THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 670/10

In the matter between:

NATIONAL STADIUM SOUTH AFRICA (PTY) LIMITED	**First Appellant**
STADIUM MANAGEMENT SOUTH AFRICA (PTY) LIMITED	**Second Appellant**
CITY OF JOHANNESBURG	**Third Appellant**

and

FIRSTRAND BANK LIMITED	**Respondent**

Neutral citation: *National Stadium v Firstrand Bank* (670/10) [2010] ZASCA 164 (1 December 2010)

Coram: Harms DP, Maya JA and Bertelsmann AJA

Heard: 23 November 2010

Delivered: 01 December 2010

Summary: Servitude ─ personal servitude ─ right to name stadium

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ORDER

On appeal from: South Gauteng High Court (Johannesburg) (Victor J sitting as court of first instance):

The following order is made:

(a) The appeal is upheld to the extent indicated below and is otherwise dismissed with costs, including the costs of two counsel to be borne by the appellants jointly and severally.

(b) Paragraphs 2 and 3 of the order of the court below are amended to read as follows:

'2 Until the lapse of the Applicant's servitude rights as set out in the Notarial Deed of Servitude 2529/08 and registered by the Registrar of Deeds, Pretoria, the First, Second and Fourth Respondents are interdicted from:-

2.1 naming the soccer stadium on Portion 4 of the farm Randskou 324 (Reg Div IQ) Gauteng Province by means of naming boards or the like affixed in, on, or at all outer perimeter entrances and exits of the stadium, or elsewhere on the property by a name other that "FNB Stadium";

2.2 purporting to sell or dispose of the right to name the stadium during the period;

3 The following declaratory order is made:-

3.1 The Applicant has the sole right to name the stadium by means of naming boards and the like affixed in, on, or at all outer perimeter entrances and exits of the stadium, or elsewhere on the property during the life of the deed of servitude;

3.2 The Applicant has chosen the name "FNB Stadium";

3.3 The First, Second and Fourth Respondents do not have the right to name the stadium during the period and the extension period.'

JUDGMENT

HARMS DP (MAYA JA and BERTELSMANN AJA concurring)

HARMS DP:

INTRODUCTION

[1] One of the iconic stadiums used for the 2010 FIFA Football World Cup was known for the duration of the competition as ‘Soccer City’. The original stadium on the site in Soweto was financed by First National Bank, which is now a division of the respondent bank (Firstrand Bank Ltd), and was built in about 1988. It was since then called the ‘FNB Stadium’. During the period 2007 to 2010, the stadium, financed by the central government and the local authority, was virtually rebuilt for purposes of the World Cup. The Bank, relying on a naming right, holds the view that the name of the stadium has to revert to ‘FNB Stadium’.

[2] The local authority and third appellant, the City of Johannesburg, as tenant of the stadium, and its appointed stadium manager, National Stadium SA (Pty) Ltd, the first appellant, together with an associated company, Stadium Management SA (Pty) Ltd, the second appellant, assert that the right to name the stadium no longer vests in the Bank and that they, instead, are entitled to ‘name’ the stadium or sell the naming rights to third parties. (For the sake of convenience I do not intend to draw any distinction between the first and second appellants and will simply refer to them as the managers.)

[3] When the Bank became aware of attempts by the managers to market the naming rights it launched an urgent application for an interdict (in general terms) to prevent them from marketing the stadium by any other name than FNB Stadium. It joined the owner of the stadium, which is Government, as respondent without seeking any relief against it and Government consequently did not take part in the proceedings. The City, as head tenant and on whose behalf the managers manage the stadium, sought and obtained leave to intervene, and joined in opposing the relief sought.

[4] The court below (Victor J) found in favour of the Bank and issued an order against the managers and the City in more expansive terms than originally sought. The order has two parts. The first is an interdict restraining the managers and the City from ‘referring’ to the stadium by any other name than ‘FNB Stadium’ or from disposing of the naming rights to the stadium. The second part is a declaratory order declaring that the Bank has the sole right to name the stadium and, accordingly, that

the managers and the City do not have naming rights. There is a time limit attached to these orders.

