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

REPORTABLE
Case number: 18924/2020

In the matter between:

TURNBURY HOUSE PROPERTIES (PTY) LTD	**Applicant**

and

BJORN ANDERS WALLIN	**First respondent**
REGISTRAR OF DEEDS, CAPE TOWN	**Second respondent**

JUDGMENT DELIVERED ON 18 MAY 2022

VAN ZYL AJ:

Introduction

1. The applicant wishes to enforce a servitude to use a road over the first respondent's property, for the supply of water from a borehole on the first respondent's property, and for the use of one third of the water sourced from springs on the first respondent's property. The servitudes are registered in the applicant's favour against the property of the first respondent.

2. The applicant and the first respondent own neighbouring farms in the Devon Valley near Stellenbosch. The first respondent owns the Remainder Portion 17 (a portion of Portion 5) of the Farm Nooitgedacht No. 65. The applicant owns Portion 28 of the same Farm. Each of their title deeds contains servitudes in terms of which the applicant may use a road running along the northern boundary of the first respondent's property, water from a borehole on the first

respondent's property for 24 hours a week, and one third of the water sourced from springs on the first respondent's property. The applicant's property is home to Mr and Mrs Harvie and their family.

3. The applicant currently uses only a small portion of the servitude road, but wishes to use all of it. The first respondent refuses to permit the applicant to use the road, which requires some reconstruction, and has stopped providing the applicant with water, claiming that he previously (following the purchase of the dominant tenement by the applicant) did so not because he was obliged to, but as *"as a form of goodwill".* The applicant therefore applies to enforce the rights (in relation to the road and to the water) afforded it by the servitudes.

4. The first respondent's main defence is the servitudes have been extinguished because the two properties (that is, the property of the applicant and that of the first respondent) were previously owned by the same owner. The applicant's argument in this respect is, briefly:

4.1. The servitudes remain in the title deeds of the respectively properties, so their existence and terms have been *prima facie* established.

4.2. The first respondent would have to rectify the title deeds, but he cannot show that he is able to do so because he admits that the servitudes were in the title deed of the entity from which he and the applicant acquired their properties, and is in his own title deed.

4.3. The first respondent does not allege or prove that when he purchased and took transfer of his property, he did not *bona fide* believe that the deed correctly reflected the position, and that its terms contained a mistake which does not accord with the agreement in terms of which he purchased his property.

4.4. The applicant, for its part, acquired its property in the *bona fide* belief that the servitudes were extant. The first respondent has, moreover, repeatedly acknowledged the servitudes through this conduct in the past.

5. The first respondent contends as follows:

5.1. The servitudes have been extinguished because the two properties were previously owned by the same owner, namely Turnbury Wine Farms CC ("the CC"). The CC had sold its properties to, respectively, the applicant and the first respondent.

5.2. The only way that the servitudes can be revived is by agreement between the parties, the seller and the purchaser. There was no such agreement.

5.3. The fact the servitudes remained in the title deeds was merely a mistake by the conveyancer who attended to the transfer at the time.

6. I shall deal with the parties' contentions, and the legal principles underlying those contentions, in the course of the discussion below.

7. As the applicant seeks final relief on motion, the rule in *Plascon Evans* applies. Insofar as there is a dispute of fact, the first respondent's version prevails, save insofar as it is implausible or untenable in the context of the facts as a whole (*Plascon Evans Paints (Tvl) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C).

8. Upon a consideration of the papers, there are no genuine disputes of fact. The first respondent's defences are issues of law. What the first respondent said and did appears from what he wrote, and from the papers. The applicant submits that caution need only be applied insofar as the first respondent makes allegations concerning his understanding or mental state, insofar as what he alleges he thought or understood is at odds with what he said and did, even though his internal reservations are scarcely relevant. He must be held to what he conveyed by his words and conduct. I agree with these submissions.

Basic relevant legal principles

9. A servitude is a limited real right that imposes a burden upon the property (in the present matter, immovable property) of another by restricting the rights, powers and liberties of its owner either in favour of another person (a personal servitude) or in favour of the owner of another immovable property (a praedial servitude, as in the present matter) (*Glaffer Investments (Pty) Ltd v Minister of Water Affairs and Forestry* 2000 (4) SA 822 at 828F).

10. The most important manner in which a servitude is established in our law is by way of registration thereof in the Deeds Office against the title deed of the servient property (*Worman v Hughes and others* 1948 (3) SA 495 (A) at 502). The inclusion of a servitude in the title deed is *prima facie* proof of its existence: *Eichelgruen v Two Nine Eight South Ridge Road (Pty) Ltd* 1976 (2) SA 678 (D) at 680C-D:

