



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 70603/2018

<p>(1) REPORTABLE: NO.</p> <p>(2) OF INTEREST TO OTHER JUDGES: NO.</p> <p>(3) REVISED.</p> <p><u>DATE: 3 OCTOBER 2022</u></p> <p><u>SIGNATURE</u> </p>
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In the matter between:

WITWATERSRAND ESTATES LTD

Applicant

and

**CENTURY PROPERTY DEVELOPMENTS
(PTY) LTD**

First Respondent

**PRECINCT RESIDENTIAL DEVELOPMENTS
(PTY) LTD**

Second Respondent

Summary: contract – specific performance – court’s discretion – final interdict
– application for a mandamus in a contractual setting.

ORDER

The application is dismissed with costs, including the costs of two counsel where employed.

JUDGMENT

This matter has been in open court and otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

Introduction

[1] Three large property developers own neighbouring properties in the Kayalami Gardens area. The properties fall in the jurisdiction of the City of Johannesburg (CoJ) and border on or have access to Allandale Road, a large arterial road to the north of Johannesburg with access to the N1 motorway. The Applicant, Witwatersrand Estates Ltd (WEL) harbours apprehensions that the two respondents, Century Property Development (Pty) Ltd (Century) and Precinct Residential Developments (Pty) Ltd (Precinct) are not honouring a Servitude Agreement entered into between WEL and the respondents' predecessor and are acting in breach of the terms of a Notarial Deed of Restraint and Servitude (the Notarial Deed) registered against the property from which portions were subsequently subdivided and which are now owned by the respondents.

Relief claimed

[2] After an unsuccessful attempt at reviewing a decision of the CoJ whereby an initially approved mode of development (with which WEL was satisfied) had been amended (in case no 90490/18 in this court and in respect of which a separate judgment had been handed down on 9 June 2022), WEL now persists with this application for interdictory relief. As will become apparent hereinlater, the nature of the relief (and not only its terms) is central to the adjudication of this matter. For this reason the relief sought in WEL's amended notice of motion, is quoted here in full:

“1. Directing that the First and Second Respondents, being the registered township owners of (i) Kyalami Gardens Extension 27 (which was established on a portion of the remaining extent of Portion 2 of the farm Bothasfontein 408 J.R., and a part of the remaining extent of portion 88 of the farm Bothasfontein 498 J.R) and (ii) Kyalami Gardens Extensions 33, 35, 36 and 37 (“the property”) and any township that may have been established thereon subsequent 20 October 2010, be compelled:

1.1 To comply with the Servitude Agreement dated 26 August 2010 pertaining to the limitation of development of the property; and

1.2 To comply with the provisions and obligations set out in Notarial Deed of Restraint and Servitude K02206/12S (the Servitude”) pertaining to the future development, road network and land uses and the positions thereof, as provided for in the said Deed registered as a praedial

servitude against the title deed of the property, namely Deed of Transfer T75612/12;

- 1.3 *In relation to the First Respondent only, to comply with the terms, undertakings and warranties as provided for in an agreement in respect of the cancellation of the School Lease dated 8 July 2013.*
2. *Directing that the Respondents be compelled to ensure that any development taking place on the portion of the property owned by them respectively complies, at any stage of the development, with –*
 - 2.1 *The Kyalami Centro Master Plan as defined in the Servitude; and*
 - 2.2 *The land uses and positioning thereof defined in Precinct Plan No 07/8004/T1/2010 approved by the City of Johannesburg on 20 October 2010, in phases 1-19 (“the Precincts Plan”), provided for in the Centro Master Plan and the Precinct Plan and the decision under which the township was established;*
 - 2.3 *The improvements and phases of the road network as defined in the Centro Master Plan and the Servitude Agreement.*
3. *That the Respondent or any person or entity (authorised by the Respondent) be prohibited, with immediate effect, from commencing with, proceeding any further or concluding, any building activities on the property in contradiction with the*

provisions of the Servitude read with the Centro Master Plan and the Precinct Plan, as referred to in prayers 1 and 2 above.

4. *That the First Respondent is prohibited from constructing, or allowing the construction of, or operation of a primary or secondary school on the property within two kilometres of the farm Waterfall as described in Title Deed 26167/1934.*
5. *That the Respondents pay the costs of this application on the attorney and own client scale”.*

[3] Before it can be determined whether any breach of the Servitude Agreement and the Notarial Deed has occurred, the relevant terms of these documents must be determined. Despite the documents having been in existence, in writing, for about a decade, there is some dispute regarding the terms thereof. The dispute resides in what exactly constituted the extent of the development (or restraint thereof) to which the parties had agreed, with reference to a plan or map.

The Servitude Agreement

[4] WEL was at all relevant times the owner of a property initially known as the Remaining extent of Portion 1 of the Farm Waterfall 5, Registration Division IR Gauteng Province (the Waterfall property). It consists of a substantial tract of land, bordered on three sides by Allandale Road, Waterfall Road (which is its main access road) and the Jukskei River. From the plans, photographs and diagrams submitted by the parties, it appears to be a fully developed township, with residential, business and leisure properties, including a dam and a clubhouse. In the Servitude agreement, it is referred to as the “servient land”.

[5] The adjacent land, then owned by Erf 51 Melville CC (Melville), consisted of a slightly smaller, then undeveloped tract of land, being the Remaining Extent

of Portion 2 of the Farm Bothasfontein 408, Registration Division JR Gauteng. It was referred to in the Servitude Agreement as the “dominant land” and is known as the Mushroom Farm.

