/LVS

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE: ~~26 November 2014~~ 1/12/2014
CASE NO: 76036/2013

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

11/12/14 .....
DATE

.....
SIGNATURE

In the matter between:

MABOTE INVESTMENTS (PTY) LTD **APPLICANT**

and

JAN GABRIEL PEENS **FIRST RESPONDENT**
LOUIS HEINRICH PEENS **SECOND RESPONDENT**
ABSA BANK LTD **THIRD RESPONDENT**
THE REGISTRAR OF DEEDS, PRETORIA **FOURTH RESPONDENT**
BERTRAND ESTATES (PTY) LTD **FIFTH RESPONDENT**

JUDGMENT

RANCHOD J:

[1] This is an application on motion in which the applicant (Mabote) seeks:

1. A declarator that the applicant is entitled to register a servitude, in accordance with the provisions of the Notarial Deed of Servitude attached to the founding affidavit as annexure "M", over the following properties, which are properties held in the names of the first and second respondents respectively;

1.1. Portion 2 of the farm Groothoek 220, registration division KR, Limpopo Province, in extent 846,9777 hectares, and held by deed of transfer T3298/1979;

1.2. Remaining extent of the farm Groothoek 220, registration division KR, Limpopo Province, in extent 331,0729 hectares, held by deed of transfer T16080/1966.

2. The fourth respondent is hereby authorised to register against the properties mentioned in prayer 1 above, the Notarial Deed of Servitude (together with the applicable servitude diagram thereto) attached as annexure "M" to the founding affidavit;

3. The first and second respondents are interdicted and restrained from passing transfer to any potential purchaser, including the fifth respondent, of their farms, referred to in prayer 1 above, unless prior to or simultaneously with such a transfer registration is effected in favour of the applicant of the Notarial Deed of Servitude, attached as annexure "M" to the founding affidavit;

4. The first and second respondents are ordered to provide to the third respondent, whatsoever is necessary, to enable the third respondent to give its consent for the registration of the Notarial Deed of Servitude;

5. The first and second respondents, jointly and severally, the one paying the other to be absolved, are ordered to pay the costs of this application;

6. It is recorded that no cost order or any substantial relief are requested against the third, fourth and fifth respondents, unless such respondents opposes this application without success;

7. Further and/or alternative relief.

[2] The application is opposed by the fifth respondent only. Condonation was granted for the late filing of applicant's replying affidavit.

[3] A director of Mabote, Mr Philip Rudolph Greyling (Greyling) sets out in the founding affidavit the essence of the application as being an attempt to obtain relief to give effect to an agreement concluded between Mabote and the first and second respondents after numerous discussions between the parties prior to and during April 2012. It is alleged that the agreement entails, inter alia, that Mabote is entitled to register a servitude over the properties of the

first and second respondents, respectively, referred to in the notice of motion. If registered, the servitude would entitle Mabote to pump water from and to convey water over the properties of the first and second respondents. Greyling says due to no fault of Mabote it has not yet registered the servitude; hence the agreement has effect inter partes only. In the interim the first and second respondents have sold their respective farms to the fifth respondent ('Bertrand') on 5 February 2013. Bertrand opposes the granting of the relief sought by Mabote on the grounds that its agreements with the first and second respondents do not make provision for the registration of the servitude to which Mabote claims to be entitled to.

[4] Unless the context indicates otherwise, I shall refer to the farms of the first and second respondents jointly simply as 'the Peens farms'. Where the first and second respondents are referred to jointly, I shall refer to them as "the Peens".

[5] Mabote is the registered owner of a farm Nyhoffsbult 231, Registration Division KR, Province of Limpopo, in extent 476,1315 hectares, held by deed of transfer No. T54267/07 ('Nyhoffsbult').

[6] Mortgage bonds have been registered over the Peens' farms in favour of the third respondent.

