

## **IN THE HIGH COURT OF ESWATINI**

**HELD AT MBABANE**

**CASE NO. 1408/2022**

In the matter between

**BEEF BOYS ABATTOIR (PTY) LTD**

**Applicant**

**And**

**EMANTINI FARMS (PTY) LTD**

**1<sup>st</sup> Respondent**

**SURVEYOR GENERAL**

**2<sup>nd</sup> Respondent**

**ATTORNEY GENERAL**

**3<sup>rd</sup> Respondent**

**Citation:** *Beef Boys Abattoir (Pty) Ltd v Emantini Farms (Pty) Ltd and 2 Others (1408/2022) [2023] SZHC 348 (04 December 2023)*

**CORAM:**

**N.M. MASEKO J.**

**FOR APPLICANT/RESPONDENT:**

**MR. B. NGCAMPHALALA**

**FOR RESPONDENTS/APPLICANTS:**

**MR. Z.D. JELE**

**DATE HEARD: 09/03/2023**

**DATE DELIVERED: 04/12/2023**

Preamble: Civil law – Servitude right of way – application for a servitude right of way where the subsequent purchaser of a

farm was made aware of the existence of the unregistered servitude at the time when he purchased the farm.

Held: That the Applicants are entitled to have the servitude registered and the respondent is ordered to facilitate the registration of the servitude by the Registrar of Deeds.

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## JUDGMENT

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### MASEKO J

- [1] The original application was filed by the Applicant on the 27<sup>th</sup> July 2022 for an interdictory relief to have the 1<sup>st</sup> Respondent re-open the flow of water as well as authorizing access to the furrow traversing through Portion 11 of Farm No. 930 District of Manzini.
- [2] The matter was thereafter postponed on numerous occasions whilst the parties negotiated a settlement. Eventually the 1<sup>st</sup> Respondent filed its Answering Affidavit on the 3<sup>rd</sup> August 2023 and also made a Counter-Application within its Answering Affidavit.
- [3] For ease of reference the Counter-Application is found at pages 58-62 of the Book of Pleadings marked Book/Volume I bearing the Registrar's stamp of the 21 September 2022. This Counter Claim or Counter Application seeks the registration of a Servitude Right of Way over property described as Remaining Extent of Portion 12 of Farm No. 930 District of Manzini. This judgment is in respect of this Counter-Claim since the parties reached an agreement that it is the crucial aspect which this Court has to deal with.

**THE INSPECTION IN LOCO:**

- [4] Owing to the complex nature of land diagrams it became necessary that the Court conduct an inspection *in loco* in order to appraise itself of the geographical situation of the farm in question and also to be shown the access route in the farm which is sought to be declared as a servitude.
- [5] The inspection *in loco* was conducted on the 18<sup>th</sup> and 20<sup>th</sup> October 2022, and about 11 focal points were designated as Scene 1 to Scene 11 for ease of identification and reference as follows:-
- Scene 1: is the junction leading to the Botanical Gardens, Beef Boys and Emantini Farm;
  - Scene 2: is the recently constructed gate on the access road in the property owned by Beef Boys. This gate is also used by Mr. Sabelo Simelane;
  - Scene 3: this is the water reservoir which was empty at the time of the inspection *in loco*. It was empty because there is no access to the source being Ngwempisi River to service the furrow wherein the water from the aforesaid Ngwempisi River flow into the Reservoir (Scene 3);
  - Scene 4: this is the triangular junction past the Reservoir wherein the access road on the unregistered servitude joins the registered servitude. All parties use this road including Mr. Sabelo Simelane who is also a property owner within the major farm;
  - Scene 5: this is the gate and the boundary of Beef Boys property and the commencement of D & T Property. This gate leads to the Ngwempisi River which is the source of the water that is conveyed by a big pipe into the reservoir

- situate at Scene 3. The furrow or canal was also constructed to supply water into the reservoir; Scene 3.
- Scene 6: the Ngwempisi River. This is the source of the water that flows into the canal and the big pipe all the way into the reservoir at Scene 3;
- Scene 7: this is the entrance to the Botanical Gardens through Scene 7. After inspecting the source of the furrow in the Ngwempisi River, the inspection in loco returned to Scene 1 and then proceeded to the botanical gardens via the registered servitude;
- Scene 8: this is the gate that leads to the Beef Boys property;
- Scene 9: this is the Botanical Garden where special plants are planted and this is a tourist attraction site;
- Scene 10: this is the Medicinal Botanical Garden. Medicinal plants are grown in this garden;
- Scene 11: the Garden Maze is one stop centre facility with a basket- ball field combined with volley ball court and linked to the library. There is also a swimming pool measuring 30m by 5m. There is also a fully-fledged Conference Center and an amphitheater.

