



(1)	Reportable	Yes
(2)	Of interest to other Judges	Yes
(3)	Revised:	Yes
Date: 10/9/2020		
Signature: <i>[Handwritten Signature]</i>		

In the matter between:

WYKWET 31 (PTY) LTD

First Appellant
(First Respondent court a quo)

ABSA BANK LIMITED

Second Appellant
(18th Respondent court a quo)

NEDBANK LIMITED

Third Appellant
(19th Respondent court a quo)

and

RAND WATER

Respondent
(Applicant court a quo)

J U D G M E N T

(Handed down electronically by circulation to the parties' legal representatives by email, uploading on Caselines and release to SAFLII. The date and time for delivery of judgment is deemed to be 10h00 on 10 September 2020.)

MAIER-FRAWLEY J (Makume J and Bester AJ concurring):

Introductory background

1. This appeal lies, with the leave of the court a quo, against the whole of the judgment delivered by Makgoba J (as he then was) on 14 September 2017 in the Gauteng Division, Pretoria.

2. Rand Water (respondent) has been conveying water through underground pipes laid by it on a certain property known as Holding 50, Rynfield Agricultural Holdings, Section 1 ('the property').¹ Its rights to do so were secured by means of a servitude which was registered in its favour over a section of the property in the Johannesburg Deeds office in 1978 under Notarial Deed of Servitude K1573/19785 ('notarial deed'), read with the original SG Diagram of A2621/37 ('servitude diagram'), following an agreement between the erstwhile landowner and the respondent. The property was subsequently on-sold and registered in the names of different successors-in-title, amongst others, the first appellant, a property developer, who purchased the property on 24 February 2014 for purposes of establishing a sectional title scheme comprising a town house development known as Cloverdene Ext 39 thereon.

3. A dispute arose between the first appellant and the respondent regarding the nature and extent of the respondent's rights under the servitude, in particular, the precise location of the servitude on the property. The respondent alleged that it held a servitutorial right to lay pipes through which water is conveyed along a strip of ground 12 metres wide along and parallel to the entire south-western boundary of the property, as denoted by the line AD on the servitude diagram, which the appellants disputed.

¹ The property will interchangeably be referred to as 'Holding 50' or 'the servient tenement' in the judgment, as dictated by the context.

4. The respondent sought a final demolition order in the court below, alleging that certain townhouse units constructed by the first appellant on the south-western boundary of the property were encroaching onto its servitude, thereby impeding its rights under the notarial deed.

5. The parties agreed to separate the issue of whether the respondent had established its servitural rights on the south-western boundary of the property from the substantive relief sought, namely, the demolition of townhouses constructed alongside the south-western boundary of the property. The substantive relief was postponed *sine dies* by agreement between the parties.

6. The question arising for determination in the court below was whether (or not) the respondent had established a limited real right of servitude along the south-western border of the property, as denoted by the line AD on the servitude diagram, such as would entitle it to seek a demolition order in due course, or whether it held a limited real right of servitude along the north-western boundary of the property, as denoted by the line AB on the servitude diagram.

7. The court a quo answered the question in favour of the respondent and ordered the first appellant to pay the costs of the separated hearing.

8. Although the first appellant filed heads of argument in the appeal, it did not participate further in the hearing thereof on account of its supervening liquidation.² The second and third appellants, however, made common cause with the case advanced by the first appellant, both in the court below and in

² In a letter dated 23 July 2020, the liquidators informed the court and the remaining parties that they had received no instructions from the creditors to proceed with the appeal.

the appeal, in addition to advancing their own reasons as to why the appeal ought to succeed.

Condonation

9. At the outset of the hearing, the appellants jointly³ sought condonation for the late prosecution of the appeal and reinstatement of the lapsed appeal, which application was opposed by the respondent. The appellants did not timeously comply with the provisions of Rule 49(6)(a) of the Uniform Rules of Court,⁴ as they did not apply for a date for the hearing of the appeal within 60 days of noting their respective appeals and simultaneously file therewith, the required amount of copies of the record of appeal. The reason therefore is that each appellant was not in position to file the complete record of appeal until after the expiry of the 60 days.⁵

10. Prior to any of the appellants formally noting their appeals, the first appellant's attorney had applied to the relevant transcribers to have the record of the proceedings in the court a quo transcribed. Despite regularly requesting updates from the transcribers, a delay ensued in providing the record, principally because the individual tasked with the duty to transcribe the record had thereafter left the employ of the transcribers and a new transcriber had to be assigned to the task. It was only on 18 March 2019 that the record was eventually provided. The respondent criticized the first appellant's attorney for seeking to have the arguments presented in the court a quo transcribed. The first appellant's attorney who deposed to the

³ At the time of noting their respective appeals, it was agreed between the attorneys acting for the respective appellants that the first appellant's attorney of record, one Swart, would take steps to procure a transcript of the proceedings in the court a quo and prepare the record of appeal.

