IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES/~~NO

(3) REVISED **NO**

DATE: 11 AUGUST 2020 – **DELIVERED ELECTRONICALLY**

SIGNATURE: .....

Case No. 43885/2018

In the matter between:

MCLEROTH, HEATHER MONICA JOY **APPLICANT**

And

NAICKER, UDESH **FIRST RESPONDENT**

NAIDOO, AMANTHA **SECOND RESPONDENT**

CITY OF JOHANNESBURG **THIRD RESPONDENT**

ABSA BANK LTD **FOURTH RESPONDENT**

NEDBANK LTD **FIFTH RESPONDENT**

CHARLES DE ANDRADE **SIXTH RESPONDENT**

JUDGMENT

MILLAR, A J

1. The applicant is the registered owner of Portion 29 of Erf [...] Morningside Extension 98. The first and second respondents, who I shall hereafter refer to as "the respondents" are the joint owners of Portion 28 of the same Erf.

2. During 1984 a company by the name of Merbuild owned and developed Erf [...]. The Erf was sub-divided by them into 5 portions – Portions 25, 26, 27, 28 and 29. The Erf fronts onto Meadowbrook Close in Morningside. Save for Portion 25, which has direct access to Meadowbrook Close and is not affected in any way for such access by its position, all of the other Portions rely on a right of way across portions of the other Erven for access to Meadowbrook Close.

3. Merbuild developed and sold on the various Portions completed dwellings. At the time that these dwellings were completed, it was contemplated that there would be a “common” driveway which would provide access for the individual properties to Meadowbrook Close. The subdivision of the Erf had provided for each of Portion 26, 27 and 28 to have a driveway of varying lengths to afford access.

4. It was also contemplated by Merbuild that all 3 driveways, which run in parallel to each other and are for all intents and purposes a single driveway, would afford access to the owners of all the Erven and to this end, at the time that the individual portions were developed and sold, Notarial Servitudes of Right of Way which would have allowed the owners of all 5 Portions from time to time free and unhindered access across the driveway area of Portions 26, 27 and 28. That this is so is not in dispute and in fact the Applicant’s property, although it fronts onto Meadowbrook Close was constructed in such a manner that access to both the front door and garages is through what Merbuild had contemplated of as the “common” driveway area.

5. For reasons that are unclear, the Notarial Agreements were not entered into between the respective owners of the Portions as and when transfer was taken by them from Merbuild.

6. It was not suggested that there was no harmony, at least until the genesis of the present dispute, in respect of the owners for the time being of the various portions with regards to the use of the "common" driveway area. For reasons not germaine to the present application, during December 2016, a dispute arose between the applicant as the owner of Portion 29 and the respondents as the owners of portion 28. In consequence of that dispute, that respondents commenced the construction of a wall which would have had the effect of closing in Portion 29 and preventing access to the garages and front door of the dwelling on that Portion from the common driveway area.

7. Inasmuch as the applicant, given the position and construction of her dwelling is to all intents and purposes wholly dependent on access to the common driveway area of Portions 26, 27 and 28, so too are the respondents – they being wholly dependant on the driveway area of Portion 27.

8. In the present application, it is only the respondents that oppose the registration of a servitude of right of way in favour of the owners of all the other Portions. Save for the owner of Portion 25 who has direct access to Meadowbrook Close

and is unaffected, the owners of Portions 26 and 27 have consented to enter into a notarial agreement for and the registration of such praedial servitude.

