REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, - PIETERMARITZBURG

CASE NO. AR 372/12

In the matter between:

BARONT INVESTMENTS (PTY) LTD	**APPELLANT**
and	
WEST DUNE PROPERTIES 296 (PTY) LTD	**FIRST RESPONDENT**
IMBALI PROPS 42 (PTY) LTD	**SECOND RESPONDENT**
CITY OF UMHLATUZE	**THIRD RESPONDENT**
REGISTRAR OF DEEDS, KWAZULU-NATAL	**FOURTH RESPONDENT**

ORDER

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(1) The appeal is allowed.

(2) The order of the Court *a quo* is set aside and replaced by the following order:

(a) The application is dismissed.

(b) The first, second and third respondents are ordered to pay the appellant's costs, jointly and severally, the one paying the other to be absolved. Such costs to include the costs of two Counsel, where employed, such costs are also to include all the appellant's other costs inclusive of the Application for Leave to Appeal moved on 14 November 2011 as well as those costs incurred in respect of the Application for Leave to Appeal to the Supreme Court of Appeal.

JUDGMENT

SISHI J

INTRODUCTION

[1] The appellant (the first respondent in the court *a quo*) appeals against the judgment delivered by His Lordship the Honourable Mr Justice Mnguni on 14 May 2010. After the Learned Judge had refused Leave to Appeal on 14 November 2011, on 6 March 2012 the Supreme Court of Appeal granted Leave to Appeal to this Court.

[2] This particular matter has its origins in an urgent application initially moved by the first respondent only in which the appellant, the third respondent and the fourth respondent herein were cited, respectively, as the first, second and third respondents.

[3] Subsequently, Imbali Props 42 (Pty) Limited (second respondent herein) applied for and was granted leave to join in the proceedings. It was therefore referred to as the second applicant in the court *a quo*.

[4] Although in the Court *a quo* the City of Umhlathuze was cited as the second respondent, in fact, it made common cause with the applicants for the relief which was sought [by them] and for all intents and purposes assumed the mantle of a further applicant.

[5] The Registrar of Deeds (the fourth respondent herein and the third respondent in the Court *a quo*) has, at all times, contented herself to abide the decision of the Court, delivered no affidavits, and was not represented at the hearing. She thus plays no role in this Appeal.

[6] What the first and second respondents asked for in the Court *a quo* (and in respect of which the third respondent made common cause) is that a road servitude in favour of the [third] respondent be registered over the appellant's property as a public road and that the appellant pay the costs of the application whilst the [third] respondent pay the costs of registration of the servitude.

Issues that require determination

[7] (a) Could the Court *a quo* grant the relief that it did?

(b) Were the first, second and third respondents herein entitled to have any servitude registered over the appellant's property?

Factual Background

[8] The following facts are either common cause or not disputed by the parties:

[8.1] Alton is an Industrial Park within the Municipal boundaries of the Third Respondent and the Township was established in 1975.

[8.2] One of the conditions of the establishment of the Township reads:

> *"A temporary road servitude is to be established in the lay-out along the south-eastern and south-western boundaries of Lot 1795 and the south-western boundary of Lot 1854 as shown on the said plan, such servitude is to be registered in such a manner that it shall provide access to this layout until such time as an alternate access is available and thereafter such road servitude shall lapse".*

[8.3] The temporary servitude was, however, not registered against the Title Deeds of Erf 1795 when that property was first transferred from the Municipality [the third respondent] on the 22nd of February 1984 under Deed of Transfer T9499/84. It was only when application was made for the sub-division of Lot 1795 into two properties that a temporary servitude was registered against the Title Deeds of portion 1.

[8.4] Prior to the establishment of the Alton Township, the third respondent had built *"Ferro Close"* to serve as a temporary connecting road between the Alusaf Plant and Alton Township.

[8.5] In July 1998, (when the appellant's predecessor-in-title, Richard's Bay Industrial Park CC, sub-divided Erf 1795), a temporary road servitude was

registered over portion 1 of Erf 1795, Richard's Bay and this was done on the following terms:

"*Subject to a temporary road servitude as indicated by the figures ABCKH on diagram S.G. No. 2652/1990 as imposed by the Minister under the provisions of the Town Planning Ordinance No.27 of 1949"*

[8.6] The first respondent is the owner of Erf 1796. The second respondent is the owner of Erf 1804 Richards's Bay. Erf 1796 and Erf 1804 are immediate neighbours. They abutt each other and face onto a road called Geleiergang.

[8.7] Behind these two properties lies Erf 1795 (now, since its sub-division, portion 1 of 1795 and remainder of 1795), which belongs to the appellant. This is clearly demarcated in Annexure "A" to the first respondent's founding affidavit.

[8.8] Access to the first and second respondents' properties is accessible via Geleiergang but the first and second respondents have used Ferro Close [which substantially approximates portions of the appellant's properties which are the subject matter of the servitude contended for] as *"their primary entrance to their properties", even though it has* been acknowledged that such entrance was not intended to be the primary entrance. In a site plan which the first respondent submitted to the third respondent in 1997 it described the entrance off Ferro Close as *"temporary"* and the entrance via Geleiergang as the future *"permanent entrance".*

[8.9] During the period 2002 to 2005/6 the appellant's predecessor-in-title (Richard's Bay Industrial Park CC) indicated to the first and second respondents that it wished to close Ferro Close and this precipitated a series of discussions according to the first three respondents. [It must be noted that the owner of Erf 1795, at that time, was the appellant's predecessor-in-title and it was they, and not the appellant, who attended the relevant meeting held on 13 June 2006. The appellant does not deny that the meeting occurred, to that extent, the meeting itself is not in dispute. However, the appellant denies any knowledge of what transpired at that meeting]. According to appellant, none of the respondents have provided any supporting documentation as to what, precisely, was agreed upon at that meeting – be it in the form of minutes of that meeting or correspondence exchanged between the parties.

[8.10] The first respondent alleges that at that meeting agreement was reached in respect of five issues, which, as explained above, the appellant does not necessarily dispute but denies having any knowledge of. It is also clear that no written agreement was concluded.

It would, however, seem that there was an oral agreement reached in respect of five issues, namely:

[8.10.1] that the access between Ferro Close and Kraft Link Street would be improved;

[8.10.2] that Ferro Close would remain a permanent public; street within the then existing servitude from Kraft Link Street, only

as far up as the entrances to the first and second respondent's properties;

[8.10.3] the remainder of Ferro Close would be closed to the public and the temporary right of way in favour of the third respondent would be cancelled;

[8.10.4] no road access would be permitted to the north-eastern boundary of the first respondent's property except for an existing entrance to its offices; and

[8.10.5] the third respondent would construct an entrance off Geleiergang (the road providing access) to the first and second respondents properties.

Appellant drew to the attention of the Court that there is no allegation by the respondents that the oral agreement extended to the registration of any new reduced servitude. This is a matter of considerable importance in the appellant's submission.

[8.11] On 1 August 2006 the third respondent's Council passed resolution 3947 in the terms set out in the last page of Annexure "D" to the first respondent's founding affidavit (such resolution does no more than note the agreement between the interested parties at the time) and it did not extend to approving or authorising the registration of a new reduced servitude.

