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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 38240/2020

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: NO

DATE: 11 AUGUST 2022

In the matter between:

STEPHEN LEONARD STOCH

First Applicant

CAROLYN WENDY RAPHAELY

Second Applicant

And

ZWELIBANZI VINCENT MNTAMBO N.O.

First Respondent

ZWELETHEMBA GANUGANU MNTAMBO N.O.

Second Respondent

MZWAKHE KUTLWANO MNTAMBO N.O.

Third Respondent

WANDILE KAMOGELO MNTAMBO N.O.

Fourth Respondent

JACOBUS PETRUS ROSSOUW N.O.

Fifth Respondent

JUDGMENT

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 11 August 2022.

MOTHA AJ

1. “Good fences make good neighbours” writes Robert Frost in Mending Wall. The double garages built on one of the litigants’ vacation home are a source of contestation between the parties. Having failed to live as good neighbours in their holiday homes, they turn to the law for good fences.

2. In *casu*, the Applicants seek an order to evict and interdict Maculisane Mntambo family Trust (“Trust”) from the garages situated at erf: [...], K [...], B [...] Municipality. They also ask for an order directing the Trust to disconnect the sewerage pipes of the property situated on erf: [...], K [...], B [...] Municipality from the septic tank situated on erf: [...].

3. In response, the Respondents bring a counter-application for an order instructing the Applicants to provide, attest or sign all the necessary documents, including the Power of Attorney and draft Deed of Servitude appended to annexure “FA18”, in order to register a servitude over erf [...] in favour of and for the benefit of erf [...].

BACKGROUND FACTS

4. This matter emanates from a small housing estate called “Keurbaai”, in K [...]. Developed in the early 1980s, Keurbaai Shareblock (Pty) Ltd (“Shareblock Company”) owned all the land situated at Keurbaai under a consolidated erf [...]. Subject to user agreement, the Shareblock Company issued a number of shares, each entitling owners

thereof to the exclusive use and enjoyment of their sites, namely a fictional section of the consolidated erf.¹

5. Some of these sections had houses built on them, whilst others were empty stands. In the late 1990s the shareholders of the Shareblock Company took a decision to subdivide the consolidated erf into individual erven, and the remaining portion as shared property. The goal was to transfer the individual erven from the Shareblock Company to individual shareholders. This process, which would result in each owner holding an individual title, is the genesis of this conflict.

6. Due to the significant transfer duty required for the transfer of an erven from the Shareblock Company to an individual shareholder, none of the shareholders took transfer. In 2013 certain changes to the tax regime were introduced, and these made it possible for the Shareblock Company to transfer individual erven to shareholders at a minimal cost.²

7. It bears mentioning that both erf [...] and its immediate neighbour erf [...] were owned by the Shareblock Company as semi-detached units comprising of one single building; and were a part of a housing block constructed on an undivided land which later became units 5 and 6 on erf [...] and erf [...], respectively. The original owner of the house on erf [...] was F. van Niekerk, and W. Labuschagne owned the house on erf [...].³(These were brothers-in-law). Four garages were built on erf [...] to service both houses. The two garages located on the eastern side were used by the owner of erf [...] whilst the other two on the western side belonged to the owner of erf [...].

8. It was practical and convenient that the garages be constructed under unit 5 to service both units, 5 and 6. The Respondents' house was hidden from view by a large bush in front of it. The designer did not anticipate any individual ownership of the fictional divisions. The first Respondent made the point that there was no need for a

¹ Respondents' Answering Affidavit para22 (001-123 Case Lines)

² FA para 23 (001-8)

³ Supra para24 (001-124 CaseLines)

formal agreement between Van Niekerk and Labuschagne, since the properties were consolidated under erf [...] and owned by the Shareblock Company.

9. The Applicants bought the shares in the Shareblock in 1999 after the subdivision had been granted. Since the Shareblock Company owned the development, it had a strict regime in place regarding tampering with the existing aesthetic of Keurbaai. In order to preserve the existing aesthetic of the complex, shareholders were precluded from effecting wholesale alterations to their houses.

10. Upon the sale of his Shareblock to the Applicants, Van Niekerk requested them to allow Labuschagne to continue utilizing the garages. Labuschagne later sold his shares to V. van Heerden who also used the garages to park and access erf [...]. He, in turn, sold his shares to the Trust in or about August 2013. For what it is worth, the first Applicant was at one stage the Chairman of the Shareblock Company.

11. The Applicants permitted the Trust to utilize the garages. According to the Applicants they did not intend utilizing the garages for their cars, and they were not permitted to alter the property in any significant way. In 2014, the first Applicant and first Respondent met and discussed registering a servitude over the Applicants' property which would formalise the permission, the owners of the Trust property already had, to continue utilizing the garages and accessing the Trust property from the Applicants' property.

ISSUES CONFRONTING THE PARTIES

12. On 23 April 2014, the first Applicant addressed an email to the first Respondent and Chairman of the Shareblock Company, Simeon Peerutin. In this email the first Applicant stated the following:

“Hi Simmy

As we are now proceeding with the transfer of the remaining part of the Shareblock to the shareholders, there is one issue that Zweli (Vincent) and I need to resolve. He basically owns the two left-most garages under No 5 and I am thus obliged to provide him with a servitude to access these garages. While all of the houses were owned by the Shareblock this was not an issue and we simply allowed the owners of unit 6 to park on half the front of our erf ([...]). Now that we have to create a formal servitude, we need to create a balance between giving Zweli access and preserving the value of our erf. The bigger the servitude, the lower our value.

