

ACCESS TO NEIGHBOUR'S LAND: REGISTER YOUR RIGHTS OR LOSE THEM

Stoch and Another v Mntambo N.O. and Others (38240/2020) [2022] ZAGPJHC 544 (11 August 2022)

If owner A's garage is situated on owner B's land by virtue of an oral agreement, neighbour law judgments' alarm bells should be heard loud and clear. The parties in this matter had such an arrangement in place and, although commencing steps to register a servitude, never bothered to see it through. When their relationship soured, the Court was asked to intervene. Property owners should note, as the Court emphasized, that because the deliberations between the owners regarding the servitude were not finalised and reduced to writing and signed, there was no agreement nor compliance with the Alienation of Land Act. Make sure to regularise and register rights over another's land; the judgment illustrates the difficulties that otherwise arise.

The Judgment can be viewed [here](#).

FACTS

This matter emanates from a small housing estate, named Keurbaai. It was developed in the early 1980s and the land was then held by Keurbaai Shareblock (Pty) Ltd ("the share block company") as a consolidated erf. Subject to the terms of a user agreement, the share block company issued a number of shares, each entitling owners thereof to the exclusive use and enjoyment of their sites.

In the late 1990s the shareholders of the share block company took a decision to subdivide the consolidated erf into individual erven. The goal was to transfer the individual erven from the share block company to individual shareholders and that the subdivided erven will align with the site allocation. This process was finally undertaken in 2013.

On the sites numbers 5 and 6 stood semi-detached homes, comprising of one single building, straddling both properties. Initially the owners were family members, brothers-in-law. For various reasons, it was practical and convenient at the time that garages for the sites be constructed on site 5 to service both units 5 and 6.

Four garages were built. The two garages located on the eastern side were used by the owner of site 5 whilst the other two on the western side belonged to the owner of site 6. The arrangement that the two western garages would be for the exclusive use of the user of site 5, remained in place for subsequent purchasers of share blocks.

Stoch and Raphaely became shareholders in 1999. Upon the sale of his share block to them, the seller requested them to allow unit 6's owner to continue utilizing the garages.

Initially, Stock and Raphaely permitted the Trust to utilise the garages. Then in 2014, after the individual subdivided erven were transferred to the share block holders in accordance with the previous site allocations, the two neighbouring owners commenced talk about regularizing affairs and registering a servitude in favour of erf 6 over erf 5 for access to and use of the garages. At the time, Stoch and Raphaely believed that the garages "belonged" to the Trust and that they had no rights thereto.

Much to-ing and fro-ing ensued, as there was a need to create a balance between giving the Trust access to the garages on site 5 and at the same time preserving the value of site 5. In this time, and because all the parties believed that the garages on the western side "belonged" to site 6, the Trust effected improvements by building a storeroom at the back of the garages, installing electric garage doors, a geyser and DB board. Stock and Raphaely did not object to these improvements as they understood these garages to belong to site 6.

Notably, when the transfers of the properties from the share block were effected, no servitude was created.

The parties commenced steps for a surveyor's diagram to be drawn up in respect of the servitude so as to procure registration of the servitude subsequent thereto. However, procrastination proved to be the thief of time and neither party processed this aspect further, despite initially briefing a notary to commence with the process.

There was no activity for a number of years.

The current proceedings were triggered when Stoch and Raphaely stated that they intended making personal use of the garages in due course and that they will allow the Trust, in the meanwhile, to use the garages nonetheless, but will not register a servitude. They sought an eviction order as well as an interdict against the Trust directing the latter to refrain from certain activities. In response, the Trust relied on the "agreement" regarding registration of a servitude and asked the Court for an order directing Stoch and Raphaely to sign the necessary documents to achieve such registration.

HELD

The purported repudiation

- Repudiation consists of two parts: the act of repudiation by the guilty party, evincing a deliberate and unequivocal intention no longer to be bound by the agreement, and the act of his adversary "accepting" and thus completing the breach.
- In the present matter, the parties regarded the western garages as belonging to the Trust, hence the improvements thereon. Stoch and Raphaely could not then state that the Trust's assertion of ownership of the garages amounted to a repudiation. Upon a proper analysis of the facts, it could not have been intended to deprive one erf of garages and grant the other four garages. The simple truth is rather that Stoch and Raphaely changed their minds.

Can an interdict be granted?

- It is trite that in order to succeed in an interdict, a party needs to prove a clear right or injury actually committed or reasonably apprehended and lack of an adequate alternative remedy. Apart from that, Stoch and Raphaely had an alternative remedy. They could not prove any injury actually committed or reasonably apprehended when they permitted the Trust to occupy the garages, which they said belonged to them.
- Accordingly, Stoch and Raphaely could not also succeed to interdict the Respondents from using the garages.

Was the agreement to register a servitude inchoate?

- On the facts: (i) Raphaely and Stoch mentioned that it was a condition of their purchase of the property to grant the owner of erf 6 access to the relevant garages. (ii) They are the ones who referred the Trust to a Notary to commence the steps for registration of a servitude. (iii) There was too, an agreement to register a servitude in order to formalise the existing recognition of the Trust's rights to the garages. However, the question remained whether this was an inchoate agreement.
- There is substance in the submission that the agreement was inchoate. At the time of negotiating the details and route of the servitude, there were proposals and counter proposals between the parties. Therefore, the parties had not exhausted their search for a solution.

- If the intention was to constitute a specific right of way, until the route is agreed upon, the agreement was inchoate.

The Alienation of Land Act: Was writing a requirement for the agreement?

- Our law holds that a servitude such as *habitatio*, *usus* or *usufructus* constitutes a subtraction of the dominium in land. It follows that any agreement granting such right has to comply with section 2(1) of the Alienation of Land Act ("the ALA"), which makes it a requirement for validity that the agreement be in writing and signed.
- In any event, even if section 2(1) of the ALA was not applicable, to order a new servitude to be registered, without the consent of the owner of the land, as requested by the Trust 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.
- Accordingly, the Court could not order the registration of the notarial deed of servitude.

CONCLUSION

The Trust's lackluster handling of this matter and its neighbours' change of mind costed both parties a fortune. It is trite that the Courts could not create contracts for the parties. In this instance, the Court was called upon to cancel and, in the same breath, enforce the same contract because Stoch and Raphaely failed to cancel it properly and the Trust failed to enforce it timeously.

The result of this judgment is that the status quo remained and "... *the ball is in the court of the parties to allow common sense to prevail. Good neighbours make good fences ...*".