[8.12] In November 2006 the appellant was introduced to one Vinesh Juglal ("Juglal") who claimed that he had acquired a right to purchase from Richard's Bay Industrial Park CC, Erf 1795 and after concluding a

nomination agreement with Juglal on the 29th of November 2006 the appellant proceeded to take transfer of the property in terms of a Deed of Transfer dated the 16th of August 2007. Subsequently, the appellant acquired the remainder of Erf 1795 from Richard's Bay Industrial Park CC.

[8.13] The Title Deed under which the appellant held the property reflected that a temporary road servitude existed and the appellant thereafter proceeded (via its land surveyors) to request, on the 19th of March 2008, that the third respondent agree to the cancellation of the temporary road servitude.

[8.14] The following day, the 20th of March 2008, the third respondent indicated to the appellant's land surveyors that it had no objection to the cancellation of the temporary *"right of way"* (sic) and stated further that *"it would be appreciated if you could attend to the cancellation on behalf of the Council"*

[8.15] On the 21th of May 2008 the appellant's attorneys effected the cancellation of the temporary road servitude (it will be noted that in the notarial deed of cancellation, it is reflected that Padimini Naidoo also represented the third respondent in executing that notarial deed of cancellation). At the time of cancellation, the third respondent had not completed or submitted any documents for the registration of a new reduced servitude, despite knowing full well that the then existing servitude was being cancelled.

[8.16] After the cancellation, the appellant gave notice to the first and second respondents that the road which previously existed through the servitude was to be cordoned off.

Nature of the servitude

[9] During argument, the question arose whether the servitude in question was a private servitude, a praedial servitude or perhaps a so called public servitude.

[10] Counsel were not in agreement as to the nature of the servitude in question in this matter. Counsel for the appellant submitted that it is a personal servitude between the appellant and the Municipality. Counsel for the first respondent submitted that it was praedial servitude and not a personal servitude, in spite of his view, it is not important to distinguish between a praedial and a personal servitude.

[11] On the other hand, Counsel for the second respondent and counsel for the third respondent, are of the view that in this matter, we are dealing with a public servitude and a public servitude does not lapse.

[12] On 5 August 2013, this Court granted Counsel for all parties in this matter, leave to supplement the argument presented particularly in respect of certain further authorities referred to during the cause of argument. These are:

(i) *Van der Vlugt v Salvation Army Property Co. 1932 CPD 56;*

(ii) *Vestin Eshowe (Pty) Ltd v Town Council of Borough of Eshowe 1978 (3) SA 546 (NPD);*

(iii) *Bowring NO v Vredesdorp Properties CC & Another 2007 (5) SA 391 SCA;*

(iv) *National Stadium SA First Bank 2011(2) SA 157 SCA.*

[13] The first respondent's supplementary heads of argument were filed on 8 August 2013. The second respondent's supplementary heads of argument were filed on 19 August 2013. The third respondent's supplementary heads of argument were filed on 19 August 2013. The appellant's supplementary heads of argument were filed on 2 September 2013.

[14] The second and third respondents contend that the servitude in question is a so-called public servitude. In this regard they rely on:

Joubert: LAWSA, 2nd Edition, Volume 24 page 509;

Van der Merwe: *Sakereg, (Twede Uitgawe) pages 544 at (sic)*

[15] In Joubert: LAWSA page 509 at para 624, the following is stated:

"… such as servitude is not praedial; nor is it personal, because it is not constituted in favour of the particular person or persons. Such right shall in the final analysis not be classified as private real right but rather as public powers granted by the public authority to the public in general".

[16] The first respondent submitted that the servitude was granted by the *"public authority"* (the Minister) to a Municipality for the use of *"… the public in general"* like inter alia, the first and the second respondents. The first respondent submitted that the servitude was therefore not the result of an agreement between two parties, and this not a personal servitude.

See: LAWSA supra, page 485 paragraph 579.

[17] In this regard, the second respondent has made the following submissions in the supplementary heads arguments:

[17.1] The road is referred to as a *"servitude"* in the papers and the registration of condition 2(k) is against the title deed of the relevant property, but *strictu sensu,* it is not a proper servitude. To constitute a servitude, whether personal or preadial, there has to be a dominant person or tenement, as the case may be, as well as a servient tenement;

See: Van der Merwe: Sakereg, 2nd Edition, page 458 e.v and page 544 e.v.

[18] It is submitted that the condition (2)(k) refers to and identifies only servient tenements i.e. the properties of all the parties of the instance and no dominant tenement or person is identified. Being a road it was manifestly created for use by the public and cannot be said to have been created for the benefit of the appellant or the first, second and third respondents. Indeed, in common, they are registered owners of the servient tenements;

[19] Public servitudes can be created by i.e. *vetustas* as immemorial user, which is not the case here, or by statute which is the case here, where the road was established by the third respondent as local authority for the benefit of the public.

See: LAWSA Volume 24 at pages 465-8.

[20] The appellant has made the following submissions with regard to public servitude in the Supplementary Heads of Argument:

[20.1] Our law has recognised that in certain instances, where the public has since *"time immemorial"* exercised access over certain immovable property, a right of way can found to exist. This is an *"unregistered servitude"* which the Roman Dutch authorities refer to as *"vetustas".*

[20.2.1] There is considerable doubt as to whether or not there is still such an entity or concept in our law as a *"public servitude"* as a self-standing category of servitude (outside the creation of same by Statute) (unless what is meant thereby is to use the phrase *"public servitude"* as a synonym for *"vetustas"* or *"immemorial user").*

[20.2.2] According to the appellant, a *"public servitude"* when it is referred to as such is now merely a type of personal servitude – there now being only two recognised categories of servitudes, the one being personal servitudes and the other being praedial servitudes.

[20.3] Appellant submitted that a *"public servitude"* is no longer a self-standing category of servitude (outside the creation of same by Statute) in our law in that:

[20.3.1] None of the authorities referred to in LAWSA in footnote 1 of paragraph 625 even refer to a *"public servitude".*

[20.3.2] Professor Van Der Merwe at page 544 refers to *"Sogenaamde publieke diensbaarhede".* He even goes so far as to state *"Dit is in dir waarheid te betwyfel of hierde beperkte regte hoegenaamd as saaklike regte, wat nog te sê as diensbaarhere, beskryf kan word".*

[20.3.3] What is more *"public servitudes"* are not referred to in either the Fifth Edition of Silberberg & Schoeman's Law of Property or even in the old text book *"Servitudes"* by Hall and Kellaway

which was published in 1942; it is probably not necessary for this Honourable Court to make any determination about existence in current times of public servitudes as a self-standing category (outside the creation of same by Statute) given that even on the basis of the very passage from LAWSA which appears in the first respondent's Counsel's heads of argument, the servitude in the present instance cannot be a *"public servitude"* (even if a public servitude exists in our law) in that what is reflected in the title Deeds is in favour of a named person (the "Richard's Bay Transitional Local Council") and therefore, the Title Deeds themselves make it clear that we are dealing with personal servitudes.

[20.3.4] Regard being had to LAWSA, relied upon by the first respondent's Counsel, it is instructive that:

[20.3.4.1] In paragraph 624 (on page 509) "public servitude" are referred to in the definition with a historical reference – "in the past".

[20.3.4.2] The heading to the Chapter describes them as "SO CALLED PUBLIC SERVITUDES".

[20.3.4.3] They are defined as rights which <u>were</u> reserved (in the past tense).

