

**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION,PRETORIA**

CASE NO: 057109/22

(1)Reportable: No.

(2) Of interest to other judges: No

(3) Revised.

11 March 2024

In the matter between:

TWO TYRES SERVICES (PTY) LTD

Applicant

and

**THE CITY OF TSHWANE METROPOLITAN
MUNICIPALITY**

Respondent

JUDGMENT

Mathunzi AJ

[1] The applicant approached this court on the 13th of October 2023 seeking a declaratory order which concerns a servitude registered in favour of the respondent read together with the provision of regulations 19(7) of the Electrical Machinery Regulations¹ ("Electrical Machinery Act").

¹ Act of 2011

[2] The background of the matter is that a servitude was registered in favour of the respondent, a 132 KV power line which runs over the applicant's property and the servitudes dates back to 2 August 1982 over a property owned by the applicant.

2.1 The subject matter relates to the property of the applicant which is portion 4[...] of portion 2[...] of the Swartkop farm 3[...] Registration Division JR in the Gauteng Province.

[3] The property, according to the applicant, has never been developed and has remained as such to date as it stands on an open piece of land. There was never a time where the respondent in the last forty-one (41) years took any steps to enclose the base of the pylons moving across the property.

[4] The applicant intends to erect a shopping centre in the above-mentioned open space in its property and in order to comply with the requirements which are stipulated by the Town Planning Council, there are a number of car parking requirements which the applicant must meet, as part of compliance. The applicant intends to use part of the space located under the pylons (electrical) as parking space or bays for cars.

[5] The servitude in question has a clause in it whose interpretation has become a subject matter before court. The original quote of the subject matter is clause 3 of the servitude and it reads as follows:

"Die geregistreerde eienaar huurder of okkupeerder van genoemde eiendom mag geen geboue of ander strukture oprig binne die serwituutgebied of binne 'n afstand van drie meter bereken vanaf die buitelyn van die serwituutgebied nie en geen grand, material of vullis mag so naby enige lyn of kabel geplaas word dat dit na die uitsluitlike mening van die stadsraad enige lyn of kabel in gevaar kan stel nie, maar hierdie beperking geld nie verder as die afstand van drie meter soos voornoem nie.

Die hoogte van borne, struik en gewasse of grand-hope of vul/ishope in die servituutgebied of binne 'n afstand van drie meter vanaf die buitelyne van die servituutgebied moet beperk word tot 2,5 meter. Geen groot wortelbome mag binne die servituutgebied of borne 'n afstand van drie meter vanaf die buitelyne van die servituutgebied aangeplant word of aanwesig wees nie.

Indien die geregistreerde eienaar of die huurder of okkupeerder van genoemde eiendom in gebreke bly om die bepalinge van hierdie klousule na te kom, het die stadsraad die reg om genoemde geboue of ander strukture te sloop en om die borne, struik en gewasse te snoei en af te kap nadat hy die geregistreerde eienaar vooraf daarvan in kennis gestel het."

[6] It would appear that the respondent's position is that both clause 3 of the servitude and the provisions of regulation 19(7) of the Electrical Machinery Regulations Act prevents the erection or placement of the permanent parking bays in the area which the applicant seeks to do so.

[7] This is particularly so, given that in their answering affidavit they stated that in line with the servitude agreement they are entitled to choose or fence the servitude area itself and or erect gates even if it meant preventing the applicant from entering or gaining access in the servitude area. What this would mean in that the respondent would have solely achieved control and usage of the servitude area.

[8] Secondly, the respondent avers further that allowing parking bays within the servitude area would be in contravention of regulation 19(7) of the Electrical Machinery Regulations Act in that it will also allow members of the public to come within close range of the pylons and as such contravene the regulations as above mentioned.

[9] The relevant regulation is regulation 19(7) which reads as follows:

"the employer or user shall ensure that all supports of the lattice type which are used to carry overhead conductors or live parts of other electrical equipment are adequately protected in order to prevent any unauthorized person from coming into dangerous proximity of the conductors by climbing such supports and an inspector may require an employer or user similarly to protect a support of any other type."

