



IN THE NORTH GAUTENG HIGH COURT, PRETORIA /ES

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

15/9/2011
DATE

SIGNATURE

A950/08
CASE NO: 50436/2007

DATE: 16/9/2011

IN THE MATTER BETWEEN

JOHANNA MARIA VAN DER MERWE

APPELLANT

AND

HENDRIK JOHANNES CONROY

RESPONDENT

JUDGMENT

ZONDO, J

Introduction

- [1] This is an appeal against a judgment and order issued by MAVUNDLA, J in this Division in an application that was brought by the present respondent against the present appellant for certain relief concerning a servitude. The appellant was the respondent in the court below and the respondent was the applicant in that court.

The orders that were sought by the present respondent in the court below were in effect in the following terms:

- (a) that the present appellant be interdicted or restrained from using Portion ABXY as shown in annexures "A1", "A2" and "A3" to the notice of motion.
- (b) that the present appellant be ordered to remove any fencing around Portion ABXY.
- (c) that the present appellant be ordered to restore the present respondent's use of Portion ABXY.
- (d) that the present appellant be ordered to pay the costs of the application.

[2] The appellant delivered and served a notice of opposition of the application but did not deliver and serve any answering or opposing affidavits in support of the opposition. At the hearing of the application, the appellant was represented by counsel who opposed the application on the respondent's own papers. After the hearing of argument judgment was reserved. Later the court *a quo* handed down its judgment. In terms of that judgment the application succeeded in effect though not all the orders that had been sought by the respondent were granted. The order that was granted by the court below was in the following terms:

- "1. That the [appellant] is ordered to remove any fencing in the servitude road, in Portion ABXY;
2. That the [appellant] is ordered to restore the servitude road around Portion ABXY;
3. That the respondent is ordered to pay the costs of this application."

[3] It can be seen from a reading of the orders sought in the notice of motion and the orders that were granted by the court below that the court below did not grant the first order that was sought in the notice of motion. That is the order interdicting the appellant from using Portion ABXY. The appellant subsequently applied for, and was granted, leave to appeal to a Full Bench of this Division against the judgment and order of the court below.

Background

[4] It is convenient at this stage to refer to the appellant as Ms Van der Merwe or Van der Merwe and to the respondent as Mr Conroy or Conroy. Conroy's case in the court below was set out in a short founding affidavit. Conroy said the following in his affidavit:

(a) He is an adult businessman and lives at Plot 100, Koningklip, Kromdraai, Krugersdorp; he said he was annexing to the affidavit a copy of the title deed held under T2006/88 from which he said it appears that he was the owner of this property.

(b) The respondent was Johanna Maria Van der Merwe, an adult woman then resident at Honingklip Farm.

(c) She is the owner of Portion 100, a portion of Portion 6 called Gelden van de Plaas Honingklip 178, Registration Division IQ, Transvaal.

(d) further, as appears more fully from annexure "A",

(i) the surface of Plot 100 consists of 21,4133 hectares

(ii) the property was originally transferred under the title deed T546 36 81 with the diagram SG number A3059/69 subject to the following condition:

- the property was subject to a servitude of a right of way of 15,74 metres in width in favour of the general public as indicated through ABEF on diagram SG number A3059/69 as annexed to title deed number T54636/81.

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[3] In paragraph 10 of the founding affidavit Conroy said he was attaching annexure "B" to his affidavit which he said was a copy of a notarial deed of servitude number K953/80. In paragraph 11 of the affidavit Conroy said that he was also annexing to his affidavit annexure "C" a copy of the title deed number T54636/81. In par 12 Conroy says that as appears more fully from annexure "B" Van der Merwe granted in favour of the general public a right of way of 15,74 metres width as reflected, according to Conroy, in ABCDE and GHJKLM in diagram SG number A3057/69.

[4] In par 13 of the founding affidavit Conroy said that Van der Merwe is the owner of the Honingklip Farm, Portion 105 of Farm 178 IQ. He said that the property was originally the property of Gelden Plaas Beleggings (Pty) Limited. He said that the property was transferred to Van der Merwe by the South African Development Foundation.

[5] On 22 August 2006 Conroy's previous attorneys wrote a letter to Van der Merwe's husband who is an attorney. A copy of the letter was annexed to the founding affidavit as annexure "D". That letter was addressed to Mr Herman Van der Merwe. It appears from the letter that there had been previous discussions between Conroy and Mr Herman Van der Merwe about problems relating to the servitude.

