SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 27000/2010

In the matter between:

DATE: 11/08/2010

In the matter between

FIRST RAND BANK Applicant

and

NATIONAL STADIUM SOUTH AFRICA Respondent

JUDGMENT

VICTOR J:

[1] This is an urgent application concerning the naming rights of the sports stadium where the recent successful 2010 FIFA World Cup™ was hosted by South Africa. The forthcoming international events which are to take place at this stadium, namely the South African Bafana Bafana and Ghana game today and the tri-nations rugby game between the South African Springboks and the New Zeeland All Blacks on 21 August 2010, are all features which have to be addressed and are relevant to the question of urgency. The applicant's concern is that the tickets will not refer to the

stadium as the First National Bank Stadium, but some other name. The commercial implications are vast and important to all the parties.

[2] As will become evident from the facts in the judgement, the application is urgent as also the handing down of this judgement, despite the fact that novel points of law have been raised regarding naming rights in South African law. At this stage of the proceedings neither the court, nor the parties have had the benefit of time to be more expansive on this novel point. I am assured by senior counsel appearing that there is no reported South African case authority directly in point.

[3] The applicant seeks to interdict, restrain and prohibit until 6 July 2014 or until 6 July 2016 the first and second respondents, ("the respondents"), from publishing, marketing, disseminating or in any way referring to the said stadium situated on Portion 4 of the Farm Rand Skou, 324, Registration Division, IQ, the Province of Gauteng, held by the third respondent (the State) under Deed of Transfer no T3762/2008, by any other name other than the *First National Bank Stadium* or *FNB Stadium*.

[4] It also seeks to interdict the respondents from purporting to sell or otherwise dispose of the applicant's naming rights to the Stadium to any third party and an order directing and compelling the respondents until 6 July 2014 or until 6 July 2016 from utilising the name *First National Bank* or *FNB Stadium* when referring to the Stadium in question, be it by way of publication, advertisement, marketing campaign, website, article or other

means. The fourth respondent, the City of Johannesburg (The City) does not acknowledge the applicant's entitlement and opposes the relief.

[5] The various contracts concluded between the parties and the execution thereof is not in dispute. In dispute is the proper application and the meaning of the rights emerging from the contracts and whether the servitude registered by the applicant in respect of its naming rights is good in law. The question of a restriction on an owner's right to alienate, sell and deal with n*aming rights per se* is novel. I am of the view that despite the points being *res nova* and that legal principles pertaining to ownership may have to be reconsidered in time [1] to cope with the rapid changes in commerce, the law and facts pertaining to ownership as raised in this application can be determined upon a proper application of first principle.

RELEVANT BACKGROUND FACTS.

[6] On 31 January 2007 the applicant concluded a written agreement with several parties, in particular the third respondent, the Republic of South Africa acting through the Department of Public Works, (the State) in terms whereof it granted the applicant rights, by way of contract and a subsequent registration of a personal servitude to name the Stadium. Clause 4.2 provides,

> *4.2. For the sake of clarity the state, the trust and Soccer City hereby grant to First National Bank, the exclusive*

[1] Silberberg and Schoeman's THE LAW OF PROPERTY 5th edition Badenhorst, Pienaar Mostert pg 5

right to name the stadium (First National Bank Stadium), or FNB Stadium or by any other such name as may be chosen by First National Bank from time to time. The state, the trust and Soccer City shall take steps and do all things necessary to ensure and procure that First National Bank acquires and retains such rights for the period as set out above."

[7] In addition clause 4.4.5 provides,

"4.4.5. In compliance with the requirements as specified by the Federation International Football Association for the stadium to be elected and the venue for the competition.

4.4.5.1. First National Bank consents to the name and or the logo of the stadium being changed for a period commencing 3 months prior to the opening of the competition and concluding 1 week after the last match and or event or the competition to be held at the stadium."

[8] Clause 7.2 provides that the applicant would be entitled to register a personal servitude against the property in respect of its rights. The right of cession as described in the contract was not carried through into the wording of the servitude, as registered. The property was duly transferred to the State on 17 April 2008 and the applicant's personal servitude was registered at the same time.

[9] Clause 2.1 and clause 2.1.1 of the servitude provides,

> *"2.1. That with the effect from the signature date the state hereby grants as a personal servitude to First National Bank the right to name the stadium and erect naming boards therein, as more fully set out in the agreement, which right shall endure for a period of 10 years from 7 July 2004.".*
>
> *"2.2.1. The stadium shall be known as First National Bank Stadium or such other names may be designated from First National Bank from time to time in agreement with the state."*

THE 1988 AGREEMENT

[10] Historically the Stadium, except for the period during the 2010 FIFA World Cup™, was known as the First National Bank Stadium. The applicant has a long history with this facility, dating back to 26 October 1988. At that stage the applicant agreed to fund the building of the first phase of the previous Stadium, hire certain advertising space at the previous stadium and commissioned a work of art for the previous Stadium. It agreed to make an amount of R15 million available for its construction. As a consideration for this the applicant obtained naming rights over the previous Stadium. The 1988 agreement provided that the applicant would receive the maximum positive publicity and exposure through media coverage and agreed to pay R5 million as advertising revenue.