[7] Mabote's counsel submitted that as Bertrand was not a party to the discussions between Mabote and the first and second respondents which culminated in the agreement between them, and as first and second respondents have not filed any affidavits to oppose Mabote's application, Mabote's factual allegations, pertaining to the discussions which it had with first and second respondents must therefore be regarded as either undisputed or common cause. I agree.

[8] Bertrand's counsel submitted in a practice note that the main issues to be determined were:

8.1 Whether a deed of servitude was concluded orally and subsequently embodied in a written agreement on 17 April 2012, the date of signature of the power of attorney granted by the first and second respondents.
8.2 Whether the alleged deed of servitude complies with section 2(1) of the Alienation of Land Act 68 of 1981 ("the Act") in that it was signed by an agent of the applicant acting on the applicant's written authority.
8.3 Whether the servitude has been properly described in the absence of a diagram.

[9] Mabote acquired Nyhoffsbult in 2007. Mabote says it (represented by a Mr Muller and Mr Greyling) entered into numerous discussions with the Peens which culminated in an oral agreement that entailed, inter alia, that the Peens would allow Mabote to register a servitude over the Peens' farms to enable Mabote to procure a water supply to Nyhoffsbult for a property development contemplated on the latter farm. The oral agreement, says Mabote, was embodied in a written agreement when the Peens signed a special power of attorney dated 17 April 2012. A similar power of attorney was signed earlier by Mr Muller on behalf of Mabote on 28 March 2012. In terms of the respective special powers of attorney the parties thereto granted a Mrs Antoinette Nel authority to appear before a notary public to notarially execute on their behalf a written Notarial Deed of Servitude between Mabote and the Peens. Drafts of the Notarial Deed of Servitude were attached to the respective powers of attorney, the one initialled by Muller and the other by the Peens.

[10] Mabote submits that the signed powers of attorney and the initialling of each page of the written Notarial Deed of Servitude attached to the powers of attorney by the parties thereto provide conclusive proof that Mabote and the Peens concluded a written agreement of a servitude over the Peens' farms not exceeding five metres in width and that a diagram to this effect will be lodged with the servitude documents (with the fourth respondent) to register the agreement against the title deeds of the farms.

[11] Mabote submits further that there is corroboration for its view that a valid servitude agreement was entered into with the Peens in a letter dated 9 December 2013 written by the Peens' attorneys, Borman Snyman & Barnard ('BSB') to Advocate Leon Van Schalkwyk ('Van Schalkwyk'). Van Schalkwyk is the deponent to fifth respondent's answering affidavit in this matter. From the record it appears that Van Schalkwyk is the legal representative of Bertrand and was involved in the negotiations and drawing up of the agreements of sale between the Peens and Bertrand. BSB's letter refers to various aspects in the agreements that it says require changes or amendments. In paragraph 8 it is stated:

"Wat betref die waterleidingserwituut ten gunste van die plaas Nyhoffsbult, is daar reeds `n ooreenkoms gesluit tussen Mnre JG Peens en LH Peens, en Mabote Investments Eiendoms Beperk wat die reg verleen aan Mabote Investments Eiendoms Beperk om water te pomp na die plaas Nyhoffsbult 231 toe oor Gedeelte 2 van die plaas Groothoek 220 en die Resterende Gedeelte van die plaas Groothoek 220 geregistreer kan word. Die registrasie het nog nie plaasgevind nie. `n Kopie van die Notariële Akte van Serwituut word hierby aangeheg vir u aandag en inligting."

[12] An earlier letter dated 29 November 2012 addressed by BSB to Van Schalkwyk states the following in the second paragraph:

"Ons het nou `n konsultasie met ons kliënt gehad rondom die serwituut ten gunste van die plaas Nyhoffsbult vir die Maatskappy Mabote Investments. Soos u van bewus is, is ons kliënt kontraktueel verbind teenoor Mabote Investments om `n Waterleidinserwituut te registreer ten gunste van die plaas Nyhoffsbult 231 wat behoort aan Mabote Investments." (My emphasis) In the third paragraph:

