

When is an erf regarded as a 'registered erf'?

The arbitrary and incorrect interpretation of legal principles and the current law by municipal officials can lead to disastrous consequences.

By Gert Minnaar

In the affordable housing market it is important that the policies and business rules of municipalities reflect the correct legal position as prescribed in legislation. If not, it introduces procedures which are not constitutional and can be challenged in a court of law.

This also complicates the already challenging and strained development environment unnecessarily, with needless costs and (unwelcome) time delays, which endanger the developers' bottom line and continued existence.

In the affordable housing market, with FLISP and Bonded housing products, that focus primarily on first time homeowners (in the price bracket between R400 000 to R1 000 000), profit margins are already fairly tight for developers.

The arbitrary and incorrect interpretation of legal principles and current laws by municipal officials can lead to disastrous consequences, firstly to the developers that are the main stakeholders and carry the financial risk of developments, as well as the vulnerable end-users of the value chain.

BUSINESS RULE 001/10-03/17

On 13 March 2017 the Building Control Department of the City of Johannesburg Metropolitan Municipality implemented a business rule, which states that no applications for the approval of buildings plans will be considered for unregistered *erven with the Registrar of Deeds.

All applications must be for registered erven and accompanied by related title deeds. It also states that the submission of approved surveyor general diagrams and general plans will not be accepted because the diagrams do not constitute registration of the erven with the Registrar of Deeds.

This means that this department, in terms of its interpretation of a 'registered erf', from that date on refuses to receive applications for the approval of buildings plans for any erf in a newly established township, where an erf is still held by the township applicant under the township title for that township, unless the township owner registered a Certificate of Registered Title for such an erf, separate from that township title.

It appears that the department, in formulating this rule, relies on a ruling from the Geographic Information System (GIS) Department of the City of Johannesburg Metropolitan



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Municipality regarding what constitutes a 'registered erf'. This rule apparently states that an erf in a newly proclaimed or formalised township, which is still held by virtue of the township title by the township applicant, is not regarded by the GIS system as a 'registered erf'.

* *Erven* – A civil engineering term meaning a South African a plot of land, usually urban, marked off for building purposes.

TRANSFER OF A SERVICED ERF DIRECTLY FROM THE TOWNSHIP TITLE IS LEGAL AND GENERAL PRACTICE

In the normal course of the business of a developer in the affordable housing market, the product on sale is a serviced erf in a township, linked to a building package to construct a house on that erf. A contractor can also obtain the right from a township owner to market such a serviced erf linked to a building package for the purchaser.

The township owner gives transfer of the serviced erf to the purchaser in terms of section 43(5)(a) of the Deeds Registries Act, 1937 (No47 of 1937), where it provides that the transfer of a whole erf from the township title is possible. Simultaneously with this transfer the end user mortgage bond which finances the purchase of the serviced erf and the construction of the house as set out in the building agreement, is registered too.

FINANCIAL IMPLICATIONS OF THIS BUSINESS RULE

This rule forced the developers, instead of transferring the serviced erf directly to the purchaser from the township title, to first create a separate title deed for any such erf still held under the township title, either by registering a Certificate of Registered Title for the specific erf or one Certificate of Registered Title for the identified batch of erven for which building plans must be submitted for approval.

In terms of rands and cents, the developer has to provide for the following additional costs:

- The recommended tariff for the registration of a Certificate of Registered Title for one erf at the time amounts to R3 850 conveyancing fee plus R305 Deeds Office charges.
- If separate Certificates of Registered Title for 100 stands have to be registered it could cost the developer R385 000 in conveyancing fees plus R30 500 Deeds Office charges for these 100 separate Certificates of Registered Title.

- If the developer opts for the registration of one Certificate of Registered Title for a batch of 100 stands the conveyancing fees could be R130 570 (R3 850 plus R1 280 x 99) plus R305 Deeds Office charges.

Even though the developers negotiate reduced conveyancing fees with their conveyancers, which attend to the subsequent transfer of the serviced erf this registration of Certificates of Registered Title, it may cause additional conveyancing costs which are not legally required in terms of existing legislation.

