THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 400/07

JOHAN BLOEM KRUGER Appellant

and

JOLES EIENDOM (PTY) LTD 1st Respondent
REGISTRAR OF DEEDS (CAPE TOWN) 2nd Respondent

Neutral citation: *Kruger v Joles Eiendom (Pty) Ltd* (400/07) [2008] ZASCA 138 (27 November 2008).

Coram: MPATI P, MTHIYANE, CLOETE, HEHER JJA *et* KGOMO AJ
Heard: 10 NOVEMBER 2008
Delivered: 27 NOVEMBER 2008
Summary: Servitude-interpretation where ambiguous.

ORDER

On appeal from: High Court, Cape Town (Traverso DJP, Griesel J and Ndita J sitting as Full Court)

The following order is made:

1(a) The appeal succeeds, with costs.

(b) The order of the full court is set aside and the following order substituted: 'The appeal is dismissed, with costs.'

2. The cross-appeal is dismissed, with costs.

JUDGMENT

CLOETE JA (MPATI P, MTHIYANE, HEHER JJA and KGOMO AJA concurring):

[1] There is an appeal and a cross-appeal before the court. It would be convenient to refer to the parties as they were at first instance. The plaintiff and the defendant own adjoining properties in Dorp Street, Stellenbosch. The plaintiff made three claims, two of which remain relevant. First, the plaintiff claimed that a servitude registered over part of his property in favour of the defendant's property had become extinguished by prescription. Second, the plaintiff claimed that he had acquired part of the defendant's property by prescription. The trial court (Woodland AJ) upheld both claims and the defendant appealed. The full court in Cape Town (Griesel J, Traverso DJP and Ndita J concurring) upheld the appeal in respect of the first claim (extinction of the servitude) but dismissed the appeal in respect of the second claim (acquisition of part of the defendant's property). The parties have respectively appealed and cross-appealed against these findings with the special leave of this court.

[2] The judgment of the full court has been reported as *Joles Eiendom (Pty) Ltd v Kruger and Another*.[1] At the end of the judgment[2] there is a diagram to which it is convenient to refer. The plaintiff's property is Erf 3765, on the left of the diagram. The first defendant's property is Erf 548, to the east. Dorp Street lies to the south of both erven where points E and N appear. Between the two erven there is a passage ,95 metres wide and 10,39 metres long the middle of which extends along the common boundary from point E to point F. (Points G and M are directly opposite point F and point N is directly opposite point E.) There is a servitude registered in favour of the plaintiff's property over that area of the defendant's property between points EFMNE,

[1] 2007 (5) SA 222 (C).
[2] Page 235.

and a servitude registered in favour of the defendant's property over the corresponding area of the plaintiff's property to the west of the common boundary. It is this latter servitude that the plaintiff in the present appeal contends became extinguished by prescription. The area of the defendant's property relevant to the defendant's cross-appeal, demarcated by points GHJMFG, is contiguous with, and situated to the north of, the passage burdened with the servitudes. (The line GH represents part of the eastern boundary of the plaintiff's property.) It would be convenient to refer to this area as 'the extended passage'. In 1966 the owner of the defendant's property, a Mr Scheiffer, constructed a wall 2,7 metres high which extended from a point about one metre to the south of point M, to point J (and thereafter to point K, to point L and further north). Subsequently, between 1966 and 1968, the plaintiff put in a door where the passage opens on to Dorp Street.

[3] Of cardinal importance to the appeal is the proper construction of the servitude in favour of the defendant's property. It is contained in a special condition in the defendant's title deed which reads: 'The passage . . . shall be for the common use of' the two properties in question. The relevant part of the special condition in the plaintiff's title deed is in identical terms. The servitudes originally provided access to the backyards of the two properties. The trial court interpreted each servitude to be one of footpath.[3] The full court disagreed, holding that because the expression 'common use' was not further described or defined in any way:

'[T]his means that the passage may be used by both owners for any lawful purpose ─ having regard to the nature and situation thereof, namely a narrow passageway between two adjoining commercial buildings in an urban setting ─ and provided, of course, that the servitude is exercised *civiliter modo*. In addition to the right of footpath (*iter*), other permissible uses of the passage would include urban servitudes, such as *ius stillicidii avertendi* (the right to pass off one's rainwater onto the ground of another); *ius stillicidii recipiendi* (the right to receive the rainwater coming from another's land); *ius cloacae* (the right to have a drain lying on or coming out on the ground of another); and so on.'[4]

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[3] See para 12 of the judgment of the full court, n 1 above.
[4] Para 15.