"Ons is dus van mening dat minstens die bepalings van die Serwituut Ooreenkoms waarvan u `n afskrif oor beskik, is `n beding ten behoewe van `n derde, in die Koopkontrak tussen Mnr LH Peens en die Koper vervat moet word. Wat die res van die Ooreenkoms rondom die serwituut en die feinere besonderhede daarvan aan betref stem ons met u saam dat dit `n Ooreenkoms is tussen Mabote Investments en u kliënt wat later gesluit kan word. Ons kliënt is egter verplig en gebonde teenoor Mabote Investments om `n Serwituut te registreer oor die eiendom wat verkoop word en die eiendom van ons kliënt wat behou word ten gunste van Nyhoffsbult."

[13] On 28 November 2012 Jan Gabriel Peens (the first respondent) wrote an email to Mrs Antoinette Nel (the person the Peens authorised to register the servitude) in which he says:

"More Antoinette

Die aktes was nie beskikbaar nie omdat Absa bank verdere verbande geregistreer het. Ons verwag om nou enige dag die koopooreenkoms te kan teken vir oordrag. Dit is vir ons uit `n finansiele punt uiters belangrik om die transaksie af te handel. Die serwituut was in die konsep koopooreenkoms vervat. Die koper se prokureur het nou voorgestel dat `n aparte ooreenkoms opgestel word om die serwituut te vervat. Ons wag nou op die ooreenkoms. Sien aangeheg ons prokureur se skrywe aan adv L. Van Schalkwyk. Wees verseker die serwituut sal beskerm word. Die koper het ook nie beswaar om die serwituut te laat registreer nie.

Sal u more bel

Dankie vir u aandag

Jan Peens."

[14] It is to be noted that first respondent gives an assurance that the purchaser of the farms (Bertrand) knew about the servitude and also had no objection against its registration. Mention is also made in the email that the servitude was recorded in the draft sale agreement but that a proposal was made that the servitude be recorded in a separate agreement. These facts are not disputed by the Peens. As I said, they are not opposing the application and what Mabote says must be accepted as fact.

[15] Mabote explains the delay in the registration of the servitude. In my view, it is not relevant to the issue whether valid servitude agreements were concluded between Mabote and the Peens. Suffice to say that it appears from various letters written by Mabote's attorneys Borchardt & Hansen Inc ('B&H') to Absa, BSB and the Trustees of the Peens Trust that attempts were made to procure registration of the servitude but that Jan Peens had instructed Absa to put the matter "on ice" ('op ys') as he was in the process of selling some of the properties[1].

[1] Annexure "H" to the founding affidavit.

[16] Mabote says during 2013 it became aware of the sale of the Peens farms to Bertrand in terms of a written sale agreement dated 5 February 2013. Mabote's attorneys then proposed to the attorneys representing the Peens that the servitude registration be effected simultaneously with the transfer of the farms to Bertrand and the cancellation of Absa's mortgage bonds[2]. To this end, the Notarial Deed of Servitude was executed[3] and furnished for simultaneous lodgement with the transfer and bond cancellation documents.

[17] Mabote says it was at this point that the Peens apparently instructed their attorney that they are not consenting to the simultaneous lodgement of its Notarial Deed of Servitude[4].

[18] In its answering affidavit Bertrand first takes two exceptions to the application.

[19] The first exception is that the notice of motion and founding affidavit lack averments which are necessary to sustain Mabote's first prayer. In essence, Bertrand contends that it's agreements with the Peens was concluded on 5 February 2013 whereas the Notarial Deed of Servitude was executed by Mrs Antoinette Nel only on 8 October 2013 i.e. some eight months later. The Notarial Deed provides that the Peens must obtain the consent of all mortgage bond holders (in this case, Absa) and interested parties. Bertrand says it is an interested party and therefore its written consent as well as that of Absa as bondholder is required to register the servitude.

[20] The question that arises firstly is when did Mabote and the Peens conclude an agreement relating to the servitude. Secondly, if an oral agreement was concluded, whether it fell foul of the provisions of section 2(1) of the Act which requires any alienation of land to be embodied in a written instrument.