[6] Although the Mushroom Farm also borders on Allandale Road for the whole length of its north-eastern border, convenient access (by way of a junction) which would satisfy the provincial and local authorities, would have had to be made where the Mushroom Farm and the Waterfall property meet at their respective north-eastern and north-western corners.

[7] In order to facilitate the road junction, a servitude had to be granted over the Waterfall property to the Mushroom Farm. The Servitude area consisted of an undeveloped and unused sliver of land, falling outside the development on the Waterfall property. It consisted (and still consists) of a triangular piece of land, measuring in total a mere 2007m².

[8] Having regard to the remainder of the tracts of land and the size of the developments thereon, the servitude portion is insignificant in size, but was necessary at that stage for the approval of development on the Mushroom Farm. It is for this reason, that the parties embodied the granting of the servitude in a written document, even prior to its registration. The agreement imposed certain obligations and restrictions on Melville. The relevant terms contained in the Servitude Agreement, dated 26 August 2010 provide the following in this regard:

“2.1 This Servitude Owner hereby and with effect from the Signature Date grants to the Dominant Owner a praedial servitude in perpetuity over the Servitude Area for roads purposes and upon the further terms and conditions contained in this Agreement.

2.2 *The Servitude Area may be used solely for the construction of a public road thereon.*

2.3 *The Dominant Owner accepts the servitude hereby granted.*

3.1 *immediately after the Signature Date withdraw all objection (if any) which it may have lodged with any relevant authority in respect of any existing application by Servient Owner or any of its successors in title to any portions of the Farm for the establishment of a township and/or rezoning and/or subdivision and/or consolidation and/or any similar (in the widest sense) application ("Planning Application") in respect of the Farm or any portion thereof;*

3.2 *not (and shall not encourage, solicit or induce any third party to do so) object to any further and/or future planning application by WEL and/or any third party in respect of the Farm or any portion thereof.*

4. ***LIMITATION OF DEVELOPMENT***

4.1 *All future development of the Dominant Land shall be substantially in accordance with the Kyalami Centro Master Plan subject to such amendments as may be reasonably required by any relevant authority and/or the Dominant Owner and as may be approved of by the Servient Owner, which approval shall not be unreasonably withheld or delayed.*

4.2 *Without limiting the generality of the provisions of 4.1, no retail development exceeding 30 000 (thirty thousand) square meters of bulk area shall be developed on the Dominant Land.*

5. **ROADS**

5.1 *The Dominant Owner shall at its cost and expense and to the standard, specification and phasing required by the relevant authorities as more fully appears from the Annexure 1, Annexure 2 and Traffic Impact Assessment dated September 2008 attached hereto as Annexure 4”.*

[9] In the definitions contained in the Servitude Agreement, the “Kayalami Centro Master Plan” referred to in clause 4.1 was defined as meaning “*the plan annexed hereto marked Annexure 1*”. There was no annexure marked as such annexed to the agreement annexed to the founding affidavit, which lead to a huge debate as to what that annexure entailed or whether it had even existed at the time of the agreement. Adv Maritz SC on behalf of Century was particularly vocal about this point, arguing that the “true” “Annexure 1” had neither been identified nor produced.

[10] Despite what the respondents argued, they could not produce any other document which they could contend was the “true” annexure or the “Kayalami Centro Master Plan”. On the other hand, WEL was adamant that Annexure FA5 to its founding affidavit was indeed the Annexure 1 referred to in the Servitude Agreement. WEL based its case on this proposition and that is the case which this court must adjudicate on.

[11] Said Annexure FA5 also featured as annexure CL9 to Century’s answering affidavit but on the lastmentioned annexure the different phases of the

development were colour-coded to correspond to a table contained in the annexure/s.

[12] It is necessary to describe the contents of these corresponding annexures, that is FA5 and CL 9. The plan is indeed titled in bold capital printed script “PROPOSED CENTRO KAYALAMI DEVELOPMENT INDICATIVE DEVELOPMENT PHASES”. It depicts Allandale Road on the north-eastern boundary of Mushroom Farm and a junction which appears to be partly on the 2007m² sliver of land described above. It depicts a proposed route of a road and subsidiary roads through the proposed development, to link up with a future provincial road K73 running along the north-western border of the Mushroom Farm.

[13] There are two blocks of print imposed on the plan, the first is a “legend” and the second depicts “Notes”. The “Legend” reads as follows:

“LEGEND: RECOMMENDED PHASING OF ROAD IMPROVEMENTS – ROAD NETWORK PHASES:

- | | |
|----------|---|
| Phase I | Allandale road (K58) dual carriage-capacity for 230 000m ² GLA of development generating 40% of the total expected trip generation. The upgrade needs to be completed before any sites take occupation. |
| Phase II | K73 one carriage way including a bridge across the Jukskei river. This road to be completed before development above 280 000m ² GLA takes occupation. This phase of road upgrades will provide sufficient capacity for a further 30% of development, i.e. 210 000m ² GLA or development generating 70% of the total expected trip generation. |

Phase III K73 one carriageway including the Allendale/K73 intersection. This road needs to be completed before development above 490 000m² GLA or development generating more than 70% of expected trip generation takes occupation.

[14] The “Notes” read as follows:

- “1) *The order in which the phases are implemented can be amended with approval from the Municipality.*
- 2) *During the implementation of the development phases it must be noted that the Allendale Road access can only accommodate 280 000m² development (or the equivalent traffic generation as detailed in the Arup traffic impact study).*
- 3) *Phases exceeding the 280 000m² bulk above should incorporate the link and access to read K73.*
- 4) *Each development phase is responsible for the implementation of the required internal road links to connect the external road.*
- 5) *The capacity provided on the internal road links should be in accordance with the extent of phase served by the link”.*

[15] The plan is identified at the bottom thereof as “PLAN6 (Revision 05) ACCESS TO PROPOSED TOWNSHIP KAYALAMI GARDENS EXTENSION 27”.