In the appeal before this court, the plaintiff championed the interpretation given by the trial court, and the defendant, that given by the full court.

[4] Both parties sought to rely in argument before this court on the use to which the passage had in fact been put as it emerged from the evidence of the witnesses who testified at the trial. Where a servitude has been granted by agreement,[5] and where the agreement is ambiguous and evidence as to surrounding circumstances which obtained at the date the contract was concluded does not resolve the ambiguity,[6] evidence as to the interpretation the parties had by their conduct put upon the grant will be admissible as an indication of their common understanding of its meaning.[7] But here there was no evidence as to how the servitude in the present matter came to be constituted ─ it may not have had its origin in contract, but have been imposed by the local authority; and furthermore, none of the witnesses who testified as to how the servitude had in fact been used, could possibly have been the parties to any agreement constituting it, nor could their evidence have related to the conduct of such parties.

[5] To my mind, the servitude means that the 'passage' is 'for the common use of' the two properties in question as a passage, ie as a passageway, to pass from Dorp Street to the properties. I am fortified in this view by the fact that the passage is so narrow that any other use does not readily suggest itself. It is not necessary, however, to elaborate further as the servitude is, at best for the defendant, ambiguous, as its counsel readily conceded. Evidence as to the conditions prevailing at the time the servitude was constituted would have been admissible to resolve the ambiguity. The decision of this court in *Cliffside Flats (Pty) Ltd v Bantry Rocks (Pty) Ltd*[8] provides a good illustration of how this may be done. In 1941 the appellant in that matter received transfer of land (Lots 6 and 7) each subject to a condition that 'no more than two

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[5] As eg in *Van Rensburg v Taute* 1975 (1) SA 279 (A).
[6] *Haviland Estates (Pty) Ltd v McMaster* 1969 (2) SA 312 (A) at 322B-C.
[7] See eg *Breed v Van den Berg* 1932 AD 283 at 291-3; *Shacklock v Shacklock* 1949 (1) SA 91 (A) at 101 *in fine*; *MTK Saagmeule (Pty) Ltd v Killyman Estates (Pty) Ltd* 1980 (3) SA 1 (A) at 12F-13C.
[8] 1944 AD 106.

dwelling-houses shall be erected on the above-described property'. It was common cause that the condition was a servitude in favour of Lot 3 (owned by the respondent). Feetham JA found the condition ambiguous in that it could mean that only two dwelling-houses could be erected and nothing more, or it could mean that as many structures could be erected as the property would permit save that of those structures, only two could be dwelling-houses. The learned judge said:[9]

'It thus appears that the condition which we have to consider originated in a deed of transfer dated August, 1919, that it was imposed in favour of a residential property occupied by the transferor, and that the two properties concerned were situate within a short distance of, and within view of, each other, in a residential area lying above the sea coast in a neighbourhood which at the date of the transfer was still only very partially developed.

These facts appear to me to be quite sufficient to justify the inference that the object of this condition was to protect and preserve the amenities of Lot 3 as a residential property by barring any developments on Lots 6 and 7 which would be inconsistent with the existing residential character of the adjacent area, and might have the effect of diminishing such amenities; and they thus afford strong confirmation of the view that the condition is to be read as having the meaning which examination of its actual terms led me to regard as the preferable choice between the two alternative meanings of which I find it to be capable ─ that is, that the condition is to be read as meaning ─ "Nothing more than two dwelling-houses shall be erected on the property".

. . .

I do not think it is open to any doubt that the facts which I have taken into account, as established by admissions and evidence, are facts which can properly be taken into account for the purpose of throwing light on the object and interpretation of the condition. I have held that the condition is susceptible of two meanings, and these facts which relate to the subject matter of the condition, namely the two properties affected by it (which may be called respectively the dominant and the servient tenement), are relevant for the purpose of determining which of the two meanings should be given to it.'

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[9] At 115-116 and 117.

