

SOUTH AFRICA / JUDGMENT

Buchanan v Hope NO and Others (81/2014) [2014] ZAECGHC 104 (3 July 2014) [2014] ZAECGHC 104

COURT

Eastern Cape High Court, Grahamstown

BEFORE

M Roberson

CASE / FILE NUMBER

81/2014

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GRAHAMSTOWN)

CASE NO: 81/2014

DATE HEARD: 29/05/2014

DATE DELIVERED: 03/07/2014

In the matter between

MARSHA ANNE BUCHANAN

APPLICANT

and

EUGENE LLEWELYN HOPE N.O.

1ST RESPONDENT

CLAUDE STANLEY BARNES N.O.

2ND RESPONDENT

EUGENE HOPE FAMILY TRUST IT 2667/97

3RD RESPONDENT

JUDGMENT

ROBERSON J:-

- [1] The applicant is the registered owner of Erf [.....]. The first and second respondents are the trustees of the third respondent trust (the Trust). The Trust is the registered owner of Erf [.....]. Erf [.....] is the consolidated erf of the former erven [.....] and [.....]. In terms of a notarial deed of servitude registered on 27 March 2009, erf [.....], which is situated in front of erf [.....]:

“shall be subject to a building height restriction of 4 (four) metres measured along the building restriction line which applies to Port Alfred erven in terms of the Ndlambe Municipality Building Regulations and which runs parallel to the common boundary with the Dominant property depicted by the line A B on diagram SG No. 8395/2006 annexed to Certificate of Registered Title No [.....]in

favour of Erf [.....]

- [2] The applicant as plaintiff instituted an action in this court for an order directing the respondents as defendants to comply with the servitude. She alleged in her particulars of claim that the respondents had erected a building on erf [.....] and that parts of the building exceeded the height restriction of four metres as measured along the building restriction line as defined in the servitude. The respondents had accordingly contravened the terms of the servitude. In their plea, the respondents admitted the existence of the servitude and pleaded that it had come about as a result of an agreement reached between the parties during 2005, whereby the applicant would withdraw her objection to a proposed subdivision of the third respondent's property if the respondents agreed to a height restriction of four metres of the dwelling to be erected on the property. The respondents denied that parts of the building exceeded the height restriction and denied that they had contravened the terms of the servitude.

- [3] Tshiki J presided in the trial and on 28 October 2011 gave judgment as follows (paragraph [40] of the judgment):

“[40] I therefore grant a declaratory order that the Trust has contravened the terms of the servitude in that the building construction in erf [.....] exceeded the height restriction of 4 (four) meters measured along the building restriction line which applies in Port Alfred ervens. Judgment therefore is granted in favour of the plaintiff.

[40.1] Defendants are ordered to comply with the servitude registered in Notarial Deed of Servitude K 326/2009.

[40.2] Defendants are ordered to pay costs of suit, jointly and severally the one paying the other to be absolved.”

- [4] It is this order which is the subject of the present application, in which the applicant seeks the following relief:

- (a) That the order of Tshiki J granted in case no 654/2010 on the 28th of October 2011 be interpreted so that the servitude contravened by the Respondents provides for a four meter building height restriction from the finished ground level along the building line;
- (b) That the Respondents comply with the order of Tshiki J so interpreted within 3 months of the date of this order;
- (c) That in the event of Respondents failing to comply with such order this application may be re-enrolled with the Notice of Motion and affidavits suitably amended and/or amplified so as to request further relief committing the Respondents to imprisonment for contempt of court for a period determined by the Court and for further consequential orders relating to the demolition of the Respondents' building;
- (d) That the Respondents pay the costs of this application.

[5] The point from which the four metre height restriction was to be measured was not an issue on the pleadings, but was an issue at the trial. The uncontroverted evidence of the applicant's expert witness Mr. Peter Sülter, a land surveyor, established that the height of the building at various points exceeded four metres. At paragraph [12] of his judgment TshikiJ said:

"It follows, in my view, that the only issue herein is from which point the building height restriction of 4 (four) metres should be measured in order to establish the extent of the 4 metres."

