[1] **SAFLII Note:** Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and SAFLII Policy

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No 15523/2013

In the matter between:

ELIZABETH DOROTHY BAARTMAN	Applicant
And	
SARAH JANE STUBBS	First Respondent
GREGORY WALTER MONCRIEFF LARGIER	Second Respondent
THE REGISTRAR OF DEEDS	Third Respondent
JACQUELI WYLANDA RUBENSTEIN	Fourth Respondent

Court: RILEY AJ
Heard: 2 December 2014
Delivered: 13 March 2015

JUDGMENT DELIVERED ON 13 MARCH 2015

RILEY AJ:

1. The applicant, who is the registered owner of Erf 985, Hout Bay, commonly known as 1… U…. Street, S…. E…... H….. B.., held by her in terms of title deed T60854/2011 and which was registered on 1 November 2011, has applied to this court for an order: -

   '(a) Declaring that the title deed condition E, contained in the title deed (T111355/2004), of the property (Erf 983, Hout Bay) registered in the name of the first and second respondents namely that "(no) structure whatsoever nor tree shall be erected or planted on the property which would obstruct or partially obstruct the sea views from the existing structure on Erf 985 Hout Bay" also applies to the wild olive tree which had already been planted at the time of the imposition of the condition.

   (b) Ordering the first and second respondent to trim the wild olive tree (or any other vegetation) on their property, Erf 983, Hout Bay, so as not to obstruct or partially obstruct the sea views from the existing structure.

   (c) Ordering the first and second respondents to pay the costs.

   (d) Granting the applicant such further and/or alternative relief as this Honourable Court may deem fit.'

[2] The third respondent was served with the application as an interested party, but no relief is sought against third respondent.

<u>The background and facts</u>

[3] Before dealing with the background and facts underpinning this application I wish to express my regret that the parties did not see it fit to resolve this matter in a manner other than by way of litigation. In my view this is indeed a matter which was eminently suited to be resolved by way of mediation or another mechanism other than litigation.

[4] At the time that the application was brought the first and second respondents were the registered owners of Erf 983 Hout Bay, also known as 8 Union Street, Scott Estate, Hout Bay ('the property'), held by them in terms of registered title deed T111355/2004 registered on 11 November 2004. Union Street runs in an east to west direction and the property, abuts the applicant's property i.e Erf 985 Hout Bay, on its western border.

[5] The following condition is registered against the title deed of Erf 983 in favour of the applicant's property:

> 'E. Subject further to the following conditions imposed by the Transferor in favour of Erf 985 Hout Bay held by Deed of Transfer No T60854/2011.
>
> No structure whatsoever nor tree shall be erected or planted on the property which would obstruct or partially obstruct the sea views from the existing structure on Erf 985 Hout Bay.'

[6] It is common cause that the 'transferor' referred to in clause E above is Diann Soutter ('Soutter'), who held the property in terms of title deed T111356/2011 and who was also previously the registered owner of Erf 985 as well as Erf 986 (also known as 12 Union Street).

[7] It is further common cause that Soutter sold both Erven 985 and 983 on 15 April 2004 as follows:

(1) Erf 985 was sold to Stephen and Sue Forster ('the Forsters'), applicant's predecessors in title.

(2) Erf 983 was sold to the first and second respondents.

(3) The Forsters would also have purchased Erf 983, had the sale to first and second respondents fallen through.

[8] It is not disputed that the Forsters found that one of the main attractions to 10 Union Street was the fact that it had a 'pretty' sea view from the upstairs part of the original house. It appears that they knew that Erf 983 was undeveloped and bearing in mind that this property would be developed in the near future, they ensured that it be made a condition of the sale of Erf 983 that the existing sea view from the upstairs part of the original building be protected from obstruction by any development of the property in front. A stipulation to this effect was duly incorporated in clause 2 of the addendum to the deed of sale entered into between Diann Soutter and the first and second respondents and registered against the title deeds of Erven 983 and 985.

[9] Clause 2 of the addendum to the deed of sale reads as follows:

> ' 2. No structure whatever and or tree shall be erected or planted on the property which would obstruct or partially obstruct the sea views of the existing structure on Erf 985. These conditions will be registered in the Title Deed and, will be in favour of Erf 985 Hout Bay'.

[10] Photographic evidence dating back to May 2005 of photographs commissioned by the Forsters, clearly show a nascent wild olive tree which does not obstruct the sea views at all.

[11] At the time that the first and second respondents concluded the agreement of sale with the Soutters, in terms of which they purchased from the latter Erf 983, it must have been clear to the first and second respondents that it was the intention of the Forsters to have a clear and unobstructed sea view from their property. This is evidenced by the registration of the condition against the title deed hereinbefore referred to.

[12] It is further clear that at the time of purchasing Erf 985 from the Forsters on 25 July 2011 and concluding the sale, the applicant's chief concern was the view that she would have from her property, of the sea, the

beach and across the bay of the village in Hout Bay where she grew up. Accordingly it was an express condition of the sale of Erf 985 in terms of clause 19.1.iii that:

> '…*the seller will provide the purchaser with proof that property in front (known as 8 Union) has a title deed restriction which would prevent them from erecting any building that would in any manner obscure or take away the current sea view of 10 Union as shown in annexure D attached hereto. The seller agrees to provide the purchaser with a copy of the title deeds, photographs of sea view and plans of 10 Union's original house.*'

[13] It is common cause that the applicant and the Forsters thereafter concluded an addendum to the deed of sale on 11 August 2011 and that the addendum recorded the views at that time and that attached to the addendum are two photographs depicting the view as it then was in August 2011.

