REPORTABLE
**IN THE HIGH COURT OF SOUTH AFRICA**
**EASTERN CAPE DIVISION, GRAHAMSTOWN**

**Case no: 654/2010**
**Date heard: 16.8.2011**
**Date delivered: 28.10.2011**

**In the matter between:**

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| **MARSHA ANNE BUCHANAN** | **Plaintiff** |
| **vs** | |
| **EUGENE LLEWELYN HOPE N.O** | **First defendant** |
| **CLAUDE STANLEY BARNES N.O** | **Second defendant** |
| **EUGENE HOPE FAMILY TRUST** | **Third defendant** |

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**JUDGMENT**

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**SUMMARY**: Plaintiff seeks a declaratory order against defendants based upon a registered servitude to enforce its terms. Plaintiff's contention is that defendants have transgressed the conditions of the servitude in that defendants erected a building with a height in excess of a 4 meter height restriction contrary to the terms of the servitude. Defendants' plea is a denial of the transgression of the terms thereof.

Held that plaintiff's action has its roots from the Roman Dutch law in terms of the *actio confessoria* and that plaintiff was entitled to enforce the terms of the servitude. Declaratory order granted.

**TSHIKI J:**

## A) INTRODUCTION

[1] Plaintiff herein has instituted action against the defendants for a declarator that defendants have erected a structure (a house) infront of and close to the plaintiff's house and in contravention of the requirements of the servitude which operates in favour of the plaintiff. The first two defendants are cited herein in their

capacities as Trustees for the time being of the Eugene Hope family Trust, the third defendant, whose registration no is IT2667/97. In these proceedings, I shall refer to the defendants as the Trust, unless reference is made to a particular defendant.

[2] The servitude was established over erf 7154 which was consolidated with erf 7155 to become the present erf 7156. The servitude remains registered in respect of the previous erf no 7154. Consequently, the dominant tenement now owned by the plaintiff has a right over only part of the servient tenement, erf 4316, which is owned by the Trust.

[3] Mr T.J.M. Paterson SC appeared for the plaintiff and Mr B Pretorius represented the defendants.

[4] The wording of the crucial portion of the restriction which is hereunder quoted *verbatim* from the relevant Notarial Deed of Servitude on page 11 of annexure "A" reads:

> "1. The servient property namely:
>
> **ERF 7154 (PORTION OF ERF 4316) PORT ALFRED**
> **IN THE AREA OF NDLAMBE MUNICIPALITY**
> **DIVISION OF BATHURST**
> **EASTERN CAPE PROVINCE**
>
> **IN EXTENT: 518 (FIVE HUNDRED AND EIGHTEEN) SQUARE METERS**
>
> **HELD** by the GRANTOR by Certificate Registered Title No T013313/09
>
> shall be subject to a building height restriction of 4 (four) meters measured along the building restriction line which applies to Port Alfred erven in terms of the Ndlambe Municipality Building Regulations and which runs parallel to the common boundary with the Dominant property depicted by line A B on Diagram SG no 8395/2006 annexed to Certificate of Registered Title No. T013313/09 in favour of:
>
> **ERF 4314 PORT ALFRED**

**IN THE AREA OF NDLAMBE MUNICIPALITY**
**DIVISION OF BATHURST**
**EASTERN CAPE PROVINCE**

**IN EXTENT: 979 (NINE HUNDRED AND SEVENTY NINE)**
**SQUARE METRES**

**HELD** by the **GRANTEE** under Deed of Transfer No. **T64031/2005**."

## B) DEFENDANTS' DEFENCE

[5] In its plea the Trust pleaded that 'during or about May 2005 the parties reached an agreement in terms of which the plaintiff would withdraw her objections against the proposed subdivision of the third defendant's property if the latter agreed to a height restriction for the proposed dwelling to be erected, of 4 meters' (4m).

[6] In a nutshell, the Trust denies that it has violated any of the terms and or conditions of the servitude.

## C) PLAINTIFF'S EVIDENCE

[7] Plaintiff testified and called Mr Peter Brocus S□lter, a registered land surveyor, as her expert witness. Thereafter the plaintiff's case was closed. No evidence was led or called by or on behalf of the Trust.

[8] According to plaintiff, in 2005, on hearing that the Trust through its trustees intended to subdivide their property so that her son would be able to utilise that piece of ground, she and her husband directed an objection to the Port Alfred municipality. The objection was then dealt with resulting in the imposition by the municipality of the restrictions on the first defendant and in terms of the servitude aforesaid. Plaintiff

is the owner of the dominant property erf 4314 and the Trust is the owner of the servient tenement erf 4316.