Notarial Deed

[16] The “NOTARIAL DEED OF RESTRAINT AND GRANT OF SERVITUDE” registered on 15 December 2012 as R02206/12 provides as follows:

“WHEREAS Melville CC requires access to and the use of portion 1 Waterfall for roadway purposes AND WHEREAS WEL has agreed to grant to Melville CC a servitude in perpetuity to gain access to and use of Portion 1 of Waterfall for roadway purposes ... NOW THEREFORE THESE PRESENTS WINESS:

RESTRAINT:

1. *THAT the servitude agreement dated 26 August 2010 (a copy of which is filed in the protocol of the notary executing this Deed) (the “Principal Agreement”) entered into between inter alia WEL and Melville CC, remains binding on the said parties and their successors in title and that this servitude is in addition to and not in substitution of such Principal Agreement.*
2. *THAT Melville CC has withdrawn all objections which have been lodged by Melville CC with all relevant authorities in respect of any existing application, made by or on behalf of WEL or WEL’s successors in title assigns, for the establishment of a township and/or rezoning and/or subdivision and/or any other similar application (which application is to be interpreted in its widest sense) on, in or over Portion 1 Waterval including such portions of the property originally*

acquired by WEL which have since been subdivided and/or transferred by WEL or WEL's successors in title and assigns to any third party.

3. *THAT Melville CC shall not object to any future applications for the establishment of a township and/or rezoning and/or subdivision and/or any other similar application (which application is to be interpreted in the widest sense), as contemplated in clause 2 above, brought by WEL or WEL's successors in title and assign and in addition thereto Melville cc agrees not to encourage, solicit or induce any third party to lodge such objection.*
4. *THAT all future development on, in or over Portion 2 Bothasfontein shall be substantially in accordance with the Kyalami Centro Master Plan, subject to such amendments as may be reasonably required by any relevant authority and/or Melville CC and as may be approved of by WEL, which shall not be unreasonably withheld or delayed. In addition thereto no retail development exceeding 30 000 (thirty thousand) square metres of bulk area shall be developed on Portion 2 Bothasfontein.*
5. *THAT condition 3 and 4 above be recorded against the title deed of Portion 2 Bothasfontein and shall be binding on the successors in title and assigns of Melville CC as owner of Portion 2 Bothasfontein.*

GRANT OF SERVITUDE OF RIGHT OF WAY

6. *THAT WEL hereby gives and grants to Melville CC, its successors in title and assigns of Melville CC as owner of Portion 2 Bothasfontien. A perpetual right of way and use over a portion of Portion 1 Waterval indicated by the figure ABCDA, measuring 2007 (two thousand and seven) square meters as indicated on diagram SG No. 4560/2010 (attached hereto) (hereinafter referred to as the "Servitude Area") with the right to Melville CC to use the Servitude Area in perpetuity for roadway purposes.*
7. *THAT the public roadway within the Servitude Area shall be constructed by or on behalf of Melville CC and in accordance with the standards specification and phasing required by the relevant authority and as agreed between the parties in terms of the Principal Agreement.*
8. *THAT the cost of constructing the roadway shall be for the account of Melville CC.*
17. *THAT there shall be no consideration payable by Melville CC to WEL for or in respect of the rights hereby granted.*
18. *THAT Melville CC shall be obliged to proceed with the construction of the roadway in accordance with the provisions of clause 5 of the Principal Agreement".*

Subsequent events and alleged breaches

[17] In 2017 Century, having bought the Mushroom Farm from Melville, applied for and obtained approval from the CoJ to amend the initial precinct plan for the development. The amendment was made in terms of the Town Planning & Townships Ordinance 15 of 1986 and the Johannesburg Metropolitan Municipality Spatial Planning and Land Use Management Bylaw 2016. The precinct plan which was amended was a plan previously approved by the CoJ as a Precinct Plan in respect of Erf 3 of Kayalami Gardens Ext 27 on 30 October 2010. This original Precinct Plan, together with the approval for development of a township on the Mushroom Farm provided inter alia for division of the township into four erven and 19 “precincts” and 30 000m² land use area for shops and 525 000m² of residential buildings. It also provided for a place of instruction, but I shall deal with this topic separately later. The total developmental area was 745 000m². It also provided for “open space areas”.

[18] The amendment to the Precinct Plan approved by the CoJ in 2017 provided for division of the township into 22 erven and 10 “precincts” or phases. The configuration of the internal roads were amended and their width was increased in accordance with requirements imposed by Gautrans and the Johannesburg Roads Agency (JRA). The extent of open space area was also substantially increased, resulting in a decrease of the development land. Further requirements imposed by the CoJ reduced the developable floor area to 590 500m². the amendment also provided for the subdivision of the Mushroom Farm into Kayalami Gardens Extensions 34 to 43.

[19] The commencement of construction and earthworks relating to the development approved in terms of the amended Precinct Plan, stated in February 2018 on Extension 34. At the time of hearing of the interdict application, it was common cause that all the “internal” bulk services, including water-, sewage and

electrical reticulation and other works relating to the road network, both in relation to connecting roads, junctions and internal roads save for the proposed K-73, had been completed. The development of Extensions 34 and 35 had also been completed. This was done by Precinct (who had in the meantime become the owner of these parcels of land) at a cost of some R 600 million.

