



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

Case No: 13234/12

In the matter between:

THE CITY OF CAPE TOWN

Applicant

and

**THE BODY CORPORATE OF
HARBOUR'S EDGE SECTIONAL
TITLE DEVELOPMENT**

Respondent

JUDGMENT DELIVERED ON 18 SEPTEMBER 2013

BOQWANA AJ

Introduction

[1] This is an application concerning the interpretation of a notarial deed of servitude where the applicant seeks a final order:

- 1.1 Declaring that the respondent is in breach of the provisions of the notarial deed of servitude, with protocol number 238, registered over the property known as Remainder Erf 526, Gordon's Bay, in the City of Cape Town, Stellenbosch Division, Western Cape

Province in extent 16,4155 hectares held by Crown Grant No 111/1931, and Remainder Erf 4702, Gordon's Bay, held by deed of grant no T74973/1994 in extent 5924 square metres ('the property');

- 1.2 Directing the respondent to remove gates, barriers and access control mechanisms to the underground parking area on the property in respect of which the servitude was granted, ('the underground parking area') and which prevent the general public from accessing the underground parking area on an *ad hoc* basis for the purposes of parking;
- 1.3 Directing the respondent to take measures to restore access to the underground parking area to the general public on an *ad hoc* basis for the purposes of parking within five days of the date of the order;
- 1.4 Interdicting and restraining the respondent from implementing access control measures aimed at preventing the general public from accessing the underground parking area on an *ad hoc* basis for the purposes of parking.

- [2] The respondent brought an application to strike out certain paragraphs of the founding affidavit deposed to by Schnackenberg who is a manager, property holding employed by the applicant, on the basis that they contained inadmissible hearsay evidence and certain identified paragraphs contained facts which were irrelevant in the determination of the issues at stake in the proceedings and certain paragraphs in the replying affidavit in that they raised new matter.

Factual background

- [3] The applicant is the owner of the property described as remainder Erf 526 Gordon's Bay, in the City of Cape Town, Stellenbosch Division, Western Province, in extent 16,4155 hectares and Remainder Erf 4702 Gordon's Bay, in the City of Cape Town, Stellenbosch Division, Western Cape Province in extent 5924 hectares ('the servient tenement').

- [4] On 08 June 2006, the applicant granted a servitude over the servient tenement to Meridian Bay Restaurant (Pty) Ltd ('Meridian Bay') for the purposes of constructing an underground parking area and a ramp for Harbour's Edge which was to be erected in Erf 4600, Gordon's Bay. The servitude area consists of a ramp for vehicles and a portion of the underground parking serving Harbour's Edge, the remainder of the underground parking comprising section 1 of Harbour's Edge.
- [5] Meridian Bay was at the time the registered owner of the dominant tenement section 1 in Erf 4600 described as Sectional Plan No. SS390/1997 in the scheme known as Harbour's Edge. The dominant tenement is adjacent to the property over which the servitude was registered. The respondent is a successor in title to Meridian Bay. The servitude is to operate in perpetuity and it binds all successors in title.
- [6] Harbour's Edge comprises commercial businesses including restaurants, a hotel, a conference centre and a residential component.
- [7] Paragraph 3 of the notarial deed of servitude provides that :
- 'The aforesaid servitudes are granted with the following obligation upon the owner of Section 1 Meridian Bay aforesaid namely that the underground parking on the servitude area must be available to the General Public for parking purposes at market related rates.' (Own emphasis)
- [8] It is common cause that on 30 November 2011 the respondent issued a notice to all owners in Harbours Edge advising them of the trustees' decision that an automated garage gate system will become operative on 15 December 2011 at 17h00.
- [9] In terms of this new system parking would be made available on the basis that those persons wishing to use the underground parking facilities (including the servitude area) would be required to obtain a parking disc by paying a deposit of R500.00 per parking bay and a monthly fee of R500 for non-owners and R150 for owners. This system was accordingly implemented.

- [10] It appears from the respondent's answering affidavit that this new arrangement had not existed before. The respondent alleges that when the underground parking servitude area was under the control of Meridian Bay, members of the general public were allowed access on an uncontrolled basis and this resulted in the theft of a speed boat with two outboard motors belonging to one of the penthouse owners which was never recovered.
- [11] The new system, according to the respondent, enhances the security of the area and members of the general public using it.

Discussion

- [12] The issue before this Court is whether the system introduced by the respondent is in breach of clause 3 of the notarial deed of servitude. The applicant's primary argument is that the system and in particular the monthly rental requirement excludes an overwhelming majority of the general public.
- [13] The respondent argues that the measures it has put in place do not offend the provisions of clause 3 for the following reasons. First, it argues that clause 3 does not impose an obligation that parking should be made available on a *casual* or *ad hoc* basis. Secondly, members of the general public are allowed to park as long as they can obtain a disc and pay the market related fee it charges. Thirdly, the servitude was granted to serve the scheme. Accordingly, the 'general public' in clause 3 should be interpreted to mean users of the facilities in the scheme and not just anybody visiting the area. According to the respondent the majority of the users of the facilities are regular clientele who make use of the facilities.
- [14] In the decision of **Royal Hotel Riversdale (Pty) Ltd v Simon NO (713/11) [2012] ZASCA 118 (18 September 2012) unreported**, at paragraph 12, the Supreme Court of Appeal, said the following:
- '[12] The task of the court is to determine the intention of the parties to the agreement that created the servitude. In so far as the language used by them is clear and unambiguous effect must be given to it. But even clear expression can benefit from an appreciation of its context in the written agreement against the background of

circumstances relevant to its conclusion provided that the plain meaning is not thereby contradicted or varied.'