> "*… the registration of the servitude in the deed of transfer is* prima facie *proof of the existence of the servitude described in the deed and that, until the deed is rectified, it remains the unassailable judicial record of what the seller has sold and delivered to the purchaser. See* Myers v. Van Heerde and Others*, 1966 (2) SA 649 (C) at p. 654H. It is also clear that it is only permissible to amend a deed of transfer on very limited grounds, and I agree with respect with what VAN ZYL, J., said in* Myers' *case,* supra *at p. 655H, namely:*
>
> > *'The deed speaks for itself and the only grounds upon which it can be altered or added to are: (a) that there was no justa causa for the execution of the deed, for example, because the transfer was induced by fraud or because the contract, in execution of which the deed was registered, was induced by fraud; and (b) that the deed does not reflect truly the agreement entered into by the parties, for example, because the deed as registered does not truly carry out, and is not a true record of the contract entered into by the parties or because the contract, in execution of which the deed was registered, does not, on account of mutual error, reflect the true intentions of the parties and the deed in consequence does not carry out the contract nor is it a true record of the execution of the contract.'*"

11. Servitudes are in principle of unlimited duration. A servitude is terminated only in the following ways:

11.1. Expiry of the time period for which the servitude was granted or the fulfilment of a resolutive condition;
11.2. Agreement between the parties; expropriation, abandonment or prescription;
11.3. The death of the usufructury or the registration of a transfer of land free from a usufruct on a sale in execution; or
11.4. Of particular relevance in the present matter, merger, or the permanent impossibility to exercise or enjoy the servitude;

12. In relation to merger, there is some disagreement in the case law and between academic writers as to whether the termination of a servitude upon merger is truly permanent. In terms of the principle of *nulli res sua servit* a servitude is terminated when the dominant and servient properties are owned by one person (see the discussion in Van der Merwe *Sakereg* (2ed, Butterworths) at pp 536-537).

13. In Joubert *LAWSA* Vol. 24 (2ed, LexisNexis) at para 620 it is stated that if the merger was only intended to be of limited duration, the servitude revives automatically when the property is again separated. If, on the other hand, the merger was intended to be permanent the servitude should only revive on separation if it is expressly reconstituted. The view that a mere reference to the material deed which contained the servitude is sufficient to revive the servitude (with reference to *Du Toit v Visser* 1950 (2) SA 93 (C); *Myers v Van Heerde* 1966 (2) SA 649 (C), and *Eichelgruen supra*) is “unacceptable” (with reference to Scholtens 1950 *SALJ* 220-223; De Villers 1977 *THRHR* 195, and Badenhorst *et al The Law of Property in South Africa* (5ed) pp 337-368).

14. In relation to the permanent inability to enjoy the servitude, *LAWSA supra* at para 621 discusses the termination of a servitude as a result of destruction: A servitude is extinguished when it becomes permanently impossible to exercise it, for example, if the dominant or servient property is totally destroyed.

15. Examples of total destruction is where a landed tenement is swept away by the sea, becomes permanently inundated or is destroyed by an earthquake, where the natural condition of the servient tenement changes so radically that the particular servitude can no longer be exercised, for example, a fountain which forms the basis of a servitude of *aquaductus* dries up permanently. A servitude is, however, not extinguished by the destruction of a building on the dominant or servient tenement, because if the building is rebuilt the servitude can again be exercised, even if the period of prescription has run its course.

16. I shall return to a discussion of these authorities in the context of the facts of this particular matter.

The terms of the servitudes

17. The content of the servitudes is common cause. The applicant has attached, to its notice of motion and in substantiation of the relief sought, diagrams indicating the layout of the properties and the points referred to in the servitudes. There is no dispute between the parties as to the correctness of what is shown in the diagrams.

18. The applicant's title deed provides that the applicant's property enjoys the following servitudes in relation to the road and the borehole:

> *"SUBJECT FURTHER to and ENTITLED to the following special conditions ...*
>
> *1. The Transferee and his Successors in Title [i.e., the applicant] shall have the right to use the road running along the boundary CDEFGHJ marked up on diagram No 637611947.*
>
> *2. The Transferee and his Successors in title [i.e., the applicant] shall have the right to the use of water from a borehole situate on the remaining extent of the property hereby transferred [i.e., the first respondent's property] and situate at the spot marked M on Diagram No 6376/1947. The water so to be used shall be conducted along the existing three inch pipeline running from the point M to N to E marked on said Diagram No 6376/1948. The pipeline shall not go into the reservoir at point N marked on the said*

Diagram, but shall bypass it so as to ensure the Transferee and his Successors in title [i.e., the applicant] a direct and uninterrupted flow from the borehole at M marked on the said diagram. The water out of the borehole shall be supplied to the Transferee and his Successors in title [i.e., the applicant] by means of the existing pump situate at point M. The Transferors as owners of the remaining extent of the property thereby transferred and their Successors in title [i.e., the first respondent] shall be responsible for the maintenance of the said pump. The said pump shall be used exclusively for the benefit of the Transferee and his Successors in title of the land hereby transferred [i.e., the applicant] for twenty-four (24) hours per week, namely from 8:00 am to 8:00 pm on Sundays, and from 8:00 pm on Wednesdays to 8:00 am on Thursdays.

It shall be the responsibility of the Transferors as owners of the remaining extent and their Successors in title [i.e., the first respondent] at their cost to maintain the supply of water by means of the pump; the Transferee and his Successors in title [i.e., the applicant], however, shall be responsible for one-seven (l /7th) of the costs of the power per week.