[20.3.4.4] Although defined therein as not being praedial or personal they are public powers <u>granted by a Public Authority</u> to the public in general.

[20.3.5] The servitude in the present matter was not granted by a Public Authority but by a private person in favour of a Municipality – thus meaning that the very basis of the creation of a public servitude is lacking.

[20.3.6] More importantly, Section 65 of the Deeds Registries Act, 47 of 1937, deals with *"personal servitudes"* (as reflected in its heading) and provides in Section 65 (1) for the registration of same – including the registration of servitudes created in favour of the public (public servitudes), thereby recognising such servitudes as a sub-category of personal servitudes. A proper construction of that section shows that what is provided for is the registration thereof in favour of the public or all or some of the owners of erven or lots in a township or settlement or for a road servitude or thoroughfare to be registered in favour of the public. That is not what happened *in casu*, where the servitude is registered in favour of the Municipality – not the public. Section 68 of the said Act provides that when a personal servitude lapses the Registrar can endorse that fact on the titled deed, thereby expunging it.

[20.3.7] When one is dealing with a servitude the construction which the servitude receives is limited by the words used and is not to be extended beyond the fair meaning of the words.
Meintjies v Oberholzer & Graaf Reinet Municipality [1].

In the present instance, the respondent's contentions with regard to the provisions of the servitude are the very opposite – they are arguing that the words in the Title Deed setting out the servitude must receive an extended meaning. Their case is that the beneficiary of the servitude is not (just) the Local Council but the public at large – which of course is directly contrary to the wording of the servitude itself.

[1] 1859 SC 265 at 268-269.

[21] The appellant submitted further that what we are dealing with here can only be a personal servitude because:

[21.1] The Title Deed refers to a servitude;

[21.2] It was passed in favour of a specific person ("in favour of the Richard's Bay Transitional Local Council")

[21.3] This happened twice in the Title Deeds:

[21.3.1] In 1998, when the appellant's predecessor-in-title acquired the property. And

[21.3.2] In 2007 when the appellant acquired the property.

[22] Four cases referred to by the appellant in reply (para 12 above):

The respondents have contended that these cases are of no application to the instant appeal and that they are distinguishable.

[22.1] *Van der Vlugt v Salvation Army Property Co.*[2] The plaintiff bought a piece of land from the defendant. The land was traversed with a 9 inch foul sewer for which the Municipality obtained easement rights from the defendant's predecessor some years before, the defendant did not intentionally conceal the existence of a sewer from the plaintiff (who was a new purchaser of the land). The Court found that the right of the Municipality to the sewer pipeline did not constitute a servitude. The Court rather held that the right in question, that of a Municipality to lay sewer over private land was not a praedial servitude because there was no dominant tenement.

[2] 1932 (CPD) 56.

[22.1.1] According to the third respondent, that case is distinguishable because there was nothing registered in favour of the Municipality but merely rights granted by agreement with the land owner, the so-called “easemen rights” (An English Law concept meaning servitude).

See: Todd v Minister of Public Works[3]*.*

[21.1.2] The third respondent is of the view that although the servitude in the present case is worded in the form of a personal servitude in favour of a Municipality, it is clear that it is not one.

(i) Firstly, because it was established by agreement between the Land owner and the Municipality but as a result of a Statutorily imposed condition of establishment of the township.

(ii) Secondly, although worded as a right in favour of the right in favour of the Municipality, it was in fact a right in favour of the public, giving the public access to and from two parts of the township. The servitude therefore can be described as a so-called public servitude.

[22.2] Counsel for the appellant submitted that the basis for this judgment being placed before the Court is simply that it was recognised that a sewage servitude in favour of the Municipality was a personal servitude in favour of

[3] 1958 (1) SA 328 (A) at 335.

the Municipality – and not a public servitude as contended for by the respondents.

Vestine Eshowe (Pty) Ltd v Town Council of the Borough of Eshowe[4] *and National Stadium S A supra.*

[22.2.1] This matter dealt with a personal servitude for the laying of a sewer pipe across the property of the appellant by the respondent Municipality. The servitude was never registered in the deeds office. When the appellant purchased the property, he had not known about the sewer pipe because it was not registered. The Court "the Full Bench" held that a right to a servitude was in effectual to burden the servient tenement unless duly registered in the Deeds Office.

[22.2.2] The third respondent has rather submitted that what distinguishes the two cases is that a sewer may be used by the Municipality only, but a road like the one in the case may be used by the public.

[22.2.3] The appellant on the other hand has submitted that the relevance of this matter is that in a Full Bench judgment in this division, it was recognised that a servitude "in that instance a sewerage servitude" passed in favour of the Municipality was a personal servitude.

[22.2.4] In the present Appeal, the servitude has been passed in favour of the Richard's Bay Transitional Local Council. It follows that it must be a personal servitude.

[4] 1978 (3) SA 546 (N).

[22.3] Appellant submitted, correctly in my view, that it is not possible to distinguish the applicable principle in *Vestin Eshowe case* (sewer servitude, from which the public would also benefit) from the present instance, a road servitude, they are both personal servitudes.

See: Bowing NO v Vrededorp Property CC & Another,supra.

[22.3.1] The third respondent has contended that this case deals with the doctrine of notice in respect of an unregistered servitude which does not arise in this case.

[22.4] In *National Stadium SA, supra,* the respondent had a personal servitude "written agreement" which gave it the right to name a soccer stadium "FNB Stadium". The Supreme Court of Appeal decided that the Appellants were bound to the servitude in spite of the fact that the original FNB Stadium was demolished and replaced with a new stadium. The Court decided that the personal servitude is also a real right which imposes a burden on the property of another.

[23] The appellant submitted that when this matter was argued, these particular authorities were advanced simply to reinforce the point that the oft quoted dicta of Innes CJ in *Willoughby's Consolidated Co. Ltd v Copthall Stores Limited*[5], was still approved by the Supreme Court of Appeal. In fact, Justice Brandt at para [17] in the *Bowring* case, reformulated Innes CJ's dictum rather elegantly and made it

[5] 1918 AD 1

much easier to understand. What is more, the principle in Willoughby's case was referred to once again (with approval) in the *National Stadium* case*, supra,* just two years ago. These cases were therefore advanced simply to reinforce the proposition that what was stated in the *Willoughby's* case is still good law in South Africa.

[24] *Silberberg & Schoeman's The Law of Property, 5th Edition, page 297,* states that Roman Dutch Law distinguish between praedial and personal servitude. The personal servitude relates to at least two pieces of land. It is said to be constituted in favour of one piece of land *"which is called dominant tenant or land"* over another piece of land *"which is called the servient tenant or land"* in other words, a praedial servitude confers a benefit on the dominant tenant and imposes a corresponding burden on the servient tenant: *"one piece of land serve the other"* by contrast, a personal servitude is always constituted in favour of a particular individual on whom it confers the right to use and enjoy another's property. Prima facie, therefore, it is not transferable by its holder. On the other hand, a personal servitude is*, "in the same way as the praedial servitude"* always enforceable against the owner of the property that is bearant with it, whoever he or she maybe. Personal servitudes are therefore real rights in every respect.

[25] Counsel for the second respondent referred to *Van der Merwe: Sakereg, Second Edition, page 546* where a public servitude is recognised.

