REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO A5030/11

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

7 May 2012 FHD VAN OOSTEN

In the matter between

JERSEY LANE PROPERTIES (PTY) LTD
t/a FAIRLAWN BOUTIQUE HOTEL & SPA **APPELLANT**

and

JEREMY WILLIAM HODGSON **FIRST RESPONDENT**
BERNADETTE OGER PLISNIER **SECOND RESPONDENT**

J U D G M E N T

VAN OOSTEN J:

[1] A riddle is defined in the Oxford Dictionary as "a question or statement phrased so as to require ingenuity in ascertaining its answer or meaning". The riddle I propose, by way of introduction, is the following: What did the ex-president of the United States of America, Jimmy Carter, have to do with an elaborate concrete Portico, straddling the

entrance to an upmarket boutique hotel, in Morningside Manor, Johannesburg? The crisp answer, as will soon become apparent, is: "everything".

[2] This appeal concerns a neighbourly dispute concerning the portico. Some background is necessary. The appellant is the developer of the Fairlawns Boutique Hotel and Spa (the hotel) which is operated by a separate company known as Jersey Lane Manor (Pty) Ltd. The hotel is situated on erf 503 Morningside Manor Extension 6, which is 10,941 square metres in size, comprises a floor area extending into some 5554 square metres and is spread across 4 separate buildings. Immediately east of erf 503 is a neighbouring property, described and known as erf 502. The respondents, at the time this application was heard in the court a quo, were respectively the purchaser and seller of unit 12, in the cluster residential complex known as Toulouse, being portion 12 of erf 502, which is 819 square metres in size. The property has now probably been transferred and the second respondent accordingly no longer has an interest in the matter. Crucial to, and the subject matter of this appeal, is a right of way servitude which is registered against erf 502 in its title deed, as follows: "Erf 502 is subject to a right-of-way servitude in favour of Erf 503 as indicated by the lines e f g n j k C on Diagram SG 2919/1996". It is similarly recorded in favour of erf 503 in its title deed. The servitude provides erf 503 with an exclusive right of access from a public road, Alma Road, to the hotel on its premises, and is colloquially referred to as Jersey Lane (the servitude).

[3] Access to the hotel had for a number of years been through an entrance, on the servitude road, comprising an electronically operated palisade gate and concrete columns. A new building, known as Building 4, was constructed on erf 503 and formed part of the hotel development. This attracted the attention of a "global think tank" known as the "Group of Elders", of which ex-USA president Jimmy Carter was a prominent member. They showed an interest in booking the whole of Building 4 for purposes of a conference. Investigations on behalf of the distinguished potential guests into the type of accommodation and nature of facilities offered by the hotel, raised nothing but praise and acclaim, except for one aspect: the entrance to the premises, which was condemned as "not being commensurate with which was on offer" and even a "distinct disappointment". This quite understandably, not only required but also indeed resulted in, swift action.

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[4] The entrance gate was replaced by a portico: a concrete structure *inter alia* described as "elaborate". It provides for a security gate entrance with gates and a guard house and indeed satisfied the expectations and requirements of the investigative group. In its haste to construct the portico the appellant overlooked, *inter alia*, the requirement of municipal approval for the proposed structure. When the construction commenced the first respondent and his wife were living in Richards Bay and the second was respondent abroad in Belgium. By the time the construction was virtually complete, the first respondent, on visiting his property, and to his dismay, was greeted by an almost completed concrete structure, which he regarded as an intrusive, illegal monstrosity. The second respondent was contacted but he, likewise, had no knowledge of it.

[5] This prompted the respondents to launch the application that forms the basis of the present appeal. It was premised on an alleged unlawfully constructed portico, in the absence of the requisite municipal approval, and, secondly, a restrictive interpretation of the nature of the servitude, as basis for the contention that the servitude did not afford to the appellant the right of improvement on the servitude road. The relief sought was for an order directing the appellant to remove the portico and costs. The application came up for hearing before Claassen J, who found in favour of the respondents and ordered the appellant to immediately demolish the portico and pay the costs of the application. The appeal is against the whole of the judgment and the order, with leave of the Supreme Court of Appeal.

[6] It is common cause that at the time of the launching of the application, municipal building plan approval for the portico had not been obtained. The appellant, probably in the aftermath of the unexpected VIP booking windfall, or as it is stated by the appellant, on advice that it was "probably prudent" to do so, commenced the process for obtaining

thereto the first respondent instructed a town planning consultant to file an objection to the appellant's application for approval.

[7] In his judgment the learned Judge a quo, with reliance on *Bloemfontein Town Council v Richter* 1938 AD 195 at 227-233, identified the core issue between the parties the question whether the appellant was entitled to build the portico "within the boundaries of the right of way servitude" or put differently, whether the appellant exercised its rights under the servitude, *civiliter modo*. In determining the question the learned Judge held that one consideration resolved the entire case: it was not necessary for the proper utilisation of the servitude to build the portico. In this regard the learned Judge expressed himself as follows:

> 'For 13 years they (the appellant) were satisfied with using the right of way, by use of a simple palisade gate which was installed to regulate the access of vehicular traffic along the right of way to stand 503. It was only when the respondent was advised that some eminent group of elders which included ex-president Jimmy Carter of the USA, wanted to lodge in their boutique hotel, that they were advised by the agents to enhance the access to the boutique hotel. According to such advice, the entrance as is was "a distinct disappointment". As a result, the respondent immediately took steps to construct the guardhouse, which has of the servitude was concerned (sic). In the process, these foreigners' view of what is necessary for an entrance has caused the owner of stand 12/502 to have to suffer the construction of a huge portico on its property.'