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[2] Annexures "K" and "L" being letters dated 8 October 2013 and 29 November 2013.
[3] Annexure "M" to the founding affidavit.
[4] Annexure "N" to the founding affidavit.

[21] The allegation by Mabote that it entered into an oral agreement with the Peens is not disputed or denied by them. As I said, they have not filed any opposing affidavit. Bertrand was not a party to the discussions between Mabote and the Peens which allegedly culminated in the oral agreement. In these circumstances, Mabote's allegation remains unchallenged and I accept an oral agreement was concluded between Mabote and the Peens.

[22] Mabote (through Muller) signed the power of attorney and draft Notarial Deed of Servitude agreement on 28 March 2012 and the Peens signed a similar power of attorney and Notarial Deed on 17 April 2012. Again, the Peens do not dispute the contents of these documents. For the reasons stated in the preceding paragraph I accept that these documents correctly reflect the agreement between Mabote and the Peens. There is nothing in the papers to indicate that the Peens had revoked or withdrawn their consent to the registration of the servitude over their respective farms. The issue then is whether the oral agreement is valid.

[23] Section 1(b) of the Act defines "land" as "any interest in land" and "alienate" and "alienation", in relation to land, means to "sell, exchange or donate". This means not all types of alienation are covered by section 2(1) of the Act but only those that are a sale, or an exchange or a donation.

[24] Bertrand contends that its established law that a praedial servitude constitutes an "interest in land" as envisaged in section 2(1) of the Act which provides:

"No alienation of land .. shall, subject to the provisions of section 28 be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority".

The notarial deed of servitude does not record that any compensation is to be paid for the servitude so it is not a sale. The notarial deed provides:

"Geen vergoeding is betaalbaar vir die verkryging van hierdie servituut nie".

[25] Is it an exchange? In *Leonard Light Investments P/L v Wright and Others*[5] Streicher J said:

"At common law, 'exchange' is a contract for the transfer by one person of property in a thing to another in return for a similar agreement by the latter. See Mackeurtan Sale of Goods in South Africa 5th ed at 271; Voet 19.4.1; Grotius 3.31.6; Scholtens 1960 South African Law Journal at 430. The Legislature, by enacting that an exchange of land should be contained in a deed of alienation in order to be valid and enforceable, changed the common law and, if it intended the word 'exchange' to have a meaning other than the meaning of the word at common law, could have made its intention clear. It did not do so and must therefore have intended the word to have the meaning that it has at common law."

[25] In *Leonard Light* the agreement had been that the applicant would lend money to the respondents for the development of sectional title units and that the respondents would, upon completion of the project, transfer three of the units to the applicant. The learned Judge held[6]:

"The applicant did not undertake the transfer a thing to the respondents. It undertook to lend money to the respondents. The undertaking to lend money created a personal right and was not an undertaking to transfer a personal right to the respondents. The transaction therefore did not constitute an exchange within the meaning of that word in the Alienation of Land Act, 68 of 1981."

[26] In *Hoeksma and Another v Hoeksma*[7] the then Appellate Division held that an exchange:

"marks a transaction between two people whereby each gives to the other, as his own, one thing in return for another".

It was held that the reciprocal obligation in an agreement of exchange was –

"the delivery or transfer of another asset."

[28] In my view, it cannot be said, having regard to the nature of the agreement between Mabote and the Peens that the latter had undertaken to "give", "transfer" or "deliver" anything to Mabote. They had merely undertaken to consent to the registration of a servitude. It entails an undertaking by the

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[5] Leonard Light Investments P/L v Wright and Others 1991(4) SA 628(W) at 633 D-E.
[6] Leonard Light Investments P/L v Wright and Others 1991(4) SA 628(W) at 633 E-F.
[7] Hoeksma and Another v Hoeksma 1990(2) SA 893 (AD) at 897 A-B.