[9] Plaintiff testified that at almost the same time she purchased the property, she became aware of Mrs Hope's (first defendant) application to the municipality for the subdivision of erf 4316. The letter written to the first defendant by Ndlambe municipality in response to Mrs Hope's application for subdivision of erf 4316, Preston Lane, Port Alfred is dated the 26th September 2005 and appears on page 29 of exhibit " A" herein. It is clear from the plaintiff's evidence that the objection posed by her which culminated to the imposition of the restriction of the building height of 4m upon the first defendant was motivated by plaintiff's foreseeable obstruction of her view to all what was likely to be obscured by the building to be erected. The obstruction would then be caused by the unrestricted height of the proposed building by the defendants. For instance before the new building was erected in erf 4316 plaintiff was able to access the view to the river down Port Alfred town which view is now totally obscured by the new building. The building that this case is concerned with has been built upon the consolidated erf 7154 which is a portion of erf 4316 and the servitude is over that part of the new erf 7156 which previously was erf 7154. In the summary of the contents of his affidavit which he confirmed in his evidence, Mr Peter Brocus S□lter states that on 28th March 2011 he accompanied his assistant, Carl Ross Miles, in attending at erf 7156 Port Alfred, which property is registered in the name of the Trust. By the use of Global Positioning equipment they measured from the town survey marks 4DB8 and 5DB8 the various height levels of the building structure on erf 7146 Port Alfred as depicted on the diagram attached in annexure "A" as well as the boundary levels between erven 7156 Port Alfred and 4314 Port

Alfred also as depicted in the diagram attached to annexure A herein. In taking the aforesaid measures they utilised the datum base of the national trigonometrical system which is currently accepted in the profession of land surveyors and was able to accurately measure various heights above sea level. They were then able to determine the following height levels of the structure on erf 7156 Port Alfred and levels of boundary between erf 7156 and erf 4314 as follows:

"7.1 the levels of the building line of the structure on erf 7156 is 42,53 meters above mean sea level;

7.2 the excavated level of the building line of the structure on erf 7156 is 42,53 meters above mean sea level;

7.3 the height of the structure's wall on its northern boundary is 4,53 meters above the excavated level of the building line;

7.4 the height of the roof at the split of the structure is 5.49 meters above the excavated level of the building line;

7.5 the height of the pitched roof of the structure is 6,01 meters above the excavated level of the building boundary line;

7.6 the height of the chimney of the structure is 5,91 meters above the excavated level of the building line;

7.7 the remaining height measurements of the structure at various points may be gleaned from the diagram;

7.8 that the above measures are correct."

[10] In his evidence Mr S□lter confirmed all what is contained in the summary and his evidence was not discredited.

[11] The Trust has not called any expert evidence to gainsay what plaintiff's expert witness had said in his evidence.

## D) ISSUES

[12] It follows, in my view, that the only issue herein is from which point the building height restriction of 4 (four) meters should be measured in order to establish the extent of the 4 meters.

[13] The plaintiff's cause of action herein has its roots from Roman law and was recognised by Roman-Dutch law as the *actio confessoria*[1]. It is an action by the owner of the dominant tenement (*praedium dominans*) to enforce the terms of the servitude in circumstances where the owner of the servient tenement (*praedium serviens*) has failed to comply with the terms and or provisions of the servitude. A servitude must be exercised *civiliter modo* meaning that the dominant owner may not make the position of the servient owner more burdensome than is necessary for the proper exercise of his or her right[2]. In their agreement the parties have to indicate what is to be deemed the proper manner in which their servitude is to be exercised[3]. A praedial servitude is constituted by registration when a deed, executed by the owners of the dominant and servient land and attested to by a notary public, is registered against the title deed of the servient tenement[4].

[14] Most important with regard to praedial servitudes is that, as a servitude is an odious thing, it must receive restrictive interpretation because it is opposed to natural freedom of the use of property by the servient tenement and that in case of doubt as

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[1] Voet 8.5.1. See also Hall & Kellaway; Servitudes by C.G. hall 3rd ed pp 15-4

[2] See Hall and Kellaway on Servitudes *supra* p 3. See also *Cumming v Cumming* 1909 EDL 54; *Smit v Rossouw* 1913 (CPD) 847, *Gardens Estate v Lewis,* 1920 AD 144; Texas Co (SA) Ltd Cape Town Municipality 1926 AD 467

[3] C.G. Hall on Servitudes p 3 *supra*

[4] Wille's Principles of South Africa Law 9th ed p 611

to its meaning there must be a declaration in favour of the exercise of freedom by the owner of the property against whom the servitude is granted.