[14] The addendum to the deed of sale reads as follows 'This *serves to confirm that the current view enjoyed from 10 Union Street, as per attached pictures from the property is the view referred to in the servitude registered in favour of 10 Union Street and is registered over 8 Union Street*'.

[15] In terms of clause D of the title deed held by the Forsters, Erf 985 had a title deed condition registered as follows:

> '*By virtue of the deed of transfer No T111356/2004, the within property is entitled to the following condition: No structure whatsoever nor tree shall be erected on (sic) planted on Erf 983 Hout Bay held by Deed of Transfer No T111356/2004, which could obstruct or partially obstruct the sea views from the existing structure on the within property*.'

[16] This condition is also contained in applicant's title deed as clause D and provides that:

> '*No structure whatsoever nor tree shall be erected or planted on Erf 983 Hout Bay, held by Deed of Transfer No T111356/2004, which could obstruct or partially obstruct the sea views from the existing structure on the within property.*'

[17] It is further common cause and not in dispute that there are also conditions registered in favour of Erf 986 Hout Bay, which are to the effect that 'no trees may' be planted on the servient tenement (i.e Erf 983, Hout Bay) which will have the effect of obstructing partially or otherwise the sea view from the dominant tenement.

[18] On 11 November 2004 the first and second respondents, as the owners of Erf 983, Hout Bay registered a notarial deed of servitude in favour of Erf 986 in terms whereof 'no trees may be planted on the servient tenement which will have the effect of obstructing partially or otherwise the sea view from the dominant tenement.'

[19] On the evidence I am satisfied that, just like the Forsters, the applicant as well as the the owner of Erf 986, one David Mohr, wanted to entrench the right not to have their sea view obstructed, partially or otherwise, i.e. by construction, building and/or the planting of trees on the servient tenement.

[20] It is not in dispute that by the time that the applicant launched this application in this court, the olive tree depicted in the photos taken in May 2005 and in the annexure to the addendum of the sale agreement applicant had entered into, had grown substantially, had increased in size and indeed obstructed the applicant's view of the sea, the beach and the village across the bay.

[21] Around 19 February 2013 the applicant, the first and second respondents, together with a certain Kurt (first and second respondents' tree expert), met to discuss the wild olive tree and the two trees that the first and second respondents had planted on their property. Applicant offered to trim

the top of the tree but first and second respondents rejected this offer. The first and second respondents agreed that the two trees planted by them, would eventually obscure the view from applicant's house. First and second respondents shortly thereafter, on their own accord, removed the two trees they had planted. Shortly after this meeting, first and second respondents presented applicant with a quote for trimming the whole tree. The first and second respondents were effectively not prepared to allow that only the top of the tree be trimmed or to accept any responsibility for maintaining the wild olive tree. After the discussions about how to deal with the offending olive tree, the applicant's attorneys addressed a letter to the first and second respondents demanding that they comply with the obligation imposed upon them in terms of condition E to their title deed.

[22] The relevant parts of the letter, which is dated 16 April 2013, read as follows:

> '… *As you are aware there is a title deed condition registered against the title deed of Erf 983 in favour of Erf 985 in terms whereof "no structure whatsoever nor tree shall be erected or planted on the property which would obstruct or partially obstruct the sea views from the existing structure on Erf 985 Hout Bay." (Condition E as contained in the title deed).*
>
> *As you are aware the wild olive tree on Erf 983 is obstructing the sea views from the first floor balcony on Erf 985.*
>
> *This obstruction of our client's view is in contravention of the title deed condition. We hereby demand that you comply with the obligations imposed on you in terms of condition E and that you restore to our client her sea view within a period of thirty (30) days.*
>
> *Kindly note that should you fail and/or neglect to comply with your obligations as set out hereinabove, our instructions are to take the necessary steps to protect our clients' interests …'*

[23] The first and second respondents responded to this letter and confirmed that they were aware of the conditions registered against Erf 983, but contended then, as was also contended on their behalf in this court, that as the wild olive tree was already an established tree at the time the conditions were registered, there was no contravention of the title deed condition. The first and second respondents offered to have the tree trimmed at the applicant's costs but with their choice of tree specialist. The applicant did not accept this proposal.

The *locus standi* of the first and second respondents and the joinder of the fourth respondent:

[24] The *locus standi* of the first and second respondents to oppose the relief sought in this application, in particular after they had sold the property to the fourth respondent, has been challenged by the applicant.

[25] In the aforegoing paragraphs I have set out briefly how and under what circumstances the first and second respondents became party to the application. It is necessary to further set out the chronology of the relevant events as they unfolded so that the matter can be viewed in its proper perspective.

[26] The following facts appear to be common cause:

1. When this application was launched on 19 September 2013 the first and second respondents were the registered owners of Erf 983, Hout Bay.

2. On 10 October 2013 the first and second respondents gave notice of their intention to oppose the relief sought by the applicant.

3. On 19 December 2013 the applicant's attorney of record wrote to the first and second respondents' attorney of record and advised *inter alia*:

> '…Finally, we are also advised that your clients placed their property in the market. Kindly confirm that your clients will inform any prospective purchaser of the pending litigation.'