Peens to give, transfer and deliver an interest in their respective properties to Mabote, but not a reciprocal undertaking and obligation on the part of Mabote to give transfer or deliver anything to the Peens. (*Coeromane Beleggings (Pty) Ltd v Alpha Auto Electrical CC)*[8]. It was not an exchange.

[29] The next question is whether the transaction amounts to a "donation".

[30] In order to constitute a donation the promise or offer must be:
"... prompted by sheer liberality or inspired solely by a disinterested benevolence on the part of the donor..."[9]

[31] In *Coeromane* it was held at paragraph 30 that:
"the alleged oral agreement would not violate the provisions of section 2(1) of the Act, that the allegations in this regard to disclose a defence and a cause of action and that the exception has to be dismissed."
Therefore, the reliance on an oral agreement by Mabote cannot in my view, be faulted. However, even if I am wrong in concluding that the oral agreement is not hit by the provisions of section 2(1) of the Act that oral agreement was later embodied in a written agreement.

[32] Section 67(1) of the Township Ordinance, 15 of 1986 provides:
"After an owner of land has taken steps to establish a township on his land, no person shall, subject to the provisions of section 70 –
(a) enter into any contract for the sale, exchange or alienation or disposal in any other matter (sic). (The Afrikaans version reads: "Op enige ander wyse" – "In any other manner".) of an erf in the township;
(b) ..."
The Alienation of Land Act provides a narrower definition, namely, "a sale, a donation or an exchange".

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[8] Per Olivier J: Northern Cape High Court, Kimberly, case No 1801/2009 judgment delivered on 3 June 2010.
[9] Commissioner for Inland Revenue v Estate Huiett 1990(2) SA 786 (AD) at 793G; and also Kay v Kay 1961(4) SA 257 (AD) at 261 A; Welch's Estate v Commissioner South Africa Revenue Service 2005(4) (SCA) para [26].

[33] The legislature, in enacting the Act, was clearly cognisant of the intention to limit the ambit of what falls into the category of an alienation. The following contracts have been held to fall outside the definition of alienation for purposes of the Act:

33.1 A contract of service by which an employee is to be remunerated by the transfer of land to him. See *Lograd Properties (Pty) Ltd v Padachy 1988(3) SA 541(D).*

33.2 An agreement between heirs to divide land bequeathed to them under an ambiguous will. See: *Hoeksma v Hoeksma 1990(2) SA 893 (A).*

33.3 An abandonment of land by a trustee in insolvency to a mortgagee. See: *United Building Society v Du Plessis 1990(3) SA 75 (W).*

33.4 An agreement to transfer land in return for a loan. See: *Leonard Light Industries (Pty) Ltd v Wright 1991(4) SA 628 (W).*

33.5 An agreement for the sale of shares and loan claims containing a statement that the transfer of the land will be procured. See: *Lewis v Oneanate (Pty) Ltd 1992(4) SA 811 (A) at 820B-D.*

33.6 An agreement to purchase an interest in a partnership and thereby to acquire land which was an asset to the partnership. See: *Desai v Desai 1993(3) SA 874(N) at 879J-881D.*

[34] Bertrand contends that the signing of the powers of attorney and initialling of the draft notarial deeds of servitude cannot be regarded as a written deed of alienation in that the initialling does not constitute a "signing" or "signatures" In *Putter v Provincial Ins Co Ltd and Another*[10] Coleman AJ held:

"Any mark on a document made by a person for the purpose of attesting the document or identifying it as his act is, in terms of these (English) authorities, his signature thereto".

