

**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 62272/2017

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

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

(3) REVISED. ✓

DATE 9/05/2019

SIGNATURE

In the matter between:

KINGSLEY JACK WHITEAWAY SEALE

First Applicant

ONTSPAN BELEGGINGS (PTY) LTD

Second Applicant

HI FRANK COMPONENTS (PTY) LTD

Third Applicant

SCHOEMANSVILLE OEWERKLUB

Fourth Applicant

and

MINISTER OF PUBLIC WORKS

First Respondent

MINISTER OF WATER AND SANITAION

Second Respondent

PREMIER OF THE NORTH-WEST PROVINCE

Third Respondent

TRANSVAAL YACHT CLUB

Fourth Respondent

REGISTRAR OF DEEDS, PRETORIA

Fifth Respondent

Coram: Davis J

Contract – Interpretation of – rights of access to Hartebeespoort dam for fishing and boating – personal or real right attaching to land – suspensive condition fulfilled or not – acquisitive prescription of servitude – loss of through non-use.

JUDGMENT

DAVIS, J

[1] This is the culmination, by way of an opposed motion, of a saga spanning more than a century. At its center, are the question of interpretation of an agreement of sale and the question whether a right of access for purposes of fishing and boating in and on the Hartebeespoort dam was meant to be a personal right of one Johan Schoeman (son of a Boer War General and previous owner of the land) or a real right attached to the land itself. Additionally the issues of acquisitive prescription of a servitude and the loss through non-use also feature.

[2] The parties:

2.1 The First Applicant is a certain Mr Seale. He is the owner of Erf 463, which erf is situated in the township of Schoemansville and which is immediately adjacent to the foreshore of the Hartbeespoort Dam. Mr Seale also owns another erf in Schoemansville and a further three erven in the nearby township of Meerhof. The townships are also situated on the banks of the Hartbeespoort dam.

- 2.2 The Second Applicant is a company of which Mr Seale is a director and which is also the owner of an erf in Schoemansville.
- 2.3 The Third Applicant is similarly a company of which Mr Seale is a director and which owns a consolidated erf in Schoemansville.
- 2.4 The fourth Applicant is the Schoemansville Oewerklub a voluntary unincorporated association of persons established in 1982. 60% of its membership comprises of owners of erven in Schoemansville.
- 2.5 The First, Second and Third Respondents are the Minister of Public Works, the Minister of Water and Sanitation and the Premier of the North West Province (being the Province within which the Hartbeespoort Dam is situated), all in their official capacities.
- 2.6 The Fourth Respondent is the Transvaal Yacht Club (the “TYC”), a voluntary unincorporated association which has been established on 23 February 1923. It is the owner of consolidated erf 1113, Schoemansville (previously erven 117, 118 and 119 Schoemansville) which consolidated erf is situated immediately adjacent to the foreshore of the Hartbeespoort Dam and to erf 463 belonging to Mr Seale.
- 2.7 The Fifth Respondent is the Registrar of Deeds.

[3] As with any sequence of events spanning such a long time, the chronology of events contextualizes the issue. It can be culled in the following fashion from the parties’ joint practice note and with reference to an extensive volume of documents produced:

3.1 1899 – 1902 Anglo Boer War

- 3.2 1902 General Schoeman passed away shortly after the Anglo Boer War
- 3.3 1911 General Schoeman's land was inherited by his seven heirs, one of whom was his son, Johan Schoeman ("Schoeman").
- 3.4 1914 The Union Government resolved to build the Hartbeespoort Reservoir in terms of the then Irrigation Act. The Reservoir later became what is now known as the Hartbeespoort Dam. Portions of the land in question are, probably as a result of the use of Dutch in some of the old title deeds, interchangeably referred to as "Hartebeestpoort", "Hartbeestpoort" or "Hartbeespoort". For sake of convenience, I shall use the latter appellation, being the current name of the dam in question.
- 3.5 1917 Schoeman acquired an additional portion of the South Eastern Portion of the Farm Hartbeespoort in his own name.
- 3.6 25 January 1918 The Union Government purchased portions of the land that formed part of the Northern Portion and the South Eastern Portion of the Farm Hartbeespoort. These were those inherited from General Schoeman and that acquired by Schoeman himself. The purchase from Schoeman and his family members was in terms of a Memorandum of Agreement in which Schoeman represented himself and his family members (the "1918 Agreement") referred to more fully hereinlater.
- 3.7 November 1918 The purchased portions of the purchased land were transferred to the Union Government in terms of the 1918 Agreement.