In addition, Zweli needs to ensure that he has sufficient parking. Note that the piece of ground opposite No 6 IS taken up by the electric box and is a servitude in favour of all Keurbaai houses.

I have come with a sketch that I think might work and thought I'd ask for your architectural opinion. It will necessitate Zweli removing about half of the bush in front of his house, but I would suggest he keeps as much as possible as close to the house as possible as to avoid exposing more brick work to the road. As it stands, it is rather nice that No 6 is hidden...

Zweli what are your thoughts?"⁴

13. At this stage, it was beyond any question that the parties regarded the two garages on the western side as belonging to erf [...]. Hence, the Respondents effected improvements by building a storeroom at the back of the garages, installing electric garage doors, a geyser and DB board. The Applicants did not object to these improvements as they understood these garages to belong to erf [...]. Therefore, the only issue up for discussion was a servitude granting the Trust the right of way to access their garages. Accordingly, during the transfer of erf [...] from the Shareblock Company into the shareholder this should have been attended to. However, the

⁴ Annexure FA5 (001-46)

Shareblock Company did not register a servitude on erf [...] in favour of erf [...] when the properties were subdivided. It could not have been the design in the Shareblock Company that erf [...] would have four garages and erf [...] would have none.

14. On 23 April 2014, the first Respondent requested a copy of the document signed by the first Applicant granting a right of way to the successors in title to erf [...]. For assistance with the registration of the servitude, the Applicants recommended the services of Steyn De Villiers, a notary public. The first Respondent requested the first Applicant to give Steyn De Villiers instructions to go ahead; and also enquired about the costs he would have to bear.⁵ In response the first Applicant sent an email to both Steyn De Villiers and the first Respondent stating the following:

“1. Fact – you basically own the western garages and are hence entitled to a servitude to them.

2. Fact – as you are entitled to use the garages, we are obliged to provide access to them.”⁶

15. On 24 April 2014, the first Applicant sent his sketch of how the servitude should look like. The first Respondent acknowledged the first Applicant’s initiative and suggested that the servitude, in order to protect the value of the first Applicant’s erf, should be registered on the garages and not on the driveway.⁷ Then the parties could agree on the terms and conditions of the use of the driveway.⁸

16. Having suggested a different route to the first Applicant’s sketch, on 25 April 2014, the first Respondent suggested that the parties sought advice from the professionals in order to arrive at a practical and effective solution.⁹ The first Respondent was interested to keep as much of the vegetation as possible, especially

⁵ Annexure FA5 (001-48)

⁶ Email by Leonard Stoch (001-52 CaseLines)

⁷ Annexure FA6 (001-51 CaseLines)

⁸ Supra

⁹ Email from Vincent Mntambo (001-52 CaseLines)

the milk-wood trees that had grown to a good size. He was, however, willing to cut and remove some ground and vegetation in order to create parking for two cars.¹⁰

17. On 15 October 2015, Steyn De Villiers drafted an email with a draft resolution, Power of Attorney and notarial deed for the registration of the servitude over the Applicants' property. The first Applicant indicated that he was "pretty much happy to go along with a verbal description for now, but my suggestion is that this be done properly from the get-go. Do the survey now and get everything registered by the book. The diagram below is pretty much what I had in mind."¹¹

18. The Applicants wanted to retain as much of their erf as possible as they would possibly extend the balcony on the north of their house and might need a column on the western boundary.¹²

19. On 27 June 2016, Steyn De Villiers emailed the first Applicant and stated that:

"Your letter below and the basic terms of the servitude seems to be the basis of the servitude namely:

-Access route commencing at 3m wide and increasing to 6m(parallel to boundary) to access garage area (6x6m) as depicted in your letter, and-described in my draft agreement.

On the strength of the above the Surveyor can plot the servitude area and draw the Diagram for approval by the Surveyor Gen, I need authority from you and Mntambo Trust to instruct the Surveyor and incur such costs obo Mtambo Trust who has to pay the costs.

Please phone me if anything is not clear."¹³

¹⁰ Email dated 23 April 2014 (001-51 CaseLines)

¹¹ Annexure FA9 (001-53 CaseLines)

¹² Email by Leonard Stoch (001-53 CaseLines)

20. Procrastination is a thief of time. There was no activity for a number of years. In 2018 owners at Keurbaai began to construct houses which were fundamentally different from the aesthetic structure of other houses. All the restrictions on the aesthetic development were removed. The Applicants began to consider utilizing the garages as an additional living area.

21. On 01 March 2018, the first Applicant enquired from the Respondents whether they still wanted to proceed with the servitude and expressed that they were considering plans for the northern portion of the erf. Relying on the institutional history, the first Respondent mentioned that the original owners of no. 5 and 6 had an agreement in terms of which no.6 had the right to use the driveway and the garages which are the property of no.5.¹⁴

22. For the first time, on 25 December 2018, the first Applicant stated that the garages were built on their property and actually were part of their house. Clearly the gloves were now off. In the email he stated the following:

“I have been giving some thought to the servitude again and to the use of the garages. While we have agreed to grant a servitude to access the two rightmost garages (as you are aware), the actual status of the garages per se is a bit moot. Although Frik allowed Wally (I think his brother in law) access to the rightmost garages and we have continued that “tradition” Wally, I do not know the long term implications of this are.