[20] WEL had two principal objections to the commencement and continuation of the developments in terms of the 2017 CoJ approved amended Precinct Plan by both Century and Precinct. The first principal objection was that the amendment was approved by the CoJ without notice to or participation by WEL. The legality of the administrative action by the CoJ, who had argued that the amendment had no external effect did not amend any roads on junctions beyond that which had originally been approved in 2010 and was in any event in accordance with the CoJ spatial planning for the area, had been dealt with in the separate review application launched by CoJ under case no 70603/2018 in this division as referred to in paragraph 2 above. That objection is therefore no longer alive.

[21] The second principal objection was that the construction and development in terms of the amended Precinct Plan were done or are being done in breach of the Servitude Agreement and the Notarial Deed and without WEL's consent.

[22] Regarding the terms of the Servitude Agreement which WEL says are breached by the respondents, WEL's case is set out as follows in its founding affidavit:

“17.3 In terms of clause 4.1 [of the servitude Agreement [all future development of the Mushroom Farm should be substantially in accordance with the Kayalami Centro Master Plan ... (the annexure to the servitude agreement) subject to such amendments as may be

reasonably required by any relevant authority and/or the owner of the Mushroom Farm which had to be approved by the Applicant (WEL) which approval the Applicant would not unreasonably withhold or delay ...

18. I draw the court's attention specifically to the Annexure to the Servitude Agreement, the Centro Master Plan. The Centro Master Plan focuses not only on the phasing and the extent of the relevant road upgrades bordering the Mushroom Farm, but also on the mixed-use nature of the development with dispersed offices, retail spaces and residential spaces which does not resemble an office park or a shopping centre. What is important about the Centro Master Plan is that it was prepared with reference to the proposed layout and land use area usage depicted in the Precinct Plan which was approved by the CoJ two months later ...

19. The Centro Master Plan relate to the same layout as can readily be seen when the documents are compared ...

20. Whereas the Centro Master Plan describes the road network phases, the Precinct Plan describes the area of land usage for each phase contained in the diagram, the road improvements were controlled by way of different stages wherever it was obliged to be completed on the Mushroom Farm. It is apparent from the Precinct Plan that the underlying concept of the development was a mixed-use development in that very few of the phases or erf's are exclusively designated to be residential or offices or shops. Rather, by and large, each phase or erf contains a mixed use of residential, shops and/or offices ...".

[23] The same allegations are made in respect of the Notarial Deed:

“In terms of clause 4, all future development on the Mushroom Farm shall be substantially in accordance with the Centro Master Plan, subject to such amendment as may be required by any relevant authority and/or Melville CC, and which have to be approved by the Applicant, which approval shall not be unreasonably withheld or delayed. In addition thereto, no retail development exceeding 20 000 square meter of bulk area shall be developed on the Mushroom Farm. Most importantly, the Centro Master Plan depicted a mixed use dispersed development, as more fully described in 20 above”.

[24] WEL relies on the contents of a brochure which it claims came into its possession during June 2018, promoting the development of the Mushroom Farm as “the Precinct”. It contains a “Micro Locality” plan which WEL compared to the Kayalami Centro Master Plan and the (initial) Precinct Plan. This led WEL to aver as follows:

“33.1 The road layout within the Mushroom Farm has been altered drastically

33.2 The layout in the Micro Locality does not mirror the division of the area into precincts as depicted in the Centro Master Plan. Nor does it mirror the division of the area into erfs as shown on the Precinct Plan.

33.3 The Micro Locality depicts various areas for use as exclusively residential retail or offices contrary to the Precinct Plan.

33.4 *Furthermore, there is an area designated for a school building in the middle of the Mushroom Farm, contrary to the Cancellation Agreement". Subject to such amendments as may be required by any relevant authority and/or Melville CC, and which have to be approved by the Applicant, which approval shall not be unreasonably be withheld or delayed. In addition thereto, no retail development exceeding 30 000 square meter of bulk area shall be developed on the Mushroom Farm. Most importantly, the Centro Master Plan depicted a mixed use dispersed development, as more fully described in 20 above".*

[25] WEL's case is further that, as a quid pro quo for granting the servitude to the adjacent dominant land, development thereon would be restricted so as not to compete directly with WEL's development of its own land.

[26] Conceding in its replying affidavit that the "servitude Agreement does not refer to the Precinct Plan", WEL contended nevertheless that *"the Applicant's case hinges firstly, and most importantly, on the fact that the Respondent is already in breach of its obligations arising out of the Servitude Agreement. Fundamentally this case is based on an assertion that the subject properties are that differs fundamentally from the Centro Master Plan, read together with the Precinct Plan"*.

[27] The above allegations were made prior to Precinct having been joined. After that had occurred, WEL further alleged that Precinct is not only bound by the restraints imposed on Melville and subsequently on Century, but that it has also breached those restraints. After the joinder, WEL maintained that *"the servitude was concluded in circumstances where the Kayalami Centro Master Plan reflected the same obligations and layout as the final Precinct Plan for*

Extension 27” and “as mentioned in affidavits filed of record, the evil that the Applicant seeks to prevent is to stop Century (and Precinct) from erecting a multi-use development in competition with the multi-use development that have been constructed on the Waterfall Farm (WEL’s land). The loss of revenue created by such competing development is almost impossible to qualify and the suggestion that the Applicant would have an alternative claim for damages, is opportunistic. The 2010 Precinct Plan defined the mixed use in erven 1 – 5 which regulated the development in these precincts. Century failed to adhere to these development controls which it was contractually obliged to do ... “and” ... the Applicant seeks no more than that the development of the Precincts properties complies with the development restrictions imposed by the Notarial Deed, read with the 2010 Precinct Plan”.

