

SOUTH AFRICA / JUDGMENT

H.R.J Properties (Pty) Ltd v Mohammed and Another (17547/17) [2019] ZAWCHC 185 (25 February 2019) [2019] ZAWCHC 185

COURT

Western Cape High Court, Cape Town

BEFORE

Vos, AJ

CASE / FILE NUMBER

17547/17

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IN THE HIGH COURT OF

SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

Case

No: 17547/17

In

the matter between:

H
R J PROPERTIES (PTY) LTD
Applicant
and
RAYDA
MOHAMMED
First
Respondent
CITY
OF CAPE TOWN
Second
Respondent

JUDGMENT

DELIVERED ON 25 FEBRUARY 2019

Vos, AJ

Introduction

[1] In this matter the applicant applies for an order in the following terms:

“1. Reviewing and setting aside the Second Respondent’s decision during June/July 2017 to approve the First Respondent’s building plans in respect of Erf [...], Cape Town at C Street, Woodstock under plan Approval Number 97508637 and Plan No.: BP/0000070317314/2017 dated 7 July 2017;

2. Interdicting the First Respondent from constructing any wall or structure on the applicant’s servitude right of way as set out in SG No 2772/2003 attached marked “JS4” to the founding affidavit.”

[2] I shall refer to the applicant as “H.R.J. Properties”, to the first respondent as “Mrs Mohammed” and to the second respondent as “the City”. Mrs Mohammed opposes the application, while the City does not oppose the application.[1]

[3] H.R.J. Properties is the owner of the remainder of erf 10923 Cape Town, while Mrs Mohammed is the owner of erf [...], a portion of erf 10923 Cape Town. The two properties are contiguous. In terms of the title deed of H.R.J. Properties,[2] it is entitled to a servitude right of way over the property of Mrs Mohammed. The servitude right of way is recorded as follows in the title deed:

“3. Entitled to a servitude right of way 1.5m wide in favour of Remainder Erf [...] Cape Town, over Erf [...] Cape Town at Woodstock, the eastern boundary of which is represented by the line BC on diagram SG No 2772/2003”

[4] The servitude right of way is recorded in similar words in the title deed of Mrs Mohammed.
[3]

[5] The layout of the two properties is best understood by reference to the following aerial photograph:

[See PDF for image]

[6] The property of H.R.J. Properties is situated immediately to the north and the east of Mrs Mohammed’s property. The letters A B C D depict the approximate boundary of the property of Mrs Mohammed. The line B C, which is about 18,3 meters in length, represents the eastern boundary of the servitude right of way over her property, and the servitude right of way accordingly extends to the west (the left) for a distance of 1.5 meters.

The proposed wall

- [7] Mrs Mohammed wants to erect a wall on her property along the line B C, and approximately 4,5 meters to the south of the letter B, the wall will be built at an angle in a north westerly direction to the left, towards the house of Mrs Mohammed where it will abut the eastern wall of her house. The purpose of the angled section of the wall, is to permit vehicles to traverse approximately 4,5 meters of the servitude right of way, because the vehicles have to enter and exit the commercial building of H.R.J. Properties.
- [8] The entrance door to the commercial building is situated just above the letter B. The distance between the letter B and the entrance door of the commercial property, is about 3 meters.
- [9] The property of H.R.J. Properties is in the form of a panhandle, which extends in a southerly direction to C Street. At the boundary, where the panhandle joins C Street, it is about 3.49 meters wide. The letters A B C, represent the common boundary between the property of H.R.J. Properties, and the property of Mrs Mohammed.
- [10] On 7 July 2017, the City approved building plans of Mrs Mohammed whereby she has been authorised to construct the wall on the boundary of her property along the line B C, in such a manner that the wall will extend to the west (left) into the servitude right of way area. The proposed wall will be 1,8 meters high, have five pillars, and the width of the wall and pillars will vary between 230mm and 345mm. The total length of the wall is about 18,3 meters. On the northern and southern sides of the wall, there will be security gates to permit only pedestrian access.
- [11] H.R.J. Properties objects to the construction of the wall, mainly on the ground that it will materially impede vehicular access to its property. Therefore, so it contends, it will constitute an unlawful diminution of its right and enjoyment of the servitude right of way.
- [12] On the other hand, Mrs Mohammed denies that the boundary wall will obstruct the right of way as she claims that it was envisaged that the servitude right of way merely serves as a pedestrian exit to C Street. She also contends that after the boundary wall has been erected, H.R.J. Properties would still have free access to its right of way, as it can still be used as a pedestrian walkway or fire escape.

