THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case no: 401/2021

In the matter between:

N'WANDLAMHARHI COMMUNAL PROPERTY ASSOCIATION	**FIRST APPELLANT**
MALAMALA GAME RESERVE (PTY) LTD	**SECOND APPELLANT**
and	
HELEN LYNNE WESTCOTT	**FIRST RESPONDENT**
CAROLINE CLARE CORMACK	**SECOND RESPONDENT**
RODRICK ANTON BEAUMONT	**THIRD RESPONDENT**
MICHAEL HEMINGFORD BEAUMONT	**FOURTH RESPONDENT**

Neutral citation: *N'Wandlamharhi Communal Property Association and Another v Westcott and Others* (401/2021) [2022] ZASCA 129 (3 October 2022)

Coram: VAN DER MERWE and MOTHLE JJA and MUSI, KGOELE and WEINER AJJA

Heard: 22 August 2022

Delivered: 3 October 2022

Summary: Property – servitude – rights of access to and occupation of immovable properties – rights constitute subtraction from dominium of land – no intention on part of landowners granting rights to bind successors in title – no rights to registration of servitudes created.

ORDER

On appeal from: Mpumalanga Division of the High Court, Mbombela, (Mashile J, Mphahlele J and Greyling Coetzer AJ concurring), sitting as court of appeal:

1 The appeal is upheld with costs, including the costs of two counsel.
2 The order of the full court is set aside and replaced with an order dismissing the appeal with costs, including the costs of two counsel.

JUDGMENT

Van der Merwe JA (Mothle JA and Musi, Kgoele and Weiner AJJA concurring)

[1] The first appellant, the N'Wandlamharhi Communal Property Association, is the registered owner of a number of immovable properties that comprise the MalaMala Private Game Reserve (MalaMala) in Mpumalanga. These properties include portion 1 of Charleston 378 KU (Charleston South) and the remaining extent of Charleston 378 KU (Charleston North). The second appellant, MalaMala Game Reserve (Pty) Ltd, operates MalaMala in terms of a lease agreement with the first appellant. The first respondent, Ms Helen Lynne Westcott, and the second respondent, Ms Caroline Clare Cormack, are sisters. The third respondent, Mr Rodrick Anton Beaumont, and the fourth respondent, Mr Michael Hemingford Beaumont, are brothers and first cousins of the first and second respondents. Broadly stated, the question in the appeal is whether the respondents have rights of access to and occupation of Charleston South and Charleston North (collectively the Charleston properties) that are enforceable against the appellants. The question must be answered in the light of the background that follows.

Background

[2] The original farm Charleston belonged to Mr Frans Unger, the maternal grandfather of the respondents. During 1958 the original farm was subdivided into two equal portions, each approximately 1801 hectares in extent, thereby constituting the Charleston properties. Their common boundary is on the southern side of Charleston North and on the northern side of Charleston South. Each adjoins the Kruger National Park on the western side thereof. This boundary is not fenced. The Sand River traverses both the Charleston properties roughly from north to south.

[3] Ms Nan Yvonne Trollip (previously Westcott) and Ms Phyllis Marie Beaumont were daughters of Mr Unger. Ms Trollip was the mother of the first and second respondents and Ms Beaumont the mother of the third and fourth respondents. During the mid-1950's Ms Trollip established a camp on the western bank of the Sand River, on what is now Charleston South (the Charleston South Camp). During or about 1956, Ms Beaumont and her husband similarly built a camp on the western bank of the Sand River, on what is now Charleston North (the Charleston North Camp). Over the years various changes and additions were made to each camp. The locations of the camps provided unique opportunities for the appreciation and enjoyment of nature. Both the Trollip and Beaumont families were committed to nature conservation and, as one could imagine, they had many memorable and exciting times at the respective camps.

[4] During 1964 Ms Trollip became the registered owner of the Charleston South and Ms Beaumont that of Charleston North. From January 1965 the Charleston properties formed part of a proclaimed reserve named Sabi Sand Wildtuin, as did the other properties that presently constitute MalaMala. Since July 2006, however, MalaMala was managed as an autonomous private game reserve within the proclaimed reserve. It is a highly sought-after eco-tourism destination.

[5] By 1986 Ms Trollip had caused the incorporation of a company named Charleston Farm (Pty) Ltd. All 300 of the issued shares in the company belonged to

her. On 26 February 1986, Ms Trollip entered into a sale of shares agreement with Rattray Reserves (Pty) Ltd (Rattray Reserves), in terms of which she sold and transferred two thirds of the shares in Charleston Farm (Pty) Ltd to Rattray Reserves. The sale of shares agreement was subject to the execution of, first, an agreement of sale between Ms Trollip and Charleston Farm (Pty) Ltd for the sale of Charleston South and, second, a shareholders agreement between Ms Trollip and Rattray Reserves in respect of their shareholding in Charleston Farm (Pty) Ltd.