[8] In the letter Conroy's attorneys *inter alia* said that Conroy had informed them that the servitude road – which they said had been registered on Mr Herman Van der Merwe's property in favour of the public in accordance with the notarial deed of servitude no K953/1980's was supposed to be 15,74 metres wide but at a certain point or area the road was 8 to 10 metres wide because Mr Herman Van der Merwe had extended the fence to the servitude road. Conroy's attorneys pointed out that Conroy wanted the servitude road to be kept at 15.74 metres wide seeing that some motorists encroached upon his property (Portion 101, a portion of Portion 6 Honingklip) because of the fact that the narrowing of the servitude area from Mr Herman Van der Merwe's side. It seems from the letter that Conroy also wanted to lay some water pipes on his property and the narrowing of the servitude road made this difficult. Conroy's attorneys asked Mr Herman Van der Merwe for his comment whereafter they would advise Conroy as to what to do.

[9] Mr Herman Van der Merwe responded to the letter (annexure "D") by way of a letter dated 5 September 2006 a copy of which was annexed to Conroy's affidavit as annexure "E". In that letter Mr Herman Van der Merwe replied by saying that the matter had previously been discussed with Conroy and the fence was exactly where it had been agreed with Conroy it should be. In paragraph 18 of his affidavit Conroy disputed the statement by Mr Herman Van der Merwe in his letter that the fence ran precisely where it had been agreed with Conroy it should run. Conroy says in paragraph 18 of his affidavit that Van der Merwe (i.e. the respondent in the court *a quo* and appellant in this court as opposed to Mr Herman

Van der Merwe) trespasses onto Portion ABXY as appears from annexure "A" to Conroy's affidavit. In paragraph 19 of his affidavit Conroy said that at the time, Van der Merwe was allowing the intrusion into the servitude road and this had made it necessary for him to bring the application to court. In paragraph 20 he asked for an order in terms of the notice of motion.

The admission of new documents

- [10] At the hearing of the application in the court below counsel for Van der Merwe took the point in effect that Conroy had failed to show that Van der Merwe was the owner of the farm adjacent to his and that her farm was subject to a servitude right of way. Counsel for Van der Merwe submitted that in order to succeed in his application Conroy had to show that Van der Merwe was the owner of the farm adjacent to his farm and that Van der Merwe's farm was subject to a servitude such as was alleged by Conroy in his affidavit. Counsel for Van der Merwe submitted that Conroy had failed to satisfy these requirements in his affidavit and, for this reason, Conroy's application should be dismissed.
- [11] It would appear that counsel for Conroy then begged for leave to hand up certain documents to rectify the omission relied upon by counsel for Van der Merwe in support of his submission that the application be dismissed. The documents that counsel for Conroy handed up to the court *a quo* were:

- (a) a document bearing the heading: Conveyancer's certificate, purporting to be signed by one J.I. Herman; in that document Jacoba Isabella Herman represented herself as a conveyancer and certified that, in terms of a certain Deed of Transfer a copy of which she said was enclosed thereto marked as annexure "J1H1", Johanna Maria Van der Merwe, with a certain identity number, was the owner of certain properties that she listed under paragraph 1 of that document; in paragraph 2.3 and 4 of that document Ms Herman made other statements.
- (b) a document purporting to be a deed of transfer of certain properties from the South Africa Rural Development Foundation to one Johanna Maria Van der Merwe.
- (c) a document with some writing on it most of which is illegible.
- (d) two pages which appear to be part of the document referred to in (c) above.
- (e) a map purporting to depict certain properties.

[12] No affidavit was tendered by counsel for Conroy by which he sought to introduce the new documents. These documents were admitted and their contents were admitted as evidence without anyone having deposed to an affidavit to explain

what they were and to confirm their contents as true and correct nor did anybody explain under oath where they had been obtained from.

[13] After admitting the new documents the court *a quo* proceeded to consider the merits of the application without postponing the matter to afford Van der Merwe the opportunity to consider whether, in the light of the admission of the new documents by the court, she should deliver and serve an answering affidavit dealing with the new documents.

[14] In its judgment the court below dealt with the admission of the new documents on the basis of the provisions of section 19 and 20 of the Civil Proceedings Evidence Act, 1965 (Act no 25 of 1965). Sec 19(1) reads as follows:

"19. Production of official documents -

(1) No original document in the custody or under the control of any state official by virtue of his office shall be produced in evidence in any civil proceedings except upon the order of the head of the department in whose custody or under whose control such document is or of any officer in the service of the state authorised by such official.

(2) Any such document may be produced in evidence by any person authorised by the person ordering the production thereof."

The provision of sections 20(1) and (2) read as follows:

"20. Certified copies of or extracts from official documents sufficient. –

(1) Except when the original is ordered to be produced any copy or extract from any document in the custody or under the control of any state official by virtue of his office, certified as a true copy or extract by the head of the department in whose custody or under whose control such document is or by any officer in the service of the state authorised by such head, shall be admissible in evidence and be of the same force and effect as the original document.

(2) Any such copy or extract may be handed in by any party who desires to avail himself thereof."

Section 20(3) is not of any significance in the present matter.

