

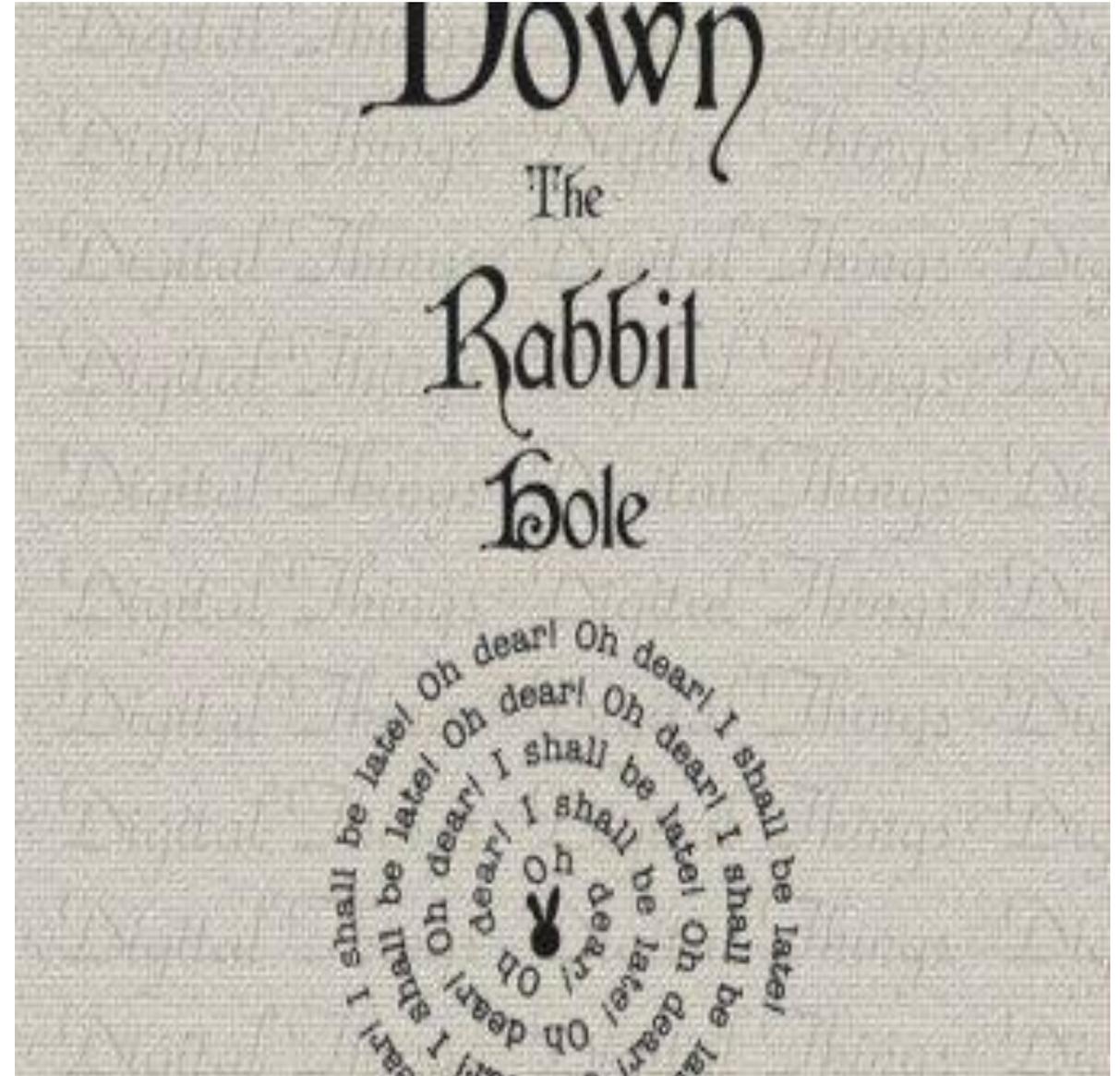
RIGHT OF WAY

EDUCATIONAL CONFERENCE
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“Valuations of Land and Rights”

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The **White Rabbit** is the spark of curiosity that activates **Alice's** spiritual awakening.
It is the **White Rabbit** who leads **Alice** down the rabbit hole.
It is the **White Rabbit** which **Alice** runs after and searches for endlessly in **Wonderland**, a symbol of her quest for knowledge ...



“If you want to go fast, go alone. If you want to go far, go together” – African Proverb

“if you know
Time as well
as I do,”
said the Hatter,
“you wouldn’t
talk about
wasting it.”