[6] The first suspensive condition was duly fulfilled and Charleston South transferred to Charleston Farm (Pty) Ltd. The envisaged shareholders agreement was also entered into on 26 February 1986. Ms Trollip signed the shareholders agreement in her personal capacity as well as in the capacity as duly authorised representative of Charleston Farm (Pty) Ltd. The upshot of all this was that Ms Trollip (one third) and Rattray Reserves (two thirds) became the shareholders in Charleston Farm (Pty) Ltd, which owned Charleston South.

[7] By 1986 Ms Beaumont had created a family trust, the Spulula Family Trust. The Spulula Family Trust held all the issued shares in a company called Charleston North (Pty) Ltd. On 8 September 1986, the Spulula Family Trust also entered into a sale of shares agreement and shareholders agreement with Rattray Reserves. The terms and conditions of these agreements were virtually identical to those of the agreements between Ms Trollip and Rattray Reserves. The sale of shares agreement was also signed by Ms Beaumont in her personal capacity, as well as by an authorised representative of Charleston North (Pty) Ltd. The execution of these agreements created the similar position that the Spulula Family Trust (one third) and Rattray Reserves (two thirds) held the shares in Charleston North (Pty) Ltd, which company was the registered owner of Charleston North.

[8] These shareholders agreements are central to the determination of the matter and I shall make reference to their material terms shortly. It is necessary, however, to set out the subsequent changes effected to the shareholding in the two Charleston

companies. During 1987, Rattray Reserves transferred its shares in the Charleston companies to a close corporation, MalaMala Ranch CC. That close corporation was later converted into a company named MalaMala Ranch (Pty) Ltd. As was envisaged in the shareholders agreement between Ms Trollip and Rattray Reserves, the former transferred her one third shareholding in Charleston Farm (Pty) Ltd to the Nan Trollip Trust during 1993.

[9] Clause 9 of each shareholders agreement placed limitations on the disposal of shares in the Charleston companies to third parties. In essence, clause 9.2 provided that a shareholder may only dispose of shares to a third party if all the shares held by it are disposed of and the other shareholder did not accept an offer to purchase the shares at the same price and on the same terms than those offered by the third party. Clause 9.4 set out a discrete procedure whereby a shareholder could give an option to the other shareholder to either sell its shares or to purchase the offering shareholder's shares at a consideration per share mentioned in the notice. The shareholder receiving the notice could then either buy or sell at the price contained in the notice.

[10] On 13 September 2010, the Nan Trollip Trust and the Spulula Family Trust each gave notice to MalaMala Ranch (Pty) Ltd in terms of clause 9.4 of the respective shareholders agreements. By then both Ms Trollip and Ms Beaumont had passed away. Contrary to the expectations of the respondents, MalaMala Ranch (Pty) Ltd opted to purchase the shares in the Charleston companies rather than to sell its shares. As a result, the respective minority shareholdings in the Charleston companies were sold to MalaMala Ranch (Pty) Ltd and it became the sole shareholder of both.

[11] In the meantime, a claim for the restitution of rights under the Restitution of Land Rights Act 22 of 1994 was instituted in respect of the properties comprising MalaMala. The owners of the properties, as well as the respondents, disputed the claim. Eventually the Minister of Rural Development and Land Reform decided to restore these properties to the claimant community and made State funds available for the purchase of the land.

[12] This led to a sale agreement in terms of which the MalaMala land was sold to the Department of Rural Development and Land Reform. The Department transferred the properties to the first appellant on 30 October 2013. Thus the first appellant became the registered owner of the properties comprising MalaMala, including of course the Charleston properties. The agreement in terms of which the second appellant conducts the operation of MalaMala, was entered into on 1 March 2016.

Terms of the shareholders agreements

[13] In terms of the shareholders agreement in respect of Charleston Farm (Pty) Ltd, 'NT' was stated to 'mean and include Nan Yvonne Trollip and her Successors in Title'. 'NT's Successors in Title' referred to Ms Trollip's husband as well as to the first and second respondents. In the shareholders agreement pertaining to Charleston North (Pty) Ltd, 'PB' similarly meant Ms Beaumont and her 'Successors in Title', which referred to the third and fourth respondents. The expression 'the Trust' referred to the Spulula Family Trust. For convenience I proceed to reproduce the material terms of the Charleston North (Pty) Ltd shareholders agreement. As I have said, the other shareholders agreement contained corresponding provisions regarding Ms Trollip, the first and second respondents, Charleston Farm (Pty) Ltd, Charleston South and the Nan Trollip Trust.

