

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A270/24

CASE NO. A QUO: 4654/2019

(1) REPORTABLE: YES/**NO**

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

(3) REVISED.

SIGNATURE

DATE 6/10/2025

In the Full Court Appeal of:

RAND WATER BOARD

Appellant

and

RAUTENBACH, IANTHE FLORENCE

First Respondent

TSHWANE METROPOLITAN MUNICIPALITY

Second Respondent

JUDGMENT

CORAM MOLOPA-SETHOSA J, FRANCIS-SUBBIAH J AND LABUSCHAGNE J

[1] The Rand Water Board (the “appellant”) is an organ of State established in terms of the Water Services Act, 108 of 1997, which has a pipeline servitude that runs through Woodhill Golf Estate in Pretoria to supply the residents of Pretoria East with sufficient water. The appellant alleges that the home and

the pool on the first respondent's property encroach on the appellant's 16 meter servitude and onto a 2 meter buffer zone on the side of the servitude, thereby preventing the appellant from installing a second pipeline. The first respondent passed away in 2023 and was represented at trial and in the appeal by her duly appointed executor.

- [2] In the Court *a quo* the appellant sought an order in motion proceedings that the first respondent be directed to demolish the encroachment, failing which the Sheriff should do so. As an alternative, a declarator was sought that the first respondent has spoliated the appellant of its undisturbed possession of the servitude, including a 2 meter buffer zone on each side thereof.
- [3] The matter came before Neukircher J who referred to matter to trial. The matter proceeded to trial before Swanepoel J who held that the appellant had consented to the construction of the structures which it now contends need to be demolished.
- [4] The first respondent brought a counterclaim based on an allegation by the plaintiff in its founding affidavit that the existing pipeline has not been maintained and is at serious risk of bursting. In the counterclaim the first respondent sought an order, that the appellant should inspect the pipeline and report to the first respondent and to the Court whether the pipeline is safe, and if not, the appellant should state what precautions are to be taken to minimise the danger. The first respondent also sought a declaratory order that the appellant had consented in writing to the development in its current form, alternatively that the first defendant be granted consent for the current encroachment as provided for in the notarial deed of servitude.
- [5] Swanepoel J dismissed Rand Water's claim on the basis of consent having been given and upheld the counterclaim in part, directing Rand Water to inspect the pipeline and to comply with its statutory duties.

- [6] This is the appeal against the dismissal of the claim and the granting of the counterclaim by Swanepoel J. The appeal is with leave of the SCA, Swanepoel J having refused leave to appeal.

THE SERVITUDE

- [7] On 9 December 1997 a servitude was registered over the remainder of Portion 2[...] of the Farm Garsfontein 3[...], Registration Division JR, Gauteng in favour of the Rand Water Board, granting it the right to convey water and to transmit water over a strip of land situated on the aforesaid property, 16 meters wide and measuring a total of 2,5887 hectares in extent, as denoted on Surveyor General Diagram 9450/1982 with the letters ABCDEFGHJKLMNP. The area is defined as the “strip” in the Deed of Servitude K7429/1997S. The rights of the appellant include the right to patrol, inspect, maintain, repair, remove and relay the pipeline and its accessory equipment on the strip, including a right of way and a right of ingress and egress from the property.
- [8] The provision pertaining to offending structures in the buffer strip of 2 metres is in paragraph 2, which reads:
- “2. There shall be no structures erected, parking allowed, trees planted or material placed or deposited on or over the strip, or within 2 (two) meters thereof, and the depth of cover over the pipeline shall not be materially altered, without written consent from Rand Water, which consent shall not be unreasonably withheld.”*
- [9] The 16 meter strip (“the strip”) is 1.6 km long and has a 2 meter buffer zone on either side.
- [10] In the Court *a quo* uncontested evidence of a surveyor, Mr Matsobane Dolo established that the first respondent’s home does not encroach onto the servitude. It does however encroach 0.34 meters into the buffer zone for a total area of 1.25 square meters and the first respondent’s swimming pool encroaches by 1.65 meters onto the buffer zone, for a total area of 6.32 square meters.

