

**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

Case Number: 4654/2019

- (1) REPORTABLE: **NO**  
(2) OF INTEREST TO OTHER JUDGES: **NO**  
(3) REVISED.

**13 July 2022**  
DATE

  
SIGNATURE

In the matter between:

**RAND WATER BOARD**

Applicant

and

**IANTHE FLORENCE RAUTENBACH**

First Respondent

**TSHWANE METROPOLITAN MUNICIPALITY**

Second Respondent

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**JUDGMENT**

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**NEUKIRCHER J:**

[1] The present dispute between the applicant (Rand Water) and the first respondent (Rautenbach) involves a notarial deed of servitude (the servitude) registered in December 1997 in favour of Rand Water, over the

Remainder of Portion 484 of the Farm Garsfontein 374, Registration Division JR, Gauteng Province, measuring 379, 5603 hectares (the Property).

- [2] According to Rand Water, it requires use of this servitude to lay a further pipeline within it to cater for the increasing demand of water supply owing to what it describes as the *“increasing population growth and township developments or spatial developments”* of the region.
- [3] Rand Water complains that there are a number of encroaching structures on the strip of land constituting the servitude but, as this application is confined to relief against Rautenbach, those are the ones that this application focuses on.
- [4] The Property is located in a development in Pretoria known as Woodhill Estate and Country Club. According to Rand Water, it has engaged with the Woodhill Homeowners Association<sup>1</sup> regarding the encroachments only to be met with a response that there are no “huge” encroachments within the estate on the servitude and that, should there be any encroachments those are most probably within the buffer zone. Thus it would appear that an impasse has been reached.

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<sup>1</sup> Which is responsible for the administration of the estate and common areas.

[5] The specific encroachments complained of via-à-vis Rautenbach are the following:

- 5.1 a swimming pool encroaching by 7.43m<sup>2</sup>;
- 5.2 the building (i.e. the house) encroaching by 4.13m<sup>2</sup>; and
- 5.3 the boundary walls constructed over the servitude area until the opposite end of the servitude boundary and on top of Rand Water's existing pipeline H26 and along the path of Rand Water's new proposed pipeline.

[6] Rautenbach has filed a counter-application in which she seeks the following:

- 6.1 that if there is an encroachment, that Rand Water has acted unreasonably in refusing to grant consent for the "as built" encroachments;
- 6.2 that, in this event, the Court should grant such consent as may be necessary; and
- 6.3 that Rand Water report to the Court on the safety of its existing pipeline in so far as it runs over Rautenbach's property.

[7] Whilst the premise of both the application and counter-application appear innocuous enough on the face of it, they are in fact anything but. The reason for this stems from the servitude itself and an email from Mmule Raditsela of Rand Water dated 29 January 2018 in response to a letter from Rautenbach's attorney, Hannes Gouws.

## **THE SERVITUDE**

[8] The servitude itself is contained in Notarial Deed of Servitude K7429/1997S and was originally granted by the City Council of Tshwane to Rand Water on 9 December 1997. Whilst not all of the terms of the servitude are relevant, paragraphs 1 and 2 are and they state the following:

*"1 The OWNER<sup>2</sup> hereby gives and grants to RAND WATER for itself, its Successors-in-Title or Assigns, the rights in perpetuity, to convey and transmit water over:*

*REMAINDER of PORTION 284 of the Farm Garsfontein 374, Registered Division JR, Province Gauteng;*

*MEASURING 379, 5603 (THREE SEVEN NINE COMMA FIVE SIX NOUGHT THREE) Hectares;*

*HELD by virtue of Deed of Transfer T26233/1978;*

*(hereinafter referable as the "PROPERTY")*

*By means of pipelines already [laid] and which may hereafter be laid, along a strip of ground, 2,5887 Hectares in extent, as depicted by figure ABCDEFGHJKLMNP on the annexed Diagram S.G. No 9450/1992 ("the STRIP"), together with the right on perpetuity, to lay or carry through water, over, on or across the PROPERTY, along the STRIP and from time to time patrol, inspect, maintain, repair remove and relay such pipelines, together with the necessary valves, cocks, metres, boxes, cables and all other accessories in connection therewith, any or all of which may be*

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<sup>2</sup> The City Council of Tshwane

above and/or below the ground level ("the WORKS"), and to build, repair and renew all embankment, on which the WORKS may now or hereafter be laid or constructed, as may be necessary, together with all such rights of way and rights of ingress to and egress from the PROPERTY, as may be requisite and necessary for any of the purposes aforesaid, and for the due and proper exercise of the rights hereby granted.

"2 THERE shall be no structures erected, parking allowed, trees planted or material placed or deposited on or over the STRIP or within 2 (TWO) metres thereof, and the depth or cover over the pipeline shall not be materially altered, without written consent from RAND WATER which consent shall not be unreasonably withheld."