[10] The applicant in the other hand had submitted in their heads of argument that clause 2 of the servitude provides that in the event that the servitude area is fenced by the owner of the property, the respondent is entitled to place gates if they so require in order to be able to obtain reasonable access into the servitude area.

[11] The applicant further submitted that there was no suggestion or averment by the respondent that they cannot access the servitude area, in the event that they needed to do maintenance or repair works on the pylons or overhead cables.

[12] The applicant further submits that the respondent misinterprets clause 3 of the servitude agreement.

[13] The respondent has further referred in their heads of argument to regulations 19(4) and 19(5) of the Electrical Machinery Act which provides that:

"19(4) No person shall constrict any road, railway, tramway, communication line, other power line, building or structure or place any material or soil under or in the vicinity of a power line, which will encroach on the appropriate minimum clearance required in terms of sub regulation (1) and 19(5) No person shall encroach in person or with objects on the minimum safety clearances required in terms of sub regulation (1) or require or permit any other

person to do so except by permission of the supplier, employer or user operating the power line."

[14] The respondent has also submitted that paragraphs 9.2.1 and 9.2.4 of the safety standards SANS 10280-1 incorporated, government gazette 34154 of 25 March 2011 into the Electrical Machinery Regulations Act in terms of section **44** of the Occupational Health and Safety² which provides for a minimum safety clearance value of 3.8 meters in vertical direction and 3.0 meters in horizontal direction between any live conductor and vegetation, building, poles and structures which are not part of the power lines, and the respondent submitted that the erection of parking bays by the applicant will contravene the provisions of the above mentioned legislative provision and therefore unlawful.

[15] The respondent argued in the heads of argument that they have obligations to carry out in terms of regulations 19 (1) and (7) to maintain and repair pylons and overhead power lines, ensuring that they are protected and that they prevent any unauthorized persons from coming into proximity with pylons and cables and as well as complying with the applicable labour, health and environmental legislative standards and in that the erection of parking bays will disable them from carrying out the above mentioned obligations.

[16] What is therefore common cause between the parties is that there is a number of parking bays required for the shopping center as intended to be erected by the applicant which requires a particular number of parking bays determined in line with the formula applicable to a shopping center in the city's area and what now stands as a dispute between the two parties as appears from the respondent's answering affidavit is that on proper interpretation according to the respondent of the servitude and relevant legislation, the applicant is **NOT** only entitled to erect parking bays where they wish to do so but also that in doing so will also be acting unlawfully as such would be in contravention of the Electrical Machinery Act and Occupational Health and Safety Act provisions.

² Act 85 of 1993

[17] It appears therefore that the issues which require adjudication are whether a court can issue a declaratory order, whether the servitude prevents the erection or placement of parking bays under the power lines and whether placement of parking bays contravenes the Occupational and Safety Health Act or Electrical Machinery Act.

[18] The first step is to look at what case law says. First, a look at what the Supreme Court of Appeal had to say about the requirements for a court to make a declarator, it is a two stage examination:

1. that the applicant is a person interested in an existing, future or contingent right or obligation
2. that the court must decide whether the case is a proper one for the exercise of discretion conferred on it.

In exercising its discretion, the court may decline to grant a declaratory order if it regards the question raised before it as hypothetical, abstract or academic." See *Clear Enterprises (Pty) Ltd v Commissioner of South Africa Revenue Services and Others*³, *Reinecke v Incorporated General Insurances Ltd*⁴, *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd*⁵.

[19] "A servitude is defined as a limited real right that grants the servitude holder specific use and entitlements over someone else's property and correspondingly reduces or burdens the servient owner's entitlements to use and enjoy her property. The approach adopted by our courts in solving disputes which arise

between servitude holder and the property owner is reliance on the principle of

³ 2011 ZASCA 164 (SCA)

⁴ 1974 (2). All SA 80 (A); 1974 (2) SA 84 (A)

