



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

27/03/2015.
CASE NO: A252/13

(1) REPORTABLE: YES / NO.	
(2) OF INTEREST TO OTHER JUDGES: YES / NO.	
(3) REVISED. OK	
27/3/2015	
DATE	SIGNATURE

In the matter between:-

MICAWBER 526 (PTY) LTD

Appellant

and

CITY OF TSHWANE

Respondent

J U D G M E N T

Rabie J:

1. This is an appeal from a judgment handed down by a magistrate who heard the trial at Pretoria. The trial court heard the evidence of a single witness on behalf of the appellant (who was the plaintiff in the court *a quo*) and made a finding of absolution from the instance.
2. Before dealing with the merits of the appeal I need to refer to the condonation applications on behalf of the appellant. Firstly, the appellant applied in writing for the late noting of the appeal. A proper case was made out for such relief and the respondent did not oppose the application.
3. In her practice note which was filed late, the respondent's attorney noted that the appellant failed to prosecute the appeal timeously with the result that the appeal had lapsed. Counsel for the appellant was only made aware of this state of affairs when I mentioned the issue at the commencement of the appeal proceedings. There had been notice in this regard to the appellant. He thereupon applied for the required condonation and for the appeal to be reinstated. These applications were not opposed, or at least not seriously opposed.
4. Having regard to the factors mentioned by counsel from the bar and those mentioned in the first condonation application and especially the prospects of success of the appeal, to which I shall refer to below, I am satisfied that these applications should all be granted.

Background

5. The issue during the trial centred around a servitude which the respondent had over the property of the appellant.
6. The appellant had a large shopping centre erected on the land which was let to Macro. Around the building approximately 800 parking bays for vehicles were constructed. The area designed for the parking area was tarred.
7. From time to time the respondent had to engage in certain maintenance work on the underground electrical cables running along the aforesaid servitude which crossed the parking area. After completing such work during June 2008 the respondent failed to close a hole and trench that was three meters deep and which posed a serious threat to the safety of members of the public in and around the parking area.
8. Due to the respondent's failure to repair the relevant area the appellant repaired it for the amount of R62 388,74. The respondent failed to remunerate the plaintiff for the aforesaid remedial work and hence the appellant instituted action against the respondent for payment to it of the aforesaid amount.
9. In its plea the respondent admitted that in the past when the repair work to the electrical cables had been done, the excavated area had been repaired to its previous state. In respect of its refusal to do so in respect of the latest excavations, the respondent, inter alia, pleaded as follows in paragraph 6.3 of the plea:

"6.3 Defendant further also avers that the Plaintiff is in violation of its servitude rights in that it has unlawfully built a parking area over the servitude area and the depth and soil banking of that servitude are a further violates the Defendant's servitude rights in that they cause repeated damage to Defendant's electrical cables hence the need to repeatedly repair the cable." (sic)

In paragraph 6.4.2 the following was pleaded:

"6.4.2 In the alternative Defendant avers that if Plaintiff suffered damages in any amount whatsoever, Defendant is not liable for such damages since plaintiff brought at the damage upon itself by unlawfully building over a servitude area, contrary to the terms of the servitude agreement." (sic)

10. The main defence of the respondent was thus that since the appellant had tarred the parking area the respondent need not repair the excavations it had made to reach its electrical cables.

11. At the commencement of the trial the following was agreed between the parties:

"1. Notwithstanding the disputes referred to in the pleadings, the parties agree that the following will be the sole issues between the parties:

1.1 Whether the plaintiff was entitled to build a parking area, covered with tar, in the defendant's servitude area, condition C in the title deed ("the servitude area");

1.2 Whether the defendant was obliged to do remedial work (restore to previous state) after doing maintenance work in the servitude area;

1.3 Whether the defendant failed to make good the damages caused by the defendant when it performed remedial work in the servitude area during January 2008 and June 2008, within a reasonable time, thus prompting the plaintiff to do the remedial work itself.

2. It is common cause between the parties that:

2.1 The plaintiff paid an amount of R62 388,74 for the remedial work, referred to in the pleadings and that such an amount is reasonable;

2.2 The plaintiff is the registered owner of erf 214, Six Fountains, Ext 5;

2.3 The plaintiff is duly complied with all its obligations in terms of Act 40 of 2002." (sic)

12. After referring to the evidence of the appellant's witness and submissions made to him, the magistrate found that he was not able to make a finding as to whether the appellant was entitled to tar the area of the parking area where it crosses the servitude. For this reason his judgement in respect of the whole action was one of absolution from the instance.

13. I must at the outset say that the state of the record of proceedings in the trial court is very poor and that much of the evidence had not been properly transcribed. However, none of the parties indicated that this was a concern as both found sufficient reliance on the evidence that was transcribed, the exhibits before the court, the magistrate's judgement and the legal principles on which they respectively relied. I propose to do the same.

14. The main thrust of the respondent's argument was that the appellant had to prove that it had a right to construct a tarred surface across the servitude area and, secondly, that the respondent was obliged to do remedial work by restoring the previous state after having done maintenance work in the servitude area.