[8] It is at the outset necessary to more fully consider the proper basic approach to be adopted in attributing a meaning to the requirement of *civiliter modo* in the exercise of rights under a praedial servitude of way. In *Texas Co (SA) Ltd v Cape Town Municipality* 1926 AD 467, Innes CJ held that the expression *civilter modo* is recognised in our law, which for the holder of the right of way meant that he is "obliged to exercise his right in a reasonable manner, that is, with due regard to the interests of the servient property and its owner". The learned Chief Justice then went on to quote *Gluck* who with reference to the general principle that a servitude must be exercised *civiliter,* pointed out that it must be exercised with as much consideration as possible towards the servient property, or as *Van Leeuwen* put it, with the least damage or inconvenience to the servient property (see also *Bloemfontein Town Council v Richter supra* 195; *Kakamas*

Bestuursraad v Louw 1960 (2) SA 202 (A) 217F; CG van der Merwe *Sakereg* 2nd ed 483).

[9] In the present case we are concerned with the rights of the owner of the dominant tenement of an urban praedial servitude of right of way (*servitude praediorum urbanorum)*. Those rights must be considered against the background of the well-established common law principles. On the other hand a progressive interpretation of the servitude is called for, having regard to modern day urban developments. The days of *wagons* and *oxen* the Roman Dutch writers grappled with, are long forgotten. In my view, a much wider interpretation than the strict interpretation applied by the court a quo is called for, to which I will presently revert (*Roeloffze NO and Another v Bothma NO and others* 2007 (2) SA 257 (C)). I am unable to agree that the single consideration relied on by the court a quo was sufficient to properly interpret the servitude. For this reason alone, the appeal must succeed.

[10] The point of departure in interpreting the servitude is to consider the question whether the mere construction and erection of the portico, ancillary to the appellant's rights as the servitude holder, amounts to an unreasonable exercise of those rights. At the heart of the respondent's unhappiness with the portico, as I understand it, lies the allegations that it impedes and blocks views from his residence; that the backyard patio and kitchen are flood-lit at night from the lights in the portico and generally, "that it renders one with a general sense of encroachment, and instils a feeling of claustrophobia when entering the kitchen and the backyard patio". These allegations were disputed by the appellant and a number of photographs are attached to the affidavits in purported support of the opposing contentions. A dispute of fact on the exact intrusion of the portico on the use and enjoyment of the respondent's residence, in my view, existed which was incapable of resolution on the papers. But, the enquiry does not end there: the application for approval of the local municipality was still pending when the matter was heard in the court a quo. The importance, and in my view pre-requisite, of obtaining municipal approval for the erection of a building structure, such as the portico, cannot be ignored. It does not appear to me, on the limited information available, that the portico *per se* amounts to an unreasonable exercise of rights.

Although not properly dealt with by either party, I am *prima facie* of the view that the objections raised by the respondent, may well have been solved, had those been considered and dealt with in the application for approval. A number of other factors affecting the reasonableness of the appellant's exercise of its rights under the servitude, such as the general aesthetics of the surroundings, the security requirements of the property and the general tendency to erect porticos at entrances to upmarket business premises, residential estates and even private residential properties in that area (significantly an almost identical portico has been erected at the entrance to Toulouse Estate), may well be relevant for consideration by the trial court. A wide interpretation of the servitude, in my view, is accordingly called for and if properly applied, will not violate the common law principles I have referred to. The trial court will therefore be best suited to adjudicate the issue on all the facts and circumstances having been placed before it.

[11] It is necessary to refer briefly to a further development subsequent to the hearing in the court a quo: the appellant before us applied for this court to receive further evidence, in terms of s 22(a) of the Supreme Court Act 59 of 1959. The new evidence sought to be introduced, in essence, is that municipal approval for the portico has now been obtained. The respondent opposed the application on the grounds that the approval was defective, irregular and invalid. A further objection is raised that the respondent was not afforded the opportunity of objecting to the approval. In addition, it appears that the approval was granted in respect of erf 503 instead of erf 502, which, quite obviously, is nothing but an administrative blunder. Save to remark that a number of factual disputes have again arisen, I do not consider it necessary to decide the application. The main application ought to have been, and will be in terms of the order I propose at the end of this judgment, be referred for trial. The aspects raised in the application to introduce new evidence, remain alive and once properly introduced into the pleadings, can and should be dealt with, insofar as may be necessary, at the trial.

[12] It remains to deal with the costs of the appeal. The appellant, on the one hand, was successful in the appeal but the respondents, on the other hand, were entitled to bring the application, at least on the basis that the portico, in the absence of municipal approval, constituted an illegal structure. In its development the matter has materially

diverted from its original course and a number of issues have since arisen, all of which are to be reserved for determination by the trial court. In my view it will be just, fair and equitable that the eventual successful party, be entitled to all costs, including the costs of this appeal.

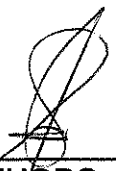
[13] In the result the following order is made:

1. The appeal is upheld.
2. The order of the court a quo is set aside and substituted with the following:
   "1. The application is referred for trial.
   2. The applicant's notice of motion is to stand as a simple summons and the first respondent's notice of intention to oppose as the defendant's notice of intention to defend the action.
   3. The applicant (plaintiff) must file a declaration within 15 days of the date of this order whereafter the rules of court will apply as to all further steps in the action.
   4. The costs of this application will be costs in the action."

3. The costs of the appeal shall be costs in the action, referred to in paragraph 2 above.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

I agree.



RS MATHOPO
JUDGE OF THE HIGH COURT

I agree.

EJ FRANCIS
JUDGE OF THE HIGH COURT

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DATE OF HEARING	*28 MARCH 2012*
DATE OF JUDGMENT	*7 MAY 2012*