3. The proper maintenance of the pipeline marked MNE on the said Diagram shall be the sole responsibility of the Transferee as owner of the land hereby conveyed and his Successors in title [i.e., the applicant], for which purpose he and his Successors in title, shall be afforded the necessary right of access to and egress from the land hereby conveyed over the remaining extent as held by the Transferors [i.e., the first respondent].

4. The Transferee and his Successors in title [i.e., the applicant} undertakes whilst such water is being supplied to him to exercise all reasonable care with the pump at point M "

19. The first respondent's title deed reflects the servitudes in substantially the same terms:

"…the Transferee and successors in title of Port. 28 [i.e., the applicant] therebyconveyed has been granted.

(a) The use of the orad [sic] on the remainder held hereunder running along the boundary marked CDEFGHJ on the diagram annexed to the said Deed of Transfer.

(b) The use of water from certain borehole situate on the remainder the water to be led through an existing 3 inch pipeline and the exclusive use of a pump situate at the borehole for 24 hours per week at stated times with right of access and egress for maintenance of the pipeline; as will more fully appear on reference to said Deed of Transfer."

20. Portion 28 (the applicant's property) was first registered separately in 1947, having been subdivided from what is now the first respondent's property.

21. It is common cause between the parties that, in the 1980s, the previous owner of the first respondent's property abandoned the borehole at point M and sank a new borehole at point X as indicated on the diagrams attached to the notice of motion.

22. The applicant's property is the dominant property and the first respondent's property the servient property in respect of the following servitude registered in favour of the applicant in the applicant's property's title deed in relation to the springs:

"SUBJECT to the conditions referred to in Deed of Transfer No T 1088/1914 andto the following special conditions contained therein:

1. The said Chapman and Bosman and their successors in title [i.e., the applicant] shall have the right of access to the springs and Dam shown on the diagram of Lot A for purpose of constructing (at their own expense) a dam below the springs on the said Lot A and of leading water therefrom by means of pipes, furrows or otherwise from and over the said Lot A to the remaining extent of taking soil and material from the ground for the maintenance of the said works.

2. Two-thirds share of the water arising from the Spring on Lot A shall belong to the said Chapman and Bosman and their successors and one-third

share of the said water shall belong to the said JA Bosman and as stated in the Deed of Transfer No 2139 dated 8th March 1938, this last mentioned one-third share was sold with and attached to the property thereby and now hereby conveyed. "

23. Lot A, to which reference is made in the servitude, was depicted on a diagram in 1911, and in 1988 Portion 28 (now the applicant's property) was still part of Lot A.

24. The first respondent's title deed reflects this servitude in the same wording.

The dealings between the CC, the first respondent and the applicant

25. The CC purchased Portion 17 (part of which is now the first respondent's property) in 1997, at which stage it was already the owner of Portion 28 (now the applicant's property).

26. The first respondent purchased his property from the CC in 2008, and transfer was registered in August 2008. It is clear from the papers that the servitudes were in the CC's title deed, that the first respondent purchased his property from the CC subject to all servitudes, and that his title deed contains the servitudes. The deed of sale provided that "*the property is also sold subject to all conditions and servitudes mentioned or referred to in Title Deed and to all such other conditions and servitudes which may exist in regard thereto…*"

27. The applicant, in turn, purchased its property from the CC in August 2008, and transfer was registered in January 2009. The deed of sale provides, as was the case in respect of the first respondent's deed of sale, that "*the property is also sold subject to all conditions and servitudes mentioned or referred to in Title Deed and to all such other conditions and servitudes which may exist in regard thereto…*"

28. The first respondent and the applicant had various dealings after the applicant had acquired its property from the CC. Those dealings occurred (a) after the applicant had taken occupation of its property, (b) thereafter and over the years as

neighbours, and (c) finally when the first respondent cut off the applicant's supply of water.

29. There is nothing on the papers to impugn the sale from the CC to the first respondent. It appears further from the founding and replying affidavits that the applicant was concerned about water rights, and purchased its property *bona fide* in the belief that its property enjoyed the servitude rights.

30. After such purchase the first respondent repeatedly referred to the servitudes and adopted the position that the applicant enjoyed no rights greater than those set out in the servitude. This appears from email correspondence sent by the first respondent on 9 November 2008, 11 November 2008, 12 November 2008, 24 November 2008 and 28 November 2008. For example, in early November 2008 the first respondent wrote to the applicant that in "*terms of the deed you require a separate waterline from the borehole to your property which is your responsibility to install and maintain. This old connection is redundant, and you will now need to install a new connection. If you decide on this option, we need to agree where this line is laid, but it would be consistent with the terms of the deed"*.

31. On 1 December 2008 the first respondent asked attorney De Jager of Van der Spuy Attorneys for an initial impression of the deeds. The advice was that the servitude probably lapsed due to merger, and possibly had prescribed. In the meantime, however, the CC (which at that stage had not yet passed transfer to the applicant) worked to ensure that the applicant would able to use the servitude, and various emails were exchanged between the parties to trye to resolve the issue.