⁴ Rule 49(6)(a) provides that if no application for a date is made by a party within 60 days, the appeal shall be deemed to have lapsed.

⁵ The 60 day period expired on 20 February 2019.

affidavits filed on behalf of the appellants, explained that it was thought prudent at the time to obtain a record of the arguments, as it was considered useful in the further prosecution of the appeal, given the narrow legal issue which served before the court a quo and concessions made during argument.⁶

11. In *Van Wyk*,⁷ the Constitutional Court held that the standard for considering condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends upon the facts and circumstances of each case.

12. According to established jurisprudence, the issue of prejudice remains an essential factor in the adjudication of an application for condonation.⁸ As was also pointed out by Zondo J in *Grootboom*:⁹

“the interests of justice must be determined with reference to all the relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If

⁶ The facts do not substantiate any finding of negligence on the part of the attorney in so doing. Moreover, it has been held that relief will more readily be granted where there is some deficiency or irregularity in the noting or prosecution of the appeal than if no steps were taken at all in connection therewith. See: *Fortman v SAR & H(2)1947* (3) SA 505 (N) at 509; *Palmer v Goldberg* 1961 (3) SA 692 (N) at 701.

⁷ *Van Wyk v Unifas Hospital and another* 2008 (2) SA 472 (CC) at 477 A-B. There, the court stated that factors relevant to the enquiry as to whether it is in the interests of justice to grant condonation include, but are not limited to, the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success.

⁸ See for example: *Santa Fe Sectional Title Scheme NO 61/1994 Body Corporate v Bassonia Four Zero Seven CC* 2018 (3) SA 451 (GJ) at 454F-G; *Madinda v Minister of Safety and Security, Republic of South Africa* 2008 (4) SA 312 (SCA).

⁹ *Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 (CC), para 51.

the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice.”

13.

The matter concerns an issue of major importance to the appellants, not only because it concerns the enforceability of a right of servitude held by the respondent but which had *not* in fact been registered against the claimed section of land on which the servitude was alleged to exist, but because nine affected townhouses constructed alongside the south-western boundary of the property (which were subsequently sold to individual homeowners whose properties were mortgaged in favour of the second and third appellants respectively as security for the repayment of loans obtained from the banks) were at risk of demolition, carrying with it, a concomitant risk of loss by the banks of their security. As will become evident from what is stated below, the prospects of success on appeal are manifestly in favour of the appellants. There are in my view no material countervailing factors that militate against a finding that it is in the interests of justice to grant condonation, more so since the requirement of prejudice to be suffered by the respondent has effectively been shown to be perceived rather than real.¹⁰ For these reasons, I am of the view that condonation should be granted and the appeal reinstated.

Issue on appeal

¹⁰ The facts of the matter establish unequivocally that the respondent delayed for over a year before instituting proceedings in the court a quo. The delay effectually puts paid to and belies any prejudice allegedly suffered by the respondent in the prosecution of the appeal.

14. The crisp issue arising for determination on appeal is whether the court below was correct in concluding that the respondent had established a clear right of servitude in its favour along the south-western boundary of Holding 50, in particular, along the AD line as denoted on the servitude diagram (SG2621/1937).

15. What follows, is a summary of the broader factual background against which the issue on appeal is to be adjudged.

Broader Factual Matrix

16. In order to contextualise the dispute, it is necessary to provide a short chronology of salient events leading up to the proceedings in court below. What follows, is a summary of relevant facts that were either common cause or not seriously disputed or refuted on the papers.

17. In January 2008, the respondent, as holder of servitude rights over Holding 50, was invited to comment on an application to establish Cloverdene Ext 39. On 23 January 2008, the respondent responded by stating that it had no objection to the proposed development provided that the conditions of its servitude, identified by it as a 12 metre wide servitude with reference to 'Deed of Servitude K1573/1978' and 'Servitude Diagram S.G. No. A2621/1937', were adhered to and its services not adversely affected.

18. According to the records of the Registrar of Deeds, a right of servitude in favour of the respondent had, in terms of those documents, been registered along the *north-western boundary* of the property and not the south-western boundary as such.¹¹ The right of servitude which had in terms of the

¹¹ In terms of the notarial deed, the area on which the respondent was granted the right to convey water by means of pipelines 'which may hereafter be laid' was along a strip of ground '12 metres wide along and parallel to the entire south-western boundary of the property, which boundary is denoted by

notarial deed been granted to the respondent along and parallel to the entire south-western boundary of the property, as denoted by the line 'AB' on the servitude diagram, was duly registered along the AB line, however, line AB was delineated in the servitude diagram as extending along the *north-western* boundary of the property and not the south-western boundary.