[5] The court below granted the necessary leave to appeal to this court and the matter was heard at the request of the parties as a matter of urgency. It is necessary for an understanding of the issues to set out the history of the football stadium with reference to a number of events beginning in 1988.

THE LOAN FACILITY AGREEMENT OF 20 OCTOBER 1988

[6] The Bank is rather proud of the fact that it was prepared as early as 1988 to finance the erection of a football stadium in Soweto. The terms and conditions of the provision of this facility were set out in an agreement of 20 October 1988. There were four parties to the agreement: (a) the future owner of the land (a trust) that intended to purchase the property to establish a soccer complex (including a stadium) to be known as Soccer City thereon; (b) a company, also named Soccer City, that was to lease the property from the trust and that undertook to erect the complex; (c) the National Soccer League, the body that controlled the sport; and (d) the Bank as lender.

[7] The Bank undertook to provide a funding facility of R15m for the erection of particularly a stadium on the property. It is not necessary to detail the funding arrangements save to refer to clause 7.1, which is the origin of the Bank's naming rights. It provided as follows:

'As additional consideration for First National providing the Facility, the main stadium at Soccer City shall be known as "First National Bank Stadium" or by such other name as may be chosen by First National from time to time. The Trust and the Company shall take all steps and do all things necessary to ensure and procure that First National acquires and retains such right in perpetuity or for such lesser period as First National may determine.'

[8] The other parties to the agreement undertook to comply with a number of obligations towards FNB such as to host at least 50 soccer matches per annum and to utilise part of the ticket sales to reduce the debt. FNB was also entitled to receive maximum positive publicity in respect of its involvement in Soccer City and to erect a number of signboards in the best possible places on or around Soccer City for which it had to pay R5m upfront as advertising revenue.

THE WAIVER AGREEMENT OF 24 MARCH 2003

[9] It would appear that the trust and the Soccer City company were unable to service their obligations towards the Bank or to pay the building contractor in full with the available finances. This led to the conclusion of the waiver agreement of 24 March 2003. The building contractor, Grinaker-LTA Ltd, waived payment of a substantial amount subject to, inter alia, the right to execute future construction work on the stadium complex.

[10] The Bank, in turn, agreed to waive its rights to payment of the outstanding amounts under the loan facility agreement. This waiver was subject to a number of conditions. They were (a) that the naming rights referred to in the loan facility agreement would endure for ten years; (b) that the Bank had an option to extend this right for a further two years upon payment of R10m; and (c) that the Bank had a renewal right for a further ten years for which it had to pay a market related price. The effect of this was that the Bank lost its right to repayment of the loan facility but retained a diluted naming right: it was no longer in perpetuity and the Bank had to pay for the right during any extended period.

THE SERVITUDE AGREEMENT OF 31 JANUARY 2007

[11] Because of the anticipated FIFA World Cup event, which had been scheduled for 2010, it became necessary to rearrange the relationship between the parties with an interest in the stadium. The stadium had to be ‘reconstructed’. This required substantial funding from both Government and the City. And to enable FIFA to enjoy the exclusive merchandising rights for the event FNB had to relinquish its naming rights in favour of FIFA for a period preceding and during the event.

[12] The servitude agreement (which was probably one of a series covering the World Cup) was concluded between the parties to the loan facility agreement and Government. Government was to become owner of the property by taking transfer from the trust. It undertook to honour and be bound by the FNB naming rights as set out above, and to secure them by means of a personal servitude in favour of the Bank. These rights were, however, to last for only ten years as from 7 July 2004 but FNB had a right of renewal for another two years subject to payment of a fair market value for those rights, meaning that if the right of renewal were to be exercised the naming rights will terminate on 6 July 2016 instead of on 6 July 2014. FNB,

importantly, agreed to forego its naming right for the duration of the World Cup in favour of FIFA.

