

Summary of Wykwet and others v Rand Water, Case No. A392/2018

The appeal concerned the validity and enforceability of a right of servitude held by the respondent (Rand Water) on a certain property known as Holding 50, Rynfield Agricultural Holdings, Section 1 ('the property'), but which had not in fact been registered against the claimed section of land on the property on which the servitude was alleged to exist. In terms of deed of servitude K1573/1978, the respondent was granted a right to convey water by means of pipelines 'which may hereafter be laid' 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 the line AB on Diagram S. G. NOA2621/37, approved by the Surveyor-general on 27 August 1948'. A right of servitude in favour of the respondent had, in terms of the said deed and servitude diagram, been registered along the *north-western boundary* of the property and not the south-western boundary, in view of the fact that line AB was delineated in the servitude diagram as extending along the *north-western* boundary of the property (and not the south-western boundary).

Rand Water nonetheless maintained that it held servitutorial rights along the south-western boundary of the property, denoted by the line AD on the servitude diagram. It relied on a deed of servitude, also bearing the reference "No K1573/1978", but one which reflected a manuscript amendment in terms of which the reference to the line 'AB' in the deed had been changed to that of 'AD'. It was common cause that the purported unilateral amendment had been effected without the landowner's consent and that the deed, as so amended, had not been registered in the deeds office.

The first appellant discovered that the respondent had, in July 2010, 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 amendment to the servitude diagram was brought about and registered in the deeds office without the knowledge of the existing landowner (first appellant). The respondent had not itself disclosed the fact of the amendment/s in its founding papers. By embarking on an

interpretative exercise, the court a quo found that the respondent had established a clear right of servitude along the south-western boundary of the property, enforceable against all successors-in-title.

Held: By virtue of the registration of the original deed of servitude K1573/1978,¹ (there being no dispute between the parties that the notarial deed had been executed and registered in accordance with the provisions of the Deeds Registries Act No. 47 of 1937) 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;

Held further: On the common cause facts, no *real* right of servitude over the south-western boundary along the AD line was established, 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, and, unless the rights are real, they do not bind third parties (*National Stadium South Africa (Pty) Ltd and Others v Firststrand Bank Ltd* 2011 (2) SA 157 (SCA), paras [31] to [33] applied);

Held further: as the pre-emptory requirements of the Deeds Registries Act were not complied with (as set out in paras 41 - 43 of the judgment), 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);

Held further: as the importunate issue on appeal 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, even if 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 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. 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

¹ 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').

deed that lacked consent of the then landowner and compliance with the prescribed statutory formalities and registration in the Deeds office.

Appeal accordingly upheld.