- 3.8 February 1922 Schoeman insists on the registration of a servitude as contained in the 1918 Agreement.
- 3.9 July 1922 The township of Schoemansville was originally laid out by Schoeman. Erf 463 thereof was identified by him as a recreational ground (in line with its location and topography).
- 3.10 August 1922 Attorney and notary Mr Meintjies (on behalf of Schoeman) forwarded a draft notarial Agreement for the Minister's approval.
- 3.11 2 September 1922 Director of Irrigation confirmed to the Secretary for Lands that the terms embodied in the draft Notarial Agreement are in order.
- 3.12 27 September 1922 The Union Government and Schoeman entered into Notarial Agreement (the "1922 Agreement").
- 3.13 3 October 1922 The 1922 Agreement was registered in the "Register of Miscellaneous Deeds".
- 3.14 19 November 1922 Schoeman advertised Schoemansville erven with right of access to be sold by public action on 14 December 1922.
- 3.15 21 November 1922 Schoeman had established his pleasure boating enterprise from the shores directly adjoining Erf 463 for boating on the dam.
- 3.16 21 November 1922 Schoeman threatened legal action if the State does not withdraw a threatened general prohibition on boating and

fishing, ruining his returns on the pending sales of erven in Schemansville.

- 3.17 24 November 1922 The Union Government published a general notice (Government Notice 047) prohibiting boating on the Hartbeespoort Dam.
- 3.18 25 November 1922 Schoeman reasserted his rights – a letter appeared in the local newspaper confirming that “boating as normal” shall take place, despite Government Notice 047.
- 3.19 27 November 1922 Meintjes approached the Union Government regarding pending urgent relief and damages claim with regards to the general prohibition.
- 3.20 29 November 1922 Meintjes is informed in writing that the Union Government has acceded to his claims regarding Schoeman’s rights.
- 3.21 5 December 1922 Secretary for Justice addressed a letter to the Director of Irrigation in which he confirmed that the State Law Advisors had advised that the matter has been dealt with in consultation with Mr Herdman, the Assistant Director of Irrigation, and the stage that has now been reached that the general prohibition has been withdrawn, the restriction being confined to a prescribed danger area.
- 3.22 1923 The township of Schoemansville was formally established by Schoeman on portion M (as it was known at the time and which previously formed part of the remainder of the Northern Portion of

the farm Hartbeespoort). A certain Clause 13 was inserted as a condition to the establishment of the township, which stated that “all registered erf-holders shall be entitled, in common with the applicant, to the right of access to the dam near the south-eastern entrance of Hartbeespoort on the eastern bank of the river for the purpose of boating on the said reservoir and fishing therein, subject to the conditions of Notarial Agreement dated 27th September, 1922”. (Subsequently Schoeman established the Meerhof township on the South-Eastern shore of the dam with similar conditions contained in its establishment).

- 3.23 8 January 1925 The Secretary of Lands confirmed the terms of a demarcation line with regard to access area k (a) including the consent required from Schoeman to afford the TYC use of the foreshore directly adjoining Erven 117 and 118, lastmentioned which Schoeman were donating to the TYC.

- 3.24 14 July 1925 The TYC received transfer of erven 117 and 118 by way of donation from Schoeman.

- 3.25 29 July 1925 Meintjes is informed by the Secretary of the Township Board of certain arrangements regarding “Hendrick Schoeman” Township including a landing place on the dam to be near the “public gardens” (later recreational ground).

- 3.26 11 September 1925 The Governor-General of the Union Government approved grants in terms of the Crown Land Disposal ordinance, 1903 (Transvaal).

- 3.27 10 October 1925 The Executive Council of the Union Government approved the grants and reservations per Cabinet Minute 3152.
- 3.28 7 April 1926 Crown Grant 67/1926 was registered, described (at the time) as Portion No 1 of portion L of the Northern Portion of the Freehold farm Hartbeespoort (portion 43). In terms of this grant the right to the free use of the foreshore immediately in front of it and between it, and the Hartbeespoort Dam, was granted to Schoeman and his successors in title together with ownership of portion 43.
- 3.29 10 April 1925 The Surveyor General sent a letter to Secretary of Lands confirming that the Grants in terms of the Cabinet Minute are over and above those rights acquired by Schoeman in favour of, inter alia, Schoemansville erven in terms of Clause k of the 1918 Memorandum of Agreement and that because the foreshore in front of Erf 463 has been utilized as a landing stage Schoeman should be made to restrict k(a) to that area.
- 3.30 2 June 1926 The Secretary of Lands responded to the Surveyor General's letter of 10 April 1926 stating that the purpose of Minute 3152 (demarcating k(a) in a certain manner with the consent of Schoeman and affording ownership of part of the area and exclusive free use of that area's foreshore) was to place the matter on a "satisfactory basis" and that provision was made in the terms of the 1922 Agreement for the proper registration of the retained rights (clause k(a), (b) and (c)) as set out in the Agreement "at a later stage".