32. The first respondent notified the conveyancer attending to the transfer during December 2008 of the advice he had received from attorney De Jager, and also conveyed the advice to the applicant.

33. On 13 January 2009 the applicant took transfer from the CC. Even though the first respondent had told the conveyancer about the advice he had received from attorney De Jager, the conveyancer nevertheless included the servitude in the

applicant's title deed.

34. After the transfer, the first respondent and several attorneys representing him, reverted to confirming the existence of the servitudes:

34.1. Herold Gie Attorneys in April 2009: they would convey a proposal from which it appeared that the first respondent had accepted that the applicant was entitled to water.

34.2. The first respondent himself in December 2011, when the applicant repainted the entrance pillars: "*Can you please inform your client [i.e., the applicant] that right of access does not mean right to interfere with the property of the landowner.*"

34.3. Bemadt Vukic Potash & Getz in July 2012: "*At present, our clients intended to put up a gate on his property, which will in no way restrict your client's right of way over the property, as your client will be given remote/codes in respect thereof. … In addition thereto our clients intend to build speed bumps, which will also in no way effect (sic) your client's right of access to the property.*"

34.4. The first respondent in August 2014: "*Since we are not changing or inhibiting your client's access to his property we believe we are entitled to proceed with the fending*."

34.5. Herold Gie in November 2014: "*In previous discussions with my client [i.e., the first respondent] he indicated that he had no intention of preventing your client gaining access to his property and that the new gate to the servitude road would be accessed in the same way as the current gate"*.

34.6. The first respondent in March 2018 (when he told the Department of Water affairs that the applicant must pay for water it sourced on his property): "*If this [the water account] refer (sic) to farm 28/65 then it is Mr Harvie. If it is 17/65 then it is me*".

34.7. Basson Blackburn in February 2020: *"… our client confirms the existence of the servitude set out and contained in the relevant deeds".*

The first respondent's defence of merger and no revival

35. The first respondent's main defence is that because the CC owned both properties before selling them to the applicant and the first respondent, *"the servitudes no longer exist".* Related to that is his allegation that the servitudes did not revive.

36. I have referred earlier to the fact the case law and the academic writers are not in agreement in relation to the revival of a servitude when, after having been owned by one owner, the relevant properties are again sold to different owners. The first respondent's counsel has detailed the opinion on the subject of various writers, including Van der Merwe *Sakereg* p 382, Lee & Honoré *Family, Things and Succession* p 322, para 434. I have also referred to *Scholtens* and *De Villiers* above, referred to in *LAWSA op cit*. Scholtens doubted the correctness of *Du Toit v Visser supra*, whilst De Villiers criticised the judgment of *Eichelgruen supra*. All of these writers are of essentially of the view that those decisions were wrong in deviating from the maxim *nulli res sua servit*. Badenhorst *op cit* does not criticise the judgments, but merely refer to the differing opinions.

37. In *Du Toit v Visser supra* at 102-104 this Court (the Honourable Ogilvie-Thomson presiding) held as follows in holding that a right of foot passage registered against the relevant properties' title deeds (such as the servitudes in the present matter) had not terminated as a result of a previous merger:

> "*In Salmon v Lamb's Executor and Naidoo (1906, E.D.C. 351) … the decision - proceeding exclusively upon the common law and, amidst a sharp conflict of authority, preferring the view advanced in Voet 8 - 6 - 3 and 19 - 1 - 6 … reached the conclusion that a servitude extinguished by merger does not (in the absence of a re-imposition of the servitude) revive on a subsequent severance of the praedium serviens and praedium dominans. <u>It is however important to notice that the servitude considered</u>*

in Salmon's case (supra), having been acquired by prescription, was not registered. In the present case the servitude in issue was not only originally duly registered, but to-day, after severance of the dominant and servient praedia, remains - in the manner detailed earlier in this judgment - duly recorded (and of apparent full force and effect) in the Deeds Registry. That a previously existing servitude is susceptible of being revived upon subsequent severance of the praedia is recognised by all authorities. The Roman law required express revival: nominatim imponenda is the phrase used in Digest 8 - 2 - 30, while van der Keessel in his Dictata (see 1906, E.D.C. p. 368 in fine) uses the word 'expresse'. Voet (8 - 6 - 3) speaks of a pact (pacto speciale) which Hoskyn translates as a 'special agreement' to revive, but in dealing with the case of the heir Voet also alludes with approval to tacit agreements to that effect. The question is what our law requires in order to bring about an express revival of a previously existing servitude which was duly registered: as I have already pointed out, there was no registration in Salmon's case; and thät decision can therefore not be accepted as decisive of the enquiry.