THE 2004 AGREEMENT

[11] A further agreement was concluded on 7 July 2004 and provided that the applicant waived its right to be paid any amounts then outstanding and waived other conditions, provided that the naming rights recorded in the facility agreement endured for a further 10 years and that it was entitled to renew the naming rights for a further period of 2 years upon the payment of R10 million and prior to the renewal period could renew the naming rights for a further 10 years at a market-related price to be agreed between the parties.

[12] In clause 5.2 of the 2004 agreement the State expressly undertook not to give a right to anyone else to name the stadium for the duration of the agreement. There is a non variation clause in 13.2 of the 2004 agreement. Some 2 weeks after the World Cup ended and on 24 June 2010 the applicant confirmed this fact by way of releasing a press statement confirming its rights to name the Stadium, following the completion of the 2010 FIFA World Cup™.

[13] On 30 June 2010 in response to the press statement the respondents posted an article on their website, alleging that they had acquired the full management rights to the Stadium, including naming rights and had the right to sell the naming rights of the Stadium and that their plans were in an advanced stage to sell the naming rights. The respondents' article claimed that no relationship existed between the Stadium and the applicant and that the Stadium would officially be referred to as the National Stadium. This claim was carried in the most widely read South African daily newspapers.

[14] It is the applicant's contention that the first respondent "*brazenly advertised the second respondent's purported entitlement to sell the naming rights to the stadium and more importantly, that it was in an advanced stage to do so."* Such conduct was alleged to be reckless. The applicant alleged the first and second respondents had been furnished with a copy of the agreement, as well as the servitude and had as at date of the application being argued, not acknowledged the applicant's right to name the Stadium and retract the statements made by them in the article. The applicant contends that the respondents' knowledge of the applicant's rights was known to them well before the publication of the article and before the first respondent concluded an agreement with the City.

[15] The applicant claims that it will suffer irreparable harm if the said Stadium should be advertised by any other name. The prejudice which the applicant claims it will suffer is irreparable, for example the stadium can accommodate at least 90 000 spectators and high attendance is anticipated for the forthcoming rugby match. The applicant is concerned that in the interim the Stadium could be renamed by a third party, creating confusion in the marketplace.

[16] The respondents contend that the marketing of the tickets under the name National Stadium is impossible to reverse. No persuasive detail together with technical data was given for this contention.

THE EVIDENCE OF THE RESPONDENTS' EXPERT ON SPORTS MARKETING.

[17] I accept the aspects of the affidavit deposed to on behalf of the respondents by one Mr. Graham Jenkins, an expert in the sports marketing business, where he highlights the commercial implications of naming rights. He drew attention to the fact that the historical nature of the events hosted at this Stadium ranged from sporting events, political events, religious, cultural gatherings, musical concerts and the like and this constitutes a component of the value of the naming rights.

[18] During the build up to the 1994 elections political rallies took place there and it was the venue where former President Nelson Mandela presented his first speech after being released from prison in 1994. It also hosted football for many years and recently of course, the opening and closing ceremony of the 2010 FIFA World Cup™.

[19] The location of the Stadium adds value to the naming rights, because it is in the centre of South Africa's economic and industrial hub. The city also has the highest population demographic in South Africa. There is an excellent road and rail infrastructure and it is in close proximity to Soweto. The status of the Stadium is perceived by the local and international community as a major contribution to the value of the naming rights. It is the largest stadium in Africa and holds world class facilities. It resembles a calabash, a unique South African symbol and is recognisable as Soccer City throughout the world. For these reasons it has achieved iconic status. The

Professional Soccer League, (PSL) according to Mr. Jenkins have committed to using the new Stadium to host their cup final matches. None of the features I have mentioned in Mr. Jenkins' affidavit have been disputed by any of the parties. It is clear that high profile events will take place at the Stadium, attracting the entire spectrum of the community and the media.

[20] He also referred to various examples of the value of naming rights in respect of international stadia, for example The City Group Inc. paid an amount of US $400 000 000, for a 20 year right to name the New Mets stadium. The price for the local Coca Cola Park Stadium, previously known as Ellis Park, commenced at R7 million per annum and escalated over a 5 year period to R12 million per annum.

THE STADIUM MANAGEMENT AGREEMENT

[21] The legal relationships between all the respondents are as follows. The City has concluded a lease with the State to lease the Stadium, in turn the City has concluded an agreement with the respondents to manage the Stadium. The agreement is known as the stadium management agreement. The respondents contend that there is great commercial value attaching to the naming rights of the new Stadium. Their contention is that they should have the naming rights in order to comply with their obligations to manage the new Stadium under the stadium management contract. According to the respondents they did not know of the naming rights granted to the applicant under the servitude and in any event the applicant has not paid a proper financial consideration for the naming rights in respect of the previous

stadium.

[22] It is the respondents' case that the applicant is claiming rights granted to it beyond those contained in the registered servitude. It is also the respondents' case that the wording of the interdictory relief sought by the applicant seeks to use the respondents' resources to do its marketing. The respondents also contend that in order for the first respondent to achieve its financial commitments set out in the service level agreement concluded with the City, the naming rights would be a major component of the new Stadium's potential revenue. Without it the City would be hard pressed to meet the maintenance costs of the new Stadium. In addition the respondents contend that the right to name the Stadium constitutes an important material term of the stadium management agreement.

