UNREGISTERED SERVITUDE: NEIGHBOUR BLOCKING SHARED DRIVEWAY - WHAT RECOURSE IS THERE?

McLeroth v Naicker and Others (43885/2018) [2020] ZAGPJHC 177 (11 August 2020)

In this matter a dispute arose in a small development where it was self-evident that the 5 subdivided erven had to grant each other servitudes of right of way in order to access the sole driveway that gave access to a public road for each. Although servitudinal diagrams were approved by the Surveyor General, these were never registered against the title deeds. This judgment illustrates one way in which an owner can claim that such servitude must be recognized and registered in favour of her property.

The Judgment can be viewed here.

FACTS

During 1984, the Merbuild company commenced with developments on a property that it owned. For these purposes, the land was subdivided into 5 portions. Only one portion had direct access to a public road, all the other in the form of a panhandle, relying on access across the properties of each other in order to access a communal driveway that gave access to the public road.

It was contemplated by Merbuild that the common driveway would provide access for the individual properties to the public road and that reciprocal servitudes to this effect would be registered against the properties upon the first transfers. For this purpose, servitudal diagrams were framed and approved by the Surveyor General's office.

Mistakenly, the notarial agreements were never entered into or registered against the title deeds.

Many years later a dispute arose amongst two adjacent owners, the outcome of which was that Naicker commenced construction of a wall on his property which would have had the effect of obstructing his neighbour, McLeroth's, access to the common driveway area.

McLeroth brought an application for an order: (i) restoring her access to the driveway (by way of *mandament of spolie*, it appears, although the judgment is not clear on this); and (ii) to compel registration of a servitude as was initially anticipated in 1984. She argued:

1. She acquired the entitlement to registration of the servitude through acquisitive prescription after a period of 30 years of undisturbed use of the common driveway by her or her predecessors in title;

2. She is entitled to registration of the servitude in consequence of the driveway on the adjacent properties constituting a via *necessitas*; and

3. The unregistered servitude contemplated by Merbuild and which has been in use from the beginning of the development, was readily apparent to Naicker and for that reason it should now be registered.

Only Naicker opposed the application; all other owners consented to enter into a notarial agreement for the registration of such praedial servitude.

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HELD

- The servitude pertinent to this matter is a praedial servitude – the type which pertains to two pieces of land that are in close proximity to, or next to each other. A praedial servitude is established over the servient property for the benefit of the dominant property in perpetuity, irrespective of the identity of the owner. Both the dominant and servient owners are entitled to use the servitude area. The owner of the servient property retains all the rights flowing from his or her ownership provided that the exercise of such rights may not interfere with the rights of the servitude holder. The relationship between the dominant and servient owners is governed by the principle of reasonableness. Where there is a conflict of interest, the interest of the dominant owner will have precedence over those of the servient owner, subject to the principle of reasonableness. The holder of the servitude must exercise the servitude *civiliter modo* (in a manner that will cause the least damage or inconvenience to the servient property) and in a civilized and considerate way.

- McLeroth claimed that she acquired the servitude of right of way in consequence of having exercised such right freely, voluntarily and without any let or hinderance for a period of 30 years. The entitlement to make this claim arises from the provisions of Section 6 of the Prescription Act 68 of 1969 ("the Act"), which reads as follows:

  "Subject to … a person shall acquire a servitude by prescription if he has openly and as though he were entitled to do so, exercised the rights and powers which a person who has a right to such servitude is entitled to exercise, for an uninterrupted period of 30 years or, in the case of a praedial servitude, for a period which, together with any periods for which such rights and powers were so exercised by his predecessors in title, constitutes an uninterrupted period of 30 years."

- The section provides that the period of 30 years need not have been exercised only by the person who seeks the registration of the servitude. Rather, the 30 year period is the aggregate period and includes the period for which it was exercised by any predecessors in title.

- Chronologically, from the time that the subdivisions by Merbuild were obtained, built on (1984) and sold (1988) for the first time, McLeroth as well as her predecessor, used the driveway without hindrance and to all intents and purposes fully in accordance with the provisions of section 6 of the Act. The use was for the purpose of exercising a right of way.

- The only element that Naicker placed in issue was that there was not "free and unhindered use as though she were the owner", as the usage was in terms of an agreement with Merbuild to this effect. Hence, Naicker argued McLeroth's use did not fall within the ambit of the Act.

- However, the defence had to fail as there never was an agreement on the use of the common driveway and servitudes over other owners' properties. It was conceded that there was an intention on the part of Merbuild, who had gone so far as to obtain the Surveyor General's approval to register the servitudes, to register these servitudes when the first transfers took place. Merbuild's intention cannot however be elevated to the status of an agreement – the erven were transferred at different times and the new owners simply used the common driveway for access, not anticipating any agreement to that effect.

- Given the manner in which McLeroth's dwelling was constructed it would in any event have been highly improbable if not absurd if each owner of that portion were to ask whether they had the right to access the property from the only place they could, given the construction. It would have been self-evident and obvious.

- Since there was no "agreement" to use the property as argued by Naicker, it followed that McLeroth by using the right of way over the land of her neighbour as she (and her predecessor) did for over 30 years, had

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acquired a servitude of right of way over the that part of Naicker's property that comprises the common driveway, by way of acquisitive prescription.

CONCLUSION

The action succeeded.

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