[6] According to the judgment, the applicant contended that the point from which the four metres should be measured was the finished ground level, whereas the defendants contended that it should be from the natural ground level. At paragraph [21] of the judgment Tshiki J said:

"[Mr Pretorius] argues that the Court should consider the height as measured from the natural ground level at the time the condition was imposed which was on 25th September 2005. And not when the servitude was registered as Mr. Paterson suggests. It should be noted that at the time of registration of the servitude the building in issue was already in existence and was not at the time when the Ndlambe municipality

imposed the condition which resulted into the registration of the servitude. In my view, it would therefore not make sense in this case to consider the height as measured from the natural ground level at the time when the condition was imposed because there was no building existing during that period."

At paragraph [36] he said:

"It follows that in the present case the servitude should be interpreted as providing a 4 meter height restriction from the finished ground level along the building line. This interpretation is consistent with the evidence of the plaintiff and the land surveyor

Mr Sülter. Measurements taken by Mr. Sülter clearly prove that the height of the wall exceeds 4 metres by far and in all respects.”

- [7] A further aspect of Sülter’s evidence and its effect was referred to in paragraph [37] of the judgment as follows:

“Even on the approach suggested by Mr Pretorius, the evidence of Mr. Sülter shows clearly that the Trust has exceeded the suggested height restriction though by a shorter margin compared to the position in the approach I have accepted, as suggested by Mr Paterson. In my view, it matters not that the Trust exceeded the height restriction by a mere 500 centimetres such would suffice to amount to a contravention of the terms and requirements of the servitude. According to Mr Sülter from the ground level at AA to the top of the wall the height at cross section BB is 5.49 meters well beyond the 4 meter restriction. Again from the ground floor level at AA to the top of that pitch of the glass roof the height is 6,01 meters.”

- [8] The respondents applied for leave to appeal against the judgment of Tshiki J. According to the judgment on the application for leave to appeal, the main ground of appeal was that Tshiki J did not decide the issue between the parties, namely from which level or point the measurements of the height of the building should be measured. In granting leave to appeal, Tshiki J said the following:

“Therefore, there are reasonable prospects that another Court could decide in favour of the applicant on only one point, which is whether in my judgment I should have made a specific order determining from which level or point the measurements of the height of the building should be taken.”

- [9] The appeal was dismissed by a full bench of this division. After referring to the respondents’ denial of the applicant’s

allegation in the particulars of claim that parts of the structure exceeded the four metre height restriction and that the respondents

had contravened the terms of the servitude, Nepgen J said as follows:

“In its plea appellant merely denied the contents of these paragraphs. The prayer in the plea is also merely one for a dismissal of the plaintiff’s claims, with costs. The only issue, accordingly, was whether there had been a contravention of the terms of the servitude. As indicated above, that this had in fact occurred was established by the evidence.”

- [10] Following the judgment on appeal, the respondents’ attorneys wrote to the applicant’s attorneys stating that the natural ground level would be used as the position from which the building height restriction would be measured and that the portion of the structure, determined accordingly, would be removed within the next few weeks. The applicant’s attorneys responded and insisted that the respondents comply with Tshiki J’s order in that he had held that the four metre height restriction should be measured from the finished ground level. No response being forthcoming, the applicant’s attorneys put the respondents on terms to comply, failing which an appropriate application to court would be brought.

- [11] Thereafter the respondents' attorneys wrote to the applicant's attorneys pointing out that the servitude only applied to the former erf [.....] and that the respondents had complied with the court order in that they had reduced that part of the structure on erf [.....] which exceeded the height restriction. In response the applicant's attorneys advised the respondents' attorneys that the respondents had not complied with the order and again reminded them of Tshiki J's interpretation of the servitude as contained in paragraph [36] of the judgment.
- [12] In response the respondents' attorneys advised that if the offending parts of the building on the former erf [.....] were removed, the portion of the building situated on the former erf [.....] which was of a similar height would remain. They were of the view that it could never have been the court's intention to compel the respondents to remove a part of the building on the former erf [.....] if the other part of the building of the same height remained in place on the former erf [.....]. They took the stance that the respondents were not in contempt of court.
- [13] In her founding affidavit the applicant contended that the particulars of claim and the plea in the action were to be interpreted as accepting her position that the building height restriction should be interpreted as being measured from the finished ground level along the building line. According to the applicant there is a dispute regarding interpretation of Tshiki J's

order and until that dispute is determined by this court she is unable to insist on compliance with the order in accordance with her interpretation.