As you are aware, the garages are built on our property and are actually part of our house. There is no sectional title of the garages in favour of erf [...] and I am under no obligation to grant such sectional title rights.

¹³ Annexure ZM 14 (001-205 CaseLines)

¹⁴ Annexure FA11 (001-56)

Have you consider building garages on erf [...] or possible creating parking facilities for your erf. Erf [...] is currently the only Erf without parking and/or garage facilities. Wouldn't be that the cleanest solution?

Of course, we can establish the servitude, but what of the garages that are on our property and are part of our house? Is it not time that we resolve this issue?

Regards

Leonard

PS. I had a look for my purchase agreement, but cannot find it. I fear it was thrown away during a major cleanup-I threw out almost all documents older than 7 years. All I have is the title deed, which mentions nothing about the garages or the driveway.”¹⁵

23. On 28 December 2018, the first Respondent dispatched an email in which he acknowledged their lackadaisical handling of the matter which led to the loss of vital information. Of paramount importance is that he again acknowledged the Applicants' ownership of the land and garages. On the same day, the first Applicant suggested the following options:

(a) “Rental of a tandem garage space with direct access and parking space on that access- the term and rental would need to be discussed;

(b) Sale of a tandem garage space to you and sectional title of that portion of my property;

(c) You build a garage on your property and we can discuss a servitude of access to your property on my property.”¹⁶

¹⁵ Annexure 12 (001-57 CaseLines)/Also on 001-74

¹⁶ Email (001-73 CaseLines)

24. At this stage it was clear that the parties were locking horns. The Applicants further stated the following:

“I bought my property in 1999 as it was a condition of purchase that individual title be granted and allowed the original owner of your property continued access to the garages.

In the spirit of good neighborliness I allowed the arrangement with purchasers of your property. At no stage was it intended that legal or property rights were intended to be created on my land- I appreciate that you have recognized this.”

17

25. The battle lines were drawn. On 23 March 2019, the first Respondent copied the first Applicant the legal advice from his lawyers, Cezanne Britain. It categorically stated that there was an unregistered praedial servitude in favour of the Respondents' property as a result of a mutual agreement between the original owners. It, further, stated that the Applicants and Respondents reached an agreement to have the right of passage, access and use formalised by registering a servitude. Therefore, they maintained, there was an existing *de facto* unregistered praedial servitude in favour of the Trust.¹⁸

26. On 12 April 2019, the Applicants' lawyers, Bernadt Vukic Potash and Getz, sent a letter disputing the existence of a praedial servitude and stated that at best there was an informal discussion between the Applicants and Respondents regarding a possible conclusion of an agreement. It bears mentioning that the Attorneys of the Applicants stated that the use of the garages could only be terminated on reasonable notice.¹⁹

27. Mr. De Villiers communicated to the Respondents' lawyers, on 30 May 2019, that he had retired and was winding down his practice and sent to them the following:

¹⁷ Supra

¹⁸ Annexure FA14 (001-58 CaseLines)

¹⁹ Annexure FA15 (001-59 CaseLines)

- (a) Trust resolution.
- (b) Copy of original D/T33049/2014.
- (c) Power of Attorney with draft notarial agreement annexed to register the servitude in general terms for signature.
- (d) General plan to be annexed to Not. Agmt.

28. Since he did not have authority to appoint a surveyor to survey the servitude area he would proceed to have the servitude registered in general terms as per description in the drafts.²⁰ The following day on 31 May 2019, the first Respondent sent an email to Mr. Steyn De Villiers indicating that he was no longer prepared to approve of or sign any servitude in favour of erf [...].²¹

29. Mention must be made that the notarial deed of servitude, as drafted by Steyn De Villiers, entitled erf [...] a right of way 3m wide over erf [...] to give vehicle access to a servitude of a double garage parking area 6x6 metres on erf [...]. The concerns of the Applicants were taken on board in that they reserved the right to extend the balcony to the north of the dwelling over the width of the house and to construct a column on the western boundary for as long as it did not interfere with the use of the servitude.

30. On 12 June 2019, the Respondents' lawyers wrote to the Applicants' lawyers and indicated that while there is no registered servitude over Erf [...] the parties had an oral agreement to register one. They recorded that the Applicants were reneging on the agreement between the parties and suggested three options, namely:

- (a) "Proceeding with the registration of the servitude, as originally agreed and intended, given that the paperwork has already been prepared;
- (b) Varying the terms of the existing agreement by negotiation and agreement and proceeding with the registration of the servitude; or

²⁰ Email by De Villiers (001-76 CaseLines)

²¹ Annexure FA16 (001-62 CaseLines)

(c) As an alternative to the registration of a servitude, by the parties entering into a 99-year lease with rental and nominal amount of R100 per annum to be paid by our client to your client.”²²

31. The first salvo was fired on 05 February 2020 when the Applicants’ Attorneys sent a letter to the Respondents’ Attorneys intimating the commencements of the proceedings. On 11 February 2020, the Applicants employed new lawyers, Knowles Husain Lindsay Inc. Despite being prepared to allow the Trust to continue utilizing the garages, the Applicants were no longer willing to register a servitude over their property. They had changed their mind.²³

THE ISSUE OF SEWERAGE

32. With the result of the development in the area, the Municipality instructed the owners of Keurbaai to disconnect their sewerage system from the old septic tanks and connect their plumbing system into the municipal wastewater system. Again the parties were involved in another skirmish because the second Respondent refused the first Applicant entry into the garages. As this would become important later, it is worth mentioning that he stated the following:

“In the interim, I wish to reiterate that you may not gain entry into my garage without my consent to do so, and further not engage with those in my employ to do so without my permission.”²⁴

33. In response the first Applicant reminded the second Respondent that the first Respondent had already acknowledged their ownership of the garages. Erf [...] has a servitude registered on it in favour of erf [...] for the passage of or provision of water, sewerage drainage, electricity and other services, including telephone, radio and

²² Annexure FA18 (001-66 CaseLines)

²³ FA PARA102 (001-27 CaseLines)

²⁴ Annexure FA 25 (001-97 CaseLines)

television services, and through or by means of pipes, wires, cables or ducts existing in or under within erf.²⁵ This was inserted when the Shareblock Company decided to subdivide the consolidated erf. I was informed during the hearing that this issue has become moot. The Applicants' Counsel submitted that there was no need for me to waste time on this issue as it had become peripheral. Both the Applicants' sewerage and Trust property's eastern sewerage systems have already been connected to the new system. I, therefore, make no pronouncement on this issue.

ADDRESS BY THE PARTIES AND THE LAW

34. The Applicants argued that this matter does not fall under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998. Counsel for the Applicants referred to the matter of *Barnet and another v Minister of land affairs and others*²⁶ in which the Court stated the following:

*"This leads to the next question: can the cottages on the sites that were put up by the defendants for holiday purposes be said to be their homes, in the context of PIE? I think not."*²⁷

35. The Court said PIE only applied to the eviction of persons from their homes. The term home required an element of regular occupation, coupled with some degree of permanency. Cottages erected for holiday purposes and visited occasionally over weekends and during vacation by persons who have their habitual dwellings elsewhere did not qualify as homes in the context of PIE. If PIE does not apply to an eviction from a cottage used for holiday purposes, it, certainly, cannot apply to an eviction from a holiday home's garage. Anyway, this issue was not pursued by the Respondents' Counsel.

²⁵ RA par 43.8 (001-233 CaseLines)

²⁶ 2007 (6) SA 313 (SCA).

²⁷ Supra para 38

36. The Applicants' Counsel submitted that the Respondents repudiated by refusing to recognize their ownership of the garages. He indicated that the Applicants were amenable but had not agreed to the registration of a servitude.²⁸ However, they had changed their minds and intended to use the garages to build additional rooms.²⁹

37. Responding to a question from the Court about the cancellation of the contract, Counsel for the Applicants submitted that the Applicants did not cancel nor terminate the agreement, but reserved the right to terminate on reasonable notice. As stated above, he argued further, the Respondents' refusal to acknowledge the Applicants' ownership of the garages amounted to a repudiation which the Applicants accepted and terminated for the first time in the founding affidavit, at paragraph 147.3.

38. To use his words, he submitted that the Applicants did not say the Respondents should get out tomorrow or in a years' time. In essence his submission was that the Applicants always remained the owners of the garages subject to a personal right terminable on reasonable notice. However, things had changed and the Applicants wanted to get the value of their property; in the same way the Respondents wanted to get the value of their property by not clearing up the bushes, because they wanted privacy. The Applicants were no longer willing to register the servitude, and they did not have any legal obligation or agreement, as the agreement was not in writing. Section 2(1) of the Alienation of Land Act 68 of 1981 had not been complied with.

39. The Applicants had a legal right to terminate on reasonable notice if and when they wanted to start renovating, argued the Applicants' Counsel. At best, he submitted, the Respondents could continue to use the garages if there is no termination. This is in line with paragraph 74 in the founding affidavit in which the Applicants mentioned their preparedness to allow the Trust to continue utilizing the garages until the commencement of the garage development. To me, it is clear that the Applicants wanted a way to justify terminating the *status quo*.

²⁸ RA par 78.2 (001-250 CaseLines)

²⁹ Replying Affidavit para 55.5 (001-239 CaseLines)

40. Addressing the issue of repudiation, the Applicants' Counsel referred to the matter of *Datacolor International (Pty) Ltd. v Intamerket (Pty) Ltd.*³⁰The Court in *Datacolor* repeated that the test for repudiation is not subjective but objective. A notional reasonable person in the position of the Applicants needs to also arrive at the conclusion that the Respondents repudiated. Therefore, the question is did the refusal by the second Respondent to allow the Applicants to access the garages amount to a repudiation? The Applicants understood the refusal by the Respondents to grant them access to the garages, acknowledge their ownership of the garages and to terminate on a reasonable notice to amount to a repudiation. In the matter of *Datacolor International (Pty) Ltd. v Intamerket*³¹ (Pty) Ltd the Court held:

*"Where one party to a contract, without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention no longer to be bound by the contract, he is said to "repudiate" the contract ... Where that happens, the other party to the contract may elect to accept the repudiation and rescind the contract. If he does so, the contract comes to an end upon communication of his acceptance of repudiation and rescission to the party who has repudiated ..."*³²

41. Finally, he submitted that even if there was an agreement it was inchoate, because it lacked the essentialia of a servitude. Hence, he submitted that to grant the counter-application would amount to giving a blank cheque, as there was no agreement on the diagram and the services of a surveyor had not been secured. The argument goes, the first Respondent, a billionaire who purchased three properties in Plettenberg Bay simply for the purpose of protecting the view of his second holiday home,³³ can

³⁰ (2/99) [2000] ZASCA 81; 2001 (2) SA 284 (SCA); [2001] 1 All SA 581 (A) (30 November 2000)

³¹ (2/99) [2000] ZASCA 81; 2001 (2) SA 284 (SCA); [2001] 1 All SA 581 (A) (30 November 2000)

³² Supra Para 16

³³ Replying and Answering Affidavit to Counter application para 22.3 (001-222 CaseLines)

afford to build garages on erf [....]. Ultimately, it was submitted, the Trust needs to clear up the garden and have a parking area. Only in the replying affidavit do the Applicants raise the issue of prescription, however, it was not pursued.