[15] Voet as quoted in ***Kruger v Joles Eiendomme (Pty) Ltd and another***[5]**,** puts it as follows:

> "*(S)ervitus ceu res odiosa restringi, ac in dubio pro libertate pronunciari debet. Et semper servitus indefinita ita est interpretanda, quo fundus serviens minori afficiatur detrimento.*"

Translated as follows:

> "(A) servitude being something *odious* should be interpreted restrictively and so, in case of doubt, should be declared free of restraint. And an imprecise servitude must always be interpreted so that the servient tenement is the less adversely burdened."

[16] The restrictive approach to interpreting servitudes has been endorsed by the Appellate Division in ***Pieterse v Du Plessis***[6].

[17] Where a servitude was granted by agreement and where the agreement was ambiguous, and evidence as to surrounding circumstances which obtained at the date of the contract was concluded did not resolve the ambiguity, the evidence as to the conduct of the parties would be admissible to show their common understanding of its meaning[7].

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[5] 2009 (3) SA 5 (SCA) para 8 at p 11 A-C

[6] 1972 (2) SA 597 (A) at 599g

[7] *Kruger v Joles Eiendomme (Pty) Ltd and another* 2009 (3) SA 5 (SCA). See also Hall & Kellaway on Servitudes *supra* p 6

[18] In ***Glaffer Investments (Pty) Ltd and others v Minister of Water Affairs and Forestry and another*** [8], at 828 para E-F Van Dijkhorst J held:

> "The servitude has to be interpreted according to its wording and in the light of the surrounding circumstances prevailing when its was granted. In addition, a servitude, being a restriction upon free enjoyment of the rights of ownership of the owner of a servient tenement has to be interpreted restrictively. Haviland Estates (Pty) Ltd and another v MacMaster 1969 (2) SA 312 (A) at 322; Willoughby's Consolidated CO Ltd v Copthall Stores Ltd 1918 AD 1 at 16".

[19] Plaintiff and defendant herein do not agree on what is meant by the building restriction line applicable in Port Alfred from which the 4 (four) meter restriction is measured to establish whether or not the defendant has exceeded the 4 meter restriction and therefore in breach of the requirements of the servitude.

[20] Mr *Paterson* for the plaintiff contends that in the circumstances of this case the building restriction line should be most properly understood as a plane, a vertical plane setback from the boundary line upon which the building has to be built on the other side of it. He contends further that by its very definition a building restriction line by itself does not assist one in measuring height, it is not a line along the ground, it is a plane setback from the boundary line. Therefore, this vertical plane could actually go up into the sky or down into the ground. Therefore, when one reads the test one sees that there is a building height restriction of 4 meters measured along the restriction line. He argues that if one interprets it in that fashion the reference to the building restriction line in no way determines the bottom point from which one is to measure the height. Therefore one has to look at the context.

[8] 2000 (4) SA 822 (T) at 828 para E-F

[21] On the contrary, Mr *Pretorius* for the defendants contends that when the Court is interpreting the text it must interpret it in accordance with the golden rule of interpretation. He argues that the Court should consider the height as measured from the natural ground level at the time the condition was imposed which was on the 26th September 2005. And not when the servitude was registered as Mr Paterson suggests. It should be noted that at the time of registration of the servitude the building in issue was already in existence and was not at the time when the Ndlambe municipality imposed the condition which resulted into the registration of the servitude[9]. In my view, it would therefore not make sense in this case to consider the height as measured from the natural ground level at the time when the condition was imposed because there was no building existing during that period.

**E) *RATIO DECIDENDI***

[22] In this case, I am required to give effect to the intention of clause 1 of the terms of the servitude referred to in para 5 *supra*. The servitude in the present case was imposed as a restriction against and upon the servient tenement after a complaint was lodged by plaintiff against the Trust to prohibit with a view to minimise the interruption of view from plaintiff's property. In my view, the agreement between the parties regarding the interruption of view from plaintiff's property was concluded in 2005 when plaintiff agreed to the suggested building height restriction of four (4) meters which was to be measured along the **building restriction line**.

[9] See para 8 of the letter appearing on page 29 of exhibit A. Its contents are similar to those of the servitude in issue.

