IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.
(3) REVISED.
28/11/14
DATE SIGNATURE

CASE NUMBER: 9774/2013
28/11/2014

In the matter between:

DEPARTMENT: RURAL DEVELOPMENT & LAND REFORM **1ST APPLICANT**

ASIKAHLANGETANDA CO-OPERATIVE **2ND APPLICANT**

AND

BARRY JACOBS NO **1ST RESPONDENT**

MAGRIETHA MARIANA JACOBS NO **2ND RESPONDENT**

JUDGMENT

LEPHOKO AJ

[1] The applicants are seeking an interdict restraining the respondents from denying them the use of certain right of way servitudes, and other ancillary relief

[2] The first applicant is the Department of Rural Development and Land Reform. The first applicant is the owner of the farm known as the Two Sisters which is leased to the second applicant. The second applicant is a Co-operative which has its principal place of business at the Two Sisters. The farm was leased out for the purpose of conducting farming operations and developing emerging farmers.

[3] The first and second respondents are cited in their capacity as trustees of the Barry Jacobs Trust. The Barry Jacobs Trust is the owner of two farms; the farm Castle Kop 592 JT (Castle Kop) and the farm Coppice 638 JT (Coppice). There is a registered right of way servitude over Coppice in favour of the Two Sisters. The Two Sisters had over some time enjoyed and exercised a right of way (the "unregistered servitude") over the neighbouring Castle Kop.

BACKGROUND

[4] The first applicant acquired the Two Sisters during 2009. The first applicant had initially leased the Two Sisters to the Road Farming CC from 21 October 2009 prior to letting it to the second applicant on or about the 18 September 2011. The applicants allege that on or about the 25 October 2012 the respondents unilaterally closed the entrance and locked the gate that gives the Two Sisters access to the public road, effectively denying the applicants use of the servitudes.

[5] According to the applicants the closure of the servitude routes comes at great inconvenience to all associated with the Two Sisters. The closure seriously hamper farming operations and result in excessive costs and various hazards from the use and maintenance of the temporary access route, which has no future benefits. It is also alleged that as a result of the respondents' conduct the applicants will suffer serious economic loss.

POINTS IN LIMINE

[6] The respondents raised two points *in limine*, being, *locus standi* and failure to properly administer the oath concerning the signing of the applicants affidavits.

***Locus standi*:**

[7] It was submitted that the second applicant lacked standing to bring the application on two grounds, namely:

(i) It is a mere lessee and not the registered owner of the property in whose favour the servitude is registered.

(ii) It is not one of the persons authorised to use the servitude in terms of paragraph 3.3 of the deed of servitude.

[8] In *Dalrymple v Colonial Treasurer* 1910 TS 372 at 379 the court stated that "no man can sue in respect of a wrongful act unless it constitutes the breach of a duty owed to him by the wrongdoer or unless it causes him some damage in law... And the rule

applied to wrongful acts which affect the public as well as to torts committed against private individuals"

[9] The second applicant is entitled to the use of the servitude in terms of the lease agreement it has with the first applicant. The closure of the servitude route has a direct and negative impact on the interests of the second applicant. The second applicant, as lessee, has a direct and substantial interest in the dispute concerning its right to use the servitude. Accordingly the second applicant has a right to bring these proceedings or to be joined as a necessary party. See *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 657; *Home Sites (Pty) Ltd v Senekal* 1948 (3) SA 514 (A) at 521; *Transvaal Agricultural Union v Minister of Agriculture and Land Affairs* 2005 (4) SA 212 (SCA) at 226F-227C. For the foregoing reasons, the point *in limine* must fail.

Administration of the oath

[10] It was contended that the affidavits on behalf of the applicants should be rejected as the oath relating thereto had not been administered in compliance with the Regulations Governing The Administration of an Oath or Affirmation promulgated in terms of the Justices of Peace and Commissioners of Oaths Act (Act 16 of 1963).

[11] The certificate reads as follows: "the deponent having acknowledged that **she/he** knows and understands the contents of this affidavit, that **he/she** has no objection to taking of the prescribed oath and that he considers the oath to be binding on his conscience" (my emphasis). The basis of the objection is that the deponents had not

been properly identified as the commissioner had failed to strike out the incorrect gender.

[12] It has been held that the requirement of a certificate that the deponent has acknowledged that he knows and understands the contents of the affidavit is directory. Failure to comply with this requirement has been condoned in several cases. See *Ex Parte Vaughan* 1937 CPD 279, *Swart v Swart* 1950 (1) SA 263 (O) at 265, *S v Munn* 1973 (3) SA 734 (NC).