19. In July 2010, presumably after becoming aware of the apparent *conundrum*, the respondent instructed a land surveyor to attend to the amendment of the notarial deed (No K1573/1978) and the servitude diagram (SG2621/1937) so as to reflect its servitude right along the south-western boundary of the property, as denoted by the line AD on the servitude diagram. On 5 January 2010, the surveyor-general approved an amended consolidation diagram, S.G. No. 4740/2010, in terms of which the respondent's servitude under Deed of Servitude K1573/1978 would henceforth be denoted by the figure 'AdcDA' on the amended servitude diagram S.G. No. 4740/2010, delineated as such along the south-western boundary of Holding 50. The first appellant's consent to the amendment was neither sought nor obtained and the amendment of the diagram was also brought about without the knowledge of the first appellant.

20. At an unknown point in time, a unilateral manuscript amendment was effected to the notarial deed by some unknown person in order to change the line of servitude from the AB line to the AD line.¹² It bears mentioning that the respondent relied on this 'amended' notarial deed (a copy of which

the line AB on Diagram S.G. NOA2621/37, approved by the Surveyor-general on 27 August 1948'. (Own translation of (original) Afrikaans text into English appears within the quoted sections).

¹² The date on which the manuscript 'amendment' of the notarial deed was effected was not disclosed in the papers. The said amendment did not either accord with the denotation of the servitude along the line AdcDA in the amended diagram.

was attached as annexure 'FA2' to the founding affidavit) to assert its right of servitude along the south-western boundary of the property in the court a quo, and persists in so doing in this appeal.

21. Ground works in respect of the development commenced in March 2014. On 2 June 2014, the building plans in respect of the development were approved by the Ekurhuleni Metropolitan Municipality, which made provision for a 12 metre building line on the south-western boundary of the property, and construction of the town houses in the development commenced. Construction was completed by 23 October 2014.

22. In March 2015, the respondent delivered a notice of encroachment to the first appellant in which it alleged that townhouses as well as a boundary wall constructed along the south-western border of the property (townhouse units 46 to 54 in the development) were encroaching onto its servitude and were built over its water pipeline without its permission. It demanded that construction cease immediately and that the alleged encroachments be removed without delay.

23. In the meantime, the first appellant uplifted a copy of the original notarial deed and servitude diagram (referred to in the notice)¹³ from the Johannesburg Deeds office.

24. The first appellant's attorneys responded to the aforesaid demand in a letter dated 20 March 2015, in which the basis of the first appellant's opposition to the respondent's demand was fully articulated. In summary, it was pointed out that a right of servitude along the south-western border of the property had not been registered in the deeds office, and as such, the respondent had

¹³ A copy of the original servitude diagram was attached to the answering affidavit as annexure "V1".

failed to establish, as against third parties (such as the first appellant) that any of the rights accorded to the respondent under the notarial deed were being infringed. In particular, any encroachment on the alleged servitude (i.e., along the south-western boundary), was disputed. It was further pointed out that the boundary wall of the development along the south-western boundary was already in place when construction of the development commenced.

25.

The respondent waited a year before launching its application in April 2016, seeking a final interdict for the demolition of units 46-54 (the affected units) on grounds that the servitude described in the notarial deed (K1573/1978) read with servitude diagram SG No. A2621/37 (being the un-amended servitude diagram, as was still referred to in the notarial deed) was encroached upon by the construction of the affected units and that, in the result, the affected units ought to be demolished.

Judgment of Court a quo and Grounds of Appeal

26.

The court a quo found that the respondent had established a right of servitude over the south-western boundary of the property, along the AD line, on the basis that :

(i) The location of the pipe-laying right was a 'minor imperfection' and did not detract from the existence of the respondent's servitude rights; and

(iii) The existence of the pipe-laying right along the south-western boundary of the property, along the AD line, was a matter of interpretation and not substantive law.

27. The grounds of appeal on which the appellants rely, are, amongst others, that the court a quo erred in:

27.1. attaching no, alternatively, insufficient value to the common cause facts that: (i) the notarial deed in respect of Holding 50 was not amended by agreement between the landowner and the respondent but by way of a unilateral manuscript inscription made by an unknown person for purposes of changing the line of servitude from AB to AD; (ii) the said amendment was not effected in terms of governing legal prescripts; and (iii) to this day, the notarial deed establishes a servitude on the north-western boundary of Holding 50 and not on the south-western boundary as alleged by the respondent and declared by the court a quo;

27.2. not finding that the respondent had failed to make out a case based, *inter alia*, on the common cause fact that the notarial deed, as registered, does not confer a real right of servitude on the south western boundary of the property;

27.3. finding, as it did, that the positioning of the servitude right, which, in terms of the notarial deed and servitude diagram, lies along the north-western boundary of Holding 50, is a 'minor imperfection';

27.4. not finding that a genuine and *bona fide* dispute existed in the papers in relation to the specific location of the servitude that was granted to the respondent on a section of the property.