[35] In *Matanda and Others v Rex*[11] a statute required a document to be signed by a witness. It was held to have been satisfied although the witness

[10] Putter v Provincial Ins Co Ltd and Another 1963(3) SA 145 (W) at 148.
[11] Matanda and Others v Rex 1923 AD at 435.

had not even marked it. A magistrate had made a mark for the witness, whose participation went no further than a symbolic touching of the magistrate's pen. It was held that that was sufficient to justify the court in regarding the mark as the personal signature of the witness. In this matter before me it is not denied that the initials on the documents are those who purport to initial them. The only attack is that the initials do not constitute a signature. In *Chisnall & Chisnall v Sturgeon & Sturgeon*[12] Flemming DJP held:

"Unless the relevant statute introduces a qualification or the need for finer distinction – which is not the case here – signing is achieved by a mark or marks intended to represent the relevant person (van Niekerk v Smit and Others 1952(3) SA 17(T) at 25 D-E), if the mark is done with the function of making the document an act of the writer, of signifying the assent of the party to that which is embodied in the document. An enquiry concerning assent must, of course, not be into what the signatory subjectively planned, but about what his acts signify to the other party. Compare Steenkamp v Webster 1995(1) SA 524(A) at 533F."

[36] In my view, there can be no doubt that the initialling by the Peens and by Mabote's representative of the draft notarial deeds of servitude are their respective signatures.

[37] A further string to counsel's (Bertrand's) bow was that the draft notarial deeds of servitude were exactly that – drafts – hence, they could not be regarded as the written agreement between the parties and, further, that the signatures of Mabote and the Peens were on separate copies of the agreement rather than on one document. However, during oral arguments it was conceded by Bertrand's counsel that an agreement can constitute more than one instrument. The question that remains then is whether the draft became the signed agreement only when it was executed before a notary on 8 October 2013 as contended for by Bertrand. The submission to this effect does not bear scrutiny.

[12] Chisnall & Chisnall v Sturgeon & Sturgeon 1963(3) SA 145 (W) at 148.

[38] The powers of attorney provide, inter alia, that Mrs Nel is to appear before a notary public:

"en dan en aldaar namens my `n Notariële Serwituut van pomp en waterlyding aan te gaan ... volgens die konsep Notariële Serwituut hierby aangeheg, waarvan elke bladsy geparafeer is vir identifikasiedoeleindes".

[39] The draft notarial deeds of servitude attached to the respective powers of attorney provide that the owners of the subservient tenements agree to the provision of servitudes over their respective farms in favour of the dominant tenement (Mabote)

"nou derhalwe kom die partye soos volg ooreen dat `n serwituut... verleen word onderhewig aan die volgende voorwaardes."

As I said the deed has been initialled by the parties albeit on two separate but identical copies by Mabote and the Peens respectively. That is the draft of an agreement already reached between the parties. The initialling thereof confirms the agreement reached between the parties. It does not, as contended for by Bertrand, became an agreement only when it is notarially executed. The only purpose of a notarial execution of the agreement is to accord it the status of it being recorded in the protocol of the notary.

[40] Hence, the contention by Bertrand that the agreement only came into existence when it was executed on 8 October 2013, that is after it (Bertrand) had signed its agreement with the Peens for the purchase of the Peens' farms cannot be sustained. Furthermore, it is common cause or not in dispute that Bertrand was aware of the prior agreement between Mabote and the Peens when it entered into the agreement with the Peens. The maxim "qui prior est tempore potior est jure' (priority in time gives priority in law) therefore it operates in favour of Mabote. The correspondence exchanged between the Peens' attorneys and Adv Van Schalkwyk makes it clear that it was made known to the fifth respondent when it entered into negotiations with the Peens's to buy their farms that Mabote had a servitude in its favour.

[41] It is also to be noted that the draft did not differ in any way from the one which was notarially executed[13]. The provision of a draft is, as stated in the power of attorney, for identification purposes so that its terms and conditions are made known, i.e. what it is that is being notarially executed.

[42] The initialling of the draft constituted the coming into existence of a written embodiment of the oral agreement. As I said, an oral agreement is in any event valid.

[43] During argument Bertrand's counsel submitted that the resolution authorising Mr Muller to act on behalf of Mabote, as stated in the power of attorney, was not attached to the papers. This issue was not raised in the answering affidavit hence Mabote was not given an opportunity to respond to the allegation in its replying affidavit. In any event, in my view, a notary public would have to ensure that a resolution was passed by Mabote before the deed was executed. I need not deal with that aspect any further.