What are servitudes and how are they regulated?



SERVITUDES:

- Are real rights, of which security of title is a key element.
- However, in principle, servitudes are perpetual rights – they exist for long periods of time, therefore they might need to be flexible to adapt to changes in the modern world.
- In South African law, servitudes are regulated by common law.
- The question is – whether the stability required for the existence and proper functioning of real rights can accommodate the flexibility required for proper exercise of servitudes in changed circumstances

The South African Law relating to servitudes

- In general, is overly rigid, and there are convincing doctrinal, economic and policy reasons to incorporate a measure of flexibility into this area of law.
- The law of servitudes needs to develop
 - Foreign systems – by way of statutory means
 - South African legal landscape – requires the development to be implemented by the judiciary, relying on the scope that common law principles allow
 - Courts will have to adopt an approach that takes account of the nature of servitudes as real rights when determining their content.
- Academic attention – the task of unraveling the true common law position relating to any servitude is considerably harder.
- Current position – general uncertainty even in the courts, regarding the common law of servitude.

How are servitudes created?

- Servitudes may be created by court order or by state grant when the state grants land subject to a servitude.
- Most praedial servitudes are created by way of agreement between the owners/parties
 - Agreement may be recorded in a notarial deed
- The establishment of servitudes is regulated extensively by a number of common law principles
 - The Numerous Clauses Principle – most well known regulatory controls imposed on servitudes
 - There are only a limited number of rights that can be established as servitudes:
 - Requirement of registration
 - Subtraction from the dominium test

Compensation paid for servitudes

Compensation paid for servitude vs. compensation paid for expropriation

- Compensation that is paid for a permanent right of way of necessity (or for any similar, common-law forced transfer of rights) vs. compensation for expropriation
 - In South African law – creation of a servitude by operation of law – common law principles
 - Cannot be expropriatory in nature – there is no common law authority for expropriation in South African law – requires statutory authority.
- Expropriations must satisfy 2 standard requirements:
 - Public purpose – servitudes are not necessarily for a public purpose
 - The compensation paid by State – with servitudes it is paid by other private party
- A forced transfer of rights – non-consensual servitude created by operation of law is not an expropriation
- Compensation alleviates burden imposed forcibly on the servient owner by operation of law

Reference: AJ van der Walt – Sharing Servitudes

Constitution

- Recognizes and protects not only property but a range of non-property rights
- Secondly, the courts may not allow property rights to trump the other, non-property rights in the traditional, hierarchical manner – they must be balanced out and reconciled as far as possible so as to “respect, protect, promote and fulfill” the rights in the Bill of Rights
- And to realise the democratic values of human dignity, equality and freedom and the constitutional transformation goals – Sec 7(1)-(2), 39 (1)-(2) of Constitution
- Judging from case law – the nature and extent of protection of a particular property right in the new constitutional order depends on the historical and social context and vary according to two considerations
 - How important upholding the established right is for the individual holder
 - How important regulating and limiting that right is in upholding and protecting other non-property rights

So then ... how is compensation determined for servitudes?

“ Would you tell me, please, which way I ought to go from here?”

“That depends a good deal on where you want to get to, “

“I don’t know where ...”

“Then it doesn’t matter which way you go,” said the Cat ...

“But I don’t want to go among mad people, “ Alice remarked.

“Oh, you can’t help that,” said the Cat: “we’re all mad here. I’m mad. You’re mad.”

“How do you know I’m mad?” said Alice

“You must be” said the Cat “or you wouldn’t have come here”

In reference – Elmien du Plessis



In law of servitude ... compensation technically alleviates the burden that is imposed forcibly on the servient owner by operation of law, which prevents the regulatory limitation of an owner's rights caused by the ex lege creation of the servitude from being excessive or disproportionate.

AJ van der Walt

Requirements for a valid expropriation

- Unilateral act by the State which, based on operation of law, acquired private property, where the loss of property for the former owner is usually total and permanent
- Property is ordinarily acquired by or on behalf of the State for a public purpose or in the public interest and compensation is payable
- In SA, Sect 2(1) of Expropriation Act – Minister of Public Works power to expropriate property or to take a right to use property temporarily for a public purpose subject to the payment of compensation
- 4 requirements for a valid expropriation”
 - The authority requirement
 - The public purpose requirement
 - The procedural fairness requirement
 - And The Compensation requirement
- In the Expropriation Act, the property that can be expropriated is not restricted to movable and immovable tangible objects, but includes:
 - Incorporeal real and personal rights

Requirements for a valid expropriation cont.