Evaluation

28. In its judgment, the court a quo reasoned as follows:¹⁴
- “It is not the existence of a pipe-laying servitude over the property that is in dispute. There is no serious dispute that servitude rights were registered over Holding 50 in favour of Rand Water. The minor imperfection about the location on either [the] north-western or south-western [boundary] does not detract from the existence of servitude rights of Rand Water. In *Natal Joint Municipality Fund v Emdumeni Municipality* [2012] ZASCA...para 18, the Supreme Court of Appeal recognised that, among other factors, the need for sensible interpretation of documents, and explained that a sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the purpose of the document.
- I therefore conclude that Wykwe’s argument, supported by the banks, is not sustainable, as it would undermine the purpose of the servitude. A declaratory [order] should therefore issue...”. (own emphasis)
29. A declarator was issued in the following terms:
- “It is declared that the applicant has servitude rights in respect of Holdings 49 and 50 Rynfield Agricultural Holding s Section 1.”
30. The record reveals that it was never in dispute that the respondent was granted a right of servitude over a strip of land on Holding 50. What was in dispute, was whether the respondent had, on the common cause facts, established a clear right of servitude along a 12 metre wide strip of land along and parallel to the entire south - western border of the property and which was enforceable against all subsequent successors-in-title. That remains the pertinent issue for determination on appeal.
31. The appellants argue that the court a quo’s conclusion that the true location of the servitude on either the north-Western or south-western boundary was a ‘minor imperfection,’ was flawed, firstly, because the difference between a

¹⁴ Paras 11 and 12 of the judgment.

servitude lying on line AB (the North-western boundary) compared to one lying on line AD (the south-western boundary) is not minor; and secondly, line AB identifies a lawful servitude which could be enforced by the respondent against third parties, whilst line AD neither identifies nor confers any right of any nature which the respondent could enforce against third parties. Moreover, the appellants contend that the unlawful *unilateral manuscript* amendment effected to the notarial deed cannot serve as a source for the limited real right contended for by the respondent.

32.

It was not in dispute on the papers that the original deed of servitude K1573/1978 and which had been registered in the deeds office,¹⁵ read, in relevant part, as follows:

“NOU DERHALWE.....word dit soos volg ooreengekom:

1. Die Eienaar verleen hiermee and die Raad....die ewigdurende reg om water oor of deur: HOEWE 50 RYNFIELD LANDBOUHOEWES AFDELING 1...te neem en te voer deur middle van pypleiding wat hierna gele mag word binne 'n strook grond 12 meter breed ewewydig met en langs die hele suid-westerlike grens van die eiendom welke grens voorgestel word deur die lyn AB op die kaart L.G. Nr A2621/32 deur die Landmeter-Generaal op 27 Augustus 1948 goedgekeur en aangeheg by Akte Van Transport Nr. T4801/1951 gedateer 26 Februarie 1951;

(hierna 'die strook' genoem)

asook die ewigdurende reg om pypleiding deur, onder of oor of op die eiendom binne die strook te le....” (own emphasis)

¹⁵ Being the initial deed as executed by the erstwhile landowner and the respondent, prior to the attempted manuscript amendment thereof by an unknown person for purposes of changing the line of servitude from 'AB' to 'AD'. The amended notarial deed was attached as annexure "FA2" to the founding affidavit. The respondent relied upon the *amended deed* for purposes of establishing a right of servitude along the south-western boundary of the property, as denoted by the line AB on the servitude diagram of 1937.

33. By virtue of its registration,¹⁶ the respondent acquired a real right of servitude to install water pipes within a 12 metre wide strip of land along the *north-western* boundary of Holding 50, as depicted by the line AB on the servitude diagram. As demonstrated in the answering affidavit, the respondents could not effectually dispute that the notarial deed, as registered, conferred a servitude right to the respondent along the AB line of the property (i.e., along the north-western boundary) because the respondent had itself appreciated the need to rectify the agreement, to which end, it instructed a land surveyor to attend to the amendment of: (i) the servitude diagram, so as to reflect the servitude along the south-western boundary, denoted by line AD on the diagram; and (ii) the notarial deed itself, to reflect that the servitude was conferred along the south-western border of the property, as denoted by the AD line on the servitude diagram.¹⁷ The purpose of the manuscript amendment of the notarial deed was ostensibly to change the line of servitude from AB to AD in order to depict the servitude as delineated along the south-western boundary of Holding 50 in terms of the amending diagram of October 2010. According to the amending diagram, however, the servitude was depicted along lines 'AdcDA' (and not line AD) along the south-western boundary of Holding 50.

