THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 224/14

Reportable

In the matter between

WILLEM GERHARDUS WERNER	**APPELLANT**
and	
FLORAUNA KWEKERY BK	**FIRST RESPONDENT**
REGISTRAR OF DEEDS, PRETORIA	**SECOND RESPONDENT**
SURVEYOR-GENERAL, PRETORIA	**THIRD RESPONDENT**
JOHANNES JACOBUS HORN	**FOURTH RESPONDENT**

Neutral citation: *Werner v Florauna Kwekery BK* (224/14) [2015] ZASCA 46 (26 March 2015)

Coram: Mpati P, Majiedt & Pillay JJA; Schoeman and Van Der Merwe AJJA

Heard: 10 March 2015

Delivered: 26 March 2015

Summary: Servitude – access road – no notarial deed creating servitude - whether servitude area depicted on Surveyor-General's sub-divisional diagram, though not registered in the Deeds Office, constitutes servitude of right of way in favour of public.

ORDER

On appeal from: Gauteng Division, Pretoria (Preller J sitting as court of first instance): *Florauna Kwekery BK v Werner en Andere* (8555/2010) [2013] ZAGPPHC 307 (23 October 2013).

1 The appeal is upheld and the first respondent is ordered to pay the costs of the appeal.

2 The order of the court below is set aside and replaced with the following:

'1. Die aansoek word van die hand gewys met koste.

2. Die bevel nisi gemaak deur hierdie hof op 25 Oktober 2010, meer bepaald paragrawe 1.1 tot 1.4 daarvan, word bekragtig.

3. Die applikant word gelas om die koste van die teenaansoek te betaal.'

JUDGMENT

Mpati P (Majiedt and Pillay JJA and Schoeman and Van Der Merwe AJJA concurring):

[1] The question to be considered in this appeal is whether a basis exists for the registration of a servitude of right of way in favour of the public over certain fixed property registered in the names of the appellant's two minor children. Should the answer be in the affirmative a second question arises, namely, whether a defence of prescription can be invoked by the owners of the property concerned and, if so, whether the claim for registration of the servitude has become prescribed.

[2] On 10 February 2010 the first respondent brought an application in the North Gauteng High Court against the appellant, as first respondent, and the present second, third and fourth respondents, seeking the following order:

'1 Die reg van weg serwituut word bevestig oor die dienende eiendom, meer volledig beskryf as:

"Gedeelte 374 ('n Gedeelte van Gedeelte 91) van die plaas HARTEBEESTHOEK 303, Registrasie Afdeling J.R., Gauteng Provinsie";

2 Die derde respondent word gelas om die endossement *"gekanseller"* op Onderverdelings Kaart S.G. No. 1149/1998 te verwyder;

3 Die tweede respondent word gelas om die serwituut teen die titelakte van die dienende eiendom, Transportakte T 30319/2006, te registreer;

4 Die eerste respondent in sy hoedanigheid as voog van sy twee minderjarige kinders, word verplig om toe te sien tot die ondertekening van alle dokumentasie, ten einde die serwituut oor die dienende eiendom te registreer; welke serwituut soortgelyk in inhoud is aan Aanhangsel "G" tot die applikant se funderende verklaring.

5 Kostes betaalbaar gesamentlik en afsonderlik deur die Eerste en Vierde Respondente.

. . . .'

The fourth respondent, Mr Johannes Horn (Horn), was the previous registered owner of the property known as Portion 374, a portion of Portion 91 of the Farm Hartebeesthoek, 303, Gauteng Province, which is referred to in paragraph 4 of the order sought as the servient property ('dienende eiendom'). I prefer to refer to it, for convenience, as 'the property concerned' or 'Portion 374' and to the farm Hartebeesthoek 303 as 'the farm'.

[3] The deponent to the founding affidavit, Mr Marius Van Niekerk Louw (Louw), lives on Portion 264 of the farm. It is not in dispute that Horn's late father was the owner of Portion 91 of the farm, while Louw's late father (Louw senior) owned the adjacent land (the Louws' property) on the western side of Portion 91. The case relied upon by the first respondent in its founding affidavit for the order

sought before the court below may be summarised briefly as follows. The first respondent, represented by Louw senior, and Horn were the original developers of their respective properties. For this purpose both, individually, engaged the same town developer, Mr Paul van Wyk (Van Wyk). Permission in respect of each development was granted during 1996, with certain conditions. One of the conditions imposed by the Provincial Authority, according to the founding affidavit, was that provision had to be made for an access road from the development to the provincial road P106-1 between Pretoria and Brits (the Brits road).