[44] Bertrand goes on to contend that by entering into an agreement with itself the Peens tacitly revoked the power of attorney they granted to Mrs Nel to appear on their behalf before a notary to execute the notarial deed. There is no merit in that submission. Mr Van Schalkwyk, who advised Bertrand in the negotiations with the Peens to purchase their farms, persuaded them that they should stop insisting that the servitudes must be recorded in the sale agreement. He told them that it would be unlawful to grant the servitudes without a licence to pump water in terms of the National Water Act, 36 of 1998 ('the Water Act') having first been obtained. The Peens then agreed that the servitudes not be recorded in the agreement for the sale of the Peens farms to Bertrand.

[45] It is common cause that Van Schalkwyk initially drafted what appears to be a consolidated agreement for both the Peens's farms and had recorded

[13] Anexure M to the founding affidavit.

therein the servitudes. But then two separate agreements were drawn up for the sale of the respective farms. Reference to the servitudes was excluded from these separate agreements. The Peens' attorney wrote to Van Schalkwyk indicating his unhappiness at Van Schalkwyk having left out the servitude in the two agreements. He says his clients have given the servitudes to the applicants (Mabote) and they must be recorded therein[14].

[46] Van Schalkwyk responds by saying, firstly, that Mabote is not a party to the agreements between the Peens's and, secondly, the Water Act governs the right to a servitude. He says that the servitude agreement cannot be entered into without first obtaining a license in terms of the Water Act. However, opportunistically, as Mabote's counsel submitted, Van Schalkwyk says Mabote can enter into a contract directly with Bertrand for the servitude without insisting that the agreed license requirement be complied with.

[47] I turn then to the second exception, i.e. that the servitude agreement falls foul of the provisions of the Water Act if a license is not obtained first. Mabote submits:

"It is not correct, as contended in this letter, that the right of the Applicant to a servitude is regulated by the Water Act. Although it is so that the Water Act makes provision for a servitude to be acquired by a person holding a right to water, such a right is a right ex lege not ex contractu, as relied upon by the applicant. The Act makes provision for the holder of a water right to approach a court for an order to entitle it to a servitude. This presupposes that there is no agreement or contract between the holder of the water right and the landowner regarding a servitude, because if there is a contract there would be no need to approach the court for an order for a servitude." I agree.

[48] A further point raised by Bertrand is that a declaratory order is sought to enable Mabote to register a servitude "together with the applicable servitude diagram thereto" but the diagram has not been attached to the papers. Counsel argued that there should have been a diagram before the notarial deed of servitude was executed. Hence, says counsel, the declaratory order

[14] Paragraph [12] supra.

cannot be granted as the notarial deed of servitude as it exists is imperfect and this court should not sanction it. It was argued that the route of the pipeline has not been specified in a diagram and that a servitude would only come into being if and when it's route was defined. Bertrand's counsel referred to *Nach Investments (Pty) Ltd v Yaldai Investments (Pty) Ltd and Another*[15] in support of this submission. I do not agree. In that case a servitude was registered. It was described in a manner not unlike the wording of prayer 2 of the notice of motion in this matter before me. In the deed of sale it was recorded:

"...that the seller has reserved to itself and its successors in title ... a servitude of right of way in perpetuity ... the exact route of which servitude is to be determined by agreement between the seller or its successors in title and the purchaser or its successors in title."

[49] After registration of the servitude the owner of the servient tenement applied to court for an order cancelling the servitude on the basis that it was too vague and unenforceable. The court a quo refused the application and the appeal to the Supreme Court of Appeal failed. It was held at page 830H that notwithstanding the inclusion of the servitude and that its exact route would be determined in future, the court none the less found the servitude to be described sufficiently well for clarity purposes. It says, a servitude in similar terms was registered against the appellant's title deed after several attempts by the parties at determining the route of the right way, the appellant issued a notice of motion in which it claimed an order inter alia declaring that the servitude of right of way is invalid as being void for vagueness.