34. The notarial deed makes no reference to the attempted manuscript amendment effected thereto or to the amended diagram of 2010 but still refers to the initial diagram of 1937, which shows the servitude over the north-western boundary of the property, along the AB line.

¹⁶ There was no dispute between the parties that the notarial deed in question had been executed and registered in accordance with the Deeds Registries Act No. 47 of 1937 ('the Act').

¹⁷ As fate would have it, the amended servitude diagram which was approved by the surveyor general in 2010, denoted the servitude along the line 'AcbbDA' without the notarial deed itself being amended to accord with such denotation.

35. The respondent did not produce any evidence that the notarial deed containing the manuscript amendment (upon which it relied in the founding affidavit to evidence its alleged right of servitude along the south-western boundary of the property, denoted by the line AD on the servitude diagram) was ever registered in the Deeds office or that such amendment was effected in accordance with the requirements of the Deeds Registries Act. In fact, the respondent failed to disclose the manuscript amendment at all in its papers.¹⁸ The purported amendment was uncovered by the first appellant, who referred thereto in the answering affidavit. The respondent did little more in its replying affidavit than to baldly deny the first appellant's allegations. As regards the attempted unilateral amendment of the notarial deed, the respondent merely stated that "...the first respondent [first appellant in *casu*] admits in its answering affidavit that the applicant [respondent in *casu*] does have servitudes over the properties concerned and it is the rights given to the applicant in terms of those servitudes which the applicant seeks to enforce in these proceedings."

36. The respondent, however, misses the point. Prior to the attempted amendment of the notarial deed and as a matter of law, the respondent acquired a real right of servitude over a 12m wide strip of land along the *north-western* boundary of the property, which was enforceable against all successors-in-title of the servient land, by virtue of the registration of the notarial deed. Prior to registration, it attained merely a personal right of servitude enforceable against the landowner at the time of the conclusion of the notarial deed. The record reveals that no attempt was ever made by the respondent to seek or obtain the consent of the landowner for purposes of rectifying the deed to accord with the common intention of the parties in executing the deed. And absent consent, no proceedings were either

¹⁸ Nor were the title deeds of Holding 50, held by the existing landowner, produced in substantiation of the respondent's claim.

instituted against the landowner for purposes of establishing a claim for

rectification.

37. To the extent that the respondent relied on the notarial deed, as amended, both in its founding papers and during argument in the appeal, and assuming the efficacy or legality of the manuscript amendment of the notarial deed (an aspect to which I shall shortly return), the evidence did not in any event establish a *real* right of servitude over the south-western boundary along the AD line, it being undisputed that the 'amended' deed as such was never registered in the deeds office, nor was any endorsement made against the title deeds of the property subsequent thereto.

38. In *National Stadium*,¹⁹ Harms DP (as he then was) put it thus:

"...Personal rights may give rise to real rights; for instance, a personal obligation to grant someone a servitude matures into a real right on registration...A servitude is a limited real right in respect of the property of another. There are two types, namely praedial and personal. In spite of the confusing nomenclature, a personal servitude is also a real right which imposes a burden on the property of another. It is 'personal' because the right holder is a particular person whereas in the case of a real servitude the right adheres to a dominant property.....Unless the rights are real, they do not bind third parties..." (footnotes omitted) (own emphasis)

39. In *Bowring NO*,²⁰ the court reaffirmed the statement by Innes CJ in *Willoughby's Consolidated Co v Copthall Stores Ltd* 1918 AD 1 at 16:

"Now a servitude, like any other real right, may be acquired by agreement. Such an agreement, however, though binding on the contracting parties, does not by itself vest the legal title to the servitude in the beneficiary, any more than the contract of sale of

¹⁹ *National Stadium South Africa (Pty) Ltd and Others v Firststrand Bank Ltd* 2011 (2) SA 157 (SCA), paras [31] to [33].

²⁰ *Bowring NO v Vrededorp Properties CC* (271/2006) [2007] ZASCA 80; (31 May 2007), par [16].

land passes the *dominium* to the buyer. The right of the beneficiary is to claim performance of the contract by delivery of the servitude, which must be effected *coram lege loci* by an entry made in the Register and endorsed upon the title deed of the servient property.”

40. In *Baront Investments (Pty) Ltd*,²¹ the following was said:

“...a mere agreement (even one in writing) in terms of which a person grants to another a servitude over property does not afford the grantee a right to enforce the servitude as per the agreement. The grantee must first enforce the right to have the servitude registered in the Deeds Office, as a real right, and, only thereafter, the grantee may then enforce the servitude itself.”