[4] The registered owner of Portion 374 at that time, so it was alleged in the founding affidavit, was Horn. It was further alleged that according to a sketch plan JR303/92-93-7/95/02 the only permissible access to the Brits road was through Portion 374. In order to fulfil the condition relating to the access road a sub-divisional diagram S.G. 1149/1998, indicating a servitude area over Portion 374, was registered in the office of the third respondent, the Surveyor-General. Horn did not proceed with his planned development, namely establishing a filling (petrol) station and shopping centre on Portion 374, but caused a certificate of registration of title in respect of the property concerned to be issued in his name.[1] It was alleged, however, that the conveyancer had omitted to have the servitude over it, as indicated on the sub-divisional diagram, registered in the Deeds Office, but made the following entry on the back of the cover of the file in the Deeds Office:

'Serwituut op onderverdelingskaart sal geregistreer word by oordrag aan 'n 3de party. Noteer caveat asb.'

A caveat, number 19943/2003, was accordingly noted on 10 December 2003, which reads:

> 'By oordrag van bogenoemde eiendom [Portion 374] aan 'n 3de party vanaf SGT, moet . . . daar 'n voorwaarde in T/akte aangebring word wat handel oor serwituutnota op LG 1149/98.'

[1] The certificate of registration is dated 27 October 2003.

[5] In 2005 Horn sold Portion 374 to the appellant, who had it registered in the names of his two minor children, Armand Willem Werner and Ané Werner. No servitude was, however, registered over it, although the caveat was still recorded in the Deeds Office. It is common cause that at the time the registration of transfer of ownership was effected into the names of the appellant's minor children a servitude note on the sub-divisional diagram had been cancelled.[2] It was alleged on behalf of the first respondent that a dispute had developed between the appellant and Louw senior since 2006 relating to the issue of the registration of the servitude. Apparently, the Tshwane Metropolitan Council refuses to allow any transfer of property in the development (known as Ozoroa Park) before the access road has been built to completion. Moreover, the appellant has threatened to close down the access that has hitherto been enjoyed from the Ozoroa Park development.

[6] The appellant opposed the first respondent's application and filed, in addition, a counter-application, seeking orders, inter alia, prohibiting members of the public, in particular inhabitants of Ozoroa Park, from entering Portion 374 or from using any road across it or from using it as a dumping ground; an order in terms of which he is allowed to put up a fence around Portion 374 so as to close any road across it; declaring that no servitude exists over Portion 374; and an order that any *'*caveat*'* in respect of Portion 374 be removed or deleted from the third respondent's register. The basis of the appellant's opposition to the first respondent's application was that: (1) the first respondent did not rely on any agreement in terms of which a servitude had been created; (2) a caveat is merely an internal cautionary note for officials in the Deeds Office and does not by itself establish any rights or obligations on owners of land; and (3) the first respondent did not rely on prescription or any other original form of acquisition of rights for the registration of a servitude.

---

[2] The cancelled servitude note read:
'The figure abcdeBCD represents a Servitude area 7099 square meters in extent.' The total extent of Portion 374 is 1,8248 hectares.

[7] On 25 October 2010 a rule nisi was issued in favour of the appellant, calling upon all interested parties to show cause on or about 22 March 2011 why the orders sought by the appellant in his counter-application should not be granted. Despite the bases of the appellant's opposition to the application the court below (Preller J) dismissed the appellant's counter-application; discharged the rule and granted the following order in favour of the first respondent:

'1 . . .

2 Dit word verklaar dat 'n serwituut van reg van weg bestaan oor Gedeelte 374 ('n gedeelte van Gedeelte 91) van die plaas Hartebeeshoek 303, Registrasieafdeling JR, Gauteng Provinsie.

3 Die derde respondent word gelas om die beweerde deurhaling van die "servitude note" op diagram S.G. no. 1149/1998 te verwyder en die nota te herstel.

4 Die tweede respondent word gelas om die serwituut van reg van weg ten gunste van die algemene publiek ooreenkomstig aanhangsel "Y" hiertoe, aangepas waar nodig, te registreer teen die titelakte, T30319/06, van die eiendom vermeld in paragraaf 2 hierbo.

5 Die eerste respondent word gelas om in sy hoedanigheid as voog van sy twee minderjarige kinders alle dokumente te onderteken en alle stappe te neem wat nodig is vir die voormelde registrasie.