[6] As support for the approach followed by him, Feetham JA referred inter alia to the judgment of Gregorowski CJ (Esser and Kock JJ concurring) in *Kempenaars v Jonker, Van der Berg and Havenga*[10] where the learned Chief Justice, in dealing with the servitude of grazing, said the following:

'It is clear that incidents [sic: sc the incidence] and the extent of the servitude must depend on the circumstances under which it was created . . . I think . . . that much must depend on the circumstances under which the servitude was created, and on the *causa et origo servitutis*.'

Feetham JA also referred to the decision in *Priestman v Simonstown Licensing Board & Others*[11] where Watermeyer J (Sutton J concurring) considered the state of the liquor laws in the Cape Colony, starting with a Plakaat of 1804, in order to interpret a prohibition on the sale of liquor inserted in 1818 in title deeds of hotels at Fish Hoek.

[7] In the present appeal the fact that the passage extended up towards two outside lavatories, one on each property with a common wall separating them, suggests that the servitudes may have been imposed by the local authority to give access to the backyards of the properties from Dorp Street for the primary purpose of removing what was politely called 'night soil'. But there was no evidence in this regard or any other evidence as to the conditions prevailing at the time the servitudes were created. The fact mentioned by the full court, in the passage from the judgment quoted above, that there are now commercial buildings on the properties, is irrelevant.

[8] In the circumstances I believe that such ambiguity as there is should be resolved by applying the well established rule of construction that because a servitude is a limitation on ownership, it must be accorded an interpretation which least encumbers the servient tenement. Voet,[12] in discussing the urban servitude of *tigni immittendi* (ie the right to let a beam into a neighbour's party wall), contrasts the position under a limited agreement as opposed to a general agreement and says that where the number of beams and mode of

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[10] 1898 5 OR 223 at 227-8.
[11] 1929 CPD 263.
[12] *Commentarius ad Pandectas* 8.2.2.

letting in has been defined, the owner of the dominant tenement is not allowed either to let in more or to alter the shape of the letting in. The reason he gives is:

'That is especially so because the granting of a servitude receives a strict interpretation as being an odious thing (because it is opposed to natural freedom); and in case of doubt there must be a declaration in favour of freedom.'[13]

As authority for this proposition Voet refers to, amongst others, Carpzovius[14] and the author of the opinion in the *Hollandsche Consultatien*[15] where the passage from Carpzovius which follows is quoted:

'. . . *servitus ceu res odiosa restringi, ac in dubio pro libertate pronunciari debet. Et semper servitus indefinita ita est interpretanda, quo fundus serviens minori afficiatur detrimento*.'

The passage may be translated as follows:

'. . . a servitude being something odious should be interpreted restrictively and so, in case of doubt, should be declared free of restraint. And an imprecise servitude must always be interpreted so that the servient tenement is the less adversely burdened.'

[9] The restrictive approach to interpreting servitudes has been endorsed by this court in *Pieterse v Du Plessis*[16] although in *Van Rensburg v Taute*[17] the caveat was added that:

'By die toepassing van hierdie beginsel moet egter steeds in gedagte gehou word dat die aard en omvang van die beswaring bepaal word na aanleiding van die betekenis wat gegee moet word aan die ooreenkoms wat die serwituut daarstel. Indien die betekenis daarvan ondubbelsinnig blyk te wees, is 'n hof nie geregtig om daarvan af te wyk ten einde 'n mindere beswaring te bewerkstellig nie.'[18]

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[13] Gane's translation vol 2 p 440.To the same effect, as regards the general principle, is Schorer in his supplementary notes to Grotius 2.32, Austen's translation p 303.

[14] *Jurisprudentia Forensis Romano-Saxonica* 2.41.4.

[15] Opinion 146.

[16] 1972 (2) SA 597 (A) at 599G-*in fine*; see also *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1918 AD 1 at 16 and *Union Government (Minister of Railways and Harbours) v Marais* 1920 AD 240 at 271 per Maasdorp JA; and see the decisions of Corbett J in *Stuttaford v Kruger* 1965 (4) SA 505 (C) (appendix) and *Jonordon Investment (Pty) Ltd v De Aar Drankwinkel (Edms) Bpk* 1969 (2) SA 117 (C) at 125H-126B.

[17] Above n 5, at 301G-*in fine*.

