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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 210/2021

In the matter between:

MARGOT BERZACK

APPLICANT

and

HUNTREX 277 (PTY) LTD

FIRST RESPONDENT

REGISTRAR OF DEEDS

SECOND RESPONDENT

CITY OF CAPE TOWN MUNICIPALITY

THIRD RESPONDENT

Neutral citation: *Berzack v Huntrex 277 (Pty) Ltd and Others* (Case no 210/2021) [2022] ZASCA 17 (21 February 2023)

Coram: PETSE AP, MOLEMELA and PLASKET JJA and
NHLANGULELA and GOOSEN AJJA

Heard: 3 November 2022

Delivered: 21 February 2023

Summary: Appeal – application for leave to appeal referred for argument in terms of s 17(1)(d) of the Superior Courts Act 10 of 2013 – whether leave to appeal ought to be granted – property law – servitude – whether a garden servitude registered against the servient tenement for the benefit of the dominant tenement is a praedial or personal servitude of *usus* – whether such servitude is capable of registration in terms of s 66 of the Deeds Registries Act 47 of 1937.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Meer J, sitting as court of first instance):

- 1 The application for leave to appeal is granted.
- 2 The appeal is upheld with costs, including the costs of two counsel.
- 3 The order of the high court is set aside and replaced with the following order:

‘The application is dismissed with costs including the costs of two counsel where so employed.’

JUDGMENT

Nhlangulela AJA (Petse AP and Molemela JA concurring):

[1] This is an application for leave to appeal referred to court for argument¹ in terms of s 17(2)(d) of the Superior Courts Act 10 of 2013² (the Superior Courts Act), and, if successful, for the determination of the appeal itself. It is a sequel to the refusal of leave by a single judge, sitting in the Western Cape Division of the High Court, Cape Town (the high court). Leave is sought against the decision of the high court delivered on 10 December 2020 in terms of which a praedial servitude registered against the immovable property of the first respondent, Huntrex 277 (Pty) Ltd (Huntrex 277), in favour of the immovable property of the applicant, Ms Margot Berzack, was declared to be a personal servitude of *usus*. The order entitled Huntrex 277 to demolish the wooden pole fence that exists on the servitude area; and to construct its own wooden pole fence, fitted with a gate, on the eastern and western boundaries of the properties. Further, the second respondent, the Registrar of Deeds, was directed to rectify Huntrex 277's title deed to reflect that the servitude in issue is not a praedial servitude but a personal servitude of *usus*.

[2] The counter-application of Ms Berzack, in which she sought the preservation of her praedial rights or the conferment of such rights by prescription in terms of s 6 of the Prescription Act 68 of 1969 (the Prescription Act), was dismissed with costs by the high court.

¹ The order of this Court granted on 11 May 2021 reads:

'1. The application for leave to appeal is referred for oral argument in terms of s 17(2)(d) of the Superior Courts Act 10 of 2013.

...

² Section 17(2)(d) reads:

'The judges considering an application referred to in paragraph (b) may dispose of the application without the hearing of oral argument, but may, if they are of the opinion that the circumstances so require, order that it be argued before them at a time and place appointed, and may, whether or not they have so ordered, grant or refuse the application or refer it to the court for consideration.'

[3] Only Huntrex 277 took part in this litigation. The second respondent, the Registrar of Deeds, and third respondent, City of Cape Town, did not take part both in the high court and this Court.

Admission of further evidence

[4] In addition, Ms Berzack brought before us an application in terms of s 19(b) of the Superior Courts Act³ for the admission of the further evidence of Mr Richard James Somerset Moffat (Mr Moffat) and Mrs Margaret Anne Boag (Mrs Boag) in amplification of her application for leave to appeal. Although this application was initially opposed by Huntrex 277, it did not persist with its opposition before this Court. Thus, nothing more needs to be said about this application, save to say that in truth, these two affidavits have no bearing on the merits of the envisaged appeal. Rather, they were filed in order to bolster Ms Berzack's application for leave to appeal.

