REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: YES / NO (2) OF INTEREST TO OTHER JUDGES: YES/NO (3) REVISED.	**CASE NO: 20400/2018**
……..	……...
Date	**ML TWALA**

In the matter between:

FRANTRADE NINETEEN (PTY) LIMITED
(REGISTRATION NO: 1998/008857/07) **FIRST APPLICANT**

JOHN JOSEPH WELCH **SECOND APPLICANT**
(ID NO: […])

GEOFFREY CORNELIS METER **THIRD APPLICANT**
(ID NO: […])

BEVERLEY ANN DUNN **FOURTH APPLICANT**
(ID NO: […])

AND

REALTY CORPORATION OF SOUTH AFRICALIMITED (REGISTRATION NO: 1906/002531/06) **FIRST RESPONDENT**

EVAN PAUL DRYEN (ID NO: […]) **SECOND RESPONDENT**

CANDICE LYNN DRYDEN (ID N0: […]) **THIRD RESPONDENT**

GARETH DRYDEN ((ID NO: […]) **FOURTH RESPONDENT**

THE MASTER OF THE HIGH COURT JOHANNESBURG **FIFTH RESPONDENT**

THE REGISTRAR OF DEEDS PRETORIA **SIXTH RESPONDENT**

MIDVAAL MUNICIAPALITY **SEVENTH RESPONDENT**

JUDGMENT

TWALA J

[1] This is an opposed application wherein the applicants sought an order for the removal of a restrictive condition on the title deed number T121406/98 and other ancillary relief.

[2] It is appropriate to note that only the first respondent filed its opposition to this application. However, for the sake of convenience, I shall refer to the parties as the respondent and applicant.

[3] At the commencement of the hearing, the respondent brought an application for condonation for the late filing of its heads of argument which application was not opposed by the applicant. There being no prejudice to be suffered by the applicants or any other litigant, the application for condonation was granted.

[4] Further, the respondent brought an application for the striking out of certain paragraphs in the founding papers of the applicant for either being irrelevant or being in admissible hearsay evidence. This application was an addition to the point in limine raised by the respondent in its answering affidavit and counsel for the respondent proposed that it be dealt with together with the main application.

[5] I am unable to disagree with counsel for the respondent in this regard. Although the paragraphs mentioned in the notice of application gave some historical background, albeit incorrect as contended by the respondent, they are irrelevant to the determination of the issues at hand. It is my respectful view therefore that the paragraphs referred to in the application to strike out are irrelevant and inadmissible as hearsay evidence and falls to be struck from the record.

[6] It is apparent from the record that in 1918 the respondent acquired ownership of the property known as the Remaining Extent of Portion 18 of the farm Faraosfontein No. 372, Registration Division IQ Province of Gauteng, Measuring 70,1893 hectares (“the property”). In 1934 the respondent sold the property to Ohenimuri Golf and Country Club and caused a restrictive condition to be registered against the title in the following terms:

"SPECIALLY subject to the condition that the property hereby transferred may only be used for the purpose of a Golf and Country Club and may not be sub-divided and no portion or the whole of the said property may be sold for purposes other than a Golf and Country Club without the consent in writing of the Corporation first had and obtained" ("the restrictive condition").

[7] In all subsequent transfers of the property, the restrictive condition has been carried forward. In 1998 the applicant acquired ownership of the property through a sale in execution and is presently holding it under title deed number T121406/1998 and the restrictive condition is extant.

[8] It is submitted by counsel for the applicant that the restrictive condition is a personal servitude as opposed to a praedial servitude. The restrictive condition is a burden on the property for the benefit of the respondent and not another property. Therefor the respondent, so it is contended, have the discretion to consent to the removal or cancellation of the restrictive condition which discretion should be exercised reasonable.

[9] Counsel for the applicant submitted further that the circumstances have changed and the restrictive condition makes the property useless since the community in the area have no interest in a golf course and country club. The existing club house has been raised by fire recently. The restrictive condition is impossible to carry into effect and the respondent is, so the argument goes, unreasonable and there is no justification in refusing to grant its consent to remove or cancel the restrictive condition.

[10] Counsel for the applicant contended further that the applicant is approaching the Court as beneficiary by virtue of being holder in title in the property and having a beneficial interest therein. The property is, so it is contended,

stripped off of its economic value and holds no benefit to the owner neither the community.

[11] It is contended by counsel for the respondent that the applicants lack the necessary locu standi to bring this application since it is not a beneficiary as defined in the Immovable Property (Removal or Modification of Restrictions) Act, 94 of 1965 (the Act). The applicant is a holder in title in the property and not beneficiary in terms of a will or other instrument as defined in the Act. The restrictive condition was not imposed by will or other instrument, so it argued, but was a condition created in an agreement of sale between the respondent and the trustees of the Ohenimuri Golf and Country Club who bought the property in 1934 which condition has since been carried forward in all subsequent transfers of the property. It is contended further that there is no allegation in the founding papers that the applicant is a beneficiary and a title deed cannot be regarded as another instrument as defined in the Act.

