

SOUTH AFRICA / JUDGMENT

# Simon NO and Another v Royal Hotel Riversdale (Pty) Ltd [2011] ZAWCHC 290; ; A522/2009 (15 June 2011)

[2011] ZAWCHC 290

## COURT

Western Cape High Court, Cape Town

## BEFORE

Dlodlo, Saldanha, Desai

## CASE / FILE NUMBER

A522/2009

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IN

THE HIGH COURT OF SOUTH AFRICA

[WESTERN

CAPE HIGH COURT, CAPE TOWN]

CASE

NO. A522/2009

In the Appeal

between:

NACHLEY

SIMON N.O.

.....FIRST

APPELLANT

BEATRIX

HELENA SIMON N.O.

.....SECOND

APPELLANT

Respondents

in Court a

quo

And

ROYAL

HOTEL RIVERSDALE (PTY) LTD

.....RESPONDENT

Applicant

in Court a

quo

## JUDGMENT

DELIVERED ON WEDNESDAY, 15 JUNE 2011

DLODLO, J

[1] The Appellants and the Respondent are contractually related in that as correctly stated by Mr. Le Roux "hulle besit aangi-ensende eiendomme in die Riversdal distrik langs N2 Nasionale pad — hulle eiendomme, voor die ondeï\*verdeling

daarvan, was voorheen een eiendom wat aan die Appellante behoort het en bekend gestaan het as Erf5372 Riversdal. " Mr. Vos and Mr. Le Roux (SC) appeared before us on behalf of the Appellants and the Respondent respectively. It is common cause that when this property was subdivided into two properties, the property that became known as Erf 6728 was transferred to the Respondent

subject to certain servitudal conditions which are to become apparent later on in this Judgment. The Respondent who was intending to build on the portion that then belonged to him discovered that title deed conditions created difficulties. A dispute arose between the parties and it led to an application brought before Court which sought certain reliefs. The Court a quo per Veldhuizen J gave an order which inter alia reads:

"1. Dat Applikant geregtig is om die gebou met die posisie en spesifikasies soos beoog in Aanhangsel "E" by die funderende

eedsverklaring aangeheg binne die gebied ABCDSKJA soos aangedui op Aanhangsel 11 El " en die sketsplan tot Aanhangsel "C" by die funderende eedsverklaring aangeheg op te rig aangesien dit geen inbreuk maak op enige seji^wituutregte van die Respondente nie. "

[2] The Appellants are appealing against the above mentioned order. Previously the Appellants were the owners of Erf 5372 Riversdale,

which was 2, 8617 hectares in extent. The property has always been a commercial property. It was on 26 September 2003 that the Appellants and the Respondent concluded a written agreement inter alia in terms of which Erf 6728, a portion of Erf 5372 Riversdale, in extent 9763 square meters, was sold to the Respondent for the sum of Five hundred thousand (R500 000.00). The property purchased by the Respondent from the Appellants was described as follows in the Deed of Sale:

"Met voorbehoud ten gunste van die restant van Erf 5372 Riversdale (gedeelte "B" op die sketsplan hierby aangeheg, hierna genoem gedeelte "B ") oor die eiendom van:

1.3.1 'n serwituut gebied voorgestel deur die figuur ABCDSKJA op die sketsplan hierby aangeheg, die serwituut voorwaardes waarvan in klousule 13.1 hieronder meer breedvoerig uiteengesit word. "

It is of importance to set out the provisions of clause 13.1 of the Deed of Sale herein relevant. Clause 13.1 provides as follows:

"13.1 Die hiernavolgende voorwaardes sal geld met betrekking tot die serwituutgebied waarna verwys word in klousule 1.3.1 hierbo:

Die eienaar van die Eiendom sal geen obstruksie plaas in die gebied van die bestaande sementbaan nie, wat in die weg van voertuigverkeer na Gedeelte B mag staan, ook vir swaar verkeer indien 'n vulstasie moontlik in die toekoms op Gedeelte B opgerig mag word.

13.1.1. Die parkeerarea aan die voorkant van die bestaande gebou op die Eiendom sal gereserveer wees vir kliente van die besighede in die gebou.

13.1.2. Vragmotors en busses al, soos dit tans die gebruik is, steeds geregtig wees om op die bestaande gruis area naaste aan die

N2-Nasionale Padte parkeer. "

According to the Diagram that was attached to the Deed of Sale, it was recorded that:

'Die figuur ABCDSKJA stel voor 'n serwituut gebied oor gedeelte "A" ten gunste van gedeelte "B".