I incline to the view that, having regard to modern concepts of registration in the Deeds Registry, it would under our law constitute sufficient revival of a previously existing and duly registered servitude if, upon severance of the praedia, the transfer deed conveying

the former servient tenement were to incorporate (even if only by reference) the servitude as one of the conditions to which - according to the Deeds Registry - the transferee becomes subject; and if that be so, the conclusion would properly follow that in the present case the servitude was revived when Stolpinsky transferred the servient tenements away by means of transfers which, by reference, continued to incorporate the above-cited 'Registration of Servitude' condition. In the present case however there are certain additional features which, in my judgment, serve to indicate that the servitude was in fact revived upon severance of the praedia. … Read in the light of Stolpinsky's actions in regard to his transfers of Lots 3 B and 3 C in 1920, the circumstance that those conveyances contained, by reference, a perpetuation of the previously existing servitude conditions must, in my judgment, be regarded as an express revival of the servitude upon

severance of the praedia. Such revival is, in my view, also confirmed by the subsequent history of these properties." (My emphasis.)

38. In *Myers v Van Heerde supra* (the Honourable Justice Van Zyl presiding) at 654F-655H this Court essentially followed the view expressed in *Du Toit v Visser* in refusing to set aside the servitude endorsement upon a deed of transfer, although it shifted the emphasis slightly:

"*I do not think that the learned Judge [in Du Toit v Visser], when he wrote the passages italicised by me in the above quotation, intended to convey more than that the transfer deed had executed and correctly recorded the execution of the agreement which had been come to by the parties and which had given rise to the registration of the servitude. Where merger of the dominant and servient tenements has taken place the servitude is not, upon the severance of ownership, revived by the act of incorporating the servitude condition - by reference or otherwise - in the deed of transfer conveying either of the tenements to the new owner. The act of registration is part of the execution of the agreement of sale. It is in fact the formal judicial delivery of the property sold. If it is the dominant tenement that has been sold, the registration of the servitude condition is the formal judicial delivery of the servitude enjoyed by the dominant tenement over the servient tenement. If it is the servient tenement that has been sold the registration of the servitude condition is the formal judicial act of delivering the property subjected to rights of third parties, viz. that the servient tenement is delivered subject to the rights which, in terms of the servitude condition, the owner of the dominant tenement may exercise over the servient tenement. The record of this formal delivery, registered in the Deeds Office, is notice to the world and speaks for itself. It is, until amended, the judicial record of what the seller has sold and delivered to the purchaser. It may of course be amended if the delivery, i.e. the registration, was induced by fraud or if the contract in execution of which the delivery was made was induced by fraud or if, through justus error, more or less was transferred than was agreed upon. … The registration of the deed of transfer is not another agreement concerning the property sold. It is a judicial recording of the final execution of the*

agreement of sale entered into between the parties and the symbolic delivery of the property. (I have spoken here of sale because the present case has to do with sale. …

… The authorities relied upon by the applicant have, except for du Toit's case, to do with the contract severing the dominant and servient tenements. They have no application to a deed of transfer which states that a servitude is registered against the property transferred by the deed. The deed speaks for itself and the only grounds upon which it can be altered or added to are: (a) that there was no justa causa for the execution of the deed, for example, because the transfer was induced by fraud or because the contract, in execution of which the deed was registered, was induced by fraud; and (b) that the deed does not reflect truly the agreement entered into by the parties, for example, because the deed as registered does not truly carry out, and is not a true record of the contract entered into by the parties or because the contract, in execution of which the deed was registered, does not, on account of mutual error, reflect the true intentions of the parties and the deed in consequence does not carry out the contract nor is it a true record of the execution of the contract." (My emphasis.)

39. These *dicta* are, to my mind, squarely of application in the particular circumstances of the present case, given the content of the deeds of sale and the title deeds, as well as the parties' conduct following the purchase of their respective properties.

40. I am not convinced that these authorities were clearly wrong and am not willing to depart from them (*see Camps Bay Ratepayers' and Residents' Association v Harrison* 2011 (4) SA 42 (CC) at para [28]: "*The doctrine of precedent not only binds lower courts, but also binds courts of final jurisdiction to their own decisions. These courts can depart from a previous decision of their own only when satisfied that that decision is clearly wrong.*").

41. In the premises, I agree with the applicant's counsel's submission that the first respondent's allegations do not establish a defence. The registration of the servitude in both the applicant's and the first respondent's title deeds *"is prima facie proof of*

the existence of the servitude described in the deed" (*Eichelgruen supra, with reference to Myers* 1966 (2) SA 649 (C)). Importantly, *"until the deed is rectified",* it remains unassailable.

42. The first respondent has not counter-applied for the rectification of the deeds, or instituted an action for rectification. He alleges in his answering papers that his deed *"stands to be corrected",* but he has not yet done so. Where the law requires a written document, a respondent raising rectification must counter-apply therefor (*Gratia (Pty) Ltd v DE Claasen (Pty) Ltd* 1980 (1) 816 (AD) at 824B-C). It does not suffice for the first respondent to allege, as he does, that he has instructed his attorneys *"to prepare the necessary documentation to have these servitudes ... removed from my Title Deed".* The servitude stipulates rights in favour of the applicant, and any application to remove the servitude would have to be on notice to the applicant.