[23] I find that the respondents were aware that the applicant was the holder of certain naming rights in respect of the Stadium albeit that they assumed that these rights referred to the Stadium prior to it being demolished and rebuilt. It is curious that the first respondent contends that despite diligent attempts it could not assess the validity or the extent of the applicant's naming rights. No detail is given. The undisputed facts do not support this. Of importance is the fact that at the time of concluding the stadium management agreement in January 2009, the respondents clearly and in anticipation of this potential problem and before signing the stadium management agreement, held a meeting with the applicant's brand director, Mr. Derrick Carstens, in order to obtain an understanding of the applicant's

naming rights. The applicant's brand director was adamant that the applicant had the naming rights of the Stadium and it was contended by the respondents that the applicant refused to explain the ambit of the applicant's rights and refused to give documentation supporting the rights.

[24] Notwithstanding the respondents' apparent lack of knowledge or understanding of the applicant's naming rights they ensured that there was a built in protection clause. The built-in protection clause refers to the fact that the City would be obliged to pay each year to the first respondent the sum of R8 million, the reason being that the sum of R8 million was far less than the value of the annual revenue derived from the naming rights. The first respondent was confident that the naming rights' revenue would be between R15 million and R20 million per year. This clause was inserted based on the respondents' understanding after reading the Servitude and the rights granted to the applicant.

[25] Despite the fact that the first respondent contends that it was only on 7 July 2010 that it first became aware of the details in the signed agreements between the applicant and the State, I find based on what appears above that the applicant, represented by Mr Carstens did hold a meeting with the respondents represented by Mr Stephens in August 2008 and the question of the naming rights was traversed.

[26] According to Mr. Carstens an invitation was given to Mr. Stephens to raise the issue with the applicant's attorney and this was not taken up.

During August or September 2009 the position was again explained to an advertising salesperson appointed by the respondents and according to the applicant, the advert was prepared on the basis that it referred to the First National Bank Stadium and this was emblazoned on the advert. The advert did not refer to the sale of the naming rights of the Stadium, but to the naming rights of the precinct.

THE LAW

[27] In the light of the above the respondents knew of the applicant's rights. It is a question of how they interpreted those rights in law. One of the basic concepts of private law of ownership is that it confers control over the *res, it is the most comprehensive real right a person can have in the thing….This apparently unfettered freedom is, however a half- truth."*[2]. The contents of the right of ownership are extensive and embrace the power to use and enjoy the *res*. The applicant submits that the State as owner of the land was legally entitled to grant the applicant naming rights in the manner described, the right to name being unfettered. The respondents on the other hand contend that there is no legal basis for this. There is no doubt that the traditional concept of ownership imbedded in the Roman Dutch tradition and the rights flowing are in a state of evolution.

[28] Authors and jurists have commented that compelling commercial considerations and statute, the most important of which in South Africa, is inter alia Section 25 of the Constitution, places the traditional methodology of

[2] Gien v Gien 1979 (2)SA1113T T 1120C
Also commentary by Siberberg and Schoeman supra at page 91

categorising ownership rights under scrutiny and have called for these categories to be expanded and possibly redefined to keep in line with its constant expansion.

[29] Authors[3] opine that the concept of property is developing far beyond the classical meaning attached to it by the common-law. The focus on a corporeal object is the traditional principle where the dominance of ownership as a real right still prevails. The fragmentation of real rights of ownership into incorporeal saleable items has become a commercial reality.

[30] Davis J in Qualidental Laboratories (Pty) Ltd V Heritage Western Cape and Another [4]

> *"A balance must be struck between the protection of ownership and the exercise of entitlements of the owner regarding third parties on the one hand, and the obligations of the owner to the community on the other. See in this regard A J van der Walt and G J Pienaar Introduction to the Law of Property 4 ed at 50. See also the manner in which the Constitution (which includes environmental rights) has shaped the nature and protection of ownership, in the judgment by Langa ACJ (as he then was) in President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae) 2005 (5) SA 3 (CC) (2005 (8) BCLR 786)."*

[3] Van der Walt, A. J. van der Walt and C. J. Pienaar, Inleiding tot Sakereg
[4] 2007 (4) SA 26 (C)

[31] Whilst the concept that rights arising out of ownership can and have been enforced, historically it has not been considered absolute. Ownership is not absolute, there are limitations. The question for determination is whether the State as owner of the property could fragment or sever an aspect of its ownership eg. naming rights in favour of the applicant. Authors in other jurisdictions in the field of law on property and ownership have commented extensively. Vandevelde [5] commentary on US law of property has commented on what he terms the *dephysicalisation* of property law where intangible aspects of property law such as goodwill are severable.

[32] Professor Sjef van Erp[6] suggests that in the same way that there was a movement from the classical model of contract law driven by considerations of modern case law, commerce and other compelling considerations led to the concept of "dynamics of contract"[7]. Similarly in the field of property law and ownership a more appropriate model for the development of property law is called for in an era characterised by global and economic integration hence supporting the concept of *dephyisicalisation* of property and ownership.