[50] The Learned Judge of Appeal went on to say:[16]

"The court a quo dismissed the application but granted the appellant leave to appeal to this court... In this court appellant's counsel raised the same argument which he had unsuccessfully addressed to the court a quo. Shorn of all its trappings it amounted to this: What is envisaged in the servitude is a right of way... along a specific route; the route has, however, not been determined for it is still to be agreed

[15] Nach Investments (Pty) Ltd v Yaldai Investments (Pty) Ltd and Another 1987(2) SA 820 (A).
[16] Nach Investments (Pty) Ltd v Yaldai Investments (Pty) Ltd and Another 1987(2) SA 820 (A) at 830I.

upon; and in this inchoate form the servitude is invalid. The Court a quo rejected the contention basically because it did not agree with the contention that the route of the servitude was intended to be a specific one ... I am of the view that the conclusion arrived at therein was the correct one."

[51] The next issue raised by Betrand is that the consent of Absa, the mortgage bond holder, to register the servitude has not been obtained. It says paragraph 9 of the Notarial Deed of Servitude provides that the Peens undertake to obtain the required consent from all bond holders and interested parties, including any regulatory authority. Bertrand contends that such consent should have been obtained prior to the bringing of this application. There is also no merit in this point as Mabote specifically requests relief to the effect that the Peens be ordered to provide to Absa 'whatever is necessary' to enable Absa to give its consent for the registration of the servitude. At the risk of tedious repetition; the Peens are not opposing the relief sought. It is not for Bertrand to raise this issue. It is a matter between Mabote and the Peens.

[52] Bertrand has also raised several other issues in the papers, inter alia, that there was an initial agreement between Louis Dam Investments (Pty) Ltd and the Peens Family Trust but these were either not argued or not argued with any conviction – correctly so, as they were not relevant to the crisp issues dealt with above. In the result, I do not intend to deal with them.

[53] The prayers in the notice of motion refer to a 'deed' of servitude. No doubt, what is meant is 'deeds' of servitude as the Peens are granting separate servitudes over their respective farms, albeit in one document styled 'deed' of servitude.

[54] I make the following order:

1. The two exceptions are dismissed.
2. A declarator is granted that the applicant is entitled to register a servitude, in accordance with the provisions of the Notarial Deeds of Servitude attached to the founding affidavit as annexure "M", over the following properties, which

are properties held in the names of the first and second respondents respectively;

2.1. Portion 2 of the farm Groothoek 220, registration division KR, Limpopo Province, in extent 846,9777 hectares, and held by deed of transfer T3298/1979;

2.2. Remaining extent of the farm Groothoek 220, registration division KR, Limpopo Province, in extent 331,0729 hectares, held by deed of transfer T16080/1966.

3. The fourth respondent is hereby authorised to register against the properties mentioned in prayer 1 above, the Notarial Deeds of Servitude (together with the applicable servitude diagram thereto) attached as annexure "M" to the founding affidavit;

4. The first and second respondents are interdicted and restrained from passing transfer to any potential purchaser, including the fifth respondent, of their farms, referred to in prayer 1 above, unless prior to or simultaneously with such a transfer registration is effected in favour of the applicant of the Notarial Deed of Servitude, attached as annexure "M" to the founding affidavit;

5. The first and second respondents are ordered to provide to the third respondent, whatsoever is necessary, to enable the third respondent to give its consent for the registration of the Notarial Deed of Servitude;

6. The fifth respondent is ordered to pay the costs of this application.

N. RANCHOD
JUDGE OF THE HIGH COURT

Appearances:

Counsel on behalf of Applicant : Advocate M.P van der Merwe

Instructed by : Borchardt & Hansen

	Attorneys
Counsel on behalf of fifth Respondent	: Advocate A.M van Wyk
Instructed by	: Smit and Marais
	Attorneys
Date heard	: 28 August 2014
Date delivered	: 1 December 2014

No appearance for first, second, third and fourth respondents.