[23] The restriction line is said to run parallel to the common boundary with the dominant property. It is common cause that this line is 2 meters inside the imaginary boundary line. The servitude was only registered on 27th March 2009 which is also the date when it came into being. In my view, it is at that stage that the plaintiff could enforce her rights to approach the Court should the Trust breach the provisions of the servitude. She could never have enforced a servitude which never existed. Praedial servitudes are limited real rights which come into existence only when the agreement has been registered and endorsed against the title deed of the dominant and/or servient tenements respectively, as the case may be[10]. It follows that servitudes normally originate from an agreement between the owner of the dominant tenement and the owner of the servient tenement. Only after registration can rights created by the servitude be enforced[11].

[24] Mr Pretorius has attempted to persuade me to accept that the plaintiff's rights to challenge the terms of the restrictions, which culminated into a servitude, were created on the 26th September 2005 and not on the date of registration of the servitude. He develops his arguments by suggesting that the reference no 8395/2006 which appears in the diagram together with the word **shall** in clause 1 of the servitude should persuade me to conclude that the rights of the plaintiff *vis-a-vis* the servitude were created in September 2005 and that the servitude was granted on the 12th December 2006 a date which is different from the date of registration. According to him the conference of the rights to plaintiff is the date when the

[10] See Silberberg and Schoeman's law of Property 5th ed by Badenhorst, Pienaar Mosterd p 332 para 14.3.5 (b). See also *Felix en 'n ander v Nortier NO en andere* [1996] 3 ALL SA 143 (SE)

[11] *Malan v Ardcannel (Pty) Ltd* 1988 (2) SA 12 (A) at 37D; See also Jones Conveyancing in South Africa 248-249 3rd ed

servitude was granted as opposed to its registration date. For the reasons that follow I do not agree.

[25] On the 26th September 2005 or even on 12th December 2006 plaintiff would not have known that the Trust would build a house in contravention of the agreement. The agreement having been made enforceable by means of a servitude, it was only at the stage of registration thereof that her rights were enforceable. This is so even for the reason that the restriction against the servient property was imposed by the municipality against the Trust and did not arise as a consequence of a written agreement between the litigants herein.

[26] In my view, even if for argument's sake, the plaintiff had a right to institute interdict proceedings against the Trust as Mr Pretorius has contended, that does not mean that she had no rights or cannot enforce her rights in terms of the servitude. She is perfectly entitled to approach this Court to enforce her rights in terms of the servitude. In any event, in the present case, the condition in issue that was imposed relative to a future imposition of the servitude was a condition for the subdivision and it applied to the first defendant, Mrs Hope, as the owner of erf 4316 and can never be construed as having afforded any rights to the plaintiff herein. The judgment of ***PS Booksellers (Pty) Ltd and another v Harrison and others***[12] does not assist the Trust. The cause of action in that case was an interdict to enforce the plaintiff's rights whereas in the present case the plaintiff is enforcing the terms of a servitude which operate in her favour.

[12] 2008 (3) SA 633 (C)

[27] *Silberg and Schoeman*[13] say:

> "Apart from an original grant by the state a servitude originates normally from an agreement between the owner of the dominant tenement and the owner of the servient tenement. The agreement will contain *inter alia* the extent of the servitudal rights, the amount payable by the *dominus* in consideration of the grant of the servitude and its duration, unless it is intended to remain in force *ad infinitum*. But the servitude as a real right comes into existence only when the agreement has been registered..."

[28] It also follows that 'a mere promise of a servitude does not affect the property until proper registration is effected but merely binds the promisor personally[14].

**E1) WHAT IS MEANT BY HEIGHT RESTRICTION ALONG A BUILDING LINE?**

[29] In the preceding paragraphs, I have indicated that, like any written instrument the rules of interpretation of written instruments such as contracts and servitudes are applicable. Where a servitude was granted by agreement and where the agreement was ambiguous, in interpreting the terms of a servitude the Court should have regard to the surrounding circumstances which obtained at the time of its execution[15].

[30] It, therefore, follows that in the present case one cannot resolve the impasse by considering only the ordinary grammatical words contained in the servitude. If one has regard to the words of the instrument herein an absurdity is created and, therefore, the matter cannot end on that note. In other words, such an approach creates ambiguities. A building line being not a mark on the ground, therefore, no

[13] The Law of Property 4th ed at 302 para 14.4

[14] Section 63 of the Deeds Registries Act 47 of 1937

[15] *Haviland Estates (Pty) Ltd and another v McMaster* 1969 (2) SA 313 (AD)

height of the building can be measured on an imaginary line. If there was such an intention, in view of the vagueness it has created, the instrument itself should have specifically said so. Therefore, resort to surrounding circumstances is the best consideration.

[31] It is clear from the surrounding circumstances that when the first defendant and the plaintiff signed powers of attorney which had reference back to past diagrams they knew that there was a house already in existence at the time and that there had been an excavation. This was not in 2005 or 2006 but in 2008 and 2009 when the building in question was already existing. It was at that moment that the servitude was created.