TIME DELAYS LINKED TO REGISTRATION OF A CERTIFICATE OF REGISTERED TITLE

The developers also have to deal with the time delays linked to the issuing of these Certificates of Registered Title by the Registrar of Deeds, which add at least another six to eight weeks onto the process to transfer the serviced erf to the purchaser.

The Certificate of Registered Title for any such erf can usually be registered within eight to 10 working days from date of lodgement at the Deeds Office, but after registration the Deeds Office must first capture all the relevant information and scan the documents into its records before the registered Certificate of Registered Title can be delivered to the conveyancers.

This delivery period may take from six to eight weeks after date of registration. A copy of the registered Certificate of Registered Title can only then be submitted to Building Control so that the building plans for the house to be constructed on that particular stand can processed for approval.

DEMAND BY THE MUNICIPALITY FOR THE SUBMISSION OF A SECTION 82 OR 113 SERVICES CERTIFICATE WITH THE REGISTRATION OF A CERTIFICATE OF REGISTERED TITLE IN CONTRAVENTION OF THE TOWN-PLANNING AND TOWNSHIPS ORDINANCE, 1986 (ORDINANCE 15 OF 1986)

What adds to the developers' woes is that the municipality sometimes forces the developer to submit the services certificate issued in respect of the erf to the Registrar of Deeds before the Certificate of Registered Title may be registered in the Deeds Office, by imposing duties on the Registrar of Deeds, which are in contravention of the Town-Planning and Townships Ordinance, 1986 (Ordinance 15 of 1986).

This requirement for the submission of a services certificate does not muster constitutionalism regarding erven in a township established in terms of the Town-Planning and Townships Ordinance, 1986 (Ordinance 15 of 1986), because the registration of a Certificate of Registered Title to create a title deed for a specific erf in the name of the township

applicant (separate from the township title) is not the transfer of ownership as described in sections 82(1)(b) and 113(1)(c).

The registration of a Certificate of Registered Title in this instance is merely the creation of a different title deed for the same erf, still held by the same registered owner, now in the form of a Certificate of Registered Title instead of the township title.

One of the duties of the Registrar of Deeds is described in section 3(1)(b) of the Deeds Registries Act, 1937 (No 47 of 1937) as follows:

'The Registrar shall, subject to the provisions of this Act, examine all deeds or other documents submitted to him for execution or registration, and after examination reject any such deed or other document the execution or registration of which is not permitted by this Act or by any other law, or to the execution or registration of which any other valid objection exist'.

The Registrar of Deeds should have challenged the municipality's contravention of the ordinance and its encroachment on the registration duties and functions of the Deeds Office instead of agreeing to it without questioning the validity of those requests.

THE INTERPRETATION OF THE TERM 'REGISTERED ERF'

The interpretation by the City of Johannesburg Metropolitan Municipality of a registered erf in Business Rule 001/10-03/17 must be evaluated in terms of the accepted legal principles applicable when townships are established.

The definition of 'owner' in section 102 of the Deeds Registries Act, 1937, (No47 of 1937) states that it means in relation to immovable property, the person registered as the owner or holder.

If one conducts a Deeds Office search on any erf still held by virtue of a township title the Deeds Office printout will show that the township applicant is the registered owner of that erf in terms of the township title, despite the fact that these individual erven held under the township title are not separately described in different paragraphs.

The Deeds Office printout for Erf 1030 Lufhereng Township (Figure 1), for example shows in the Owner Name column the 'City of Johannesburg Metropolitan Municipality' and in the Title Deed column T38034/2014. The code T/T appears in the purchase price column on this printout, which is the Deeds Offices' way of indicating that the erf is still held by virtue of the township title.