15. This, the respondent submitted, the appellant failed to do. In this regard the respondent relied on the evidence which was placed before the Magistrate and upon which the magistrate could not come to a conclusion. This evidence relates mainly to the Deed of Cession of Servitude K145/93 S which was alleged by the legal representative of the respondent during cross-examination of the appellant's witness, to be the relevant document relating to the servitude in question. This Deed of Cession of Servitude was registered on 13 January 1993. From the contents of this Deed it seems that this was at a time when the area concerned constituted farmland.
16. According to the Deed the City Council of Pretoria (now the respondent) obtained a servitude of powerline of 31 metres wide over the relevant area. According to paragraph 2 of the Deed the council is obliged to pay damages, *inter alia*, caused to any improvements caused by, *inter alia*, the repair of cables and equipment used for the transfer of electricity. Paragraph 4 of the Deed prohibited the owner of the property from erecting any building or other structures on the servitude area. It also contains a number of provisions relating to vegetation which is allowed and not allowed on the servitude area. Paragraph 5 of the Deed, *inter alia*, allows for the servitude area to be used for purposes of farming, provided the cables under or above the ground are not disturbed.
17. Before dealing with the aforesaid arguments it is necessary to refer to some of the other evidence. In his evidence Mr Coetzee, who was involved in the management of the construction process, referred to the fact that the whole project was approved by the municipality. This included the tarred surface of the

open parking area. I accept for purposes hereof that the relevant local authority was the Kungwini Local Municipality in whose area of jurisdiction the land in question falls. Mr Coetzee also referred to the establishment of the township in which the property is situated which was published in the Provincial Gazette of 11 July 2007. The published conditions relating to the township acknowledges the servitude of the respondent which runs across the appellant's property. The Conditions of Establishment, which also acknowledges the servitude, provides, *inter alia*, as follows: "Provided further that, the electrical servitude area may be used for purposes of parking and/or for other purposes with written permission of the authorised authority".

18. Mr Coetzee testified, in the first place, that the servitude relied on by the respondent's attorney was not the servitude which was relevant in the present instance. He testified, in the second place, that even if the said servitude were relevant, that such written authority was obtained from the respondent. He also referred to a written Service Agreement with the respondent which apparently recognised the tarred parking area on the approved plans. He also testified that the respondent had at all times been aware of the fact that the parking area had been tarred and had not complained. He added that when repairs had to be made in the past, the excavations as well as the tarmac were repaired by the respondent.
19. It was, firstly, submitted on behalf of the appellant that the magistrate erred by absolving the respondent from the instance for the reason that he could not make

a finding in respect of the question whether the appellant was entitled to tar the area of the servitude.

20. I agree with this submission. The respondent's plea in this regard was in the form of a special plea and consequently the onus to prove the allegations was on the respondent. Consequently, if the magistrate was unable to find on the evidence whether the appellant had been allowed to tar the parking area across the area of the servitude, it only had the effect of such special plea not being further considered and it could not have prevented him from finding in favour of the appellant and awarding its claim. It could thus not have resulted in a finding of absolution from the instance in respect of the appellant's claim.
21. There was no cross-appeal by the respondent against the finding in respect of the special plea and consequently, at best for the respondent, the finding of the magistrate, which is in reality a finding of absolution from the instance in respect of the special plea relating to the question whether the appellant could have tarred the servitude area, still stands. That leaves the balance of the issues which clearly should have been found in the appellant's favour. In that respect it was common cause that the defendant had failed to do the necessary remedial work within a reasonable time and that the amount expended by the appellant in that regard, was a reasonable one. Consequently, for this reason alone, the appellant's claim should have succeeded.
22. The second submission made on behalf of the appellant was that the question whether the appellant was allowed to tar the servitude area, was in fact an

irrelevant issue. The submission was that the area where the servitude is situated, as well as the tarred surface, were at all times the property of the appellant. The respondent, as holder of the servitude, must exercise the servitude *civiliter modo*, i.e., in a civilised, considerate way so as to cause as little inconvenience as possible to the appellant as owner of the servient land. According to Lee and Honoré, Family, Things and Succession, second edition, at paragraph 370, this also implies that the holder of the servitude may not increase the burden on the servient land beyond the express or implied terms of the servitude.

23. In *Sussman v Stabilis Trust Finansiërders (Edms) Bpk* 1970 (3) SA 58 (O) Hofmeyer AJP said the following at p 60F:

"In this connection it must be borne in mind that a servitude of way, as any other servitude, must be exercised *civiliter modo* which implies that, although the holder is entitled to every right without which the servitude cannot be properly enjoyed, the servitude is limited to the actual requirements of the dominant tenement. The holder must 'exercise his right with due regard to the interests of the servient property and its owner'. (See *Texas Co. (S.A.) Ltd v Cape Town Municipality*, 1926 AD 467 at p. 474). The same principle was applied in *Nolan v Barnard*, 1908 T.S. 142 at p. 152, where the question was whether, once a servitude of grazing had been created over a farm, the occupation and the cultivation of that farm could in no way be changed or enlarged? The reasonable view was adopted by the Court that the servitude of pasturage had to be interpreted 'liberally and in favour of the owner of the servient property, viz., that so long as the owner of the dominant tenement can exercise fully the right which has been granted to him he must not be allowed to interfere with the right of the owner of the servient tenement to use his farm in a reasonable manner.