- [15] Not much of the background leading to the granting of the servitude has been placed before the Court in this case. In any event, the starting point in my view is the actual wording of the contract. In **Johl and Another v Nobre and Others (23841/2010) [2012] ZAWCHC 20 (20 March 2012)**, at paragraph 16 unreported, Meer J said:

'Where the wording of the servitude is clear, it must be given the ordinary grammatical meaning and in such circumstances the Court will not have recourse to the surrounding circumstances.'

- [16] The wording of the servitude is in my view clear. The servitude requires parking to be made available to the general public at market related rates. The Oxford English Dictionary meaning of the word 'available' is '*to render accessible for use*' or '*place at one's disposal* or '*within one's reach*'. This much was confirmed by the decision of **Reynolds Brothers Ltd v Chairman, Local Road Transportation Board, Johannesburg and another 1985 (2) SA 790 (A)**. Context of each case is without a doubt important. In this case the word 'available' should be read within the context of the words 'general public' used in clause 3 in order to understand its meaning.

- [17] The Oxford Dictionary defines the word '*general*' to mean '*affecting or concerning all or most people or things; widespread*'. Public is defined as '*concerning or open to the people as a whole, 'ordinary people in general; the community*'.

- [18] From the definitions above it is clear that general public cannot be confined to a certain section of exclusive users of the scheme. The general public in my view refers to anybody wishing to use the underground parking facilities whether they visit the beach, or the sectional title scheme facilities or the vicinity surrounding the title scheme. The requirement of obtaining a monthly disc excludes those members of the public who do not have a monthly commitment to the scheme and who may wish to visit the scheme or other areas in the vicinity for a shorter period. The grammatical meaning of the

words 'available to the general public' is in my view clear and the conduct of the respondent is in conflict with those provisions.

- [19] I further agree with the remarks made by Meir J in the Johl decision when she said the following at paragraphs 13 and 14:

'[13] The relationship between the dominant and servient owners is governed by the principle of reasonableness. See *Van der Walt and Pienaar, Introduction to the Law of Property* 4th edition Juta 2004 at 274. Where there is a conflict of interests, the interests of the dominant owner will have precedence over those of the servient owner, subject to the principle of reasonableness. The holder of the servitude must exercise the servitude *civiliter modo*, that is, in a civilized and considerate way...

[14] It follows that the holder of the servitude may not increase the burden on the servient property beyond the express or implied terms of the servitude. See LAWSA Vol 24 at para 544. The dominant owner cannot make changes to the servient land that would cause the servitude to be more limiting to the servient owner as could have been reasonably foreseen at the time when the servitude was agreed upon. Importantly, the dominant owner has no right to change the subject matter of the servitude. See Hall, *Servitudes* 3rd Edition Juta, 1973 at 133. It is accepted that he has the right to do what is requisite for the enjoyment of his servitude, but this right is subject to the condition that he imposes no greater additional burden upon the servient property than is absolutely necessary. See also *London and SA Exploration Co v Rouliot*, 1890 Vol VIII S.C. 74 at 97.'

(Own emphasis)

- [20] The respondent is increasing the burden on the servient tenement beyond the express or implied terms of the servitude. Accordingly, as argued on behalf of the applicant, the system introduced by the respondent results in exclusive use of the underground parking by those members of the public who have a commitment to the scheme and excludes an overwhelming majority of members of the general public who do not.

- [21] On the installation of gates, the respondent as the holder of the servitude is in my view entitled to control access into the underground parking of the servitude for security and other reasons. The issue of whether or not the fee charged by the respondent is market related is not the key issue for the purposes of this inquiry.
- [22] In conclusion, I am satisfied that the applicant has met the requirements of a final order in that it has established a clear right in terms of the notarial deed of servitude which has been infringed. No alternative remedy has been shown to exist and all the other avenues in trying to resolve the matter and find solutions have been exhausted. It is not necessary for me to consider the issue of whether certain portions of the affidavits should be struck out as they do not affect my findings. The facts regarding the introduction of the parking system in December 2011 are admitted by the respondent.
- [23] In regard to the relief sought in the notice of motion, I agree with the respondent that part of the relief sought may lead to absurdity if the Court were to grant the orders that the applicant is seeking. That however does not mean the Court cannot grant relief that it deems fit from what it has ascertained the applicant's case to be from the founding affidavit. The costs follow the result.
- [24] In the circumstances, the following order is made:
1. The respondent is declared to be in breach of paragraph 3 of the notarial deed of servitude with protocol number 238, registered over the property known as Remainder Erf 526, Gordon's Bay, in the City of Cape Town, Stellenbosch Division, Western Cape Province in extent 16,4155 hectares held by Crown Grant No 111/1931, and Remainder Erf 4702, Gordon's Bay, held by deed of grant no T74973/1994 in extent 5924 square metres by implementing a system requiring payment of a deposit of R500.00 and a rental of R600.00 per bay per month for 'non-owners';
 2. The respondent is directed to remove the system requiring payment of a deposit of R500 to obtain a parking disc and payment of R600 per

month for purposes of underground parking in respect of the servitude area within 30 days of this order;

3. The respondent is restrained and interdicted from implementing any system that would prevent members of the general public from accessing underground parking in terms of paragraph 3 of the notarial deed of servitude;
4. The respondent must pay the costs of the applicant.

A handwritten signature in black ink, consisting of a stylized 'N' followed by a large loop and a horizontal line underneath.

N P BOQWANA

Acting Judge of the High Court

APPEARANCES

FOR THE APPLICANT:	Advocate N Bawa
INSTRUCTED BY:	Fairbridges Attorneys, Cape Town
FOR THE RESPONDENT:	Advocate D Melunsky
INSTRUCTED BY:	Kulenkampff & Associates C/O C & A Frielanders, Cape Town