Owner Information	
Owner 1 of 1	
Owner Name	CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY
ID / Reg. Number	-
Owner Type	COMPANY
Title Deed	T38034/2014
Purchase Date	UNKNOWN
Registration Date	22/09/2014
Purchase Price	T/T = TOWNSHIP TITLE
Multiple Owners	NO
Multiple Properties	YES
Share	-
Microfilm Reference No.	-

Figure 1: The Deeds Office printout of Erf 1030 Lufhereng Township.

printout is linked to the endorsement in terms of section 46 of the Deeds Registries Act, 1937, (No47 of 1937) on the township title showing that the land (mother property) held in terms of that title has now been laid out into erven, parks and streets in a separate register under the name of that specific township (Figure 2).

In this section 46 endorsement in respect of the township register for Lufhereng Township it shows that the land has been laid out into erven numbered 1 to 1 031 and 8 parks numbered 1032 to 1 039 in accordance with General Plan SG No 9011/2008. The township owner is therefore now the owner of the erven as described in this section 46 endorsement, even if the erven is not listed in separate paragraphs in the township title for Lufhereng Township

Figure 2: The section 46 endorsement in respect of the township register for Lufhereng Township.

It further shows that this information was booked in a separate register under the name Lufhereng, which is in fact the township register for Lufhereng Township.

In the court case of EM and EM Engineering (Pty) Ltd and the Kwadukuza Municipality, the Registrar of Deeds and ASK Y Development Professionals CC, which was delivered on 26 June 2015 in the KwaZulu-Natal Local Division of the High Court, the following points were raised while determining what constitutes a registered erf:

- The real issue is if a rates clearance certificate had to be issued for the mother property (tantamount to the Remaining Extent of the township in Gauteng) or for the subdivisions (tantamount to the erven depicted on the General Plan for a township in Gauteng) with the transfer of an erf from the township title.

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subdivision of the mother property in the office of the Registrar of Deeds, KwaZulu-Natal in terms of the provisions of section 46 of the Deeds Registries Act, 1937 (No 47 of 1937) which is tantamount to what we know in Gauteng as the opening of a township register.

- In paragraph 20 on pages 10 to 11 of this judgment the court found that it must follow that the owner of land as defined in section 102 of the Deeds Registries Act, 1937, (No47 of 1937) in respect of which a general plan has been registered in terms of section 46(1) of the Deeds Registries Act, 1937, (No47 of 1937), must also at the time of such registration continue to be the owner of each subdivision or erf, therefore registered. After all, there is no suggestion that erven, which occurs by the registration of a general plan, would be ownerless.
- In paragraph 22 on page 11 of this judgment the court also confirmed the principle that when section 46(1) of the Deeds Registries Act, 1937, (No47 of 1937) is read with the provisions of section 46(7) and 43(5)(a), any erf, if alienated as a whole, may be registered into the name of its new owner without the need to first obtain a certificate of registered title in respect of that erf.

It is clear then that an erf held by the township applicant by virtue of the township title is in fact a registered erf for the purposes of the Deeds Registries Act, 1937, (No47 of 1937).

RESPONSE FROM THE BUILDING CONTROL DEPARTMENT

When the Building Control Department was approached with the interpretation of a registered erf (above) sanity prevailed, and thereafter applications for the approval of building plans for Res 1 erven were accepted and processed again without requiring to first register a Certificate of Registered Title.

However, Business Rule 001/10-03/17 was not revoked formally. This department still insists on the submission of a registered Certificate of Registered Title with building plans for a Res 3 erf before processing such applications. It does not make sense because if a Res 1 stand held by a township title is a registered erf then surely a Res 3 stand held by a township title must also be a registered erf?

RATES DEPARTMENT ENTERS THE ARENA

In the affordable housing development space, the banks finance two basic products known as Plot & Plan and Turnkey transactions and they differ as follows:

- Plot & Plan: the purchaser takes transfer of the serviced erf and on registration of the transfer and the linked end-user mortgage bond, construction of the house commences.
- Turnkey (Delayed Plot & Plan): the purchaser purchases a serviced erf and building package but transfer and registration of the linked end-user mortgage bond is delayed until the construction of the house is completed.