[13] The exact terms of the relevant provisions are these:

'4.2 For the sake of clarity, The State, the Trust and Soccer City hereby grant to FNB, the exclusive right to name the Stadium "First National Stadium", or "FNB Stadium", or by any other such name as may be chosen by FNB from time to time. The State, the Trust and Soccer City shall take steps and do all things necessary to ensure and procure that FNB acquires and retains such rights for the period set out above.'

'4.4.2 In keeping with the FNB Rights, the name "FNB Stadium" shall be prominently displayed at all outer perimeter entrances and exits of the Stadium and on not less than four prime skyboard sites in the Stadium. FNB accepts that during periods of reconstruction of the Stadium the skyboards may not be able to be displayed and that any re-design may require the skyboards to be relocated. In the latter event, FNB shall be granted a preferent right to choose the sites for its relocated skyboards. The Parties agree that any relocation of the said skyboards shall take place in consultation with FNB in an effort to facilitate the placement of the skyboards within the Stadium so as to afford to FNB similar exposure as previously provided to FNB prior to any relocation of the skyboards.'

'7.2 FNB shall be entitled, simultaneously with the cancellation with the FNB Bond and the transfer of the Property to The State, to register a personal servitude against the Property in respect of FNB's rights under this Agreement in a form reasonably required by FNB's attorneys and that is acceptable to the Registrar of Deeds at Johannesburg. All costs of registration of these rights shall be borne and paid by FNB.'

'7.3 The State, the Trust and Soccer City agree that the registration of the personal servitude referred to in clause 7.2 shall be binding on any successors in title to the Property and shall, to the extent required, disclose the details of such personal servitude to any successor in title to the Property.'

[14] The 'reconstruction' of the stadium to which the agreement referred commenced during 2007 and, according to the appellants, the original stadium was for all intents and purposes demolished and replaced by a new stadium.

THE SERVITUDE

[15] The property was transferred to Government on 17 April 2008, and on 29 April Government registered a personal servitude 'for naming right purposes of the Stadium on the Property' in favour of FNB. The executive portion states that Government thereby 'grants as a personal servitude to FNB the right to name the Stadium and erect naming boards therein' as set out in the servitude agreement, and provides that the 'Stadium shall be known as "FNB Stadium" or such other name as may be designated by the Bank in agreement with the State'. It further provides for the same time limit and for termination as set out in the agreement, and it repeats in Deeds Office parlance the first two sentences of the quoted clause 4.2.2.

THE STADIUM MANAGEMENT AGREEMENT OF 16 JANUARY 2009

[16] The City entered into a stadium management agreement with the first appellant on 16 January 2009. The agreement, significantly but prematurely, recorded that the City in its capacity as the lessee of the stadium had 'a real right' to the stadium. The manager was appointed as an independent contractor to render defined management services and received the exclusive and full use of the stadium. The agreement also mentioned that the stadium was under construction and it imposed certain limited obligations on the manager during the construction period.

[17] The agreement further provided that the manager was entitled to conduct 'NSSA Business' (the business of the first appellant) on the premises and this was defined to include the business conducted by the manager in the field of operational and commercial management and administration of sport stadiums. This incorporated, in terms of clause 6.3.3.2.2, the right 'to sell the Naming Rights and Commercial Rights in respect of the Stadium' for the duration of the agreement. 'Naming Rights' was defined to mean 'the right to name the Stadium, any of its facilities and/or any part thereof'.

[18] The agreement contemplated the possibility that a third party might have had the naming rights because of a prior agreement entered into by either the City or someone else. In that event the parties undertook to renegotiate the terms of the naming rights so as to limit any loss of revenue.

[19] The parties estimated the annual value of the naming rights for at least R8m, which would escalate. Apart from this agreed figure, the evidence confirms that naming rights of sport stadiums world-wide are extremely valuable. The managers anticipate that the annual revenue from the naming rights could be in the region of R15m to R20m.

THE LONG-TERM LEASE OF 7 AUGUST 2009

[20] Government entered into a long-term notarial lease for 99 years with the City on 7 August 2009 in terms of which the property on which the stadium was erected was leased to the City for the purpose of promoting the sport of football in general and the 2010 FIFA World Cup in particular. Although the erection of the 'new' stadium was in already in progress it provided that the City was entitled to upgrade and renovate the stadium.

