

## WILL SERVITUDES SURVIVE MERGER WHEN THE DOMINANT AND SERVIENT LANDS ARE ACQUIRED BY ONE PERSON AND LATER TRANSFERRED TO NEW OWNERS?

Turnbury House Properties (Pty) Ltd v Wallin and Another (18924/2020) [2022] ZAWCHC 95 (18 May 2022)

*A praedial (land) servitude is a specific type of strong right that imposes a burden upon one person's property, by restricting the rights and powers of the owner in favour of the owner of another property. Where the same owner gets to own both properties, merger occurs and the servitudes are said to terminate. Do they revive if the owner later sells the two properties to two new owners? The Court here answered that yes, they can be revived, in certain circumstances. The Court also affirmed that in specific circumstances, a borehole servitude can survive destruction of the borehole. The judgment is very informative and a good read for immovable property owners either enjoying servitude rights, or carrying the burden thereof.*

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

### FACTS

Turnbury House Properties (Pty) Ltd ("Turnbury") and Wallin owned neighbouring farms in the Devon Valley near Stellenbosch. Each of their title deeds contained servitudes granting Turnberry certain rights over Wallin's land.

At the time of the dispute before the court, Turnberry was using only a small portion of the servitude road, but sought to use the servitude rights to full. Wallin, however, refused to permit Turnbury to use the road and stopped providing that property with water, claiming that he previously (following the purchase of the property by Turnbury) did so not because he was obliged to, but as "as a form of goodwill".

Turnbury therefore applied to court to enforce the servitudes to use a road over Wallin's property for the supply of water from a borehole on the latter's property, and the servitude for the use of one third of the water sourced from springs on Wallin's property. The servitudes were registered in the relevant title deeds.

Wallin defended the matter, arguing that the servitudes hadve been extinguished because the two properties were previously owned by the same owner, a close corporation ("the CC") and had therefore terminated as a result of merger.\* (The *maxim nulli res sua servit* applies, which roughly translated means that no-one can have a servitude over his own property.) The history of the acquisition of the properties is that the CC at some stage obtained ownership of both properties and then, in 2008, sold the properties to Wallin and Turnbury respectively, in separate transactions. Transfer to Wallin occurred first and contained the reference to the servitudes owing to the neighbouring land.

In the period before transfer to Turnbury was effected, a few months later, Wallin obtained a legal opinion to the effect that the servitudes had lapsed as a result of merger. Wallin forwarded the opinion to the conveyancer attending to the transfer to Turnbury. The CC, seller, was at the time assisting Turnbury to ensure the servitude rights were in place. In the end, both the title deeds of Turnbury and Wallin reflected the details of the servitudes that were contained in the titles of the CC.

Both sale agreements contained a provision to the effect that the property was sold subject to all servitudes mentioned or referred to in the title deed of the property sold.

It appeared further from the affidavits that Turnbury was, at the time of contracting, concerned about water rights and purchased its property *bona fide* in the belief that its property enjoyed the servitude rights.

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After the transfer, Wallin and several attorneys representing him, reverted to confirming the existence of the servitudes in various separate matters. For example, Wallin himself in December 2011, when Turnbury repainted the entrance pillars, notified the latter's attorneys as follows: "Can you please inform your client [i.e. Turnbury] that right of access does not mean right to interfere with the property of the landowner." And in July 2012, writing on behalf of Wallin, his attorneys stated: "At present, our clients intended to put up a gate on his property, which will in no way restrict your client's right of way over the property, as your client will be given remote/codes in respect thereof. ... In addition thereto our clients intend to build speed bumps, which will also in no way affect your client's right of access to the property."

Regarding the borehole servitude in particular, Wallin contended that the servitude was in any event terminated by destruction, because the borehole had collapsed and did not produce water. Turnbury sought specific performance of the servitude, by permitting it to continue to use water in accordance with the servitude, albeit not from a borehole at the particular point referred to in the servitude, but from Wallin's new borehole.

## HELD

### *Principles relating to servitudes*

- A servitude is a limited real right that imposes a burden upon someone's property (in the present matter, immovable property) by restricting the rights, powers and liberties of its owner either in favour of another person (a personal servitude) or in favour of the owner of another immovable property (a praedial servitude, as in the present matter).
- The most important manner in which a servitude is established in our law is by way of registration thereof in the Deeds Office against the title deed of the servient property, and this constitutes *prima facie* proof of the existence thereof.
- Servitudes are in principle of unlimited duration. A servitude is terminated only in the following ways: Expiry of the time period for which the servitude was granted or the fulfilment of a resolutive condition; agreement between the parties; expropriation, abandonment or prescription; the death of the usufructuary or the registration of a transfer of land free from a usufruct on a sale in execution; merger; or the permanent impossibility to exercise or enjoy the servitude.
- In relation to merger, there is uncertainty in our law as to whether the termination of a servitude upon merger is truly permanent.