- 3.31 6 August 1930 Department of Lands confirmed its commitment to uphold its agreement with Schoeman and cancelled a lease for a water plane landing strip near the Swartspruit Valley.
- 3.32 1939 Schoeman sold his Hotel business adjoining erf 463, which includes Portion 43, including the ferrying rights pertaining to Portion 43, as well as all boats that formed part of that business, by reference to the Crown Grant as authorized in Cabinet Minute 3152 to one Jacobs.
- 3.33 1958 Schoeman had a servitude registered (621/1958S) in favour of the general public over Portion 71 (a portion of Portion 64) of the farm Hartbeespoort measuring about 72 morgen, which afforded the public the right to fish, swim and boat in and on the water which covers this land.
- 3.34 1959 The TYC acquired Erf 119 which is adjacent to erven 117 and 118 previously donated to it by Schoeman.
- 3.35 6 November 1962 By Notarial Contract and with reference to clause k of both the 1918 Agreement and the 1922 Agreement, Schoeman appointed his son, Johan Hendrik Tolstoi Schoeman and Lincoln Karel Troup Schoeman, their heirs or assigns, as his assigns to enjoy the rights granted under clause k of the 1918 Sale Agreement and the 1922 Agreement.
- 3.36 Schoeman passed away shortly hereafter.
- 3.37 Subsequent to the foregoing chronology, various organs of State exercised control of over the Hartbeespoort Dam. One of the

consequences of transfer of control lead to litigation involving the TYC and its rights of access to boating on the Dam, all the way up to the Supreme Court of Appeal. The decision is reported as Bullock NO v Provincial Government, North West Province 2004 (5) SA 262 (SCA).

- 3.38 Chronologically, to date of the application, a dispute raged from time to time primarily between the Applicants and the TYC regarding servitudes of access to the “foreshore”. The foreshore is the narrow strip of land between the “buy-out line” being a line three feet above the “High Flood Level” and the actual water line of the Dam from time to time. Insofar as necessary only, reference will be made to these disputes hereunder.

[4] Relief claimed

The Applicants seek the following relief

- 4.1 An order declaring that there has been fictional fulfilment of the condition precedent in the 1922 Agreement and, if such a declaration is made, an order directing the First Respondent, in his nominal capacity as owner of the State-owned land, to co-operate towards registration of praedial servitudes against the titles of the relevant State-owned properties;
- 4.2 Alternatively, the Applicants seek an order declaring that the State, as original contracting party and as represented herein by the First and Second Respondents, is contractually bound to the terms of the 1918 Agreement and 1922 Agreement vis-a-vis the First Applicant;

- 4.3 In the alternative to relying on the 1918 and 1922 agreements (the contractual claims) the Applicants seek an order, declaring that as a result of the owners of the adjacent land having exercised the servitudal rights openly as if entitled to praedial servitudes for a continuous period of more than 30 years prior to 1971 and without precarious consent, the servitudes vested by way of acquisitive prescription against the State-owned land constituting the servient tenements;
- 4.4 Other extensive declaratory, consequential and interdictory relief regarding the exercise of the servitudes mentioned above are also claimed. Some of them involved the Fifth Respondent who played no role in those proceedings.

[5] It is clear, both from the chronology and the relief claimed, that the Applicants traced the rights which they sought to assert, from the 1918 Agreement and the 1922 Agreement. No reliance was placed on any rights obtained from the Crown Grant referred to in paragraph 3.26 – 3.29 and 3.32 above. The spur which jolted the Applicants into launching their application, was the intention of “the State” to conclude new leases with third parties in respect of the foreshore, in particular the TYC. It appeared during argument (and from the Heads of Argument submitted on behalf of the Applicants) that there was no leeway for negotiation or a sharing of these rights and the Applicants claim exclusivity in respect of access to the relevant parts of the foreshore. For purposes of both the contractual and the acquisition claims, the relevant agreements need to be examined, which I shall do hereunder.

