IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
Case number: **286/99**

In the matter between:

HENRI SMITH Appellant

and

VICTOR EDWARD MUKHEIBIR 1st Respondent

JOHN CHRISTOPHER BOWMAN 2nd Respondent

GUTSCHE FAMILY INVESTMENTS (PTY) LIMITED 3rd Respondent

CORAM: **SMALBERGER ADCJ, HARMS, STREICHER, MPATI JJA and BRAND AJA**

HEARD: **23 FEBRUARY 2001**

DELIVERED: **23 MARCH 2001**

Servitude - of road - Subdivision of dominant tenement - whether owner of subdivided portion has a right additional to that of dominant tenement before subdivision.

JUDGMENT

MPATI JA:

[1] This appeal concerns the interpretation of a condition relating to a servitude of road and route incorporated in a deed of transfer. By deed of sale signed by appellant (as seller) and first and second respondents (as purchasers) during September 1996 the appellant sold to them the member's interest in Henfri Beleggings CC ("the close corporation") for the sum of R405 000,00. Appellant was the sole member of the close corporation which in turn is the owner of immovable property described as Erf 5027, Portion of Erf 4113 Walmer, in the Municipality and Division of Port Elizabeth ("Erf 5027").

[2] Prior to its subdivision, which produced Erf 5027 and the remainder of Erf 4113, Erf 4113 was "subject and entitled to a reciprocal general servitude of road and route of which may be agreed upon from time to time by the registered owners over and in favour of Erf 4112 Walmer ...". The remainder of Erf 4113 and Erf 5027 are both continguous to Erf 4112.

[3] Erf 5027 is held by the close corporation under Deed of Transfer No T70538/93 and the said servitude was carried over in the following terms:

> "B. SUBJECT FURTHER and ENTITLED to the benefits in terms of the endorsement dated 12 December 1988 on certificate of registered title no T72406/88, reading as follows:
>
> > 'By virtue of Deed of Transfer no T72410/88 the within property is subject and entitled to a reciprocal general servitude of road and route of which may be agreed upon from time to time by the registered owners and in favour of Erf 4112 Walmer, meas 6, 2201 ha, held by Deed of Transfer no T72410/88.'"

[4] Subsequent to the sale of the member's interest and on 6 December 1996, first and second respondents made a payment to appellant in the sum of R236 546,14. Appellant accepted the payment on account. First and second

respondents failed to pay the balance of the agreed purchase price and appellant instituted action for payment thereof. They counterclaimed for payment of the sum of R168 453,86. They alleged in essence that contrary to a term of the agreement of sale, *viz* that Erf 5027was one to which there was reasonable and appropriate access, there was no such access, with the result that first and second respondents had to construct an access to Erf 5027at a cost of R168 453.86 (the balance of the purchase price which they had withheld). In his plea in reconvention appellant pleaded *inter alia* as follows:

> "3.6 Both Erf 4113 and Erf 5027 have, in terms of their respective Deeds of Transfer, a servitude which entitles them access over Erf 4112 [the Walmer Park Shopping Centre parking lot] as a reciprocal General Servitude of road and route.
>
> 3.7 The Close Corporation owner of Erf 5027 has access accordingly to the aforesaid parking ground and from the parking ground to one or other of the surrounding public roads.
>
> 3.8.1 Erf 5027, accordingly, was a property to which there was reasonable and appropriate access."

[5] The only issue which the Court *a quo* was required to determine in terms of Rule 33(4) of the Uniform Rules of Court was formulated as follows:

> "Whether the condition incorporated in deed of transfer no 70538/93 in respect of the property Erf 5027 (a portion of Erf 4113), confers on Erf 5027 as dominant tenement an enforceable right of road over Erf 4112 as servient tenement."

[6] After it had heard argument on behalf of appellant and first and second respondents the Court *a quo* (Ludorf J) directed that third respondent be joined

because of its interest in the matter as owner of Erf 4112. Third respondent consequently filed a pleading in which it is alleged that third respondent "has complied with the terms of the reciprocal general servitude of road and route between Erf 4112, Walmer, and Erf 4113, Walmer, more particularly in that such access as is envisaged in such servitude has been agreed upon and granted as between the owners of the said respective erven". Third respondent further denied that the condition incorporated in Deed of Transfer No 70538/93 in respect of the property confers on the property, as dominant tenement, another right of way over Erf 4112 as servient tenement.

[7] Ludorf J answered the question posed in the negative but granted appellant leave to appeal to this Court.

[8] The question is in my view incomplete. This is evidenced by the concession made by first and second respondents' counsel in his heads of argument that Erf 5027 has a right of access enforceable against Erf 4112 as servient tenement, but that the condition in the title deed does not confer any additional right to that which it originally conferred upon Erf 4113 before subdivision. It was accordingly contended that Erf 5027 has to exercise its right of access over the remainder of Erf 4113 and then onto the agreed road and route over Erf 4112. These, in essence, were also the contentions advanced on behalf of third respondent.