43. Nor does it suffice, for the purposes of rectification, to allege speculatively (as the first respondent does) that the title deeds contain *"obvious mistakes by the conveyancers* ". The first respondent acknowledges (a) that the servitudes were *"brought forward into the title deed of the* CC"; (b) that he purchased in terms of a deed of sale which expressly provided that he would take transfer subject to existing servitudes; and (c) that the servitudes are in his and the applicant's title deeds. The first respondent was required to adduce evidence either from the conveyancers who registered three transactions (the CC's title deeds when it acquired the two properties, the first respondent's title deed, and the applicant's title deed) to show that all of these deeds contained mistakes. If he could not provide evidence from those conveyancers, he was required to explain why, and at least obtain evidence from another conveyancer who has investigated the transactions and all available transfer documentation and who is in a position to comment on it.

44. The facts do not support the inference that the conveyancer who registered the applicant's title deed made a mistake. The conveyancer who transferred the applicant's property knew attorney De Jager's advice, would have taken instructions from the CC, and nevertheless included the servitude in the applicant's title deed. The better inference is that the CC intended to include the servitudes in

the title deeds. In any event, the conveyancer did not depose to an affidavit in these proceedings admitting that a mistake had been made.

45. It is not in dispute that the additional source of water is valuable to the applicant's property, as was demonstrated by the Harvies' concern about water when they purchased. The applicant further explains that the servitude road is the natural, more amenable way to access its property, and that it needs the servitude road to access and maintain the dam on the applicant's property, remove invasive plants as well as reeds and slit from time to time. It is not disputed that the servitude road sits well below the main part of the first respondent's property so that it is not ordinarily visible from the largest part of his property, and it does not affect the amenity of his property.

46. The first respondent disputes the allegations about the applicant's need for the road. The dispute need not be resolved. there are good reasons for both the water and road elements of the servitude, which would negate the inclusion of the servitude by the conveyancers as a "mistake". The principal defence proceeded with in argument was, moreover, the defence of merger, and thus that the servitude has been terminated.

47. The first respondent contends that the term of the deed of sale by way of which he agreed to purchase his property from the CC which provides that he purchased the property subject to servitudes is pre-printed, and therefore is somehow of less force. This is not correct. On the contrary, the reason such provisions are pre-printed is because of their importance. That a provision is pre-printed does not make it less binding.

48. What is noteworthy, rather, is that when called upon to dispel the applicant's *prima facie* proof of the servitude by way of the title deeds, the first respondent does not allege that when he purchased his property and took transfer of it from the CC he *"did not bona.fide believe that the deed of transfer correctly reflected the position" (Eichelgruen supra* at 680), or that *"there was no iusta causa for the execution of the deed, for example, because the transfer [from the CC to him] was induced by fraud or because the contract, in execution of which the deed was*

registered, was induced by fraud" (Myers v Van Heerde supra at 655H). In the circumstances, I am of the view that the first respondent did not overcome the evidentiary burden on him, accepting his argument in relation to the words "*shall be prima facie evidence*" as interpreted in the realm of criminal law, namely that an evidentiary burden only, and not a legal burden, is imposed upon an accused (and by analogy, on the first respondent in the present matter).

49. Even were the first respondent to have done so, there can be no rectification where there would be prejudice to *"people, who at the time of their acquisition of their rights were unaware of the error in the registered deed of transfer"* (*Myers supra* at 656H). The time at which the applicant acquired its rights was when it concluded its deed of sale with the CC, on 9 August 2008. At that stage, the applicant was not aware of any controversy in relation to the servitudes.

50. In all of these circumstances, I am of the view, on the authority of *Du Toit v Visser supr*a and *Myers v Van Heerde supra*, that the servitudes exist and are enforceable despite the fact that the applicant's and the first respondent's properties were previously owned by the same owner.

The borehole servitude

51. The first respondent contend that the borehole servitude was in any event terminated by destruction, because the borehole had collapsed and does not produce water. He refers to Van der Merwe *op cit* p 381: "*'n Serwituut verval indien die uitoefening daarvan ontmoontlik word; by ondergang van die heersnde of dienende erf as gevolg van oorstromings, aardbewings of brande; indien die natuurlike gesteldheid van die erf waarvan die betrokke serwituut afhanklik is verlore gaan, soos wanneer 'n fontein waarop ;n serwituut van waterhaling gevestig is, opdroog of wanneer 'n muur waarvan 'n serwituut van inankering of stut afhanklik is, verkrummel.*"

52. I have earlier referred to what *LAWSA* says on the subject.

53. The applicant seeks specific performance of the servitude, by permitting it to

continue to use water in accordance with servitude, albeit not from a borehole at the particular point referred to in the servitude, but from the first respondent's new borehole.

54. In making an order for specific performance in the face of a change of circumstances, the background principle is that the change of circumstances must not make the enforcement sought unconscientious or inequitable (*Rex v Milne and Erleigh* 1951 (1) SA 791 at 873G).

