

GARDEN SERVITUDE MORE THAN A GARDENER'S CAPRICE

Margot Berzack v Huntrex 277 (Case no 210/2021) [2023] ZASCA 17 (21 February 2023)

A praedial servitude, such as a servitude right of way, offers some permanent benefit that serves more than the owner's personal pleasure or caprice, to the owner of the dominant land over the land of another. Such a servitude is registrable against the title deeds of the land parcels in question and, in principle, lasts in perpetuity. Personal servitudes, on the other hand, grant limited rights to a specific person for the use and enjoyment of another's property and do not exist longer than the lifetime of the rights holder. The court in this judgment had to decide whether the garden-type servitude right registered by an owner, when subdividing and selling off part of her property, over that portion of the subdivided property to where her garden extended, was personal or praedial in nature. It was a win for the green fingered servitude holder and her successors in title. The judgment is also a valuable read to learn how courts approach the question of determining the nature of a servitude and hence the consequences that flow therefrom.

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

FACTS

In 1982 and due to security concerns on her large Constantia property, Ms Berzack procured a subdivision. At the time her intention was to subdivide the property exactly in accordance with the area where her house and large garden (enclosed with a wooden pole fence) was situated and to "cut off" the part where she had not established a formal garden.

However, due to local municipal ordinances that imposed minimum erf sizes, she had to alter the plans. This resulted in a subdivision where part of the garden she lovingly maintained was situated on the subdivided property. In order to retain her rights to this part of the garden, a servitude was registered against the title deed of the subdivided portion (and in her title deed) allowing her to develop and maintain a garden on a 20m² portion of the subdivided portion.

The subdivided portion had subsequently changed hands a few times and the current owner was Huntrex 277 (Pty) Ltd ('Huntrex') which acquired the property with the terms of the servitude endorsed on the title deed.

The wording of clause P in the title deed which embodied the servitude was as follows:

"P. SUBJECT FURTHER to the following conditions contained in said Deed of Transfer No. T. ... imposed by ... BERZACK in favour of herself and her successors in title as owner of the REMAINDER OF ERF ...CONSTANTIA, which conditions are as follows:

(a) The property hereby transferred is subject to a servitude area 20 (TWENTY) meters wide, The Western Boundary

(b) The said servitude shall be subject to the following terms and conditions, namely:

(i) No wall or fence of any description shall be erected on the servitude boundary except extension of existing type of fencing (wooden pole fencing).

(ii) The seller shall have the right to plant, control, care for and renew the existing garden situated within the servitude area more fully described above.

(iii) *The seller shall have full rights of access to such servitude area in fulfilment of the rights hereby granted.*

(The term of Seller shall include her Successors-in-Title)."

A dispute arose between Ms Berzack and Huntrex regarding the wooden pole fence. Huntrex wanted to erect a different fence - and a gate. This resulted in an application being launched by Huntrex in the High Court to declare that the servitude was a personal servitude of *usus** (which was not capable of registration in terms of the Deeds Registries Act; granted limited rights to the holder; and would allow Huntrex to erect a new fence and gate) and not a praedial servitude.

Huntrex was successful in the Cape Town High Court which held that the servitude in question lacked *utilitas** which was a pre-requisite of a praedial servitude. In doing so, the Court also made separate findings in respect of the sub-provisions of condition P in the title deed which housed the servitude details. For example, it held that P(b)(i) was praedial in nature, but that P(b)(ii) and (iii) were separate and of a personal servitude nature.

(*The relevance of the *utilitas* principle in servitudes is explained as follows in our law: "A praedial servitude must offer some permanent advantage or benefit to the owner of the dominant land *qua* owner and must not merely serve his or her personal pleasure or caprice. This is known as the requirement of *utilitas* (utility). It has already been intimated that utility is a fundamental requirement. . . where additional benefits accompany the pleasurable pursuits of a particular person, such servitude can validly be constituted as a praedial servitude. Examples are a servitude of view (prospectus) which simultaneously guarantees a free and useful supply of light . . . In present day law it is accepted that the utility requirement is not only satisfied if the particular servitude is of direct agricultural utility to the dominant tenement but also if it increases its economic, industrial or professional potential.'

A personal servitude of *usus* (use) grants limited rights: In the case of immovable property, the right holder may occupy the land, may take the fruits for his daily needs but may not sell it and he may not grant a lease of the property.)

Appeal to the Supreme Court

Ms Berzack appealed, arguing that the High Court's interpretation of the servitude was not supported by the plain language used in the servitude, the intention of the relevant parties when registering the servitude and the subsequent conduct of the various owners of the Huntrex property. The High Court was also wrong to adopt a sequestered approach to the provisions of the servitude. Secondly, it was contended that the High Court erred in failing to appreciate that the *utilitas* could be gleaned from the fact that the existing servitude benefitted the Berzack property and added an economic value that effectively increased the size of the Berzack property.

HELD

- To arrive at a correct interpretation of the meaning of the servitude in question, the plain wording should have been taken and interpreted against the background circumstances giving rise to the creation of the servitude. That exercise began when Ms Berzack first negotiated the servitude when she sold the property to one Wellens in 1983. It was therefore wrong of the High Court to adopt a sequestered approach by excising different aspects of the same servitude.
- The meaning of clause P, read as a whole, shows that the element of *utilitas* was present. The Huntrex property had been serving the Berzack property continuously for a period spanning more than thirty years. The right to the garden was reserved on the servient land and it enured in favour of the Berzack property, serving the pursuit of Ms Berzack's personal pleasure.

- In fact, the enjoyment of the servitudal rights by the owner of the dominant tenement is a natural feature of a praedial servitude. In addition, the servitude rights as described in clause P increased the economic potential of Ms Berzack's property. This was in line with the intention expressed in writing by Ms Berzack and Mr Wellens in 1983, that the garden should be reserved on the Huntrex property for the former's benefit and subsequent successors-in-title of the Berzack property in perpetuity.
- It does not matter that a garden servitude was not one of the traditional servitudes recognised in our law, as there is no exhaustive list of real servitudes. In modern South African law, types of rights and restrictions found in traditional servitudes have been relaxed to the extent that "their number is practically unlimited although certain general requirements have to be fulfilled". The crucial point is this: "The common law on servitudes illustrates that property rights have dimension, colour and complexity far beyond any barefaced general proposition about ownership. Servitudes limit the rights of ownership and place certain burdens on property by affording power of use and enjoyment to another. That has been the case for thousands of years, for our law of servitudes, both consensual and non-consensual, is derived from the Roman law."
- In this case the features of the garden servitude met the distinctive characteristics of a praedial servitude, not a personal servitude. Previous case law stated that: 'A praedial servitude is one where there are at least two pieces of land implicated. The servitude confers benefits on one piece of land, the dominant tenement, while imposing corresponding burdens on the other, the servient tenement. A praedial servitude vests in the owner of the dominant land. But neither its benefit nor its burden can be detached from the land. These are passed from one land owner to the next.'
- By contrast, a personal servitude is a real right that attaches to the burdened land, but is also always connected to an individual. He or she holds the right to use and enjoy another's property. That right is non-transferable: it cannot be passed on to another. However, personal servitudes are always enforceable against the owner of the property burdened by it – even when that owner changes.'
- The description of a personal servitude of *usus* makes it plain that the garden servitude in this case was not a personal servitude of *usus*.

CONCLUSION

The appeal court found in favour of Ms Berzack.