4. On 2 March 2014 first and second respondents sold Erf 983 Hout Bay to the fourth respondent.

5. On 10 March 2014 the first and second respondents, after having sold their property, deposed to their answering affidavits.

6. Transfer and registration of the property into the fourth respondent's name took place on 23 June 2014.

[27] The applicant in due course filed replying affidavits and on the 19th August 2014 the matter was by agreement between the parties allocated by the Judge President for hearing on 16 September 2014.

[28] On 26 August 2014, the applicant's attorney of record addressed a further letter to the first and second respondents' attorney of record which stated inter alia that:

> '… consequent to the meeting between our respective clients counsel and the Judge President on 19 August 2014 your clients' counsel informed us that the property known as Erf 983, Hout Bay ('the property') has been sold by your clients.
>
> 3. After conducting a deeds office search on the property we established that the property has been sold to one Jacqueli Wylanda Rubenstein ('Ms Rubenstein') on 2 March 2014.

4. In view of the aforesaid, we are constrained to record that:

4.1 Your clients deposed to their answering affidavits on 10 March 2014;

4.2 Notwithstanding the fact that the property was sold before your clients deposed to their affidavits they failed to mention the sale of the property;

4.3 At the meeting with the Judge President your counsel failed to inform the Judge President that the property that forms the subject matter of the litigation, was sold and transferred;

4.4 As the sale of the property obviously has a bearing on the future conduct of this matter, and in any event, will necessitate a joinder application, in our view this had to be disclosed to the Judge President.

4.5 Due to your clients failure to inform our client of the sale of the property, our client can only now proceed with a joinder application which may have an impact on the hearing date of the matter;

As you are also aware we requested in our e-mail of 19 December 2013 that you confirm that you will inform any prospective purchasers of the pending litigation.

Kindly thereafter furnish us, as a matter of urgency, with a copy of the deed of sale entered into between your clients and Ms Rubenstein …'

[29] In a letter dated 27 August 2014, first and second respondents' attorney undertook to 'revert in respect of the issues raised …' to the letter dated 26 August 2014 and reserved the first and second respondents' rights.

[30] The fact of the matter is that first and second respondents' attorney did not 'revert' in respect of the issues raised (as they undertook to do), nor did they provide applicant or her attorney with a copy of the deed of sale.

[31] From the aforegoing it is clear that the allocation of the trial date took place during a meeting with the Judge President on Tuesday, 19 August 2014. Immediately after this meeting, applicant's legal representatives were advised by counsel representing the first and second respondents that they had sold the property. In my view it is reasonable to find that this was the first formal notification by the first and second respondents to the applicant of the sale of the property. Upon receiving this information applicant's attorneys conducted a search at the deeds office on 21 August 2014 and established from the records that the first and second respondent had indeed sold their property to the fourth respondent on 2 March 2014 and that registration and transfer had taken place on 23 June 2014.

[32] It is clear from the letter dated 19 December 2013 addressed to respondents' attorney that applicants attorney had specifically requested of first and second respondents to advise any prospective purchaser of the pending application in this court.

[33] It is necessary to point out at this stage that despite the fact that first and second respondents had sold their property to the fourth respondent, no mention whatsoever is made of this 'very crucial fact' in the answering affidavit(s) of the first and second respondents, which was deposed to on 10 March 2014, i.e. eight days after the date given by the third respondent as the date of sale.

[34] The applicant thereafter contacted the fourth respondent, in an 'endeavour to engage her in a meaningful resolution of the application'. Fourth respondent's response was that the dispute had nothing to do with her and that she had her financial obligation to attend to and undertook to discuss the matter with first and second respondents. It is not in dispute that nothing further came of this interaction between the fourth respondent and applicant.

[35] Due to the fact that the fourth respondent now had a direct and substantial interest in the subject matter of the application, an application to join her was launched on 2 September 2014. In her affidavit in support of the joinder application, the applicant clearly states that the presence of the first and second respondents in the main application other than in respect of costs, falls away. (My emphasis). In my view this was the clearest indication to the first and second respondents that applicant no longer had the intention of seeking the relief originally sought from them in the notice of motion.

[36] The application to join the fourth respondent was not opposed and an order was granted to join the fourth respondent on 23 October 2014.

[37] On 12 November 2014 the applicant's heads of argument were filed. Paragraph 17 thereof is to the effect that, given the fact of the sale and transfer of Erf 983 to the fourth respondent, who had stated her intention to abide the decision of this court, it was not clear on what basis the first and second respondents initially opposed the application and continued to do so. (my emphasis)

[38] On 20 November 2014 the fourth respondent served a notice to abide which is to the effect that she 'undertakes to abide the decision of the above Honourable Court in the above matter and notes that such application is opposed by the first and second respondents'.

[39] On the same day the first and second respondents filed their heads of argument. Nowhere in their heads of argument is there any response to paragraph 17 of the applicant's heads of argument.

[40] Considering the developments in the matter (i.e. the sale of the property to the fourth respondent and fourth respondent's intention to abide the decision of the court), at the conclusion of argument by counsel for both parties, I invited counsel to provide me with additional submissions on the

locus standi of the first and second respondents to oppose the relief sought by the applicant.

[41] During argument Mr Olivier, on behalf of the applicant, contended that after concluding the sale agreement with the fourth respondent, the first and second respondents no longer had a legal interest in the subject matter of the litigation which may be prejudicially affected by a judgment. He contended further that since it was clear that the fourth respondent had decided to abide the decision of this court, neither first nor second respondent or anyone else is permitted to oppose the relief sought. In short he submitted that the first and second respondents had no *locus standi* to oppose the relief sought.