9. In Johl v Nobre[1] the servitude in issue in the present case was described thus:

> *"12] The servitude pertinent to this matter is a praedial servitude which pertains to two pieces of land that are in close proximity to, or next to each other. See LAWSA Vol 24 Second Edition p 456 para 540. A praedial servitude is established over the servient property for the benefit of the dominant property in perpetuity, irrespective of the identity of the owner. See LAWSA supra p 461 para 545. Both the dominant and servient owners are entitled to use the servitude area. The owner of the servient property retains all the rights flowing from his or her ownership provided that the exercise of such rights may not interfere with the rights of the servitude holder. See Roeloffze NO and Another v Bothma NO and Others 2007 (2) SA 257 at 266 H – 267 D See also Estcourt Corporation v Chadwick 1925 NPD 239*

[1] 2012 JDR 0485 (WCC) at paras [12] to [13]

[13] The relationship between the dominant and servient owners is governed by the principle of reasonableness. See Van der Walt and Pienaar, Introduction to the Law of Property 4th edition Juta 2004 at 274. Where there is a conflict of interests, the interests of the dominant owner will have precedence over those of the servient owner, subject to the principle of reasonableness. The holder of the servitude must exercise the servitude civiliter modo, that is, in a civilized and considerate way. In Rabie v De Wit 1946 CPD 346 at 351civiliter modo conduct was found to be use "in a manner that will cause the least damage or inconvenience to the servient property". (See also Nolan v Barnard 1908 TS 142 at 152 – 4 Texas Co (SA Ltd v Cape Town Municipality 1926 AD 467 at 475; Kakamas Bestuursraad v Louw 1960 (2) SA 202 (A); Stuttaford v Kruger 1967 (2) SA 166 (C) at 172F and Brink v Van Niekerk en 'n Ander 1986 (3) 428 (T) at 434).”

10. The applicant argued 3 alternative basis upon which this court should come to the assistance of the applicant. A finding in the affirmative on any one of these basis would be dispositive of the application.

10.1 Firstly, the applicant has acquired, the entitlement to registration of the servitude through an acquisitive prescription, a period of 30 years of undisturbed use by her or her predecessors in title, of the

common driveway and in particular that portion of the common driveway which is part of Portion 28.

10.2 Secondly, the applicant is entitled to registration of the servitude in consequence of the driveway of Portion 28 constituting a *via necessitas;* and

10.3 Thirdly, that the unregistered servitude contemplated by Merbuild and which has been in use from the beginning of the development, was readily apparent to the respondents and they should for that reason it should now be registered.

11. The applicant also argued that the costs relating to the spoliation application should be borne by the respondents.

12. It was argued on behalf of the respondents that the applicant is not entitled to the registration of the servitude as of right and on any of the basis contended for. The respondents are prepared to accede to the registration of the praedial servitude sought but only in respect of the area immediately in front

of the garages of Portion 29 and argue that they should be compensated at a market related rate. Furthermore, the restrictive condition in the proposed servitude that reads as follows:

> "7. *The areas encumbered by the servitudes may be utilized and traversed freely and without let or hindrance and no structure, wall, fence or improvement of whatsoever nature may be erected within such areas or along any of the boundaries thereof."*

should not in any event be included.

13. The respondents also argued that they ought not to pay the costs of the spoliation application.

14. During the argument, counsel for both parties conceded that the costs of the spoliation application should be costs in the cause of this application and accordingly I need not deal any further with this aspect. Those costs will follow the result.

15. The applicant claims that she has acquired the servitude of right of way in consequence of having exercised such right freely, voluntarily and without any let or hinderance for a period of 30 years. The entitlement to make this claim arises from the provisions of Section 6 of the Prescription Act 68 of 1969 ("the Act") which reads as follows:

> *"Subject to the provisions of this Chapter and of Chapter IV, a person shall acquire a servitude by prescription if he has openly and as though he were entitled to do so, exercised the rights and powers which a person who has a right to such servitude is entitled to exercise, for an uninterrupted period of 30 years or, in the case of a praedial servitude, for a period which, together with any periods for which such rights and powers were so exercised by his predecessors in title, constitutes an uninterrupted period of 30 years."*

16. The Section provides that the period of 30 years in respect of which the right, in respect of a praedial servitude as is the case in the present matter, has been exercised, need not only have been exercised by the person who now seeks the registration of the servitude, but the period is the aggregate period

and includes the period for which it was exercised by any predecessors in title.