The owner of the dominant tenement must not be allowed to curtail the rights of ownership of the owner of the servient property more than is necessary to enable him to enjoy his servitude. In other words, the right of servitude must be exercised *civiliter modo*. And if there is any doubt as to which interpretation we should prefer, we should adopt the maxim which has been so often referred to by the commentators, namely, that in any doubtful case the interpretation should rather lean in favour of the servient than in favour of the dominant tenement'.

It is unnecessary to quote further authority for such well-recognised principles."

24. In *Servitudes*, CG Hall and EA Calloway, 1957 at 118, the following was stated regarding the duties of the owner of the dominant tenement:

"The owner of the dominant tenement must exercise his right in a manner least burdensome to the servient owner. He must act *civiliter modo*, that is to say, he must not make the position of the servient owner more difficult than is necessary for the due and proper exercise of his right (*Cumming v Brown*, 23 EDC 54; *Rubidge v McCabe*, 1913 AD 441). The dominant owner must use skill and care in the exercise of his right, and if he does any damage, repair it (*London and SA Explorations Co v Rouliot*, 8 SC at 97). ... It is the dominant owner's and not the servient owner's, duty to make the repairs necessary for the proper enjoyment of his right, e.g. the burden of preparing a right of way, aqueduct and other rights of like nature falls upon the dominant owner (*Domat*, 1.12.5.3; *Gale*, p449), and he's bound to effect the repairs if the servitude is of such character that the want of repair causes damage to the servient tenement (*Washburn on Easements*, 6.1.6)."

25. Consequently, so I understand the argument on behalf of the appellant, by destroying the tarred service without repairing it, and, more importantly, by leaving a deep excavation which clearly created a serious danger to the life, limb and property of the general public, and by so doing also preventing the

appellant's customers from using the parking area and driving over and parking on the servitude area, the respondent acted unlawfully. I agree with this argument and I further agree with the submission that even if the appellant was in the first place not entitled to tar the servitude area, such fact would never be a defence to the aforesaid unlawful conduct. To allow the respondent to avoid the consequences of the destruction of the appellant's property without repairing same, and the creation of a danger to the general public and to the visitors to the appellant's property, in this manner, namely as a defence to its own unlawful conduct, would be tantamount to apply the *versari in re illicita* principle which is no longer part of our law.

26. I consequently agree with the conclusion that the content of the servitude is not relevant in the present proceedings. If the respondent were to remain of the view that the appellant is contravening the terms of the servitude, and that no permission to tar the servitude area had been given by the respondent, the respondent may consider having the matter adjudicated in proceedings directed specifically at that purpose. It is not a defence to his otherwise unlawful conduct.
27. It would furthermore be during such proceedings where the correct servitude would be identified and even if it were to be the one alleged by the respondent, the court would consider whether, in the days we live in now, a tarred surface can really be regarded as "building a structure", having regard to the ease with which modern equipment cut through tarred surfaces and the ease by which such surfaces are restored. Furthermore whether a tarred surface should be regarded a "structure" on a proper interpretation of the servitude. If necessary the court

might decide to amend the servitude for the reason that it seems ridiculous that a narrow passage through an 800 vehicle tarred parking area should be left untarred.

28. Finally, apart from the above considerations, it should be considered that the evidence before the trial court was that the respondent had given its written permission for the parking area to be tarred; and furthermore that the respondent had been aware of this situation all along; had done nothing contrary thereto; and had in fact in the past restored the tarred surface to its previous state at its own costs. No rebutting evidence was presented by the respondent. On this basis too, the appellant's claim should have succeeded.

29. In the result the following order is made:

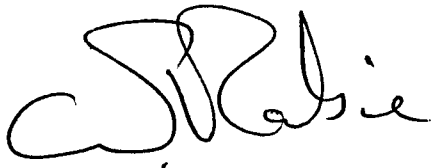
1. The condonation applications applied for by the appellant are granted and the appeal is reinstated.

2. The appeal is upheld with costs.

3. The order of the court *a quo* is replaced with the following order:

- "1. The defendant is ordered to pay the plaintiff an amount of R62 388,74 together with interest there on at the rate of 15.5% *per annum* from 27 November 2008 to date of payment.

2. The defendant is ordered to pay the plaintiff's costs of suit."

A handwritten signature in black ink, appearing to read 'C.P. Rabie', written above a horizontal line.

C.P. RABIE

JUDGE OF THE HIGH COURT

I agree:

A handwritten signature in black ink, appearing to read 'M. Ismail', written above a horizontal line.

M. ISMAIL

JUDGE OF THE HIGH COURT