- [9] Rand Water states that owing to increasing water demand in the region, and in furtherance of its Constitutional obligations<sup>3</sup> it had identified and requires use of its servitude, including the part laid across a portion of the estate, in order to lay a further pipeline to augment the existing but insufficient water supply. It alleges that the encroachments directly interfere with its rights, entitlements, duties, powers and functions. Rand Water alleges that not only do the encroachments hinder Rand Water's access to the servitude and pipeline but pose a danger to the pipeline.

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<sup>3</sup> In terms of Section 27(1):

"(1) everyone has the right to have access to

....

(b) sufficient food and water...

(2) The State must take reasonable legislative and other measures within its available resources to achieve the progressive realization of each of these rights ..."

[10] It further alleges that at the time that Woodhill was being developed, Rand Water had agreed to the development subject to conditions of agreement of servitude and pipeline protection stated in a letter written to the developer (Nuclear Lifestyle Design), dated 8 December 2005<sup>4</sup>. It alleges that the present layout of Woodhill and the encroachments were never approved and subsequent attempts to obtain copies of the certificates of occupation were met with a complete lack of co-operation both from the representatives of the residential estate and from Rautenbach. Attempts to obtain copies of the requisite permissions from the custodian of town planning and the relevant law enforcement structures for building regulations also proved fruitless.

[11] Rand Water then states:

*"57 Symptomatic of these infringements, the Applicant's representatives generally encountered difficulties in gaining access into the estate over the years, for purposes of inspecting its water services work, either for general inspections, doing meter readings or general patrols or repairs...."*

[12] This, states Rand Water, was despite providing the estate's representatives with a monthly schedule of visits to inspect, for example,

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<sup>4</sup> The conditions were stipulated in that letter and an accompanying annexure and annotated A4 layout plan

water leaks, meter readings and for general patrols. Not only was gaining entry into the estate and residential properties made difficult for the inspectors, but the encroachments also hindered proper execution of their duties.

[13] Of course this is all disputed by Rautenbach who argues that, not only was the consent for the encroachments actually granted, but Rand Water has failed to substantiate any of its allegations with expert evidence. This it eventually attempted to do in a further affidavit to which Rautenbach has objected.

[14] An argument has also been made on her behalf that this court can decide the matter based solely on the fact that the consent to development in 2005 is deemed to be given because there was no formal objection to the development and that clause 2 of the servitude which provides that consent "*shall not be unreasonably withheld.*"

[15] The fact that the "experts" relied on by Rand Water cannot agree on the exact measurements of the encroachments and their materiality also does not assist Rand Water.

[16] In my view, there are material disputes of fact present on these papers which are not limited to:

- 16.1 whether or not actual consent whether tacit or otherwise, was given to this development and any possible encroachments;
- 16.2 the extent of any encroachments;
- 16.3 their materiality via-a-vis Rand Water's constitutional and statutory obligations;
- 16.4 whether the counter-application should be granted.

[17] I do not agree that these issues are such that they should be decided on paper or that they are issues solely of interpretation and law. In my view, whether or not consent was originally sought and granted is a matter for evidence, as is whether there are encroachments and, if so, the materiality of these. It remains so that a

*"..... court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field".<sup>5</sup>*

[18] Given the importance of the constitutional prerogatives of access to water that Rand Water is obliged to fulfill and given the weighty disputes of fact on these papers, I am of the view that it is in the interest of justice that this matter be referred to trial.

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<sup>5</sup> International Trade Administration Commission v SCAW South Africa P/L (Bridon International Limited Intervening) In re: SCAW South Africa P/L v International Trade Administration Commission 2012 (4) SA 618 (CC) at para 101



**ORDER**

[19] Thus the order I make is the following:

- 19.1 the application is referred to trial;
- 19.2 the Notice of Motion shall stand as a simple summons;
- 19.3 the applicant shall file a Declaration within 20 days of this order setting out the facts and issues to be decided at trial;
- 19.4 thereafter the Uniform Rules of Court shall apply to the delivery of further pleadings and all matters incidental to and including the conduct of trials;
- 19.5 costs are reserved for determination by the trial court.



**B NEUKIRCHER**

**JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, PRETORIA**

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 14 July 2022

**Appearances:**

For the Applicant	: Adv VP Ngutshana
Instructed by	: Raborifi R Incorporated
For the First Respondent	: Adv JL van der Merwe (SC)
	: Adv J Rust (SC)
Instructed by	: Gerhard Wagenaar Attorneys
For the Second Respondent	: No appearance
Date heard	: 20 January 2022 (final heads of argument filed on 21 February 2022)
Date handed down	: 13 July 2022