- [6] It is common cause that whilst the inspection in loco was being conducted, Counsel from both sides would occasionally make their submissions, and these submission were also made in the Heads of Argument.

#### **ISSUE FOR DETERMINATION:**

- [7] The primary issue for determination is whether the access route from Scene 1 to Scene 2 and to Scene 3 curving left to Scene 4 be declared as a servitude. At Scene 4 the access route joins the existing old servitude.

### **THE EXISTING SERVITUDE**

- [8] It is my considered view after having conducted the inspection in loco that the existing servitude has not been utilized in a very long time. Even the gate which is Scene 8 has not been used in a long time, and even the terrain is overgrown clearly demonstrating that that route has not been used in a long time.

### **THE PROPOSED SERVITUDE FROM SCENE 1 TO SCENE 4**

- [8] This is the access route which the Applicant is seeking for the registration of a servitude right of way from Scene 1 right up to Scene 4.

### **ANALYSIS OF THE CASE FOR THE REGISTRATION OF THE SERVITUDE**

#### **RIGHT OF WAY:**

- [9] For ease of reference in this Counter-Application the parties shall be referred to as follows:-

D & T Enterprises (Pty) Ltd	1 <sup>st</sup> Applicant
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Emantini (Pty) Ltd	2 <sup>nd</sup> Applicant
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And

Beef Boys Abattoir (Pty) Ltd	1 <sup>st</sup> Respondent
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Surveyor General	2 <sup>nd</sup> Respondent
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Attorney General	3 <sup>rd</sup> Respondent
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- [10] The Applicants contend that they entered into an agreement with Lloyd Mphilo Dlamini the previous owner of the portion of the farm who eventually sold same to the current owner Beef Boys Abattoir to have the access route from Scene 1 to Scene 4 formally registered as a servitude by the Registrar of Deeds after the diagrams were approved by the 2<sup>nd</sup> Respondent.

- [11] The aforesaid agreement in question is produced before Court marked as **Annexure "TC3"** and was entered into on the 18<sup>th</sup> July 2017. Also on the same day the 18<sup>th</sup> July 2017, Lloyd M. Dlamini then owner of DD4 Ranch and Tony de Castro, the director of the 1<sup>st</sup> Applicant forwarded correspondence to the 2<sup>nd</sup> Respondent applying for the registration of a servitude.
- [12] The collective objection of the parties who signed the agreement was to have the proposed unregistered servitude to be registered by the Registrar of Deeds as a servitude right of way on the terms agreed upon by the parties as contained in the aforesaid agreement. The agreement was signed by Mr. Tony De Castro, Lloyd Dlamini and Sabelo Simelane all of them being land owners.
- [13] The application for the registration of the servitude right of way by D&T Enterprises, and Lloyd Dlamini was approved by the 2<sup>nd</sup> Respondent on the 23<sup>rd</sup> October 2018 under references S.G. No. S215/2018 and S.G. No. 214/2018 as contained in **Annexures "TC 4"** and **"TC 5"** respectively.
- [14] According to the Applicants the only reason that caused delay of the already approved registration of the servitude right of way was the untimely demise of Attorney M.L. Dlamini.
- [15] The Applicants argue that at the time of the transfer of the property to the 1<sup>st</sup> Respondent by DD4 Ranch the **"new servitude road"** was already being used by the parties and further that when the 1<sup>st</sup> Respondent assumed transfer of the property from DD4 Ranch they were made aware of the existence of the aforesaid agreement together with the application to the 2<sup>nd</sup> Respondent to have the servitude registered by the Registrar of Deeds. The Applicants argue further that the doctrine of notice is fulfilled

because the 1<sup>st</sup> Respondent found the new servitude road already being in use by the parties.

- [16] The Applicants argue further that since the 1<sup>st</sup> Respondent was aware of the new servitude road and found it being used when it purchased and took transfer of the farm from Lloyd Dlamini, and this is also confirmed by Lloyd Dlamini in his affidavit filed before Court on the 11<sup>th</sup> October 2023. Mr. Dlamini states that when 1<sup>st</sup> Respondent purchased the farm the first servitude was no longer used, but the new servitude road was used and Mr. Verster used the very same new servitude road to access the farm.
- [17] The 1<sup>st</sup> Applicant operate a Botanical Garden from Scene 8 to Scene 11 and the 2<sup>nd</sup> Applicant D & T Investments operate a game and nature reserve. It is D & T which has to access its nature reserve at Scene 5 and since the parties entered into the agreement and submitted a joint application before the 2<sup>nd</sup> Respondent to have the new servitude road from Scene 1 to Scene 4 registered as a servitude right of way, the 1<sup>st</sup> Applicant has always used the new servitude road to access the Game Reserve as well as to service and maintain the said road and the furrow or canal wherein the water flows into the Reservoir at Scene 3, and which Reservoir is utilized by all the parties and the community at large.
- [18] I must state that during the inspection in loco, the Court noticed that Scene 3, the Reservoir was dry, there was no water flowing into the reservoir due to lack of maintenance of the furrow by D & T who is seized with the duty to maintain the road and the canal or furrow for the consistent supply of water into the Beef Boys' Reservoir located at Scene 3.