17. Chronologically, from the time that the subdivisions by Merbuild were approved to the present, the following occurred:

17.1	10 April 1984	Subdivision approved.
17.2	21 May 1984	Building plans approved for Portion 29.
17.3	26 November 1984	Surveyor General approves subdivisions.
17.4	16 March 1988	First transfer of Portion 29.
17.5	23 March 1988	First transfer of Portion 28.
17.6	14 December 1988	First transfer of Portion 27.
17.7	31 August 1990	First transfer of Portion 26.
17.8	7 December 1993	Second transfer of Portion 29 (to applicant).
17.9	18 April 2008	Second transfer of Portion 28 (to respondents).
17.10	December 2016	Dispute between applicant and respondents.

18. During the entire period and from at least 16 March 1988 when the first transfer of portion 29 took place, the owner for the time being – her predecessor from that date and the applicant from 7 December 1993 used the driveway and in particular the portion of the driveway falling within portion 28. It was not disputed that this use was without hindrance and to all intents

and purposes fully in accordance with the provisions of section 6 of the Prescription Act. Furthermore, the applicants use was and will only be for the purpose of exercising a right of way. The applicant claims no other right or entitlement whatsoever.[2]

19. The respondents were not able to place in issue the applicant's entitlement in terms of the Act[3] save to argue that the free and unhindered use as though she were the owner, was in terms of an agreement and for that reason did not fall within the Act.

20. The respondents relied for this argument on a passage in the applicants founding affidavit – in paragraph 89 where she stated "*It will be argued, when this application is heard, that it was not necessary for Naicker and Naidoo to have specific knowledge of the circumstances which gave rise to the original agreement to allow the reciprocal rights of use over the various panhandle portions of Portions 26, 27 and 28. It was sufficient that they were aware of that arrangement and were perfectly capable of ascertaining how and why it came about."*

[2] Johl v Nobre *supra* at para15.

[3] There was no suggestion in the papers nor was it argued that the running of prescription in terms of section 6 of the Act had been interrupted by the service of any process as required by sections 4(1).

21. This argument was predicated on the fact that there was indeed an agreement[4]. It is not in issue that insofar as there was an intention on the part of Merbuild who had gone so far as to obtain the Surveyor Generals approval to register the servitudes, when the first transfers of the various erven were effected, that these servitudes were not registered[5].

22. Merbuild's intention cannot be elevated to the status of an agreement – the erven were transferred at different times and the new owners simply used the common driveway access that was there. Given the manner in which the applicants dwelling was constructed on portion 29 – with the garages and front facing onto the common driveway – it would have been highly improbable if not absurd if each owner of portion 29 from the first were to ask whether they had the right to access the property from the only place they could, given the construction. It would have been self-evident.

23. That this is so would appear from the fact that none of the owners of portions 26, 27 and 28 Meadowbrook Close have ever taken issue with the use of their particular portion of the common driveway by any of the others[6] - even

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[4] Malan v Nabygelegen Estate 1946 (AD) 562 at 574 where Watermeyer CJ held "mere occupation of property *'nec vi nec clam nec precario*' for a period of thirty years does not necessary vest in the occupier a prescriptive title to the ownership of the property. In order to create a prescriptive title, such occupation must be a user adverse to the true owner and not occupation by virtue of some contract or legal relationship such as lease or usufruct which recognises the ownership of another."

[5] The mere fact that the servitudes are reflected on the Surveyor General's diagram and have been approved by him do not elevate these to real rights binding on any party in the absence of the specific registration of those servitudes – see Werner v Florauna Kwekery BK and Others 2016 (2) SA 282 (SCA) at para [21] and Ethekwini Municipality v Brooks and Others 2010 (4) SA 586 (SCA) at para [32].

