



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 21 February 2023

Status: Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal.

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

Today, the Supreme Court of Appeal (SCA) upheld an appeal by Ms Berzack against a decision of the Western Cape Division of the High Court, Cape Town (high court) which found in favour of Huntrex 277 (Pty) Ltd (Huntrex) that a servitude registered in the title deed of the Huntrex was a servitude of *usus*. The case came before the SCA as an application for leave to appeal which had been referred for oral argument. The SCA granted leave to appeal and upheld the appeal on the merits.

The servitude was created by agreement which was concluded at the time that Ms Berzack subdivided and sold off a portion of her property. It allowed Ms Berzack to develop and maintain a garden on a 20 m wide portion of the subdivided erf. It was registered in the title deeds in favour of the seller as owner (of the Berzack property) and her successors in title.

A dispute arose between Ms Berzack and Huntrex (the successors in title to the subdivided property) relating to a wooden pole fence erected across the servitude area. Huntrex brought an application in the high court to declare that the servitude was personal and not capable of registration in terms of the Deeds Registries Act. Ms Berzack brought a counter-application seeking orders declaring that the rights were praedial and that the title deed be rectified to this effect, alternatively that the rights be conferred by operation of acquisitive prescription.

The high court found that the servitude was one of *usus* and therefore personal in nature. It held that the registration of the servitude was prohibited by section 66 of the Deeds Registries Act 47 of 1937 (Deeds Registries Act). It dismissed the counter application in which Ms Berzack sought declaratory relief to the effect that the servitude was praedial.

The SCA, (Nhlangulela AJA, with Petse AP and Molemela JA concurring), granted leave to appeal against the whole of the order of the high court and determined the appeal. It held the clause in the title deed was erroneously interpreted to mean a personal servitude of *usus* rather than a praedial servitude. Registration therefore did not offend the provisions of section 66 of the Deeds Registries Act.

The SCA therefore set aside the high court's orders and substituted them with an order dismissing the application (brought by Huntrex) with costs.

The minority in a joint judgment by y Plasket JA and Goosen AJA, held that on the primary issue, namely whether the servitude was personal or praedial, there was no reasonable prospect of success on appeal and leave to appeal ought to be refused. The minority accepted that leave to appeal ought to be granted in relation to certain orders granted by the high court and that the appeal should succeed to the limited extent that those orders be set aside. They held, however, that the high court was correct to find that the servitude was one of *usus* and that it ought not to have been registered as extending beyond the life time of Ms Berzack. The minority found that the servitude, conferring upon Ms Berzack an entitlement to garden on the servient property, did not meet the requirements for recognition as a praedial servitude.