[32] Where it is impossible to give a meaning to a condition in a title deed imposing a servitude, recourse may be had to the subsequent conduct of the parties affected by the condition, and its meaning may be determined from this interpretation which the parties had themselves given to it by their subsequent conduct[16].

[33] As I have already alluded to *supra* I am unable to accede to the submission by Mr Pretorius that in construing the terms of the servitude the Court must restrict itself to the linguistic construction in that the Court has to apply the golden rule of interpretation. In my view, having regard to the surrounding circumstances recourse has to be had to the subsequent conduct of the parties affected by the condition and

[16] *Breed v Van der Bergh and others* 1932 AD 283 – quoted on page 6 of Servitudes by C.G. Hall page 6

its meaning may be determined from this interpretation which the parties had themselves given to it by their subsequent conduct[17].

[34] Evidence by the plaintiff and her witness which shows the common intention of the parties is the measurements of the actual height of the building from its base to the top of the roof along the line of the side building line. Given that the natural lay of the building line restriction had already been removed, measurement from the natural line of the land had therefore become difficult if not impossible. I agree with Mr Paterson's submission that the natural, ordinary meaning of the height of a building is from the natural mean ground level of the structure to the top of its roof. In this instance the natural mean ground level is flat and along the building restriction. The same approach was adopted by the Western Cape division[18] wherein the Court defined the mean ground level as the finished level and the definition of the height as being the lowest habitable room or mean ground level in the Cape Town zoning scheme regulations[19].

[35] In the absence of any definition of the relevant terms such as the building restriction line, definitions offered by decided cases are instructive to our case. In ***Muller NO and others v City of Cape Town*** *supra* the concept 'mean ground level' in that case is described in the relevant statute[20] as the average finished level of the surface of the ground immediately abutting the elevational plane of a building or

[17] *Breed v van der Bergh supra*

[18] *Muller NO and others v City of Cape Town* 2006 (5) SA 415 (CPD) at p 431 per Yekiso J

[19] See footnote 17 *supra*

[20] Section 2 (46 of part I of the Zoning Scheme regulations created by the National Regulations and Building Standard Act 103 of 1977

proposed building. However, the approach adopted in Muller's case *supra* can guide me, but cannot assist me in the case *in casu* where we are dealing not with the Zoning Regulations but a servitude.

[36] It follows that in the present case the servitude should be interpreted as providing a 4 meter height restriction from the finished ground level along the building line. This interpretation is consistent with the evidence of the plaintiff and the land surveyor Mr S□lter. Measurements taken by Mr S□lter clearly prove that the height of the wall exceeds 4 meters by far and in all respects.

[37] Even on the approach suggested by Mr Pretorius, the evidence of Mr S□lter shows clearly that the Trust has exceeded the suggested height restriction though by a shorter margin compared to the position in the approach I have accepted, as suggested by Mr Paterson. In my view, it matters not that the Trust exceeded the height restriction by a mere 500 centimetres such would suffice to amount to a contravention of the terms and requirements of the servitude. According to Mr S□lter from the ground level at AA to the top of the wall the height at cross section BB is 5,49 meters well beyond the 4 meter restriction. Again from the ground floor level at AA to the top of that pitch of the glass roof the height is 6,01 meters.

[38] Mr S□lter has not been shown to have misled the Court and in the absence of any contrary expert evidence from the defendants' side I am bound to accept the evidence of Mr S□lter. In any event his evidence is credible and has assisted the Court in many respects.

[39] Having considered all aspects of this case including the evidence led, I am of the view that the Trust has contravened the terms of the servitude which was created in favour of the plaintiff.

[40] I therefore grant a declatory order that the Trust has contravened the terms of the servitude in that the building construction in erf 7154 exceeded the height restriction of 4 (four) meters measured along the building restriction line which applies in Port Alfred ervens. Judgment therefore is granted in favour of the plaintiff.

[40.1] Defendants are ordered to comply with the servitude registered in Notarial Deed of Servitude K326/2009.

[40.2] Defendants are ordered to pay costs of suit, jointly and severally the one paying the other to be absolved.

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P.W. TSHIKI
JUDGE OF THE HIGH COURT

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|---|---|---|
| For the applicant | : | Adv. T.J.M. Paterson SC |
| Instructed by | : | Neville Borman & Botha<br>GRAHAMSTOWN |
| For the defendants | : | Adv B Pretorius |
| Instructed by | : | Nettletons<br>GRAHAMSTOWN |