6 Die eerste respondent word gelas om in sy hoedanigheid as voog van die minderjarige eienaars van die dienende eiendom die nodige stappe te neem ten einde aan die vereistes van Artikel 80 van die Boedelwet (Wet 66 van 1965) te voldoen vir sover dit deur die tweede respondent vereis word vir doeleindes van die registrasie van die serwituut vermeld in paragraaf 4 hierbo.'

The appellant and fourth respondents were ordered, jointly and severally, to pay the costs of the application.

[8] The annexure "Y" referred to in paragraph 4 of the order is a draft notarial deed of servitude prepared in accordance with the terms of the order. The court

subsequently dismissed the appellant's application for leave to appeal. This appeal is with the leave of this court.

[9] In his answering affidavit the appellant confirmed that his two minor children took transfer of the property concerned on 16 March 2006. On 18 April 2006 his attorneys, on his instructions, dispatched a letter to Louw senior in which the latter was advised, inter alia, that the appellant intended to develop Portion 374; that owners or occupiers of plots situated to the north of Portion 374 were making use of an illegal access over it; that no servitude of right of way was registered against the property concerned in favour of the public or any one of the owners of the plots situated to the north of it; that as the developer of those plots he (Louw senior) should instruct the said owners or occupiers to cease using the access road; and that the appellant intended to fence in the property concerned. The appellant alleged further that during the negotiations that preceded the purchase of the property concerned Horn informed him, in the presence of his wife and brother, that he (Horn) had intended to develop Portion 374 and to establish a shopping centre on it, which would have meant that part of the property would be used for purposes of a right of way. He decided, however, not to proceed with the proposed development.

[10] The history of the development or subdivision of Portion 91 of the farm and the acquisition of a certificate of registration in respect of Portion 374 is set out in an answering affidavit deposed to by the Horn, a brief summary of which follows. After the passing of their parents in 1992 Horn and his four siblings approached Van Wyk and asked him to draw up a proposal in terms of which Portion 91 would be divided into four portions and to do a cost analysis for the development or part of it. In April 1994 he requested Van Wyk to apply, on his behalf, to the relevant authorities for business rights in respect of a filling station and a shopping centre to be operated North-West of Pretoria on Portions 1 and 2 of Portion 91. These

two portions were situated on either side of the Brits road. The approval of the application, subject to certain conditions, was communicated to Van Wyk by letter from the Western Services Council (Gauteng) – now Tshwane Metropolitan Council - dated 27 June 1996 (approval letter).

[11] With regard to access to the businesses in respect of which approval had been given, the following is contained in paragraph 9 of the approval letter:

'9. Die aansoeker moet skriftelik bevestig dat die voorwaardes soos gestel deur die Gauteng Provinsiale Regering: Departement Openbare Vervoer en Paaie, in hul brief gestel (verwysingsnommer HO6-11/1/1/3-303 JR Vol 3), nagekom sal word.

- Al die toegangspaaie, afleweringsarea en parkeerarea moet geplavei word.
- Die op- en aflaai van goedere mag slegs binne die grense van die eiendom plaasvind.'[3]

The letter containing conditions set or imposed by the Gauteng Provincial Department of Public Transport and Roads, referred to in the approval letter, was dated 15 February 1995 and addressed to the senior executive officer of the Council on Local Management Affairs, Pretoria. The letter, the subject of which is recorded in it as 'VOORGESTELDE KONSOLIDASIE EN ONDERVERDELING VAN GEDEELTES 92, 93 EN RESTANT VAN GEDEELTE 7 VAN DIE PLAAS HARTEBEESTHOEK 303 JR: DISTRIK PRETORIA',[4] was in response to an application by the first respondent in which it sought consent, from the relevant authorities, for the consolidation and subdivision of the land identified therein. The first two paragraphs of the letter read:

'U aansoek JR 303/93/-/7 wat by hierdie kantoor ingedien is op 9 Februarie 1995, het betrekking.

---

[3] Loosely translated the paragraph reads: 'The applicant must confirm in writing that the conditions imposed/set by the Gauteng Provincial Government: Department of Public Transport and Roads, in their letter (reference number HO6-11/1/1/3-303 JR Vol 3) will be fulfilled.

- All access roads, delivery area and parking area must be paved.
- The loading and off-loading of goods may only occur within the bounds of the property.'

[4] 'PROPOSED CONSOLIDATION AND SUBDIVISION OF PORTIONS 92, 93 AND THE REMAINDER OF PORTION 7 OF THE FARM HARTEBEESTHOEK 303 JR: DISTRICT OF PRETORIA.'