- [11] The appellant contended that due to the encroachments it is unable to lay a second pipeline on the northern side of the existing pipeline, which is on the far side of the existing pipeline from the first respondent's home.
- [12] The Court *a quo* found that the appellant's servitude extends to the strip, but not to the buffer zone. As far as the buffer zone is concerned, the appellant merely have the right to insist that the buffer zone is not encroached upon. It however does not have the right of use of the buffer zone for purposes of laying the pipeline. That has to take place within the strip of 16 meters.
- [13] This point alone would be dispositive of the appellant's case in the Court *a quo*, but the Court *a quo* assumed in favour of the appellant that it had the same rights in respect of the buffer zone as it has in respect of the strip.
- [14] The Court then proceeded to determine whether written consent had been granted by the appellant as envisaged by Clause 2 of the Deed of Servitude for the encroachments in the buffer zone.

THE FACTS

- [15] The salient facts pertaining to the dimensions and location of the servitude and the encroachments are not challenged on appeal. The dispute on appeal relates to whether Rand Water consented to the encroachments. In paragraphs [10] to [14] of the judgment *a quo* Swanepoel J sets out the relevant facts with reference to the documents which are here repeated:

"[10] On 28 November 2005 the architects, acting on behalf of the developer of the property, Nuclei Lifestyle Design, sought consent from the plaintiff (Rand Water-our insertion)) for the development of the property. The material part of the letter reads as follows:

'DEVELOPMENT OF ERF 4[...] P[...] P[...] X[...]

The registered letter received from The City of Tshwane City Planning

PRETORIA AMENDMENT SCHEME 9196: ERF 4[...] P[...] P[...] [...] states in annexure B of Amendment Scheme 9169/8:

‘all the conditions imposed by Rand Water shall be complied with to the satisfaction of the municipality.’

- *Firstly could you please forward us all the conditions referred to by the municipality, and*
- *Secondly also have a look at the site development plan attached and let us know if this will be acceptable for Rand Water.”*

[11] *Attached to the letter was a site plan reflecting the envisaged development. The plan reflected the 16 meter wide strip, but it did not reflect the 2 meter buffer zone. All six of the relevant homes, including the first defendant’s home (Unit [...]) are reflected on the plan, and clearly, all encroach into the buffer zone, and one also encroaches into the servitude by approximately 10 cm.*

[12] *On 8 December 2005 the plaintiff replied to the architect’s letter. The reply commenced with the words: ‘Your letter of 28 November 2005 and the accompanying plan, refer (my emphasis)’. The letter recorded that the proposed development was in close proximity to the servitude. It also recorded that the plaintiff intended to lay a second pipeline along the servitude. Furthermore, the plaintiff recorded that it required unimpeded access to the pipeline at all times. It also dealt with certain requirements relating to fencing, and a number of other prohibitions. Significantly, the letter did not refer at all to the buffer zone. It simply recorded that the plaintiff was the holder of a 16 meter wide servitude in terms of Deed of Servitude K7429/97. Attached to the letter was an annexure “A”, and the first defendant’s architects were specifically referred to Clause 1.3 thereof. The material part of the letter reads as follows:*

“Rand Water has no objection in principle to the proposed development provided than in addition to the abovementioned requirements, all the relevant conditions in the enclosed copy of annexure “A” are complied with and accepted in writing by your client and/or the owner.