The legal nature of the right of way: only pedestrian access?

- [13] In *The Selective Voet Being The Commentary On The Pandects*[4], and dealing with rural servitudes, the following explanation about a right of way is given:

“Rural servitudes described – (iii) Right of way (via). -

Right of way is the right of going, walking and driving, and further of hauling stone or timber, and of carrying a lance straight up if only it does not injure fruits. The last two things are not permitted in a right of foot-passage or of driving.

Right of way embraces both foot-passage and driving. – Right of way includes in itself foot-passage and driving, not only physically but also formally. It follows that one who has a right of way established for himself can also expressly vindicate foot-passage and driving, according as he has been hindered from either passing or driving; and that he who, after having first brought such a right of way into a stipulation, has then been content to accept both foot-passing and driving, is deemed to have renounced the right of way.”

[14] In *Ethekwini Municipality v Brooks and Others*[5] it was held:

“[18] When it comes to a servitude of right of way it is important to bear in mind that it enures not only to the servitude holder, but, as it was put by Voet, also to 'the members of his household, his guests, his table companions, hirelings and medical attendants along with him'. This passage in Voet does not purport to create a watertight numerus clausus of parties entitled to make use of a servitude road. Thus, Maasdorp paraphrased the above passage as follows:

'(S)ervitudes . . . may be made use of, not only by the owner of the dominant tenement, but by anyone who has a legal right to be upon the dominant tenement, such as servants, guests, visitors, labourers, etc.' [My emphasis.]”

[15] In *Kruger v Joles Eiendomme (Pty) Ltd and Another*[6] the Supreme Court of Appeal held that an “imprecise servitude” must always be interpreted so that the servient tenement is “the less adversely burdened”[7], but approved of the following dictum in *Van Rensburg en Andere v Taute en Andere*[8] :

“By die toepassing van hierdie beginsel moet egter steeds in gedagte gehou word dat die aard en omvang van die beswaring bepaal word na aanleiding van die betekenis wat gegee moet word aan die ooreenkoms wat die serwituut daarstel. Indien die betekenis daarvan

ondubbelsinnig blyk te wees, is 'n hof nie geregtig om daarvan af te wyk ten einde 'n mindere beswaring te bewerkstellig nie”

[16] In other words, where a servitude is unambiguous, a court may not favour an interpretation thereof which is less onerous than the clear grammatical meaning.

[17] In arriving at the proper construction of the servitude in this matter, regard should also be had to the nature of the two properties and their relationship to one another. The property of Mrs Mohammed is improved by a dwelling in which she lives. Her property abuts C Street, and she has direct access to it.

[18] The property of H. R. J. Properties is improved by a commercial building in which it does business involving the supply and installation of sustainable and domestic green energy and heating solutions. H. R. J. Properties has direct access via the panhandle on its property, to C Street.