[18] In applying this principle it must, however, be borne in mind that the nature and extent of the encumbrance is determined with reference to the meaning that must be given to the agreement that constitutes the servitude. If the meaning is unambiguous, a court is not entitled to depart therefrom in order to achieve a lesser encumbrance. (My translation.)

[10] In my respectful view, the meaning given by the full court to the servitude burdening the plaintiff's property loses sight of this principle of interpretation, and the conclusion reached by that court accordingly cannot be supported. Indeed, counsel was unable to refer to any authority where a servitude was construed as being in such wide and imprecise terms and I have found none either. I therefore conclude that the servitude in question must be limited to the use of the passage as a passageway to gain access to the defendant's property.

[11] The conclusion reached in the previous paragraph renders it unnecessary, with one exception, to consider the evidence of the witnesses called on behalf of the defendant as to the alleged exercise of the servitude. The exception relates to the evidence of Mr Gideon Jacobs who was employed by a tenant of the defendant's predecessor in title. Counsel representing the defendant submitted that a proper reading of Jacobs' evidence showed that on occasion he used the passage as a passageway to obtain access to the extended passage to clear a drain on Erf 548 and also to clean away debris which had fallen into the extended passage when he cleaned gutters of a building on Erf 548 which adjoined the extended passage. Therefore, so went the argument, the passage was used as a passageway to gain access to the extended passage, which was part of Erf 548 (now the defendant's property), and extinctive prescription was accordingly interrupted on each occasion this took place. I find the argument contrived but it is possible to dispose of it relatively briefly on the facts. Jacobs never said expressly that he went into the extended passage, but we were asked to infer that he did. I am not prepared, however, to accept that he was there at all because his evidence was confusing and contradictory, and deviated in significant respects from what was put to the plaintiff's witnesses on this very point. In addition he confessed to two confrontations with the plaintiff in the past which cast doubt on his reliability.

[12] The trial court found it to be clear on the evidence that the defendant and its predecessors in title had not exercised the right of way through the passage since at least 1966, when the wall was built by Scheiffer; that after

the wall was built, it was no longer possible to obtain access to Erf 548 by means of the passage; and that the position did not change until 2001, when the defendant built a door which opened on to the passage. I agree with these conclusions. It follows that the requirements of s 7(1) of the Prescription Act,[19] which provide that:

'A servitude shall be extinguished by prescription if it has not been exercised for an uninterrupted period of thirty years',

have been satisfied. The argument set out in paragraphs 35 and 36 of the judgment of the full court was ─ in my view, correctly ─ abandoned on appeal and it is therefore not necessary to consider it. In my view the appeal should be upheld.

[13] I turn to consider the cross-appeal. The plaintiff occupied Erf 3765 as owner after he acquired it in 1967 (although he only obtained transfer in 1976, the delay being due to litigation with his father from whom he acquired it). After the wall was built by Scheiffer in 1966 the extended passage effectively became part of the plaintiff's backyard. A year or two thereafter, as I have said, the plaintiff erected the door, at the Dorp Street entrance to the passage, to which he and his tenants had a key. The door was kept locked most of the time thereafter. He accordingly controlled access to the passage and the extended passage. In addition in 1968 the plaintiff effected improvements to his property: he built a wall which encroached slightly on the extended passage between points G and H; he constructed a drain which ran from and under the extended passage to Dorp Street; and he paved the passage and the extended passage. On these facts there is no doubt in my mind that the trial court and the full court were correct in finding that the plaintiff had both the intention to possess the extended passage as owner, and that he exercised physical control over it. The requirements of that part of s 1 of the Prescription Act, which provide that

'a person shall by prescription become the owner of a thing which he has possessed openly and as if he were the owner thereof for an uninterrupted period of thirty years',

were accordingly satisfied. It follows that the cross-appeal falls to be dismissed.

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[19] 68 of 1969.

[14] The following order is made:

1(a) The appeal succeeds, with costs.

(b) The order of the full court is set aside and the following order substituted: 'The appeal is dismissed, with costs.'

2. The cross-appeal is dismissed, with costs.

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T D CLOETE

JUDGE OF APPEAL

Appearances:

Counsel for Appellant:	J H Roux SC Instructed by Morkel & De Villiers, Somerset West Matsepes, Bloemfontein
Counsel for Respondent:	Ms M Ipser Instructed by Schliemann Incorporated, Somerset West Naudes, Bloemfontein