[6] The 1918 Agreement

As aforementioned, on 25 January 1918, the Union Government entered into an agreement of sale with the Schoemans to purchase portions of their land for purposes of constructing the Hartbeespoort dam. Clause 3(k) of the agreement, also referred to in some documents as “clause k” or “Clause K”, provided for the reservation of the following rights in respect of the foreshore area of the dam in respect of boating and fishing (notably not irrigation):

“(k) The said Johan Hendrik Schoeman, in his individual capacity or his Assign shall retain the right of access to the said Hartbeespoort Reservoir on certain three places to be mutually agreed upon by the parties to these presents – the said places being situated approximately as follows: (a) near the south eastern entrance to Hartbeespoort on the eastern bank of the River, (b) near the site of the old dam on the Crocodile River built by the now late General Schoeman, and (c) at a suitable site in the Zwartspruit Valley – for the purpose of boating on the said reservoir and fishing therein ...”.

[7] The 1922 Agreement

On 27 September 1922 the parties to the 1918 Agreement concluded a Notarial Contract with each other which was subsequently registered in the “Register of Miscellaneous Deeds”. The relevant portions thereof reads as follows:

“Whereas it is desired to have the right so reserved in Clause K registered in the Deeds Office, but as the government will hold that area which will form the submerged area of the said Hartbeespoort

Reservoir under a great many titles, some portions of which have not yet been acquired by the Government”.

“Now therefore, the parties hereto agree to register this Contract in the Deeds Office in the Register known as the Register for Diverse Acts, whereby the rights granted to the Party of the other part, the said Johan Hendrik Schoeman, in his individual capacity, or his Assigns, and more fully detailed in Clause K above set out in full, may be recorded and registered in favour of the said Johan Hendrik Schoeman, in his individual capacity, or his Assigns, against the said submerged area of the Hartbeespoort Reservoir subject to the conditions that when and so soon as the Government has acquired the whole of the area which will form the submerged area of the Hartbeespoort Reservoir, and has taken out a Certificate of Consolidated Title of such area, the parties hereto, their Successors in Title or Assigns, bind themselves to enter into a Contract whereby the rights as detailed in said Clause K of the said Deed of Sale, may be properly registered as servitude against the Titles of the servient and dominant tenements respectively”.

[8] Interpretation and evaluation:

- 8.1 There is no dispute that the 1922 Agreement made the registration of the rights contained in the 1918 Agreement subject to a suspensive condition. There is also no dispute about the fact that the conditions have not yet been fulfilled, hence the Applicant’s claim for a declaration of fictional fulfillment thereof.
- 8.2 The suspensive conditions provided that Schoeman would only be entitled to the registration of the servitude granted by clause 3(k) of

the 1918 Agreement if and when the Government acquired all of the land which would form the submerged area of the Dam and when a Certificate of Consolidated Title of the land so acquired has been taken out. This was referred to by Schoeman in his purported cession to his sons referred to in paragraph 3.35 above and in the Applicants' papers as being the "State's intention".

- 8.3 There can be little doubt that it was an implied term of the 1922 Agreement that the suspensive conditions had to be fulfilled within a reasonable time. There is no indication of what such a time period would be. Even if one were to, for example, use the time period of 30 years for acquisitive prescription as a yardstick of reasonableness in the context of this case, then the period for fulfillment had expired somewhere in 1952. After such non-fulfillment, the agreement (and the right of enforcement of the servitude and insistence on its registration) had lapsed.
- 8.4 The Applicants' argument on fictional fulfillment of the suspensive conditions prior to the lapsing of the agreement is tenuous. They bear the onus in this regard. See: Resisto Dairy (Pty) Ltd v Auto Protecting Insurance Co. Ltd 1963 (1) SA 632 (41) at 644H and Lekup Prop Co No 4 (Pty) Ltd v Wright 2012 (4) All SA 136 (SCA) at [12]. In the lastmentioned judgment Cloete, JA held that the party who wishes to rely on the doctrine of fictional fulfillment had to prove that the other party (in this instance "the State" or "the Government") had by deliberate commission or omission prevented the condition from being fulfilled with the intention of avoiding its obligations under the agreement/s.

- 8.5 The high-watermark of the Applicants' attempt at satisfaction of this onus was the assertion that "*the State, however, decided at an unknown stage not to acquire the remaining properties and consolidate them*".
- 8.6 On behalf of the Applicants it was argued that the State had a "change of intention" and, at least at date of the application, no longer had an intention to acquire all the remaining land (it appeared to be satisfied with a servitude of submersion or water storage in respect of the properties it had not yet acquired). This "change" must have occurred sometime after 1964 or 1969 at which time correspondence still indicated that acquisition was foreseen "in the near future" and that no further steps could be taken before ("alvorens") the land had been acquired. This alleged "change of intention" must therefore have occurred long after the agreement had already lapsed due to non-fulfillment of the suspensive conditions on the basis as set out in paragraph 8.3 above. Even if the "reasonable period" were to be extended to 1969, then it has surely since lapsed. In this construction, I gave the Applicants the most beneficial time line – in their later stance on the papers, they allege the "change" only occurred as late as in 2016. Whenever such "change of intention" may have occurred, there is in any event no proof that any such "change" had been with the deliberate attempt at avoiding the contract.
- 8.7 Any reliance on the doctrine of fictional fulfillment of the suspensive conditions must therefore fail.