- [19] If vehicles and pedestrians require access from C Street to the commercial building of H. R. J. Properties, they do not have to traverse the right of way servitude area on the property of Mrs Mohammed in order to do so. The reason is that the panhandle part of H. R. J. Properties' property, abuts C Street, and it is about 3.49 meters wide.
- [20] The panhandle is therefore wide enough for pedestrians, and also wide enough for one vehicle for entrance and exit purposes. Therefore, vehicles and pedestrians can quite easily gain access to C Street by traversing only the panhandle part of H. R. J. Properties' property.
- [21] But, if a vehicle is parked on the panhandle part, or driving on it, the panhandle becomes too narrow to permit another vehicle from entering or exiting the property of H.R.J. Properties at the same time. That would only be possible if such other vehicle partially traverses the right of way servitude area in order to gain access to the commercial building of H.R.J. Properties. The same situation would arise if such other vehicle wishes to leave the commercial building and drive towards C Street. The combined width of the panhandle and the servitude area, is about 4.99 metres. That is wide enough for two vehicles.
- [22] The panhandle is 3.49 meters wide, which is obviously sufficiently wide for pedestrians. It would not have made sense at the time of the creation of the right of way, to serve only as a pedestrian walkway over the property of Mrs Mohammed, because a wide enough pedestrian access route was already available and existed over the panhandle, being the property of H.R.J. Properties.
- [23] So, if the panhandle is wide enough for pedestrians, why was an additional right of way created over Mrs Mohammed's property?

The answer to this question will soon become self evident.

[24] Mrs Mohammed contends that she wishes to build the wall for a number of reasons:

[24.1] the vehicles of H.R.J. Properties block her access to the servitude area and prevent her from taking the garbage out of her house;

[24.2] the wall will prevent H.R.J. Properties from again erecting a gate, laying cables and erecting an electric fence on her property;

[24.3] the wall will prevent the servitude area from being used as a commercial driveway; and

[24.4] it will prevent H.R.J. Properties from parking vehicles in the servitude area.

[25] If H.R.J. Properties has exercised its servitude rights in an improper manner, Mrs Mohammed should obtain a court order to stop such unlawful conduct. She is not permitted to build a wall, thereby permanently sterilising the right to use the servitude area. Put differently: if H.R.J. Properties is causing a nuisance, the nuisance should be stopped, not the right to use the servitude area.

- [26] It is common cause that, after the construction of the wall, its presence will prevent vehicles from traversing the major part of the servitude area, as only one vehicle at a time will be able to gain access to the commercial building on the property of H.R.J. Properties. Upon exiting, only one vehicle at a time will be able to leave. Two way traffic will come to an end.
- [27] Given the fact that H.R.J. Properties conducts business in its commercial building, it is obviously vital that vehicles should have access to its building. In fact, one may safely assume that vehicular access is just as important, as pedestrian access.
- [28] Mrs Mohammed has specifically designed the angled section of the wall to afford vehicular access over that area of the servitude area which extends approximately 4,5 meters to the south of the letter B. Her purpose is to allow vehicles easier access into the commercial building. The above photograph shows that, if a wall or pillar was erected at B, such wall or pillar would severely impede vehicular access into the commercial building, because the letter B is situated approximately in front of the door of the commercial building.
- [29] The contention of Mrs Mohammed that the right of way is only for pedestrians, and not vehicles, is unconvincing, because by her own admission she wishes to grant vehicular access to a part of the servitude area which is about 4,5 meters in length.[9]
- [30] There is another important feature of the servitude right of way that should be considered. At present, access to the servitude right of way area is afforded along the total length of the eastern boundary of the servitude. Put differently, a pedestrian and vehicle may enter the servitude area at any place along the whole of the eastern boundary of the servitude area. The servitude does not limit access to only the northern or southern boundary of the servitude area. But once the proposed wall has been erected, no entrance by a pedestrian or vehicle will be permitted along the eastern boundary of the servitude area – save for the area extending southerly for a distance of 4,5 meters from the letter B.
- [31] The construction of the wall will obviously prevent vehicular access to about 13,8 meters of the servitude area. A material part of the servitude area will be obstructed. Two way traffic will not be possible.
- [32] The servitude is described in the title deeds as a “right of way”. It is not described as a “passage”, which would probably have suggested that the servitude would be for pedestrians only. According to Voet,[10] a “right of way” includes “walking” and “driving”. Given the facts of this matter, the

servitude right of way is in my view clear. It includes the right of pedestrians and vehicles to make use of the whole servitude area. The right of way does not exclude vehicles.