[13] It has also been held that the court has a discretion to refuse to receive an affidavit attested otherwise than in accordance with the regulations, provided there is proof of substantial compliance with the regulations. See *S v Munn* (supra), *S v Msibi* 1974 (4) SA 821 (T), *Nkondo v Minister of Police* 1980 (2) SA 362 (O) at 365A-B, *Dawood v Mahomed* 1979 (2) SA 361 (D) at 367A-B. In my view there has been substantial compliance with the regulations concerning the attestation of the applicants' affidavits and the point *in limine* is dismissed.

ISSUE TO BE DECIDED

[14] The applicants abandoned their claim to the right to use of the unregistered servitude. The main issue to be determined by the court is whether the registered servitude is enforceable.

THE REGISTERED SERVITUDE OVER COPPICE

[15] The respondents contended that the registered servitude over Coppice is not enforceable despite it being registered as it is subject to the parties reaching an agreement as to its exact route or location. The respondents contended that the location of the servitude was never agreed upon. The applicants contended that the registration of the servitude gave rise to a limited real right in favour of the first applicant which entitled it to a *prima facie* right to make use of the servitude as provided in the Deed of the Two Sisters.

[16] The right to the registered servitude is recorded in the tittle deeds of the farms Two Sisters and Coppice as well as in a notarial deed of servitude.

(a) The servitude is recorded in the tittle deed of Coppice as follows:

"Kragtens Notariele Akte van serwituut K6123/03S gedateer 31/7/2003 is die binnegemelde Serwituut geregtig op reg van weg 6 m wyd oor gedeelte 1 van die plaas Coopice 638, Registrasie Afdeling J.T., Mpumalanga, gehou kragtens Akte van Transport T. 69558/1999, soos meer volledig sal blyk uit bovermelde Notariele Akte".

(b) The servitude is recorded in clause 2(b) of the Tittle Deed of Portion 1 of the Farm Coppice 638 J.T., as follows:

"Onderhewig aan 'n serwituut van oorpad 6 meter breed, langs 'n roete waarop ooreengekom moet word ten gunste van Gedeelte 1 (Otezelle) van die plaas

Two Sisters 594 Registrasie Afdeling J.T. Mpumalanga, soos meer ten volle sal blyk uit Notariele Akte K6123/2003S".

(c) Paragraph 3 of the notarial deed of servitude K6123/03S reads as follows:

"Derhalwe het die komparant verklaar dat die Dienende Eienaar, as eienaar van die Dienende Erf, hierby aan die Heersende Eienaar, as eienaar van die Heersende Erf, 'n saaklike oorpad serwituut oor die Dienende Erf gee en toestem vir 'n pad 6 meter breed ten opsigte waarvan die roete tussen die Heersende en Dienende eienare ooreengekom sal word, en welke Reg van Weg gebruik word deur die Heersende Eienaar en wel op die volgende bedinge en voorwaardes:"

[17] The registered servitude concerned in this matter can be defined as a general servitude. A servitude is general in nature when its operation on the servient tenement is over the whole of such tenement and is not restricted to any part or portion thereof. In *Linvestment CC v Hammersley* ZASCA 1 (28 February 2008) at para 21 it was stated that "A general servitude of right of way burdens a whole tenement (*totus enim fundus servit*). (This has been variously expressed as "over any part of the land that he likes", "the whole farm and every clod of it", and every inch of the servient tenement".

[18] It is clear from the wording of clause 3 of the deed of servitude that the parties thereto agreed on the type and nature of the servitude to be registered but have left its exact location to be agreed upon on a future date.

[19] In *Nach Investments (Pty) Ltd v Yaldai Investments (Pty) Ltd and Another* 1987 (2) SA 820 (A) at 831C-E the court stated that in an agreement for the constitution of a right of way, the determination of the route of the servitude is not essential. Such a servitude may be constituted either along a specifically agreed route (*facta partis assignation, per quam exerceatur*) or generally (*simplicius per fundum cessa*), in which case the entire servient tenement is subject to the servitude and the grantee may select a route provided only that he does so *civiliter modo*.