It is common cause that at the stage when the Deed of Sale was concluded there was one big building containing various businesses on Erf 5372 Riversdale. The Deed of Sale recorded that the sub-divisional boundary' would run' through the existing building. It was submitted by Mr. Vos that the servitudinal conditions referred to supra were inserted in the Deed of Sale at the special instance and request of the Appellants as the latter wished to preserve the rights and market value of their portion of the property (portion B).

[3] Mr. Le Roux, on behalf of the Respondent submitted as follows:

"Dit is die Respondent se saak dat die bewoording van die ooreenkoms, insluitend die gedeeltes wat met serwituutregte handel, beoordeel in die perspektief van die agtergrond feitematrys, dus aanduidend is daarvan dat dit nooit die bedoeling met die ondertekening van die destydse koop-ooreenkoms was of kon wees dat die serwituutgebied ABCDSKJA in serwituutgebied vir die Appellante se uitsluitlike gebruik of voordeel sou wees waarbinne die Respondente niks sou mag doen nie.

Die doel van die serwituutgebied ABCDSKJA was bloot om 'n serwituutarea (in teenstelling met serwituutgebruiksregte) te identifiseer waarbinne die voorwaardes vervat in klousule 13 sou geld, sonder om afbreuk te doen aan die Respondent se oorblywende eienaars- en besigheidsregte. "

Dealing with clause 13.1 set out above Mr. le Roux submitted that: "Klousule 13.1 word nie bewoord as 'n tipiese serwituut ten gunste van heersende eiendom oor dienende eiendom nie. Dit is bloot voorwaardes wat in daardie gebied, waarna as serwituutgebied verwys word, geld nie noodwendig ten gunste van een eiendom oor die ander nie, maar voorwaardes wat bepaal wat deur beide die partye daar gedoen mag word en ook wat nie gedoen mag word nie. " I do not necessarily agree with Mr. Le Roux. This will become clearer infra in my further dealings with

clause 13.1 of the agreement between the parties. Mr. Le Roux correctly submitted that the intention of the parties is to be found in the words used by them in the agreement. In this regard reference was made to *Worman v Hughes and Others* 1948

(3) SA 495 (A) at 505 where the following formulation appears:

"It must be borne in mind that in an action on a contract, the rule of interpretation is to ascertain, not what the parties' intention was, but what language used in the contract means, i.e. what their intention was as expressed in the contract. As was said by Solomon, J in *Van Pletzen v Henning*, 1913 A.D. p82 at p89: 'The intention of the parties must be gathered from their language, not from what either of them may have had in mind.' (See also *Union Government v Smith*, 1935 A.D. p232 at p240-l; *Lanfear v Du Toit*, 1943 A.D. p59 at p72-3 and, in regard to wills, *Cuming v Cuming*, 1945 A.D. 201 at p206). "

Indeed the abovementioned approach has become trite. In *Haviland Estates (Pty) Ltd and Another v McMaster* 1969

(2) SA 312 (AA) at 336 C-G the following self explanatory exposition I also agree with, was made:

"If a party relies upon the memorial as the source of the right claimed by him, he must satisfy the Court that the right, to its full extent, is so defined in the memorial. The Court is not permitted to go beyond the definition included in the memorial by agreement between the parties. Not infrequently a party agrees to the definition of a right in his favour in terms which subsequently result in the right being inadequate in relation to his needs in the field, in which he anticipated, at the time of contracting, that the right, as defined, would fully and effectively satisfy those needs. He may agree to this

'inadequate' right because e.g. he lacks bargaining power or the ability to foresee correctly future developments or possibly because he unwisely relies upon the continuance of a state of things existing at the time he agreed to the terms defining his right. It not infrequently occurs that, where subsequent developments show that a party has contracted 'inadequately \ equitable considerations may at times give rise to a natural desire to come to the aid of the party concerned, particularly so where the 'inadequacy' of his right virtually affects him. This feeling of sympathy should, however, not be permitted to blunt the Court's understanding of the meaning of the words. In this regard it is instructive to bear in mind the approach of this Court in cases such as *Lanfear v Du Toit* 1943 AD 59; *Van der Mei\*we v Viljoen* 1953 (1) SA 60 (AD) and what was said by Ogilvie Thompson, JA in his judgment in the case of *Owsianick v Afrincan Consolidated Theatres (Pty) Ltd.*, 1967 (3) SA 310 (AD) at p317E. "

