

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

JUDGMENT

Not Reportable

Case no: 2025-046041

In the matter between:

SAMUEL JACOBUS MORRIS

First Applicant

CORNELIA JOHANNA MORRIS

Second Applicant

and

ELIZABETH JOSEPHINE TE BOEKHORST

Respondent

Neutral citation:

Coram: Mgengwana, AJ

Heard: 24 February 2026

Delivered: 8 May 2026

Judgment handed down: The judgment is handed down electronically by circulating to the parties or legal representatives by email. The date for the handing down of the judgment is deemed to be 8 May 2026.

Summary: Mandatory Interdict- Registered Notarial Tie Agreement-Rights flowing therefrom.

ORDER

[1] In the result, I grant the following order:

[1.1] The Applicants' application is dismissed.

[1.2] The Applicants are ordered to pay the costs of the application including the costs of counsel on Scale B.

JUDGMENT

MGENGWANA, AJ

Introduction

[1] First and Second Applicant ("the Applicants") instituted motion proceedings against the Respondent for removal of metal fencing ("the fence") erected by the Respondent around a parking area ("the parking") situate on Erf 1[...] Gordon's Bay ("Erf 1[...]") which fence prevents the Applicants' patrons from accessing the parking area.

[2] By removing the fence and allowing access to the parking area, the Respondent will be allowing the Applicants to exercise rights allegedly granted to them by a Notarial Tie Agreement registered at the Deeds Office against Erf 1[...] under registration number K1564/2017.

[3] In a nutshell and according to the Applicants Founding Affidavit, they are seeking to enforce the conditions of the Notarial Tie Agreement by means of an interdict which would compel the Respondent to remove the fence which is preventing them from utilizing Erf 1[...] in terms of the conditions created by the registered Notarial Tie Agreement.

Background

[4] During November 2017, a Notarial Deed to Connect Two Separate Properties (Notarial Tie Agreement) being Erf 1[...]3 Gordons Bay (Erf 1[...]3) owned by Emelia Elizabeth Te Boekhorst ("Emelia") and Erf 1[...] Gordons Bay (Erf 1[...]) owned by Elizabeth Josephine Te Boekhorst ("the Respondent") was registered at the Deeds Office of Cape Town on, *inter alia*, the following terms:

- (a) That, after the approval of a rezoning application by the City of Cape Town, Erf 1[...]3 can be used as offices and a restaurant (coffee shop) subject to the use of a parking area on the adjoining Erf 1[...].
- (b) That, the City of Cape Town was granted the right to restrict the Erf owners, their heirs, executors and assigns from alienating the said properties separately or in any other way dealing separately with them, which prohibition must be included in every subsequent transfer of the said properties.

[5] The above registration was made pursuant to the City of Cape Town's ('the City') approval of the rezoning application and which approval was made subject to, *inter alia*, the following conditions:

- (a) That Erf 1[...]3 be utilized for office and coffee shop purposes only; and
- (b) That trading hours shall be limited to 08:00 -18:00, Monday to Saturday.

[6] In May 2021, Emelia sold Erf 1[...]3 after it was consolidated with Erf 1[...]4 to form Erf 1[...]2 to Cathleen Henriette Mostert and Jacob Johannes Mostert ("the Mosterts") for an amount of R3 400 000.00 subject to the terms set out in the Notarial Tie Agreement referred to in paragraphs 4 of this judgement.

[7] On 16 September 2021, the Respondent addressed a letter to the Mosterts in which she alleged that they are using Erfs 1[...]3 and 1[...] unlawfully in that they are operating a Restaurant and a pottery painting studio, which is not permissible in terms of the aforementioned approval. As already alluded to, the rezoning approval only permitted the operation of an office block and a coffee shop. The Respondent

also advised the Mosterts that she did not agree to their use of Erf 1[...] as parking for the aforementioned businesses.

[8] The Respondent also intimated in the same aforementioned letter that her attempts to explore reasonable long-term measures that would have prevented any prejudice and inconvenience suffered by Respondent and her neighbours, resulting from the unlawful use of the parking with both Mr. Mostert and the patrons of the businesses have been met with abuse. Finally, the Respondent made it clear to the Mosterts that they do not have permission to use Erf 1[...] as parking spaces for their businesses and their clients and should therefore stop using same forthwith.