[14] The agreement defined 'Viewing Rights' in the following terms:

'[S]hall mean the right of access to and egress from and of traversing Charleston North, whether on foot or in a vehicle or in or on any other form of transport, for the purpose of viewing fauna and flora, including the right to exercise such other rights in regard to Charleston North as shall be implicit in or incidental to the viewing of fauna and flora . . .'

The definition of 'Affiliate' included a holding company of Rattray Reserves, a subsidiary of Rattray Reserves and a company in which the managing director of Rattray Reserves directly or indirectly held a controlling interest. MalaMala Ranch (Pty) Ltd was an 'Affiliate'.

[15] Clauses 2.1 and 2.2 recorded that Charleston North (Pty) Ltd had purchased Charleston North from the Spulula Family Trust and that the latter had sold two thirds of the shares in that company to Rattray Reserves. Clause 2.3 proceeded to say:

'The Parties wish to record their respective rights and obligations as shareholders in the Company and to provide for the creation and entrenchment of the right to use and occupy Charleston North Camp and the Viewing Rights in favour of PB.'

[16] Clause 11.1 provided:

'11.1 PB shall have:

11.1.1 the sole and exclusive use and occupation of Charleston North Camp;

11.1.2 Viewing Rights;

11.1.3 the right to bring guests, who shall at all times be accompanied by PB, and not exceeding 16 (sixteen) in number, upon Charleston North in the normal course of the exercise of the rights hereby granted to PB provided that no consideration shall be given to or received by PB for the benefits enjoyed by such guests, provided further that PB shall procure that such guests shall abide by the provisions of this agreement; . . .'

I refer to these rights as the occupation and viewing rights.

[17] In terms of clause 11.2, Rattray Reserves undertook obligations to facilitate the exercise of the occupation and viewing rights through Charleston North (Pty) Ltd or an 'Affiliate'. These were to supervise and maintain the Charleston North Camp and to make a four-wheel drive vehicle and three servants available to the occupants of the camp. Clause 11.3 provided for rights similar to the 'Viewing Rights' to Ms Beaumont (not 'PB' as defined) in respect of other properties owned by or under the control of Rattray Reserves or an 'Affiliate'.

[18] Clause 11.4 read:

'To the extent that the Viewing Rights and/or the rights hereby granted to PB in respect of Charleston North Camp are or may at any time in the future become registrable against the title deeds of the Company over Charleston North, Rattray Reserves shall, upon request in writing by PB addressed to the Company, and at the cost of PB, procure the adoption of all

such resolutions, the granting of all such powers, the signature and lodgement of all such applications and the taking of all such other steps as may be necessary or expedient for the purpose of procuring registration of such rights in the appropriated Deeds Registry.'

[19] Clause 11.6 provided:

'Should PB or the Trust sell or otherwise dispose of the Shares held by PB or the Trust, to any person other than Rattray Reserves or an Affiliate, the rights created in terms of clauses 11.1, 11.2 and 11.3 shall terminate with effect from the date of such sale. Should, however, the Shares be sold, or otherwise disposed of to Rattray Reserves or an Affiliate, the said rights shall endure until the death of the last dying of PB's Successors in Title.'

Litigation History

[20] Despite the developments set out above, the respondents continued to exercise the occupation and viewing rights. Soon after the second appellant took control of the management of MalaMala, however, it took the stance that the occupation and viewing rights had ceased to exist. It accordingly notified the respondents that they would not be granted access to MalaMala after 31 July 2016. That sparked the litigation that led to the present appeal.

[21] The respondents launched an application in the Mpumalanga Division of the High Court, Mbombela, for the enforcement of the occupation and viewing rights. Their principal contention was that clause 11.1 read with clause 11.6 of the shareholders agreements afforded them the right to the registration of servitudes against the title deeds of the Charleston properties. In the alternative, on the basis that the occupation and viewing rights constituted mere personal rights, their case was that these rights were enforceable against the appellants through the doctrine of notice.

[22] The appellants' main argument was that a proper interpretation of the shareholders agreements indicated that no servitudal rights had been granted. Their alternative contention was that the provisions of s 3 of the Subdivision of Agricultural Land Act 70 of 1970 rendered the occupation and viewing rights invalid and

unenforceable. The premise of the argument was that the Charleston properties constituted agricultural land. The appellants proceeded to contend that the rights to 'the sole and exclusive use and occupation' of the approximately 0,5 hectares upon which each of the two camps were situated, amounted to a subdivision of agricultural land without the required written consent of the Minister of Agriculture.