55. There is no *numerus clausus* of praedial servitudes (*Cillie v Geldenhuys* 2009 (2) SA 325 (SCA) at 332G-H). The terms of a particular servitude must thus be interpreted in order to give it content. In interpreting, the court considers context, purpose and what is sensible and business-like in a unitary exercise (*Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para [18]). The manner in which parties who are subject to an obligation discharged it - that is, their subsequent conduct - also falls to be taken into account (*Comwezi Security Services (Pty) Ltd v Cape Empowerment Trust Ltd* [2012] ZASCA 126 paras [12]-[13]).

56. In this case, the servitude, the provisions of which have been quoted above, refers to "*the right to the use of water from a borehole situate on the remaining extent of the property hereby transferred [the first respondent's property] and situate at the spot marked M on Diagram No 6376/1947."*

57. The subject of the servitude is not "the" borehole. The subject of the servitude is the use of water sourced from underground the first respondent's property. The purpose of the servitude is to provide the applicant's property with a direct and uninterrupted flow of water sourced from underground water on the first respondent's property. The business-like construction of the terms of the servitude requires that its purpose be given effect.

58. The examples of destruction given in *LAWSA* and Van der Merwe *op cit* in illustration of the principle show that destruction extinguishes a servitude where (1) the destruction is a permanent consequence of *vis maior*, and (2) the *vis maior* event

entirely destroys the subject of the servitude (though not necessarily the entire servient tenement). Where, however, the destruction so occasioned can be remedied, the servitude is not extinguished. Where the subject of the servitude itself is not entirely destroyed, then the servitude is not extinguished.

59. The sort of remediable circumstances which do not extinguish a servitude have as their correlative the sort of circumstances which permit an owner of a servient tenement to relocate the servitude. In that regard, the Supreme Court of Appeal has recognised that a servient owner may relocate a servitude at its cost, outside of *"the strict terms of the grant"*, where circumstances have changed, and the dominant owner suffers no prejudice (see *Linvestment CC v Hammersley* 2008 (3) SA 283 (SCA)).

60. The source of this finding is the Roman-Dutch principle that *"the owner of the servient tenement may not do anything by which the use of the servitude is rendered less useful or convenient. He may therefore not change the condition of the property, nor transfer the exercise of the servitude to or impose it upon any part of the property other than that on which it was originally laid. Nevertheless, when the original institution has become more burdensome to him, or hinders him in carrying out any necessary or useful repair, he may offer to those entitled to the right of servitude another equally good and convenient for their exercise, at his cost; an offer so made cannot be refused" (see Linvestment CC v Hammersley supra* para [24]).

61. I agree with the applicant's submission that it would be anomalous to find that the law has developed as set out above to permit the owner of servient tenement to relocate a servitude, but not the owner of a dominant tenement where circumstances beyond the control of both have changed.

62. Servitudes are in principle perpetual. Boreholes, on the other hand, are not indefinite. Particular boreholes, by their inherent nature, do not always provide a supply of water in perpetuity, because they may collapse or dry up, but that is not to say that a farm on which a borehole is situated will not yield a supply of underground water which may be extracted from other boreholes (see *Flemming v Kommissaris Van Binnelandse Inkomste* 1995 (1) SA 574 (A)).

63. The present matter is, in fact, a case in point: As mentioned earlier, in the 1980's the previous owner of the first respondent's property abandoned the borehole on at point M and sunk a new borehole at point X. In February 2020, the first respondent suffered problems with the pump in the borehole at point X. The pump fell into the borehole and then, the first respondent alleges, he became aware that the borehole at point X might have collapsed. He proceeded to drill a new borehole at point H (also shown on the uncontentious diagrams attached to the notice of motion).

64. Boreholes also differ from springs. People drill boreholes in order to access groundwater. When one borehole fails, another can be drilled, whilst springs occur naturally. The drying up of a spring thus does not stand on the same footing as the collapse of a borehole. The right to source water from underground a property bv way of a borehole differs from the right to source water appearing on the surface, in that the owner of a property subject to a borehole servitude may have to suffer the drilling of a borehole to meet the purpose of the servitude (and that would be the difference between the servitudes included in the title deeds in relation to the borehole and the springs on the first respondent's property).

65. Boreholes are more comparable to buildings than they are to entire properties, or to springs, because they are man-made. Where buildings are destroyed, servitudes over them are not usually extinguished (Van der Walt *Servitudes* p 557). The reason is buildings are able to be rebuilt, and the servient owner is permitted to do so.

66. It is clear from the papers that, from the time that the first respondent acquired his property from the CC in 2008, and until February 2020, the first respondent provided the applicant with water from the borehole situated not at point M, but at point X. The first respondent alleges that he has supplied water from the borehole at point X not because the servitude obliged him to do so, but as a sign of goodwill.

67. This allegation is implausible, because, as shown earlier, the record of the dealings between the two neighbours indicates that the first respondent

acknowledged the existence of the servitudes on various occasions, albeit that he tried to get rid of his obligations under the servitudes. The only inference from the papers is that the first respondent supplied the water because he realised that the servitude obliged him to do so. The parties' subsequent conduct therefore supports the interpretation of the servitude to impose a burden on the first respondent's property by way of boreholes drilled to replace the borehole at point M, being the boreholes at point X, and now at point H.

