THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 713/11

In the matter between:

ROYAL HOTEL RIVERSDAL (PTY) LTD **APPELLANT**

and

NACHLEY SIMON NO **FIRST RESPONDENT**

BEATRIX HELENA SIMON NO **SECOND RESPONDENT**

Neutral citation: *Royal Hotel v Simon NO* (713/11) [2012] ZASCA 118 (18 September 2012)

Coram: HEHER, CACHALIA, MALAN, TSHIQI AND PILLAY JJA

Heard: 28 August 2012

Delivered: 18 September 2012

Updated:

Summary: Servitude – praedial – interpretation – entitlement to park on servient tenement – erection of building on substantial portion of servitude area – breach of entitlement.

ORDER

On appeal from: Western Cape High Court (Cape Town) (Dlodlo, Saldanha and Desai JJ sitting as court of first instance):

1. The appeal is dismissed with costs.

2. The order of the court a quo is amended to read as follows:

'(a) The appeal is upheld with costs.

(b) The order of the court of first instance is set aside and replaced with an order in the following terms:

"(i) An order is granted in terms of para 2.1 of the notice of motion.

(ii) Save as aforesaid the application is dismissed with costs."'

JUDGMENT

HEHER JA (CACHALIA, MALAN, TSHIQI AND PILLAY JJA concurring):

[1] This appeal concerns the interpretation of a servitude. The appellant who was the applicant at first instance succeeded in the Western Cape High Court before Veldhuizen J. However, on appeal by the present respondents to the Full Court (Dlodlo J, Saldanha and Desai JJ concurring) the order was set aside and replaced by one dismissing the application with costs. The appellant was thereafter granted special leave to appeal to this Court.

[2] In September 2003 the respondents, the trustees for the time being of the Simon Family Trust, were the registered owners of erf 5372, Riversdale. On 26 September 2003 they sold the northern portion of that property, in extent 9 763 square metres, to the appellant. The property sold became erf 6728 on transfer on 3 December 2003. That property and the remaining extent of Erf 5372 were referred to in the papers as Portions A and B respectively and it will be convenient to adopt this nomenclature. Portion B remained the property of the respondents.

[3] The common boundary between the portions runs west to east. Along the western boundary lies the N2 national road to Mossel Bay. Before transfer, access to the undivided property was gained from a road along the northern boundary (which remains the case in relation to Portion A). That road met the N2 at the north west corner of the property. It was and is the access point for both portions from the national road.

[4] At all material times there has been a building on the land lying in a north-south direction across what is now the common boundary in a central location. At the time of the sale it was let by the respondents to two tenants, Ball Trading and Die Rooi Aalwyn Padstal, and, it would seem, the respondents themselves carried on business in the southern section.

[5] The subject-matter of the deed of sale consisted not only of Portion A but also the letting business of the seller and the two leases. Of special relevance to the appeal, the deed also created praedial servitudes in favour of Portion B. The relevant terms of the contractual clauses were these:

1. The description of the property sold ('Die Eiendom') was qualified as follows:

'Met voorbehoud ten gunste van die Restant van Erf 5372 Riversdal (GEDEELTE B op die Sketsplan hierby aangeheg, hierna genoem Gedeelte B) oor die Eiendom van:

1.3.1 'n Serwituutgebied voorgestel deur die figuur ABSDSKJA op die Sketsplan hierby aangeheg, die serwituut voorwaardes waarvan in klousule 13.1 hieronder meer breedvoerig uiteengesit word.'

(The second servitude, a road over portion A, is not relevant to these proceedings.)

2. Clause 13 ('SPESIALE VOORWAARDES'):

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

13.1.1 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.

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

13.1.3 Vragmotors en busse sal, soos dit tans die gebruik is, steeds geregtig wees om op die

bestaande gruis area naaste aan die N2-Nasionale Pad te parkeer.'

[6] Although the servitude was executed simultaneously with the registration of transfer it became common cause that the terms of its registration did not accord with the terms embodied in the deed of sale.