- [19] There is also **Annexure "TCSB"** found at page 84 of Book 1 which is a Legal Notice No. 22 of 2015 which proclaims Emantini Farms owned by D & T Enterprises, as a nature reserve. Indeed during the inspection in loco the Court was taken to the various departments or sections within the botanical gardens and I am of the view that the Applicants have made a sufficient case to warrant this Court to grant their prayer that the new servitude road be registered as a servitude by the Registrar of Deeds. The main reason for that is because the process had already commenced in 2018 and had even been approved by the 2<sup>nd</sup> Respondent on the 23<sup>rd</sup> October 2018 as I indicated above. All that remained was for attorney M.L. Dlamini to register the servitude with the Registrar of Deeds, however, he passed on before he could do that.
- [20] There is no prejudice that will be suffered by the 1<sup>st</sup> Respondent if the new servitude road is registered with the Registrar of Deeds because when the 1<sup>st</sup> Respondent purchased the property from DD4 Ranch Lloyd Dlamini, the road was already there and being used by the parties to agreement then, after all of them realised the convenience and need to have the new servitude road for the benefit of all the parties.
- [21] Further, there is no prejudice that will be suffered by the 1<sup>st</sup> Respondent if the new servitude road is formally registered because D & T would maintain the road all the way to their Game Reserve at Scene 5, as well as the canal or furrow from the Ngwempisi River all the way to Scene 3 the Reservoir. This is in terms of the agreement amongst the parties.
- [22] The nature of the botanical gardens and the D & T game reserve is such that access be restricted to the owners, staff and guests to prevent the massive flow of traffic which may pass by the botanical garden if the old



servitude road was to be used, however, the nature of the enterprise being carried out at the Botanical Garden is not conducive for public traffic.

[23] The 1<sup>st</sup> Respondent opposes the Counter Application on the basis that the agreement entered into by the three parties is not compliant with The Stamp Duties Act and therefore not binding on him. This argument does not hold water or has no merit because all those formalities are to be addressed when the application for the registration of the servitude is lodged with the Registrar of Deeds. It must be borne in mind that the 2<sup>nd</sup> Respondent approved the application for the registration of the servitude based on the diagrams furnished by the Land Surveyor C.L. Forte found at page 81 of the Book. Authority is legend that in such circumstances where the doctrine of notice has been complied with, courts would grant the registration of the servitude.

[24] In the case of **Dhayanundh v Narain 1983 (1) NPD 565 at 573** Page J. stated the following:-

The effect of this passage is, in our view, not to suggest that a purchaser who was entirely innocent at the time when he bought can be rendered subject to the doctrine by means of knowledge acquired subsequently thereto: it is more than that a person whose knowledge at the time of the sale may be imperfect can nonetheless be hit by the doctrine if the imperfections in his knowledge are supplemented before he takes transfer particularly if such imperfections were due to his own failure to make a proper investigation despite overt indications that it was necessary. The effect of the passage is summarized by **Hall and Kellaway**, *SERVITUDES* 3<sup>RD</sup> Ed at 32 as follows:-

“In order to entitle a person to whom the servitude was granted to an order for the registration of his rights against the title deed of the new purchaser, there must be clear proof that he knew of the servitude at the time that he bought (**de Villiers v Erasmus 1 SAR 138; Jansen v Fincham 9 SC 294**), and the fact that he had knowledge shortly after the sale and prior to taking transfer ought only to be taken into consideration if the party challenging the clean transfer shows that it must be regarded as forming part of a scheme to take advantage of a fraud.

The Question was left open by the Appellate Division in **Grant and Another v Stonestreet and Others 1968 (4) SA 1 at 16H**. The

principle was enunciated by Ogilve Thompson JA as follows at 20 A-G:-

“Having regard to our system of registration, the purchaser of immovable property who acquires clean title is not lightly to be held bound by an unregistered praedal servitude claimed in relation to that property. If however, such purchaser has knowledge, at the time he acquires the property, of the existence of the servitude, he will – subject to a possible qualification discussed below relating to cases where there has been an intervention of a prior innocent purchaser – be bound by it notwithstanding the absence of registration.