[9] Personal or praedial servitude?

Even if the Applicants had been able to overcome the hurdle of non-fulfillment of the suspensive conditions, i.e that the right of registration of the servitude had not lapsed as a result thereof as indicated above, a further hotly contested issue in the matter was whether the rights acquired by Schoeman were personal or praedial in nature:

9.1 The above question again turns on the interpretation of the 1918 and 1922 agreements.

9.2 The current state of our law regarding the principles of such interpretation are the following: in interpreting any documents, the starting point is inevitably the express language used, being the medium through which the parties have expressed their contractual intentions. The process of interpretation does not stop at a perceived literal meaning of the words, but they have to be considered in the light of all relevant and admissible context, including the circumstances in which the documents came into being. See: Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others 2013 (6) SA 520 SCA; Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) and Bothma-Batho Transport (Edms) Bpk v S. Bothma & Seun Transport (Edms) Bpk 2014 (2) SA 494 (SCA).

9.3 A servitude is, in essence, only a contract to achieve a particular end, and should be interpreted in the same fashion. See Royal Hotel Riverside (Pty) Ltd v Simon No and Another (713/11) [2012] ZASCA.

- 9.4 The Applicants relied heavily on earlier cases which placed much weight on evidence of the interpretation which the parties may have, by their conduct, placed on the agreement in question, while in Bothma-Batho emphasis was placed on the circumstances under which the contract came into being as follows: “*the correspondence exchanged between the parties prior to the conclusion of the agreement was an important part of the admissable factual matrix*”.
- 9.5 What we know of the prevailing circumstances at the time of the 1918 Agreement from the historical facts produced by the parties, are the following:
- 9.5.1 During the late 1900’s the late General Hendrik Jacobus Schoeman (“General Schoeman”) was the registered owner of (inter alia), the Northern Portion of the farm Hartbeespoort and three other portions of the South-Eastern portions of the same farm.
- 9.5.2 The Crocodile river ran through a valley on General Schoeman’s Farm. His alleged dreams of creating a town or village on the eastern bank of the river and an adjacent lake were halted by the outbreak of what became known as the Anglo Boer War in 1899. Shortly after the conclusion of the war (so the papers say although it might have been earlier) General Schoeman passed away.
- 9.5.3 After the passing of General Schoeman, the farms in question were inherited by seven heirs, one of which was his son, Johan Schoeman (the “Schoeman” already

referred to earlier in this judgment). It took some 10 years for the properties to be transferred to the heirs. In addition Schoeman also acquired a separate adjoining property from a neighbour.

- 9.5.4 In 1914 the Government of the Union of South Africa passed the Hartbeespoort Irrigation Scheme (Crocodile River) Act, No 32 of 1914 in order to implement an irrigation scheme in the area. This included the construction of a dam and the storage of water therein.
- 9.5.5 On 5 January 1918, as part of the implementation of the scheme, the Union Government, bought certain portions of the farms Hartbeespoort and Cyferfontein on the eastern bank of the Crocodile river. The area purchased would only include the land actually to be submerged. The demarcation thereof would be by a line three feet above “High Flood Level” of the then proposed dam (the “buy-out line” referred to earlier).
- 9.5.6 As consideration for the abovementioned land purchased from Schoeman and his siblings, the Union Government paid £35 000. Of this, £12 000 was paid up front, with the balance to be paid over a two year period. The agreement recorded that Schoeman would use the £12 000 to pay or buy out his siblings and, if this amount would not be enough, he would use his own funds to buy them out, leaving him the sole remaining contracting party.

9.5.7 The agreement provided that Schoeman in his “individual capacity” would “retain” a right of access to the dam via the foreshore for purposes of boating and fishing on the dam.

9.6 The Applicants painted a picture of a Government desperately short of money after the First World War, being unable to pay, not only the full value of the property or even lesser agreed purchase price in full, but “hurriedly” having to implement an irrigation scheme after a debilitating drought after having “bought into” General Schoeman’s “dream”. The Respondents, quite rightly, point out that there was no primary evidence of all this. There are also other facts to be taken into account:

9.6.1 The Crocodile river is not the only source of water feeding the dam. There are various other streams leading into the dam as well as the Magalies river.