- Public purpose in its simplest form means that the expropriation should benefit the community as a whole and not just one person in particular
- The payment of compensation is a requirement for a valid expropriation
 - Sect 2(1) of the Expropriation Act 63 of 1975
 - The compensation amount is determined in terms of Sect 12 of the act – even if an expropriation is authorised by another act, compensation must be determined in terms of the 1975 Expropriation Act
 - Under the Expropriation Act, the High Court has an inherent jurisdiction to determine the compensation

Compensation in terms of the Expropriation Act 63 of 1975

- The Compensation principle
 - Section 12 provides basis upon which expropriation is determined in all cases of expropriation, regardless of statutory origin.
 - Section 12 is still applicable for insofar as it is compatible with the Constitution
- Constructive expropriation – a deprivation of property that severely limits or destroys property rights without a formal transfer of ownership to the state
 - Quasi-expropriation or de facto expropriation, material expropriation, inverse condemnation or a taking
 - Is mostly a constitutional property law issue – therefore not known in SA before 1994.
 - The Constitution brought new debates on whether or not this form of expropriation should be recognised in SA

What is then compensated?

- The owner should be compensated for the rights that are taken away
- Compensation should thus be determined according to the rights that the owner had in the property
 - Gildenhuys argues that we have to accept that rights in relation to things give them value, that the rights themselves determine the value of the property and not any subjective interest of the owner or expropriatee.
 - Thus at the time of expropriation it is the rights in the property that must be taken into account, and not the property itself.
 - Therefore rights give value to land. At the expropriation of land, it is the owner's subjective rights that are expropriated and not the immovable property as an object.

How is compensation calculated?

- Section 12(1) of the Expropriation Act sets out how compensation should be calculated
- The influence of the Constitution on the existing law
 - It is not sure how the Constitution complements or restricts current legislation that provides for expropriation and compensation
 - Grey areas where Expropriation Act conflicts with the Constitution
 - Public purpose vs. public purpose and the wider public interest
 - Calculation of compensation act prescribes “market value” while Constitution prescribes “just and equitable” compensation with market value being one of the factors to take into account
 - The Expropriation Act should be re-interpreted to give content to the values enshrined in the Constitution
 - The Expropriation Act should therefore “promote the spirit, purport and objects of the Bill of Rights, and not merely be adjusted so as not to be unconstitutional

“A new Constitutional Interpretive Framework”

Interpretive Framework?

- In the context of property law
 - The property clause be interpreted in such a way as to promote the values that underlie an open and democratic society.
 - When developing the common law or customary law
 - While recognising the existing rights and freedoms recognised or conferred by common law, customary law or legislation insofar as it is consistent with the Bill of Rights
- Secondly it instructs the courts to consider international law, and allow the courts to consider foreign law
- Courts must interpret the Bill of Rights purposively in such a way as to promote the values that underlie a free and democratic society
 - Interaction between Constitution, the Bill of Rights and other legislation and the common law
 - Constitution's superiority – obligation to bring common law, customary law, and legislation in line with the Constitution
- Section 25 – horizontal application?
 - Unlikely – a power conferred on the state only
 - Roux and Davis – sect 25 is only applicable where the state deprives, expropriates or otherwise infringes private property rights
 - Property clause – protects property rights, but also promotes land reform ...



Is this how we deal
with our future?

Nope!!

*“Therefore as **SARWA members** we have to acquaint ourselves with the changing markets and legislations”.*

WHY?



Value determination outcomes

- Market value
 - Prior to South African Final Constitution - Played central role in the calculation of compensation
 - Under the Constitution, 1 of 5 factors
- Based on the willing buyer, willing seller principle
 - Determined by a chosen calculation method (often different results)
- Which damages should be included?
 - Left to the courts – which relies on what is placed in front of them
 - Therefore necessary to question the assumptions that the methods are based on
- Questions to ask
 - Why do we pay compensation?
 - What is compensated?
 - When do we pay compensation?
 - How much compensation should be paid?

Role of Valuers going forward ...

- Constitution demands
 - Just and equitable compensation
 - Market value just 1 interpretation of the just compensation principle
 - Courts have a choice where to focus
 - This choice can influence their determination of the fair market value
 - Highest and Best Use of the property
 - Development costs of reaching highest and best use
 - May pay more than market value
 - Market value therefore not so objective
- Role of the OVG and the Property Valuation Act 2014
- Development of servitude law – join hands with professionals
- Need for on-going training - keeping abreast with the times
- Servitude Training Manual & Workshops

THANK YOU

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