



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NUMBER: 40691/2018

1. REPORTABLE: NO
2. OF INTEREST TO OTHER JUDGES: NO
3. REVISED

DATE: 14 JUNE 2019 SIGNATURE:

In the matter between:

LOUIS ADRIAAN DANIEL ROUX

1ST APPLICANT

PETRUS IGNATIUS STEENEKAMP

2ND APPLICANT

VEROUX PROPERTY DEVELOPMENT CC

3RD APPLICANT

and

CHRISTIAAN JOHANNES PETRUS GROENEWALD

1ST RESPONDENT

CHARL LOUIS DERCKSEN

2ND RESPONDENT

TSHWANE METROPOLITAN MUNICIPALITY

3RD RESPONDENT

JUDGMENT

COERTZEN AJ:

- [1] This matter was argued before me on 2 May 2019 and I reserved judgment. The dispute involves an oral right of way over immovable property.

THE RELIEF SOUGHT:

[2] The following relief is claimed in the notice of motion:

- "1. That the right of way servitude agreement, previously orally entered into between the 1st Respondent and the 1st Applicant, in February 2016, in terms whereof the 1st Respondent has agreed to the granting of a right of way servitude over his property, known as Erf 78/1, situated at 864 31st Avenue, Villieria, Pretoria, - ['Erf 78'] - granting access to the two second dwelling building sites undertaken by the Applicants and in progress on the respective properties of the 1st and the 2nd Respondents, the latter's property known as Erf 79/R, situated at 863 32nd Avenue, Villieria, Pretoria, - ['Erf 79'] - be and is hereby declared valid and in full force.
2. That the 1st Respondent's rejection complaint laid with the 3rd Respondent against the agreed upon right of way via his property to that of the two second dwellings erected on the portions of the properties respectively purchased from the 1st and 2nd Respondents, be and is hereby declared to be unlawful and in breach of the right of way servitude afforded to the 1st Applicant in terms of the right of way servitude agreement referred to in paragraph 1 above.
3. That the 1st Respondent be and is hereby ordered to withdraw and/or to remove the rejection complaint laid with the 3rd Respondent as referred to in paragraph 2 above, with immediate effect.
4. That the 1st Respondent be ordered to complete and to sign, without any delay, all documents with regards to the official registration of the right of way, required by all of the municipal and other legal institutions.
5. That, to the extent necessary, the Sheriff of the Court be and is hereby

authorised and directed to assist the 1st Applicant in effecting the content of the above referred to paragraphs 3 and 4 of this order.

6. *That the 1st Respondent is hereby ordered to pay the costs of this application on a scale as between attorney and client."*

- (my emphasis).

THE PARTIES:

- [3] The 1st applicant is the sole member of the 3rd applicant. The 2nd applicant is the "business partner and investor" of the 1st and 3rd applicants. The 2nd respondent is the owner of Erf 79, being one of the two "second dwelling building sites" referred to in prayer 1 of the notice of motion. The 3rd respondent (the Municipality) was joined as interested party. No relief is sought against the 2nd and 3rd respondents. Only the 1st respondent opposed the application.

THE FACTS:

- [4] It was common cause at the hearing of the matter that the 1st respondent is in fact not the owner of Erf 78, the property being registered in the name of a close corporation, Coenbob Construction CC ('Coenbob'), of which the 1st respondent is the sole member.
- [5] The applicants seek a declaration of validity of an oral right of way over Erf 78. On 17 May 2019 I invited the parties in terms of a directive, to submit additional heads of argument, on the following issues:
- "1. Whether Coenbob Construction CC, as the registered owner of Erf 78/1, situated at 864 31st Avenue, Villieria (referred to in paragraph 1 of the notice

of motion) in respect of which the alleged right of way servitude is claimed, should not have been joined to the application, as an interested party whose rights may be affected by an order of court in this matter;