[4] Concluding on this legal setting Mr. Le Roux submitted as follows:

"Die praktiese implementering van die bogemelde begins els kom daarop neer dat wanneer 'n gewraakte serwituut se bewoording vir meer as een betekenis vatbaar is die bogemelde reels inskop en die mins moontlike beswaarde vertolking moet seevier, tensy daar geen sinvolle of effektiewe betekenis gegee kan word nie in welke geval die woorde of frase as *pro non scripto* beskou moet word:

'In elk geval skep die gewraakte serwituut 'n beperking op Respondent se eiendomsreg en moet dit beperkend vertolk word... Die vertolking wat Respondent voorstaan is, ten minste 'n moontlike vertolking en aangesien dit minder verswarend is as wat die Applikant voorstaan,

behoort eersgenoemde gehandhaaf te word.' Stofberg v Lady br and Landbou Bpk 1970 (2) SA 57 (O) op 61 D" In Mr. Le Roux's submission "die bewoording van 13.1.1, 13.1.2 en 13.1.3 is sodanig dat die enigste werklike beperking wat op die dienende erf se eienaar geplaas word is dat hy nie strukture mag oprig in die serwituutgebied wat vrye verkeersvloei na die heersende erf mag belemmer nie. "

It is clear that Mr. Le Roux is not of the view that the servitude in the legal context of the word came into being by virtue of the clause referred to above.

[5] When the Deed of Sale was concluded between the parties (we are told), the property of the Appellants was situated adjacent to the N2 highway and there was no other vehicular access then available from the N2 highway onto portion B, unless the access was via portion A. Portion B not being a residential unit, according to the papers, the intention of the Appellants was to preserve and develop all the existing and future commercial property rights on Portion B. What the Respondent sought by way of relief *a quo* was a declaratory order to the effect that the construction of the particular building in the servitude area would not interfere with any of the servitudinal rights of the Appellants. Therefore clearly the Respondent bore the onus to convince a Court that it would not be interfering with any of the servitudinal rights of the Appellants. I agree with Mr. Vos that there was no corresponding onus on the Appellants then to disprove the Respondent's allegations. Mr. Vos submitted correctly as follows:

"To the extent that a dispute of fact exists, the court *a quo* should have followed the principles enunciated in *Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) 634. There can be no suggestion that the Appellants' contentions *a quo* were far fetched, untenable or stood to be rejected on the papers. "

[6] According to Annexure "E" the Respondent wishes to construct a large building in the servitudinal area. The proposed

building will be 32,35 meters in length, and 10,7 meters wide. The proposed building structure will consist of five shops, a stoep, a veranda over the stoep and 20 permanent parking bays for vehicles in front of the building. Additionally, the parking area for the 22 motor vehicles will be surrounded by (apparently) a permanent curb. According to the Appellants, the objective effect of the proposed building and parking bays is that about 50% of the Appellants' servitudinal rights

will be sterilized because busses and trucks will not be able to park or turn in that area. On the other hand, the Respondent argues in his Founding papers that after the construction of the building: "23.2 Parkering word steeds in dieselfde area soos voorheen voorsien. "

It is common cause that the above version put forth by the Respondent is denied by the Appellants. The application of the test enunciated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984

(3) SA 623 (A) would clearly result in the acceptance of the Appellant's version as correct. Seeing that the Court a quo found that the structure will comprise a "nie onbenullige" area, Mr. Vos contended that it should accordingly have found that it could never have been the intention of the parties at the time of the conclusion of the Deed of Sale, that the Respondent had the right to effectively sterilize approximately 50% of the servitudinal area. In his submission the Court a quo should have found that the building of the intended structure would amount to an unlawful interference with the rights of the Appellants.