Hierdie Departement kan hierdie aansoek, soos getoon en gewysig op plan JR 303/92-93-7/95/02, steun slegs indien die onderstaande voorwaardes streng nagekom en daar in alle opsigte voldoen word aan die vereistes/voorwaardes hieronder gestel:'

Condition 3 of the conditions contained in the letter deals with the building or establishment of access roads to and from the proposed development as well as blockades to prevent uncontrolled access to the Brits road.

[12] Sub-paragraph 3.5 of condition 3 stipulated that the applicant, or owner, must, in collaboration with the local authority and co-users, plan, design, build and maintain, at own costs, an access road to the Brits road, which must be to the satisfaction of the Director responsible for maintenance in the Department of Public Transport and Roads. A further condition was that the right of access (to the Brits road) would be summarily withdrawn if the access road had not been built to completion by the time that any developed area became occupied.[5] (My translation.) These and other conditions, some of which being not particularly relevant to the issues in this appeal, applied in respect of Horn's application for the business development referred to above.

[13] It is not in dispute that Horn did not proceed with his envisaged development. This was due to his inability to meet the financial obligations which would be created as a result of the conditions imposed in respect of his proposed development. As has been mentioned above, he caused Portion 374 of the farm to be registered in his name and a Certificate of Registered Title T141333/03 was issued in his favour on 27 October 2003. The description of the property on the certificate is:

---

[5] 'Die aansoeker /eienaar moet in samewerking met die plaaslike owerheid en medegebruikers 'n toegang tot pad P106-1 (K14) op eie koste beplan, ontwerp en tot bevrediging van die Direkteur: Instandhouding van die Departement Openbare Vervoer en Paaie, bou en in stand hou.
. . .
Die reg tot toegang sal summier ingetrek word indien die aansluiting nie gebou en voltooi is teen die tyd dat enige ontwikkeling in gebruik geneem word nie.'

'Gedeelte 374 ('n gedeelte van Gedeelte 91) van die Plaas HARTEBEESTHOEK 303, REGISTRASIE AFDELING J.R., GAUTENG;

GROOT 1,8248 (EEN komma AGT TWEE VIER AGT) Hektaar

SOOS aangedui op die aangehegte Onderverdelingskaart L.G. Nr. 1149/1998 en GEHOU kragtens Akte van Transport T23173/1993

. . . .'

The conveyancer, who attended to the registration of transfer of Portion 374 into Horn's name, was Mr Erwin Fleischhauer (Fleischhauer). He deposed to an affidavit, which was annexed to the first respondent's combined answering and replying affidavit. (The first respondent's answering and replying affidavit was in response to the appellant's counter-application and answering affidavit.)

[14] In his affidavit Fleischhauer stated that as a consequence of the provisions of Regulation 60(2) of the Regulations promulgated under the Deeds Registries Act[6] Horn could not have the servitude, as depicted in the Surveyor-General's sub-divisional diagram S.G. 1149/1998, registered simultaneously with the registration of transfer of Portion 374. He accordingly personally entered the note relating to the *caveat* (referred to in para 4 above) on the back of the cover of the file in the Deeds Office. He did so in his capacity as Horn's conveyancer.

[15] A servitude in favour of the public is constituted by means of a grant of ownership of land by the state subject to the reservation of a so-called public servitude; by registration against the title deed of privately owned land; by will or legislation.[7] Its existence can also be asserted by proving *vetustas* or immemorial

[6] Act 47 of 1937.
[7] LAWSA, 2 ed, vol 24 para 625. See also the proviso in s 65(1) of the Deeds Registries Act 47 of 1937.

user[8], which does not apply in the instant case. The *onus* of proving entitlement to a servitude over a servient property rests on the person who asserts its existence.[9] It is not in dispute that at the time the appellant purchased the property concerned, some residents of Ozoroa Park enjoyed access to the Brits road through the said property. In his answering affidavit Horn explained this as follows:

'4.18 Tydens die onderverdeling en ontwikkeling in kleiner plotte deur die Applikant en sy voorganger is ek genader oor 'n vergunningspad oor my eiendom wat net tydens die onderverdeling gerieflik gebruik sou kon word.'[10]

He granted the temporary access sought, which now constitutes the access road the appellant wishes to close off.