[9] The position in our law is that when a dominant tenement is subdivided, each portion retains the original dominant tenement's servitudal rights. Each portion can exercise a right of access over the servient tenement and, in the absence of any agreement to the contrary, each owner can trek over that portion of the original dominant tenement, which, owing to the division, now lies between it and the servient tenement. (See D 8.3.23(3); Van Leeuwen *RHR* 2.21.12; *Louw v Louw* 1921 CPD 320 at 322; *Briers v Wilson and Others* 1952 (3) SA 423 (C) at 439H.) In *Louw's* case the facts, briefly, were: A farm, in favour of which there was a right of way over a neighbouring farm, was divided into two portions in such a manner that only one of such portions was adjacent to the neighbouring farm. Nothing was said in the title deeds of the divided portions as to the right of way. In order to reach the neighbouring farm, the purchaser of the portion remote to it

drove his cattle over the portion adjacent to the neighbouring farm and was sued by the owner of such adjacent portion for damages for trespass. The Court held that he was entitled to a right of way over such adjacent portion for the purpose of reaching the neighbouring farm, and was not liable to pay damages for the alleged trespass.

[10] Counsel for the appellant submitted that the implication of the *Louw* judgment is that if the subdivision which had originally formed part of the dominant tenement had not been completely cut off from the servient tenement, it would have had a right of way directly over the servient tenement rather than having to cross the other subdivision in order to gain access to it. He argued further that if the servitude is not so drafted as to confine the right of way over the servient tenement to a single route, which, once chosen, is the only route along which the servitude may be exercised, then the subdivisions must be entitled to exercise their individual rights of way across the servient tenement. To adopt an arbitrary rule that the right of way must invariably follow the route already chosen by one of the other subdivisions to which it was attached may, so the argument proceeded, render the right valueless. To illustrate this point counsel referred to the facts of the present matter where, because of the topography and in order to follow the path of the route chosen in respect of the original Erf 4113, the new owners had to have a ramp built at enormous cost, whereas access could have been obtained by merely driving across the boundary between Erf 4112 and Erf 5027 at a point where the two sites are level with each other.

[11] In deciding the issue before him Ludorf J held that the clear and ordinary meaning of the words used in what he termed "the preamble" to the condition quoted in the title deed is that the property acquires the very same rights previously enjoyed by Erf 4113. The learned judge also held that it "is ... significant that what follows on the preamble is enclosed in inverted commas" and that that "indicates that the right of way referred to is the original right of way and not a new right". With respect to the learned judge the emphasis on the inverted commas was misplaced. To my mind the inverted commas merely signify a direct quotation from another title deed, that of Erf 4113 before the subdivision.

[12] What must be remembered is that the servitude in favour of Erf 5027does not found its origin in an agreement between the present owner of Erf 5027and the owner of Erf 4112 but in the original grant. In interpreting the deed regard must therefore be had to the wording of the original condition. That a servitude in favour of Erf 5027 exists is not in issue. What is, is whether the owner of Erf 5027is entitled to select an additional route over the servient tenement separate from the existing one that runs from the remainder of Erf 4113.

[13] Appellant's counsel submitted that the servitude in question is a general servitude which does not specify a route. That being so the owner of Erf 5027

was possessed of a right of way which it was entitled to exercise in a way which was most practical and convenient for itself, provided that in the exercise of that right it caused the servient tenement the least amount of inconvenience and loss possible. 6

[14] The servitude granted in favour of the original Erf 4113 is a reciprocal general servitude of road and route "of which may be agreed upon from time to time" by the registered owners of erven 4112 and 4113. It could accordingly only come into being if and when its route was so defined. (*Nach Investments (Pty) Ltd v Yaldai Investments (Pty) Ltd and Another* 1987 (2) SA 820 (A) at 832 C-D.) In that case Hefer JA remarked that where a general servitude is intended and there is reference in the agreement to a future agreement in respect of the route then what is envisaged is an initial general right which may be converted to a specific one by subsequent agreement (at 831 G-H). In the present matter a route was indeed so defined. A definite servitude was therefore constituted which could only be altered by mutual consent (*Gardens Estate Ltd v Lewis* 1920 AD 144 at 150.) However, even with a general servitude (*simpliciter*) the grantee (dominant tenement) may select a route but must do so *civiliter modo* (for the meaning of which see *Kakamas Bestuursraad v Louw* 1960 (2) SA 202 (A) at 217 D-E). Once the grantee has exercised his election he cannot afterwards change it unilaterally (*Gardens Estate Ltd, supra,* at 150).

[15] In the present matter Erf 4113 was entitled to one road and the route was agreed upon between the dominant and servient tenements before the subdivision. Mere subdivision of the dominant erf could not have increased the number of roads or the route of the existing road. To hold otherwise would be to grant to a subdivision a greater right to that which the dominant tenement enjoyed before it was subdivided. In my view the Court *a quo* correctly answered the question posed.

[16] The appeal is dismissed with costs.

L MPATI JA

CONCUR:
SMALBERGER ADCJ)
HARMS JA)
STREICHER JA)
BRAND AJA)