Legal efficacy of manuscript amendment to Notarial Deed

41. In terms of the Deeds Registries Act, 47 of 1937 (‘the Act’) a personal servitude may be created by means of a deed executed by the owner of the land encumbered thereby and the person in whose favour it is created, and attested by a notary public.²² In terms of section 3(1)(o) of the Act, the Registrar of Deeds is required to record any modification of any registered servitude.²³ Moreover, in terms of the Regulations, all alterations and interlineations of deeds and other documents lodged for registration or record shall, in the case of a deed attested by a notary, be initialled also by such notary.²⁴

²¹ *Baront Investments (Pty) Ltd v West Dune Properties 296 (Pty) Ltd and Others* 2014 (6) SA 286 (KZP), par [57], a judgment of the Full Court of the KwaZulu-Natal High court, Pietermaritzburg.

²² Sec 65(1) of the Deeds Registries Act.

²³ Only the Registrar of Deeds could record the modification of the deed of servitude. See: *Jansen v Fincham* 1892 9 SC 289.

²⁴ Regulation 20(6) of the Registration of Deeds Regulations published under GNR474 in GG466 of 29 March 1963.

42. None of these requirements were shown to have been met in the instant case. On the common cause facts: (i) the respondent's proposed amendment to the notarial deed was not consented to by the *then* owner of Holding 50, as required by section 75 of the Act; (iii) the deed was not modified or rectified by the Registrar of Deeds – no endorsement by the Registrar of Deeds was recorded on the deed of servitude and/or presented by the respondent to the court a quo; (iiii) the alteration to the deed was not attested or initialled by a notary public; (iv) the attempted manuscript amendment was in any event incorrect, because it did not align with the stipulations of the approved consolidation diagram of 2010, which amended the servitude to the line 'AdcDA' and not 'AD,' and (v) the notarial deed was not amended to include a reference to the amended diagram No. 4740/2010. The description of the area over which a right of servitude was conferred in terms of the notarial deed was thus not rectified in accordance with the dictates of the law.

43. Until such time as the notarial deed was corrected in terms of section 3 of the Deeds Registries Act, the respondent was only the holder of a real right of servitude as registered along the north-western boundary of Holding 50 and *not* the south-western boundary, where the affected town house units were constructed.

44. As indicated earlier, the notarial deed, as amended, did not align with the amended diagram No. 4740/2010, but still refers to diagram No. A2621/1037. Significantly, the initial diagram (A2621/1937) is the one to which the respondent referred: (i) in its founding affidavit when attempting to demonstrate a clear right; (ii) when it raised no objection to the proposed development; and (iii) when it 'consented' to the amendment of the servitude diagram. The first appellant stated that when it commenced with

the property development, it did not know of the respondent's attempts to amend the diagram to depict the servitude along the south-western boundary. On the objective facts, it could not have known thereof.²⁵

45. The appellants argued that the personal servitude embodied in the notarial deed converted into a praedial servitude on registration. No counter-argument was presented in relation thereto by the respondent in the appeal. As this was not a point for consideration in the appeal, I express no view thereon. However, the second appellant argued that although the initial deed of servitude (K1573/1978) complied with the peremptory provisions of the Act,²⁶ the contents of the statutorily compliant deed of servitude did not match up with the diagram filed in support thereof. At the risk of sounding repetitive, the respondent's servitude was actually registered along line AB, delineated along the North-western boundary of the property and not along line AD, delineated along the south-western boundary.

46. It must by now be obvious that the appellants' contention, namely, that the respondent failed to establish a servitude, with legal effect, along the south-western boundary of the property (and hence a clear right to the relief it sought), is undoubtedly correct. The existence of a real right is a matter of substantive law. Whether a clear right has been established, is a matter of evidence. It was incumbent upon the respondent to prove, on a balance of

²⁵ It was in any event not the respondent's case that the first appellant had or acquired knowledge of the attempt to amend the diagram to depict the servitude along the south-western boundary.

²⁶ In terms of section 75 of the Act, a praedial servitude in perpetuity may be created by a deed executed by the owners of the servient and dominant tenement and attested by a notary public. In terms of section 65(2), the deed shall contain a sufficient description of the land encumbered by the servitude and shall mention the title deed of such land. In terms of section 73, a **diagram** shall be annexed to deeds creating or **defining servitudes** and real rights (whether created or defined by the parties thereto or by court), signifying a need for the exact location of a servitude to be reflected on the relevant immovable property.

probability, that it was vested with the limited real right it sought to enforce.²⁷