[9] On the same date, the Respondent also sent a letter to the City in which she confirmed her decision not to allow the Mosterts to use Erf 1[...] as parking area for their business. This decision was allegedly based on their irresponsible and unlawful use of Erf 1[...]3 and 1[...], in that Erf 1[...]3 is not operated as an office block and coffee shop as per the rezoning approval.

[10] On 23 September 2021, the Respondent sent another letter to the Mosterts in which she advised them that she will be closing off the parking area as of the morning of 24 September 2021 due to their failure to heed her demand to stop the use thereof so as to allow for its rehabilitation. In her Answering affidavit, the Respondent averred that on 24 September 2021 she erected a metal fence around the parking area, an action which *de facto* prevented the Mosterts from using Erf 1[...] as their businesses' parking area as per her undertaking.

[11] In 2024, the Mosterts sold Erf 1[...]2 to the Applicants for an amount of R3 000 000.00 subject to the terms set out in the Notarial Tie Agreement referred to in paragraph 4 of this judgement. The Applicants bought Erf 1[...]2 with the specific intention of continuing running the restaurant business thereon. They also intended to use the parking area on Erf 1[...] for the restaurant's patrons as advised by the Mosterts. It is the Applicants' averment that erection of the metal fence around Erf 1[...] occurred at some point prior to the registration of transfer in 2024. The Applicants further contend that Respondent's action in this regard is in conflict with the restrictive condition in the Notarial Tie Agreement.

Issues for determination

[12] Based on the above factual background, this Court is enjoined to make a determination on whether the Applicants are entitled to an order instructing the Respondent to remove the metal fence around Erf 1[...] and granting the Applicants continued access to Erf 1[...] based on the Notarial Tie Agreement registered in 2017.

[13] In order to make a determination as sought by the Applicants, one has to make a finding on whether the Notarial Tie Agreement as referred to in Applicants' Deed of Transfer created a limited real right over Erf 1[...] in favour of the Applicants or not.

Submissions by the Parties

[14] The Applicants, who appeared in person made, *inter alia*, the following submissions in their Heads of Argument:

"(a) That the matter does not concern ownership of Erf 1[...] but concerns misrepresentation, consent, reliance and unlawful deprivation of use.

(b) That at all material times, parking on Erf 1[...] was utilized in connection with the business conducted on Erf 1[...]2 with the knowledge of the Respondent. The Applicants relied on this arrangement when acquiring and developing Erf 1[...]2 with substantial capital which was also used to renovate it, to buy the necessary equipment for a restaurant business and to pay compliance costs.

(c) That after the Applicants commenced business operation, the Respondent closed access to parking and thereby interfered with Applicants' use thereof, an action which rendered their business commercially unviable.

(d) That through her conduct, consent and acquiescence, the Respondent represented that the Applicants would be able to conduct a viable restaurant business. The Applicants reasonably relied on these representations when they bought the business on Erf 1[...]2."

[15] In court they submitted, *inter alia*, that the conduct of the Respondent has severely prejudiced their business in which they invested a large portion of their lives' savings and pensions.

[16] Counsel for the Respondent submitted, *inter alia*, as follows in his Heads of Argument:

- (a) That when Applicants bought and took transfer of Erf 1[...]2 (1[...]3), they did not also buy and take transfer of Erf 1[...] owned by the Respondent as required by the Notarial Tie Agreement.
- (b) That at all material times, the Respondent was the owner of Erf 1[...].
- (c) That the Notarial Tie Agreement does not create a right to alienate the "tied" property, nor does it create a servitude in favour of the property tied.
- (d) That in these circumstances, the Respondent clearly retained all her rights to peaceful enjoyment of her property.
- (e) That the source of the problem is that when the Applicants caused the transfer of Erf 1[...]2 to be passed to them on 3 April 2024, they did not also purchase and seek simultaneous transfer of Erf 1[...]. In so doing, the Applicants clearly breached the City's conditions for the rezoning of Erf 1[...]3 (1[...]2) of 7 March 2017.