42. In the same way a servitude was registered for the water reticulation, servitudes for the right of way and use of garages were supposed to have been registered. The Respondents' failure to strike whilst the iron was still hot led to the Applicants' volt face. By any means the Applicants wanted out of the agreement. Hence, they argued that there was an inchoate agreement, and yet their pivotal point is repudiation. It begs the question can one repudiate a non-existent contract? Further, the Applicants on more than one occasion insisted that they had changed their minds. Facts changed agreements change, said the Applicants' Counsel.

43. In examining the purported repudiation, I need to look at the two parts that have been said to make up an act of repudiation. Dealing with this issue, the Court in *Datacolor* said the following:

“Repudiation has sometimes been said to consist of two parts: the act of repudiation by the guilty party, evincing a deliberate and unequivocal intention no longer to be bound by the agreement, and the act of his adversary, “accepting” and thus completing the breach. So for example Winn LJ remarked in Denmark Productions Ltd v Boscobel Productions Ltd [\[1969\] 1 QB 699](#) at 731F-732A:

“Where A and B are parties to an executory contract, if A intimates by word or conduct that he no longer intends, or is unable, to perform it, or to perform it in a particular manner, he is, in effect, making an offer to B to treat the contract as dissolved or varied so far as it relates to the future. If B elects to treat the contract as thereby repudiated, he is deemed, according to the language of many decided cases, to ‘accept the repudiation’ and is thereupon entitled (a) to sue for damages in respect of

any earlier breach committed by A and for damages in respect of the repudiation, (b) to refrain from himself performing the contract any further.”³⁴

44. In *casu*, the parties regarded the western garages as belonging to the Trust, hence, the improvements thereon. Fact you basically own the western garages and are hence entitled to a servitude, said the Applicants. It cannot come from the mouths of the Applicants that the Respondents’ assertion of ownership of the garages amounts to a repudiation. Upon a proper analysis of the facts, it could not have been intended to deprive erf [...] of garages and grant erf [...] four garages. Even the location of these garages bear testimony to the fact that they were intended to service erf [...]. The simple truth is that they changed their minds. Repudiation is simply a ruse to deal with their failure to give reasonable notice and ultimately compensation. Hitherto, the Respondents are in lawful occupation of the garages. Accordingly, I regard this argument to be without substance.

45. Relying on *Seale and Others v Minister of Public Works and Others*³⁵, Counsel for the Applicants argued that at best this was an agreement to agree. In that instance the Court in *Seale* held the following:

*“Our law in respect of the enforceability of an agreement to agree developed in the following manner. In Premier of the Free State Provincial Government and Others v Firechem Free State (Pty) Ltd. **2000 (4) SA 413** (SCA); **[2000] 3 All SA 247** (A) at 431G-H Schutz JA said, with reference to earlier authority, that ‘an agreement that the parties will negotiate to conclude another agreement is not enforceable, because of the absolute discretion vested in the parties to agree or disagree’. In Southernport Developments (Pty) Ltd v Transnet Ltd **2005 (2) SA 202** (SCA); **[2005] 2 All SA 16** (SCA) at 208C-D Ponnann AJA, writing for the court, held that the dictum in *Firechem* is not applicable to a contract that*

³⁴ Datacolor para 1

³⁵ (899/2019) [2020] ZASCA 130 (15 October 2020)

contains what he referred to as a deadlock-breaking mechanism. By that he meant provisions that prescribe further steps to be followed in the event of the failure of the negotiations."³⁶

46. He concluded that, in this case, the contract is unenforceable because there is no deadlock-breaking mechanism such as the one mentioned in *Seale's* case, where the Court held:

*"Letaba Sawmills (Edms) Bpk. v Majovi (Edms) Bpk. [1992] ZASCA 195; 1993 (1) SA 768 (AD); [1993] 1 All SA 359 (A) provided an example of such a deadlock-breaking mechanism. There an option to renew a lease on the basis that in the event of the parties failing to agree on the rental, a market-related rental would be determined by arbitrators, was held to be enforceable. Southernport similarly dealt with an option to lease specified properties (or agreed portions thereof) 'on the terms and conditions . . . negotiated between the parties in good faith'. The court held at 211F-G that the enforceability of the option had been saved by a provision that should the parties be unable to agree on any of the terms and conditions, the dispute would be referred to an arbitrator whose decision would be final and binding."*³⁷

47. Referring to, *inter alia*, *Thorpe and Others v Trittenwein and Another*³⁸, he argued that the Trust did not give the first Respondent (Mr. Mntambo) the authority to act on its behalf nor did other trustees give their signatures. Unlike in partnerships where one partner can bind the rest of the partners trust have to act jointly unless the trust deed says otherwise. If regard is heard to the fact that Steyn De Villiers was in possession of the Trust resolution, this argument, as pointed out by the Respondents' Counsel, is a non-starter. Finally, he argued that at the date at which Mr. Mntambo purported to reach this agreement the trust did not own the property. It was owned by the Shareblock

³⁶ Supra par 28

³⁷ Supra par 29

³⁸ 2007 (2) SA 172 (SCA)

Company. The Respondents' Counsel made short work of this argument by pointing out that this is in consistent with the facts of the case, the Applicants allowed the Respondents to continue using the garages.