[20] The court went on to state at 831F-H that "where the formulation does not contain such a reference and the route is to be determinable by agreement, the servitude may or may not be valid depending on the intention of the parties. If the intention is to constitute a specific right of way, i.e. one which may only be exercised along a specifically defined route, the agreement is inchoate at least as to a material term and for that reason it is unenforceable until a route is agreed upon. But the agreement is perfectly valid and enforceable if a general servitude is intended and there is a reference to a future agreement merely because the parties contemplate that the route will eventually be agreed upon..... What is envisaged in such a case is an initial general right which may be converted to a specific one by subsequent agreement. Accordingly, where there is a dispute about the nature of the right conferred on the grantee in any given case, the intention of the parties is decisive. It is to be determined, of course, by interpreting the agreement according to the normal rules of construction"

[21] In my view, a reasonable interpretation of the agreement between the parties is that the registration of the general servitude was intended to subject the servient tenement to a general right of way in favour of the dominant tenement pending the parties reaching agreement on a specific route. It is inconceivable that the parties would have gone to the trouble of registering what they considered to be an unenforceable right. It is common cause between the parties that the servitude had at some point been used for the benefit of the Two Sisters.

[22] In the absence of an agreement on a specific servitude route the first applicant is entitled to exercise and enforce the right conferred in terms of the general servitude over Coppice, and to choose a route for that purpose. See *Nach Investments (Pty) Ltd v Yaldai Investments (Pty) Ltd and Another (supra)*, (*Northern Properties (Pty) Ltd v Lurie* 1951 (3) SA 688 (A) at 697, *De Villiers and Another v Barnard and Others* 1958 (3) SA 167 (A) at 266. The applicant as holder of the real right conferred by the general servitude would be entitled to lease that right to the second applicant. The second applicant would in turn be entitled to enforce that right against the respondents.

[23] In *De Witt v Knierim* 1991 (2) SA 371 (C) at 386F it was stated that our law recognizes and enforces the principle that once a right has been given to another the grantor cannot either directly or indirectly reappropriate it. The respondents are precluded from unilaterally taking away the general nature of the servitude.

[24] It appears from the facts of the case that the applicants have in the past used the servitude route over Coppice that is currently blocked by the respondents. It is clear that the said route is the route that is still preferred by the applicants. This being the case, it can be taken that this is the route the first applicant can be assumed to have elected in terms of the general servitude. It is clear from decided cases that the first applicant does not require the consent of the respondents to use this route in terms of the right conferred by the general servitude. The applicants are accordingly lawfully entitled to use a route of the first applicant's choice until such time the first applicant and the respondents reach an agreement on a specific route in terms of the agreement envisaged in the deed of servitude.

INTERDICT

[25] In order to obtain a final interdict the applicants must establish all of the following requirements which must be present at the same time, namely: a clear right on the part of the applicants; an injury actually committed or reasonably apprehended; the absence of any other satisfactory remedy available to the applicants. See *Setlogelo v Setlogelo* 1914 AD 221, *Sanachem (Pty) Ltd v Frmers Agri-Care (Pty) Ltd* 1995 (2) SA 781 (A) at 789C, *V & A Waterfront Properties (Pty) Ltd v Helicopter & Marine Services (Pty) Ltd* 2006 (1) SA 252 (SCA).

[26] The applicants have established a clear right arising from their entitlement to the use of the general servitude over Coppice. The alleged conduct of the respondents clearly result in actual injury to the applicants which is, *inter alia*, the following: The

Department of Agriculture is not able to get to the Two Sisters (the farm) to give support to the second applicant, inspectors are not able to gain access for the purpose of testing the water in the fish production site, delivery trucks are not able to access the farm, during the rainy seasons the bus is not able to access the farm and pick up school children. Children have to walk 8.6 kilometres in order to catch the school bus. It is generally difficult for service providers, applicants' clients and family members of employees to visit the farm. The second applicant spends money on fixing the temporary access route which does not have any future benefits.

[27] Given the circumstances of this case, I am of the view that the applicants have established that they have no other satisfactory remedy available. Accordingly the applicants have established that they are entitled to an interdict against the respondents.

ORDER

1. The respondents are interdicted and restrained from unlawfully denying the applicants the use of the registered right of way servitude over the Remaining Extent of Portion 1 of the farm Coppice 638, Registration Division JT, Mumalanga. (Coppice).
2. The respondents are ordered to reopen the locked gate and to restore the removed gate which gives access to the public road through the servitude route over Coppice, which route is depicted by the purple line in Annexure "RDL5" to the applicants' founding affidavit.

3. The respondents are to pay the costs of the application.

A L C M LEPHOKO
ACTING JUDGE OF THE HIGH COURT

Heard on: 13 August 2014.

Judgment delivered on: 28 November 2014.

For the Applicant: T C Kwinda

Instructed by: State Attorney, Pretoria.

For the First Respondent: D Keet

Instructed by: Mare Attorneys, Lynwood.