The principle that the law will not step in to assist a purchaser who having within his reach the means to ascertain and secure his rights fails to exercise that diligence which the law would expect from a reasonable and careful person and does not avail himself of the means of knowledge accessible to him, was enunciated as far back as 1881 in *Judd v Fourie* 2 EDC 41.

It is apparent from the authorities quoted that the onus of establishing the requisite knowledge on the part of the purchaser rests upon the person seeking to raise his unregistered right against that purchaser; and this was accepted through out by the parties to the present matter.”

[25] *In casu*, Lloyd Dlamini of DD 4 Ranch confirmed that the 1<sup>st</sup> Respondent Mr. Jan Hendrik Verster was aware of the new servitude road since he (Dlamini) made him aware, and that the only road which was used to access the farm is the said new servitude road which Mr. Verster himself used to access the farm.

[26] In the case of **Grant and Another v Stonestreet and Others 1968 (4) SA at pgs. 16-17 H**, Ogilve Thompson JA stated as follows:-

“I now proceed to consider the important question of the extent to which Grant was proved to have had knowledge of the aforementioned servitude at the time that he acquired Navarre. In the circumstances of this case, there is no material difference between Grant’s knowledge at the date of purchase and the date when he took transfer: I accordingly do not pause to consider which of those dates should, in law, be regarded as decisive. (CF. *Ridler v Gartner 1920 TPD 249 at p. 259: Frye’s (Pty) Ltd v Ries*

**1957 (3) 8A 575 (A.D.) at p. 582 D).** As was clearly appreciated by the learned judge *a quo*, the onus lay throughout upon applicants to establish that Grant had that degree of knowledge of the servitude which would render it legally binding upon him notwithstanding the absence of registration."

[27] Again this is the position *in casu*. The 1<sup>st</sup> Respondent's director was very much aware of the new servitude road because Lloyd Dlamini informed him when he purchased the farm and further he (Mr. Vester) used the very same new servitude road to access the farm. I do not for a moment doubt Lloyd Dlamini's testimony. There is no reason for Dlamini to tell an untruth more so because the issue of the registration of the servitude was at an advanced state it having been approved by the 2<sup>nd</sup> Respondent. This is not a situation where the 1<sup>st</sup> Respondent has just discovered about the new servitude road, even the law enjoins him (it) to investigate the circumstances of the servitude before taking transfer of the property. *In casu*, Lloyd Dlamini advised Mr. Vester of the new servitude road, and as I have observed above I believe Lloyd Dlamini.

[28] At page 20 of the Grant case (*Supra*) Ogilve Thompson JA continues to say:-

"The vital question remains: was the extent of Grant's knowledge of the servitude, at the time he acquired Navarre and as established by the evidence, sufficient in law to render him bound by the unregistered servitude claimed by the applicants? Having regard to our system of registration, the purchaser of immovable property who acquires clean title is not lightly to held bound by an unregistered praedal servitude claimed in relation to that property. If, however, such purchaser has knowledge at the time he acquires the property, of the existence of the servitude, he will subject to a possible qualification, discussed below, relating to cases where there has been the intervention of a prior innocent purchaser – be bound by it notwithstanding the absence of registration ..."

- [29] In the case of **Francis Leslie Bowring N.O. v Vrededorp Properties CC and Another [2007] SCA 80 (RSA)** Brand JA stated as follows at paras 16-17:-

“What is more, the same anomaly reveals itself in the sphere of unregistered servitude when a purchaser with knowledge is compelled to cooperate in procuring registration of a servitude previously granted by the seller of immovable property. The nature of the right granted by the seller in this instance appears from the following statement by Innes CJ in **Willoughby’s Consolidated Co. v Copthall Stores Ltd. 1918 AD at 16:-**

“[16] Now a servitude, like any other real right, may be acquired by agreement. Such an agreement, however, though binding on the contracting parties, does not by itself vest the legal title to the servitude in the beneficiary, any more than the contract of sale of land passes the dominium to the buyer. The right of the beneficiary is to claim performance of the contract by delivery of the servitude, which must be effected *coram legi loci* by an entry made in the Register and endorsed upon the title deed of the servient property.”

