

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 16638/2022

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED: NO

13 June 2024
DATE

[...]

SIGNATURE

In the matter between:

RIVER MEADOW MANOR PROPERTIES (PTY) LTD

First Applicant

and

SIYANDASABELO TRADING (PTY) LTD

First Respondent

THE REGISTRAR OF DEEDS, PRETORIA

Second Respondent

THE CITY OF TSHWANE MUNICIPALITY

Third

Respondent

THE BODY CORPORATE OF TWIN RIVERS

SECTIONAL TITLE SCHEME Respondent	Fourth
CHRISLAINE EQUESTRIAN (PTY) LTD Respondent	Fifth
THE INDUSTRIAL DEVELOPMENT CORPORATION Respondent	Sixth

JUDGMENT

COWEN J

1. The applicant, River Meadow Manor Properties (Pty) Ltd, has applied to this Court for an order authorising it to register a right of way servitude over Portion 647 of the farm Doringkloof No 391 JR (Doringkloof). The first respondent, Siyandasabelo Trading (Pty) Ltd is the registered owner of Unit 1 and 2 together with the exclusive use areas W1 and W2 in the Doringkloof sectional title scheme, under Title Deed ST79691/2019 (the property).
2. The application came before me on the opposed roll on 13 May 2022 and was allocated for hearing on 14 May 2022. Although the first respondent opposed the application, it did not appear at the hearing notwithstanding notice of set down. The Court was nevertheless in a position to consider both the answering affidavit and heads of argument delivered on its behalf. The other respondents, being the

Registrar of Deeds, Pretoria, the City of Tshwane Municipality, the Body Corporate of Twin Rivers Sectional Title Scheme, Chrislaine Equestrian (Pty) Ltd (Chrislaine) and the Industrial Development Corporation are not participating in these proceedings.

3. The applicant was previously the owner of Doringkloof and an adjacent property known as 'the Stables'.¹ The applicant grounds its right to register the servitude on an agreement of sale which it concluded when selling the property to the first respondent. The alleged entitlement to register the servitude arises from Clause 20 of the sale agreement, concluded on 25 April 2019, which provides:

'20. On the Transfer Date a right of way servitude will be created over the property in favour of the Stables, on the following terms and conditions:

20.1 The approximate route of the servitude is indicated by the letters A, B, C, D on the attached Site Plan marked Annexure B.

20.2 The parties shall each pay 50% of the costs associated with the creation of the servitude, including but not limited to, the costs of preparation of the servitude diagram approved by the Surveyor General and registration of the servitude against the title deeds of both properties:

20.3 The value of the servitude is agreed to be R100 (one hundred Rand);

20.4 There is no consideration payable by the Seller to the Purchaser for the use of the servitude;

20.5 The Seller, or its successor in title shall be liable for the costs of building and maintaining the road and bridge in the servitude area;

20.6 It is specifically recorded that the right of way servitude only grants access to the Stables Property and that the Seller, or its successor in title, will not grant direct or indirect access to adjacent properties over the servitude area.'

¹ The formal description being Portion 144, a portion of Portion 1 of the Farm Doornkloof 391 JR (the Stables).

4. Subsequent to the conclusion of the agreement, the applicant sold the Stables to Chrislaine, resulting in its joinder, which was effected after the institution of the proceedings. Chrislaine is not participating in the proceedings. However, the Court is informed in the answering affidavit that Chrislaine is in dispute with the applicant about whether Chrislaine is entitled to cancel the agreement. That dispute concerns the issue of access.

5. The first respondent raises various defences to the application in the answering affidavit and heads of argument but it is only necessary to deal briefly with some of them.

6. First, the first respondent disputes the applicant's standing to institute the application in view of its sale of the property to Chrislaine. The property was registered in the name of Chrislaine on 21 April 2022. In my view the applicant has standing notwithstanding the change in ownership. The applicant is seeking to enforce its contractual right against the owner of the property and the conclusion of the sale agreement between those parties is not in dispute. There is no mention in the answering affidavit of any cession or other transfer of rights in the agreement of sale of the Stables between the applicant and Chrislaine, which is attached to the answering affidavit. In argument, counsel confirmed the absence of any such provision in the agreement and rather pointed to provisions that confirm the contrary. I do not deal with these as they were not expressly pleaded. The very basis for the registration of the servitude as a limited real right however, is the agreement

between the applicant and the first respondent, and the applicant is entitled to enforce its agreement so as to ensure that the servitude, as agreed, is duly registered in the deed of transfer.² While the servitude, once registered, is incidental to and passes with ownership of the dominant land to which it is attached,³ it was constituted by way of the sale agreement between the applicant and the first respondent and on the information before me, the applicant retains a right to register the servitude.