9.6.2 There were various other riparian owners adjacent to these other water sources. There were also various other properties and landowners to the North-West, West and South-West of the dam. It was the Government’s intention to also acquire those properties in similar fashion as those of Schoeman.

9.6.3 The use of the word “retain” in the agreement with Schoeman cannot have the wide meaning attributed to it by the Applicants, namely a retention of the pre-existing rights belonging to the “Schoeman properties” prior to the conceptualization and implementation of the irrigation

scheme: The owners of the properties only had the common law rights of a riparian owner at the time. Apart from drawing water for irrigation or watering of animals (which are not applicable to the current dispute) these would only have included access for purpose of boating and fishing on the Crocodile River (and a small private dam situated therein). Once the Hartbeespoort Dam was established, its area would be vast and extended over various properties, areas and rivers to which Schoeman never had any pre-existing rights.

9.6.4 There was no evidence of a general recognition of similar rights of access of any of the other owners of the riparian properties referred to in paragraph 9.6.2 above or a “retention” of their rights. The rights afforded to Schoeman appeared to have been an exception.

9.6.5 The alleged “sacrifice” by Schoeman in having to sell parts of the properties to the Government, relied on by the Applicants as a reason for his being granted rights of access would presumably be far overshadowed by the profits made by him by the establishment of the towns of Schoemansville and Meerhof and the sale of numerous residential and commercial erven adjacent to the new dam. The Applicants were silent about this.

9.7 Very little is known of the prevailing facts in existence at the time of the conclusion of the 1922 Agreement. What we do know, is that:

- 9.7.1 The parties are in agreement that the 1922 Agreement did not create new rights, those rights that the parties (and Schoeman) had, had been created in the 1918 Agreement. The 1922 Agreement was meant to make provision for the registration thereof.
- 9.7.2 The 1922 Agreement was drafted by Schoeman's attorney and notary, Meintjies.
- 9.7.3 It was preceded by some correspondence one of which was on 26 November 1918, addressed by the conveyancing attorney to the Director of Irrigation. Herein it was stated that the rights under clause (k) of the 1918 Agreement could not be introduced as a servitude into the transfers (of the portions of land sold by Schoeman to the Government) but that it was necessary to give Schoeman "some other form of title", such as a Crown Grant.
- 9.7.4 The second letter of which there is a record of is one written by Meintjies addressed to the Director of Irrigation on 7 February 1922. Therein, Meintjies, on instruction of Schoeman and after reference to the 1918 Agreement, stated the following:

"The rights therein set out and in particular under clause K are not personal rights but real rights capable of registration against the titles of the servient and dominant tenements". The letter then proceeded to deal with the issue of registration of Schoeman's rights.

- 9.7.5 The next piece of evidence of facts in existence at the time is a letter in response, being that of 22 February 1922 from the then Secretary of Justice to the Director of Irrigation. This letter quotes a view of the State Law Advisor, a certain Mr Nightingale (to whom reference was made in certain collateral documents) as follows:

“On further consideration of Condition 3 (k) of the Memorandum of Sale (it) seems to be something more than a mere contractual right, but rather in the nature of a personal servitude in favour of Mr Schoeman during his lifetime. It is certainly not a praedial servitude which requires a dominant and servient tenement. From dicta in Van Vuuren v Registrar of Deeds 1907 T. S at para 295 and Willoughbys’ Consolidated Company Ltd v Copthall Stores Ltd 1914 AD at para 281 there is nothing in principle to prevent the registration of a personal servitude against the title of a servient tenement. It would have been competent to have incorporated the condition in the Deed of Transfer from Schoeman to the Government and if the Registrar is now prepared to register it against title for what its worth, the Deeds office will present difficulties. If at any time it becomes necessary to interpret the condition, we are disposed to think that any benefit conferred will not extent beyond Mr. Schoeman lifetime”.

- 9.7.6 A handwritten annotation was added to the letter presumably by the Secretary, directed to the Director as

follows (on the same day) *“I have seen Mr Nightingale who stated that Schoeman is entitled to have this servitude, whatever its value may be, registered. It is understood however that the plan indicating the spots referred to in the deed of sale has been lost”*.