- [14] The first respondent deposed to the answering affidavit and stated that the height of the building had been reduced by 250 millimetres, in accordance with the respondents' interpretation of the court order. He agreed that there was a dispute about the interpretation of Tshiki J's order and contended that the interpretation contended for by the applicant would result in an absurdity. He referred to the applicant's original letter of objection to the proposed subdivision, in which she stated that she had purchased erf [.....] because of the view of the river, marina, and sea, and felt that the subdivision would have a negative effect on her property. The first respondent attached photographs which he claimed demonstrated how limited the obstruction of the applicant's view of the river was. With reference to further photographs he stated that removal in accordance with the applicant's interpretation would make a miniscule difference because the portion of the building on the former erf [.....] would remain at its present height and block the applicant's view of the distant hills. The applicant therefore, so it was stated, stood to gain nothing by forcing the respondents to comply with the servitude as interpreted by Tshiki J.
- [15] The first respondent went on to state that the respondents disagree with Tshiki J's interpretation and to illustrate his point posed the situation where the respondents could have added two or three metres of soil to the natural ground level and built a dwelling from that point up to a height of four metres. In such a situation, if Tshiki J's interpretation was

applied, they would have complied with the servitude. Such an interpretation would be open to abuse. The first respondent further pointed out that removal of the offending portions of the building would result in an unattractive building. The removal would also be expensive, a quotation of R395 000.00 having been obtained. Lastly, the first respondent referred to attempts to reason with the applicant, to no avail.

- [16] The respondents contended that Tshiki J's order was ambiguous in that it was not clear from the order from which point the four metre height restriction was to be determined. As aids to interpretation, reference was made to the matter of *PS Booksellers (Pty) Ltd and Another v Harris and Others* 2008 (3) SA 633 (C) where reference in turn was made to the unreported case of *Camps Bay Residents and Ratepayers' Association and Another v Avadon 23 (Pty) Ltd and Another* CPD case number 1736/2005 where Foxcroft J said:

"In my view, the suggestion by Mr. Roos that a building can be provided with an artificial ground level is without any legal substance."

- [17] Reference was also made to the Port Alfred Planning Scheme which contains restrictions which it was submitted are similar to those which were intended in the servitude. It was submitted that in view of the fact that the planning scheme and the servitude seek to achieve similar aims, similar approaches should be taken in determining the height of any building.

- [18] The applicant contended that the order was not ambiguous.

- [19] In *Van Rensburg and another NNO v Naidoo and Others: Naidoo and Others NNO v Van Rensburg and Another NNO* 2011 (4) SA 149 (SCA) at para [42] Navsa JA said:

"In interpreting a judgment the court's intention is to be ascertained primarily from the language of the judgment or order, as construed according to the well-known rules relating to documents. As in the case of any document, the judgment or order and the court's reasons for giving it must be read as a whole to ascertain its intention. In this regard, see Administrator, Cape, and Another v Ntshwaqela and Others 1990 (1) SA 705 (A) at 715F-H."

The passage referred to in the Administrator, Cape matter was as follows:

"In Firestone South Africa (Pty) Ltd v Genticuro AG 1977 (4) SA 298 (A) Trollip JA made some general observations about the rules for interpreting a Court's judgment or order. He said (at 304D-H) that the basic principles applicable to the construction of documents also apply to the construction of a Court's

judgment or order: the Court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual well-known rules. As in the case of any document, the judgment or order and the Court's

reasons for giving it must be read as a whole in order to ascertain its intention. If on such a reading, the meaning of the

judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement

it.”