[21] The lease was not registered when litigation began but nothing turns on this. The only other matter of any significance for present purposes is that the City was entitled to erect signage on the property and to affix or paint advertising signs. Nothing was said about naming rights.

THE CONTENTIONS OF THE PARTIES ON THE PAPERS

[22] The Bank's case as set out in the founding affidavit was that it has naming rights over the stadium in terms of the servitude agreement. In addition, it alleged, it has a real right in terms of the servitude, which is enforceable against third parties, to name the stadium. Its cause of complaint was that the managers, shortly after the completion of the World Cup, claimed publicly that they had acquired from the City 'all the rights to Advertising, Sponsorships, Naming Rights and Commercial Rights to Soccer City Stadium' and that they had the right to sell the naming rights to Soccer City Stadium. Because the managers were third parties it meant that the Bank relied on its servitude.

[23] The managers, in the answering affidavit, asserted that the right to name the stadium belonged to the City. This right, they said, followed from the fact that the City was the lessee and 'as such possesses the right to name the Stadium'. They, as managers were entitled, in terms of the management agreement, to sell those rights. They added that the name 'National Stadium' was simply a holding or interim

name used to neutralize the limiting consequences of the FIFA name ‘Soccer City’. If the naming rights were to be sold, they said, the purchaser would be entitled to use its brand name on its own or in conjunction with ‘National Stadium’.

[24] Their defence against the claim was that the Bank’s naming rights, which had been conferred by agreement, were never capable of registration in the form of a servitude. In the alternative, they said, the servitude ‘expired’ when the original stadium was demolished during 2007, and that the servitude did not apply to the ‘new’ stadium.

[25] The City, as mentioned, intervened as fourth respondent and asked that the Bank’s application be dismissed with costs. Apart from complaining about the extent of the relief sought by the Bank, the City alleged that it had the right to name the stadium by virtue of the terms of the long-term lease agreement with Government, that it could transfer those rights to the managers, and that its rights prevailed over whatever naming rights the Bank may have had.

THE NATURE OF NAMING RIGHTS

[26] As pointed out, it is common cause that the naming rights attached to a sport stadium are exceptionally valuable. But that does not tell one anything about their nature. During argument the Bank and, unexpectedly, the City argued that these rights are, in the particular circumstances of this case, real rights that flow from ownership of the stadium. The consequence of this acceptance by the City led to the recognition that its case as set out in its affidavit had no merit; that the servitude was valid and created real rights in favour of the Bank; that the City did not ‘receive’ any naming rights from Government by virtue of the lease; and that the clause in the management contract in which the City purported to grant naming rights to the managers was ineffectual.

[27] This attitude of the City was in direct conflict with that of the managers. They insisted that naming rights cannot be real rights and can only arise by virtue of contract and that, accordingly, the servitude was void. Mr du Plessis SC, on behalf of the managers, referred in this regard to an article by Lionel Hogg and Franki

Ganter where the authors, presumably writing about Australian law without quoting authority, stated as follows:[1]

'One cannot effectively acquire naming rights to an event or venue without having practical control of the event or the venue. Naming or title rights are contractual and not proprietary. Their protection and value is dependent almost entirely on market usage.'

[28] It is no doubt correct that some naming rights are purely contractual in the sense that they arise as a result of an agreement. This would for instance apply where someone wishes to stage a sporting or cultural event and enters into agreements with others relating to the event. Whether that is necessarily true about a product or a commercial building, such as a shopping centre, office block or sports stadium, is another matter. One would assume that the owner would be the person who could name the building by attaching naming boards to the property or to use its name for commercial purposes.[2] As Mr Joseph SC for the City said, it is a common occurrence that the owner of a commercial building would let the building and give the head lessee the right to name the building. Although the grant of the right to name to the lessee is by contract, the owner must have had the right by virtue of its control over the building. This does not mean that others may not refer to the building by some other name but that use will not have commercial significance.