Evaluation

[28] The first issue to be decided is whether the 2010 Precinct Plan formed part of the Servitude Agreement and the Notarial Deed. This is what WEL contends. The first point to be noted that the Precinct Plan as such is not mentioned in either document. The reason why it could not mentioned in the Servitude Agreement is because that agreement pre-dated the approval of the Precinct Plan. This much is conceded by WEL. However, WEL argues, in supplementary Heads of Argument delivered on its behalf, that:

“The servitude agreement was informed by the land use rights and the placing thereof which was at that stage in the process of approval and reflected in the then pending township development process of Extension 27. The difference between the Kayalami Centro Plan and the 2010 Precinct Plan is the purpose they served and the information that is reflected therein. The Kayalami Centro Master Plan deals with the development phases of the development

over the land in respect of road improvement and access and was directly linked to the 2010 Precinct Plan which deals with different land uses, positioning of the land uses and the development controls thereof which bound the parties and restricted Century in their development rights”.

[29] These submissions do not assist in answering the question as to why, if WEL sought to limit the respondents and their predecessor Melville, in the fashion contended, no such limitation featured in the agreement. The Kayalami Centro Master Plan was at that stage, in the same manner as the proposed Precinct Plan, still part of the development process to be approved by the CoJ. Nothing therefore would have prevented the parties, if that had been their intention, to incorporate a draft plan or indeed the Precinct Plan submitted to the CoJ for approval, into the Servitude Agreement. Nothing also prevented them from otherwise delineating those restrictions which WEL now contends for, in the agreement. This could have been made subject to approval by CoJ or, if not approved, as applicable only inter partes.

[30] The explanation as to why the Precinct Plan could not have been annexed to or incorporated in the Servitude Agreement, does not hold water in respect of the Notarial Deed, which was registered only in 2012, that is after the Precinct Plan had already been approved. WEL, when explaining which of the annexures to its founding affidavit actually constituted “Annexure 1” to the Servitude Agreement, had access to the notary and the protocol containing the servitude documents. Notably, despite this access, the Precinct Plan, did not feature as an annexure.

[31] Of crucial importance is the absence of a claim for rectification for inclusion of either the Precinct Plan or its contents into either the Servitude Agreement or the Notarial Deed.

[32] In an attempt to meet these deficiencies, WEL sought to rely on the interpretational aids¹ to be gleaned from the “context” existing at the time when the Servitude Agreement was concluded. For this purpose WEL referred to a “sheaf” of correspondence exchanged between the parties at the time. Rather than confirming any negotiation or agreement regarding restrictions or restraints to be placed on the nature and extent of the development on the Mushroom farm, the correspondence centered around the maximum traffic volumes at the two entry points to the development, i.e. the junction with Allandale Road and the K-73 respectively. I give one example hereof, contained in a letter from the director of Atterbury Properties (one of the negotiating parties) to WEL dated 25 February 2021: *“Thank you once again for meeting re the above matter [identified as “Waterfall – Servitude for Mushroom Farm”] ... on 11 February 2010. We wish to confirm the salient aspect of our discussion during the meeting to be as follows:*

1. *Mushroom Farm (Kyalami Ext 70) did not notified the owners of Waterfall land as the direct adjacent land neighbours when submitting their application for township establishment. Hence no opportunity was granted to comment or object.*
2. *Waterfall owners (Mia’s & Atterbury) obtained a copy of the T.I.S of the Mushroom Farm. Waterfall have serious reservations re the road infrastructure upgrading proposed by the T.I.S.*

¹ *Affirmative Portfolios CC v Transnet t/a Metrorail* 2009 (1) SA 196 (SCA) at [15] and *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at [18] and [19] and *University of Johannesburg v Auckland Park Theological Seminary* 2021 (6) SA 1 (CC).

3. *The owners of the Mushroom Farm is seeking to obtain a right of way servitude over a certain portion of the Waterfall land in order to bet access off Allandale Rd.*
4. *Mushroom Farm owners & Waterfall owners met some time ago during 2009 and agreed that a right of way servitude may be granted subject to an agreement be reached re the upgrading of road infrastructure.*
5. *Waterfall drafted such an agreement and submitted same to JRA for comments. JRA objected against the principles of the draft agreement and advised that an alternative access may be granted for the owners of the Mushroom Farm. A draft order copy of this agreement was submitted to you during our meeting.*
6. *Waterfall owners appealed to Joburg Planning – your office – to withheld the approval of the Mushroom farm township application until such time that an amicable agreement is reached with the Mushroom Farm owners.*
7. *Waterfall owners are having a further follow up with representatives of JRA tomorrow re inter alia the above matter and hope to have a resolution on this matter soon.*

We trust the above to be a true reflection of our discussion and we shall be keeping you posted with any progress made.

Your faithfully

Coenie Bezuidenhout”.