- [33] The proposed wall will effectively and practically prevent vehicles from utilising the largest part of the servitude area. Therefore, the erection of the proposed wall will materially diminish the servitude rights of H.R.J. Properties. It follows in my view that such conduct would be unlawful and therefore H.R.J. Properties is entitled to an interdict preventing Mrs Mohammed from erecting the wall.

Review of the decision to approve building plans

- [34] I now turn to consider the question whether the approval of the building plans should be reviewed and set aside.
- [35] On 21 October 2016 the attorneys of H.R.J. Properties sent a letter to the City to advise it that it would be incorrect and in violation of the right of way to allow Mrs Mohammed to build the proposed wall. The primary objection to the proposed wall was that it would obstruct vehicular access and would negatively affect the value of the property of H.R.J. Properties.
- [36] Mrs Mohammed's attorneys responded to the letter of 21 October 2016 by inter alia informing the City that there would be "no unreasonable interference" with the rights of H.R.J. Properties, and that vehicular access will not be obstructed.
- [37] On 9 March 2017 the attorneys of H.R.J. Properties addressed another letter to the City in which they inter alia stated that the objective of the servitude is to facilitate vehicular access to the building of H.R.J. Properties and the proposed wall would therefore defeat the purpose of the servitude. They further contended that the proposed wall would constitute an unreasonable infringement of their client's servitude rights.
- [38] On 7 July 2017 Mr Craig Rolfe, the acting building control officer with delegated powers in terms of section 6 (4) of the National

Building Regulations and Building Standards Act, No. 103 of 1977 ("the Building Act") produced a memorandum, which he addressed to Mr Benito Cogill.

- [39] In the memorandum Mr Rolfe inter alia stated the following:

"I am unable to find satisfying factors indicating that the proposed building will probably or in fact derogate from the value of adjoining or neighbouring properties."

- [40] Mr Rolfe then concluded his memorandum by stating that he had considered all the aspects listed in sections 6 and 7 of the Building Act, and he therefore recommended that the building plans of Mrs Mohammed be approved.
- [41] On the same day, on 7 July 2017, Mr Benito Cogill approved the building plans.
- [42] In support of this application, H.R.J. Properties relies on an affidavit of Mr Rees Heggie who is a professional associated valuer. His affidavit explains that the erection of the proposed wall will amount to a decrease of R 380 000.00 in the capital value of the property of H.R.J. Properties. His opinion is predicated upon the following :

[42.1] there will be a diminished width for access into the yard; and

[42.2] there will be a diminished circulation space for parking and general efficiency in logistics; and

[42.3] there will be diminished and impeded access to the roller shutter door used as loading access.

[43] Mr Heggie further concludes that, should the proposed wall be erected, H.R.J. Properties would suffer a net annual rental income

loss amounting to R 36 337.00.

[44] Mrs Mohammed does not rely on a professional valuer to gainsay the opinion of Mr Heggie. She does, however, rely on a letter[11] by Seeff estate agents which was apparently addressed to her son. The letter does not deal with the question whether the construction of the wall will reduce the value of the property of H.R.J. Properties and there is no confirmatory affidavit by Seeff.[12] It follows that not much reliance can be placed on the letter by Seeff.

[45] Although Mrs Mohammed contends that Mr Heggie has misinterpreted the servitude, his evidence to the effect that there will be a material derogation in value of the property of H.R.J. Properties, should the wall be erected, is not seriously challenged. There is no reason why the opinion of Mr Heggie should be rejected.

[46] I turn to consider the relevant part of section 7 (1) of the Building Act. It provides as follows:

“7. Approval by local authorities in respect of erection of buildings

(1) If a local authority, having considered a recommendation referred to in section 6 (1) (a)-

(a) is satisfied that the application in question complies with the requirements of this Act and any other applicable law, it shall grant its approval in respect thereof;

(b) (i) is not so satisfied; or

(ii) is satisfied that the building to which the application in question relates-

(aa) is to be erected in such manner or will be of such nature or appearance that-

(aaa) the area in which it is to be erected will probably or in fact be disfigured thereby;

(bbb) it will probably or in fact be unsightly or objectionable;

(ccc) it will probably or in fact derogate from the value of adjoining or neighbouring properties;

(bb) will probably or in fact be dangerous to life or property,

such local authority shall refuse to grant its approval in respect thereof and give written reasons for such refusal:”

[47] In *Trustees of the Simcha Trust v Da Cruz and Others; City of Cape Town v Da Cruz and Others*[13] the Constitutional Court inter alia considered the proper interpretation of section 7 (1) (b) (ii) (aa) of the Building Act. In that case the building control officer wrote:

"I can find no reason to be satisfied that the proposed building would disfigure the area."