[29] That naming rights vest in the owner was impliedly admitted by the managers when they sought to justify their entitlement to those rights. They said that the rights were derived from the City who had obtained them from the owner, albeit by contract. Although Mr du Plessis initially submitted that the naming rights of his clients flow from the control Government as owner had over the stadium, he retracted from this position and eventually submitted that the managers' lawyerly evidence was based on a misconception of the legal position. His argument in this regard that naming rights come from nowhere, could (somewhat unkindly) be compared, according to Mr Louw SC for the Bank, to the Big Bang theory.

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[1] 'Legal Issues in Sports Marketing' (1997) 13 *Queensland University of Technology Law Journal* 92 at p 120.

[2] The right to an exclusive name of one's property does not exist unless the name has a commercial or financial significance. Compare *Day v Brownrigg* (1878) 10 ChD 294.

[30] It is not necessary to get embroiled with a discussion about the nature of rights according to Bentham or Hohfeld and the like,[3] or (for those who are not affected by cultural cringe)[4] according to WA Joubert *cum suis*.[5] It is also not necessary to delve into the history of real rights,[6] to re-conceptualize ownership,[7] or (as the court below did) to 'dephysicalise' property law.[8] In any event, as the Digest 50.17.202 warns, 'omnis definitio in iure civilis periculosa est; parum est enim, ut non subverti posset'. Instead, it should suffice to deal with some elementary propositions still taught, I hope, at law schools.[9]

[31] The first concerns the distinction between real and personal rights. Real rights have as their object a thing (Latin: *res*; Afrikaans: saak). Personal rights have as their object performance by another, and the duty to perform may (for present purposes) arise from a contract. Personal rights may give rise to real rights, for instance, a personal obligation to grant someone a servitude matures into a real right on registration.[10] Real rights give rise to competencies: ownership of land entitles the owner to use the land or to give others rights in respect thereof. Others may say that ownership consists of a bundle of rights, including the right to use the land, but it does not really matter who is right on this point.

[32] A servitude is a limited real right in respect of the property of another. There are two types, namely praedial and personal. In spite of the confusing nomenclature, a personal servitude is also a real right which imposes a burden on the property of

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[3] See F M Kamm 'Rights' in Jules Coleman & Scott Shapiro (eds) *The Oxford Handbook of Jurisprudence & Philosophy of Law* (Oxford 2002); P J Fitzgerald *Salmond on Jurisprudence* 12 ed (1966) para 41.

[4] Prof Ricketson's description of the inclination of Australian lawyers to follow English precedents blindly. Quoted by Kathy Bowrey in Catherine W Ng, Lionel Bently & Giuseppina D'Agostino eds *The Common Law of Intellectual Property –Essays in honour of Professor David Vaver* (Hart Publishing 2010) p 46.

[5] Discussed for instance in Van Heerden & Neethling *Unlawful Competition* (Butterworths 1995) ch 4.

[6] Robert Feenstra *Ius in Re: Het Begrip Zakelijk Recht in Historisch Perspektief* (Leiden 1979); R Feenstra *Romeinschregtelijke Grondslagen van het Nederlands Privaatrecht* (Leiden 1984).

[7] J R L Milton 'Ownership' in Reinhard Zimmermann and Daniel Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa.*

[8] With special reference to Kenneth J Vandevelde 'The New Property of the Nineteenth Century: The Development of the Modern Concept of Property' (1980) 29 *Buffalo Law Review* 325.

[9] For a full discussion of the topic reference may be made to the standard works such as C G van der Merwe *Sakereg* 2 ed (1989) and the same author's chapters on 'Things' in *Lawsa* and in Francois du Bois (ed) *Wille's Principles of SA Law* 9 ed (2009); Badenhorst, Pienaar & Mostert *Silberberg and Schoeman's The Law of Property* 5 ed (2006). The judgment in *Lorentz v Melle* 1978 (3) SA 1044 (T) provides an encyclopaedic excursion on the subject.