- [13] *It is common cause that the letter of 8 December 2005 is a consent to the development of the property on the conditions set out therein and in annexure "A" to the letter. The first question is what conditions were imposed upon the developer and secondly whether the plaintiff consented to the erection of buildings in the buffer zone. The plaintiff says that he did not consent to an encroachment into the buffer zone, and that the reference in the letter to Clause 1.3 of annexure "A" makes it clear that no construction was allowed to take place in the buffer zone. The plaintiff led the evidence of Ms Paleka Mashele, who testified that she was a Senior Civil Technologist in the plaintiff's employ. She denied that the plaintiff had consented to the erection of structures in the buffer zone. She relied upon Clause 1.3 of annexure "A" to justify her view. Clause 1.3 reads as follows: 'No service (e.g. Fibre Optic Cables / Telecommunications Cables) running parallel to Rand Water's pipeline/s, no box, manhole, structure supporting any services, footing of any pylon, pill or stay wire and no stormwater culvert / or appurtenances shall be within 2 meters of Rand Water's pipeline/s or on Rand Water's servitude/s or proposed servitude/s or discharge thereon unless the written permission of Rand Water has been obtained. Rand Water's final approval needs to be obtained. Such services must be outside Rand Water's servitudes.'*
- [14] *On 22 February 2008 the owner's consulting engineers wrote a further email to the plaintiff, again attaching a plan showing the layout of the proposed development. This plan also did not show the buffer zone, but it clearly showed that the houses were to be erected partially on the area of the buffer zone, and that one home would also encroach onto the strip (by 3 cm). On 6 March 2008 the plaintiff replied to the email. It pointed out that the plaintiff had previously commented on the proposed development, and it simply repeated the conditions set out in the plaintiff's letter dated 8 December 2005. Once again, a reference is made to annexure "A", and particular to Clause 1.3 thereto. No reference is made to the buffer zone. The relevant part of the letter reads as follows:*

‘No structures including gazebos, patios, splash pools, etc. will be allowed within Rand Water’s servitude (referred to Clause 1.3 of attached annexure “A”) (my emphasis)’.”

- [16] The appellant contends that Clause 1.3 must be interpreted to have conveyed to the developer that the erection of any structures on the buffer zone was prohibited.
- [17] The Court *a quo* found that the appellant had approved the development on two separate occasions with express reference to the site plan. The first was prior to construction. That site plan indicated, as set out *supra*, where encroaching structures would appear on the buffer zone. Even assuming that the appellant had the right to use the buffer zone (which was found not to be the case) the Court *a quo* found that the appellant was on the facts estopped from asserting its rights. It was bound to the representation of consent as contained in its responses to applications for consent as set out *supra*.
- [18] The reference to estoppel as a defence would only arise if the appellant had not in fact consented. As the question of consent is determined by the Court’s interpretation of Clause 1.3 and clause 2 of the Deed of Servitude as quoted *supra*, a finding that there was consent is dispositive of the matter.

THE COUNTER APPLICATION

- [19] In paragraphs [77] to [79] of the founding affidavit the deponent for Rand Water states:
- “... as a result of these obstructions or encroachments, at the point of the encroachments, it has been rendered impossible to undertake patrols, inspections, remove or lay further pipelines, as the applicant now urgently seeks to do ... In fact, in the normal course, the pipeline network is exposed to corrosion from stray current sources, corrosive soils and microbiological corrosion, which results in metal loss and threatens the integrity of the pipeline ... Upon a likely and resultant pipeline burst, the consequences will certainly be catastrophic and deadly, owing to the high volume of water and*

the pressure through which it will flow out, in particular, considering the close proximity of the encroaching structures to the pipeline.”

- [20] The Court *a quo* found that, as these averments emanated from the appellant, and as it had expressed no intention of maintaining the pipeline in the normal course, that a need for the interdict had been established.

THE APPELLANT’S CONTENTIONS ON APPEAL

- [21] The crux of the appellant’s contentions is that, on a proper construction of Clause 2 of the Deed of Servitude, the appellant could only consent to any development, both in the strip or servitude and buffer zone, in writing. The appellant contends that the Court *a quo* erred and ought to have found that firstly there was no application to develop the buffer zone, and secondly, that there is no written consent to develop the buffer zone.
- [22] In the alternative, the appellant contends that Clause 2 of the Deed of Servitude reigns supreme and that Clause 1.3 of the annexure “A”, being a subsidiary document *“cannot be used to make or render the terms of the Deed of Servitude unworkable or to make the servitude impractical and ineffective.”*
- [23] In respect of the granting of the counterclaim, the appellant contends that the Court *a quo* erred in misconstruing the dangers referred to. The appellant contends that the risks to the pipeline are created by the encroachment and not by the failure to maintain or inspect the pipeline.
On the issue of costs, the appellant contends that the Court *a quo* erred in awarding costs of two counsel. It contends that the Court *a quo* failed to exercise a discretion in respect of costs.
- [24] During argument, counsel for Rand Water sought to interpret the aforesaid letters of 8 December 2005 and 6 March 2008 without reference to the site plan, that was annexed to each of the letters, contending that it was impermissible to refer to the site plan.