[12] It is submitted further by counsel for the respondent that the doctrine of arbitrium boni viri does not find application in this case for the servitude confers a real right on the respondent which right gives the respondents unfettered discretion on the servitude. Therefore, as the argument goes, the refusal of the respondent to furnish consent to the removal of the restrictive condition, irrespective for the reasons for such refusal, is fatal to the relief claimed by the applicant. The applicant bought the property with full knowledge of the restrictive condition and cannot expect the rights of the respondent to be extinguished without its consent.

[13] It is trite that once a condition or a servitude is registered either notarial or as a condition of title in the title deed by the Registrar of Deeds, it bestows a

real right to the person in whose favour it is registered. Further, it is trite that a real right is absolute in the sense that it prevails against the whole world.

[14] *Silberberg and Schoeman in the Law of Property, 5th Edition* on page 51 state the following:

"The holder of a servitude such as a right of way in relation to a piece of land is entitled to enforce such servitude, being a limited real right, not only against the original grantor but also, for the duration of the right, against all successors in title and creditors, irrespective of whether they had actual knowledge of the existence of the servitude."

[15] On page 338, the author continued and defined the personal servitude as:

"a servitude established in favour of particular persons over things and may confer a variety of benefits on their holders. They are real rights; however they cannot be transferred. They may be constituted for a fixed term of years or be granted until the happening of a future event or for the lifetime of the beneficiary, but not beyond his or her death. For this reason, mineral rights, which were in many respects similar to personal servitudes but transferable from one person to another, were generally described as either quasi-servitudes or real rights sui generis. If the usufructuary is a legal person, the usufruct is terminated upon dissolution of the legal person or the lapse of 100 years."

[16] The Deeds Registries Act, 47 of 1937 as amended provides as follows:

Section 3(1)

The registrar shall, subject to the provisions of this Act -

(a) …….

(o) *register any servitude, whether personal or preadial, and record the modification or extinction of any registered servitude;*

Section 63

Restriction on registration of rights in immovable property –

(1) No deed, or condition in a deed, purporting to create or embodying any personal right, and no condition which does not restrict the exercise of any right of ownership in respect of immovable property, shall be capable of registration:

Provided that a deed containing such a condition as aforesaid may be registered if, in the opinion of the registrar, such condition is complementary or otherwise ancillary to a registrable condition or right contained or conferred in such deed.

Section 102

Definitions

(1) In this Act, unless inconsistent with the context –

"real right" includes any right which becomes a real right upon registration;

[17] In *Exparte Saiga Properties (Pty) Ltd 1997 (4) SA at 716 (ECP)* in which *Exparte Rovian Trust (Pty) Ltd 1983 (3) SA at* 209 was quoted with approval the Court state the following:

"It has long been settled that the High Court has no inherent jurisdiction to remove, vary or suspend a restrictive condition of title to land. The rationale lies in the nature of a restrictive condition which, in its essence, is a form of contractual stipulation in terms of which a transferor of land regulates the exercise of the transferee's dominium over the property. The condition of transfer of the land to the successor in title is endorsed upon the deeds and, by reason thereof, restricts the use to which the property may be put by succeeding successors in title. Such condition may also confer rights upon the holders of title to other properties by defining the relationship between

portions of land or by conferring upon such other lot holders a right to enforce the restrictive condition applicable to the property in question in this respect such condition are in the nature of servitudes. Given the nature of these conditions of title and the rights that are thereby conferred they cannot be removed, varied or suspended except with the consent of all of the parties whose rights and interests are regulated thereby."

[18] I am unable to disagree with counsel for the applicant that the restrictive condition in the title deed is a personal servitude. However, once a personal servitude is registered by the Registrar of Deeds against the title deed, it becomes a real right in favour of the person in whose favour it is registered. It is carried forward with every transfer unless the holder thereof consent to its removal or is expunged by a particular event or the elapse of time. I hold the view therefore that it is not within the powers and function of the Court to unilaterally and without the consent of all the affected parties to make or break the contract that came into being when the personal servitude was registered.

[19] I find myself in agreement with counsel for the respondent that the respondent's refusal to consent to the removal of the restrictive condition from the title deed is fatal to the case of the applicant and on this basis the application falls to be dismissed.

[20] There is no merit in the applicant's contention that it is approaching the Court since it has a beneficial interest in the property as the holder in title. It is trite that in motion proceedings a litigant must make out its case in its founding papers and the applicant has failed to make the allegation that it was a beneficiary in this case. Further, it is not in dispute that the applicant has an interest in the property by virtue of being the holder in tittle.

However, the applicant's rights and interest in the property is limited by and subject to the servitude registered in favour of the respondent. It is my respectful view therefore that the applicant's rights are limited by the servitude and the legislature intended to protect the rights of beneficiaries to the land from the owners of the land by the promulgation of section 2 of the Act. The inevitable conclusion is that it would be counter-productive for the Act to provide the same remedies for both the beneficiaries and the owners of land alike.