- 9.8 At the time when Meintjies thereafter drafted the 1922 Agreement, it must have been for purposes of making provision for the registration of whatever rights Schoeman had acquired in terms of the 1918 Agreement. Meintjies forwarded his draft of the 1922 Agreement to the Director of Irrigation who forwarded the draft together with a Special Power of Attorney to the Secretary of Lands for signature with a note: *“The terms embodied are those entered into with Schoeman at the time of purchase of the farm and the matter is in order”*. The Registration of the 1922 Agreement itself thereafter took place in the Deeds Office’s Miscellaneous Deeds Register.
- 9.9 Despite the apparent divergence of views on the nature of the rights of Schoeman contained in the 1918 Agreement (and as expressed by the Director of Irrigation, the State law advisor and Schoeman and his attorney) none of the parties before me at any stage contended that the 1918 agreement was void or unenforceable due to a lack of consensus. They all, during the ensuing years and certainly during the litigation, contended for their respective interpretations to be placed on the agreement.
- 9.10 Much was made on behalf of the Applicants that “Schoeman did not part with these rights and the Government did not pay for

them” but it is clear from the documents that neither party placed any value on these rights anyhow. They also appear to have been of recreational and not commercial value only.

9.11 Much stock was also placed by the Applicants on the parties’ conduct subsequent to the 1922 Agreement. Each indication by various officials regarding the registration of the rights against the properties previously owned by Schoeman was pounced on. The inclusion of the wordings of the 1918 and 1822 Agreements in the title deeds of all the erven in the Schoemansville and Meerhof township was also seized upon as an alleged admission of those erven as all dominant tenements. In my view these aspects are not conclusive. In regard to the Schoemansville and Meerhof title deeds, the inclusions were done unilaterally at the behest of Schoeman. At best they go no further than the inclusion of a reference to the wording of the two agreements. Such inclusion cannot, of itself, create any rights, praedial or otherwise. Apart from this, the conduct of the parties and various successive organs of state or officials thereof (evidence of which were either hearsay or secondary) were neither unequivocal nor uniform. They should therefore carry far less weight than the circumstances prevailing at the time as set out above.

9.12 If the intention of the parties to the 1918 Agreement had been that the remaining portions of the properties not purchased by the State would have been entitled (in perpetuity) to a servitude over the property of the state (the foreshore), such right would have been easy to formulate. From the unique (and contrary) formulation of the right, by, for example referring to Schoeman “individually”, it

must follow that something else than a praedial right in favour of the properties had been intended. The argument by the Applicants that the use of the word “individually” was used to denote that Schoeman’s siblings would not have any rights (seeing that Schoeman was about to buy them out) does not assist the Applicants: if Schoeman (“individually”) was singled out from other persons, it means that he was the only person (of seven possible persons or landowners) who would be the holder of the right in question as opposed to any landowner of a dominant tenement becoming the holder of rights.

9.13 The words “or his Assign” are also not conclusive nor indicate a praedial right. In my view, in the context of schoeman’s rights, it simply means that he, or whoever he may authorize to do so, on his behalf, may exercise his rights. The intentions of the State at the time and certainly before the registerability of whatever rights Schoeman had, were merely confirmed in the 1922 Agreement.

9.14 Apart from all these indications of the rights being personal, presumptions of law must also be considered when interpreting a contract. In the present instance, that means considering the strong presumption in favour of the least burdensome interpretation attached to the grant of a right over a property. A praedial servitude is perpetual in nature and imposes a heavier burden on a servient tenement than a personal servitude. A servitude will therefore be presumed to be personal rather than praedial in the event of doubt or ambiguity. See Kruger v Joles Evendomme (Pty) Ltd 2009 (3) SA 5 (SCA) at [8] and the list of cases mentioned in footnote 16 of that judgment. The caveat mentioned in paragraph

[9] of that judgment with reference to Van Rensburg & Andere v Taute en Andere 1975(1) SA 279 (A) is not applicable here as there was no unequivocal and clear description of a praedial servitude. Such a restrictive interpretation will also accord with clause (i) of the 1918 agreement which envisioned the removal of restrictions (such as bonds or servitudes) on those portions of the properties purchased by the Government.

9.15 I have earlier in paragraph 9.6.3 dealt with the use of the word “retain” used in the 1918 agreement. To recap, owners of the remaining portions of the properties, as erstwhile riparian properties to the Crocodile River, did not have any right to the subsequently created new dam (which extended, not only over the western bank of the river, but well beyond and over the banks of other rivers and properties). Nothing of a praedial nature could be “retained” by all these properties in respect of the dam. Rather, a personal right of access to that novel object, being the dam / reservoir could be created and this is what had been granted to Schoeman. In similar vein, the insertion of references to dominant and servient tenements by Mentjies, should be interpreted to have only been an expression of his view and would have been limited to the registration of Schoeman’s personal rights against the titles of the portions purchased from him by the Government (or, as suggested by the current State respondents, against those properties constituting “the submerged area of the Hartbeespoort Reservoir”).