[7] Indeed if one reads the Deed of Sale one gathers that it refers in express terms to the fact that a petrol filling station would

possibly be constructed on the Appellants' property ("...indien 'n vulstasie moontlik in die toekoms op Gedeelte "B" opgerig mag word.") Strangely the Respondent concedes that the Appellants at all relevant times envisaged the construction of a petrol filling station on their property. The question is why then would the Respondent nevertheless wish to sterilize about 50% of the servitudinal area? Mr. Vos submitted that "...the Court a quo had no authority to effectively alter the terms of the servitude...the Court had no power to expropriate the servitudinal rights of the Appellants relating to the establishment and operating a petrol station. " Another obvious prejudice to be suffered by the Appellants is significant loss of business in that:

"Voornemende kliente van my voorgenome vulstasie op Gedeelte "B " (at) eenvoudig net nie afdraai van die N2 Nasionale pad en oor Gedeelte "A " ry nie. " The legal principles applicable to servitudes are well known and documented in our case law. These are best illustrated in *Kruger v Joles Eiendomme (Pty) Ltd* and *Another* 2009

(3) SA 5 (SCA) at paragraph [4] where the Supreme Court of Appeal explained as follows with regard to the interpretation of a servitude: "Where a servitude has been granted by agreement, and where the agreement was ambiguous and evidence as to surrounding circumstances which obtained at the date the contract was concluded did not resolve the ambiguity, evidence as to the interpretation of the parties had by their conduct put upon the grant will be admissible as an indication of their common understanding of its meaning. " And at paragraph [6] the Supreme Court of Appeal proceeded as follows:

"As support for the approach followed by him, Feetham J A referred inter alia to the judgment of Gregorowski CJ (Esser and Kock J J concurring) in *Kempenaars v Jonker, Van der Berg and Havenga* where the learned Chief Justice, in dealing with the sei'vitude of grazing, said the following:

It is clear that incidents [sic: sc the incidence] and the extent of the servitude must depend on the circumstances under which it was created...I think ...that much must depend on the circumstances under which the servitude was created, and on the causa et origo servitutis. '

Feetham J A also referred to the decision in *Priestman v Simonstown Licensing Board and Others* 1929 CPD 263 where Watermeyer J (Sutton J concurring) considered the state of the liquor laws in the Cape Colony, starting with a Plakaat of 1804, in order to interpret a prohibition on the sale of liquor inserted in 1818 in title deeds of hotels at Fish Hoek. "

[8] If the abovementioned test is applied (particularly the circumstances under which the servitude was created), it becomes clear that the whole parking area relevant in this matter has to be preserved for trucks and busses because those trucks and busses

visit the Appellants' business and the whole parking area must be preserved to obtain a licence for a proposed petrol filling station. This appears to have been inter alia the causa of the servitude. Ordinarily Courts prefer to interpret a servitude restrictively but the following statement made in *Van Rensburg en Andere v Tante en Andere* 1975

- (1) SA 279 (SCA) at 301 G bears significance: "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 dubbelsinnig blyk te wees, is 'n hof nie geregtig om daarvan af te wyk ten einde 'n mindere beswaring te bewerkstellig nie. " The owner of a dominant tenement does not have to exercise the right personally because as *AFS Maasdorp* (Institute of Cape Law, Vol. 2 (1918) at 202 quoted with approval in *Roelofse N.O. and Another v Bothnia N.O. and Others* 2007
- (2) SA 257 (C) explains: "Servitudes ...may be made use of, if not only by the owner of the dominant tenement, but by anyone who has a legal right to be upon the dominant tenement. " It appears that the whole servitudinal area created for the parking and turning of trucks and busses was established lawfully for the use by them - for the benefit of the Appellants. It is and remains the principle that one may not derogate from one's own grant of a right on the basis of the maxim "concessa servitude simul concessa censetur omnia sine quibus servitus exerceri nequit. " [8] In my view there is no justification for holding that the doctrine of *civiliter modo* should negate the essential content of the servitude (See *De Kock v Hanell & Others* 1999
- (1) SA 994 (Q) in that the servitude as it stands is not capable of ambiguity. To interpret this servitude restrictively and to contend

that it must be exercised *civiliter modo* (and therefore the Appellants should give up 50% of their rights) should be treated with caution and this Court will be slow in following that path in the light of the following guiding statement by the Supreme Court of Appeal in *Linvestment CC v Hammersley and Another* [2008] ZASCA 1; 2008