[33] One of the last correspondences, dated 26 July 2010, prior to WEL (or its holding company) agreeing to the Servitude Agreement, annexed a traffic flow report from Arup Transport Planning. It dealt with trip generation, traffic volumes and road upgrades and recommended that *“road network construction phases that correspond to the establishment of 40%, 20% and 100% of the development respectively are provided in the attached Plan 6 (Rev 4) ... it was concluded that if the above recommendations are adhered to, Atterbury Properties and Century properties will grant the servitude access to Kayalami Gardens Ext 27”*. The response from the WEL side was *“Thank you for the feedback. Only WEL and WII are signatures to the agreement and we have written confirmations from both Atterburg and Century that we may proceed to sign the agreement”*. Nothing was said about the Precinct Plan or any “limitations” or “restrictions” on the development. One may be reminded that the Kayalami Centro Master Plan was revision 5 of Plan 6 and not revision 4 as referred to in this correspondence but, on the evidence, nothing turns on this. The point remains that the only restrictions contained in the “sheaf” of documents, were those relating to traffic flows and roads as quoted in paras 12-15 above. There are no other references in any of the documents that lead to an incorporation of the 2010 Precinct Plan, even by reference.

[34] I therefore find that the case sought to be made out by WEL for the incorporation of the 2010 Precinct Plan or any restrictions pertaining to development contained therein into either the Servitude Agreement or the Notarial Deed is not supported by the evidence and cannot be sustained, despite any interpretational exercise proposed by WEL.

[35] The next question to be answered is then whether the construction and development of the Mushroom Farm, although it may be lawful as far as the CoJ and compliance with all statutory prescripts are concerned, still amount to a

breach of the Servitude Agreement and the Notarial Deed. This would entail a determination of whether the current construction and development are “substantially” in accordance with the Kayalami Centro Master Plan as provided in par 4.1 of the Servitude Agreement and par 4 of the Notarial Deed.

[36] In order to facilitate a comparison, as far as roads go, between the Kayalami Centro Master Plan and the 2017 Precinct Plan (which reflects the current development), the roads depicted on the former were superimposed on the latter. This was done by way of a colour diagram prepared by Century. This incidentally also facilitated a comparison between the precincts depicted on the Kayalami Centro Master Plan (and the 2010 Precinct Plan referred to earlier) and the 2017 Precinct Plan.

[37] The differences are principally the following: The Kayalami Centro Master Plan provided for a junction of the “Mushroom Farm Road” with Allandale Road at the north eastern corner of the Mushroom Farm (where the servitude sliver of land referred to earlier is utilized) and then proceeded to provide for two grid-like sets of internal roads, serving all 19 proposed precincts depicted on the 2010 plan before linking up via a traffic circle and a further road to the K-73 on the north western side of the Mushroom Farm. The 2017 Precinct Plan has retained the junctions at Allandale Road and the K-73 but the grid of internal roads has been somewhat limited by way of more simplistic access to the proposed precincts which will now be developed in 10 phases. In total, four “spheres” of the grids have fallen away while the road width has increased and two internal traffic circles have been added.

[38] Do these differences amount to “substantial” changes? I think not: the external exit points and points of access to the Mushroom Farm have remained unaltered. The internal roads have been amended to comply with the JRA

requirements and the widening of an internal road can hardly be viewed as a “substantial” amendment. The access to the phases were at all relevant times in both plans simply a means of accessing each phase or precinct in the most convenient and practical way and this principle has been retained. The simplification of the internal roads amount to an almost imperceptible amendment, particularly when viewed from outside the Mushroom Farm and in any event, it has no external effect. Where the road traffic volumes, on which the Servitude Agreement and the Notarial Deed had been based, had remained unaffected (or possibly been decreased), the 2017 Precinct Plan and the development in accordance therewith cannot be found to constitute a “substantial” deviation from the Kayalami Centro Master Plan. Construction in terms thereof therefore does not amount to a breach and neither had it been necessary to seek WEL’s approval.

[39] If I were to be wrong about the exclusion of the 2010 Precinct Plan from the Servitude Agreement or the Notarial Deed or, even if it remains excluded, can it be found that, in addition to the issue of roads already dealt with in paragraph 38 above, the current development is in breach of the terms of the Servitude agreement or the Notarial Deed in that it is not in “substantial” accordance with the depiction of precincts (or the uses of land contemplated therein) which may possibly be extracted from the Kayalami Centro Master Plan? This is what WEL’s argument quoted in paragraph 22 above contemplates.

[40] As already indicated Kayalami Centro Master Plan depicted 19 “precincts”. This word was used by the parties interchangeably with erven, phases or even townships. This depiction was done without reference to zoning types or developable areas. These kind of details only appeared on the 2010 Precinct Plan. But even if one were to extract this detail from the 2010 Precinct Plan and impose it on the Kayalami Centro Master Plan, and consider, apart from

the issue of roads already described above, the remaining features and compare them with the 2017 Precinct Plan, the only real difference is that 19 precincts have now become 10 precincts. The maximum developable floor area for maximum bulk area of 30 000m² contained in the Servitude Agreement has been retained. The CoJ has found that the amendment has no negative external effect on neighbouring properties or the area as a whole. Even if one were to ignore this view expressed by the CoJ, the evidence placed before the court by Century by way of an affidavit by a registered professional town planner (Dacomb) has to be weighed up. Although this evidence has been supplied in a replying affidavit to its initial counter-application by Century and therefore it may not conveniently fit into the application of the Plascon-Evans-Rule², the town planner's expertise has not been doubted in subsequent affidavits filed by WEL and his factual evidence is corroborated by documents filed of record. I find no cogent reason to discard his evidence. He inter alia concluded the following after reference to the detail contained in the Kayalami Centro Master Plan, the 2010 Precinct Plan and the 2017 Precinct Plan:

“35. When the 2010 Precinct Plan is compared to the alleged Kyalami Centro Master Plan which the Applicant relies on, it is evident that there is a vast difference in the detail denoted on each plan, with the 2010 Precinct Plan as approved by the municipality, containing detailed information with regard to the intended use of each developable land parcel (precinct) (either a combination of land use hypologies or single use components).