[33] In my view the concept of severing naming rights from the right of ownership may well constitute the *dephysicalisation* of property and an acceptable form of fragmentation of ownership. Whilst our South African jurisprudential writers refer to entitlements which an owner can dispose of,

[5] K.J. Vandevelde, The new property of the 19th Century: development of the modern concept of property Buffalo Law Review 1980.p 325ff
[6] From Classical to Modern European Law, University of Maastricht
[7] See P. S. Atiya, the Rise and Fall of Freedom of Contract (Oxford University Press), 1979

the owner retains the reversionary right. Once the entitlement is extinguished, the ownership becomes unencumbered again[8]. Upon a proper interpretation of the applicant's contractual rights as well as the registered servitudinal right, I am of the view that the personal right of naming the Stadium is good in law. Whilst various legal principles may apply the proper interpretation of the naming rights can nonetheless be done on first principle combining various fields of law. In Makhanya vs. University of Zululand [9]Nugent JA in dealing with the law of precedent made the following observation:

> "[8] *The law does not exist in discrete boxes, separate from one another. While its rules as they apply in various fields are often collected together under various headings, that is, for convenience of academic study and treatment that should not be allowed to disguise the fact that the law is a seamless web of rights and obligations that impact upon one another across those fields.*"

THE ISSUES IN DISPUTE.

[34] The first and second respondents' first attack on the applicant's case is that the right to name a Stadium is not a personal right capable of

[8] Silberberg and Schoeman *supra* at page 94 referring to Lewis now Lewis JA 1985 Acta Juridica 257
[9] 2010 (1) SA 62 (SCA)

registration in terms of The Deeds Registry of Act 7 of 1937. Secondly, even if it could be registered, the right to name the Stadium came to an end when the old Stadium was demolished and the new one built. Thirdly, the respondents have no contractual *nexus* with the applicant and consequently no right to the relief sought, the same being for the City. Fourthly, no case has been made out in the founding affidavit, nor have the necessary allegations been made in the affidavits to justify the interdictory relief.

[35] The City attacks the applicant's case on similar grounds. No new facts are alleged. It does however attack the applicant's *locus standi* to bring these proceedings and submits that it is only the State that can do so, since the applicant has a contract with the State. The first and second respondents also raise this argument.

[36] A court should not demure from enforcing contractual rights that are first in time and good in law because a claimant claims that the current contract in operation does not enjoy the optimal commercial reward for the City and the public based on the reasoning that the first respondent could have sold the naming rights and added millions of rand to the City's coffers for the administration of the Stadium.

[37] In this case the respondents have made no counterclaim to set aside the contractual and servitudinal rights granted by the State to the applicant. The validity of the 2004 contract and the registered servitude stand unchallenged at this stage, it is only their meaning and applicability that is

challenged and it is for this reason that despite the fact that naming rights are *res novo*, the court can decide the issues raised on a proper application of first principle

THE SERVITUDE

[38] The applicant relies on a contractual provision in the contract it concluded with the State. It was granted a personal right and the servitudinal right to name the Stadium. The basis of the applicant's case is that these rights are conjunctive. The applicant's submission that the right to name a property is a competent component of ownership and this question as to whether it is capable of registration finds resonance in a range of statutes and the common-law. The applicant gave examples for this submission, such as the Local Government Ordinance 17 of 1939, read together with the Town Planning and Township Ordinance 15 of 1986, Transvaal, which provide that the owner of the township has to name the township and all the streets in the township. In addition a further example is that the first members of a company have to give the company its name and a further example is that the owner of a business must name it in terms of the *Business Names Act 27 of 1960*. In addition, if a right diminishes the owner's dominium over the *res* it confers on the holder of those rights certain powers against the whole world. In other words, by registering the servitude there is a subtraction of the owner's dominium. The subtraction test is augmented by the intention test, which the applicant contends can be clearly adduced from the contract. In other words no one else can alienate or sell the naming right component for a period of 10 years.

The respondents submit that the placing of signage referred to in the servitude amounts to a duty placed on the State to publish and market the Stadium and is an aspect which is fatal to the registration of the servitude. This fact is described as the "fatal missing link" in the applicant's case. Upon a proper analysis of the wording of the servitude and the rights which the respondents enjoy in terms of their contract with the City, both the applicant and the respondents are entitled to advertise their respective clients' branding. These features are congruent. The only difficulty for the respondents of course, is that they will not be able to sell the naming rights of Stadium for the duration of the period and the extension period.

[39] In order to find whether the personal servitude registered in favour of the applicant is good in law, the principle of *servitus in faciendo consistere non potest* is applicable. The servient tenement may be required to tolerate something to be done to it or refrain from doing something means the benchmark is passivity. On a proper application of this principle I find that the State's role is characterised by acquiescence in that it has to tolerate the dominant serviens to name the stadium. It also has to tolerate the applicant displaying advertising boards. The State does not have to do so, it is the applicant who has to put up the boards. Fagan J in *Van der Merwe v Wiese*[10] interpreted the principle of acquiescence in the *Dig. 8.1.15.1* as a useful guide only. The criticism of acquiescence as a useful guide was criticised by

[10] 1948 (4) SA 8 (C)

the author, Van der Merwe [11]. However Van der Merwe [12] postulates two requirements for the registration of a servitude: the servitude must not be too onerous and that the servient tenens must bring some advantage to the dominant tenens. Upon a proper application of these two principles and the "useful guide" of acquiescence, the personal servitude was properly registered. A further requirement is that a personal servitude may not be alienated to a third party. In this case the wording of the registered personal servitude does not include the right to cede the naming right, as provided for in the contract between the State and applicant.