47. The respondent argued the appeal on the basis of a mistaken assumption

that its manuscript amendment to the notarial deed carried legal effect. As I have earlier found, it did not. Furthermore, the respondent relied on a document comprising a servitude diagram (annexure "W3" to the answering affidavit) which was produced by it pursuant to a notice delivered by the first appellant in terms of Rule 35(12) of the Uniform Rules of Court. Such diagram, whilst also bearing the number 'SG A2621/37,' reflects the respondent's servitude along the AD line on the south-western boundary of the property. Significantly, the respondent failed to disclose the existence of such document to the court. It was discovered fortuitously by the first applicant pursuant to the provisions of rule 35(12). Its validity is questionable, as it does not accord with the original servitude diagram (annexure 'W1' to the answering affidavit), a copy of which was obtained from the Deeds office. The respondent failed to explain the origin of such document. No evidence was produced to indicate that it had been obtained from the Deeds office. In those circumstances, it can safely be discounted.

48. The respondent argued that the court a quo correctly applied established principles of interpretation in ascertaining the intention of the parties in concluding the notarial deed, i.e., whether the intention was to grant a servitude on the south-western boundary or the north-western boundary of the property. Reliance was placed on the case of *Gardens Estate*,²⁸ for the contention that the first step in determining the nature and extent of a

²⁷ Prest: *The Law and Practice of Interdicts*, 1st ed., p43.

²⁸ *Gardens Estate v Lewis* 1920 AD 144.

registered condition, is to examine its terms.²⁹ Arguing that the court a quo's interpretation of the notarial deed was correct (i.e., that the intention of the contracting parties at the time of execution of the deed of servitude was to confer a right of servitude to the respondent along the south-western boundary of the property), the respondent then sought to persuade this court that a clear right of servitude had therefore been established by it on the south-western boundary of the property.

²⁹ *Gardens Estate Ltd* concerned a servitude of *aquaeductus* (a servitude allowing the leading of water) constituted and registered in defined and unambiguous terms against the title of the servient tenement. The question arising for determination was whether Gardens estate (the servient owner) had a right to relocate the pipeline used to convey water. At p. 150, the court held: "A further question between the parties is: Did the Gardens Estate Syndicate have the right to deviate the pipe-line as it did in 1902? In my opinion it had no such right. A definite servitude having originally been constituted, it could only be altered by mutual consent. In this respect a servitude as constituted differs from a servitude created simpliciter..." (own emphasis)

In *Linvestment CC v Hammerstey and Another* (2008 (3) SA 283 (SCA), para 13, the following was said: "The first step in determining the nature and extent of a registered condition is to examine its terms. In the present instance we are concerned with servitudes of rights of way which are precisely defined in relation to the remainder of the servient tenement by reference to surveyors' diagrams and leave no room for uncertainty. Unless there is a valid reason to distinguish or depart from the conclusion in *Gardens Estate Ltd v Lewis*, the appeal must fail."

Both cases concerned praedial servitudes, involving, as they did, both servient and dominant tenements. *Linvestment* was concerned with the question of whether the owner of a servient tenement can, of his own volition, change the route of a defined right of way that was registered against the title deeds of his property. The consent of the owner of the dominant tenement had been sought to change the route. Such owner refused to consent to the alteration of the route and an action was instituted for an order declaring that the owner of the servient tenement was entitled to substitute the proposed servitude route for the existing route. Applying the dictum in *Gardens Estate*, the court held that the owner (of the servient tenement) could not change the route on the basis that a "...servitude along a defined route has been said to be analogous to a compulsory sale of a particular part of property and can only be altered by mutual consent. *Beukes v Crous en 'n ander* albeit that the analogy is not exact, cf *Reid v Rocher*." (own emphasis)

In the present matter, consent from the owner of the servient tenement to change the line of servitude from AB to AD was never sought in the first place. *Linvestment* ultimately turned on the proper construction of Voet's differentiation between general and specific servitudes, as applied in *Garden Estate*. Both cases are distinguishable from the present matter on the facts.