[16] The first respondent responded in its combined answering and replying affidavit that the servitude area as shown on the sub-divisional diagram S.G. 1149/1998 provides access from the road network (padstelsel) of the development (ontwikkeling) to the Brits road; that the diagram had been registered in the office of the Surveyor-General in 1998; and that the servitude should have been registered over the property concerned when the Certificate of Registered Title was issued to Horn. The first respondent also stated that the grant of the orders it sought was of importance to it, because '[d]it is egter meer noodsaaklik vir die huidige – en toekomstige inwoners van die betrokke ontwikkeling, omdat dit hulle enigste toegang tot die provinsiale pad is'.[11] Except for stating that Horn's version was inaccurate, the first respondent significantly proffers no version as to how it came about that the residents of the Ozoroa Park development obtained permission to use an access road over the property concerned to the Brits road, other than relying on the sub-divisional diagram.

---

[8] See *De Beer v Van der Merwe* 1923 AD 378 at 386, where Kotze JA expressed the view that '[i]f it can be shown, or does appear how and when a particular work or construction was originally made, the doctrine of *vetustas* does not apply'.

[9] *Worman v Hughes & others* 1948 (3) SA 495 (A) at 501-2; *Tauber v Venter* 1938 EDL 82 at 87.

[10] Loosely translated: 'During the subdivision and development into smaller plots by the Applicant [Louw] and his predecessor I was approached for a concession (access) road through my property, which would be used conveniently only during the subdivision.'

[11] Quoted statement loosely translated: 'It is, however, essential for the current and future residents of the development concerned, because it is their only access to the provincial road.'

[17] Mr Alexis Nicolas Myburgh Sandenbergh (Sandenbergh), a practising professional land surveyor, confirmed in an affidavit which was annexed to the first respondent's combined answering and replying affidavit, that he surveyed the sub-division of Portion 91 of the farm on the instructions of his client, Horn. He consequently drafted certain diagrams, one of which being the sub-divisional diagram depicting the extent of Portion 374 and the servitude area at issue here. Another diagram depicted a stretch of servitude road running south between developed plots situated north-west of Portion 374 (the property concerned) and Portion 91 of the farm; then turning left at the north-west corner of Portion 374 and running along its northern boundary. That servitude road is described in the notarial deed of servitude that created it as

' 'n Ewigdurende Serwituut van Reg van Weg, groot 2,1736 (TWEE komma EEN SEWE DRIE SES) Hektaar aangedui deur die figuur ABCDEFGHJ op Serwituutdiagram S.G. 1147/1998'.

This appears to be a servitude of right of way created as such by notarial deed of servitude attested before Fleischhauer on 26 November 2002. Horn denied any knowledge of this notarial deed – it was executed not by him but by a Helen Analise Roodt, purportedly acting as agent on his behalf and on behalf of Louw senior, who was in turn representing the Ozoroa Park Homeowners Association. The notarial deed was registered on 27 October 2003. The third diagram depicted the servitude road running along the northern boundary of Portion 374, linking with the servitude area depicted on sub-divisional diagram S.G. 1149/1998, which covers all of 7099 square meters of the total extent of Portion 374 (being 1,8248 hectares). It should be mentioned that the southern boundary of Portion 374 borders on the Brits road.

[18] Sandenbergh stated further in his affidavit that he applied, on behalf of Horn, to the National Department of Agriculture for the Minister's consent for the sub-division of Horn's land. Ministerial consent was granted subject, inter alia, to

the stipulation that, simultaneously with registration of transfer, written proof must be submitted that there had been compliance with the conditions imposed by the Gauteng Provincial Administration.

[19] What must be clear with regard to Horn's application for the sub-division of formerly agricultural land is that if the sub-division was such that it would not be necessary to build roads for the provision of access to a national road, then the condition imposed by the Gauteng Provincial Administration, relating to the building of roads, would not apply. There is no evidence on the papers that a road network was necessary in his (Horn's) planned development. In the letter of approval (of his application for business rights) mention is made of all access roads (toegangspaaie), a delivery area and a parking area, which were all required to be paved. Mention is also made of the loading and off-loading of goods, which should only occur within the precincts of the property concerned.[12] In my view, the reference in the approval letter to access roads (toegangspaaie) is clearly a reference to access roads to and from the business undertakings in respect of which application had been made on behalf of Horn and not to access roads in favour of the residents of Ozoroa Park to and from the Brits road. There is accordingly no substance in the submission by counsel for the first respondent that the servitude depicted on sub-divisional diagram S.G. 1149/1998 represents the access road to be utilised by the owners and occupiers of Ozoroa Park and the general public. The servitude area would have provided access only to the envisaged businesses either from the Brits road or from the other servitude road from the north of Portion 374.