[26] In 24 LAWSA 2nd Edition, paragraph 626, the following is stated about the existence of a public servitude:

"The existence of a public servitude can be asserted by proving vetustas or immemorial user. In terms of this doctrine, there is a rebuttable presumption that where a so-called public servitude has been exercised by members of the public from time immemorial, such servitude arose by virtue of a valid title even though there is no written proof of the validity of the title"

See: Langebaan, Ratepayers' & Residents' Association v Darmel Properties 391 (Pty) Ltd and other[6]*.*

[27] If one looks at the definition of a praedial servitude, the servitude in question does not fall within the definition of a praedial servitude.

[28] If one also look at the definition of a public servitude, it is clear that the servitude in the instant case does not fall within the definition of a public servitude. In my view, it falls within the definition of a personal servitude as Counsel for the appellant submitted. It is servitude in favour of the Municipality, it is between the appellant and the Municipality

[29] The servitude in the instant case cannot be a public servitude, in that what is reflected in the title deed is in favour of a named person (the Richard's Bay Transitional Local Council) and therefore the title deed itself makes it clear that we are dealing with personal servitudes.

[30] I entirely agree with the appellant's submission that what we are dealing with in the instant case is a personal servitude rather than a public or praedial servitude.

[6] 2013(1) SA 37 (WCC) para 19.

[31] The servitude in the present matter was not granted by public authority but by private person in favour of a Municipality, thus meaning that the very basis of the creation of a public servitude is lacking.

[32] Considering all the above, I am persuaded by the appellant's argument that the servitude in question is a personal servitude rather than a public servitude or praedial servitude.

[33] It is indeed not necessary for this Court to make a determination about the existence in current times of public servitudes as a self-standing category (outside the creation of somebody's statute).

Dispute of fact

[34] The disputed issue on the papers is whether or not the appellant knew of the alleged agreement apparently concluded as between its predecessors-in-title and the third respondent pertaining to the cancellation of the temporary servitude and the registration of the permanent servitude (before the appellant purchased the property and before appellant applied for the cancellation of a temporary servitude).

[35] The appellant has contended, correctly in my view, that in seeking final relief in this matter, the first, second and third respondents were alive to this dispute of fact and yet elected to argue the matter on the papers.

[36] The first respondent has conceded in the heads of argument that this is a factual dispute which can properly not be decided on paper, but submitted that it

was not necessary, *in casu,* to refer it to oral evidence because the Court decided correctly that section 211 of the Ordinance was not adhered to and that the cancellation of the servitude by the appellant was therefore void and of no effect.

[37] According to the appellant, what the first, second and third respondents implicitly undertook was the obligation to persuade the Court *a quo* that the appellant's denials of knowledge of the agreement was so far-fetched or clearly untenable that the Court was justified in rejecting them merely on the papers as per rule in *Plascon Evan's Paints Ltd v Van Riebeeck's Paints (Pty) Ltd*[7].

[38] It is settled law that ordinary, motion proceedings cannot be used to resolve factual disputes or factual issues because they are not designed to determine probabilities.

> *See: National Director of Public Prosecutions v Zuma (Supra) at 290 D-E, para 26.*

[39] None of the respondents in their affidavits set out any facts demonstrating that the appellant had any knowledge of the agreement when it purchased the property and when it took transfer of the property. The respondents' assertions in this regard are either hearsay or purely speculative and without foundation. The only references to this issue by the respondents in their affidavits are the following:

[39.1] The first respondent contends that in the light of what it sets out in its founding affidavit at paragraphs 18 to 22 thereof, as well as annexures "F" to

[7] 1984 (3) SA 623 (A) at 634 E-635C.

"J", "the first respondent (i.e. the appellant) must have been aware of the agreement …"

[39.2] The paragraph 18 referred to, confirms only that the appellant became owner after the alleged agreement and nothing else. The existence of a "servitude" at the time is not in dispute. Knowledge by the Appellant of such a servitude at the time it purchased and at the time it took transfer, is not in issue.

[39.3] Paragraph 19 takes the issue no further, as it deals with the cancellation of Ferro Close.

[39.4] Paragraphs 20 and 21 at best only demonstrate that the appellant became aware, after it acquired the property and after it attempted to cancel the existing servitude, that there was a purported agreement concluded with the erstwhile owner.

[39.5] Paragraph 22 takes the issue of the appellant's knowledge prior to purchase and prior to transfer of ownership no further either.

[39.6] Annexure "F" to "J" were all drafted in 2008. The appellant obtained transfer in 2007. None of those Annexures indicate, or acknowledge that the appellant had any idea of the alleged "Agreement" before it purchased and took transfer.

[39.7] In the circumstances this Court can safely reject its assertions on the papers.

[39.8] The second respondent associated itself with the averments by the first respondent but added no further facts to support the conclusion that the appellant had knowledge of the agreement prior to purchasing and prior to taking transfer.

[39.9] In the circumstances nothing that the second respondent says in this regard advances the respondents' case.

[39.10] The third respondent who, it must be remembered, was a party to the alleged earlier "Agreement", says in its answering affidavit that it "does not know whether the appellant was made aware of the agreement prior to taking transfer thereof".

[40] However, in support of its contentions that the appellant had actual knowledge of the agreement (and despite not setting out direct evidence to that effect in its own Affidavits) the first respondent relies upon an incorrect assertions made by Advocate S C Erasmus (apparently a director of the third respondent's corporate services) contained in a letter dated the 18th of June 2008 that the Applicant was "fully aware of" [the agreement to simultaneously register a new servitude] and that "the surveyor" indicated to [the appellant] that he was awaiting the approval of the replacement servitude diagram.

[41] Significantly, the author of that letter to which the first respondent made reference, Sophia Catherina Erasmus (who deposed to a confirmatory affidavit in support of the third respondent's answering affidavit) did not confirm what is clearly a hearsay averment made by the first respondent with regard to that letter and the facts stated therein. The earlier documents pertaining to the cancellation of the servitude, which were sent to or emanated from Advocate Erasmus did not require the simultaneous registration of another servitude nor did the Council resolution referred to in her letter authorise and empower anyone to attend to such. No affidavit from the surveyor who was instructed to attend to the cancellation on behalf of the third respondent was introduced to confirm the allegations made and the appellant has denied any knowledge of an agreement to register a new servitude.

[42] Further, as regards the appellant's actual knowledge (or lack of it) of the so called "agreement", evidence of the appellant's principal deponent, Rajendra Balmakhun ("Mr Balmakhum") is clear and unequivocal:

[42.1] The appellant was not party to the meeting.

[42.2] The appellant negotiated the purchase of the property with Juglal (and not with Richard's Bay Industrial Park CC).

[43.3] Only the temporary road servitude was recorded on the title Deed, Annexure "O" and at the time of the conclusion of the sale he had no knowledge of the oral agreement reached in 2006.

[43.4] Once it came to his attention that there was a temporary road servitude in place, he contacted Johannes Daniel Davel ("Davel") [the member of Richard's Bay Industrial Park CC] requesting a reduction in the purchase price and he [Dave] told Mr Balmakhum that the servitude was only temporary, that it had fallen away and that the appellant would be entitled to cancel it due to the availability of Geleiergang as a Municipal Road.

[43.5] When the appellant took transfer of the properties it did so on the basis that there was a temporary road servitude and that the servitude had either fallen away as a matter of law, or could be cancelled.