[40] The respondent's submission that the underlying principle of a servitude is that a real right confers on the owner of the dominant tenant a direct right to use and enjoy an aspect of the thing on which it vests. The dominant tenens must be able to control the physical aspect of the property directly. According to the respondents the naming right does not fall into such a category. *Section 63 of the Deeds Registry Act* provides that a condition in a Deed which does not restrict the exercise of any right of ownership in the respect of the immovable property shall not be capable of registration. Once there is acceptance that a fragmentation of rights arising out of ownership is possible or the *dephysicalisation* of ownership allows for rights to be severed then that particular fragment of ownership is a real right capable of registration. I find that the naming right component of ownership is capable of registration as a personal servitude.

[11] Van der Merwe's sake reg.474
[12] Van der Merwe supra 468 referring to Van Oewen *Leerboek* 143_

[41] There is no statutory limitation on the registration of the servitude in question. The two statutes dealing with the stadium in question and indeed all the stadia which were constructed for the World Cup, in particular, on 7 September 2006 *the 2010 Fifa World Cup of South Africa Special Measures Act 11 of 2006* and the second statute, *2010 Fifa World Cup South Africa Special Measures Act 12 of 2007*, do not assist in adjudicating whether the applicant's rights are capable of registration or not and only serve to claim the naming of the stadium for the duration of the World Cup. In the result I find that the said statutes do not interfere with any aspect contracted for by the applicants.

[42] The applicant's rights in the material Deed of Servitude are spelt out in clause 2.1.

> *"2.1 With effect from the signature date, the state hereby grants as a personal servitude to FNB the right to name the stadium and erect naming boards therein as they are fully set out in the agreement which right shall endure for a period of 10 (ten) years from 7 July 2004.*
>
> *2.2 The rights referred to above are those set out in the agreement and shall inter alia be on the following terms and conditions.*

2.2.1 The stadium shall be knows as the FNB stadium or such other name as may be designated by FNB from time to time in agreement with the State.

2.2.2 In keeping with the FNB Rights the name "FNB Stadium" shall be prominently displayed on all outer perimeter entrances and exits of the Stadium and on not less than four prime sky board sites in the Stadium. FNB accepts that during periods of reconstruction of the Stadium, the skyboards may not be able to be displayed and that any re-design may require the sky boards to be relocated. In the latter event, FNB shall be granted a preferent right to choose the sites for its relocated sky board. The parties agree that any relocation of the skyboards shall take place in consultation with FNB in an effort to facilitate the placement of the skyboards in the Stadium so as to afford to FNB similar exposure as previously provided to FNB prior to any relocation of the skyboards.

2.2.3 FNB may, at any time, in its discretion, terminate the naming rights by written notice to SAFA, in which event SAFA shall be obliged and FNB shall be entitled, to forthwith remove all signs time, lettering or hoardings from the \Stadium and its environs which reflect the name "FNB Stadium" or any other name substituted therefor pursuant to clause 2.2.1 and any logos or distinctive marks associated with those names."

DEMOLITION OF THE STADIUM

[43] The further defence relied on by the respondents is that the old Stadium was demolished and if indeed there was any such right, it came to an end when it was demolished. Upon a careful reading of the agreement it is clear that the applicant agreed to the destruction of the stadium. The context amply demonstrates that the reconstruction of the Stadium was foreseen and was the *causa* for the 2004 agreement in the first place. It is important to note that the rights set out in the notarial Deed of Servitude, read together with the rights flowing from the 2004 agreement, are clearly spelt out. The draftsperson of the 2004 agreement was well aware that the Stadium would be reconstructed during the period of the servitude and that there would be skyboards and

other signs reflecting the name FNB Stadium and that these would have to be removed during reconstruction.

[44] The applicant relies on the Oxford English Dictionary of 'reconstruction' meaning: the action or process of reconstructing, rebuilding or reorganising something'. According to the respondents the fact that the Stadium was rebuilt, meant the extinguishment of the servitude. The principle of the Roman Maxim *superficio solo quedit and omne quad ed idificato solo quedit* has to be considered. In an article by Lewis 1979 SALJ 94, now Lewis JA in the Supreme Court of Appeal she considered the various conflicting dicta in a number of judgments and opined that it is now beyond doubt that a building annexes to the land in particular if regard be had to the test laid out by Van Vincent AJA in the case of *Theatre Investments (Pty) Limited v Butcher Brothers*[13]. Prior to that there was some debate about the ambit of the test to be utilised in assessing whether a building annexes to the land. The learned author then submitted that the approach of Van Vincent AJA *supra* is the sound one. In accordance with this principle the "*professed intention of the owner/annexor is to be inferred from a number of factors even if it conflicts with the imputed intention. This is a much more equitable test and one which excludes a consideration of the annexor's ipse dixit save where physical features are equivocal".*

[45] Accordingly upon a proper application of the Roman maxim referred to, the professed intention was quite clearly foreshadowed in

[13] 1978 (3) SA 682 AD

the agreement that the Stadium would be reconstructed and that notwithstanding the reconstruction, the applicant would retain its servitude as registered.