[42] Mr Bruce-Brand, for the first and second respondents, on the other hand contended that once the applicant had become aware of the change in ownership of Erf 983, applicant had the ideal opportunity to release the first and second respondents from the matter by substituting fourth respondent in their place. He submitted that the applicant in instituting the proceedings against them had bound them to the matter until the proceedings are withdrawn or there is judgment. He was adamant that applicant ought to have withdrawn the proceedings against first and second respondents and that the only issue left should have been argument about costs.

[43] In his supplementary heads of argument Mr Bruce-Brand submitted that once litigation has been commenced there is a *lis* before the court on the merits and costs, and that even if the subject matter of the *lis* is ended, whether by withdrawal of the legal proceedings or otherwise, the first and second respondents are entitled to a judgment in their favour and at the least for the costs of the application.

[44] With reference to the fourth respondent’s notice to abide he submitted that the fourth respondent had made it clear that she knew the first and second respondents were opposing the application and that implicit from this is the following:

1. She approved the continuation of their opposition to the application; and

2. Her undertaking was to abide whatever decision the court makes when considering the opposed application.

[45] Rule 41 of the Uniform Rules of Court provides that a party wishing to withdraw against another party against whom an application has been instituted, must deliver a notice of withdrawal to this effect. See Herbstein & Van Winsen *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5th Edition ch 30 at p749.

[46] It was contended on behalf of the first and second respondents that the applicant could have and should have withdrawn the application against them when applicant became aware of the fact that they had in fact sold the property or at the latest when applicant joined the fourth respondent to the matter. It is correct that the applicant did not formally withdraw the application against the first and second respondents. It is further correct that the applicant did not formally apply for an amendment to the prayers in the notice of motion.

[47] In her affidavit to the joinder application, applicant makes it abundantly clear that the presence of the first and second respondents falls away and that no substantive relief was being sought against them, aside from costs. I am satisfied that even though the applicant did not formally apply for an amendment to the prayers in the notice of motion and even though she did not formally withdraw the application against the first and second respondents, applicant had effectively formally notified the first and second respondents that she was no longer proceeding against them as far as the substantive relief was concerned. I find support for my finding in the approach adopted by Meer J in *Bonne Veleur CC v Wood 2007 JDR 0336 (C)* where she held that the applicant had effectively withdrawn his main application, despite not having entered a notice of withdrawal, by the

amendment of the applicant's claim, wherein the applicant abandoned the substantial relief sought against the respondent, leaving only the question of costs for decision. The facts in that matter are analogous to the facts in the present matter and similarly dealt with a situation where the respondent sold the property which was the subject matter of the dispute consequent to the institution of the application, thus rendering the relief specifically sought against the respondent effectively academic. Even though in that matter there was an amendment of the applicant's claim, I am of the view that the approach adopted by Meer J is sound and correct and such approach is equally applicable in the present matter. In my view it was accordingly not necessary for applicant to formally withdraw the application against the first and second respondents.

[48] I turn now to deal with the general principles regarding *locus standi* which are well established.

[49] In *Dalrymple and others v Colonial Treasurer 1910 TS 372 at 390*, the court held that:

> '*The person who sues must have an interest in the subject matter of the suit, and that interest must be a direct interest … Courts of law … are not constituted for the discussion of academic questions, and they require the litigant to have not only an interest, but also an interest, that is not too remote.*'

And further at 390:

> '*Whether the interest is remote or not depends upon the circumstances of the case, and no definite rule can be laid down*.'

[50] In *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* 1988 (3) SA 369 (A) at 388B Rabie ACJ expressed the general principle of our law as follows:

> '*A person who claims relief from a court in respect of any matter must, as a general rule, establish that he has a direct interest in that matter in order to acquire the necessary locus standi to seek relief*.'

[51] In dealing with the concept of *locus standi* the following was said in *Jacobs en 'n ander v Waks en andere 1992(1) SA 521 (A) at 533J -534E*:

> '*In die algemeen beteken die vereiste van locus standi dat iemand wat aanspraak maak op regshulp 'n voldoende belang moet hê by die onderwerp van die geding om die hof te laat oordeel dat sy eis in behandeling geneem behoort te word. Dit is nie 'n tegniese begrip met vas omlynde grense nie. Die gebruiklikste manier waarop die vereiste beskryf word, is om te sê dat 'n eiser of applikant 'n direkte belang by die aangevraagde regshulp moet hê (dit moet nie te ver verwyderd wees nie); andersins word daar ook gesê, na gelang van die samehang van die feite, dat daar 'n werklike belang moet wees (nie abstrak of akademies nie), of dat dit 'n teenswoordige belang moet wees (nie hipoteties nie) - … .' In die omstandighede van die huidige saak is dit veral die vereiste van 'n direkte belang wat op die voorgrond staan. Wat dit betref, is die beoordeling van die vraag of 'n litigant se belang by die geding kwalifiseer as 'n direkte belang, dan wel of dit te ver verwyderd is, altyd afhanklik van die besondere feite van elke afsonderlike geval, en geen vaste of algemeen geldende reëls kan neergelê word vir die beantwoording van die vraag nie (sien bv Dalrymple and Others v Colonial Treasurer 1910 TS 372 per Wessels R op 390 in fine, en vgl Director of Education, Transvaal v McCagie and Others 1918 AD 616 per Juta Wn AR op 627). Vorige beslissings kan behulpsame algemene riglyne vir bepaalde soort gevalle aandui, maar meestal het dit weinig nut om die besondere feite van een geval te vergelyk met dié van 'n ander.*'

[52] In *Vandenhende v Minister of Agriculture, Planning and Tourism, Western Cape, and others* 2000 (4) SA 681 (C) at 686 J – 687 A Thring J was of the view that the most useful source of guidance as to the approach which should be adopted in matters of this nature is to be found in the

decisions of our courts which over the years have dealt with the intervention and joinder of parties.