[21] *Section 1* of the *Immovable Property (Removal or Modification of Restrictions) Act, 94 of 1965("the Act")* provides as follows:

1. Interpretation of terms:

In this Act, unless the context otherwise indicates –

'beneficiary' means any person entitled to a beneficial interest in immovable property under a will or other instrument or whose benefit any immovable property is held in terms of a will or other instrument by a trustee, administrator or fiduciary without a beneficial interest;

[22] *Section 2 Application to the court for the removal of modification of restrictions on immovable property:*

(1) If any beneficiary interested in immovable property which is subject to any restriction imposed by will or other instrument before or after the commencement of this Act, desires to have such restrictions removed or modified on the ground that such removal or modification will be to the advantage of the persons, born or unborn, certain or uncertain, who are or will be entitled to such property or the income thereof under such will or instrument, such beneficiary may apply to the court for the removal or modification of such restriction.

[23] *Section 9 Endorsement of title deed*

(1) ……

(2) After any restriction against alienation has ceased to be effectual in respect of any immovable property in terms of section eight, the registrar shall, on the application by or on behalf of the person in whose name such immovable property is registered, accompanied by the title deed under which such immovable property is so registered and in which such restriction is embodied, together with and order of court, or such other proof as the registrar may consider necessary, to the effect that the said restriction has so ceased to be effectual in respect of the said immovable property, endorse the said title deed to that effect.

[24] I hold the view that the title deed does not fall into the category of other instruments as envisaged in section 2 of the Act. Section 2 of the Act refers to a will and other instruments and in my respectful view it would be against the principles of interpretation to give other instruments a wider meaning to include a title deed. The section deals with beneficiaries whose interest in the property was bestowed by will or other instrument. A title deed does not bestow beneficial interest in the property but ownership or title which may be limited or subject to a restrictive condition registered in favour of a beneficiary to that restrictive condition.

[25] *Section 1 of the Wills Act 7 of 1953* provides the following:

1. Definitions

In this Act, unless the context otherwise indicates –

"will" includes a codicil and any other testamentary writing.

[26] It is my respectful view therefore that the definition of a 'will' in the Wills Act includes "other instruments" as envisaged in section 2 of the Immovable

Property Act as it refers to other testamentary writing. I hold the view therefore that the applicant is not a beneficiary as envisaged in the Act as it is the owner of the subject property. If the Act intended to refer to the owner of the property as a beneficiary, section 9 (2) would have referred to him as a beneficiary and not the person in whose name the property is registered. The other instruments referred to in the Act are, in my view, other testamentary instruments as per the definition of the 'will' in the Wills Act since the legislature was in that section dealing and referring to a will.

[27] In *Moodley v Umzinto North Town Board 1998 (2) SA 188* the Supreme Court of Appeal stated the following:

"Because the section invades the common-law right of a council to claim damages suffered by it in consequence of the negligent acts of its servants, it should be interpreted restrictively.

A change in language prima facie indicates a change in intention, especially where the change occurs in immediately successive sections within the same ordinance."

[28] In *Padayachee v Adhu Investments CC and Others 2016 (2) ALL SA @ 555* the Court stated the following:

"The inevitable point of departure is the language of the provision and where more than one meaning is possible each possibility, i.e. each possible meaning, must be weighed in the light of all these factors. Where the court is faced with two or more possible meanings that are to a greater or lesser degree available on the language used…. The apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation".

[29] In *The City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association 2019 (1) ALL SA at 291* the Supreme Court of Appeal emphasised the above principle of interpretation as follows:

" This Court has consistently stated that in the interpretation exercise the point of departure is the language of the document in question. Without the written text there would be no interpretive exercise. In cases of this nature, the written text is what is presented as the basis for a justiciable issue. No practical purpose is served by further debate about whether evidence by the parties about what they intended or understood the words to mean serves the purpose of properly arriving at a decision on what the parties intended as contended for by those who favour a subjective approach, nor is it in juxtaposition helpful to continue to debate the correctness of the assertion that it will only lead too self-serving statements by the contesting parties. Courts are called upon to adjudicate in cases where there is dissensus. As a matter of policy, courts have chosen to keep the admission of evidence within manageable bounds. This court has seen too many cases of extensive, inconclusive and inadmissible evidence being led. That trend, disturbingly, is on the rise."

[30] I am unable to disagree with counsel for the respondent that the meaning to be ascribed to other instruments should not be wider than reference in the Wills Act to other testamentary instruments since the words were used by the drafters of legislation when they were dealing with and referring to a will. It is my considered view therefor that the applicant lacks the necessary locu standi to bring this application under the Act and the application falls to be dismissed on this ground.

[31] In the circumstances, I make the following order:

A. The application is dismissed;

B. The applicants are liable to pay the costs of the respondents jointly and severally the one paying the other to be absolved including the costs of senior counsel.

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TWALA M L

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of hearing: **4 February 2019**

Date of Judgment: **22 February 2018**

For the Applicants: **Adv. JC Viljoen**
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