- [25] As far as the counterclaim is concerned, the appellant argued that the affidavit evidence relied on by the court as the basis for the order granted *a quo* was not before the trial court. Those affidavits served before Neukircher J but were not “in evidence” before Swanepoel J.

DISCUSSION

- [26] The appellant advanced a position on appeal at variance with the evidence that served before Swanepoel J in contending that clause 1.3 of its standard terms and conditions in respect of servitudes cannot be used to interpret clause 2 of the Deed of Servitude. At trial Ms Mashele based her case for the absence of consent on clause 1.3 (see par [13] of the judgment *a quo*, quoted *supra* in par [15]). She was however only employed by Rand Water in March 2013. Her interpretation of documents is therefore a retrospective interpretation of documents written prior to her employment by Rand Water.
- [27] Swanepoel J correctly found that clause 1.3 prohibits structures within two meters of the pipeline and not within two metres of the pipeline servitude. The latter would have included the buffer zone. But grammatically the prohibition related to structures within close proximity to the pipeline. The evidence is therefore not on point.
- [28] It is trite that documents need to be interpreted using the three guiding principles set out in **Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] ZASCA 13**) at par (17 - 26) of text, context and purpose.
- [29] The appellant’s interpretation exercise pertaining to consent to encroachments as envisaged by clause 2 the Deed of Servitude is difficult to understand. The appellant made much of the fact that the letters by Rand Water reflected early in the document that the encroachments were in close proximity to its servitude of pipeline. That alone is advanced as an indicator that there was not consent. In addition, it was argued that the annexed site plan could not be referred to as part of the interpretation of the letters concerned.

- [30] The aforesaid approach falls foul of two principles of interpretation. The first is that a document needs to be read as a whole. The second is that, where Rand Water itself attaches the site plan as part of its response, that site plan becomes part of the document, or at least provides context for the response. Whether the annexure is seen as part of the letter as a matter of text alone, or whether it merely provides context, both approaches point to its inclusion in the interpretation of the letter.
- [31] Rand Water's argument on consent ignores the fact that the Rand Water letters of 2005 and 2008 were responses to enquiries whether the layout on the site plan would meet with Rand Water's approval. And both letters express no objection in principle and attach the very site plan in question. To craft a negative response in such circumstances is to ignore the context of the response and its content, read as a whole.
- [32] The finding of the court a quo on the presence of consent, as envisaged in clause 2 of the Deed of Servitude, for the structures in the buffer zone cannot be faulted. That is dispositive of the crux of the appeal.
- [33] On a belts and braces approach, the court a quo entertained an alternative basis of consent based on an estoppel. It found that, even if there were some subjective *reservatio mentalis* on the issue of consent, that Rand Water gave a negligent representation of consent, based on which the structures were erected in the buffer zone. Having acted to her detriment, in reliance on such representation being made, by constructing the encroachments in the buffer zone, the first respondent is entitled to hold Rand Water to its representation of consent.
- [34] The only issue in respect of the estoppel is whether the requirement imposed in certain authorities that the representation had at least to be negligent, had been established. The authorities on estoppel include a limited fault requirement. The requirements for an estoppel do not expressly

require fault-In **Aris Enterprises (Finance) (Pty)(Ltd) v Protea Assurance Co Ltd** 1981 (3) SA 274 (A) the following is stated at 291B:

“Finally, I come to the estoppel point. Appellant's counsel agreed that the estoppel contended for by him was an instance of estoppel by representation. The essence of the doctrine of estoppel by representation is that a person is precluded, i.e. estopped, from denying the truth of a representation previously made by him to another person if the latter, believing in the truth of the representation, acted thereon to his prejudice (see Joubert, The Law of South Africa vol 9 para 367 and the authorities there cited). The representation may be made in words, i.e. expressly, or it may be made by conduct, including silence or inaction, i.e. tacitly (ibid para 371); and in general, it must relate to an existing fact (ibid para 372).”