48. Respondents' Counsel seized on the submission, made by the Applicants' Counsel, that the Applicants did not cancel nor terminate the agreement but there was a repudiation. Relying on *Myaka v Havemann and Another*³⁹ and *Chetty v Naidoo*⁴⁰, he pointed out that the agreement was still in existence for the Respondents to make use of the garages. Therefore, the Applicants did not meet the requirements of a *rei vindicato*.

49. The Court dealing with the subject of eviction in *ACSA v Exclusive Books*⁴¹ held the following:

"It is trite that when claiming eviction an owner must aver and prove its ownership and that the occupier is in possession. If the owner alleges more than is necessary to vindicate its property, as ACSA did by alleging that the lease had been terminated on one month's notice, it must show that the termination was lawful. In Myaka v Havemann¹⁰ Davis AJA settled some uncertainty in this regard by approving statements of Hathorn JP in Karim v Baccus¹¹ and Greenberg J in Boshoff v Union Government, that once an owner has admitted to parting with possession by virtue of an agreement such as a lease, or a sale on instalments, he is bound by the admission, and bears the onus of proving that the reason for the possession has come to an end. The owner must prove lawful termination."⁴²

50. In *casu*, The Applicants categorically stated that they had not terminated nor cancelled the contract. If anything there was a repudiation. It stands to reason that the

³⁹ 1948 (3) SA 457 (A)

⁴⁰ 1974 (3)SA 13 (A)

⁴¹ (945/2015) [2016] ZASCA 129 (27 September 2016)

⁴² Supra para 24

Respondents are still in lawful occupation of the garages. In fact at paragraph 74 of the founding affidavit the Applicants mentioned that they are prepared to allow the Trust continue utilising the garages until they decide to commence the development of the garages.⁴³ Referring to the *locus classicus Chetty v Naidoo*, the Court in ACSA stated the following:

“The incidence of the onus was discussed in depth by Jansen JA in Chetty v Naidoo, which confirmed the correctness of the approach in Myaka. He said: ‘It is inherent in the nature of ownership that possession of the res should normally be with the owner and it follows that no other person may withhold it from the owner unless he is vested with some other right enforceable against the owner (eg a right of retention or a contractual right). An owner, in instituting a rei vindicatio, need, therefore, do no more than allege and prove that he is the owner and that the defendant is holding the res – the onus being on the defendant to allege and establish any right to continue to hold against the owner . . . But if he goes beyond alleging merely his ownership and the defendant being in possession (whether unqualified or described as “unlawful” or “against his will”) other considerations then come into play.

If he concedes in his particulars of claim that the defendant has an existing right to hold (eg, by conceding a lease or hire-purchase agreement), without also alleging that it has been terminated . . . his statement of claim obviously discloses no cause of action. If he does not concede an existing right to hold, but, nevertheless, says that a right to hold now would have existed but for a termination which has taken place, then ex facie the statement of claim he must at least prove the termination, which might, in the case of a contract, also entail proof of the terms of the contract.”⁴⁴

51. The Applicants have gone beyond merely alleging ownership and possession by the Respondents. I, therefore, agree with Counsel for the Respondents that the

⁴³ FA para 74 (001-19 CaseLines)

⁴⁴ Supra para 25

Applicants have failed to show that the Respondents are in unlawful occupation of the garages. The only time the termination is alleged is on the founding affidavit at paragraph 147.3. Counsel for the Applicants submitted that it is sufficient to give notice of termination of an agreement between the parties in their founding affidavit. To this end he relied on *Win Twice Properties (Pty) Ltd v Binos and Another*,⁴⁵ which stated that at common law notice of cancellation could be communicated in a pleading or application.

52. The parties requested to file supplementary heads of argument in order to address the issue of termination that appears for the first time in the founding affidavit. What is patently obvious is that no reasonable notice can be talked of. The *Win Twice Property* case would only shoot into prominence if the Court agreed with the Applicants that there was a repudiation. Since I have already rejected this submission it would be an exercise in futility to look at *Win Twice Property* case.

53. For the mere fact that the Applicants rely on repudiation was a clear indication that an agreement existed between the parties, the Respondents' Counsel submitted. He argued that the Applicants had not exercised one of the two choices following a repudiation, namely; to accept the repudiation and terminate the contract or to reject the repudiation and enforce the contract. This submission is incorrect if one has regard to paragraph 147.3 of the founding affidavit. Nonetheless, upon applying an objective test, referred to in *Datacolor* case, on the facts, I found that there was no repudiation. Therefore, the Applicants could not evict the Respondents from using the garages.

54. It is trite that in order to succeed in an interdict a party needs to prove a clear right, injury actually committed or reasonably apprehended and lack of an adequate alternative remedy. In short the requirements mentioned in *Setlogelo v Setlogelo*.⁴⁶ Apart from that the Applicants have an alternative remedy, they cannot prove any injury actually committed or reasonably apprehended when they permitted the Respondents

⁴⁵ 2004 (4) SA 436 (W)

⁴⁶ 1914 AD 221

to occupy the garages, which they said belong to them. Accordingly, the Applicants cannot also succeed to interdict the Respondents from using the garages.