49. Reliance was also placed by the respondent on the case of *Le Roux N.O.*³⁰

There, the court held, *inter alia*, that the application fell to be determined upon a proper construction of the servitudes as they were reflected in the registered title deeds. *Le Roux N.O.* is, however, wholly distinguishable from the present matter on its facts. There, a farm had been sub-divided into 4 parcels of land (portions 1, 2, 3 and the Remainder) (owned by the applicants) and portion 3 (owned by the respondent). There were 3 dams on the land which were historically filled with water abstracted from the Waterkloof river (the weir point). The river ran across part of Portion 3 and thereafter flowed over the Remainder to its junction with the Holsloot River, which was on the Remainder. Servitudinal rights were registered against Portion 3 in favour of the Remainder and Portion 2, which gave the owner of the Remainder, the right to pipe water from dam 1 (on Portion 1) across Portion 3 to the Remainder, and also afforded the owner of Portion 2 the right to lead water by means of a furrow over Portion 3 to the dam on Portion 2. Historically, dam 3 was filled with excess water that was led to dam 3 by means of a furrow or sloop from dam 1, until such time as the owner of Portion 1 decided unilaterally to fill the connecting sloop. No servitude had been registered in favour of Portion 3, allowing its owner to take water via dam 1 to dam 3 situate on Portion 3. The question falling for determination was the extent to which, if at all, the provisions of the registered servitudes in favour of Portions 1, 2 and the Remainder derogated from the right of the owner of Portion 3 to abstract water from the Waterkloof River and to lead it to dam 3. At the time when the division agreement had been concluded, all three dams were filled with water abstracted at the weir. The entire farm had enjoyed riparian rights under the Water Act 54 of 1956 (then in force). Given the peculiar circumstances, the court was tasked to interpret the provisions of the registered servitudes. It

³⁰ *Le Roux NO and Others v Botha NO and Others* (5788/2016) [2018] ZAWCHC 86 (3 July 2018), paras 22, 27 and 28..

did so, finding that the factual context indicated that a continuation by the owner of Portion 3 of the practice to abstract water at the weir point and to lead it to dam 3, would not, if reasonably carried out, derogate from the servitude rights given to the owners of Portions 1, 2 and the Remainder.

50. In my view, neither the cases relied upon by the respondent, nor the principles sought to be extracted therefrom, serve to assist the respondent in the present matter. The unfortunate issue in the present matter was whether the respondent had established a clear right of servitude on the south-western boundary by an amendment brought about to the notarial deed, which, as was common cause on the papers, failed to comply with the prescripts of the law. I agree with the submission by counsel for the appellants that the controversy in the present case could not be resolved by way of an interpretation of the notarial deed – it concerned a possible error that arose in the drawing of the servitude diagram, which error had to be rectified in the deeds office and was not capable of being cured by way of interpretation. In other words, even if one were to accept that the intention of the contracting parties at the time of executing the deed was to confer a servitude along the south-western boundary of the property, in so far as the notarial deed (read with its accompanying diagram) therefore required rectification, the respondent had to procure rectification in accordance with the relevant statutory prescripts, armed with the consent of the landowner³¹ or absent consent, by application to court.³²

51. Stated differently, even if the court a quo correctly interpreted the notarial deed as conferring a right of servitude along the south-western boundary of
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- ³¹ The reason is obvious – a bilateral agreement cannot be amended unilaterally without the consent of the other party thereto.

³² In such an application, the Registrar of Deeds would, by virtue of his material interest in the outcome, necessarily have to be joined as a party to the proceedings.

the property, on the common cause facts, the respondent would still have failed to establish a clear and existing *real* right of servitude along the south-western boundary of the property, enforceable against all successors-in-title of the property, given the flubbed amendment to the notarial deed that lacked consent of the then landowner and compliance with the prescribed statutory formalities and registration in the Deeds office.

52.

In *casu*, there was also no evidence that water pipes had been laid along the south-western boundary at the time the notarial deed was executed. On the contrary, the deed itself conferred a right to lay pipes in the future on the strip of land specifically identified in the accompanying diagram. Evidence of the surrounding circumstances *after* the execution of the notarial deed revealed that the respondent itself understood, appreciated and accepted that it held a registered limited real right of servitude along the north-western boundary, and *not* the south-western boundary of Holding 50. Why else would it have sought to procure an amendment of the notarial deed and accompanying diagram? Whilst the parties to the appeal ostensibly operated on the assumption that a right of servitude was intended to be conferred on the south-western boundary of the property, in my view, insufficient facts were disclosed by the respondent in support of what the common intention of the parties had been at the time the notarial deed was executed. This, in itself, differentiates the present matter from the facts in *Le Roux N.O.* For this reason too, I am constrained to conclude that the respondent failed to establish that a clear right of servitude had been conferred along the south-western boundary of Holding 50. In so far as the court a quo found, by implication, that it did, the court erred in its application of the facts and the law.

53. For all the reasons given, the order of the court a quo falls to be set aside on appeal. The general rule is that costs follow the result. I see no reason to depart therefrom.

54. Accordingly, the following order is granted:

1. The late prosecution of the appeal by the appellants is condoned and the lapsed appeal is reinstated.
2. The appeal is upheld and the order of the court a quo is set aside in its entirety and replaced with the following order: "The application is dismissed with costs, such costs to include the costs of two counsel where employed."
3. The respondent is ordered to pay the second and third appellants' costs of appeal.

Frawley
MAIER-FRAWLEY J

I agree:

[Signature]
MAKUMBE J

I agree

[Signature]
BESTER AJ