"If the current setup of the GIS system at the City of Johannesburg Metropolitan Municipality has the unintended consequence of discarding the existing legislation, this system must be updated as soon as possible to resonate with the current law."

In the case of Plot & Plan transactions the municipality is prepared to open a municipal account for the erf before its transfer to the purchaser but with Turnkey transactions the municipality refuses to open a municipal account, apparently because of the fact that transfer of the Turnkey transactions takes so much longer than the Plot & Plan transactions. If the result is the same, namely the transfer of the serviced

erf into the name of the purchaser who purchased it in terms of a sale agreement or offer to purchase, it is difficult to understand why the municipality does not treat Turnkey transactions in the same manner as Plot & Plan transactions.

CONCLUSION

If the current setup of the GIS system at the City of Johannesburg Metropolitan Municipality with regard to what constitutes a registered erf has the unintended consequence of discarding the existing legislation, this system must be updated as soon as possible to resonate with the current law. If not, it will remain the Achilles heel which hampers speedy and efficient development and cause unrequired costs and delays.

The establishment of the Johannesburg Developers Forum, just like it did with the Tshwane Developers Forum during 2018, can create a sound platform for engagement between all stakeholders in the development space where these type of issues, and specifically the unpremeditated consequences of uninformed decisions, can be discussed with municipal officials so that it can be resolved in line with the principles of efficiency and good administration as described in section 7 of the Spatial and Planning and Land Use Management Act, 2013 (No16 of 2013). 🏠

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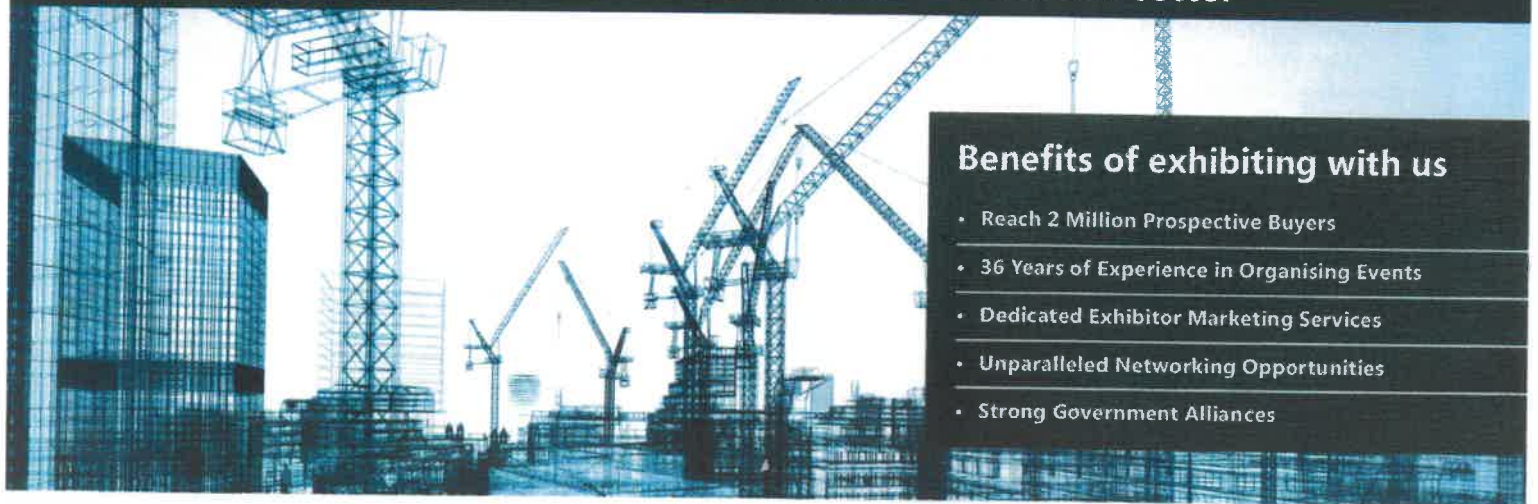
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