2. *Whether a right of way servitude could validly have been granted to the 1st applicant in terms of the oral agreement referred to in paragraph 1 of the notice of motion and as alleged in paragraph 4 of the founding affidavit, in the light the decisions in Felix en 'n Ander v Nortier NO en Andere [1996] 3 All SA 143 (SE) and Janse van Rensburg and Another v Koekemoer and Others 2011 (1) SA 118 (GSI);*
3. *Whether the oral right of way servitude alleged to have been granted to the 1st applicant could be enforced against the 1st respondent and/or the aforementioned Coenbob Construction CC, in the light of the aforementioned decisions;*
4. *Whether the oral right of way servitude alleged to have been granted to the 1st applicant is capable of 'official registration', either as claimed in prayer 4 of notice of motion, or in terms of the provisions of the Deeds Registries Act No. 47 of 1937;*
5. *Whether any submissions made by the parties in respect of 1, 2, 3 and 4 above, influence the parties' earlier submissions or argument on any other aspect."*

Counsel for the parties submitted additional heads of argument.

- [6] The 1st respondent, as sole member, did not take issue with the non-joinder of Coenbob in his affidavit, or at the hearing on 2 May 2019. In the additional heads of argument, it is submitted on behalf of the 1st respondent, as follows:

"Coenbob has waived its rights to be joined to the proceedings on the grounds envisaged in In re BOE Trust Ltd and Others NNO 2013 (3) SA 236 (SCA)."

I will accept that the non-joinder of Coenbob is therefore not an issue before the court.

- [7] In the additional heads of argument, it is submitted on behalf of the applicants that they *"do not seek registration of the afforded right of way servitude"* and further that *"no relief in terms of any required registration of the relevant right of way has been sought in the present application and, in addition, that the relief initially sought in terms of prayer 4 of the notice of motion... has been abandoned at the inception of the hearing...."*

THE ORAL AGREEMENT:

- [8] The oral agreement relied on by the applicants, is pleaded in the founding affidavit, as follows:

"4.1 In terms of an oral agreement entered into between the 1st Respondent and myself [the 1st applicant], during the course of February 2016, it was agreed, amongst others, that:

4.1.1 I would purchase a 540m² portion of 1st Respondent's and the 400m² portion of 2nd Respondent's adjacent residential properties, respectively known as Erf 78/1... and Erf 79/R..., for purposes of a building project involving the erection of two new second dwellings;

4.1.2 The 1st Respondent agreed to right of access (right of way) for both new second dwellings through his property; and,

4.1.3 The 1st Respondent agreed to provide and sign all necessary documents

for effecting the agreed upon right of way through his property to the property of the 3rd Respondent (sic) - [presumably meant to be a reference to the property of the 2nd respondent]."

- (my emphasis).

- [9] A site plan is attached to the founding affidavit, which according to the 1st applicant, reflects the right of way as a *"3m wide right of way for Erf 79 Remainder"* next to the words *"vehicle entrance"*. This document was prepared by a representative of the applicants and submitted to the 3rd respondent. The 1st respondent disputes the document and alleges that he never had sight of it.
- [10] In the answering affidavit, the 1st respondent states that he *"on behalf of Coenbob, had agreed to grant a right of way to the applicants."* He goes on to state that had he not done so *"the applicants would have been unable to access the portion of the Property that forms the basis of the Sale Agreement."* The sale agreement concluded with the 1st respondent is referred to later in the judgment.
- [11] The 1st respondent alleges that the right of way was granted in respect of only that portion of land that formed the basis of the sale agreement to which he was a party. The fact that the right of way may have been used by the 1st applicant to access the portion of land owned by the 2nd respondent, was according to the 1st respondent, not in terms of the oral agreement. The 1st respondent alleges that the right of way was *"contingent"* upon the applicants complying with their obligations in terms of the sale agreement. While the 1st respondent agreed to sign all documents necessary to give legal effect to the right of way, he would do so only, *"once the Sale Agreement had been completed and the portion subject to the sale registered into the name of the third applicant"*.
- [12] In the replying affidavit the 1st applicant alleges that the 1st respondent agreed to a

right of way "via his property to that of the 2nd Respondent where [the applicants] had also erected a second dwelling. The second dwelling that [the applicants] had erected on the 1st Respondent's property requires no right of way."

- (my emphasis).