² *Plascon-Evan Points Ltd v Van Rebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E – 635D and *NDPP v Zuma* 2009 (2) SA 277 (SCA) at [26].

36. *This distinction is important when regard is had to the allegation by the Applicant that, what had been approved by the municipality with regard to the 2017 precinct plan and, by Extensions 34 and 35, somehow conforms to what the Applicant describes as a “multi-use development”, as opposed to his preferred “mixed use development”, ostensibly denoted on the Kyalami Centro Master Plan. As is evident from the explanations above, and with due regard to the Kyalami Centro Master Plan, there is no indication on such master plan of any mixing of land use typologies nor a quantification thereof and such submissions made by the Applicant seem to have no merits.*
42. *The amendments reflected in the 2017 precinct plan were of an internal nature (confined to the layout of road reserves within the boundaries of Extension 27 whilst reducing the developable floor area by a considerable margin) and, as a result, would not be expected to have any material impact on the receiving environment beyond the boundaries of the township, including the development and interest of the Applicant as an adjacent land owner and property developer. The amendments can in my view therefore be regarded as being substantially in accordance with the Kyalami Centro Plan.*
43. *In fact, the 2017 precinct plan and the subsequent amendment of the municipality’s decision with regard to Extension 27 brought about a decrease in the approved land use zoning*

rights cap from 695 000m² in floor area to 675 000m² (a reduction of some 20 000m²).

44. *Such a reduction may be expected to reduce the possible impact of such development on the receiving environment, including the interests of the Applicant as an adjacent land owner. Furthermore, such a substantial reduction in developable floor area may be expected to lessen any competition which may exist between the developments of the Respondent and the Applicant.*

48.1 *Whereas the 2010 precincts plan indicated more and wider notional road reserves (separating the individual proposed precincts or developable land parcels), the 2017 precinct plan illustrates proposed road reserves which are of lesser extent (both in reserve width and length). The position and alignment of the main road reserved and thoroughfares and parts of access to external perimeter roads (all internal to the boundaries of Extension 27) remained largely unchanged.*

48.2 *By reducing the width of the internal road reserves in the 2017 precinct plan, it had the effect of enlarged the developable land parcels of the individual precincts which were to take access from the internal road system. Consequently the position, configuration and general shape of each of the individual precincts (developable land parcels) reflected on the 2010 precinct plan are the absence of internal road reserves*

in places although developable floor- area were substantially reduced by increased open space areas.

- 48.3 *In the 2010 precinct plan a total of 19 precincts or subdivided land parcels (parts of the larges Erf 3) are reflected. In the table described as "Area of Land Use" on the 2010 precinct plans, the second column thereof reflects the land area with regard to each on the 19 Precincts, and an indication of the mix of land use typologies envisaged on each.*
- 48.4 *When the 2017 precinct plan is considered, it is evident that it only provided for 10 precincts or developable land parcels, albeit that the main points of entry to the subject property remained unchanged and the perimeter boundary of the larger township boundary remained unchanged.*
- 48.5 *Of importance is the fact that in combination, the developable floor area with regard to the 10 precincts or developable land parcels depicted on the 2017 precinct plan rendered 675 000m², as opposed to what had been originally approved by the municipality viz a viz the 2010 precinct plan namely 695 000m². notwithstanding the difference in the internal layout of the proposed road systems reflected on the two precinct plans, it is evident that what was previously approved with regard to the larger Extension 27 (i.e. 695 000m² of floor area) was effectively reduced to 675 000m²,*

whilst the combination of land use components envisaged for the larger development (the mix of land uses) remained substantially unchanged save for an increase in open space areas.

48.6 Following the approval of the 2017 precinct plan, the division of Extension 27 into the different independent township extensions namely Extension 34 up to and including 43 resulted in Extensions 38 up to and including 43 (a total of 6 separate township extensions) accounting for approximately 80% of the developable floor area which may be considered to be exclusively for mixed use purposes. Extensions 34 up to and including 37 (a total of 4 township extensions) account for approximately 20% of the developable floor area and is largely residential in nature.

49. Upon consideration of the foregoing there can form a Town Planning perspective be no basis on which these amendments could be described as being material in nature.

[41] Based on the above, I find that the respondents have not breached the terms of the Servitude Agreement or the Notarial Deed, even if the two Precincts plan are used as a method of comparison. The town planner reached the same conclusion, even having taking into account WEL's argument about so-called "mixed use" area.

[42] To sum up thus far, I conclude that:

- (a) The 2010 Precinct Plan did not form part of the Servitude Agreement or the Notarial Deed and neither were its contents incorporated therein.
- (b) The relevant plan applicable to the Servitude Agreement and the Notarial Deed was the Kayalami Centro Master Plan reflected as Annexures FA5 and CL9.
- (c) The development and construction by Century and Precincts are not substantially different from the roads and restrictions reflected in the Kayalami Centro Master Plan and therefore not in breach of the Servitude Agreement or the Notarial Deed.
- (d) Even if the conclusion in (a) were to be wrong or even if the contents of the Kayalami Centro Master Plan relating to precincts were to be extrapolated to accord with the 2010 Precinct Plan then the construction and development in accordance with the 2017 Precinct Plan would still not be so substantially different to constitute breaches of the Servitude Agreement and the Notarial Deed.

The school issue

[43] In the brochure obtained by WEL, the impression was created that Century (and/or Precinct) might construct or operate a school on the Mushroom Farm. Were this to be the case, it would constitute a breach of yet a further agreement reached between WEL and Century, regarding the possible construction of a school. This agreement was referred to as the “Cancellation Agreement”.