[6] From which it may be inferred that all the parties made use of the common driveway comprised of the property of portions 26, 27 and 28 *civiliter modo* – that is respectfully and with due regard to the rights of others - see Tshwane City v Link Africa and Others 2015 (6) SA 440 (CC) at para [87].

the respondents contented themselves with this state of affairs until the dispute in December 2016. The owners of portions 26 and 27 are without more prepared to consent to the registration of the proposed servitude – indicative of what I have found the true position to be – particularly since the respondents are in the same position with regards to their use of the common driveway property of portion 27.

24. Since there was no "agreement" to use the property as argued by the respondents, it follows that the applicant by using the right of way over portion 28 as she (and her predecessor) did, has acquired a servitude of right of way over the part of portion 28 that comprises the "common driveway."

25. In view of the conclusion that I have reached that the applicant, as the owner of portion 29, has acquired a servitude of right of way over portion 28, it is not necessary for me to deal with the alternative claims.

26. In considering the question of costs I am mindful of the fact that the respondents, procured building plans and which had been approved on 8 February 2016 which allowed the construction of a wall along the entire length of the servitude used by the applicants. Tellingly, the building plans ignore the construction on portion 29 and do not reflect any right of way in favour of portion 29. The plans do however, inexplicably since it is common

cause that no servitudes were registered by Merbuild, reflect an “Access Servitude” in favour of portion 28 over portion 27.

27. The commencement of building and the flaring up of the dispute which led to the applicants bringing of the spoliation application seems to me have been deliberately provoked by the respondents. The parties being represented by this stage, it is inexplicable that the respondents, if they believed that the applicant was not entitled to use the portion of their property that is part of the common driveway, took no further steps to assert their rights. Instead they respondents concede the registration of a servitude but seek to render such servitude nugatory by insisting that clause 7 of the proposed servitude was removed. The conduct of the respondents has done nothing other than to provoke and thereafter prolong the litigation and to put the applicants to unnecessary legal costs.

28. The conduct of the respondents is to be deprecated and it is for this reason that I intend to make the order for costs that I do.

29. In the circumstances it is ordered:

29.1 the First and Second Respondents are ordered and directed to allow the registration of a servitude of right of way in perpetuity over Portion 28 of Erf [...] Morningside Extension 98 Township,

Registration Division I.R, Province of Gauteng ("Portion 28") in favour of the owners from time to time of Portions 26,27 and 29 of the said Erf [...] Morningside Extension 98 Township, in accordance with Servitude Diagram S.G. No. A7234/84 and in terms of a notarial agreement in accordance with the draft annexed hereto as "A".

29.2 the First and Second Respondents are ordered and directed, forthwith upon demand, to sign all and any documents necessary for the purpose of registering the servitude referred to in paragraph 1 above including, but not limited to, the notarial agreement referred to therein;

29.3 the Fourth and Fifth Respondents are ordered and directed, forthwith upon demand, to furnish any such consents as may be necessary for the purpose of registering the servitude referred to in paragraph 29.1 above.

29.4 the Sheriff of the above Honourable Court is ordered, directed and authorised, only in the event that the First and Second Respondents fail to comply with the orders in paragraphs 29.1 and

29.2 above, to sign on their behalf all and any documents required to give effect to the orders in paragraphs 29.1 and 29.2 above

29.5 the First and Second Respondents, jointly and severally, the one to pay the other to be absolved, are ordered and directed to pay, on the scale as between attorney and client, the costs of the spoliation application launched by the Applicant under the above case number on 9 December 2016; and

29.6 the First and Second Respondents, jointly and severally, the one to pay the other to be absolved, are ordered and directed to pay the costs of this application on the scale as between attorney and client.

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A MILLAR
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

HEARD ON: 3 AUGUST 2020

JUDGMENT DELIVERED ON: 11 AUGUST 2020

(DELIVERED ELECTRONICALLY BY EMAIL TO THE PARTIES)

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