68. In these circumstances, I agree with the submissions made on the applicant's behalf that the correct, business-like and sensible interpretation of the servitude, which accords with its purpose and the conduct of the parties, is that it affords the applicant the right to the use of water sourced from underground the first respondent's property, by way of a borehole situated on such property at point M, and boreholes subsequently drilled to replace the borehole at point M. The servitude is perpetual, even if the boreholes are not indefinite. The collapse of the borehole at X (the change in circumstances) does not permanently impair the applicant's ability to source water from the first respondent's property.

69. In the premises, I find that the borehole servitude has not been terminated as a result of destruction.

Prescription in relation to the road

70. The other defence raised by the first respondent in the papers concerns the road. The first respondent alleges that, aside from the small portion of the road, the applicant and its predecessors did not use the road for more than thirty years. This defence was not pressed in oral argument.

71. Be that as it may, a praedial servitude such as a right of way is indivisible in nature and cannot be partially acquired or lost (*Joles Eiendom (Pty) Ltd v Kruger* 2007 (5) SA 222 (C) at paras [19] and [24] (the judgment was overturned on appeal but not on this point)). For a right of way to be extinguished by prescription, the owner of the servient tenement must show that the owner of the dominant tenement has not exercised any of the rights inherent in the right of way for a continuous

period of thirty years.

72. It is common cause that the applicant has used a part of the road, and therefore prescription is not a defence.

Conclusion

73. In all of these circumstances, the applicant has made out a case for the relief sought.

Costs

74. There is no reason to depart from the general rule in relation to costs, namely that costs should follow the event.

75. The applicant contends that the first respondent's conduct has been objectively vexatious. The record shows that he has disregarded advice he did not like in the face of the terms and conditions of his deed of sale and the relevant title deeds, as well as the advice received from various sets of attorneys, namely that he is bound by the servitude.

76. In the circumstances, I agree that an award on the attorney and client scale is warranted on the basis of the extended meaning of "vexatious" referred to *Johannesburg City Council v Television and Electrical Distributors (Pty) Ltd and another* 1997 (1) SA 157 (A) at 177D: " … *in appropriate circumstances the conduct of a litigant may be adjudged 'vexatious' within the extended meaning that has been placed upon this terms in a number of decisions, that is, when such conduct has resulted in 'unnecessary trouble and expense which the other side ought not to bear (In re Alluvial Creek 1929 CPD 532 at 535)*."

Order:

The following order is granted:

77. The first respondent is directed, within 60 ordinary days of the grant of this order:

77.1. To permit the applicant to exercise its servitude right to use the road running along the boundary CDEFGHJ situated on the Remainder of Portion 17 (a portion of Portion 5) of the Farm Nooitgedacht No. 65 in the Municipality and Division of Stellenbosch (the first respondent's property") marked on Diagram No. 6376/1947 attached to the applicant's notice of motion as NOM1.

77.2. To permit the applicant to construct a road not exceeding three metres in width in a reserved area with a width of five metres measured from the boundary of the first respondent's property and parallel to the boundary, adjacent to the boundary and on the first respondent's property from point E, via points F, G, and H to point J as shown on Diagram No. 6376/1947 attached to the applicant's notice of motion as NOM1.

77.3. To permit the applicant to exercise its servitude right to use the water from the borehole situated on the first respondent's property at the point marked X, alternatively H, on the orthophoto annexed to the applicant's notice of motion as NOM3, on the basis that:

77.3.1. The water so used shall be conducted along a three-inch pipeline which shall afford the applicant and direct and uninterrupted flow from the borehole for supply by way of a pump used exclusively for the benefit of the applicant and its successors-in-title for 24 hours per week from 8 am to 8 pm on Sundays and from 8 pm on Wednesdays to 8 am on Thursdays.

77.3.2. The first respondent shall be responsible for the maintenance of the pump.

77.3.3. The applicant shall be responsible for one-seventh of the costs of the power required to operate the pump per week.

77.3.4. The proper maintenance of the pipeline shall be the responsibility of the applicant, and the first respondent shall permit the applicant reasonable access to the first respondent's property and the pipeline to that end, failing which the first respondent shall maintain the pipeline insofar as it runs over the first respondent's property.

77.3.5. The applicant shall exercise all reasonable care with the pump.

77.4. To permit the applicant to exercise its servitude right of access to the springs on the first respondent's property shown by the letters P, Q, and R on the diagram attached to the applicant's notice of motion as NOM2 for the purposes of leading water therefrom by means of pipes, furrows or otherwise over the first respondent's property to the applicant's property, on the basis that a two-third share of the water arising from the spring shall belong to the first respondent and one-third to the applicant.

78. The first respondent shall pay the costs of this application on the scale as between attorney and client.

P. S. VAN ZYL
Acting judge of the High Court

HEARING DATE: **16 February 2022**

Appearances:

Counsel for the applicant: R. G. Patrick, instructed by Fairbridges Wertheim Becker Attorneys.

Counsel for the first respondent: A. M. Heunis, instructed by Dykes, Van Heerden Attorneys