- [35] The representation in question must have the capacity to mislead a reasonable man (*Ibid* at 292E)- i.e. the failure to correct a wrong impression reasonably created can result in the invocation of an estoppel.
- [36] In this instance the letters from Rand Water created a clear impression that consent to the location of specific encroachments detailed in a site plan was being given in 2005 (and later confirmed in 2008 in respect of a slightly amended and annotated site plan). A reasonable man would interpret the letters in this manner and the failure to correct that impression timeously would be negligent as reliance on the misrepresentation was foreseeable.
- [37] Although unnecessary on the facts, the court a quo correctly applied the principles of estoppel as an alternative approach. As there was consent there is no need to consider the scenario that was pleaded by the first respondent, in its third counterclaim, i.e. that consent was unreasonably withheld and that an order to that effect should be granted.

THE COUNTERCLAIM

- [38] Counsel for Rand Water contended that, as the sole source for the granting of the counterclaim was the content of certain paragraphs of Rand water's founding affidavit in the motion proceedings, the court a quo erred as those

affidavits were not evidence before the trial court. That would distinguish a referral to trial from a referral to evidence where the affidavits are still before court as the proceedings remain motion proceedings. This distinction is important since the consequences are different, as was highlighted by the Supreme Court of Appeal in **Lekup Prop Co No 4 v Wright** 2012 (5) SA 246 SCA at [32]:

'[32] ... It will be recalled that the appellant initiated motion proceedings and that the matter was referred to trial after the respondent had filed his answering affidavit. At the trial the respondent was allowed to read from that affidavit and did so, extensively. That was not the correct procedure. ... Affidavits filed may of course be used for cross-examination and also as proof of admissions therein contained, but (save to the extent that they contain admissions) they have no probative value; and in the absence of agreement, they do not stand as the witness's evidence-in-chief or supplement it. ... A referral to trial is different to a referral to evidence, on limited issues. In the latter case the affidavits stand as evidence, save to the extent that they deal with dispute(s) of fact; and once the dispute(s) have been resolved by oral evidence, the matter is decided on the basis of that finding together with the affidavit evidence that is not in dispute.'

[39] What distinguishes the aforesaid position is that the first respondent in claim 1 of her counterclaim quoted in full at par 85 of the counterclaim the content of par 77-80 of the founding affidavit of Rand Water, which Rand Water admitted in the plea to that counterclaim. Those paragraphs were therefore common cause before the trial court.

[40] The trial court therefore did not err in this regard. There is no basis for interfering with the partial granting of the counter application.

COSTS

[41] Counsel for the appellant contends that the court a quo did not apply its mind by ordering it to pay the costs of two counsel.

[42] This submission was made while counsel for the appellant was leading junior counsel in the appeal. It was submitted that that is an irrelevant consideration as the complexity of the issues determine the costs. Two counsel were thought to be justified by both parties. While that is not a conclusive consideration, it is relevant. In addition, the court regards the issue to be sufficiently important to the estate of the late Ms Rautenbach to employ two counsel. This dispute with Rand Water has had the effect of depressing the value of her property and the administration of her estate. There are many other adjacent properties for which this is a test case. It is therefore an important issue in the community whose properties are subject to the servitude in that area.

[43] Having considered both arguments before this court, and taking into consideration all factors; and in the light of what is stated above, it is proposed that an order in the following terms be made:

ORDER

[44] In the premises the following order is made:

1. The appeal is dismissed with costs, such costs to include the costs of two counsel, on Scale C

EC LABUSCHAGNE
JUDGE OF THE HIGH COURT

I agree

L M MOLOPA-SETHOSA
JUDGE OF THE HIGH COURT

I agree

R FRANCIS-SUBBIAH
JUDGE OF THE HIGH COURT

APPEARANCES:

FOR APPELLANT:

INSTRUCTED BY:

FOR RESPONDENT:

INSTRUCTED BY: