FURTHER CASES IN PRAEDIAL SERVITUDES

Introduction

Not surprisingly, much of the case law dealing with praedial servitudes tends to concern itself with the nature, extent and duration of the burden cast upon servient land. There has been some controversy relating to –

1. Whether the utility of a praedial servitude is a requirement for its continued existence; and

2. When, whether and how obligations of a positive nature[1] are nevertheless registerable alongside a servitude and can survive changes in ownership the way that servitudes do. We know that positive obligations cannot strictly form part of a servitude. However, the law is not entirely clear on whether this means a successor in title can nevertheless sometimes be bound by them.

In this lecture, we will address these questions through an examination of the relevant cases.

[1] In the cases these are often referred to in Latin as obligations *in faciendo*.

De Kock v Hanel 1999 (1) SA 994 (C)

The question before the Court in De Kock v Hanel was whether a right of way registered over De Kock's land had been extinguished because:

1. It created an excessive burden over the De Kock's property; and/or
2. It had lost is usefulness to Hanel.

The first contention arose from the principle of **indivisibility**, which states that a servitude attaches to every part of the dominant land and burdens every part of the servient land. Where land subject to a servitude is subdivided, the servitude remains over each subdivision of the servient land. Likewise, when dominant land is subdivided, each subdivision retains the benefit of the servitude.

This principle is subject to two provisos:

1. The first is that if the servitude is locally defined (for example a right of way is restricted to a defined path) then only subdivisions over which the defined servitude is registered remain encumbered.

2. The second proviso is that a servitude ceases to exist if it becomes an excessive burden over the servient land.

See LAWSA (2 ed.) vol 24 paras 551 to 553

In this case, the Court held that there was no evidence that the right of way had become an excessive burden over De Kock's land and so that contention had to be dismissed.

In approaching the second question, the Court considered whether a servitude became extinct once it was clear that it had permanently ceased to be of any use to the dominant land. It held as follows:

1. There is no authority for the proposition that "when the utility of the servitude has permanently ceased the servitude itself will become extinguished"; and

2. Even assuming that a servitude that lost its usefulness did become extinct, Hanel's undisputed evidence was that he used the right of way to access part of his property that he would not otherwise be able to access because of a steep slope on part of his own land.

3. Although "there might be some scope for debate as to whether the test for the existence of utility be objective or subjective", the Court held that "there is utilitas when there is a reasonable claim for such utilitas by the dominant tenement holder".

See De Kock v Hanel 1999 (1) SA 994 at 998F to 1000B

This decision has come in for some heavy criticism. In **LAWSA (2 ed) at volume 24 para 549**, Van Der Merwe describes the decision as "unacceptable". He gives two reasons –

1. First, he says that the principles of **vicinity** and **permanent cause**[2] are both requirements for the continued existence of a servitude. There is no reason why utility should be any different;

2. Second, he says that a "reasonable claim" of utility from the current owner is not enough to conclude that the servitude is still useful. The question is rather objective and relates to the land – not the owner. The question is whether the servitude is actually still useful to the land itself – not its temporary owner.

The questions of whether a servitude extinguishes once it has lost its usefulness (and how we would know if it had) are still to be finally decided. Consider the issue for yourself. Ask yourself two questions: first, whether the underlying principles of law themselves make the answer clear; second, which answer to the problem would be the fairest or most constitutionally acceptable (if there are any constitutional issues implicated at all)?

[2] This is the idea that servitudes can only exist between two pieces of land which are sufficiently close (usually next to each other) and that a servitude grant rights in respect of some permanent feature of the land (the right to draw water can only be from a permanent water course). **See LAWSA (2 ed) volume 24 paras 547 and 548**.

Schwedhelm v Hauman 1947 (1) SA 127 (E)

In Schwedhelm v Hauman, the Court was asked to enforce a registered servitude (referred to as condition "C(3)" in the case). The condition had two components. The first guaranteed Schwedhelm's right to draw water from Hauman's farm. This was not in dispute. Both parties agreed that the right to draw water was a valid and binding part of the servitude.

The problem was with the second part of the condition which stated that "any windmill, pipes etc. which are necessary for the exercise of such right [to draw water] shall be provided and suitably maintained by the transferee or his successors in title".

Both parts of the condition were subject to payment of a pound a month by Swedhelm to Hauman.

Hauman excepted to the claim on the grounds that the second part of the condition did not confer a valid and binding servitude and were accordingly of no force of effect. They may have bound the owners that first agreed to them, but they did not bind any of his successors in title, including Hauman, because they constituted a positive obligation – which cannot, by the principle of **passivity** form part of a servitude. For this reason, Hauman argued, the positive obligations imposed by the servitude were contrary to public policy, unenforceable, and should be treated as if they were never written (or *pro non scripto* as it is put in the case).

After comparing English and Roman Dutch law on the subject, the Court agreed with Hauman that a positive obligation could not form part of a servitude (**see pages 133 to 134**). However, it disagreed with Hauman's submission that the imposition of a positive obligation was contrary to public policy and void.

Although the second part of the condition did not confer real rights, there was nothing inherently objectionable about it. It could still be enforceable if Hauman **expressly agreed to be bound** by it at any time before or after purchase.

Because the Court was hearing an exception, there was no evidence before it on whether Hauman had agreed to be bound by the second part of the condition. The Court found that Schwedhelm's declaration could be interpreted to include an allegation that he did. The Court accordingly dismissed the exception and allowed the matter to go to trial on that issue.

Accordingly, after Schwedhelm, a positive obligation registered alongside a servitude was only binding upon a successor in title if he **expressly agreed to be bound by it**.

Van der Merwe v Wiese 1948 (4) SA 8 (C)

However. this conclusion was rejected in Van Der Merwe v Wiese. The idea that the principle of passivity is a strict rule was also rejected. Van der Merwe sued Wiese for

delivery of 200 gallons of water per day in terms of “servitude” agreed and registered by their predecessors in title. Wiese excepted on the basis that the obligation to deliver the water was not capable of forming part of a servitude and that the registered agreement was not binding unless accepted by both parties.

Fagan J held that a positive obligation can indeed form part of a servitude. He also held that the common law authorities suggested that the principle of passivity was merely a guide to the application of the law of servitudes and not a strict rule of identification. He accordingly dismissed the exception. Most commentators think this decision was wrong (see **LAWSA (2 ed) vol 24 para 550**).

In 1973, the Deed’s Registries Act was amended to allow for the registration of a positive obligation with a servitude if it is “in the opinion of the registrar of deeds complementary or otherwise ancillary to a registrable condition or right conferred or contained in the deed [of servitude]”.

This is now generally thought to have changed the position such that, although it is not part of a servitude itself, a positive obligation will bind a successor in title if he **expressly agrees to be bound by it** or if he purchases the land **with the full knowledge of the positive obligation**. The idea is that registration at the deeds office means that a purchaser can, in principle, find out whether the land he wants to purchase is subject to a servitude registered alongside a positive obligation. (see **LAWSA (2 ed) vol 24 para 550**).

Even this statement is controversial. In **Low Water Properties (Pty) Ltd v Wahloo Sand CC 1999 (1) SA 655 (SE)** the Court held that even registration and positive knowledge on the part of the purchaser was not sufficient to bind a subsequent purchaser with a positive obligation.

In my view, neither the conventional take on the effect of the 1973 amendment to the Deed Registries Act nor the decision of the Court in Low Water Properties is correct, because they both ignore the law relating to unregistered servitudes.

We will discuss the law relating to unregistered servitudes in a later lecture. However, in summary, it was developed in two cases decided in the Supreme Court of Appeal. It is, roughly, as follows:

A successor in title is bound by a unregistered servitude only if:

1. It came into existence <u>before</u> he concluded the agreement to purchase the property; and
2. He acquired knowledge of the existence of the agreement before transfer and did nothing about it, or for reasons of equity, it would be appropriate to hold him to the agreement.

"Knowledge" in this case means that the possible existence of such an obligation comes to a purchaser's attention, and, had he exercised a reasonable degree of diligence, he would have fully acquainted himself with its terms.

See Grant v Stonestreet 1968 (4) SA 1 (A)

Wahloo Sand BK en Andere v Trustees, Hambly Parker Trust (2002) 2 SA 776 (SCA)

I can see no reason why registered positive obligations should be treated any differently to unregistered servitutal agreements.

Consider for yourself what the position should be. The weight of learning seems to be against the idea that we should too readily hold successors in title to positive obligations registered alongside servitudes. Why do you think this is so? One suggestion is that purchase and sale of land is easier when there are fewer real obligations that could encumber it. But is that a good reason? If a positive obligation (e.g. to deliver water) enhances the productivity of a piece of land without creating an undue burden on the owner who is bound by it, why should a positive obligation not survive changes in ownership?