[53] In that matter, the applicant, who was the prospective purchaser of the property that formed the subject matter of the claim, sought an order for review and setting aside of the decision of the first respondent to dismiss an appeal against him against the decision of the local authority (the third respondent) refusing a rezoning application in respect of certain property owned by the sixth and seventh respondents (the sellers) in the matter. In coming to the conclusion that the applicant was not entitled to join or intervene as a co-applicant in the initial application to the local authority for the rezoning of a property (in terms of section 17(1) of the relevant Ordinance) as he was not and had never been the owner of the property, Thring J placed reliance on what was stated by Corbett J (as he then was), when he held in *United Watch & Diamond Co (Pty) Ltd and others v Disa Hotels Ltd and another* 1972 (4) 409 (C) at 415A-B that:

> '*In my opinion, an applicant for an order setting aside or varying a judgment or order of Court must show, in order to establish locus standi, that he has an interest in the subject-matter of the judgment or order sufficiently direct and substantial to have entitled him to intervene in the original application upon which the judgment was given or order granted*.'

[54] It is clear from the authorities that it is not every interest in a dispute which will entitle a person to join or be joined in legal proceedings. This principle is clearly illustrated in *Sheshe v Vereeniging Municipality 1951(3) SA 661 (A) where at 667 A* the proposition was rejected that:

> 'a *plaintiff who brings an action for the ejectment of his tenant must necessarily join as defendants his tenant's milkman, vintner or charwoman. We have had numbers of actions for ejectment against the lessees of hotels and blocks of offices. In no case that I can recall to mind was it even suggested that the plaintiff was bound to join the lodgers, boarders or sub-lessees of offices*.'

[55] Having regard to the authorities hereinbefore referred to and applying them to the present matter, I am satisfied that first and second respondent are required to show that they had or continued to have 'a direct and substantial interest', ''n direkte en wesenlike belang … by die uitslag van die geding'. See *Kock & Schmidt v Alma Modehuis (Edms) Bpk* 1959 (3) SA 308 (A) at 318 E-H. It is further clear that that interest must be 'a legal interest in the subject matter of the action which could be prejudicially affected by the judgment of the court deciding the dispute. 'See *Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O) at 167E – 170H**.** The court held further that it is not sufficient for the interest concerned to be a merely financial or commercial one.

[56] Applying the aforesaid legal principles to the facts of this matter it is clear that first and second respondents persisted in their opposition to the relief sought by the applicant notwithstanding the fact that by the time that they sold the property, or at the least by 23 June 2014, i.e. when transfer and registration of the property was effected in the name of the fourth respondent, they had no interest, both legally and/or financially, in the property. The decision by the first and second respondents to persist in their opposition of the relief sought stands in stark contrast to the approach adopted by of the fourth respondent. The fourth respondent is the current legal owner of the property which is the subject matter of the litigation, she has the real interest, and is ultimately the affected party in this matter, yet she gave notice to abide the decision of this court.

[57] It is necessary to emphasize that apart from abiding the decision of this court and noting that the application is opposed by the first and second respondents, no evidence has been placed before this court that the first and second respondents are authorised in law by the fourth respondent to oppose the relief sought by the applicant. Her decision to abide the decision of this court and the basis upon which it is done is clear and unambiguous.

[58] Accordingly there is no foundation in fact or law for the contention that it was implicit in the fourth respondent's conduct in abiding the decision of this court, that she approved the continuation of the first and second respondent's opposition to the application. The fact that the fourth respondent 'notes' that the application is opposed by the first and second respondent can never on a plain meaning of the words be understood to mean that she agreed to abide the decision of the court, on the basis that she agreed with the first and second respondents' opposition of the relief sought by the applicant. This argument must accordingly be dismissed.

[59] It must further be pointed out that at a very early stage, when it came to her attention that the first and second respondents were selling the property, the applicant made it clear that she could not understand why the first and second respondents were still opposing the relief sought. When she deposed to her affidavit in the joinder application in respect of the fourth respondent she states clearly that *'the presence of the first and second respondents to the main application, other than in respect of costs, falls away*'. What is disconcerting is the fact that neither Mr Bruce-Brand nor the first and second respondents' attorneys of record informed the Judge President of this Honourable Court that the first and second respondents had sold the property at the time when the parties were discussing the allocation of a trial date. Of further concern to me is the reluctance on the part of the first and second respondents to provide the applicant's attorneys of record with a copy of the deed of sale when requested to do so. I will deal further with the approach adopted by first and second respondents to this matter at a later stage.

[60] On the evidence it is clear that even though the first and second respondents acquiesed to the joinder application they continued opposing the relief sought, when it must have been clear to any reasonable person that the relief was only being sought against the fourth respondent.

