



before the court. I will therefore assume its provisions to be those which the Applicant has stated, and with which statement the Respondents appear to be in agreement. It is clearly written evidence of a term ancillary to the Deed of Sale "MHZ1" which was agreed upon prior to the execution of the Deed of sale itself. The parole evidence rule excludes only evidence of oral collateral terms and does not apply in this case to a document signed by the parties recording a term of a transaction they contemplated concluding. I fail to see any reason why the provisions of "MHZ3" are not effective and binding on the parties inter se.

The agreement is a servitude which was identified by Hoexter J in *VESTIN ESHOWE (PTY) LTD v TOWN COUNCIL OF THE BOROUGH OF ESHOWE 1978 (3) SA 546 (N)* in the following terms

A personal servitude may be constituted in favour of a particular person to use the land of another for almost any specified purpose. Dealing with the topic in *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd 1913 AD 267* INNES CJ observes at 281 - 2:

(See Voet 7,1. 2.) There is nothing in principle to prevent portion of the globular dominium of fixed property being transferred to an individual for his life, instead of to the owner of an adjoining property in perpetuity. (See Voet 8.1.4.) And there are many instances in which South African Courts have recognised as personal servitudes rights which, had they been

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attached to the ownership of other land, would have constituted praedial servitudes. See *Dreyer v Ireland 1874 Buch 193*; *Oosthuizen v Plessis 5 Juta 69*; *Louw v Van der Post 11 CLJ 151* etc. Now, the right of trading upon the property of another amounts to the right of using and occupying that property or part of it for the specified purpose. And that right (when not embodied as a condition in a lease) seems to me theoretically capable of being granted and registered as a personal servitude."

It is convenient at this stage to examine the nature and extent of the rights acquired by the Town Council against Ziegler. The essence of the agreement embodied in annexure "A" is an irrevocable consent by Ziegler to the future registration of a servitude enabling the Town Council to lay pipes across the property - the exact route of the pipe-line having yet to be determined. That agreement, though binding on the parties, did not by itself vest the legal title to the servitude in the Town Council. In such a case;

"The right of the beneficiary is to claim performance of the contract by delivery of the servitude, which must be effected coram lege loci by an entry made in the Register and endorsed upon the title deeds of the servient property"

(per INNES CJ in *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd 1918 AD 1* at 16)."

The agreement concluded by the parties in "MHZ3" creates an obligation to register such a servitude and not only is it binding on the parties, but the respondents are in accordance with the authorities quoted entitled, as they have claimed in their counter application, to have the servitude registered against the title of the property. While its terms are not closely defined, the intention expressed in the document to bestow a life servitude of use and habitation is clearly manifest.

The judgment of the court is, and it is so ordered 1 The Application is dismissed with costs, and

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2a The Applicant is ordered to register a servitude of usus and habitatio over Portion 102(a portion of portion 85) of Farm No. 1117, situate in Mbabane Urban area, District of Hhohho, Swaziland in favour of the respondents securing the rights of the respondents to live upon, use and occupy the property until the death of the last of them to die. Should the Applicant fail to execute the documents necessary to have the servitude registered when called upon to do so, the Sheriff or his lawful deputy is authorised and required to do so on his behalf.

2b The Applicant is to pay the costs of the counterclaim.

S W Sapire

Acting Chief Justice