[46] The submission by the respondents that the servitude did not revive, is without merit. *Voet Commentaries* 8.6.4 has the following to say:

> "*Servitudes ended by (ii) destruction of either tenement.– A servitude is also wiped out by the destruction of the dominant or of the servient tenement. Flooding nevertheless is by no means to be classed as destruction, inasmuch as the right of servitude is nonetheless in violate when that happens.*
>
> *Servitude revives on restoration of tenement.– But if the property which had persisted is restored, as when a servient or dominant house has been replaced, or a farm which had at first been washed away by the erosion or onset of a river is brought back to its former state by alluvion, it is fair that a servitude should revive or be renewed. Hence also the owner of a servient house can only replace it, after it has fallen down or been burnt out or being taken down, on terms that the servitude may be inviolate over the house put in its place in like manner as the servitude was performed.*"

[47] The respondents place reliance on the comment by *Van der Merwe*[14] on *Voet supra* that a personal servitude is not lightly assumed to survive the

[14] *op cit* at p 535

reconstruction of the servient property. In *De Miellon v Mont Clair Society of the Methodist Church*[15] De Villiers CJ held that the owner of a servient tenement cannot be compelled to rebuild it, hence the servitude is extinguished. The applicant did not abandon the Stadium during its reconstruction. [16] On a proper application of the wording of the servitude and the entire undisputed factual matrix I find that the servitude did survive the re-construction /demolition.

[48] The applicant relies on this principle of the Roman Dutch writers that even if there was a temporary suspension of its rights, it nonetheless revived when the stadium was reconstructed. Van Rooyen AJ in *Kidson supra* refers to Van der Kesel who opined that the only time a servitude cannot be revived, is if there has been a total mutation of the land itself. In other words, if the land itself becomes incapable of supporting any structure that can be utilised as a dwelling and for this, he found support in the Digest under the principle *'Rei mutatione interire usum fructum placet.'* The land itself has not become mutated. The applicant's servitude was registered against the land, the land itself is capable of supporting a structure and in fact a structure (the Stadium) has been erected and thus the applicant did not lose its servitude.

THE CONTRACTUAL PROVISIONS OF THE CONTRACTS CONCLUDED BETWEEN STATE, CITY AND THE RESPONDENTS

[15] 1979 (3) SA 1365 (D) at 1371G-H.
[16] Kidson and Another v Jimspeed Enterprises CC And Others 2009 (5) SA 246 (Gnp)

[49] The applicant submits that the *nemo plus juris ad alium transferre potest quam ipse haberet* applies. The lease concluded between the State and the City does not deal with the question of naming rights. The State could not deliver rights it did not have. The State specifically undertook not give away the naming right and thus the City could not have acquired it.

[50] The City relies on all the legal submissions made by the first and second respondents in regard to their rights. The City however goes on to contend that when the State entered into a long lease with it and thereby the State gave away the naming right to it in the contract. The lease does not give the City the right to name the Stadium. In any event the applicant's right was first in time by virtue of the contract together with the registered personal servitude.

[51] As to the legal interpretation of the naming right, the respondents sought to compare a naming right with a liquor licence which in essence is an intangible or immaterial thing such as goodwill which can be sold and is thus moveable incorporeal property and cannot be registered.[17]. They also contend that a naming right does not give physical control over the *res* and thus cannot be registered. I have found that the fragment which was severed from the right of ownership can be registered and that physical control is a concept capable of symbolic application when it comes to naming rights.

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[17] Slims (Pty) Limited v Morris 1988 SA 715A 727-729 and *Jacobs v The Minister of Agriculture* 1972 (4) SA 608 (W) 621

[52] Careful consideration should also be given to the manner in which the stadium management agreement has been drawn up. Reference has already been made to the finding that the stadium management agreement foreshadowed the very naming problem. In particular clause 9.6.1, 9.6.2, 9.6.3, 9.6.4.

THE INTERDICTORY RELIEF

[53] The applicant contends that the City saw fit to join these proceedings but placed no further facts before the court, only legal argument. The City in supporting the respondents on the naming rights question is impliedly giving away rights it did not have. In joining in these proceedings and by supporting the respondents in the claim to have naming rights it becomes a co-wrongdoer and also requires restraint. The City has made itself complicit in breaching the applicant's rights

[54] In Iir South Africa BV (Incorporated In The Netherlands) T/A Institute For International Research v Hall (Aka Baghas) and another [18] the following is referred to.

> *"17.2Crucial to Goldstein J's decision was his finding that the interdict against the fourth and fifth respondents was based on the delict of intentionally assisting in breaching the undertaking. This finding is echoed in Atlas Organic (supra) at 202 G-H where it is said that a delictual remedy is available to a party to a contract who*

[18] 2004 (4) SA 174 (W)

complains that a third party has intentionally and without lawful justification induced another party to the contract to commit a breach thereof. See also Corbett J, as he then was, in Dunn and Bruidspriet (Pty) Limited v SA Merchants Combined Credit Bureau (Cape) (Pty) Limited 1968 (1) SA 209 (C) where it is was held that a rival trader was liable in damages where it had knowingly furthered its business by unfairly using confidential information of the competitor."