[61] I am on the whole satisfied that when the first and second respondents sold the property concerned to the fourth respondent, or, at the least when registration and transfer took place in the name of the fourth respondent, the subject matter of the dispute between them and the applicant was essentially moot and no longer justiciable between them.

[62] In light of the above and in the absence of any opposition by the fourth respondent to the relief sought by the applicant, it follows that whatever order I make herein can therefore only operate as and against the fourth respondent.

The approach followed in the interpretation of servitudes:

[63] Notwithstanding what I have found hereinbefore, it is necessary to consider the law relating to the interpretation of servitudes as it is the interpretation of this servitude which lies at the heart of the dispute between the parties.

[64] In *Royal Hotel Riversdale (Pty) Ltd v Simon NO and Another* (713/11) [2012] ZASCA (18 September 2012), dealing with the interpretation of a servitude, the court held (at paragraph [12] – [14]) that:

> *"[12] The task of the court is to determine the intention of the parties to the agreement that created the servitude. In so far as the language used by them is clear and unambiguous effect must be given to it. But even clear expression can benefit from an appreciation of its context in the written agreement against the background of circumstances relevant to its conclusion provided that the plain meaning is not thereby contradicted or varied.*
>
> *[13] What principles must one apply in interpreting the servitude, recognising that it is, in essence, only a contract to achieve a particular end? It is unnecessary to rehash all the conflicting*

approaches. They are adequately debated by my colleague Wallis JA in his article, What's in a word? Interpretation through the eyes of ordinary readers 127 SALJ (2010) 673, and do not give rise to controversy in this appeal.

[14] It is sufficient for present purposes to examine the combined effect of the relevant facts present to the minds of the parties at the time of contracting, and the language adopted by them in the context of their contract as a whole. These are the signposts to their common intention and, as will become apparent, they point to a single destination."

[65] In *Kruger v Joles Eiendomme (Pty) Ltd and Another* 2009 (3) SA 5 (SCA), the court held at para [4] that the approach to the interpretation of a servitude is as follows:

"Where a servitude has been granted by agreement, and where the agreement is ambiguous and evidence as to surrounding circumstances which obtained at the date the contract was concluded does not resolve the ambiguity, evidence as to the interpretation the parties had by their conduct put upon the grant will be admissible as an indication of their common understanding of its meaning."

[66] In *Johl and Another v Nobre and Others (23841/2010) [2012] ZAWCHC 20 (20 March 2012)* the court adopted the approach that:

"[16] In interpreting the servitude agreement the Court seeks the intention of the parties from the terms of the agreement itself. The words in the agreement must be read in context and in the light of the surrounding circumstances prevailing at the time of the creation of the servitude. See De Witt v Knierim 1991 (2) SA 371 AT 385 C-E. . . . Where the wording of the servitude is clear, it must be given the ordinary grammatical meaning and in such circumstances the Court

will not have recourse to the surrounding circumstances. See De Kock v Hanel 1999 (1) SA 994 (C) at 997 E - 998 B."

[67] In *Berdur Properties (Pty) Ltd v 76 Commercial Road (Pty) Ltd 1998 (4) SA 62 (D)*, the court held (at page 68G-J) that:

"The applicant submits that it is relevant to have regard to the presumed intention of the parties when creating the servitude. Compare Nach Investments (Pty) Ltd v Yaldai Investments (Pty) Ltd and Another1987 (2) SA 820 (A). There are, however, limitations to such an approach. Where the parties have been precise in determining the scope and nature of their agreement the Court is bound to accept the consequence of their language - compare, generally, Van Rensburg en Andere v Taute en Andere1975 (1) SA 279 (A) at 302G--H; and, with particular reference to servitudes, Kruger v Downer 1976 (3) SA 172 (W) at 178H."

[68] When considering the interpretation of servitudes, it is however clear that there are other considerations that have to be taken into account when ascribing meaning to a particular condition.

[69] In *Schwedhelm v Hauman 1947 (1) SA 127 (E)* the court applied the rule of the Roman law that, with the exception of the servitudes *oneris ferendi* and *altius tollendi*, a servitude cannot cast upon the owner of the servient tenement an obligation actively to do something.

[70] In *Van der Merwe v Wiese 1948 (4) SA 8 (C)* this court came to a different conclusion and found that an agreement could not be deemed invalid merely on the ground that it imposed a positive duty.

[71] In *Cape Explosives Works Ltd and Others v Denel (Pty) Ltd and Another 2001 (3) SA 569 (SCA) at par [14]* Streicher JA did not consider it

necessary to deal with the question as to whether or not the rule relied upon in Schwedhelm is absolute.

[72] The traditional view seems to be that one of the prerequisites for the validity of a praedial servitude is that a positive duty may not be imposed upon the servient tenement. See detailed discussion in Silberberg and Schoeman's The Law of Property (Lexis Nexis Electronic edition at 324) LAWSA Volume 24 – Servitudes at para 550 and also Wille's Principles of South African Law at 596 footnote 45.