[10] *Van Vuren v Registrar of Deeds* 1907 TS 289 at 296.

another. It is 'personal' because the right holder is a particular person whereas in the case of a real servitude the right adheres to a dominant property.[11]

[33] In this case we are concerned with an alleged personal servitude. The question is then whether these rights are real rights in respect of land or are personal (in the sense that they place obligations on others to perform).[12] Unless the rights are real they do not bind third parties.[13] This principle is embodied in the Deeds Registries Act 47 of 1937. Section 63(1) provides that no deed, or condition in a deed, purporting to create or embodying a personal right, and no condition which does not restrict the exercise of any right of ownership in respect of immovable property shall be capable of registration. This means that the servitude to be valid must carve out a portion, or take away something, of the dominium.[14] Whether a deed of servitude embodies a personal right or restricts the exercise of ownership is a matter of interpretation.[15]

[34] The present servitude is in its terms said to be a personal servitude. According to its tenor Government, as owner of the property, granted the Bank the right to name the stadium the 'FNB Stadium'. The Bank is in consequence entitled to erect naming boards displaying this name. These may be placed at all outer perimeter entrances and exits of the stadium and on not less than four prime sites in the stadium. The servitude does not purport to place any duties on Government, which means that Government has no obligations to perform which, in turn, means that the servitude did not create a personal right in favour of the Bank. The fact that the Bank has the rights mentioned means that Government, in its capacity as owner, is not entitled to place other naming boards on or around the stadium. It is not conceivable that the parties could have intended that conflicting naming boards could be erected at the stadium. This means that the right to name the stadium as

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[11] See e g M J de Waal 'Servitudes' in *Southern Cross* supra.
[12] This is the basis of *Lorentz v Melle* 1978 (3) SA 1044 (T). See *Hollins v Registrar of Deeds* 1904 TS 603 at 605.
[13] The Bank's case as set out in the founding affidavit was not based on either the doctrine of notice or interference with contractual rights. The judgment of the court below occasionally dealt with the matter on one or other of these bases, as did the Bank's written argument, but it would be inappropriate to decide the case on that basis.
[14] *Grant v Stonestreet* 1968 (4) SA 1 (A) 24A-B.
[15] *Venter v Minister of Railways* 1949 (2) SA 178 (E); *Edelor Ltd v Champagne Castle Hotel (Pty) Ltd* 1972 (3) SA 684 (N) at 689F-690C and the authorities there mentioned.

owner was carved out from the owner's full ownership right, thereby restricting the exercise of this particular right of ownership in respect of the immovable property.

[35] The particular naming rights can be compared to a trading right. It is accepted, at least since *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1913 AD 267, that the right to trade on the property of another amounts to the right to use and occupy that property or part of it for a specific purpose and can amount to a personal servitude. It should be borne in mind that there is not a closed list of personal servitudes and that the right of the Bank to advertise its business on and through the stadium does not differ in kind from a conventional trading right.[16] Since a stadium cannot have more than one name the naming right is the sole right of the Bank and affixing any other name for the stadium on, in or around the stadium would infringe the Bank's real right because the property is put to a use that belongs exclusively to the Bank.

[36] It follows from this that the present stance of the City as expressed during Mr Joseph's argument is correct and that the contrary submissions of the managers have to be rejected.

THE BUSINESS EFFICACY ARGUMENT

[37] The argument just disposed of was not the managers' main argument but it had to be dealt with first because was the basis of the Bank's claim. Their main argument was the so-called business efficacy argument which was directed at the terms of the servitude agreement and not the servitude itself. Although the written submissions stated that this agreement was void for vagueness the oral submission was that it lacked business efficacy because it did not oblige Government to use and promote the stadium. Without, at least, a contractual obligation on the owner or manager to acknowledge and use the name, said Mr du Plessis, the naming right is valueless.

[38] I have serious difficulty in following the argument. Counsel relied in support of the argument on cases that say that a tacit term cannot be implied into a contract merely because the agreement lacks business efficacy. Lack of business efficacy may affect the value of the agreement but it does not affect its enforceability. If

[16] *Durban City Council v Woodhaven Ltd* 1987 (3) SA 555 (A) at 559B-I.

counsel's argument was that there was nothing to enforce in the agreement, I have to disagree. The Bank is entitled to erect the naming boards and the owner has to respect that right as described above.