[20] Annexure 'N' to the founding affidavit, which is referred to in the conditions imposed by the Provincial Administration, is a plan 'JR 303/92-93-7/95/02'. With reference to the plan, condition 3.2 stipulates that with the implementation of the

[12] See para 9 of the approval letter quoted in para 11 above.

roads PWV2 and PWV7, access to those planned roads must be obtained through the planned access and service roads as shown on it (the plan). In my view, the plan concerned refers to some future roads still to be built or extensions to an existing road. The position or location of Portion 374 is unascertainable from the plan, which counsel seem to rely on for his submission that I have just rejected as being without substance. Accordingly, no conditions were ever imposed on Horn, in my view, to provide access for the Ozoroa Park residents or the general public to the Brits road. If that were the case it would be tantamount to an expropriation of part of Horn's property without compensation, in violation of his property rights enshrined in section 25 of the Constitution.

[21] In his answering affidavit Horn averred that the servitude was merely connected to the business rights with which he did not proceed. Paragraph 16 of the approval letter reads:

'Indien die regte nie uitgeoefen word binne twee jaar vanaf datum van goedkeuring nie, of sodanige verlengde tydperk soos deur die Westelike Gauteng Diensteraad bepaal, sal die voormelde regte verval.'

There is no evidence of any extension ever having been requested. Horn accordingly averred, correctly so in my view, that the business rights he had obtained had lapsed and so had the condition attached thereto, of having to provide access (in the form of a servitude) to his property where the businesses were to be established. And the mere fact that a servitude area is depicted on the sub-divisional diagram of the Surveyor-General relating to Portion 374 does not convert what has been a temporary access road into a servitude of right of way in favour of the public. (*Cf Ethekwini Municipality v Brooks and others* 2010 (4) SA 586 (SCA) para 32.)

[22] With regard to the cancellation of the servitude note on sub-divisional diagram 1149/1998 Horn stated in his affidavit that this occurred on 23 November 2005 when he visited the office of the Surveyor-General upon the advice of an

official in the Deeds Registry. He had gone to the Deeds Registry after he had fielded enquiries and claims that a servitude of right of way existed over his property, Portion 374. There he was informed that no servitude burdened the property concerned and no mention was made of a *caveat*. At the office of the Surveyor-General he informed a certain official that he did not proceed with the business development for which he had obtained the necessary consent. The official then deleted the broken lines depicting the servitude and another deleted the servitude note on the diagram.

[23] In a supplementary affidavit deposed to on 19 February 2011 Sandenbergh testified that on 21 March 2011, following an earlier meeting with Horn, he dispatched a letter to the latter in which he confirmed his opinion that the servitude in issue was still in operation. He referred, in the letter, to regulation 21(4) of the Regulations promulgated under Land Survey Act 8 of 1997,[13] which provides that when a servitude is not registered in the Deeds Registry but its existence is indicated by a note on a registered diagram, the note 'shall not be altered or omitted except as a result of an order of a competent authority . . . '. It appears therefore that the cancellation of the servitude note on the sub-divisional diagram may well have been unlawful. It is, however, not necessary to say more on this issue.

[24] The conclusion I have reached in paragraph 21 above renders it unnecessary for me to consider the submission by counsel for the first respondent that the appellant had prior knowledge of the servitude of right of way over Portion 374. It also renders unnecessary a consideration of the defence of prescription raised by the appellant and entitles him, insofar as it may be necessary, to the order sought in his counter-application for the removal or cancellation of the 'caveat' or servitude note contained in sub-divisional diagram S.G. 1149/1998.

[13] The regulations came into effect on 1 October 1997.

[25] In the result the following order shall issue:

1 The appeal is upheld and the first respondent is ordered to pay the costs of the appeal.

2 The order of the court below is set aside and replaced with the following:

‘1. Die aansoek word van die hand gewys met koste.

2. Die bevel nisi gemaak deur hierdie hof op 25 Oktober 2010, meer bepaald paragrawe 1.1 tot 1.4 daarvan, word bekragtig.

3. Die applikant word gelas om die koste van die teenaansoek te betaal.’

_____

L MPATI

PRESIDENT

APPEARANCES

For appellant	J G Bergenthuin SC
Instructed by:	Van Zyl Le Roux Inc, Pretoria
	McIntyre & Van Der Post Attorneys, Bloemfontein
For first respondent	J G Blignaut
Instructed by:	Nöthling Attorneys, Pretoria
	De Villiers Attorneys, Bloemfontein