⁵ 2005 ZASCA 50 2006 (1) All SA 103 (SCA) 2005 (6) SA 205

'*civiliter modo*' literally meaning acting in a civilized manner or mode and interpreted at law or referred to as 'reasonableness' or acting reasonably. In line with the principle of '*civiliter modo*', the servitude holder must exercise the servitude so as to impose the least possible burden on the servitude or property owner, which therefore means that a balance must be struck between the right of the servitude holder to do anything that is necessary for proper and effective exercise of the servitude and the residual right of the servitude owner to use her property in so far as that does not interfere with the legitimate exercise and enjoyment of the servitude entitlements". See: *Mannaru & Another v McLennan Smith and Others* ⁶. "The approach of adopting a wider and relaxed interpretation of the common law to accommodate modern day imperatives and must also be developed in line with section 173 of the Constitution⁷ i.e. the interpretation of sentences and considerations of convenience and prejudice must also be determined". See: *Linvestment CC v Hammersley and Another*⁸. "There are two observations concerning the approach to the interpretation of servitudes and are necessary; first: the nature and character of the right created must be analyzed; second: the intention of the parties as presented in their agreement has its limits;" See *Lorentz v Melle and Others*⁹.

[20] The application before this court turns on interpretation of clause 3 of the servitude quoted or referred to in paragraph 5 of this judgment. It is the same interpretation thereof which will also determine whether the action intended by the applicant i.e. the establishment of permanent parking bays, whether it will be in contravention of the regulations in the Electrical Machinery Act and or Occupational Health and Safety Act. Furthermore, the interpretation has to be in line with principles adopted in case law referred to in this judgment.

[21] In line with the two prerequisites, established in *Clear Enterprises v South*

⁶ 2022 JOL 56071 (SCA)

⁷ Act 108 of 1996

⁸ 2008 (3) SA 283 (SCA)

⁹ 1978 (3) SA 1044

African Revenue Services supra, Reinecke v Incorporated General Insurances supra and Cordinant Trading supra, namely;

(a) that the applicant is a person interested in an existing, future or contingent right or obligation,

(b) that the case before this court is a proper one for it to exercise its discretion and that such discretion is conferred, so that the exercise thereof considers that the question raised before it is not hypothetical, abstract or academic. The applicant before court is the property owner against whom the respondent is the servitude holder of a servitude which is a subject matter for interpretation before this court. It is at this stage common cause that the applicant intends to erect parking bays some of which will be placed under part of the pylons or overhead electric cables to which the respondent is the servitude holder over the applicant's land. It therefore follows that it cannot be said that the question before court raised by the applicant or respondent is only hypothetical and or academic.

[22] It is trite in our law that a servitude does not give or transfer ownership of a property to the servitude holder.

[23] A servitude itself is defined in our law as a limited real right which grants the servitude holder specific use and entitlements over someone else's property and correspondingly reduces or burdens the property owner's entitlements to use and enjoy her property.

[24] The first point is that clause 3 specifies that there shall be "no erection of any buildings or other structures within the servitude area."

24.1 Then it states that "any ground material or rubbish which may be placed near any line or cable within the servitude area which in the respondent's opinion can create danger to any line or cable."

24.2 Third, it then refers to "the height of trees, shrubs or crops and heaps of ground or rubbish heaps, in the servitude area not to exceed 2.5 meters in height."

24.3 Fourth the clause refers to "no trees with large root systems may be planted or be present within the servitude area."

[25] In the first place the clause refers that there should be "no erection of any buildings or structures within the servitude area," there is nothing in the papers of the applicant's application which seems to suggest that he intends to erect a building or any structures but to create parking space or bays within the servitude area.

[26] Secondly, the clause states that "the height of trees, shrubs or crops or heaps or ground or rubbish in the servitude area". It would appear that the clause anticipates that there would be human movement or activity within the servitude area, for how else could the heaps of ground, crops or rubbish be moved or placed in the servitude area save it be placed through human action or movement.

[27] Then the clause refers to the height distance about "2.5 meters" i.e vertical or from the ground surface upwards and at this point in time it becomes relevant to bring into the fore the height distance by the Occupational health & Safety Act (supra) which also provides for a ground clearance distance in height of about 3.8 meters vertically.