- [13] It is the applicants' case that on 1 March 2016, the 1st applicant obtained the consent of the bondholder of Erf 78, to erect a second dwelling on the property. The 1st respondent disputes that the bondholder gave its consent, as alleged by the applicants. In view of the conclusion reached in this judgment, nothing turns on this dispute.

THE WRITTEN SALE AGREEMENT:

- [14] On 10 March 2016 the 1st applicant (as "voornemende koper") and the 1st respondent (as "voornemende verkoper") concluded a written sale agreement for the purchase by the 1st applicant of a 540 m² portion of Erf 78, which portion is described in the agreement as "1/78 (gedeelte van 1/78)", at an agreed purchase price of R200,000.00.
- [15] On 14 March 2016 the 1st applicant also concluded a written sale agreement with the 2nd respondent for the purchase of Erf 79 (the adjacent property) for an agreed purchase price of R220,000.00. The oral right of way, whether on the terms as alleged by the applicants, or on the terms as alleged by the 1st respondent, was not reduced to writing in either of the two sale agreements.
- [16] In terms of annexure B to the written sale agreement concluded with the 1st respondent, the 1st applicant undertook to perform certain improvements to the existing dwelling situated on Erf 78 (referred to by the parties as the 1st respondent's property), at an additional cost of R50,000.00.

IS THE ORAL RIGHT OF WAY VALID?

- [17] In *Robarts v Antoni N.O. and Others* [2014] 3 All SA 160 (SCA) the Supreme Court of Appeal, with reference to *Felix en 'n Ander v Nortier NO en Andere* and *Janse van Rensburg and Another v Koekemoer (supra)*, considered the validity of an oral agreement of 'height servitudes'. In considering the provisions of s 2 of the Alienation of Land Act 68 of 1981 ('the Act') the SCA held at [17] – [18] - (quoted *sans* footnotes):

"...s 2(1) of the Act requires alienation of land to be contained in a deed of alienation duly signed by the parties or their agents acting on written authority to be valid. In terms of s 1(b) of the Act 'land' includes 'any interest in land' and 'alienate' which corresponds with 'alienation', in relation to land, means 'sell, exchange or donate'. It is established that a praedial servitude (such as the height servitudes involved here) constitutes an 'interest in land' as envisaged in the Act. The height servitudes are real rights which diminish the dominium of the owner's rights in the Robarts property as they entitle the respondents and their successors in title to restrict the owner of the Robarts property from exercising normal rights to ownership and developing the property to its full potential."

And:

*"As was argued for Robarts, the parties' affidavits and indeed the written instrument relied upon by the respondents, make clear that the servitudes were agreed upon 'in exchange' for the zoning scheme departures and title deed amendments, which would impinge on the trust property, sought on behalf of the Robarts property. The trust would waive its rights to enforce the zoning scheme and title deed restrictions and support Robarts' applications in that regard. In exchange, Robarts would abandon the right to build higher than he was otherwise entitled and secure the servitudes for the trust property. Each party therefore agreed to waive certain rights and simultaneously undertake certain obligations in exchange for the same concession from the other. In sum, the parties exchanged corporeal rights in land. So, whilst there may not have been an alienation of an interest in land in the form of a sale or donation, there certainly was an exchange thereof in the manner envisaged in s 2(1) of the Act. The decision of this court in *Hoeksma & another v Hoeksma* upon which the respondents sought to rely cannot assist because it is distinguishable. There, the agreement in issue was intended to be a compromise and not an exchange and there was in any event no discernible object exchanged."*

- [18] In the matter before me the oral right of way purported to be a real right which

diminishes the *dominium* of the owner. On the facts as they appear from the affidavits, the oral agreement, at the very least, envisaged that the 1st respondent would grant a right of way over Erf 78 to the 1st applicant, as part of the sale of a portion of the said property to the 1st applicant, at a price to be agreed upon (a written sale agreement having subsequently been concluded), for purposes of the erection of a second dwelling on such portion, and for purposes of the erection of a new dwelling on the adjacent property of the 2nd respondent.