[55] In Lanco Engineering CC v Aris Box Manufacturers (Pty) Ltd[19] confirmed the principle:

> *"that to show an interference with a contractual relationship neither a breach nor an inducement is necessary. In Godongwana v Mpisana 1982 (4) SA 814 (Tk) , both because it shows that neither a breach nor an inducement is a requirement, and because it fully supports the plaintiff's claim. In that case the applicant had obtained a kraal site certificate in his favour from the administrative authority but could not take occupation of the kraal because the respondent had refused to vacate it. In granting an ejectment order Van Coller J assumed that a kraal site certificate did not confer a real right, and said (at 816E-H):*

[19]Lanco Engineering CC v Aris Box Manufacturers (Pty) Ltd 1993 (4) SA 378 (D)

'This allegation, read with the averment that appellant is the holder of a kraal site certificate in respect of the property, can be interpreted to mean that appellant relies, as basis for the relief claimed, upon an unlawful infringement by respondent of appellant's rights arising out of the contract between him and the grantor of the certificate. In the case of an inducement to commit a breach of contract, there is a direct interference with the contractual rights and obligations. Where a third person takes possession of the thing to which contractual rights relate, as alleged in the present case, there is no such direct interference with the contractual rights as such. The contractual relationship between the two contracting parties remains intact. The contract, however, imposes a duty on the grantor to give possession to the certificate-holder, or to allow him to take possession. A corresponding right and duty is conferred upon the certificate-holder to accept performance on the part of the grantor. By remaining unlawfully in possession of the kraal site, the respondent is interfering with the respective rights and obligations of the contracting parties relating to performance. He interferes, in my view, directly with the execution of the contract, and it is in that sense that he infringes the rights of the contracting parties.' The significance lies, however, in the question of unlawfulness. features which must be thrown into the scales when a Court considers whether public policy, or the boni mores, or the criterion of

reasonableness, will regard any particular interference in a contractual relationship as unlawful or not. Indeed, they are important considerations, so important that in a given case their absence might make it difficult for a Court to conclude that the interference concerned was unlawful. I emphasise however that each case must depend upon its own facts. "

[56] Upon a proper application of the tests set out in the above cases it is quite clear that the respondents, as well as the City, have interfered in the contractual relationship between the applicant and the State. The founding affidavit outlines this position sufficiently. The relevant portions on unlawful interference have already been referred to.

[57] However, the case law suggests that additional considerations should also apply as to whether this interference in the contractual relationship between the applicant and the State. These considerations require the application and scrutiny of public policy, bona mores and the criterion of reasonableness.

[58] In applying these principles, it is important to note that there was a *quid pro quo* between the applicant and the State for the naming rights. Accordingly the additional features which play a role and required to be addressed are: public policy, reasonableness and bona mores.. Despite the lucrative financial considerations which the respondents could enjoy, the applicant's rights must be upheld.

[59] The question is whether an interdict is justified in these circumstances to prevent an ongoing infringement of those contractual rights. The applicant has made out a case that the first and second respondents conduct is such that it infringes on its goodwill and it is unlawful in this regard, relies on the case of G A Fichardt Ltd v The Friend Newspapers Ltd[20] On the other hand the respondents contend that because there is no contractual nexus between the applicant and the respondents, therefore the applicant has no right to interdict the respondents. The law recognises that an interference with contractual rights may give rise to a delictual liability. In this regard, the respondents contend that the applicants have made out their case in their heads of argument, regarding the question of delictual liability. On a proper construction of the founding affidavit this is not so.

[61] In *Smit v Sipem* [21] our law recognised a delictual remedy against the interference by a third party with contractual rights. The question as to whether the respondents conduct is to be found in the realm of a delict, can be inferred from the facts. The respondents knew of the applicant's rights, there had been a debate that had taken place as early as 2008, again in 2009 but nonetheless the respondents responded to the applicant's article on the website as already described.

[20] 1916 AD 1 at 6

[21] 1974 (4) SA 918 (A) 926-7

INTERDICTORY RELIEF AGAINST AN ORGAN OF STATE

[62] A further question to be considered is whether an interdict, should be granted against the City. The remedies sought are not only prohibitory in nature but the fourth interdict is a mandatory interdict. In the matter of *Redland Bricks Limited v Morris* 1969 (2) All England 576H at 59D to 581H, Lord Upjohn confirmed that the court has an inherent power to grant mandatory relief. This principle was followed in *Cape Town Municipality v Abdullah* [22]as also *James v Magistrate Wynberg*[23]. *Pretoria City Council v Osmond Ohmar (Pty) Limited*[24].

[63] However there has to be caution when a court exercises its discretion to grant this mandatory relief against an organ of state. The mandatory interdict will only be exercised sparingly and with caution, but in a proper case unhesitatingly. The applicant contends that the City has not adopted a neutral stance in this case. The City submitted that as an organ of state, it nonetheless enjoys the right of freedom of expression and of course this is correct. However in enjoying that right to freedom of expression, the City also has to take into account that its failure to adopt a neutral stance in this matter and actively promote the interests of its stadium manager to whom it could not confer a naming right, means that the court has to curtail its conduct. Its stated position is that it cannot be interdicted from referring to the Stadium by any name it chooses.