[23] The matter came before Legodi JP. He rejected the argument that the provisions of the Subdivision of Agricultural Land Act were applicable, on the basis that the grant of the occupation and viewing rights did not amount to a subdivision of land. He held, however, that the occupation and viewing rights were neither servitudal rights nor enforceable against the appellants under the doctrine of notice. He consequently dismissed the application of the respondents with costs, such costs to include the costs of two counsel.

[24] With the leave of this court, the respondents appealed to the full court of that division. That court (Mashile J, Mphahlele J and Greyling Coetzer AJ concurring) upheld the appeal. It made short shrift of the argument based on the Subdivision of Agricultural Land Act. It framed its conclusion on the enforcement of the occupation and viewing rights in these terms:

'A simple fact is, however, that the rights have always been registrable. Whether the rights were registrable or not would be rendered irrelevant in an instance where the shares were sold to a party outside of the Rattray Group. Now that they have been acquired by a company within the Group, the Appellants can exercise their choice to register them.'

And:

'The conclusion on this question ought to be that the rights of the Appellants have always been enforceable regardless of whether or not they were in addition, registrable.'

It proceeded to grant the order sought by the respondents and directed the appellants, jointly and severally, to pay the costs of the application and of the appeal, including the costs of two counsel. The present appeal is with the special leave of this court.

Rights to registration of servitudes

[25] In the light of what I have said, the first issue is whether the respondents were afforded servitudal rights. A servitude is a real right to use the property of another in a particular manner, irrespective of a change in ownership of that property. The right may be attached to a particular dominant tenement (praedial servitude) or to a particular person (personal servitude) and comes into existence upon its registration in the Deeds Office, save where the servitude is acquired by prescription. See *Cillie v Geldenhuys* [2008] ZASCA 54; [2008] All SA 507 (SCA); 2009 (2) SA 325 (SCA) para 13 and A J Van der Walt *The Law of Servitudes* 1 ed (2016) at 322.

[26] The personal right to claim the registration of the servitude (*ius in personam ad rem acquirendam*) may of course arise from an agreement. Such a right would exist where on a proper interpretation of the agreement, two requirements are met, namely:

(a) The person who created the right intended to bind the present owner of the property as well as successors in title; and

(b) The right resulted in a subtraction from the dominium of the land against which it is registered.

See *Ethekwini Municipality v Mounthaven* (Pty) Ltd [2018] ZACC 43; 2019 (4) SA 394 (CC) para 11 and *27 Lawsa* 2 ed paras 63-65. There is a presumption against the creation of a servitude and in cases of doubt or ambiguity the court will adopt the construction that least encumbers the servient tenement. See *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1918 AD 1 at 16, *Kruger v Joles Eiendom (Pty) Ltd and Another* [2008] ZASCA 138; [2009] 1 All SA 553 (SCA); 2009 (3) SA 5 (SCA) para 8 and *24 Lawsa* 2 ed para 543.

[27] Under the doctrine of notice, the personal right to claim the registration of a servitude is also enforceable against a person who bears knowledge thereof. See *Bowring NO v Vrededorp Properties CC and Another* 2007 (5) SA 391 paras 7-8. Where an interpretation of the agreement in accordance with the ordinary well-known principles of construction leads to the conclusion that any one of the requirements above is absent, the right to use the property is not registerable. If the intention is only

to bind the present owner, the right is not registrable even though it amounts to a subtraction from the dominium of the property concerned. In this regard s 63(1) of the Deeds Registries Act 47 of 1937 provides:

'No deed, or condition in a deed, purporting to create or embodying any 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: Provided that a deed containing such a condition as aforesaid may be registered if, in the opinion of the registrar, such condition is complimentary or otherwise ancillary to a registrable condition or right contained or conferred in such deed.'

[28] At the outset of the analysis it is necessary to place the references in the shareholders agreements to the successors in title of Ms Trollip and Ms Beaumont respectively in proper perspective. It is clear from their context that these were not references to successors in title in the ordinary meaning thereof. They were mere convenient labels to refer to the persons who were also offered the occupation and viewing rights, but were not parties to the shareholders agreements, such as the respondents. I do accept, however, that the respondents duly accepted the benefits that had so been offered to them by agreement between the parties to the shareholders agreements.

[29] The appellants correctly conceded that the Charleston companies were parties to the respective shareholders agreements. In my view, the occupation and viewing rights constituted subtraction from the dominium of the respective Charleston properties. It is common cause that at all relevant times the appellants had knowledge of the respondents' claims to the occupation and viewing rights. It follows that in the event of a finding that the Charleston companies intended their respective successors in title to be bound to the occupation and viewing rights, they would be enforceable against the appellants. As I shall show, however, this is where the respondents' case flounders.