[43.6] The third respondent agreed to the cancellation of the temporary road servitude.

[43.7] When Advocate Erasmus signed the necessary consent documents she never indicated any requirement that another servitude be registered.

[43.8] It was the third respondent which asked the land surveyors to *"attend to the cancellation on behalf of the Council".*

[43.9] When the appellant's surveyors first approached the third respondent on the 19th of March 2008 requesting the cancellation of the temporary road servitude they stated in their letter:

"The owner now wishes to develop the land to its full extend [sic] and desperately needs this additional area of 8846 square metres encumbered by the temporary road servitude"

According to the appellant, this was a clear indication that neither the land surveyor nor the appellant contemplated that a different servitude would have to thereafter be registered over the property once the temporary servitude had been cancelled. In the light of this, there can be no suggestion that the appellant had acted in an underhand fashion. It actually advised the third respondent of its intentions to develop the entire property.

[43.10] When, on the 3rd of April 2008 Nirasha Badassy ("Badassy") an Attorney, Conveyancer and Notary Public, employed by the Newlyn Group (of which the appellant is a member) met with Advocate Erasmus, she [Advocate Erasmus] at no stage queried the documentation or suggested that there was any other registration of a servitude which needed to be prepared. In this regard Badassy deposed to a confirmatory affidavit.

[44] In the founding papers the first respondent delivered an affidavit deposed to by Davel in which he [Davel] alleged that the appellant was aware of the existence of the agreement in respect of the road servitude on the property described by the applicant. He goes further to state that when the appellant bought the property the

servitude was no longer registered on the Title Deeds because it was cancelled in error (as explained by the first respondent).

[45] As Mr Balmakhun points out in the appellant's first answering affidavit, these allegations are demonstrably false in that the servitude was indeed registered on the Title Deeds when the appellant took transfer of the property. It had not been cancelled in error. This much is obvious from Annexure "O" to that affidavit. Accordingly, Davel is simply wrong and his evidence cannot be accepted.

[46] Furthermore, the appellant submitted that Davel's statement should also be treated with "caution" because, as Mr Balmakhum had already explained, when he first had knowledge of the existence of the temporary road servitude he had asked Davel for a reduction in the purchase price and it was on the basis of Davel's reassurances that the temporary road servitude could be cancelled that Mr Balmakhun proceeded with the sale on the original terms (with no reduction in the price). Accordingly, Davel has a motive not to tell the truth.

[47] The averments of Mr Balmakhun are directly supported and confirmed by the person from whom the appellant acquired the property, Juglal and by the estate agent who introduced the property to the appellant, one Ivan John van der Vyver, both of whom deposed to confirmatory affidavits in the proceedings and whose allegations have not been disputed. Similarly, other aspects of the appellant's case have been confirmed in the affidavits of Badassy and Ashnee Ramdhani.

[48] The appellant, submitted, correctly in my view, that it is not open to find (and certainly not in the absence of the hearing of oral evidence) that the appellant had knowledge of the agreement apparently concluded as between the first, second and third respondents and the appellant's predecessor-in-title.

[49] The evidence set out above demonstrates clearly that the appellant had no knowledge of the agreement concluded as between the first, second and third respondents and the appellant's predecessor-in-title (before the appellant purchased the property and before the appellant applied for the cancellation of a temporary servitude).

[50] In the light of the above, I am satisfied on the evidence presented in the affidavits that the appellant had no knowledge of the agreement as referred to in the previous paragraph and at the relevant periods referred to therein.

The Law

[51] Appellant submitted, correctly in my view in the heads of argument that once it is accepted that the appellant (as purchaser) did not have knowledge of the alleged unregistered servitude, at the time it acquired the property, it is not bound by the servitude. *See: Frye's (Pty) Ltd v Ries*[8]

[52] According to the appellant, the first and the second respondents have never contended that there exists a praedial servitude as against the appellant's property. They have also never contended for a right of way (nor could they, because a right of way or via *necessitates* over the property of a non-consenting owner can only be

[8] 1957 (3) SA 575(A) at 582(A-D).

acquired when it is shown that the right of way is necessary to provide access to a public road and it must be the only reasonably sufficient means of gaining access).

See: Aventura V Jackson NO & Others[9]

[53] In Aventura's case, the Supreme Court of Appeal stated:

> "A Court may grant a right of way over the property of a non-consenting owner (subject to the payment of appropriate compensation), but only where it is shown that the right of way is necessary to provide access to a public road (See: for example, *Van Rensburg v Coetze*[10])(and the authorities collected in that judgment) … What is meant by "necessity" is that the right of way must be the only reasonable sufficient means of gaining access to the land-locked property and not merely a convenient means of doing so *"Troutman NO v Poole*[11]*…"*

[54] In the instant case, the first and second respondents conceded that there is another access to their properties which, as pointed out earlier, was to be the permanent entrance and, what is more, even if the agreement for which they contend, reference is made to the third respondent being obliged to provide them with better entrance and egress from their properties to that other road.

[55] According to the appellant, what the first, second and third respondents contend for is the personal servitude in favour of the third respondent - the right thereto being derived from an alleged oral agreement (which did not even contain a term relating to the registration of a new servitude). The appellant submits that a purchaser is not bound by an unregistered agreement of this type (servitudinal) if

[9] 2007 (5) SA 497 (SCA) at 499/500 para [8].
[10] 1979 (4) SA 655 (A).
[11] 1951 (3) SA 200(C) at 207 (D) – 208 (A)

the said purchaser did not have knowledge of the agreement at the time he purchased, the onus *"of proving such knowledge"* being on the party alleging it.

See: *Dhayanundh v Narain*[12] *and Felix & Another v Notier NO & Others*[13]*.*

[56] A servitude usually originates from an agreement, but, because the servitude is an interest in land, the underlying agreement must be in writing in terms of Section 2(1) of the Alienation of Land Act, 1981.

See : Silberberg & Schoeman's THE LAW OF PROPERTY 5th Edition[14]*.*

Felix & Another v Nortier NO & Others[15] *(referred to with approval in Janse van Rensburg v Koekemoer*[16]*.*

[57] What is more, a mere agreement (even one in writing) in terms of which a person grants to another a servitude over property does not afford the grantee a right to enforce the servitude as per the agreement. The grantee must first enforce the right to have the servitude registered in the Deeds Office, as a real right, and, only thereafter, the grantee may then enforce the servitude itself.

> "Now a servitude, like any other real right may be acquired by agreement. Such an agreement, however, though binding on the contracting parties, does not by itself vest the legal title to the servitude in the beneficiary, any more than a contract of sale passes the dominium to the buyer. The right of the beneficiary is to claim performance of the contract by delivery of the servitude, which must be effected *coram lege loci* by an entry made in the register and endorsed upon the Title Deed of the servient property".

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[12] 1983 (1) SA 565 (NPD)
[13] 1996 3All SA 143 SE
[14] Page 332 and footnote 96.
[15] Supra, at 153 D-J
[16] 2011 (1) SA 118 (GSJ) at 121 A.

As per Innes CJ in *Willoughby's Consolidated Co. Ltd v Copthall Stores* Ltd[17].

"It is however, well established in our law that, whilst an agreement such as the present does not itself constitute a real right of servitude – which is constituted only when the servitude is registered against the Title Deeds to the servient Erf – the agreement gives rise to a *jus in personan ad servitutem ad quirendam* – a personal right to claim registration of the servitute.