[7] At the beginning of 2007 the appellant investigated the possibility of erecting a further free-standing building within the servitude area on that portion of Portion A which is referred to in clause 13.1.3 as the 'gruis area' (the gravel area). The proposed structure would cover some twenty per cent of that area and be located in the north-western quadrant of Portion A near the service road. It is clear from the sketch plan annexed to the replying affidavit that it will not obtrude on to the areas described in clauses 13.1.1 and 13.1.2, respectively and will not obstruct access to either or to Portion B.

[8] The appellant instructed its attorney to discuss with the first respondent the differences between the description of the servitude in the deed of sale and in the title deed of Portion A, and also its proposed erection of the building within the servitude area. The report that it subsequently received was that the respondents had no interest in any such discussion.

[9] In December 2007 the appellant applied to the High Court for an order in the following terms:

'1. Wat verklaar dat die 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 "E" en die sketsplan tot Aanhangsel "C" by die funderende eedsverklaring aangeheg op te rig aangesien dit geen inbreuk maak op enige serwituutregte van die Respondente nie.

2. Alternatiewelik, en slegs indien die Agbare Hof nie bereid is om die bevel in 1 toe te staan nie, 'n bevel:

2.1 Wat gelas dat die serwituut soos omskryf in voorwaarde D(a) op bladsy 3 van Transportakte T113383/2003 geliasseer in die Kantoor van die Registrateur van Aktes (Aanhangsel "A" tot die Applikant se Funderende Eedsverklaring), geskrap word en vervang

word met die serwituut soos bewoord in Klousule 1.3.1 gelees met Klousule 13 van die koopooreenkoms tussen die Applikant en die Eerste en Tweede Respondente gesluit soos per Aanhangsel “C” tot die Funderende Eedsverklaring;

2.2 Wat verklaar dat die 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 “E1” en die sketsplan tot Aanhangsel “C” by die funderende eedsverklaring aangeheg op te rig aangesien dit geen inbreuk maak op enige serwituutregte van die Respondente nie.’

[10] After service of the application the respondents consented to an order in terms of para 2.1 of the notice of motion. Despite this, neither of the courts below made such an order or provided reasons for that failure. I propose to correct that shortcoming in the order in this appeal.

[11] The application nevertheless proceeded in respect of para 1 of the notice. Both parties elected to argue on the papers, eschewing the opportunity to resolve by evidence conflicts arising from the affidavits. This attitude must, in accordance with the practice in motion proceedings, redound to the benefit of the present respondents. The relief claimed depended upon the applicant bringing its proposed erection of the building within the permitted scope of the servitude without which it could not discharge the onus of proof.

[12] The task of the court is to determine the intention of the parties to the agreement that created the servitude. In so far as the language used by them is clear and unambiguous effect must be given to it. But even clear expression can benefit from an appreciation of its context in the written agreement against the background of circumstances relevant to its conclusion provided that the plain meaning is not thereby contradicted or varied.

[13] What principles must one apply in interpreting the servitude, recognising that it is, in essence, only a contract to achieve a particular end? It is unnecessary to rehash all the conflicting approaches. They are adequately debated by my colleague Wallis JA in his article, *What’s in a word? Interpretation through the eyes of ordinary readers* 127

SALJ (2010) 673, and do not give rise to controversy in this appeal.

[14] It is sufficient for present purposes to examine the combined effect of the relevant facts present to the minds of the parties at the time of contracting, and the language adopted by them in the context of their contract as a whole. These are the signposts to their common intention and, as will become apparent, they point to a single destination.

The background circumstances

[15] Although the context may at first glance appear to be two parties on an equal footing endeavouring to regulate their future relationship as owners of adjoining properties who will both carry on commercial enterprises on those properties, that summary provides an inadequate picture. The heart of the matter was the viability of Portion B as a separate entity. To survive and prosper, the evidence shows, Portion B required user friendly access to the highway and adequate parking for visiting business traffic including buses and lorries. The negotiation took place in the context of an existing situation in which such vehicles parked freely and indiscriminately on the gravel area on what was to become Portion A. This benefited businesses carried on in the building on both sides of the proposed division of the property. There is no suggestion in the papers that at that time the appellant contemplated a development of Portion A in any manner inconsistent with the continuation of that practice. There is some dispute as to its frequency, but that is of little significance as it is common cause that the parties envisaged a dynamic development of Portion B.