[73] It appears that our courts have interpreted servitudes narrowly or restrictively, due to limitations placed on ownership by the servitude. This approach finds expression in *Kruger v Joles Eiendomme (Pty) Ltd and Another supra* at paragraphs [8] – [9] where the SCA held that:

> *"[8] In the circumstances I believe that such ambiguity as there is should be resolved by applying the well-established rule of construction that because a servitude is a limitation on ownership, it must be accorded an interpretation which least encumbers the servient tenement. Voet, in discussing the urban servitude of tigni immittendi (ie the right to let a H beam into a neighbour's party wall), contrasts the position under a limited agreement as opposed to a general agreement and says that where the number of beams and mode of letting-in has been defined, the owner of the dominant tenement is not allowed either to let in more or to alter the shape of the letting-in. The reason he gives is:*
>
> > *I That is especially so because the granting of a servitude receives a strict interpretation as being an odious thing (because it is opposed to natural freedom); and in case of doubt there must be a declaration in favour of freedom.*

As authority for this proposition Voet refers to, among others, Carpzovius, and the author of the opinion in the Hollandsche Consultatien where the passage from Carpzovius which follows is quoted:

> *(S)ervitus ceu res odiosa restringi, ac in dubio pro libertate pronunciari debet. Et semper servitus indefinita ita est interpretanda, quo fundus serviens minori afficiatur detrimento.*

The passage may be translated as follows:

> *"(A) servitude being something odious should be interpreted restrictively and so, in case of doubt, should be declared free of restraint. And an imprecise servitude must always be interpreted so that the servient tenement is the less adversely burdened.*

[9] The restrictive approach to interpreting servitudes has been endorsed by this court in Pieterse v Du Plessis although in Van Rensburg en Andere v Taute en Andere the caveat was added that:

> *"By die toepassing van hierdie beginsel moet egter steeds in gedagte gehou word dat die aard en omvang van die beswaring bepaal word na aanleiding van die betekenis wat gegee moet word aan die ooreenkoms wat die serwituut daarstel. Indien die betekenis daarvan ondubbelsinnig blyk te wees, is 'n hof nie geregtig om daarvan af te wyk ten einde 'n mindere beswaring te bewerkstellig nie."*

[74] See also *Roeloffze NO and Another v Bothma NO and Others 2007 (2) SA 257 (C) at paragraph [33]* with regard to the restrictive interpretation of a servitude.

[75] The servitude imposed by the clause in the present matter is a servitude of view (prospectus) in terms of which the owner of the dominant tenement has the right to an open view which restricts the rights of the owner of the servient tenement to impede the view in the form of both buildings and trees.

[76] In *Kruger v Downer supra at 178 B – C* after having, discussed the servitude prohibiting a neighbour from building higher, and the servitude prohibiting the darkening or obstruction of light by any building, the court goes on to say the following, quoting the translated "Roman-Dutch Law", 2.20.14 of Van Leeuven:

> '*But the right to free prospect is more extensive, for it not only includes the light from the heavens above, but also a free and unobstructed view along the earth in a straight line, whereby the prospect must be left in the same condition it was in at the time of creating the servitude*'.

[77] In the present matter the right which arises from the servitude agreement is precisely this right to free prospect. Mr Oliver contended that the right is one whereby the prospect must be left in the same condition it was in at time of the creation of the servitude.

[78] In *Myburgh v Jamison* (1861) 4 Searle 8 the question arose as to the interpretation of a condition contained in the deed of transfer of certain property which prohibited the erection of buildings which obstructed the view from a specific adjacent property. The defendant planted trees which ultimately obstructed the view from the plaintiff's property. He claimed a contravention of the condition. The plaintiff requested the court to give effect to the purpose of the condition, namely, the protection of the view from the plaintiff's property, despite reference in the condition to the erection of buildings, and not trees. On the other hand, the defendant contended that the court should apply a strict interpretation to the wording of the condition,

arguing that a servitude of prospect was odious as it hindered development and thus contravened public policy. The court ultimately adopted a narrow interpretation and held that the trees did not obstruct the plaintiff's view in a manner disallowed by the condition.

[79] *In Lewkowitz v Billingham and Co (1895) 2 Off Rep 36* the court adopted a different approach. In this matter the respondent leased an advertising wall from the appellant, subject to the condition that either party could cancel the contract if a building that would obstruct the view to the wall was constructed during the lease period. The court adopted a more purposive approach and held that the term "building" not only referred to a house but any kind of structure by which the view of the wall was obstructed.

The current law in regard to interpretation:

[80] It is necessary to consider the general principles of interpretation with reference to the approach adopted by the SCA having regard to the approach adopted by the courts in regard to the interpretation of servitudes.

[81] In *Natal Joint Municipality Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)* the SCA held at para [18] that:

> "*Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be*

> *weighed in the light of all of these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; … The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document*".

[82] In *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk 2014 (2) SA 494 (SCA)* Wallis JA held as follows at para [12]:

> "*Whilst the starting point remains the words of the document, which are the only relevant medium through with the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise*'.

See also: *Rainy Sky SA v Kookmin Bank [2011] UKSC 50 [2012] Lloyds Rep 34 (SC) para 21*.

[83] Both *KPMG Chartered Accountants (SA) v Securefin Ltd and Another 2009 (4) SA 399 (SCA) at paragraphs [39] – [40]* and *Natal Joint Municipality Fund supra* make it clear that in interpreting any document the starting point

is inevitably the language used but it falls to be construed in the light of its context, the apparent purpose to which it is directed and the material known to those responsible for its production. Context, the purpose of the provision under consideration and the background to the preparation and production of the document in question are not secondary matters introduced to resolve linguistic uncertainty but are fundamental to the process of interpretation from the outset. See *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd & Others 2013 (6) SA 520 (SCA) at par [16]* per Wallis JA.

[84] It seem to me that the context is now determined by both the internal context, namely the language, words, grammar and syntax of both the provisions in question and the document as a whole, and also by the external context provided by the factual matrix in which the document finds its setting, which includes both the background and surrounding circumstances.

