

SOUTH AFRICA / JUDGMENT

Hope NO and Another v Buchanan (CA 83/2012) [2013] ZAECHGC 78 (2 August 2013)

[2013] ZAECHGC 78

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Nepgen, Sandi, Lowe

CASE / FILE NUMBER

CA 83/2012

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**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE - GRAHAMSTOWN)****Case No: CA 83/2012****In**

the matter between:

EUGENE

LLEWELLYN HOPE N.O

.....First

Appellant

CLAUDE

STANLEY BARNES N.O

.....Second

Appellant

In

their capacity as trustees for the time being of the

EUGENE

HOPE FAMILY TRUST IT 2667/1997

and

MARSHA MANNE BUCHANAN

.....First

Respondent

JUDGMENT

NEPGEN, J

- [1] Despite the citation of the parties in the case heading, the appellant is in fact the Eugene Hope Family Trust, represented herein by its trustees. The appellant is the registered owner of Erf 7156, Port Alfred, in the area of the Ndlambe Municipality. The respondent is the owner of Erf 4314, Port Alfred.
- [2] Because of the numbering of the erven referred to, it is necessary to provide a brief background before referring to what is in dispute between the parties. The property owned by the respondent was registered in her name on 12 August 2005. At that stage the respondent's property adjoined what was known as Erf 4316. During April 2005 an application was made for the sub-division of Erf 4316. The effect of the proposed sub-division was that that portion of the property which was in front of the respondent's property would be cut off from Erf 4316, creating a separate erf. At that time that portion of Erf 4316 was vacant land. The respondent objected to the proposed sub-division. However, subsequently an agreement was reached that a height restriction of 4m would be imposed on the new erf. As a consequence the objection to the sub-division was withdrawn. The sub-division accordingly went ahead, with the number allocated to the new erf in front of the respondent's property being Erf 7154. During December 2006 the said Erf 7154 was consolidated with Erf 7155. The consolidated erf was numbered Erf 7156, which is the property owned by the appellant.
- [3] On 7 April 2009 a Notarial Deed of Servitude was registered in respect of Erf 7154 (which, as has been mentioned, was then part of the consolidated Erf 7156), the relevant portion whereof reads as follows:

“ WHEREAS the Grantor as owner of the Servient property has in terms of a condition imposed by the Ndlambe Municipality, in terms of Section 25 of the Land Use Planning Ordinance NO. 15 of 1985 when approving the subdivision of the Grantors property granted to the Grantee as owner of the Dominant property certain Restrictive Rights over the Servient property

NOW THEREFORE

The Servient property namely:

ERF 7154 (PORTION OF ERF 4316) PORT ALFRED IN THE AREA OF NDLAMBE MUNICIPALITY

DIVISION OF BATHURST

EASTERN CAPE PROVINCE

IN EXTENT: 518 (FIVE HUNDRED AND EIGHTEEN) SQUARE METRES

HELD by the Grantor by Certificate of Registered Title No. T 013313/09

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 T013313/09 in favour of:

ERF 4314 PORT ALFRED

IN THE AREA OF NDLAMBE MUNICIPALITY

IN EXTENT: 979 (NINE HUNDRED AND SEVENTY NINE) SQUARE METRES

HELD by the Grantee under Deed of Transfer No T 64031/2005”

- [4] During 2008, and prior to the registration of the Notarial Deed of Servitude, the appellant constructed a dwelling on Erf 7156. A portion of the dwelling was situated on the former Erf 7154. The respondent was and is of the view that that portion of the dwelling which was erected on the former Erf 7154 in some respects exceeds the 4 metre height restriction as referred to in aforesaid Notarial Deed of Servitude. As a result the respondent, during March 2010, instituted action against the appellant in which she sought an order directing the appellant to comply with the servitude registered in terms of the aforesaid Notarial Deed of Servitude. The action was opposed by the appellant. The matter came before Tshiki, J who, after hearing evidence and argument, granted the respondent the relief sought by her, including costs. It is against this order that the appellant, with the leave of the court a quo, now appeals.
- [5] Only two witnesses testified at the trial, both called by the respondent. It is apparent from the evidence given by the Land Surveyor, Sulter, that when the building was erected on Erf 7154 the foundations were laid along the building restriction line after an excavation of some 1,8 metres. The respondent contended that in measuring the 4 metre building height the height should be measured from the foundation upwards. From the cross examination of Sulter it is clear that the appellant held the view that, in order to determine whether the height restriction had been exceeded, the height of the building, should be measured from the natural ground level along the building restriction line as it was prior to the excavation having been made. The evidence establishes that the actual height of the building exceeds 4 metres by a considerable extent. However, if it is only measured from the natural ground level, insofar as Sulter was able to determine what the natural ground level had been, it would only exceed 4 metres at one point, referred to as the apex of the building. The extent by which this would then exceed 4 metres was stated by Sulter to be 21 centimetres.
- [6] It is clear from the judgment of Tshiki, J that he preferred the contentions of the respondent as to how the height of the building should be measured, but he also pointed out, quite correctly, that even on the contentions advanced on behalf of the appellant the building height restriction was exceeded, if only at the one point. Tshiki, J consequently granted the respondent the order sought by her.

- [7] The argument sought to be advanced on appeal by the appellant was that Tshiki J was wrong in preferring the respondent's view regarding the position from which the height of the building should be measured. Counsel for the appellant was asked what effect this could have on the order made by Tshiki, J should we be of the view that he should have accepted the appellant's

contention regarding such measurement, as it was clear that even then the height restriction had been exceeded, although to a considerably

lesser extent. After a number of unsuccessful attempts to answer the question, counsel for the appellant eventually stated that what we should do was to determine this question in favour of the appellant and to then replace the order made by Tshiki, J by adding, in paragraph 1 of that order, the words "to the extent that it exceeds the height restriction of 4 metres measured from natural ground level".

- [8] It is quite clear, on whatever basis the height of the building is measured, that the order made by Tshiki, J that the appellant had to comply with the servitude registered in the Notarial Deed of Servitude was the correct order. More than half a century ago, in *Western Johannesburg Rent Board and another vs Ursula Mansions (Pty) Ltd*, 1948 (3) SA 353 (A) it was pointed out, at 355, that

".....an appeal can be noted not against reasons for judgment but against the substantive order made by a court".

This was recently affirmed in *Tecmed Africa (Pty) Ltd vs The Minister of Health*, [2012] 4 All SA 149 (SCA) where it was stated, at 157 g, para [17], that

".....whether or not a Court of Appeal agrees with a lower court's reasoning would be of no consequence if the result would remain the same".

In the circumstances the order made by Tshiki, J must stand.

- [9] In my view there is no substance whatsoever in the contention on behalf of the appellant that we should replace the order made by Tshiki, J in the manner referred to in para [7] above. The reason for this is that this was never an issue between the parties. After alleging, in her particulars of claim, that the appellant had erected a structure upon the servient property, the respondent averred that:

"6. Parts of the structure exceed the height restriction as measured along the building restriction line as defined in the servitude.

7. Defendants have contravened the terms of the servitude."

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] The appeal is dismissed with costs.

.....
J NEPGEN

JUDGE OF THE HIGH COURT

SANDI, J

I agree

.....
B SANDI

LOWE, J

.....
M J LOWE

APPEARANCES:

FOR THE APPELLANT: Adv B Pretorius instructed by Audie Attorneys

FOR THE RESPONDENT: Adv T J M Paterson SC instructed by Schäfers Attorneys

Date delivered: 2 August 2013

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