9.16 To sum up:

- 9.16.1 The 1918 Agreement was the agreement in which whatever rights Schoeman would have acquired in respect of access to the reservoir (the Hartbeespoort dam) had been recorded;
- 9.16.2 The 1922 Agreement was intended to deal with the registerability of those rights;
- 9.16.3 Despite the divergent views of the parties (and apparent lack of consensus) on the nature of the rights contained in clause 3 (k) of the 1918 agreement, no party contended or sought to have the agreement declared null and void or unenforceable as a result thereof;
- 9.16.4 The interpretation I place on the rights which Schoeman had acquired in terms of the 1918 Agreement, is that they were personal and not praedial in nature and had therefore lapsed on his passing away (irrespective of his attempts to cede or assign it to his children or any of the erven in the Schoemansville or Meerhof townships).

[10] Prescription

- 10.1 In an alternative to their contractual claims, the Applicants argued that they have acquired praedial rights of access for purposes of boating and fishing over state properties by way of acquisitive prescription. They alleged that these rights had been exercised by successive owners of land (including theirs) adjacent to the Dam

without force, openly, without precarious consent and adverse to the ownership of the land from the date that the reservoir / dam had been completed for an uninterrupted period of more than 30 years thereafter.

- 10.2 For the Applicants to have acquired the alleged rights, acquisition must have been completed by 28 June 1971. This is so because the State Land Disposal Act 48 of 1961 prescribed that, after the expiry of a period of 10 years after the date of commencement of the said act (on 28 June 1961), state land would not be capable of being acquired by prescription.
- 10.3 As part of their case, the Applicants dealt with the period prior to the Prescription Act, 18 of 1943 coming into operation, the period of operation of that act and the period since the coming into effect of the Prescription Act, 68 of 1969 (effective from 1 December 1970).
- 10.4 I need not deal with the facts alleged by Mr Seale in support of the above issue as, even if the alleged rights had been acquired prior to 1971, they have been extinguished by prescription thereafter because, so the Respondents contended, the rights have not been exercised for an uninterrupted period of thirty years.
- 10.5 In support of the above contention, the TYC pointed out that it had started leasing (and occupying) the foreshore in front of Erf 463 from the State since 1969 in terms of various agreements from time to time. It had even constructed a fence on the northern side of the foreshore, being the southern boundary of Erf 463. The continued occupation by the TYC up to (at least) 31 July 2001 has previously

been accepted as a fact by our courts. See: Bullock No v Provincial Government, North West Province, 2004 (5) SA 262 (SCA) at [3] and [4]. Nothing on the present papers also detract from these facts.

- 10.6 In terms of section 7 of the Prescription Act, 68 of 1969, a servitude shall be extinguished by prescription if it has not been exercised for an uninterrupted period of 30 years. This is clearly the case in respect of the property of Mr Seale.
- 10.7 There are insufficient facts indicating that any of the similar rights have been acquired by acquisitive prescription by any of the other Applicants or, if they had, that those rights have not similarly been extinguished. See: Kruger v Joles Eiendomme (Pty) Ltd & Another 2009 (3) SA 5 (SCA) at [12].
- 10.8 It further clearly appears from the papers that Mr Seale's attack, irrespective of which Applicant he represents, was primarily directed at his neighbour, the TYC, in similar fashion as he had done in Seale v Van Rooyen NO and Others, Provincial Government, North West Province v Van Rooyen NO and Others 2008 (4) SA 43 (SCA).
- 10.9 I conclude that the Applicants' alternative causes of action based on acquisitive prescription must also fail.

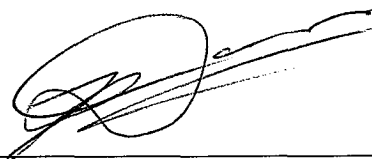
[11] Final conclusion and costs

The Applicants have approached the court in 2017, seeking to enforce rights which have been granted to Schoeman in 1918 and 1922 and which

rights have, by all accounts lapsed. I find, on these papers no cogent reason why costs should not follow the event.

[12] Order

1. The Applicants' application is dismissed.
2. The Applicants are, jointly and severally, ordered to pay the Respondents' costs including the costs of senior and junior counsel, where so employed.



N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 11 and 12 February 2019

Judgment delivered: 10 May 2019

APPEARANCES:

For the Applicants:	Adv. E C Labuschagne SC (together with Adv J L Gildenhuis and Adv W C Meyer)
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For the 4th Respondent:

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