### *The arguments regarding merger and no revival*

- Wallin's main defence was that because the CC owned both properties before selling them to Wallin and Turnbury respectively, the servitudes no longer existed, nor did they revive upon transfer to the new owners.
- Case law and the academic writers are not in agreement in relation to the revival of a servitude when, after having been owned by one owner, the relevant properties are again sold to different owners.
- The correct approach is as follows:
  1. It is relevant that, in the present matter, the servitude was duly registered and remained reflected in the title deeds of the dominant and servient tenements and duly recorded (and of apparent full force and effect) in the Deeds Registry.

2. Our law recognises that a previously existing servitude is susceptible of being revived upon subsequent severance of the properties.
  3. In order to bring about an express revival of a previously existing servitude which was duly registered, and having regard to modern concepts of registration in the Deeds Registry, it constitutes sufficient revival of a previously existing and duly registered servitude if, upon severance of the properties, the transfer deed conveying the former servient tenement were to incorporate (even if only by reference) the servitude as one of the conditions to which - according to the Deeds Registry - the transferee becomes subject.
  4. The aforementioned does not occur automatically upon severance, but follows where this outcome reflects the agreement between the parties, as reflected in the contract of sale. The act of registration is part of the execution of the agreement of sale. If it is the dominant tenement that has been sold, the registration of the servitude condition is the formal judicial delivery of the servitude enjoyed by the dominant tenement over the servient tenement. If it is the servient tenement that has been sold, the registration of the servitude condition is the formal judicial act of delivering the property subjected to rights of third parties, viz that the servient tenement is delivered subject to the rights which, in terms of the servitude condition, the owner of the dominant tenement may exercise over the servient tenement. The record of this formal delivery, registered in the Deeds Office, is notice to the world and speaks for itself.
- It is, until amended, the judicial record of what the seller has sold and delivered to the purchaser. It may be amended if: (a) there was no just cause for the execution of the deed, for example, because the transfer was induced by fraud or because the contract, in execution of which the deed was registered, was induced by fraud; and (b) that the deed does not reflect truly the agreement entered into by the parties, for example, because the deed as registered does not truly carry out, and is not a true record of the contract entered into by the parties or because the contract, in execution of which the deed was registered, does not, on account of mutual error, reflect the true intentions of the parties and the deed in consequence does not carry out the contract nor is it a true record of the execution of the contract.

### ***In conclusion regarding the revival***

The registration of the servitude in both Turnbury's and Wallin's title deeds is prima facie proof of the existence of the servitude described in the deed and remains unassailable until the deed is rectified. Wallin had not applied for the rectification of the deeds and there does not appear to be any grounds therefor. He never alleged that when he purchased his property and took transfer that he believed, in good faith, that the deed of transfer did not reflect the correct position or that there was no just cause for registration of transfer, or that there was fraud.

It must therefore be concluded that the servitudes existed and were enforceable.

### ***The borehole servitude***

- There is no exhaustive list of praedial servitudes. The terms of a particular servitude must thus be interpreted in order to give it content. In interpreting, the court considers context, purpose and what is sensible and business-like in a unitary exercise. The manner in which parties who are subject to an obligation discharged it - that is, their subsequent conduct - also falls to be taken into account.
- In this case, the servitude, the provisions of which have been quoted above, refers to *"the right to the use of water from a borehole situate on the remaining extent of the property hereby transferred [Wallin's property] and situate at the spot marked M on Diagram No 6376/1947."*