7. The first respondent pleads that the agreement, on this issue, is void for vagueness. I disagree and note that the argument was not persisted with in the written submissions. On the information before me, the servitude area is reasonably capable of ascertainment. The servitude area is referred to in the sale agreement and depicted on a diagram Annexure B. It relates to an existing road. Indeed, prior to registration of transfer of the property, the servitude was surveyed and a servitude diagram (3281/2019) was prepared by a land surveyor (G Putter) and approved by the Surveyor-General on 25 November 2019. The property was merely transferred and registered without lodging the servitude registration application. It does however warrant mention that after the hearing I requested further submissions from the parties due to a variance between the referencing to the servitude in the sale agreement and the diagram. I received no submissions from the respondent. I am satisfied that the variance does not alter my view on the matter, but the relief I grant

² *Eichelgruen v Two Nine Eight South Ridge Road (Pty) Ltd* 1976(2) SA D&CLD at 680C-F.

³ *LAWSA Servitudes* Para 545: 'A praedial servitude is a limited real right which a person in the capacity as owner of one tenement (*praedium dominans*) holds over another tenement (*praedium serviens*). The servitude is incidental to and passes with the ownership of the dominant land to which it is inseparably attached and burdens the servient land, irrespective of the identity of the owner.'

– while intended by the notice of motion – is in amended terms proposed by the applicant that will prevent confusion arising in due course.

8. A further issue the respondent raises is that it must unlawfully construct a road. That is not factually correct. There is an existing gravel road.
9. The first respondent submits that the servitude is prohibited, illegal and unenforceable because it is located within a 1:50 and 1:100 year flood line. In this regard, the Olifantspruit divides Doornpoort and the Stables and a bridge is required to cross it. An old low water bridge constructed by a previous owner in 2005 was damaged and collapsed during heavy rains in 2019. The applicant started construction on a new steel bridge in April 2020 which was designed to be above the flood line. However, when the new bridge was close to completion, the Department of Environmental Affairs stopped the works due to non-compliance with the National Environmental Management Act 107 of 1998 (NEMA). The applicant explains that it was initially unaware of the authorisation requirement but has since submitted an application in terms of NEMA.
10. The first respondent contends in its heads of argument that this is a dispute that cannot be resolved in motion proceedings involving as it does a dispute of fact.⁴ In my view, the submission conflates the legality of a servitude with the legality of bridge construction. The applicant could not refer me to any prohibition on the servitude itself and conceded that environmental authorisation is required before a

⁴ With reference to *National Director of Public Prosecutions v Zuma* 2009(2) SA 277 (SCA) at para 26.

bridge can lawfully be constructed. Indeed, other authorisations under law may also be required. That cannot, in my view, render the servitude invalid, unlawful or prohibited.

11. In my view, the applicant is entitled to the relief it seeks and to its costs. Inasmuch as costs have been incurred after the introduction of the amended Rule 67A(3)(c), I am of the view that scale B should be applied.⁵ The case is not without complexity and arose in context of a plethora of interrelated litigation.

12. I make the following order:

- 12.1. The applicant is granted leave to register the right of way servitude as set out in the Servitude Diagram 3281/2019 and recorded as 'The figure ABCDa mid River bEFGA representing 776 square meters of land being a right of way servitude' over Portion 647 of the farm Doringkloof No 391 JP, against or on title deed ST7961/2019;
- 12.2. The first respondent shall pay 50% of the costs of registration of the servitude;
- 12.3. The First Respondent is ordered to pay the costs of the application on Scale B, where applicable.

⁵ *Mashava v Enaex Africa (Pty) Ltd* [2024] ZAGPJHC 387.

[...]

SJ COWENJUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**Appearances**

Counsel for applicants: Adv C R F De Villiers instructed by Deneys Zeederberg
Attorneys

Counsel for respondents: No appearance

Date heard: 14 May 2024

Date of Judgment: 13 June 2024