Applicable legal principles

[17] Section 3(1)(r) of Deeds Registries Act 47 of 1937 (the Act) describes one of the duties of the Registrar of Deeds as the follows:

"The registrar shall, subject to the provisions of this Act register any real right, not specifically referred to in this subsection, and any cession, modification or extinction of any such registered right"

[18] The registration of personal servitudes, like Notarial Tie Agreements, is governed by section 65 of the Act and the rights arising therefrom may only be terminated in accordance with section 68 and 69 of the Act. Section 68 of the Act reads as follows:

"(1) If for any reason a personal servitude has lapsed, the registrar shall, on written application by or on behalf of the owner of the land encumbered thereby, accompanied by proof of the lapse of the servitude, the title deed of the land and, if available, the title deed, if any, of the servitude (which title deed the holder of the servitude shall on demand hand over to the owner of such land) note on the title deed of the land and of the servitude, if the title deed of the servitude has been produced, that the servitude has lapsed.

(2) Cancellation of the registration of a personal servitude in pursuance of an agreement between the owner of the land encumbered and the holder of the servitude shall be effected by notarial deed: Provided that no such deed shall be registered if the servitude is mortgaged, unless the mortgagee consents in writing to the cancellation of the bond or the release of the servitude from its operation.

[19] Section 48 (1) of the City of Cape Town Municipal Planning By-Law, 2015 (City's By-Law) states the following:

"The City may on application or on its own initiative remove, suspend or amend a restrictive condition in respect of any land unit."

[20] In *Pocock v De Oliveira and Others*, Judge Jajbhay described a Notarial Tie Agreement (Notarial Deed of Connection) as follows:

"These Agreements are concluded between local authorities in the position of the second respondent and the owner of two or more adjoining properties. The properties, although registered under different title deeds and for legal purposes regarded as separate, are, in terms of the notarial tie agreement, tied together and regarded as one property for all intents and purpose and none of the properties may be sold or transferred otherwise than to the same transferee."¹

¹ *Pocock v De Oliveira and Others* 2007 (2) SA 90 (WLD) at par 11

[21] The Honourable Judge further states the following with regards to the Notarial Tie Agreements:

"A notarial tie agreement by its very definition requires the agreement to be in writing between the owners of the respective erven and the local authority."²

[22] In *ABSA Bank Limited v Amien and Others (ABSA)*, Judge Modiba held as follows with regard to the operation of the Notarial Deed of Connection:

"The importance of untying these two properties for the applicant is that it has sold them in execution to separate purchases to recover payment of a judgement debt owed to it by the first respondent. The applicant was hamstrung to approach this court for the relief prayed for in the notice of motion because the Registrar of Deeds would not effect separate transfer of registration of the two properties without an order of court, despite the applicant's contention that the notarial tie agreement has lapsed."³

Facts that are common cause

[23] During November 2017, a Notarial Tie Agreement in respect of Erf 1[...]3 owned by Emelia at the time and Erf 1[...] owned by the Respondent was registered subject to the terms already outlined in paragraphs 4 and 5 of this judgment. One of these conditions is that the City placed a restriction on Erf 1[...]3 and Erf 1[...] being alienated separately from each other.

[24] In May 2021, Emelia sold Erf 1[...]3 after it was consolidated with Erf 1[...]4 to form Erf 1[...]2 to the Mosterts for an amount of R3 400 000.00 without selling Erf 1[...] to the Mosterts as required in the Notarial Deed to Connect.

[25] During September 2021, a dispute arose between the Mosterts and the Respondent regarding the Mosterts' right to use Erf 1[...] as a parking area for their

² Ibid at par 12

³ *ABSA Bank Limited v Amien and Others* (24878/2012) ZAGPJHC 180 (24 March 2016)

business. The said dispute was never resolved and it ultimately culminated in the Respondent erecting a metal fence around Erf 1[...] on 24 September 2021. The Respondent's conduct in this regard resulted in the Mosterts being denied access to the parking area for their business for nearly three years before the sale of Erf 1[...]2 to the Applicants. It is clear from the court papers that this fact was never disclosed to the Applicants by the Mosterts prior to the sale of property transaction.

