THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 899/2019

In the matter between:

KINGSLEY JACK WHITEAWAY SEALE	**FIRST APPELLANT**
ONTSPAN BELEGGINGS (PTY) LTD	**SECOND APPELLANT**
HI FRANK COMPONENTS (PTY) LTD	**THIRD APPELLANT**
SCHOEMANSVILLE OEWERKLUB	**FOURTH APPELLANT**

and

MINISTER OF PUBLIC WORKS	**FIRST RESPONDENT**
MINISTER OF WATER AND SANITATION	**SECOND RESPONDENT**
PREMIER OF THE NORTH-WEST PROVINCE	**THIRD RESPONDENT**
TRANSVAAL YACHT CLUB	**FOURTH RESPONDENT**
REGISTRAR OF DEEDS, PRETORIA	**FIFTH RESPONDENT**

Neutral citation:	*Seale and Others v Minister of Public Works and Others* (899/2019) [2020] ZASCA 130 (15 October 2020)
Coram:	PONNAN, ZONDI, DAMBUZA and VAN DER MERWE JJA and WEINER AJA
Heard:	7 September 2020
Delivered:	This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 15 October 2020.

Summary: Contract – agreement to agree – unenforceable in absence of deadlock-breaking mechanism.

Acquisitive prescription – of servitude under Prescription Act 18 of 1943 – proof required of actual use of servitude as if of right continuously for 30 years.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Davis J sitting as court of first instance):

1 The appeal is dismissed with costs, including the costs of two counsel.

2 The costs order of the court a quo is substituted with the following:

'(a) The first, third and fourth applicants are jointly and severally ordered to pay the costs of the second respondent, including the costs of two counsel;

(b) The second respondent is ordered to pay the costs of the second applicant, including the costs of two counsel;

(c) The applicants are jointly and severally ordered to pay the costs of the fourth respondent, including the costs of two counsel.'

JUDGMENT

Van der Merwe JA (Ponnan, Zondi, Dambuza JJA and Weiner AJA concurring)

[1] The Hartbeespoort area is a popular destination for spending holidays and leisurely weekends. Its central attraction is the Hartbeespoort Dam (the Dam). The Dam was built by the government of the Union of South Africa (the Union Government) during the early part of the previous century. Its legal successor, the national government of the Republic of South Africa (the State), owns a narrow strip of land on the eastern bank of the Dam between the waterline and the boundaries of the adjacent properties. These properties include erven in the Schoemansville and Meerhof townships. This strip of State land has at least since 1925 been referred to as the foreshore. The appeal concerns servitudal rights of access over the foreshore for purpose of boating and fishing on the Dam.

[2] The first appellant is Mr Kingsley Jack Whiteaway Seale. He is a director of both the second appellant, Ontspan Beleggings (Pty) Ltd and the third appellant, HI Frank Components (Pty) Ltd. Each of the appellants own properties that are situated adjacent,

or in close proximity, to the foreshore. The fourth appellant is the Schoemansville Oewerklub, a voluntary association that acts in the interest of its members. The majority of its members are registered owners of erven in Schoemansville.

[3] The appellants launched an application in the Gauteng Division of the High Court, Pretoria for orders declaring and enforcing servitudal rights over the foreshore. The second respondent, the Minister of Water and Sanitation, opposed the application on behalf of the State. The fourth respondent, the Transvaal Yacht Club, a voluntary association that owns property adjacent to the foreshore, also opposed the application. The court a quo (Davis J) dismissed the application, but granted leave to the appellants to appeal to this court.

Background

[4] The history of the matter spans more than a century. The following exposition suffices for a proper understanding of this judgment. At the time when the Union Government determined to construct the Dam (then referred to as the Hartebeestpoort Reservoir), the Schoeman family owned portions of the freehold farm Hartebeestpoort nr 498 in the district of Pretoria. The Crocodile River, which would be the main source of water for the Dam, traversed the original farm. Mr Johan Hendrik Schoeman and members of his family were the co-owners of the land known as the northern portion of the farm Hartebeestpoort. Mr Schoeman was the owner of an adjacent farm referred to as a certain portion of the south-eastern portion of the farm Hartebeestpoort. Parts of these two portions of land would be submerged by the Dam.

[5] In the light hereof, on 25 January 1918, the Union Government, represented by the Minister of Lands, and the owners of the aforesaid portions of the farm Hartebeestpoort, represented by Mr Schoeman, entered into an agreement of sale (the 1918 agreement). In terms thereof the Union Government purchased the portions of the aforesaid tracts of land from the Schoeman family that would be submerged by the Dam. The eastern boundary of the land purchased was determined to be a line running three feet above the projected high flood level of the Dam.

[6] The land in question was subdivided accordingly and the portions thereof that became the property of the Union Government presently consists of three titles. These adjoining properties are presently described as the following portions of the farm Hartbeestpoort: the remaining portion of portion 28, measuring 474,6058 hectares (portion 28); the remaining extent of portion 29, measuring 231,4418 hectares (portion 29); and portion 59 (a portion of portion 29), measuring 2,0296 hectares (portion 59). They vest in the State as the legal successor of the Union Government.

[7] After the subdivision, Mr Schoeman retained ownership of the remainder of the portion of the south-eastern portion and shortly afterwards also acquired ownership of the remainder of the northern portion. The boundary between Mr Schoeman's land and the State land therefore ran above the actual (fluctuating) waterline of the Dam. As I have said, this strip of land is referred to as the foreshore and has to be traversed to gain access to the Dam from the east.

[8] Clause 3(k) (clause K) of the 1918 agreement provided for the retention of rights of access to the Dam in the following terms:

'The said Johan Hendrik Schoeman in his individual capacity or his assigns shall retain the right of access to the said Hartebeestpoort Reservoir on certain three places to be mutually agreed upon by the parties to these presents – the said places being situated approximately as follows: (a) near the south eastern entrance to Hartebeestpoort on the eastern bank of the River, (b) near the site of the old dam on the Crocodile River built by the now late General Schoeman, and (c) at a suitable site in the Zwartspruit Valley – for the purpose of boating on the said reservoir and fishing therein, provided that the said Schoeman or his assigns shall at all times be subject to all general regulations and restrictions that may be framed and at any time come into force in connection with the said reservoir and the use thereof by the public, provided that such regulations shall be of general application and that the said Schoeman or his assigns shall not be prevented from reasonably using the said reservoir for the said purposes unless and until the water of the said reservoir may at any time be required for domestic purposes and the public are excluded from access to the Reservoir when the rights hereby granted to the said Schoeman shall cease and determine until such time as such restrictions are withdrawn. It is further understood and agreed that if in regards to the operations to be undertaken in connection with the said reservoir the actual sites marked on the last mentioned diagrams or any of them should be required for the purposes aforesaid that then and in that case a suitable site as near as possible to the original site shall for the purposes aforesaid be granted to the said Schoeman

in his individual capacity who shall have the right of selecting such site or sites – which shall not interfere with the working and works of the Reservoir.'

[9] For reasons lost in time, the parties never agreed upon the precise locations of the 'three places'. Mr Schoeman nevertheless desired the registration of these rights. After correspondence had been exchanged, the Union Government during 1922 entered into a notarial contract with Mr Schoeman (the notarial contract). It recorded the 1918 agreement, reproduced clause K and proceeded as follows:

'WHEREAS it is desired to have the right so reserved in Clause K registered in the Deeds Office, but as the Government will hold that area which will form the submerged area of the said Hartebeestpoort Reservoir under a great many titles, some portions of which have not yet been acquired by the Government.

NOW THEREFORE, the parties hereto agreed to register this Contract in the Deeds Office in the Register known as the Register for Diverse Acts, whereby the rights granted to the Party of the other part, the said JOHAN HENDRIK SCHOEMAN, in his individual capacity, or his Assigns, and more fully detailed in Clause K above set out in full, may be recorded and registered in favour of the said JOHAN HENDRIK SCHOEMAN, in his individual capacity or his Assigns, against the said submerged area of the Hartebeestpoort Reservoir, subject to the conditions that when and soon as the Government has acquired the whole of the area which will form the submerged area of the Hartebeestpoort Reservoir, and has taken out a Certificate of Consolidated Title of such area; the parties hereto, their Successors in Title or Assigns, bind themselves to enter into a Contract whereby the rights as detailed in said Clause K of the said Deed of Sale, may be properly registered as a servitude against the Titles of the servient and dominant tenements respectively.'

[10] It is apparent that the notarial contract envisaged two registrations. The first was the registration of the notarial contract itself in the Register of Diverse Acts. The second was the registration of a servitude. The first registration took place on 3 October 1922. The second did not take place. Although the Union Government and its successors for many years afterwards expressed the intention to acquire the titles of the area submerged by the Dam, the State at some stage decided not to do so. It therefore did not take out the certificate of consolidated title envisaged in the notarial contract.

[11] It appears that Mr Schoeman was an entrepreneur of note. During 1923 he established the Schoemansville Township. It was established on the remainder of the

northern portion adjacent to portion 28. The title deeds of all the erven in Schoemansville contain the following clause:

'All registered erf-holders shall be entitled in common with JOHAN HENDRIK SCHOEMAN, his Successors in Township Title or Assigns, to the right of access to the dam near the South- eastern entrance to Hartebeestpoort on the Eastern-Bank of the Crocodile River, for the purpose of boating on the said reservoir and fishing therein, subject to the conditions of Notarial Agreement No. 99/1922M, dated the 27th day of September, 1922, filed in the Deeds Office. . . .'

[12] During 1935 Mr Schoeman also established the township of Meerhof. Meerhof is situated adjacent to portions 29 and 59. The title deeds of the erven in Meerhof contain a similar provision in respect of access to the Dam:

'All registered erfholders in the Township shall be entitled in common with the Applicant, his successors in Township Title or Assigns to the right of access to the Lake at the southern end thereof near the late H.J. Schoeman's old dam known as Sophia's Dam (now adjoining Schoemansville Station) on the Eastern Bank of the Crocodile River for the purpose of boating in the said lake and fishing therein subject to the conditions of the Notarial Agreement No. 99/1922M, dated the 27th September 1922, and filed in the Deeds Office. The owners of business erven Nos. 89, 90, 164 and 165 however, shall be entitled to ply boats for hire on the Lake, as from the abovementioned access.'

[13] In the meantime, Mr Schoeman persuaded the Union Government to retransfer a portion of the land that had been transferred pursuant to the 1918 agreement, to him. The decision of the Union Government was taken on 10 October 1925 and was recorded in Cabinet Minute 3125 (the Cabinet Minute). In terms thereof, the following was approved:

'1. The grant to JOHAN HENDRIK SCHOEMAN of certain piece of land being Portion No. 1 of Portion L of the Northern portion of the farm Hartebeestpoort No. 498, District Pretoria, measuring 476 square roods, together with the right to use the foreshore immediately in front of the said land and between it and the Hartebeestpoort Lake, subject to rights of access to the said foreshore in favour of the Government of the Union of South Africa and its servants.

2. The grant of a right of user in favour of the TRANSVAAL YACHT CLUB in respect of the foreshore immediately in front of Stands Nos. 117 and 118 of Schoemansville Township

and between the said Stands and the Hartebeestpoort Lake. Subject, however, to rights of access in favour of the Government of the Union of South Africa and its servants.

3. The reservation of the foreshore adjoining the Hartebeestpoort Lake extending from Stand No. 121 to the corner of Tolstoi Street and Lakeside Avenue of Schoemansville Township as a landing place for the general public and persons plying for hire with boats on the Hartebeestpoort Lake, other than standholders in the Schoemansville Township, the owner for the time being of the piece of land referred to in paragraph (1) above and the Transvaal Yacht Club referred to in paragraph (2) above, subject to rights of access in favour of the Government of the Union of South Africa and its servants.

4. The reservation of the foreshore adjoining the Hartebeestpoort Lake extending from the corner of Tolstoi Street and Lakeside Avenue to Riekert Street of Schoemansville Township, as a landing place for the owners of Stands in Schoemansville Township other than the owner for the time being of the piece of land referred to in paragraph (1) above and the Transvaal Yacht Club referred to in paragraph (2) above, subject to rights of access in favour of the Government of the Union of South Africa and its servants.'

[14] Paragraph 1 of the Cabinet Minute was given effect to by Crown Grant 67 of 1926 (the Crown Grant). It was registered in the Deeds Office on 1 April 1926. In terms thereof Mr Schoeman received transfer of a piece of land, measuring some 48 hectares, presently known as portion 43 of the farm Hartebeestpoort (portion 43). It does not form part of the Schoemansville Township. The Crown Grant also provided for access to the Dam, as follows:

'The owner of the land hereby granted shall be entitled to the free use of the foreshore immediately in front of it, and between it, and the Hartebeestpoort Lake as indicated on the Diagram S.G. No. A.1936/25. . . .'

This servitude was duly endorsed on the title deed of the servient tenement, presently portion 28.

[15] The fourth respondent was established on 23 February 1923. It was a condition of the grant of portion 43 to Mr Schoeman that he would donate erven 117 and 118, Schoemansville to the fourth respondent. These erven were duly transferred to it. It subsequently also obtained ownership of the adjacent erf 119. These three erven have since been consolidated and are presently known as erf 1113 Schoemansville. The rights that had been approved in terms of para 2 of the Cabinet Minute were registered

as a servitude against the title deed of the servient tenement, in favour of the fourth respondent's land.

[16] Lakeside Avenue in Schoemansville is presently known as Waterfront Street. During the early 1980's a bird sanctuary was established on parts of the foreshore referred to in paragraphs 3 and 4 of the Cabinet Minute. The relative locations of the adjacent properties that I have referred to can be pictured as follows. Moving roughly from west to east, one would traverse the foreshore in this order: in front of portion 43; in front of erf 463, Schoemansville (erf 463); in front of erf 1113, Schoemansville; from in front of erf 121, Schoemansville to the western boundary of the bird sanctuary; the bird sanctuary itself; and from the eastern boundary of the bird sanctuary to in front of the corner of Riekert Street and Waterfront Street in Schoemansville.

[17] The first appellant established the Hartbeespoort Snake and Animal Park on portion 43 during 1962. In 1964 he extended his operation to the adjacent erf 463, with the permission of the owner thereof, Mr Schoeman. During 1965 Mr Schoeman donated erf 463 to the Peri-Urban Health Board. The first appellant leased erf 463 from it. During 1973 the first appellant obtained the shareholding in the second appellant and the second appellant obtained transfer of portion 43. And in 1982 the Peri-Urban Health Board transferred erf 463 to the first appellant.

[18] As I have said, erf 1113 adjoins erf 463. In terms of various successive lease agreements, the fourth respondent has since 1969 leased not only the foreshore in front of its property but also approximately two thirds of the foreshore in front of erf 463. The fourth respondent effected significant improvements to the foreshore, to facilitate access to the Dam for yachting. The fourth respondent's use of the foreshore in front of erf 463 was and remains a major bone of contention. One of the principal purposes of the appellants' application was to limit the fourth respondent to the use of the foreshore in front of the fourth respondent's property.

[19] The first appellant also owns a residential property in Schoemansville (erf 297), as well as erven 89, 90, 164 and 165 in Meerhof. Erf 90 adjoins portion 59 and the other erven are situated adjacent to portion 29. The third appellant is the owner of erf 1132 in Schoemansville. It is situated opposite erf 463, which lies between it and the foreshore.

[20] In the court a quo the first, third and fourth appellants essentially claimed an order directing the State to take all steps necessary to register praedial servitudes of access to the Dam for purposes of boating and fishing, as follows: (a) over portion 28 in favour of the land on which the township of Schoemansville had been established (that is all the erven in Schoemansville), in accordance with the aforesaid provision in the title deeds of these erven; (b) over the foreshore in front of erf 463, in favour of erf 463; (c) over portion 29 in favour of the land on which the township of Meerhof had been established (that is all the erven in Meerhof), in accordance with the aforesaid provision in the title deeds of these erven; and (d) over portion 59, in favour of erf 90, Meerhof. Thus, the place of access envisaged in para (c) of clause K is not directly relevant to the matter. The second appellant, in essence, sought a declarator that it is entitled to free use of the foreshore in front of portion 43, subject to the rights of the State.

Analysis

[21] It is apparent that the case of the second appellant was very different to that of the other appellants. Unless indicated otherwise, I henceforth refer to the first, third and fourth appellants collectively as the appellants and to the second appellant as Ontspan Beleggings. I commence with a consideration of the appeal of the appellants. They contended that they were entitled to the enforcement of contractual rights to registration of the servitudes, alternatively that they had acquired the servitudes by acquisitive prescription.

[22] It is trite that a servitude is a right to use the property of another in a particular manner. The right may be attached to a particular (dominant) tenement (praedial servitude) or to a particular person (personal servitude). Both are real rights that come into existence upon their registration in the Deeds Office. A personal right to claim the registration of a servitude (praedial or personal) may, of course, arise from an agreement. Whether or not an agreement provides for the right to the registration of a servitude, and whether such servitude would be praedial or personal, depends on an interpretation of the particular agreement in accordance with the ordinary well-known rules of construction. See *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1918 AD 1 at 16.

[23] The appellants contended that the rights to obtain the registration of the servitudes emanated from clause K on its own, or clause K together with the notarial contract. A personal servitude held by a natural person inevitably terminates when that person dies. See AJ van der Walt *The Law of Servitudes* (2016) at 565-566. Mr Schoeman passed away in 1967. It follows that the contractual case was entirely dependent thereon that Mr Schoeman had obtained the right to the registration of a praedial servitude. It is trite that a praedial servitude is characterised by the fact that it attaches to a dominant tenement, regardless of the identity of the owner thereof from time to time. Therefore an agreement cannot give rise to the right to a praedial servitude without the express or implicit identification of a dominant tenement.

[24] Clause K did not grant rights in favour of a dominant tenement. It provided quite the contrary. The rights were granted to Mr Schoeman 'in his individual capacity or his assigns'. Clause K did not require him to be the owner of any property. In context the 'assigns' meant persons to whom Mr Schoeman in his individual capacity might have ceded his rights. I agree with the fourth respondent that the use of the word 'or' instead of 'and' was significant and indicated that 'assigns' did not refer to successors in title. It would make no sense to grant rights of access to a person *or* his successors. Insofar as there might be an ambiguity, it should be resolved by the application of 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, that is, in this case, a personal servitude. See *Kruger v Joles Eiendomme (Pty) Ltd and Another* [2008] ZASCA 138; 2009 (3) SA 5 (SCA) para 8. In my opinion clause K did not provide the right to a praedial servitude.

[25] The mere registration of the notarial contract could not alter this position. The notarial contract, in any event, specified that the purpose of the registration of the notarial contract was that the rights granted in terms of clause K might 'be recorded and registered in favour of the said Johan Hendrik Schoeman, in his individual capacity or his Assigns, against the submerged area of the Hartebeestpoort Reservoir'.

[26] There are indications that the second part of the notarial contract might have envisaged the registration of a praedial servitude. These are, first, that, other than in clause K and in respect of the registration of the notarial contract itself, the second part

referred to ‘the parties hereto, their Successors in Title or Assigns’. Second, it expressly referred to the registration of a servitude against the titles of the servient and dominant tenements respectively. The registration of a servitude was, however, subject to a finding that the ‘conditions’ had been fictionally fulfilled, as the appellants contended. Their reliance on fictional fulfilment appears to be tenuous. Even if it is accepted for argument’s sake that the notarial contract placed a tacit contractual duty on the Union Government to take steps to acquire all the land that had been submerged by the Dam and that it or its successor in law took a decision not to acquire the land, the appellants had to prove that the decision had been taken with the intention to avoid the registration of the servitude. See *Lekup Prop Co No 4 (Pty) Ltd v Wright* [2012] ZASCA 67; 2012 (5) SA 246 (SCA) paras 7 and 10-11. There was no evidence as to when and why such a decision had been taken. But, as I shall demonstrate, none of the aspects mentioned in this paragraph matters if clause K was an unenforceable agreement to agree. This is the issue that I now turn to.

Agreement to agree

[27] In terms of clause K access to the Dam would be obtained at three places. Only the general location or vicinity of the three places was stated. Clause K did not identify the locations of the three places. They had to be mutually agreed by the parties. Material elements of the right of access would therefore only be determined by further agreement. Thus, there was an agreement to agree. I accept that there was an implicit obligation on the parties to negotiate in good faith, but subject thereto, the further agreement was entirely dependent on the will of the parties. Clause K did not contain any provision that would regulate the position in the event of failure of the negotiations in respect of the proper identification of the three places.

[28] Our law in respect of the enforceability of an agreement to agree developed in the following manner. In *Premier of the Free State Provincial Government and Others v Firechem Free State (Pty) Ltd.* 2000 (4) SA 413 (SCA); [2000] 3 All SA 247 (A) at 431G-H Schutz JA said, with reference to earlier authority, that ‘an agreement that the parties will negotiate to conclude another agreement is not enforceable, because of the absolute discretion vested in the parties to agree or disagree’. In *Southernport Developments (Pty) Ltd v Transnet Ltd* 2005 (2) SA 202 (SCA); [2005] 2 All SA 16 (SCA) at 208C-D Ponnan AJA, writing for the court, held that the *dictum* in *Firechem* is

not applicable to a contract that contains what he referred to as a deadlock-breaking mechanism. By that he meant provisions that prescribe further steps to be followed in the event of the failure of the negotiations.

[29] *Letaba Sawmills (Edms) Bpk. v Majovi (Edms) Bpk.* 1993 (1) SA 768 (AD); [1993] 1 All SA 359 (A) provided an example of such a deadlock-breaking mechanism. There an option to renew a lease on the basis that in the event of the parties failing to agree on the rental, a market-related rental would be determined by arbitrators, was held to be enforceable. *Southernport* similarly dealt with an option to lease specified properties (or agreed portions thereof) 'on the terms and conditions . . . negotiated between the parties in good faith'. The court held at 211F-G that the enforceability of the option had been saved by a provision that should the parties be unable to agree on any of the terms and conditions, the dispute would be referred to an arbitrator whose decision would be final and binding.

[30] Ponnan AJA referred to the judgment of Kirby P in the Australian case of *Coal Cliff Collieries (Pty) Ltd v Sijehama (Pty) Ltd* (1991) 24 NSWLR 1 and proceeded to say:

'[16] Kirby P then adverted to three situations. He stated of the first:

> "In many contracts it will be plain that the promise to negotiate is intended to be a binding legal obligation to which the parties should be held. The clearest illustration of this class will be cases where an identified third party has been given the power to settle ambiguities and uncertainties… But even in such cases, the court may regard the failure to reach agreement on a particular term as such that the agreement should be classed as illusory or unacceptably uncertain: In that event the court will not enforce the agreement.";

of the second:

> "In a small number of cases, by reference to a readily ascertainable external standard, the court may be able to add flesh to a provision which is otherwise unacceptably vague or uncertain or apparently illusory…";

and, of the third:

> "Finally, in many cases, the promise to negotiate in good faith will occur in the context of an "arrangement" (to use a neutral term) which by its nature, purpose, context, other provisions or otherwise makes it clear that the promise is too illusory or too vague and uncertain to be enforceable:…".

The principles enunciated in *Coal Cliff Collieries* accord with our law. The first and third situations alluded to by Kirby P are covered, respectively, by *Letaba Sawmills* and *Firechem.*'

[31] In his majority judgment in *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC) Jafta J said that our common law, as reaffirmed in *Southernport*, was that an agreement to negotiate in good faith is enforceable if it provides for a deadlock-breaking mechanism in the event of the negotiating parties not reaching consensus. He, however, also said:

'[100] Whether an agreement to negotiate in good faith is enforceable where there is no deadlock-breaking mechanism remains a grey area of our law. This is because *Firechem Free State* suggests that it is not enforceable while *Everfresh* suggests otherwise. In *Everfresh*, Moseneke DCJ said:

> "Were a court to entertain Everfresh's argument, the underlying notion of good faith in contract law, the maxim of contractual doctrine that agreements seriously entered into should be enforced, and the value of ubuntu, which inspires much of our constitutional compact, may tilt the argument in its favour. Contracting parties certainly need to relate to each other in good faith. Where there is a contractual obligation to negotiate, it would be hardly imaginable that our constitutional values would not require that the negotiation must be done reasonably, with a view to reaching an agreement and in good faith."'

[32] The combined *rationes decidendi* of the decisions of this court in *Firechem* and *Sourthernport* are therefore that an agreement to agree without a deadlock-breaking mechanism is not enforceable because it is dependent on the absolute discretion of the parties and/or because it is too vague and uncertain to be enforceable. We are bound by these decisions, of course, unless we determine that they were clearly wrong. The appellants did not advance such an argument. I am, in any event, by no means convinced that these decisions were wrong. With respect, I fail to see how a mere agreement to agree (in good faith) can be enforced without violation of the fundamental principle that a court may not make a contract for the parties.

[33] As I have said, the appellants did not question these principles. Instead, they attempted to avoid their application by arguing, on the strength of *Nach Investments (Pty) Ltd v Yaldai Investments (Pty) Ltd and Another* [1987] ZASCA 25; [1987] 2 All SA 154 (A); 1987 (2) SA 820 (A), that clause K had contemplated a general servitude. Hefer JA said in *Nach* at 831D-E that it has long been accepted that a servitude may be constituted either along a specifically agreed route (a definite or defined servitude) or generally (simpliciter). He added that in the latter case the entire servient tenement is

subject to the servitude and the grantee may select a route provided only that it does so *civiliter modo*. As clause K had created the right to a servitude simpliciter, so the argument went, the identification of the places of access was immaterial.

[34] Both the language and the context of clause K, however, point to an intention to agree on a definite servitude. The right of access was expressly created at three specific places to be selected and identified by mutual agreement from each of the general areas mentioned. It is also apparent from clause K that the locations of the places mattered to the Union Government. The fourth respondent pointed out that clause K provided that should any of the actual sites marked on diagrams (that is, agreed sites) subsequently be required for the operations to be undertaken in connection with the Dam, 'a suitable site as near as possible to the original site shall for the purposes aforesaid be granted to the said Schoeman in his individual capacity who shall have the right of selecting such site or sites – which shall not interfere with the working and works of the Reservoir'. Thus, the parties to clause K did not agree to a general servitude and merely made reference to a future agreement because they contemplated that defined places of access would eventually be agreed upon. Clause K rather complied with the description in *Nach* at 831F-G: 'If the intention is to constitute a specific right of way, i.e. one which may only be exercised along a specifically defined route, the agreement is inchoate at least as to a material term and for that reason it is unenforceable until the route is agreed upon'.

[35] It follows that clause K was unenforceable. That impacted on the enforceability of the notarial contract and the title deed provisions. The notarial contract provided that the parties 'bind themselves to enter into a Contract whereby the rights as detailed in said Clause K of the said Deed of Sale may be properly registered as a servitude. . .'. In the absence of further agreement, therefore, the notarial contract could not have an independent existence. And in respect of the places of access the provisions in the title deeds of the erven in Schoemansville and Meerhof echoed the wording of para (a) and para (b) of clause K respectively. Thus, the unenforceability of clause K was destructive of the enforceability of the notarial contract and the title deed provisions.

[36] The first appellant placed some reliance thereon that, on 6 November 1962, Mr Schoeman had entered into a notarial agreement in terms of which he ceded the

rights under clause K and the notarial contract to his sons and that they had subsequently (on 30 August 1992) ceded these rights to him. The short answer hereto is *nemo plus iuris ad alium transferre potest quam ipse habet*; no one can transfer to another a greater right than he has himself. As I have said, the rights that had purportedly been ceded, were not enforceable. And even on the basis that Mr Schoeman had a personal servitude, neither he nor his sons could cede rights that extended beyond Mr Schoeman's lifetime. It follows that the contractual case had to fail.

Acquisitive prescription

[37] This brings me to the question of acquisitive prescription. The effect of s 3 of the State Land Disposal Act 48 of 1961 was that the relevant period of prescription had to be completed prior to 28 June 1971. The Prescription Act 18 of 1943 (the 1943 Act) was repealed by the Prescription Act 68 of 1969 with effect from 1 December 1970. The appellants accepted that the matter was governed by s 2 of the 1943 Act. It provided:

'(1) Acquisitive prescription is the acquisition of ownership by the possession of another person's movable or immovable property or the use of a servitude in respect of immovable property, continuously for thirty years *nec vi, nec clam, nec precario.*

(2) As soon as the period of thirty years has elapsed such possessor or user shall *ipso jure* become the owner of the property or the servitude as the case may be.'

[38] The onus rested on the appellants to prove all these requirements. See *Stoffberg NO and Others v City of Cape Town* [2019] ZASCA 70. It is not necessary to consider them in detail. I confine myself to the element of 'use of a servitude in respect of immovable property'. This postulates *de facto* exercise of a servitude as if of right, by a person and his or her successors in title for a continuous period of 30 years. See *Bisschop v Stafford* 1974 (3) SA 1 (AD) at 9C.

[39] As I have said, the appellants claimed the registration of praedial servitudes in favour of the following properties: all the erven in Schoemansville; erf 463; all the erven in Meerhof; and erf 90, Meerhof. In view of what I have said, this issue must, of course, be determined on the basis that no contractual rights to such servitudes existed.

[40] It did not appear from the papers when boating and fishing on the Dam had become viable. The notarial contract was entered into on 27 September 1922. It

recorded that the land that had been purchased in terms of the 1918 agreement, 'will form the submerged area of the HARTEBEESTPOORT Reservoir which is at present in course of constructions'. An advertisement of a public auction of the proposed Schoemansville erven, to be held on 14 December 1922 in the town hall in Pretoria, contained images of the Dam 'as it should appear when completed'. As I have said, the Schoemansville township was formally established in 1923. In the circumstances it seems probable that little or no boating and fishing on the Dam could have taken place prior to the establishment of Schoemansville.

[41] Assuming, nevertheless, that Mr Schoeman in his capacity as the owner of the remainder of the northern portion, was the predecessor in title of the owners of the erven in Schoemansville, the appellants had to prove that Mr Schoeman and the successive owners of all the erven in Schoemansville actually used the foreshore on portion 28 to obtain access to the Dam as if of right for a continuous period of 30 years prior to 1971. This was an onerous burden that the evidence simply did not satisfy. And the evidence told us nothing about the use of the foreshore on portion 29 by Mr Schoeman and the successive owners of the erven in Meerhof. There was also no evidence as to the use of the foreshore on portion 59 by the successive owners of erf 90, Meerhof.

[42] The appellants attempted to show that Mr Schoeman had erected a landing stage on the foreshore in front of erf 463 for use in respect of his passenger boat enterprise. The deponent for the fourth respondent said that the foreshore in front of erf 463 was too steep for this purpose and that even when the water level of the Dam was as low as 16 percent of its capacity, there was no sign of such a landing stage or any remains thereof. The first appellant disputed this, but the dispute cannot on the papers be resolved in his favour. The only admissible piece of evidence in this regard was contained in a contemporaneous letter by the Surveyor General (Mr Murray) to the Secretary of Lands dated 10 April 1926. It made quite clear that Mr Schoeman had erected landing stages on the adjacent portion 43. As I have said, the first appellant commenced the use of erf 463 during 1964. There was no evidence of the actual use of the foreshore in front of it prior hereto. In the result, the appellants did not show the acquisition of the servitudes by prescription.

Second appellant

[43] It remains to deal with the declarator claimed by Ontspan Beleggings. The court a quo erred in saying that no reliance was placed on rights that had emanated from the Crown Grant. It therefore failed to consider Ontspan Beleggings' case before it. As I have demonstrated, the owner of portion 43 is clothed with a registered praedial servitude of access to the Dam over the foreshore in front of it. In this court the second respondent submitted that there had been no dispute as to the existence and use of this servitude. Ontspan Beleggings countered the submission by correctly pointing out that in the answering affidavit in the court a quo, the second respondent had denied that the Crown Grant gave rise to a praedial servitude. The true position was repeated in the replying affidavit. The second respondent did not dispute that in argument in the court a quo it had adopted the stance reflected in the answering affidavit.

[44] In the light of the second respondent's denial of Ontspan Beleggings' rights, the court a quo should have issued the declarator that it sought. However, in written and oral argument in this court, the second respondent unreservedly recognised the servitude attached to portion 43. Thus, there was no further need for the declarator that Ontspan Beleggings had sought. It is trite that this court does not decide abstract or academic issues and there is no reason why we should, in these circumstances, nevertheless exercise a discretion to issue a declarator. The second respondent acknowledged the rights of Ontspan Beleggings almost at the outset of the appeal. There should, however, be an order that the second respondent is liable for the costs of Ontspan Beleggings in the court a quo, and not the other way around, as the court a quo ordered.

Conclusion

[45] There is a final matter that I should mention. It will be recalled that the Cabinet Minute had approved the reservation of portions of the foreshore for landing places for the general public and the owners of erven in Schoemansville respectively. As I have said, parts of both these portions of the foreshore have been taken up by the establishment of a bird sanctuary. I make no pronouncement on the enforceability of these reservations, for two reasons. First, none of the appellants purported to represent the general public in these proceedings and there was a lack of evidence in respect of the current position in this regard. Second, in answer to the evidence of the appellants

that the remaining portion of the foreshore reserved for the Schoemansville title holders was being used as envisaged in the Cabinet Minute, the second respondent said that it was irrelevant to the issues in the case. In my view, this stance was correct, as no relief was claimed solely on the basis of para 4 of the Cabinet Minute.

[46] In the result the appeal must be dismissed with costs, including the costs of two counsel. The fourth respondent rightly did not press for punitive costs of the appeal. As I have said, however, the order of the court a quo should be adjusted to provide that the second respondent pay the costs of Ontspan Beleggings in the court a quo.

[47] The following order is issued:

1 The appeal is dismissed with costs, including the costs of two counsel.

2 The costs order of the court a quo is substituted with the following:

‘(a) The first, third and fourth applicants are jointly and severally ordered to pay the costs of the second respondent, including the costs of two counsel;

(b) The second respondent is ordered to pay the costs of the second applicant, including the costs of two counsel;

(c) The applicants are jointly and severally ordered to pay the costs of the fourth respondent, including the costs of two counsel.’

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C H G VAN DER MERWE

JUDGE OF APPEAL

APPEARANCES

For appellants:	J L Gildenhuys SC, with her W C Meyer
	(Heads also prepared by E C Labuschagne SC)
Instructed by:	Couzyn Hertzog & Horak Attorneys, Pretoria
	Symington de Kok Attorneys, Bloemfontein
For 2nd respondent:	M C Erasmus SC, with him H A Mpshe
Instructed by:	State Attorney, Pretoria
	State Attorney, Bloemfontein
For 4th respondent:	W Trengove SC, with him K Hofmeyr and C Shongwe
Instructed by:	Bowman Gilfillan Inc., Sandton
	McIntyre van der Post Inc., Bloemfontein