As per Vivier J (as he then was) in *James v Mendelowtz* [18]

[58] In the light of the above quoted authorities, the appellant submitted that the Judgment referred to by His Lordship Mr Justice Mnguni in his judgment *Dhayanundh v Narain*[19], is not of application in the present instance. In that matter, His Lordship Mr Justice Page found that a purchaser would be bound by an unregistered agreement in circumstances where his predecessor-in-title had granted a servitude to another if, it could be proved that the purchaser had knowledge of the servitude when he brought the property. However, upon a reading of that case it is clear from the authorities quoted therein that if a Court were to hold the purchaser bound by that unregistered servitude it would only do so if it found that the purchaser had acted fraudulently, although *mala fides* will not be readily presumed. Therefore, the principles of that case have no application in the present instance because it is not open for this Court to find, as a fact, that the appellant acted mala fide. In any event, the judgment in *Dhayanundh v Narain*

[17] 1918 AD 1 at 16
[18] 1983 (1) SA 481 (CPD) at 485 C-E.
[19] 1983 (1) SA 565 (NPD) at 571 F

(supra) was handed down on 9 September 1982, prior to the Alienation of land Act, 1981 which governs the position and which came into operation on 19 October 1982. I agree with the appellant's submission in this regard.

[59] It is trite that a servitude "a real right comes into existence only when the agreement has been registered"

See: Silberberg & Schoeman's THE LAW OF PROPERTY[20]

Willoughby's Consolidated Co. Ltd v Copthall Stores Ltd 1918 AD 1 at 16

[60] It also follows from what has been submitted in respect of the authories referred to above, *(e.g. Janse Rensburg v Koekemoer and Felix & another v Nortier NO & Others)* that ultimately, it is irrelevant to the issues as to whether or not the appellant did or did not know of the 2006 agreement when it took transfer of the property, as there was no written agreement to confer a servitude. There was of course agreement by all three respondents that the (original) temporary servitude should be cancelled. The appellant has submitted that this agreement was not necessary. I agree with the appellant's submission in this regard.

The Judgment of the Court *a quo*

[61] At the conclusion of the matter, the Court *a quo* granted an order in the following terms:

(a) The first respondent is directed to have a road servitude re-registered as follows:

"Subject to the temporary road servitude as indicated by the figures ABCKH on diagram SG No.2652/1990, as imposed by the

[20] 5th Edition, page 332 and footnote 96.

Minister under the provisions of the town planning ordinance No.27 of 1949 in favour of the Richards Bay Transitional Local Council"

On its property described as Portion 1 of Erf 1795 Richards Bay Transitional Local Council Area, Province of KwaZulu-Natal, in extent two comma two four seven nine (2, 2479) hectares;

(b) In the event of the first respondent refusing to do what is set out in (a) of this order within thirty days after having been requested to do so, the Sheriff of this Court is hereby authorised and ordered to sign all documents on behalf of the first respondent necessary to effect such registration;

(c) The first respondent is directed to pay the costs of both applicants in this application;

(d) The second respondent is ordered to pay the costs of re-registration of the temporary servitude on the property of the first respondent; and

(e) The second respondent will bear its own costs.

[62] The Order that was eventually granted (and which is the subject matter of this appeal) is one which the first and second respondents never sought – not even in the alternative. It requires that the servitude be registered in terms of a prior temporary servitude but it was also one which the first, second and third respondents agreed would be cancelled.

[63] The appellant submitted correctly, in my view, that the Honourable Mr Justice Mnguni was correct in holding that the matter of *Felix and Andere v Nortier NO & Andere* which decided that an agreement concluded in respect of a servitude must be in writing in order to comply with the provisions of the Alienation of Land Act, 1981 should be applied.

[64] In the light of the above, the first, second and third respondents submissions that an oral agreement (even a tacit one as contended, in the alternative, by the first respondent), can validly create a servitude capable of being enforced cannot be correct and fall to be rejected.

[65] According to the first, second and third respondents, the judgment of the Court *a quo*, was based on non-compliance with Section 211 of Ordinance 25 of 1974. The Court *a quo* gave favourable consideration to an argument raised by the first and second respondents that what had happened did not comply with the provisions of Section 211 of the Local Authorities Ordinance 25 of 1974. The Court held that the agreement to cancel the servitude was contrary to Section 211 and was therefore void.

[66] In their heads of argument, the second and third respondents have indicated that for the purposes of this appeal, they will limit their opposition to this ground alone, that is non-compliance Section 211 of Ordinance 25 of 1974.

[67] The respondents argued that the finding that the agreement to cancel the servitude fell fowl of Section 211 was correct and that the first and second respondents were entitled to the relief granted.

[68] The following submissions were made on behalf the second and third respondents in this regard:

[68.1] It is common cause that the local authority's powers in this regard derive from the empowering provisions of Sections 208, 209, 210 and 211 of the Local Authorities Ordinance No.25 of 1974 (N) ("the Ordinance");

[68.2] Section 208 confers upon the council of the local authority the ownership, management and control, together with the land of all public streets comprised in the streets;

[68.3] Section 209(1)(a) empowers the council, for the benefit of the public, to make, construct, lay, alter or keep clean and repair public streets, subject to the proviso that nothing in the section shall authorise the deprivation or substantial deprivation of the public of its enjoyment of its rights in or to any public street;

[68.4] The only power conferred upon the Local Authority by the Ordinance to close or divert any public or private street is to be found in Section 211. Subsection (1) thereof which provides that for the purposes of Section 211

the word “street” defined in Section 1 of the Ordinance as any street, road, lane or avenue shall include any part of such “street”.

[68.5] On any version, there was no semblance of compliance with section 211. This means that if Ferro Close was a street, its closure was unlawful. This is because the section provides that a Municipality shall have the power to permanently close a road subject to certain conditions. This means that the closure may not take place without the conditions being fulfilled and if this happens, the action is unlawful.

[68.6] The question then is whether the road was a street for purposes of the Ordinance. The respondents submitted that the learned Judge convincingly showed that this was the case. In this regard the following submissions are made:

[68.6.1] Section 211 applies when any street as defined in section 1, or any part thereof is permanently closed.

[68.6.2] ‘Street’ is defined as including any street, road, lane, avenue, way or other right of way.

[68.6.3] Given that Ferro Close was tarred, was built prior to and confirmed in terms of a servitude reading’ “… a temporary road servitude in favour of the Richards Bay Transitional Local

Council, and was used by the public, it can hardly be disputed that it was a street in the ordinary sense of the word.

[68.6.4] The definition of 'public street' is set out in the judgment and Ferro Close is covered by all the paragraphs except (b). It was accordingly a public street.

[68.6.5] There was not even purported compliance with the detailed provisions of section 211(2) except paragraph (b), which was partially complied with because owners of adjoining properties were notified of the intention to close the road.

[68.6.6] There was no publication in a newspaper (paragraph 9a)), no notices were put up in the street or at the municipal offices, and no opportunity was given for objections, and no approval from the Administrator (now the MEC) was granted (paragraph (f)).

[68.7] The fact that the servitude was of limited duration does not detract from the fact that there was a street in existence and the Ordinance does not distinguish between "permanent" and temporary roads. In any event, Ferro Close has been in existence since before 1975.