[44] The Cancellation Agreement was concluded on 5 July 2013. In it, the parties thereto agreed that Century “... *shall not construct (or allow to be constructed) or operate (or allow to be operated) a Primary (Grades 1 – 7) or*

Secondary (Grades 8 – 12) School on the Mushroom Farm property ...”. In terms of clause 5.2 of the Cancellation Agreement, Century undertook to bind all future purchasers to this restriction.

[45] The representation contained in the brochure referred to earlier which came into WEL’s possession, which might have created a fear that this restriction might be breached, was due to an architect’s impression expressed in the brochure pertaining to a “place of instruction”. In the letter from Century’s attorneys dated 27 June 2018 (referred to earlier and which also featured prominently in the review application under case no 90490/18 already mentioned above) it was confirmed that “... *no school development is envisaged by the respondent in terms of any “place of instruction” land use rights*”. This intention has expressly and repeatedly been confirmed in the affidavits subsequently delivered by Century. Factually also, there is no evidence that any construction of any school is taking place or is envisaged. Precinct has completed the development of Extensions 34 and 35 and no school has been constructed on those parcels of land. The further portions intended to be developed by Precinct are Extensions 36 and 37. These will contain 716 residential units and no construction of any school has been approved by the CoJ in these two extensions.

[46] In my view there appears to be no reasonable apprehension justifying the granting of an interdict against either of the respondents regarding the construction of a school as contained in the relief sought by way of WEL’s amended notice of motion, irrespective of any finding on the remainder of issues.

Specific performance

[47] Even if I were wrong in respect of the conclusions reached regarding the exclusion of the “limitations” introduced by the 2010 Precinct Plan (or the interpretation regarding the absence of such limitations in the Kayalami Centro

Master Plan) and wrong as to whether the 2017 Precinct Plan and the construction and development in terms thereof constitute “substantial” deviations or not, one still has to consider whether the relief claimed ought to be granted in the circumstances of this case insofar as the relief amount to a claim for specific performance. Although the relief is couched in the form of an interdict, ostensibly aimed at preventing a breach of contractual terms, upon a reading of the affidavits delivered on behalf of WEL, it appears that WEL seeks the demolition of existing works and an alignment thereof with the pre-amendment plans. This amounts to nothing other than an enforcement of a contract by way of a claim for specific performance.

[48] It is trite that a court has a discretion to grant or refuse an order for specific performance in appropriate circumstances³. There are no hard and fast rules as to what appropriate circumstances may be, but the starting point seems to be a comparison of the consequences of either granting or refusing such an order and which of the two options would lead to an “unduly harsh” result⁴.

[49] In the present case, Extensions 34 and 35 have been completely developed. This was done at the cost of approximately R600 million and comprise 672 residential units. All these units are occupied. Extensions 36 and 37 have also been approved in terms of the existing town planning scheme. These townships will comprise a further 715 residential units. The groundworks already completed cost some R36 million and construction agreements of some R163 million have already been concluded, accommodating approximately 267 workers on site daily. The aggregate costs of this part of the development

³ See: *Hagnes v King Williamstown Municipality* 1951 (2) SA 371 (A) at 398: “although a court will as far as possible give effect to a plaintiff’s choice to claim specific performance, it has a discretion in a fitting case to refuse to decree specific performance and leave the plaintiff to claim and prove his *id quod interest*”. See also *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) at 781 H-I.

⁴ See *Benson’s case* above at 783 C-D and *ISEP Structural Engineering and Planting (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 (4) SA 1 (A) at 5 E-H.

amounts to R 248 million and the daily operational costs of Precinct amount to R 2 million per day. WEL denies that the halting and setting aside of these developments, the roads (both access and internal) and the entire currently existing cadastral existence of the township (all duly registered in the offices of the Registrar of Deeds and the Office of the Surveyor General) would be as “cataclysmic” as the respondents claim, but the sheer extent thereof renders this denial somewhat hollow. On the other hand, the perceived apprehension of loss to be suffered by WEL which may result from the competing development on the Mushroom Farm, has nowhere been identified with any measure of certainty. WEL alleges that it might be impossible to calculate and that may be so, but the nature thereof has not even been explained.


[50] In the circumstances of this case, I find that is an appropriate case where a court should exercise its judicial discretion by declining to order specific performance, particularly in the somewhat vague and far-reaching fashion in which it has been claimed by WEL.

[51] It follows that the application should be dismissed. The further result hereof is that Century’s conditional counter-application (for a mandamus that WEL considers granting consent to the amendments brought about by the 2017 Precinct Plan), need not be entertained. In respect of the incidence of costs, I find no cogent reason to depart from the general principle that costs should follow the event.

[52] **Order**

The application is dismissed with costs, including the costs of two counsel, where employed by the respondents.

35



N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 29 August 2022

Judgment delivered: 3 October 2022

APPEARANCES:

For the Applicant:

Adv. L.G. F Putter SC together with

Adv. H. V Vorster

Attorney for Applicant:

Faber Goërtz Ellis Austen Inc., Bryanston
c/o John Broido Attorneys, Johannesburg

For the 2nd Respondents:

Adv. M. C Maritz SC together with

Adv. J. A Venter

Attorney for 2nd Respondents:

Adriaan Venter Attorneys, Pretoria

For the 3rd Respondents:

Adv. M C Erasmus SC together with

Adv. D. J van Heerden

Attorney for 3rd Respondents:

Weavind & Weavind Attorneys, Pretoria