- [19] In my view the right of way in issue in this matter constitutes an 'alienation' of an 'interest in land' as contemplated in s 1(b) of the Act. To be valid and binding the agreement of a right of way had to be in writing in compliance with s 2(1) of the Act.
- [20] The relief sought in prayer 1 of the notice of motion, to declare the orally agreed right of way as "*valid and in full force*", can therefore not be granted. The relief sought in prayers 2 and 3 of the notice of motion, being entirely dependent on a declaration of validity, can similarly not be granted. The application can therefore not succeed.

THE ALLEGED CANCELLATION OF THE WRITTEN SALE AGREEMENT:

- [21] The 1st applicant raises the 1st respondent's refusal to provide him with a company resolution. The 1st respondent in turn raises allegations of forgery of his signature on a company resolution that was filed with the 3rd respondent. It is debatable whether these allegations raise a real dispute of fact, or whether they are at all relevant.
- [22] Subsequent to the conclusion of the sale agreement a dispute arose between the 1st applicant and the 1st respondent, pertaining to the improvements and pertaining to the 1st applicant's alleged refusal to provide the 1st respondent with documentation relating to the building project. The 1st respondent alleges in the answering affidavit, as follows:

"...[D]espite the applicant's (sic) having enticed me with the prospect of the improvements, they have done little to affect them. Despite starting the works in March 2016, the renovations have not been completed since the applicants downed tools in October 2016. As a result, my home has been left in a dilapidated and unlivable state for nearly two years."

The 1st respondent further alleges that the 1st applicant, in breach of the sale agreement, failed to deliver certain documentation to the 1st respondent. The 1st respondent alleges that he cancelled the sale agreement on 27 July 2018, because of the 1st applicant's failure to rectify his alleged breach, in accordance with the 1st respondent's prior demand. The 1st respondent submits that there is therefore *"no need or right for the applicants to access the Property"*.

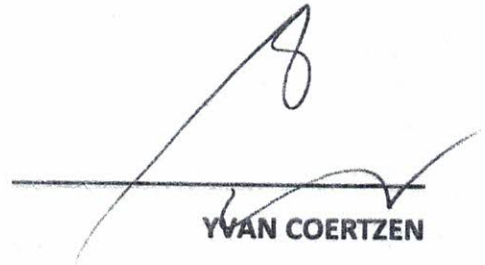
- [23] The 1st applicant disputes the allegations of breach and cancellation. It was submitted on behalf of the applicants that it is not necessary to determine this dispute on the papers, because the sale agreement is subject to an arbitration clause and these disputes will form the subject of arbitration. I am not persuaded. Even if I am wrong in finding that the oral right of way is not valid, it seems to me that the validity of the right of way and the lawfulness of the cancellation of the sale agreement, are interrelated. They cannot be determined in isolation, as the applicants would have me do.
- [24] The 1st respondent's version that the right of way was contingent upon the 1st applicant complying with his obligations in terms of the sale agreement and that the 1st respondent cancelled the sale agreement, cannot in my view be rejected out of hand - *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)*. The timing of the alleged cancellation may indeed be curious, but it is not appropriate to resolve paper contests by reference to the probabilities, however tempting - *TIBMS (Pty) Ltd t/a Halo Underground Lighting Systems v Knight and Another (JA29-2017) [2017] ZALAC 59; (2017) 38 ILJ 2721 (LAC) (18 October 2017)* at [29].

COSTS:

[25] I have considered whether the 1st respondent is entitled to costs. Only after my invitation to do so, did counsel address the validity of the oral right of way in the additional heads of argument, with reference to the provisions of the Act and the authorities. This matter should have been disposed of earlier.

In the result, the following order is made:

1. The application is dismissed;
2. The applicants are ordered to pay the 1st respondent's costs, jointly and severally, the one paying, the others to be absolved, excluding the costs of the hearing on 2 May 2019 and excluding the costs of the 1st respondent's heads of argument.



YVAN COERTZEN

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing: 2 May 2019

Date of judgment: 14 June 2019

Counsel for the Applicants: Adv. J C Erasmus

Instructed by: Van Jaarsveldt Attorneys

Counsel for the Respondents: Adv. M J Cooke

Instructed by: MDA Attorneys