[39] The problem with the argument is more fundamental. The Bank seeks to enforce a registered servitude right and not contractual rights under the servitude agreement. In addition, the purpose of the agreement was to create real rights and if were to create additional personal rights by imposing contractual obligations on the owner of the property it would have been self defeating.

THE DESTRUCTION OF THE STADIUM

[40] I have alluded to the fact that the original stadium, which was financed by the Bank, was substantially demolished and replaced by what the appellants call the 'new' stadium. They argue that the servitude was intended to cover the original stadium and since that has been destroyed the servitude was extinguished. For this they rely on Voet *Commentarias ad Pandectas* 8.6.4 where the author dealt with the effect of the destruction of the servient tenement: in principle it extinguishes the servitude. He added, however, that if in the case of a praedial servitude the property is restored the servitude revives, but not in the case of a personal servitude. If one follows the reasoning in *Kidson v Jimspeed Enterprises CC* 2009 (5) SA 246 (GNP) this might not necessarily be the case.[17] However, there are two fundamental reasons why the argument cannot succeed.

[41] In the first instance it is clear from the examples given by Voet that he was concerned with those cases where the subject of the servitude was destroyed as a result of *casus fortuitous* or *vis maior.* He did not deal with the case where the owner of the servient tenement (here, in conjunction with the lessee) intentionally destroyed the subject matter of the servitude within weeks after conclusion of the servitude agreement and even before its registration and then erects a similar structure in its stead. It is a general principle that one cannot rely on one's own wrongdoing to evade any obligation. A party is not, for instance, relieved from a contractual obligation because of supervening impossibility where that party was responsible for

[17] See also the case comment by C G van der Merwe 'Extinction of Personal Servitude of *Habitatio*' 2010 (73) *THRHR* 657.

the impossibility.[18] Another example would be the doctrine of fictional fulfillment of a condition.[19] There is no reason why the underlying principle cannot be extended to a case such as this and why the right holder has to be satisfied with a damages claim which, in this case, would probably be met with a defence that the Bank had agreed in the servitude agreement to the destruction and why the servitude should not extend to the replacement structure.

[42] There is, however, a more profound reason why the 'destruction' of the old stadium did not extinguish the servitude. It is because the servitude agreement and the servitude itself, on a proper interpretation, covered the 'new' stadium. It is in this regard necessary to have regard the circumstances against which the servitude was granted.

[43] The Bank held a bond over the property and had naming rights. Government committed itself to finance, in conjunction with the City, the redevelopment of the stadium to the satisfaction of FIFA. The stadium was redesigned to be in the form of a calabash. The new design was approved before conclusion of the servitude agreement. When the agreement referred to the fact that the servitude would cover the stadium as 'reconstructed' it referred to the stadium as 'reconstructed' for purposes of the World Cup event. It was never intended that the old stadium would simply be rebuilt to be in the same form and with the same capacity as the old stadium. The fact that the costs estimate was way out and that the supposition that more of the old stadium could have been used – matters that did not concern the Bank – cannot affect the interpretation of the agreement and servitude. I therefore find that there is no merit in this submission.

THE ORDER AGAINST THE CITY

[44] As mentioned, the City became a party to the proceedings by its own volition. The Bank did not ask, either initially or subsequently, for any substantive relief against the City but the order of the court below was directed against not only the managers but also the City. It is customary, and also procedurally correct, that if a party joins proceedings as respondent and in the absence of a suitable and timely

[18] Van der Merwe et al *Contract: General Principles* (1 ed) p 385-386.
[19] Ibid p 206.

amendment of the notice of motion in which substantive relief is sought against the joining party, the only order a court can grant against it is one for costs.[20]

[45] The court below justified its approach on the ground that in joining the managers in the proceedings and supporting them the City became a co-wrongdoer and had to be restrained. This, however, does not dispense with the required prayer for relief against the City. The court also relied on the prayer for alternative relief. It erred because this superfluous prayer does not entitle a court to grant relief that is inconsistent with the factual statements and the terms of the express claim,[21] especially where, as in this case, the last affidavit of the Bank made it clear that the only relief sought against the City was one for costs.