[17] The essential quality of the right that the purchaser acquires from a contract of sale is therefore no different from the right of the beneficiary under a servitude agreement. Both rights are so-called *uira in personam ad rem acquirendam* i.e. personal rights to acquire a real right (see e.g. Van der Merve op. cit p. 86; Badenhorst, Prennar and Mostert op cit p. 70). In the case of a servitude, application of the doctrine of notice does not require that the transfer of the property to the purchaser be set aside so as to enable the beneficiary under the servitude agreement first to claim registration of the servitude against the seller before the property is re-transferred to the purchaser subject to a registered servitude. The beneficiary’s claim is allowed directly against the purchaser. That there is no privity of contract between the beneficiary and the purchaser is not seen as an insurmountable hurdle...”

- [30] The authorities referred to herein above are self-explanatory and compliment the position *in casu*. I have no doubt that the 1<sup>st</sup> Respondent’s Mr. Verster was made aware by Lloyd Dlamini of the cancellation of the first servitude and that the road was no longer in use, and further that Mr. Verster himself used the very same new servitude road to access the farm. The doctrine of notice in so far as the new servitude road is concerned was fully complied with, and in my view the

registration of the new road servitude would not result to an injustice and prejudice to the 1<sup>st</sup> Respondent but would enhance the terms of the aforesaid agreement entered into by the concerned parties on the 18<sup>th</sup> July 2017 before the 1<sup>st</sup> Respondent purchased the farm. The terms of that agreement were meant to promote good neighbourliness amongst all the riparian owners of the various farms which are affected by the new road servitude.

[31] In the case of *Grant (supra)* at pg. 20 FGH-21A Ogilve Thompson JA continues as follows:-

“Although, unlike the English law, the doctrine of constructive knowledge has, in our law, little or no application in enquiries of this kind (*Erasmus v Du Toit* 1910 TPD 1037; *Snyman v Mugglestone* 1935 CPD 565) the statement by Bristowe J in *Erasmus’s* case *supra* at p. 1049; that;-

“if a person wilfully shuts his eyes and declines to see what is perfectly obvious, he must be held to have had actual notice, appears to me to be sound in principle and to merit the approval of this Court. It is with due regard to the above-mentioned principles that the facts of the present case must be considered.”

The Helderberg stream is a relatively short river the waters whereof have for generations been utilized by the riparian owners. To this the furrow on Noortgedacht and Navarre and the diversion, last century, of the whole stream below the original homestead on Klipheuvel bear clear testimony. No doubt the amount of water actually used in earlier generations was relatively small; but, by the time *Grant* appeared on the scene in 1958, such user had materially increased, and on Evergreen substantial storage of water had already been effected.

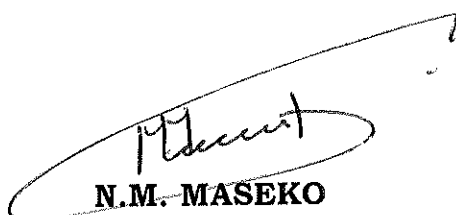
It is against that background that *Grant’s* admitted knowledge, before he acquired Navarre, of the existing water-turns must be considered. In this connection, it must again be emphasized that the turns operated along the whole river, with each turn precisely defined in respect of each respective riparian property, throughout the 168 hours of a full week. That being the case, it must surely have been obvious to *Grant*, not only that the turns had their origin in a prior agreement between the riparian owners, but also that they were operative throughout the year. A simple enquiry of almost any one of the riparian owners would have elicited information that the 1865 agreement was accepted as the origin of the servitude and that the turns were regarded by the riparian owners as operating throughout the whole year...”

[32] The primary consideration in this matter is whether the 1<sup>st</sup> Respondent was aware at the time it took transfer of the farm from Mr. Lloyd Dlamini

that there was a new road servitude which had not been registered with the Registrar of Deeds. The evidence of Lloyd Dlamini which cannot be denied by the 1<sup>st</sup> Respondent because Mr. Verster utilized the very same new servitude road to access the farm. Further the whole infrastructure had been put in place i.e. the furrow/canal, the road, water piping and the Reservoir at Scene 3 was all in place to service the various farms as well as the community. The 2<sup>nd</sup> Respondent had approved the new servitude road, but for the untimely demise of Attorney M.L. Dlamini, the registration of the servitude would have been executed to finality with the Registrar of Deeds Office.

[33] In the circumstances, I hereby grant the following order, that:-

1. The new servitude road from Scene 1 to Scene 4 be registered as a servitude right of way with the Registrar of Deeds, as per the approval of the 2<sup>nd</sup> Respondent on the 23<sup>rd</sup> October 2018 based on the joint application filed by the parties then.
2. The 1<sup>st</sup> Respondent is to do all things necessary to facilitate the registration of the servitude by the Applicant over Scene 1 to Scene 4.
3. Each party is to pay its own costs.

  
**N.M. MASEKO**  
**JUDGE**