[28] According to the Oxford English Dictionary, 2nd edition V XI; a building refers to: *"that which is built, a structure, edifice, now a structure of the nature of a house built where it is to stand."* Then the same dictionary refers to a 'structure' as *"that which is built, a building or edifice of any kind especially a pile of building of some considerable size and imposing appearance."*

[29] Counsel for the respondent has correctly submitted during argument before court that when interpreting clause 3 of the servitude the principle to be applied is that the context of the document as a whole, regard being had to the purpose and the process must be objective, the purpose of the document, circumstances surrounding the document as a whole, the language of the provision must be read in context but should not be read subjectively.

[30] I did not get any impression in the applicant's submissions or papers that they intend erecting any structure or building within the servitude area, save that they intend erecting parking bays. The second part of clause 3 refers to "trees, shrubs and crops, heaps of ground or rubbish". On proper interpretation of this portion of clause 3, it comes to mind immediately that if the height of trees has to be controlled not to grow beyond 2.5 metres in height, or plantation of trees and of crops, or heaps of ground or rubbish, it means that the clause 3 permits human movement and or human activity. Equally so and similarly, if crops had to be grown, then the land has to be cultivated and plantation has to take place so that tractors and irrigation use is permitted which means that clause 3 at the time it was concluded, it was meant to cater for agricultural use of the land for crops, same would apply for rubbish heaps, hence the clause had to be adopted in a manner that considered the height restriction of the trees, the crops and the heaps of rubbish.

[31] I am almost tempted to take judicial notice of the fact that in the Gauteng Province there are pylons and overhead cables running over suburbs and towns as well as some cities and there are wall structures built under them and parking bays. It is not something that seems to require scientific evidence or equipment for analysis, it is there and self-evident for everyone to see and or observe but as I have mentioned it is merely only a temptation at this stage.

[32] Save also to mention that the height provided for by the Occupational Health & Safety Act S.44 is 3.8 meters, yet clause 3 in its last part states "no trees

with large root system may be planted" this is indicative that human activity was considered in that 'how else may a tree be planted except such is done through human activity within the servitude area.'

[33] On interpretation of what constitutes a structure or building, it does not appear that clause 3 considers heaps of rubbish, crops and trees as constituting a structure or a building because at the opening portions of the clause it states that it restricts the erection of structure or building but on the second part of it, shrubs, crops and heaps of rubbish and trees as well as planting of such are allowed only to a particular height restriction and are not considered as constituting a 'building' or a 'structure'.

[34] I cannot therefore find any circumstances under which an "a parking bay" or parking bays could constitute a structure or a building perhaps if it were covered parking bays which is not what applicant are seeking before this court for except only where the parking bays intended were to be enclosed or covered through a wall constructed structure or building.

[35] The catering of crops and plantation of trees allows for human activity so that as for the height, clause 3 of the servitude provides for 2.5 meters in height, then the Occupational Health and Safety Act read with the Electrical Machinery Act provides for the height of up to 3.8 meters. There seems to be nothing beyond the height of 3.8 meters which can be said to be turning on any of the regulations or provisions which were raised by the respondent which were said to be at the risk of being contravened by the applicant.

[36] It cannot therefore be said that the erection of parking bays could be in contravention of clause 3 of the servitude or the Electrical Machinery Act or Occupational Health and Safety Act where the height of clause 3 as provided is not exceeded and as it appears staying within the height provided for by clause 3 automatically means that the height of 3.8 meters is also not contravened.

[37] In the circumstances I make the following order:

1. The applicant is entitled to erect permanent parking bays within the servitude area subject to the height stated in clause 3 of the servitude at Portion 4[...] a Portion of portion 2[...] of the Farm 3[...], Registration Division J.R. Gauteng Province.
2. The respondent to pay costs of the application.

A.T Mathunzi

Acting Judge of the High Court, Pretoria

Heard on: 13 October 2023

Judgment Electronically Delivered on: 11 March 2024

APPEARANCES

For the Applicant: Adv M. M Rip SC Instructed by: Jacques Classen Inc

For the Respondent: Adv R. B Mphela

Instructed by: Motsoeneng Bill Attorneys Incorporated