[26] The Mosterts never challenged this action by the Respondent, they instead sold Erf 1[...]2 to the Applicants for R3 000 000.00 which is R400 000.00 less than what they bought it for. Ostensibly, the Mosterts withheld crucial information from the Applicants to their detriment when the sale of Erf 1[...]2 was negotiated. Evidently the Respondent did not conduct any due diligence before concluding the sale agreement in respect of Erf 1[...]2.

Application of the Law to the facts

[27] At the hearing the Applicants correctly pointed out in their Heads of Argument that *ABSA* dealt with whether two separate properties bound together by a notarial tie agreement could be sold separately without a Court Order. However, the Applicants submitted that *ABSA* is distinguishable from the facts of the current matter.

[28] The submission that *ABSA* is irrelevant to the facts of this case is unsustainable, in that the challenges faced by the Applicants currently are a direct result of the registration of the transfer of Erf 1[...]3 by the Registrar of Deeds separately from Erf 1[...] in contravention of a material term of the Notarial Tie Agreement.

[29] In *ABSA*, the Registrar of Deeds refused to effect separate transfer registration of two properties bound by a notarial tie agreement without an order of court declaring that the notarial tie agreement had lapsed. Therefore, in my view, *ABSA* is apt in this instance in that Erf 1[...]2 and Erf 1[...] should not have been sold separately as it is inconsistent with the terms of the Notarial Tie Agreement. I therefore agree with counsel's submission that *ABSA* is authority in this regard as it

is in line with Modiba J's observations in ABSA that the Registrar of Deeds should have refused to register the transfers made after the registration of the Notarial Tie Agreement as the registration of such transfers was in violation of the terms of the Notarial Tie Agreement. The separate registration of Erf 1[...]2 and Erf 1[...] was in total disregard of the principle enunciated in *Pocock v De Oliveira and Others*, already cited in this judgement and which clearly states that none of the properties tied together by a Notarial Tie Agreement may be sold or transferred otherwise than to the same transferee. No averment is made in the papers that the Applicants bought Erf 1[...]2 pursuant to the Notarial Tie Agreement lapsing or being terminated in terms of section 68 of the Act or being dealt with in terms of section 48(1) of the By-Law. In a nutshell, the terms of the Notarial Tie Agreement were in existence and very binding when the Mosterts bought Erf 1[...]2 from Emelia and sold it to the Applicants without seeking to take transfer of Erf 1[...].

[30] In my view, the Applicants and their predecessors in title violated the terms of the Notarial Tie Agreement by concluding sale agreements in respect of Erf 1[...]2 separately from Erf 1[...]. Thus, Applicants cannot seek the protection of this Court when the Respondent, in reaction to the separate registration decides to deal with her property separately from Erf 1[...]2.

[31] Moreover, because of the registered separation of Erf 1[...]2 from Erf 1[...], notwithstanding that it was done in contravention of the terms of the Notarial Tie Agreement, the Applicants have no right over Erf 1[...]. Consequently, Applicants are not entitled to the relief sought in their Notice of Motion and Founding Affidavit.

[32] The Court has also taken judicial notice of the Mosterts' decision not to contest the Respondent's decision to erect a fence around Erf 1[...] and sell same at a discounted price instead. The Court also rejects Applicants' claim of misrepresentation made by the Respondent which allegedly ultimately induced them to buy Erf 1[...]2 separately from Erf 1[...]. If there is anyone who made misrepresentations to the Applicants, that would be none other than the Mosterts who neglected to disclose to the Applicants the problems surrounding access to Erf 1[...] prior to the finalization of the Sale Agreement.

[33] In the result, I make the following order:

[33.1] The Applicant's application is dismissed.

[33.2] The Applicants are ordered to pay the costs of the application including the costs of counsel on Scale B.

TJ MGENGWANA
Acting Judge of the High Court

APPEARANCES:

For the Applicants: In person

For the Respondent: Mr. A. de Villiers

Instructed by: Louw Incorporated
J.S. Louw