- The subject of the servitude is not “the” borehole. The subject of the servitude is the use of water sourced from underground Wallin’s property. The purpose of the servitude is to provide the applicant’s property with a direct and uninterrupted flow of water sourced from underground water on Wallin’s property. The business-like construction of the terms of the servitude requires that its purpose be given effect.
- A servitude is extinguished when it becomes permanently impossible to exercise it, for example, if the dominant or servient property is totally destroyed. Examples of total destruction is where a landed tenement is swept away by the sea, becomes permanently inundated or is destroyed by an earthquake, where the natural condition of the servient tenement changes so radically that the particular servitude can no longer be exercised, for example, a fountain which forms the basis of a servitude of aqueductus dries up permanently. A servitude is, however, not extinguished by the destruction of a building on the dominant or servient tenement, because if the building is rebuilt the servitude can again be exercised, even if the period of prescription has run its course.
- The examples of destruction above show that destruction extinguishes a servitude where: (1) the destruction is a permanent consequence of vis maior, and (2) the *vis maior* event entirely destroys the subject of the servitude (though not necessarily the entire servient tenement). Where, however, the destruction so occasioned can be remedied, the servitude is not extinguished. Where the subject of the servitude itself is not entirely destroyed, then the servitude is not extinguished.
- The sort of remediable circumstances which do not extinguish a servitude have as their correlative the sort of circumstances which permit an owner of a servient tenement to relocate the servitude. In that regard, the Supreme Court of Appeal has recognised that a servient owner may relocate a servitude at its cost, outside of “*the strict terms of the grant*”, where circumstances have changed, and the dominant owner suffers no prejudice. The source of this finding is the Roman-Dutch principle that “*the owner of the servient tenement may not do anything by which the use of the servitude is rendered less useful or convenient. He may therefore not change the condition of the property, nor transfer the exercise of the servitude to or impose it upon any part of the property other than that on which it was originally laid. Nevertheless, when the original institution has become more burdensome to him, or hinders him in carrying out any necessary or useful repair, he may offer to those entitled to the right of servitude another equally good and convenient for their exercise, at his cost; an offer so made cannot be refused*”.
- Servitudes are in principle perpetual. Boreholes, on the other hand, are not indefinite. Particular boreholes, by their inherent nature, do not always provide a supply of water in perpetuity, because they may collapse or dry up, but that is not to say that a farm on which a borehole is situated will not yield a supply of underground water which may be extracted from other boreholes. The present matter is a case in point: As mentioned earlier, in the 1980’s the previous owner of Wallin’s property abandoned the borehole at point M and sunk a new borehole at point X. In February 2020, Wallin suffered problems with the pump in the borehole at point X. The pump fell into the borehole and then, Wallin alleged, he became aware that the borehole at point X might have collapsed. He proceeded to drill a new borehole at point H (also shown on the uncontentious diagrams attached to the notice of motion).
- Boreholes also differ from springs. People drill boreholes in order to access groundwater. When one borehole fails, another can be drilled, whilst springs occur naturally. The drying up of a spring thus does not stand on the same footing as the collapse of a borehole. The right to source water from underground a property by way of a borehole differs from the right to source water appearing on the surface, in that the owner of a property subject to a borehole servitude may have to suffer the drilling of a borehole to meet the purpose of the servitude (and that would be the difference between the servitudes included in the title deeds in relation to the borehole and the springs on Wallin’s).
- Boreholes are more comparable to buildings than they are to entire properties, or to springs, because they are

man-made. Where buildings are destroyed, servitudes over them are not usually extinguished. The reason is buildings are able to be rebuilt and the servient owner is permitted to do so.

- It is clear from the papers that, from the time that Wallin acquired his property from the CC in 2008, and until February 2020, Wallin provided Turnbury with water from the borehole situated not at point M, but at point X. Wallin alleged that he supplied water from the borehole at point X not because the servitude obliged him to do so, but as a sign of goodwill.
- This allegation is implausible, because, as shown earlier, the record of the dealings between the two neighbours indicated that Wallin acknowledged the existence of the servitudes on various occasions, albeit that he tried to get rid of his obligations under the servitudes. The only inference from the papers is that Wallin supplied the water because he realised that the servitude obliged him to do so. The parties' subsequent conduct therefore supports the interpretation of the servitude to impose a burden on Wallin's property by way of boreholes drilled to replace the borehole at point M, being the boreholes at point X, and now at point H.
- In these circumstances, the correct, business-like and sensible interpretation of the servitude, which accords with its purpose and the conduct of the parties, is that it affords Turnbury the right to the use of water sourced from underground Wallin's property, by way of a borehole situated on such property at point M, and boreholes subsequently drilled to replace the borehole at point M. The servitude is perpetual, even if the boreholes are not indefinite. The collapse of the borehole at X (the change in circumstances) does not permanently impair the applicant's ability to source water from Wallin's property.

#### ***In conclusion regarding the borehole servitude***

In the premises, the borehole servitude has not been terminated as a result of destruction.