[48] The Constitutional Court held[14] that the correct formulation of the reasons should have been "I am satisfied that the area will not be disfigured". The Court further held that in terms of section 7 (1)(b)(ii)(aa) of the Building Act, the local authority must be satisfied that none of the disqualifying factors are present.[15]

[49] When regard is had to the memorandum of Mr Rolfe, it is clear that he was not positively satisfied that none of the disqualifying factors are present. The statement by Mr Rolfe that "I am unable to find satisfying factors indicating that the proposed building will probably or in fact derogate from the value of the adjoining or neighbouring properties", is in my view not the correct approach. The correct approach which he should have adopted, was to determine that he was positively satisfied, on a balance of probabilities, that any of the listed factors would not apply.

[50] In *Walele v City of Cape Town*[16] the Constitutional Court held that the local authority must be positively satisfied that there are no disqualifying factors present.

In applying the principles enunciated in *Walele* and *Simcha Trust*, I am of the view that the acting building control officer was not positively satisfied that there are no disqualifying factors present.

[51] If regard is had to the affidavit of Mr Heggie, it is clear that the erection of the proposed wall will involve a material

derogation from the value of the property of H.R.J. Properties. Therefore, the building plans of Mrs Mohammed should not have been

approved. In approving the building plans, both Mr Rolfe and Mr Cogill were materially influenced by an error of law in that they

misunderstood the requirements of section 7 (1) of the Building Act, and they did not follow the principles of *Walele* and *Simcha Trust*.

[52] All administrative action must be lawful, reasonable and procedurally fair. I find that the decision in terms of which the building plans were approved, was unlawful and so unreasonable that no reasonable person would have approved the building plans. It follows in my view that the approval of the building plans should therefore be set aside in terms of the provisions of PAJA.[17]

Order

[53] In the result, I make the following order:

[53.1] The decision taken on 7 July 2017 by the building control officer of the City of Cape Town, in terms of which building plans were approved for a wall in respect of Erf [...], Cape Town at C Street, Woodstock under plan approval number 97508637 and plan no. BP/0000070317314/2017, is reviewed and set aside.

[53.2] The first respondent is interdicted from constructing a wall in the applicant's servitude right of way as set out in the diagram SG No 2772/2003 and attached to the applicant's founding affidavit as annexure "JS4".

[53.3] The first and second respondents are ordered to pay the costs of this application jointly and severally, if the one pays the other is to be absolved, subject thereto that the second respondent's liability for costs shall be limited to costs against it on an unopposed basis.

WESLEY VOS, AJ

[1] The return of service indicates that service of the application was effected on 4 October 2017

[2] T63510/2015 dated 4 November 2015

[3] T45710/2004 dated 20 May 2004

[4] Book VIII – Title 3, volume 2, p465

[5] 2010 (4) SA 586 (SCA)

[6] 2009 (3) SA 5

[7] At paragraph 8

[8] 1975 (1) SA 279 (A) at 301 - G

[9] Measured in a southerly direction from B

[10] See footnote 4

[11] Dated 9 February 2018

[12] Represented by Mr Craig Algie

[13]

[2018] ZACC 8

[14] At paragraph 24

[15] At paragraph 26

[16]

[2008] ZACC 11

- [17] Promotion of Administrative Justice Act, 3 of 2000. The relevant sections are: section 6 (2) (d) (error of law), section 6 (2)
- (e) (iii) (relevant considerations were not considered) and section 6 (2) (h) (decision unreasonable).

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