[46] In spite of these procedural problems it appears to me that the order should not be set aside because the City can suffer no prejudice as a result of the order. Because the City joined in the proceedings and made common cause with the managers the judgment of the court below would in any event bind the City in any future proceedings.[22]

THE TERMS OF THE ORDER

[47] The appellants also object to the terms of the order. The objections of the managers depend largely on the correctness of their submissions on the nature and effect of the servitude and, because of my findings, need no further consideration. The remaining objections are formalistic and were not even raised during oral argument, and can be discounted.

[48] The City's first objection to the formulation of the interdict is that it prevents the appellants from 'referring' to the stadium by any name other than 'FNB Stadium'. The argument was that this limits the City's rights of free speech because if it wished to refer to it as 'the stadium in Soweto' or as 'the stadium that looks like a calabash' or the one 'that was used during the World Cup' it would be guilty of contempt of court. These examples are farfetched and although the word 'refer' could, if read out

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[20] Compare in the context of third party proceedings *Geduld Lands Ltd v Uys* 1980 (3) SA 335 (T).
[21] *Johannesburg City Council v Bruma Thirty-Two (Pty) Ltd* [1984] 4 All SA 137 (T), 1984 (4) SA 87 (T); *Combustion Technology (Pty) Ltd v Technoburn (Pty) Ltd* 2003 (1) SA 265 (C).
[22] Compare *Le Roux v Le Roux* [1967] 1 All SA 488 (A), 1967 (1) SA 446 (A) and *Du Raan v Maritz* 1973 (4) SA 39 (SWA).

of context, give rise to difficulties it should be clear to all who read with a mind willing to understand that the order was directed to the protection of the Bank's merchandising rights. But in order to state matters more clearly, I propose to amend the order to reflect the fact that the appellants are interdicted from 'naming' the stadium by means of naming boards on or around the stadium by a name other that 'FNB Stadium'.

[49] These formal changes do not justify any costs order in favour of the appellants. For sake of completion the substantive order as amended will be rendered in full.

ORDER

[50] The following order is made:

(a) The appeal is upheld to the extent indicated below and is otherwise dismissed with costs, including the costs of two counsel to be borne by the appellants jointly and severally.

(b) Paragraphs 2 and 3 of the order of the court below are amended to read as follows:

'2 Until the lapse of the Applicant's servitude rights as set out in the Notarial Deed of Servitude 2529/08 and registered by the Registrar of Deeds, Pretoria, the First, Second and Fourth Respondents are interdicted from:-

2.1 naming the soccer stadium on Portion 4 of the farm Randskou 324 (Reg Div IQ) Gauteng Province by means of naming boards or the like affixed in, on, or at all outer perimeter entrances and exits of the stadium, or elsewhere on the property by a name other that "FNB Stadium";

2.2 purporting to sell or dispose of the right to name the stadium during the period;

3 The following declaratory order is made:-

3.1 The Applicant has the sole right to name the stadium by means of naming boards and the like affixed in, on, or at all outer perimeter entrances and exits of the stadium, or elsewhere on the property during the life of the deed of servitude;

3.2 The Applicant has chosen the name "FNB Stadium";

3.3 The First, Second and Fourth Respondents do not have the right to name the stadium during the period and the extension period.'

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L T C HARMS
DEPUTY PRESIDENT

APPEARANCES

APPELLANT/S	1 & 2: S J du Plessis SC (with him T vd Walt)
	Instructed by Glyn Marais Inc in association with Denton Wilde Sapte, Johannesburg
	Matsepes Attorneys, Bloemfontein
	3: S L Joseph SC (with him M Smit)
	Instructed by Cliffe Dekker Hofmeyr Inc, Sandton
	McIntyre & Van der Post, Bloemfontein
RESPONDENT/S:	P F Louw SC (with him G Amm)
	Deneys Reitz, Bloemfontein
	Webbers, Bloemfontein