[22] 1974 (4) SA 428 (C) 437B-D
[23] 1995 (1) SA 1 (C) 22
[24] 1959 (4) SA 439 (T)

[64] In other words, the City contends that it is like the man in the street that cannot be interdict from referring to the Stadium as the World Cup Stadium or Soccer City. In the absence of a neutral stance and in the absence of an undertaking to abide the court's decision, in regard to any order it makes I find the City is not a man in the street and therefore has constitutional obligations. This is an unusual stance adopted by the City and therefore the structured interdict or the mandatory interdict should be granted against it.

[65] I find the court does have the jurisdictional power to exercise this right. Under the prayer further or alternative relief (clause 6 in the amended notice of motion) a court has discretion to decide to issue an order. In the light of the attitude adopted by the City, it is important to avoid further litigation using rate payers money and I am accordingly of the view that an order against the City in the form of a declarator is appropriate.

[66] Further defences raised by the respondents are that the application is to be determined, in terms of the *Plascon Evans rule* and thus on the respondents' version. Except for the legal principles emanating from the applicant's founding affidavit and the affidavits as a whole, there are no substantial disputes of fact. The fact of the publication and the knowledge by the respondents of the applicant's rights prior to the publication, whether correctly interpreted or not, are

not disputed. Therefore there is no need for an application of the *Plascon Evans rule* on the facts upon which this judgment is based.

[67] The respondents also contend that the effect of the interdicts which the applicant seeks is really when stripped of the non essential verbiage, placing an obligation on the respondents to promote the Stadium, by using the applicant's trade name and in this way the applicant will in fact receive free advertising coverage. This is incorrect. All that the respondents are required to do is when referring to the location of any event taking place at the Stadium, the location name will be the FNB Stadium. The applicant has its other rights, regarding the signage to which I have already referred and spelt out in great detail.

[68] A further attack on the validity of the servitude and the agreement is that the agreement as well as the servitude does not contain sufficient detail. The respondents rely on two articles published on the internet by the solicitors, in the United Kingdom. The articles refer to the fact that a contract in respect of naming rights is a complex one and that there are many essential elements which ought to be included. Upon a proper reading of those two articles, it is quite clear that those articles are really aimed at assisting solicitors in drawing up contracts and do not purport to suggest that the features suggested by them should, amount to legal principles.

[69] The respondents also rely on the case of *Lowater Property (Pty) Limited and Another v Walu Sand CC*[25], where a successor in title is not obliged to recognise a personal right and they rely on that principle. The respondents contend that they are successors in title and neither the City nor they are obliged to recognise the personal right as registered. That that submission has no merit based on the entire conspectus of facts before the court, coupled with the absence by the respondents and the City to counterclaim for the setting aside of the contract and the servitude which was validly concluded and registered as between the applicant and the State. There might well be an argument based on public policy or any other right that the respondents can rely upon, to impugn the current and existing contract between the State and the applicant, but it has not done so.

[70] A further consideration as to whether the interdict as claimed can be granted, I place reliance on the case of Malan and Another v Aard Canal Investments (Pty) Limited[26]:

> "*In the present case the respondent's right is clear, namely a registered servitude and the second appellant's activities constitute an unlawful infringement thereof. In a long line of cases our courts have in similar instances granted prohibitory interdicts to protect registered servitudes against the continuance of unlawful infringement as well as the perpetration of*

[25] 1999 (1) SA 655 (SE) 663 B-C
[26] 1988 (2) SA 12 (A)

future infringements where there has been no proof of damage or injury."

[71] In this matter I have found that the failure by the City and also the refusal by the respondents to retract publicly their contention that they have a right to sell the name in the face of the applicant's registered servitude, constitute such an infringement which justifies the grant of an interdict.

[72] On the question of urgency. I find that the application is clearly one of urgency and cannot be dealt with in the normal course. Commercial urgency is trite law. The effect of the respondents' claim to their being entitled to name the Stadium, is clearly detrimental to the applicant's position in the market place and justifies the matter be resolved expeditiously. It is not necessary to spell out all the features that justify the commercial urgency in this application; they have been dealt with in detail. The continued high profile programme of events, which are to follow, is a further urgent factor requiring the resolution of confusion in the market place.

The order that I would make is:

1. That the application is urgent.

2. That until 14 July 2014 or 14 July 2016 (the period) and should the applicant extend its rights as provided for in clause 5 of the agreement, annexure DNC1 to the founding affidavit, the first, second and fourth respondents are interdicted and restrained and prohibited from:

2.1 Referring to the Stadium on Portion 4 of the farm Randskou 324 (reg Div IQ) Gauteng Province by any other name other than “FNB” Stadium”;

2.2. Purporting to sell or dispose of the right to name the Stadium during the period.

3. The following declaratory order is made:

3.1 The applicant has the sole right to name the stadium during the period:

3.2 The applicant has chosen the name “FNB Stadium”:

3.3 For the duration of the period, the name of the stadium is the FNB stadium.

3.4 The first, second and fourth respondents do not have the right to name the Stadium during the period.

4. The first, second and fourth respondents are ordered to pay the applicant's costs including the cost of two counsel jointly and severally the one paying the other to be absolved.

5. The costs of the two appearances during the week of 22 July 2010 shall be costs in the cause.

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VICTOR J