Judgment of the court below

[15] In paragraph 14 of its judgment the court below said in part:

"The relevant conveyancer's certificate relates to the title deed of the [appellant], which is a certified copy of a public document. Since this is an official document as per section 19 of Act 25 of 1965 and it shows that the respective properties mentioned therein belong to the [appellant] and have been identified by a conveyancer. I am satisfied that this certified title deed should be accepted as evidence over the bar in terms of the

provisions of section 20(1) of the Civil Proceedings Evidence Act no 25 of 1965."

In the same paragraph of its judgment the court below additionally sought to justify its admission of the new documents on the bases that:

- (a) it was satisfied that the admission of the new documents was not "akin" to allowing an applicant to make its case in reply because no answering affidavit had been delivered.
- (b) the appellant would not be prejudiced by the admission of the new documents because they related to her own title deed and ownership of properties.
- (c) the appellant had not filed an opposing affidavit.

The appeal

[16] It seems to me upon a reading of the judgment of the court below that the admission of the new documents was fundamental to its conclusion that Conroy had made out a case for the order that the court *a quo* granted. There can be no doubt that, without the admission of the new documents, the court *a quo* could not justifiably have concluded that Conroy had made out a case. Accordingly, the correctness or otherwise of the decision of the court *a quo* depends upon whether or not it was correct in admitting the new documents.

[17] Before us on appeal counsel for Van der Merwe submitted that the court *a quo* erred in admitting the new documents. In this regard it needs to be pointed out that the court below relied upon the provisions of sec 19 and sec 20 of the Civil Proceedings Evidence Act no 25 of 1965 to justify its admission of the documents. Sec 19 deals with original documents. It prohibits the production of original documents under the control of or in the custody of any state official by virtue of his or her office except upon the order of the head of the department or other official authorised by such head. Sec 19 does not relate to the production of copies. As the new documents were copies, section 19 was of no application in this case. Counsel for Van der Merwe also submitted that section 20 of the Civil Proceedings Evidence Act 25 of 1965 lays down certain requirements before copies of documents referred to therein may be admitted and he submitted that these were not met in this case. For that reason, continued counsel for Van der Merwe, the court *a quo* was not entitled to admit the new documents.

[18] Counsel for Van der Merwe is right in his submission about sec 19 and sec 20. Section 20 envisages that a copy or extract from any document in the custody or under the control of any state official by virtue of his office is admissible in evidence and has the same force and effect as the original document thereof but the copy or extract to which section 20 refers is one that is "certified as a true copy or extract by the head of the department in whose custody or under whose control such document is or by any officer in the service of the State authorised by such head." In this matter before the court *a quo* there was no evidence that the

copies of or extracts from the title deed and other documents handed up in court together with the so-called "conveyancer's certificate" were certified by the head of the relevant department or an authorised officer in the service of the state as true copies of or extracts from, the relevant documents.

[19] Before us counsel for Conroy attempted to invoke the provision of section 18 of the aforesaid Act in an attempt to defend the decision of the court below. Sec 18 of the Act reads as follows:

"18. Certified copies or extracts from public documents admissible in evidence. - (1) Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from proper custody, any copy thereof or extract therefrom proved to be an examined copy or extract or purporting to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted, shall be admissible in evidence."

Counsel's reliance upon this section is misplaced in this case because the section refers to a copy or extract that is signed and certified as a true copy or extract by the officer to whom reference is made towards the end of the provision and this was not the case in the present matter. There was no evidence to the effect that the person by whom the copies or extracts were certified was an officer such as is

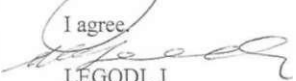
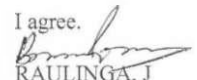
referred to in section 18. Accordingly, section 18 cannot be of assistance to the respondent.

[20] In the light of the above I conclude that the court *a quo* should not have admitted the new documents. In the absence of the new documents there was no evidence before the court *a quo* linking the appellant to the farm to which the present respondent sought to link her which was subject to the servitude right of way which was the subject of the application. In the premises the appeal must succeed with costs.

[21] In the premises I make the following order:

1. The appeal is upheld with costs.
2. The order of the court *a quo* is set aside and, for it, the following order is substituted:

"The application is dismissed with costs."


ZONDO, J
I agree.

LEGODI, J
I agree.

RAULINGA, J

HEARD ON: 3 AUGUST 2011

DATE OF JUDGMENT:

FOR THE APPELLANT: ADV JH vd B LUBBE

INSTRUCTED BY: MESSRS HERMAN VAN DER MERWE AND GREYLING
c/o NIEMANN & SWART ATTORNEYS, PRETORIA

FOR THE RESPONDENT: ADV INGE OSCHMAN

INSTRUCTED BY: MESSRS VAN ZYL BEYERS & RAUTENBACH
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