- (3) SA 283 (SCA) at paragraph [20]: "[20] The attempt of appellant's counsel to introduce the rule that servitudes must be exercised *civiliter modo* as a means of justifying his client's attempt to remove the right of way to a route more convenient to it, is misconceived. As Van den Heever J pointed out in *Penny and Another v Brentwood Gardens Body corporate*: 'Civility is not in law synonymous with a waiver of one's rights. The old authorities when dealing with this obligation, usually refer to the choice of a route by the owner of the dominant tenement. No one suggested he should rest content with a narrower one than that stipulated because of convenience of the servient owner, to the best of my knowledge, until Hofmeyr AJP (as he then was) appears to have done so in *Sussman A v Stabilis Trust Finansiëers (Edms) Bpk 1970 (3) SA 58 (O)* at 60 E-F. With such a proposition, if it were intended, I respectfully disagree. The cases on which he relies do not support

such an interpretation of the obligation to exercise one's rights *civiliter modo*. '"

- [8] If the abovementioned test is applied (particularly the circumstances under which the servitude was created), it becomes clear that the whole parking area relevant in this matter has to be preserved for trucks and busses because those trucks and busses

visit the Appellants' business and the whole parking area must be preserved to obtain a licence for a proposed petrol filling station. This appears to have been *inter alia* the causa of the servitude. Ordinarily Courts prefer to interpret a servitude restrictively but the following statement made in *Van Rensburg en Andere v Tante en Andere 1975*

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"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 servituut daarstel. Indien die betekenis daarvan dubbelsinnig blyk te wees, is 'n hof nie geregtig om daarvan af te wyk ten einde 'n mindere beswaring te bewerkstellig nie. " The owner of a dominant tenement does not have to exercise the right personally because as *AFS Maasdorp* (Institute of Cape Law, Vol. 2 (1918) at 202 quoted with approval in *Roelofse N.O. and Another v Bothnia N.O. and Others 2007*

- (2) SA 257 (C) explains: "Servitudes ...may be made use of, if not only by the owner of the dominant tenement, but by anyone who has a legal right to be upon the dominant tenement. "

It appears that the whole servitudinal area created for the parking and turning of trucks and busses was established lawfully for the use by them - for the benefit of the Appellants. It is and remains the principle that one may not derogate from one's own grant of a right on the basis of the maxim "*concessa servitude simul concessa censetur omnia sine quibus servitus exerceri nequit*. "

- [8] In my view there is no justification for holding that the doctrine of *civiliter modo* should negate the essential content of the servitude (See *De Kock v Hanell & Others 1999*

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that it must be exercised *civiliter modo* (and therefore the Appellants should give up 50% of their rights) should be treated with caution and this Court will be slow in following that path in the light of the following guiding statement by the Supreme Court of Appeal in *Linvestment CC v Hammersley and Another* [2008] ZASCA 1; 2008

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'Civility is not in law synonymous with a waiver of one's rights. The old authorities when dealing with this obligation, usually refer to the choice of a route by the owner of the dominant tenement. No one suggested he should rest content with a narrower one than that stipulated because of convenience of the servient owner, to the best of my knowledge, until Hofmeyr AJP (as he then was) appears to have done so in *Sussman A v Stabilis Trust Finansiërs (Edms) Bpk* 1970 (3) SA 58 (O) at 60 E-F. With such a proposition, if it were intended, I respectfully disagree. The cases on which he relies do not support

such an interpretation of the obligation to exercise one's rights *civiliter modo*. "'

The Appellants' contention that if the Respondent were to be allowed to construct the proposed building and parking bays for motor vehicles, the former will not be successful in obtaining a licence to build a petrol filling station, is sound and compelling. Without the whole servitudinal area reserved for trucks and busses, the Appellants will surely not obtain a licence for its intended commercial activity because the licensing authorities will first inspect the place/premises and find it wanting in space and accessibility. In the circumstances I would uphold the Appeal. ORDER: In the result the appeal against the order made by Veldhuizen, J succeeds with costs. The order is replaced with the following: "The application is dismissed with costs. " DLODLO, J I agree. SALDANHA, J I agree and it is so ordered. DESAI, J

The Appellants' contention that if the Respondent were to be allowed to construct the proposed building and parking bays for motor vehicles, the former will not be successful in obtaining a licence to build a petrol filling station, is sound and compelling. Without the whole servitudinal area reserved for trucks and busses, the Appellants will surely not obtain a licence for its intended commercial activity because the licensing authorities will first inspect the place/premises and find it wanting in space and accessibility. In the circumstances I would uphold the Appeal. ORDER:

In the result the appeal against the order made by Veldhuizen, J succeeds with costs. The order is replaced with the following: "The application is dismissed with costs. "

DLODLO, J

I agree.

SALDANHA, J

I agree and it is so ordered.

DESAI, J

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