[68.8] The appellant contends that once the servitude lapsed or was cancelled, that was the end of the road as it were. However,

Section 211 clearly deals with the physical closure of a road. This means that the requirements of the section are additional requirements that must be met before a road can be closed.

[68.9] The appellant's argument begs the question whether the servitude ought to have been cancelled without Section 211 being complied with. The respondents contend that the servitude could not lawfully be cancelled without compliance with the section because the servitude was the legal basis for the existence of the road.

[69] The relevant provisions of Sections 211 provides as follows:

'211. Permanent closing of streets.

(1) In this section word "street" means a street as defined in section 1, or any part of a street.

(2) If, in the opinion of the council, it is expedient permanently to close or divert any public or private street, it shall have power to do so subject to the following conditions:-

(a) The intention to close or divert the street shall be published in one or more newspapers not less than thirty days beforehand, and during that time it shall also be placarded conspicuously in the street and a notice exhibited on the public notice board at the town office.

(b) Notice shall be given to the owners and occupiers of all properties abutting upon the street not less than thirty days beforehand. The

advertisements, placards and notices shall state the expected date of closing or diversion, and, in case diversion or partial closing, shall state the place where the plans of the proposed work are lying open for inspection;

(c) Any person aggrieved may give written notice to the council, setting forth his objection and the ground thereof;

(d) If objections are lodged with the council the closing or diversion of the street shall not be proceeded with until the approval of the Administrator has been obtained.

(e) Application for approval, together with copies of any objections, shall be forwarded to the Administrator, who may, upon receiving the same, appoint an inspector to make enquiry at the cost of the council into the propriety of the proposed closing or diversion and the objections thereto;

(f) On receiving the inspector's report, the Administrator may approve disallow the proposal or approve it with such modifications or upon such conditions as he may think proper.

(g) …….

(h) …….

(i) If the street is a public street, the town clerk shall immediately after compliance with such of the aforegoing conditions as are relevant to the closing or diversion of any public or private street, advise the Surveyor-General of the same and make application for the amendment of the relevant general plan in terms of section 30 of the Land Survey Act, 1927 (Act 9 of 1927)

[70] The respondents placed heavy reliance on Section 211 of the Local Authorities Ordinance of 1974.

[71] The appellant submitted that, that Ordinance has no application in the present instance because it was clearly intended to deal with *"public streets"* which had *"been established by a Local Authority or other competent Authority as a public street" or which had "been taken over by or vested in a Local Authority as a public street in terms of any law".*

[72] The land in question is not owned by the Local Authority, nor has it been expropriated.

[73] Furthermore, if one has regard to the provisions of Section 208 of the Ordinance it speaks of ownership and control of all public streets, which shall *"vest in the Council".*

[74] Given the fact that the (former) road traversed land which is, indisputably reflected on the Title Deeds as belonging to the appellant, it follows that the road itself did not belong to the Council (the third respondent) but it belonged to the appellant. As such the provisions of Section 211 of the ordinance are inapplicable as that Section refers to a closure of roads by the Municipality and not by the owner of the land.

[75] According to appellant, the definition of "street" (and this is the definition which is specifically referred to in section 211 of the Ordinance) is "any street, road,

lane, avenue, way, footpath, bridge, subway or other right of way and includes appurtenances". That definition, however, according to the appellant, becomes nonsensical unless one reads into the definition a "street, road, lane, avenue, way, footpath, bridge, subway or other right or way [which is located on public or Municipal land]. After all, unless one reads into that provision that the "street, road, lane, avenue, way, footpath etc." is located on public or Municipal land, then a simple footpath or private road which traversed the front garden of a residential home would fall within the provisions of Section 211 of the Ordinance. Correspondingly, a private farm road between the farm house and the main gate would, for similar reasons, fall within the provisions of Section 211 of the Ordinance.

[76] The provisions of Sections 208 to 211 of the Ordinance only make sense within the context of a road located on land which actually belongs to the Municipality or, (at best for the respondents) on land where the owner thereof has chosen not to exercise any rights of dominium over it (which did not happen in this case). As has already been submitted by appellant, the provisions of Section 211 of the Ordinance could never have been intended to apply to a temporary road servitude but to the closure of a road of a permanent nature. The servitude in question was clearly of a temporary nature, being specifically called a "temporary road servitude" and was registered as such having its *causa* in terms of one of the conditions of establishment of the township of Alton which specifically provided for it to lapse once alternate access became available (which it is common cause *in casu*, it was)

[77] The facts of *SJMM Hilcove (Pty) Ltd t/a Kentucky Fried Chicken and another v Pietermaritzburg City Council*[21] referred to by the second and third respondents are clearly distinguishable from the facts of the instant case. In that case, it is the City Council of Pietermaritzburg itself, which wanted to close part of the street, Council had to comply with Section 211(2). In the instant case, it is a private company which closed the temporary street, with the permission of the Council. The ordinance itself refers to *"council"* and not private individuals or companies. The order also requires that the servitude be registered in terms of a prior temporary servitude, which, it is common cause, was not only a temporary servitude but it was also one which the first, second and third respondents agreed would be cancelled.

[78] In *National Director of Public Prosecutions v Zuma,* Harms DP held:

> *"It is crucial to provide an exposition of the functions of a Judicial Officer because, for reasons that are impossible to fathom, the Court below failed to adhere to some basic tenets, in particular that, in exercising the judicial function, Judges are themselves constrained by the law"*[22]*.*

[79] Furthermore, with regard to the order made by the Court *a quo*, it is important to note (as stated above) that the appellant's predecessor-in-title (Richard's Bay Industrial Park CC) as well as First, second and third respondents agreed to the removal of this temporary servitude. The temporary servitude was later removed. Appellant has correctly pointed out that such agreement was not necessary as the servitude which was temporary has run the course of its limited life once alternate access was provided to the affected properties of the first and

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[21] 1988(3) SA 319(A)
[22] 2009 (2) SA 277 (SCA) para [15]

second respondents which was the case at all material times of this application. This temporary servitude lapsed and all that remained was to have it expunged.

[80] Despite the aforegoing, it was ordered to be reinstated, without any of the parties having requested that it be stated in those terms, in the judgment of the Court *a quo*.

[81] The order granted by the Court *a quo* was therefore more extensive than the relief claimed.

[82] In granting the order it did, the Court *a quo* went beyond that which the law permits and this constituted a misdirection.

[83] The second and third respondents contend that the relief granted was competent and, could have been granted under the prayer *"alternative or further relief".*

See: *Queensland Insurance Co. Ltd v Banque Commerciale Africaine Co. Ltd*[23]*.*
Tsoane & Others v Minister of Prisons & Others[24]Where the Court stated:

> *"Relief may be granted under this prayer where what is sought is not inconsistent with the substantive relief claimed and where the basis for such relief has been laid in the supporting papers and dealt with in the answer of the respondent."*

[23] 1946 AD 272 at 286
[24] 1982 (2) SA 55 C at 63 F

In terms of these authorities, alternative relief will not be granted where:

(i) No basis has been laid for such relief in the supporting papers; and
(ii) The order granted is inconsistent with the substantive relief.

[84] The second and third respondents have submitted that the order made by the Court *a quo* satisfies the requirements set out in the authorities referred to above.