55. The long and short of Counsel for the Respondents' submission was that the arrangement between the parties was never subject to the lifting of the restrictions on the development. Therefore, the Applicants could not change their minds and want to build a swimming pool or a flat.

56. I agree with this submission that even the failure to produce the document requested by the Respondents was not material because the Applicants mentioned that it was a condition of their purchase of the property to grant the owner of erf [...] access to the garages. They are the ones who referred the Respondents to Steyn De Villiers, a notary public. The Applicants informed De Villiers that they were happy to proceed with a verbal description. I am persuaded that the conspectus of evidence points to an agreement to register a servitude in order to formalize the *de facto* recognition of the Respondents' ownership of the garages. However, the question still remains was this an inchoate agreement?

57. Turning to the Applicants' submission that the agreement was inchoate because the parties had not drafted the diagram nor employed a surveyor, Counsel for the Respondents argued that those were the nitty-gritties of the implementation of the agreement. The first Applicant told Steyn De Villiers that he was happy to go along with the verbal description. The Respondents' Counsel hit the nail on the head that as a result of the limitations being uplifted the Applicants considered expanding the house and that is when they changed their minds.

58. He submitted that the Applicants accepted the Respondents' ownership of the garages, otherwise they would not agree to grant a servitude to the garages if there was no permission to utilise the garages. Puzzlingly, the Respondents' Counsel submitted that the Respondents did not ask for a servitude over the garages but over the driveway to access the garages. This argument does not dovetail with the email sent by the first

Respondent, on 28 December 2018, in which he acknowledged that the garages belonged to the Applicants. Hence, the first Respondent suggested that the servitude be registered over the garages and the parties discuss the terms and conditions around the driveway. Even Steyn De Villiers' proposal involved registering a 6m x 6m servitude over the garages.

59. The parties seemed to use personal servitude and praedial servitude interchangeably. As much as both these are real rights, they differ in their application and impact. To put this issue into perspective, reference must be made to the matter of *Ex Parte Geldenhuys*⁴⁷ where the Court said:

*“One has to look not so much to the right, but to the correlative obligation. If that obligation is the burden on the land, a subtraction from the dominium the corresponding right is real and registrable; if it is not such an obligation, but merely an obligation binding on some person or other, the corresponding right is a personal right or right in personam, and it cannot as a rule be registered”*⁴⁸

60. Therefore, our Courts have developed a two-fold test to establish whether a condition is registrable on the Deeds office. These are:

- (a) The subtraction from the dominium test; and
- (b) The question whether or not the parties had the intention that the condition should bind both the present and the successors in title.

61. Our law makes a distinction between a personal servitude and a praedial servitude. In short a personal servitude is a servitude registered against land in favour of a natural or other person. Therefore, it is a real right granted to the holder thereof in his or her personal capacity the right to do something on someone else's property, or to prevent the land owner from exercising some or other ordinary powers as the owner

⁴⁷ 1926 OPD 155

⁴⁸ Supra at 164

thereon.⁴⁹ It is for the life span of the holder thereof who enjoys it in his personal capacity.

62. Generally personal servitude are created by a bilateral notarial deed (signed by both the giver and the recipient of the servitude) which is registered in the Deed's registry. However they can be created by a Court order or even by prescription where a person has openly exercised the right of servitude holder, as if he was entitled thereto, for an uninterrupted period of 30 years. ("nec vi, nec claim, nec precario" i.e. without force without secrecy and without permission)

63. Whereas a praedial servitude involves two properties, the land entitled to the benefit from the servitude is called the dominant tenement and the land burdened by the servitude is called the servient tenement. The registered servitude is enjoyed by the registered owner of the dominant tenement in his capacity as the owner of such tenement. Therefore, a praedial servitude usually continues *ad infinitum* and is a servitude in favour of another piece of land not in favour of another person.

64. Both the praedial and the personal servitudes are real rights; therefore, enforceable between the parties and also against third parties. A servitude holder's right is absolute and is enforceable against the whole world. Through the letter written by the Respondents' erstwhile Attorneys Britain the Respondents were enforcing a praedial servitude. As is the case with personal servitudes praedial servitudes are created by an agreement between the owners of the respective properties and are registered by means of a bilateral notarial deed. Of significance is that a valid *causa* (legal ground) is required for the registration of a servitude, for example a sale, donation, exchange, partition agreement or testamentary bequest.⁵⁰

65. Praedial servitudes may be described in three different ways namely;

⁴⁹ Van Der Merwe at 135-136

⁵⁰ Van Der Merwe at 136

- (a) By servitude diagram;
- (b) By description; or
- (c) In general terms.

66. The parties should be properly described and the land affected by the servitude must be sufficiently described including the terms and conditions to which the servitude are subject. These must be set out in the deed for example who is responsible for the maintenance of the servitude area and at whose expense, restrictions of use and the manner in which the parties ought to conduct themselves and the costs of registration. In *casu*, these requirements have not been complied with. To succeed in the counter-application, as I see it, the Respondents need to skip over two hurdles, namely:

- (a) The argument that this was an inchoate agreement/agreement to agree.
- (b) Section 2 (1) of Alienation of the Land Act 68 of 1986 which reads thus:

“Formalities in respect of alienation of land

(1) No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.”