[30] I find no indication in the shareholders agreements of an intention on the part of the Charleston companies to bind their respective successors in title. In this regard

the respondents relied on clauses 2.3 and 11.4 of the shareholders agreements, quoted above. But these provisions are neutral and do not support the respondents' argument. Clause 11.4, in particular, clearly stated that to the extent that the occupation and viewing rights 'are or may at any time in the future become registrable against the title deeds', Rattray Reserves would be obliged to take the steps necessary to effect such registration.

[31] In addition, the arrangements between the respective shareholders in terms of the shareholders agreements point the other way. In this regard the appellants referred to two categories of entrenchments in the shareholders agreements. The first category imposed limitations on the disposal of the respective Charleston properties. The shareholders agreements provided: that the minority shareholder would be entitled to have a director on the board of directors; that in the absence of that director there would not be a quorum; and that the respective Charleston properties could only be sold or disposed of with the unanimous approval of the board of directors. The parties to the shareholders agreements thus contemplated that the Charleston properties might be disposed of, but made no provision for the survival of the occupation and viewing rights in such an event.

[32] The second category imposed limitations on the sale of the shares in the Charleston companies to third parties, subject to detailed exceptions. This takes one to clause 11.6 of the shareholders agreements. It will be recalled that it explicitly stated that should the minority shareholding be sold to anyone other than Rattray Reserves or an 'Affiliate', the occupation and viewing rights would terminate.

[33] Thus, in terms of the shareholders agreements the occupation and viewing rights would not survive the disposal of the Charleston properties or even the sale of the minority shareholding in a Charleston company to a third party. This is inconsistent with an intention on the part of the Charleston companies to bind their successors in title to the occupation and viewing rights. In sum, not only did the Charleston companies not bind their successors in title, but their shareholders arranged their affairs on that

understanding. I therefore conclude that the respondents were not afforded the right to have the occupation and viewing rights registered against the title deeds of the Charleston properties and that they in fact terminated when the Charleston properties were sold.

Alternative arguments

[34] As I have said, the respondents argued in the alternative that even if they had no rights to obtain the registration of servitudes, the occupation and viewing rights should be enforced against the appellants under the doctrine of notice. It has been said that this anomalous doctrine is a purely equitable one, aimed at tempering the strict precedence of real rights over personal rights in appropriate circumstances. See *Meridian Bay Restaurant (Pty) Ltd and Others v Mitchell SC NO* [2011] ZASCA 30; 2011 (4) SA 1 (SCA) para 13. In terms of the doctrine, limited real effect is given to a personal right against those who have knowledge of the right. The respondents contended that, in the circumstances, their mere personal rights against the Charleston companies were protectable under the doctrine of notice by analogy or judgments such as *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd en Andere* 1982 (3) SA 893 (A) (right of pre-emption) and *Cussons en Andere v Kroon* 2001 (4) SA 833 (SCA) (right of partner to consent to alienation of partnership asset).

[35] In *Cussons v Kroon* para 12, Streicher JA held that the underlying reason for the enforcement in *Associated Bakeries* of the right of pre-emption against the person who had knowledge thereof, was that the latter wrongfully interfered with the personal right of the former. This appears to me to be a sound and principled basis upon which the future application of the doctrine of notice to mere personal rights should be considered. See also *Meridian Bay* paras 19-21. But this issue does not arise in this case, for the simple reason that I have held that the occupation and viewing rights had terminated when the Charleston companies disposed of the Charleston properties. Nothing remained that could be protected under the doctrine of notice.

[36] In the circumstances it is unnecessary to consider the argument based on the Subdivision of Agricultural Land Act. It follows that the appeal must succeed and that the order of Legodi JP should be reinstated. Costs should follow the result of both appeals. It was not in dispute that the employment of two counsel was reasonable.

[37] For these reasons the following order is issued:

1 The appeal is upheld with costs, including the costs of two counsel.
2 The order of the full court is set aside and replaced with an order dismissing the appeal with costs, including the costs of two counsel.

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C H G VAN DER MERWE
JUDGE OF APPEAL

Appearances:

For appellants:	G L Grobler SC and H S Havenga SC
Instructed by:	Larson Falconer Hassan Parsee Inc, Umhlanga Rocks
	Symington & De Kok, Bloemfontein.
For respondents:	M du P van der Nest SC and D A Turner
Instructed by:	Bowman Gilfillan Inc, Johannesburg
	McIntyre & Van der Post, Bloemfontein.