[85] To the extent, that the court found on a point not relied upon by a party (which is not conceded), according to the third respondent, it complied with the doctrine of legality, a component of the rule of law, which is entrenched by section 1 of the Constitution. As was stated by *Ngcobo J in Cusa v Tao Ying Metal Industries and Others*[25]:

> "These principles are, however, subject to one qualification. Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, *mero motu*, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality. Accordingly, the Supreme Court of Appeal was entitled *mero motu* to raise the issue of the commissioner's jurisdiction and to require argument thereon…"

[25] 2009 (2) SA 204 (CC) at para 68

[86] It is even open to this Court, sitting as an appeal court to raise a fresh legal issue. The Supreme Court of Appeal referred to the above passage in *Cuninghame and another v First Ready Development 249*[26], in the following terms:

> "What is more, even if it is accepted for the sake of argument that the appellants had indeed conceded a point of law in their favour, the respondent's object and its business are, on my interpretation of s21(1)(b), unlawful. In this light any suggestion that this court should allow an unlawful business to continue because the other side had made a concession of law which is found to be incorrect, would, in my view, be untenable. This is an a fortiori situation of the one described (in para 85 above) as follows by *Ngcobo J in Cusa v Tao*[27]*supra"*

[87] As was pointed out by Wallis J in *National Horseracing Authority of Southern Africa v Naidoo and Another*[28], the need for the court to ensure that the parties are afforded a fair opportunity to deal with the point is important.

[88] The facts and the legal principles in the authorities referred to by the third respondent in this regard are clearly distinguishable from those of the instant case, no incorrect concession of law has been made in the instant case and the principle of legality also does not arise in the instance case.

[89] In the light of the above, I am satisfied that the requirements for the grant of relief in the alternative as set out in *Tsosane & Others, supra,* have not been satisfied in this matter.

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[26] 2010 (5) SA 325 (SCA) at para 30
[27] 2009(2) SA 204 (CC) 2009 (1) BCLR 1 2009(1) BLLR 1; 2008(29) ILJ 2461 para 68.
[28] 2010 (3) SA 182 (N) at para 12

[90] In my judgment, the Court *a quo* could not have granted the order granted as an alternative or further relief.

[91] The Learned Judge Presiding, had regard to a dictum of Innes CJ in *Shierhout v Minister of Justice*[29]*:*

> *"It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect"*

[92] The reliance on the aforesaid dictum by the Learned Judge is, somehow, misplaced. The Ordinance has not prohibited any action such as was undertaken and is thus of no application. The servitude that came into existence was of a temporary duration and was created for but a limited time. ("it shall provide access to this layout until such time as an alternate access is available and thereafter such road servitude shall lapse" - condition of establishment of the Township read with Annexure "O", Clause C. It is common cause that at all material times such alternative access i.e. Geleiergang was available. There was thus no "permanent" road/street created with an indefinite life which was sought to be closed, which is the "street" envisaged in the Ordinance. The Ordinance could never be said to refer to temporary roads (which can be created for any number of reasons e.g. a diversion). Furthermore, the Ordinance speaks of a "right of way" and such right as there was emanated from a servitude and ceased to exist once the *causa* therefor ceased to exist. The Ordinance cannot seek to impose any procedure to be followed in the present matter (which stems from the cancellation of a temporary

[29] 1926 AD 99 at 109.

servitude, which had lapsed and whose *causa* thus no longer existed) where the relief being sought is to register a servitude based on an alleged contractual right.

c/f Section 68(1) Deed Registries Act, 47 of 1937.

[93] The Learned Judge in the Court *a quo* is correct when he says:

> *"I am of the view that it would not be appropriate to direct the first respondent to register the reduced servitude on its property as submitted by the applicants and the second respondent's counsel"*

[94] The mistake that the Learned Judge made is in the very next sentence of his judgment:

> *"The only avenue available to me is to direct that the Applicants be restored in a position in which they were prior to the purported cancellation of a temporary servitude"*

[95] In a sense his actions were akin to the Judge in the Court *a quo* in *Ekurhuleni Metropolitan Municipality v Dada NO*[30] who, without having been asked to do so in an Application brought by a land owner, ordered the Municipality to purchase that property from the Applicant. In that regard, His Lordship Mr Justice Hurt stated:

> *"There can be no doubt that the order that the municipality should purchase the property stemmed from a pre-conceived notion on the part of the judge that it was time 'to get things moving' , as it were. He was not asked, in the papers or in the course of evidence, to make such an order and it was not rationally related to the evidence which was adduced concerning the municipality's policies and plans and the extent of is immediate obligations to alleviate the plight of these particular occupiers. He had plainly persuaded himself that it was time to cut across the principles of*

[30] 2009 (4) SA 463 (SCA)

'progressive realisation' of housing access emphasised in the decisions of the Constitutional Court to which he had referred. In this he fell foul of another fundamental rule emphasised in Bato Star and the other cases dealt with in para [10], and also in Zuma, supra, in para 16, viz:

> **'Judges as members of civil society are entitled to hold views about issues of the day and they may express their views provided they do not compromise their judicial office. But they are not entitled to inject their personal views into judgments…'".**

[96] Section 25(1) of the Constitution[31] provides:

(i) "No one may be deprived of property except in terms of the law of general application, and no law may permit arbitrary deprivation of property.

(ii) Property may be expropriated only in terms of the law of general application:
(a) …
(b) Subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

[97] To order a new servitude to be registered, without the consent of the owner of the land (the appellant) as requested by the respondents in this matter, is to deprive the owner of a portion of his property, without any compensation therefor. This would be contrary to the provisions of Section 25 (Bill of Rights) of the Constitution. Even in the case where a portion of land is taken away as a via

[31] Act 108 of 1996

necessitates, the Supreme Court of Appeal has held that adequate compensation therefor should be paid.

See: Aventura Ltd v Jackson NO and Others[32].

[98] In the circumstances of this case, it was not open to the Court to make that order. The first, second and third respondents were not entitled to have any servitude registered over the appellant's property.

[99] The order granted by the Court *a quo* should not be allowed to stand. Had the Court *a quo* decided the matter on the facts and the law applicable, it would not have granted the order which it did, and it would have dismissed the application with an appropriate order as to costs.

[100] In this matter, there is no reason why the costs should not follow the result.

[101] In the circumstances, I am of the view that the appeal should be allowed with costs.

[32] 2007 (5) SA 497 (SCA) at page 499 para [8].

[102] In the result, it is ordered as follows:

(1) The appeal is allowed.

(2) The order of the Court *a quo* is set aside and replaced by the following order:

(c) The application is dismissed.

(b) The first, second and third respondents are ordered to pay the appellant's costs, jointly and severally, the one paying the other to be absolved. Such costs to include the costs of two Counsel, where employed, such costs are also to include all the appellant's other costs inclusive of the Application for Leave to Appeal moved on 14 November 2011 as well as those costs incurred in respect of the Application for Leave to Appeal to the Supreme Court of Appeal.

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SISHI J

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JAPPIE DJP

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SEEGOBIN J

Date of hearing	:	05 August 2013
Date of judgment	:	31 January 2014
Appellant's Counsel	:	**A K KISSOONSINGH SC with A.D. COLLINGWOOD**
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Instructed by		**DUVENAGE INC.** **C/O HAY & SCOTT** 1st Floor, Alexander Forbes Wing 3 High Gate Drive **REDLANDS ESTATE** **REF: L WEAKLEY**