[16] The evidence of surrounding circumstances established, first, that the existing practice was for buses and lorries visiting the business now conducted on Portion B to park anywhere on the gravel area and, second, that the servitutal conditions were framed at the instance of the seller in the interest of the promotion and expansion of the business to be carried on Portion B and that the appellant was aware of that intention.

The structure and language employed by the parties

[17] Starting with the written agreement it seems clear from clause 1.3.1 that the parties contemplated only a single servitude area. According to the ordinary meaning it

would be that area in respect of which the servient tenement agreed to limit its rights of ownership in favour of the dominant tenement. In so far as clause 13.1 contains the conditions of servitude it should, in the absence of clear language to the contrary, be interpreted so as to give effect to that meaning. Approached in that way:

1. Clause 13.1.1 secures unobstructed *access* by traffic including heavy vehicles, to Portion B over the cement track ('baan'), in the event of the opening of a filling station on Portion B in the future.
2. Clause 13.1.2 is framed unequivocally as a limitation on the dominant tenement's use of the servitude area by reserving the parking area in front of the existing building for use by clients of the business in it.
3. Clause 13.1.3 entitles lorries and buses to park on the gravel area nearest to the N2 'as is presently the practice'.

[18] It is clause 13.1.3 upon which the dispute turns. The submission of appellant's counsel, which also finds a voice in the founding affidavit, is that, properly interpreted, as with clause 13.1.2, the entitlement is a limitation on the breadth of operation of the servitude in favour of the servient tenement. I do not agree. There is an absence in clause 13.1.3 of the clear language to be found in the preceding clause which compels that conclusion. Without it the suggested restriction is in conflict with the ordinary meaning of clause 1.3.1 as identified earlier. Moreover, the gravel area, which, as the sketch shows, takes up the greater part of the servitude area defined in clause 1.3.1, only has meaningful content if clause 13.1.3 is interpreted in favour of the dominant tenant; absent that content there is no identifiable servitutal use over that area, which makes nonsense of providing for a servitude over it at all. In law a 'servitude' which confers no permanent advantage present or future upon a supposed dominant tenement cannot be a praedial servitude (*Voet 8.4.15*) and, in the present instance, would provide no basis for a personal servitude either. Such a conclusion flies in the face of the manifest utility that the respondents intended to derive from the agreement.

[19] Thus both the background to the parties' consensus and the proper construction of the agreement conflict with the interpretation which the appellant seeks to attach to clause 13.1.3.

[20] The correct meaning of that clause is that the dominant tenement is entitled to insist on a right to have buses and lorries visiting its premises park anywhere on the gravel area. The entitlement does not confer an exclusive right to park on the gravel area in favour of such visitors but it is such as to entitle the respondents to defend the right conferred on Portion B against a proposed development on the servitude area that would detract from its reasonable use for the agreed purpose. That such would be the effect of the erection of a building that covers a substantial proportion of the gravel area, as is proposed by the appellant, is beyond doubt. The court of first instance should therefore have found that the appellant had fallen short of proving that it was entitled to the relief claimed in para 1 of the notice of motion, as indeed the court a quo did.

[21] In the result the following order is made:

1. The appeal is dismissed with costs.

2. The order of the court a quo is amended to read as follows:

‘(a) The appeal is upheld with costs.

(b) The order of the court of first instance is set aside and replaced with an order in the following terms:

“(i) An order is granted in terms of para 2.1 of the notice of motion.

(ii) Save as aforesaid the application is dismissed with costs.”’

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J A HEHER
JUDGE OF APPEAL

APPEARANCES

APPELLANT:	N J Treurnicht SC
	W F Botha Attorney, Stilbaai
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