is an agreement by which the owner of a thing at the request of another person, gives him an item to use as long as the owner shall please. As such, it falls to only be terminated on reasonable notice. The occupation of the property by the first respondents accordingly remains a

---

<sup>1</sup> (A61/2020) [2020] ZAWCHC 106 (18 September 2020)

'lawful' occupation, pending the lawful termination thereof and the lapse of a reasonable period as set out in the appropriate notice.

## **The Law**

In the *Felix*<sup>2</sup> matter, the plaintiff instituted an action against the executor of the deceased estate of a person who was alleged to have purchased the fixed property subject to the express oral agreement that after the transfer of the property to the deceased, the plaintiff and the other co-plaintiffs would enjoy continued occupation of the property until their deaths. The court, in this case, held that a person who holds the right to a personal servitude does not have a real right, but a personal right which may only entitle him to the registration of servitude in due course. The requirement was confirmed in the *Brink*<sup>3</sup> matter.

In *Baront Investments (Pty) Ltd v West Dune Properties 296 (Pty) Ltd and Others*,<sup>4</sup> the full bench considered the question whether an oral agreement creating a servitude was capable of being enforced. The court held that such oral servitude constituted an '*interest in land*' which must be in writing. It seems to me that it is settled law that a real right only comes into existence when an agreement has been registered.

In *Robarts v Antoni N.O. and Others*<sup>5</sup> the Supreme Court of Appeal held that an oral agreement whereby a servitude was created, was invalid and stated the following:

*'In terms of s 1(b) of the Act 'land' includes 'any interest in land' and 'alienate' which corresponds with 'alienation', in relation to land, means 'sell, exchange or donate'. It is established that a praedial servitude (such as the height servitudes involved here) constitutes an 'interest in land' as envisaged in the Act.'*

## **Conclusion**

If you intend granting a right to any family member to occupy a property, such must be done in writing and registered in the deeds office. If this is not done, lengthy and costly litigation inevitably follow. We, therefore, recommend that you contact an expert at SchoemanLaw for all your property related needs.

---

<sup>2</sup> Felix en 'n ander v Nortier N.O. en andere [1996] 3 All SA 143 (SE)

<sup>3</sup> Brink v Stadler 1963 (2) SA 427 (C)

<sup>4</sup> 2014 (6) SA 286 (KZP)

<sup>5</sup> [2014] 3 All SA 160 (SCA)