

26/87

NACH INVESTMENTS (PROPRIETARY) LTD....APPELLANT

and

YALDAI INVESTMENTS (PROPRIETARY)

LIMITED

.....FIRST RESPONDENT

MARMERNOVA AND BUILDING PRODUCTS

(PROPRIETARY) LIMITED

.....SECOND RESPONDENT

HEFER, JA.

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between

NACH INVESTMENTS (PROPRIETARY) LIMITEDAPPELLANT

and

YALDAI INVESTMENTS (PROPRIETARY)

LIMITEDFIRST RESPONDENT

MARMERNOVA AND BUILDING PRODUCTS

(PROPRIETARY) LIMITEDSECOND RESPONDENT

CORAM : JOUBERT, HOEXTER, HEFER, SMALBERGER, JJA, et
KUMLEBEN, AJA.

HEARD : 17 February 1987.

DELIVERED : 26 March 1987.

J U D G M E N T

.....HEFER, JA.

HEFER , JA :

First respondent is the owner of erf 157 in the township of Meadowbrook Extension 8. Appellant purchased the adjoining erf from first respondent during 1980. In an addendum to the deed of sale it was recorded

"-----that the Seller has reserved to itself and its successors in title to Erf 157 Township of MEADOWBROOK EXTENSION NO. 8, a servitude of right of way in perpetuity leading to the proclaimed service road on Portion 460 of the Farm RIETFontein NO. 63, Registration Division I.R. Transvaal, over Erf 158 Township of MEADOWBROOK EXTENSION NO.8, the exact route of which servitude is to be determined by agreement between the Seller or its successors in title and the Purchaser or its successors in title."

A servitude in similar terms was registered against appellant's title deed when erf 158 was subsequently transferred to it.

After several attempts by the parties at determining the route of the right of way appellant issued a notice of motion in the Court a quo in which it claimed an order inter alia declaring that

"-----the servitude of right of way referred to in:

- (a) the Addendum to the written Agreement of Sale concluded between the Applicant and the First Respondent (a copy of each of which written Agreement of Sale and Addendum is annexed to the Applicant's Founding Affidavit, marked 'C' and 'D' respectively); and
- (b) the Deed of Transfer in terms whereof

the First Respondent transferred Erf 158 Meadowbrook Extension No. 8, Registration Division I.R. Transvaal, to the Applicant on the 25th June, 1981-----

is invalid as being void for vagueness."

The Court a quo dismissed the application but granted the appellant leave to appeal to this Court. Hence the present appeal.

In this Court appellant's counsel raised the same argument which he had unsuccessfully addressed to the Court a quo. Shorn of all its trappings it amounted to this : what is envisaged in the servitude is a right of way across erf 158 along a specific route; the route has, however, not been determined for it is still to be agreed upon; and in this inchoate form

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the servitude is invalid. The Court a quo rejected the contention basically because it did not agree with the contention that the route of the servitude was intended to be a specific one. I do not propose discussing the grounds upon which the judgment of the Court a quo was challenged in this Court. Instead I proceed immediately to state the reasons why I am of the view that the conclusion arrived at therein, was the correct one.

By way of introduction two preliminary observations may be made. The first is that this is not a case (eg like Hattingh v van Rensburg 1964(1) S A 578 (T) and Aris Enterprises (Finance) (Pty) Ltd v

Waterberg Koelkamers (Pty) Ltd 1977(2) S A 425 (A D) on

which appellant's counsel relied) where one of the essential terms of an agreement has been left inchoate. In

an agreement for the constitution of a right of way

the determination of the route of the servitude is not

essential. It has long been accepted that such a ser-

vitute may be constituted either along a specifically

agreed route (facta partis assignatione, per quam exer-

ceatur), or generally (simplicius per fundum cessa), in

which case the entire servient tenement is subject to

the servitude and the grantee may select a route provi-

ded only that he does so civiliter modo. (Northview

Properties (Pty) Ltd v Lurie 1951(3) S A 688 (A D) at

p 697, Kakamas Bestuursraad v Louw 1960(2) S A 202 (A D)

at p 217, Gardens Estate Ltd v Lewis 1920 A D 144 at p

150, De Villiers & Another v Barnard & Others 1958(3)

S A 167 (A D) at p 226, Hellmann & Another v Estate Latre

1970(3) S A 638 (A D) at p 645). It follows that a

right of way may be validly constituted without any reference in its formulation to its route.