- [20] If one reads Tshiki J’s judgment as a whole, it is clear that he decided that the point from which the height restriction was to be measured was the finished ground level. At paragraph [12] of the judgment he identified the issue to be determined; at paragraph
- [21] he considered and rejected the respondents’ contention as to how the servitude was to be interpreted; at paragraph [36] he determined the issue in favour of the applicant; and at paragraph
- [37] he endorsed his acceptance of the applicant’s approach to the interpretation of the servitude. The wording of his order at paragraph [40] could not be considered merely in isolation but in the context of his clear determination of the issue for decision. By declaring in paragraph [40] that the building exceeded the height restriction of four metres “measured along the building restriction line which applies in Port Alfred erven”, he was effectively declaring that the point from which the four metre height restriction was to be measured was in accordance with his decision on the issue contained expressly in paragraph [36] of his judgment.
- [21] I am therefore of the view that the order, interpreted in accordance with established principles, is not ambiguous and extrinsic evidence as an aid to interpretation is not admissible.
- [22] Insofar as the de minimis defence was raised in the papers, this was not an issue at the trial and can have no bearing on the interpretation of the order. In any event, the evidence of Sülter demonstrated that the height of the building exceeded the four metre restriction relatively substantially at certain points.
- [23] As to the other complaints in the answering affidavit, in my view they reveal an acceptance that Tshiki J decided that the height restriction was to be measured from the finished ground level, but unhappiness with the consequences of his decision, namely how such an interpretation of the servitude could be abused, an unattractive building resulting from compliance with the order, and the expense of demolition. These factors and the applicant’s alleged unreasonable attitude have no bearing on the interpretation of Tshiki J’s order.
- [24] The applicant was criticised for not mentioning in her founding affidavit that the respondents had reduced the height of the building in accordance with their interpretation of Tshiki J’s order, and it was further submitted that there was no indication in the papers to what extent the building exceeded the height restriction, and consequently no indication that the respondents remain in breach of the servitude. The interpretation contended for by the applicant was therefore, so it was submitted, not motivated. I was referred to the matters of JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others [1996] ZACC 23; 1997 (3) SA 514 (CC) and Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam, and Another: Maphanga v Officer Commanding, South African

Police Murder and Robbery Unit, Pietermaritzburg, and Others 1995

(4) SA 1 (AD). Both those matters dealt, inter alia, with the discretionary power of a court to grant declaratory orders and the policy of not exercising such discretion in order to decide points which are abstract or academic.

[25] I do not think that this argument avails the respondents. The applicant did not seek a declaratory order in a vacuum. The applicant sought in this application an interpretation of Tshiki J's order which accorded with his decision contained in paragraph [36] of his judgment, for the purpose of enforcing the order, in which purpose she has so far been unsuccessful. Tshiki J also accepted the evidence of Sülter which proved that various parts of the building exceeded the height restriction. The order sought by the applicant is therefore clear and relates to her right to enforce the order in accordance with Tshiki J's

interpretation of the servitude and the various measurements testified to by Sülter.

[26] In the result the application must succeed. The following order will issue:

[26.1] The order of Tshiki J granted in case no 654/2010 on the 28th of October 2011 is interpreted sothat the servitude contravened by the Respondents provides for a four meter building height restriction

from the finished ground level along the building line;

[26.2] The Respondents are to comply with the order of Tshiki J so interpreted within 3 (three) months of the date of this order;

[25.3] In the event of the Respondents failing to comply with such order this application may be re-enrolled with the Notice of Motion and affidavits suitably amended and/or amplified so as to request further relief committing the Respondents to imprisonment for contempt of court for a period determined by the Court and for further consequential orders relating to the demolition of the Respondents' building;

[26.4] The Respondents are to pay the costs of this application.

J M ROBERSON

JUDGE OF THE HIGH COURT

Appearances:

For the Applicant: Adv T J M Paterson SC, instructed by Neville Borman & Botha Attorneys, Grahamstown

For the Respondent: AdvTMöller, instructed by Netteltons Attorneys, Grahamstown

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