67. Focusing on Section 2(1) of ALA, Counsel for the Respondents referred to the definition of alienation under Section 1 of the Act which reads as follows:

“‘alienate’, in relation to land, means sell, exchange or donate, irrespective of such sale, exchange or donation is subject to suspensive or resolutive condition, and ‘alienation’ has a corresponding meaning.”

68. Referring to *United Building Society Limited v Du Plessis*,⁵¹ Counsel for the Respondents maintained that Section 2(1) of ALA did not apply; since the agreement

⁵¹ 1990 (3) SA 75 (W)

between the parties neither fell under a sale, nor an exchange or a donation of land. Therefore, the agreement does not have to be in writing. The Applicants' Counsel argued that the *United Building* case is distinguishable because it dealt with an insolvent estate in which the United Building Society already had a real right as mortgage bond holder.

69. I agree with the Applicants' Counsel that a case on point in this matter is *Van Rensburg and Another v Koekemoer and Others*,⁵² in which the Court held:

"Once it is concluded that a servitude such as habitatio or usus or usufructus constitutes a subtraction of the dominium in land it follows that any agreement granting such right has to be in writing and signed by the parties upon pain of being declared invalid in terms of the aforesaid sections. For the same reasons, mineral rights are also to be in writing to be valid.⁶ Units in a sectional titles scheme are also defined as "land" in section 1 of the Alienation of Land Act. All formalities pertaining to the sale and purchase of units have to comply with section 2(1) of the Act. In the light of these analogous situations, it seems incongruous that a servitude of habitatio, usus or usufructus? orally concluded can be valid and enforceable. In each instance there is a measure of deprivation of the owner's title to the immovable property. As such they have to be in writing and signed by the parties to have any force whatsoever,"⁵³

70. Even if Counsel for the Respondents is correct that Section 2 (1) of the Act does not apply, I still cannot ignore what was stated in *Baron Investments (Pty) Ltd v West Dune Properties 296 (Pty) Ltd and Others*.⁵⁴ The Court said:

⁵² (2006/28207) [2010] ZAGPJHC 91; 2011 (1) SA 118 (GSJ) (11 October 2010)

⁶See Silberberg and Schocman's "The Law of Property" Fourth Edition, p 336, note 101.

⁵³ Supra par 17

⁵⁴ 2014(6) SA 286 (KZP)

“To order a new servitude to be registered, without the consent of the owner of the land (the Appellant) as requested by the Respondents in this matter, is to deprive the owner of a portion of his property, without any compensation therefor. This would be contrary to the provisions of s 25 (Bill of Rights) of the Constitution. Even in the case where a portion of land is taken away as a via necessitate, the Supreme Court of Appeal has held that adequate compensation therefor should be paid.”⁵⁵

71. There is substance in the submission that the agreement was inchoate. I cannot turn a blind eye to the proposals and counter proposals between the parties. On 28 December 2018 the Applicants made certain overtures geared towards finding a solution. On 12 June 2019 the Respondents, through their lawyers responded with no less than three alternative solutions to the problem. Therefore, the parties had not exhausted their search for a solution to ratify the agreement between man and man following their failure to capture and reflect the design in the Shareblock scheme during the subdivision.

72. In their submission for the relief, Counsel for the Respondents referred me to the notarial deed of servitude drafted by De Villiers. In contradiction to the Respondents’ case, De Villiers creates a 6 x 6 metres double garage servitude over and above a 3 metre wide right of way servitude. In this instance *Seale and Others v Minister of Public Works and Others, supra*, is instructive. The Court said if the intention is to constitute a specific right of way, until the route is agreed upon the agreement is inchoate. What the Respondents’ Counsel referred to as merely nitty-gritties, indeed are nitty-gritties needed in order to succeed in the counter-claim. Accordingly, I cannot order the registration of the notarial deed of servitude.

CONCLUSION

⁵⁵ Supra par 96

73. To sum the entire matter up, the Respondents' lackluster handling of this matter and the Applicants' volt face have costed both parties a fortune. It is trite and a truism that the Courts cannot create contracts for the parties. In this instance the Court was called upon to cancel and in the same breath enforce the same contract because the Applicants failed to cancel it timeously and the Respondents failed to enforce it timeously.

74. The purchasers of erf [...] could not have purchased a house without garages. It is an accident of history and design that the garages were located on erf [...]. For the owners of erf [...] to want to benefit from a design flaw amounts to inequity, to say the least, especially when they knew about the condition when they purchased the property. The result of this judgment is that the *status quo* remains. Therefore, the ball is in the court of the parties to allow common sense to prevail. Good neighbours make good fences.

COSTS

It is trite that costs are in the discretion of the Court. I do not see any reason why any of the parties should bear the costs of this application.

ORDER

In the result the following order is made;

1. The Applicants' application is dismissed.
2. The Respondents' counter-application is dismissed.
3. Each party is ordered to bear its own costs.

MOTHA AJ

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION OF THE HIGH COURT, JOHANNESBURG

Date of hearing: 18 May 2022

Date of judgment: 11 August 2022

Appearances:

For the Applicants: Adv. J.M. Hoffman
(Instructed by: Egon A. Oswald Attorneys)

For the Respondents: Adv. Kennedy Tsatsawane SC
(Instructed by: Knowles Husain Lindsay Inc.)