The second observation is that where the formulation does contain such a reference and the route is said to be determinable by agreement, the servitude may or may not be valid depending on the intention of the parties. If the intention is to constitute a specific right of way i e one which may only be exercised along a specifically

defined.....8

defined route, the agreement is inchoate at least as to a material term and for that reason it is unenforceable until the route is agreed upon. (Johnston v Leal

1980(3) S A 927 (A D) at p 939). But the agreement is perfectly valid and enforceable if a general servitude is intended and there is a reference to a future agreement merely because the parties contemplate that the route will eventually be agreed upon. What is envisaged in such a case is an initial general right which may be converted to a specific one by subsequent agreement. Accordingly, where there is a dispute about the nature of the right conferred on the grantee in any given case, the intention of the parties is

decisive.....9

decisive. It is to be determined, of course, by interpreting the agreement according to the normal rules of construction.

I do not agree with appellant's counsel that the addendum to the deed of sale in the present case is to be construed as an agreement for a specific right of way. The whole addendum consists of three clauses. Clauses 2 and 3 are irrelevant. Clause 1 in truncated form reads as follows :

"It is recorded that the Seller has reserved-----a servitude of right of way in perpetuity -----over erf 158 -----the exact route of which servitude is to be determined by agreement -----."

Clause 1 is, in my view, capable of one inter-

pretation....10

pretation only. It may conveniently be divided

into two parts. The first (which I have itali-

cised) records what has been agreed upon i e

that the seller has reserved a right of way over

erf 158. Without detracting from the right which

has thus already been reserved, the second part

then provides that the route will be determined

by agreement; and the effect is that, until it

is so determined, the right may be exercised along

a route selected by the seller. To hold other-

wise would lead to results which could never have

been intended. If a specific servitude had been in-

tended one wonders why its route was not settled there and

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then and why the parties preferred to leave such a vital part of their agreement open for further negotiation. On that construction the determination of the route was indeed vital for, as appellant's counsel rightly submitted, a servitude would only come into being if and when its route was defined. Accordingly, should further negotiations fail or even if the appellant should refuse to negotiate (cf Putco Ltd v TV and Radio Guarantee Co (Pty) Ltd and Other Related Cases 1985(4) S A 809 (A D) at p 828), it would never come into existence at all. Nothing would then come of the careful reservation, in the clearest possible terms, in an agreement specially

prepared for the purpose, of a right which the parties obviously intended to be effective and capable of being exercised; nor would anything come of its registration. That is plainly not what the parties had in mind; it is inconceivable that they envisaged a right dependent for its very existence on matters such as the whim of the owner of the servient tenement or the uncertain outcome of further negotiations.

Assuming, however, that I am wrong and that the construction for which appellant's counsel contended is a possible one, the "ut res magis valeat quam pereat" principle clearly applies. It was enunciated in the following terms by GREENBERG JA in Hughes v

Rademeyer 1947(3) S A 133 (A D) at p 138 :

"-----in construing a contract, the Court is not entitled to strain words because of the provisions of an Act which might affect the validity of the contract, or to be influenced by those provisions in determining whether the contract is reasonably capable of a meaning which will not make the contract invalid, but that when it has come to a conclusion that the contract is reasonably capable of such meaning, it will apply the maxim."

(See also McCulloch v Fernwood Estate Ltd, 1920 A D

204 at p 209). It makes no difference to the application of this principle whether the agreement is alleged to be invalid for non-compliance with some statutory requirement or on some other ground. Once it appears that

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it is reasonably capable of an interpretation which will not render it invalid, that interpretation is to be preferred. And in the instant case the agreement is at least reasonably capable of the interpretation which I consider to be the correct one.

It should perhaps be stated in conclusion that the registration of a right of way in the form in which the servitude was registered in this case appears to be common in Deeds Office practice. (Cf Jones: Conveyancing in South Africa (3rd ed) pp 256,262; Newall's Law and Practice of Deeds Registration (2nd ed) pp 132,300). According to the report of the Registrar of Deeds it is also in accordance with the requirements of the Deeds

Registries Act, 1937 and the relevant Regulations.

In view of the conclusion at which I have arrived, it is unnecessary to decide whether the application should not in any event have been dismissed on the grounds stated inter alia in Standard Bank van S A Bpk v Breitenbach en Andere 1977(1) S A.151(T) at p 155-6.

The appeal is dismissed with costs including the costs of two counsel.

J J F HEFER, JA.

JOUBERT, JA.	)	
HOEXTER, JA.	)	
SMALBERGER, JA.	)	CONCUR.
KUMLEBEN, AJA.	)	