[85] I agree with the view that though it may be necessary to correct an apparent error in the language used in a document in order to avoid an identified absurdity, a court should be slow to alter the words actually used and must, as cautioned in Natal Joint Municipality Fund *supra*, guard against the '*temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used*'.

As was also stated in that judgment:

> '*A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.*'

[86] In my view the sound approach adopted by Wallis JA and the principles set out by him in Bothma-Batho Transport (Edms) Bpk judgment (*supra*) are equally applicable when dealing with the interpretation of servitudes. Bearing this in mind, I turn now to deal with the crucial question, -

"Is the existing tree which was already planted at the time of the conclusion of the agreement of sale in April 2004, covered by the provision?

[87] In my view the important part of the relevant provision is that "No … tree shall be … planted which would obstruct or partially obstruct the sea views".

[88] On a consideration of the provision I find that the word 'would' points to a future state of affairs and places the emphasis where it belongs i.e. on the sea views, and accordingly must be interpreted as intending to cover both planted trees and trees to be planted.

[89] In my view a proper consideration of the servitude reveals that the clause creates a situation where the owner of Erf 983 is obliged to ensure that the view from the applicant's house at the time that the restriction was registered remains unrestricted by buildings, plants or trees on the property and such condition included within its purview trees already planted at the time of the creation of the servitude.

[90] I am satisfied that this is what was clearly intended by the creation of the servitude and I find support for this finding in the circumstances under which the servitude was agreed to.

[91] It is clear that the obligation embodied in the servitude is to afford unobstructed views of the sea as such views existed at the time of the creation of the servitude. It is further clear that what the servitude seeks to preserve is the applicant's views of the sea. It must therefore logically follow that no structure or tree may obstruct that view.

[92] Accordingly I cannot agree with the contentions made on behalf of the respondents that because the tree had already been planted at the time of the conclusion of the agreement, the tree is excluded from the operation of the servitude.

[93] If I were to accept that the servitude in question was created with the intention that it did not apply to already existing trees which could be permitted to grow to the extent that they obscured the applicant's view, and that the prohibition only applied to the planting of trees, then the servitude would not achieve the exclusive purpose of its creation, which in my view is to preserve the applicants' views of the sea. The result would be that the servitude would be rendered completely ineffective and be reduced to a futility.

[94] I am satisfied that a proper and correct interpretation of the servitude must mean that trees already planted at the time of the creation of the servitude are in fact included in the operation of the clause.

[95] In the result I find that that the fourth respondent and her predecessors in title are in breach of the servitude.

[96] It follows that the applicant is entitled to enforce the servitude and the fourth respondent is obliged to afford the applicant an unobstructed view of the sea. It seems to me that the easiest way to afford the applicant an unobstructed view of the sea would be for the fourth respondent to trim the tree. Of course, as was submitted by Mr Olivier for the applicant, the fourth respondent is at liberty to remove the tree.

[97] Since the fourth respondent from the outset gave notice of her intention to abide by the decision of this court, no costs order will be made against her.

[98] In my view there is no reason whatsoever why the first and second respondents, after selling the property to the fourth respondent, could not have agreed to abide the decision of the court on condition that the issue of costs be determined separately. This decision could have been made as early as the date upon which they signed the deed of sale to sell the property to the fourth respondent. The effect of this would simply have been that there would have been no need to engage in unnecessary costly litigation. I must

therefore conclude that first and second respondents did not make full and frank disclosure to this court when they deposed to their affidavits in opposition to the relief sought. For reasons of their own they elected not to tell this court that they had sold the property and/or that they no longer had any legal interest in the property.

[99] It is difficult not to conclude that first and second respondents have not come to court with clean hands. In the premises I have no alternative but to draw an adverse inference about the manner in which they have opposed this application and the manner in which the matter has been conducted after they sold the property to the fourth respondent.

[100] The truth is that the manner in which they have conducted themselves in this matter has impacted heavily on the cost implications herein.

[101] It is an important generally accepted principle of our law that litigation is not a game where a party may seek tactical advantages by concealing facts from his opponent and thereby occasioning unnecessary costs. See *Nieuwoudt v Joubert* 1988 (3) SA 84 (SE) at 90 D-E**.** I agree with the sentiments expressed by Mullins J in that case where he states at p90 E that 'There seems to me unfortunately to be an increasing *tendency amongst litigants* and practitioners '*to play one's cards close to one's chest'*, and not to be frank and open with an opposing party either prior to summons or during the course of the proceedings. This is a practice which the courts should seek to eliminate'. The costs must accordingly follow the result.

[102] Accordingly I make the following order:

(a) It is declared that the title deed condition E, contained in the title deed (T 111 355/2004), of the property (Erf 983, Hout Bay) registered in the name of the fourth respondent, namely that *"(n)o structure whatsoever nor tree shall be erected or planted on the property which would obstruct or partially obstruct the*

sea views from the existing structure on Erf 985 Hout Bay" also applies to the wild olive tree(s) which had already been planted at the time of the imposition of the condition.

(b) The fourth respondent is ordered to trim the wild olive tree(s) on the property, described as Erf 983, Hout Bay, so as not to obstruct or partially obstruct the applicants' sea views from the existing structure.

(c) The first and second respondents are ordered to pay the applicant's costs as taxed or agreed.

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RILEY, AJ