Leave to appeal application

[5] The fate of the application for leave is dependent on proof to the satisfaction of this Court that the envisaged appeal would have a reasonable prospect of success or that there is some other compelling reason why the appeal should be heard as envisaged in subsections 17(1)(a)(i) and (ii) of the Superior Court Act,⁴ respectively.

³ Section 19(b) reads:

'The Supreme Court of Appeal or a Division exercising appeal jurisdiction may, in addition to any power as may specifically be provided for in any other law . . . receive further evidence.'

⁴ Subsections 17(1)(a)(i) and (ii) read:

(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that —

(a)(i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

[6] Regard being had to the papers filed in support of the application for leave and hearing argument by counsel, I am satisfied that the application for leave passes muster. The appeal raises important questions of law, such as whether a servitude involving reservation of rights of access to use and enjoyment of a garden by Ms Berzack, registered against the property of Huntrex 277, is a praedial servitude or a personal servitude of *usus* and, therefore, hit by the prohibition located in s 66 of the Deeds Registries Act 47 of 1937 (Deeds Registries Act).⁵

Background

[7] The facts of this matter are not in dispute. Ms Berzack is the owner of a residential property which is described as the remainder of erf 3[...], Constantia. Huntrex 277, too, is the owner of the residential property described as erf 8[...], a portion of the original erf 3[...], Constantia. For convenience, these residential properties will be referred to as the ‘Berzack property’ and ‘Huntrex 277 property’ respectively. The Huntrex 277 property is the subdivision carved out of the original erf 3[...], which had been registered in the name of Ms Berzack on 31 December 1970. At the time, erf 3[...] was an undivided residential property measuring 8331m² in extent. After taking occupation of the property from Mr M M Liebman, Ms Berzack created a garden westward of the house and to a point beyond which the property was unused and left in its natural vegetated state. She went on to delineate that point with a wooden fence to cordon off the area of the property that was in use and to prevent vagrants from encroaching on it.

⁵ Section 66 reads:

‘No personal servitude of *usufruct*, *usus* or *habitatio* purporting to extend beyond the lifetime of the person in whose favour it is created shall be registered, nor may a transfer or cession of such personal servitude to any person other than the owner of the land encumbered thereby, be registered.’

She extended the wooden fence eastward to the poolside patio to establish a garden.

[8] Troubled by issues of safety posed by the undeveloped western side of the property, Ms Berzack took a decision to subdivide the property and sell the portion that lay unused. Ms Berzack's intention at the time was to align the subdivision with the western perimeter of the wooden fence. However, she was prevented from doing so by a local use ordinance which imposed a minimum erf size of 4000m². In 1982, Ms Berzack subdivided erf 3[...] into two separate portions resulting in the Berzack property being reduced to 4320m². To keep the garden as part of her property without contravening the land use regulations, Ms Berzack was compelled to reserve her rights to the garden, which had fallen into the subdivided portion, by means of a servitude. Having identified a willing buyer, Mr A G Wellens, on 21 September 1983, Ms Berzack transferred erf 8[...] to him, subject to a praedial servitude which was duly endorsed and registered against the title deed of erf 8[...] in accordance with the relevant provisions of the Deeds Registries Act. The terms of the servitude were set out and incorporated in the deed of transfer in favour of Mr Wellens.

[9] Erf 8[...] was later transferred to two successive other persons at different times. Ultimately, on 28 February 2017, the third owner, Mr K W Sander, transferred the property to Huntrex 277. At all material times relevant to the transfers of the Huntrex 277 property, the praedial servitude that was created by means of a contract concluded between Ms Berzack and Mr Wellens was endorsed on the successive title deeds. I set out below the

express terms of the servitude that is endorsed on the title deed of the Huntrex 277 property:

‘P. SUBJECT FURTHER to the following conditions contained in said Deed of Transfer No. T. 3[...]/1983 imposed by MARGOT BERZACK in favour of herself and her successors in title as owner of the REMAINDER OF ERF 3[...] CONSTANTIA, which conditions are as follows:

(a) The property hereby transferred is subject to a servitude area 20 (TWENTY) meters wide, The Western Boundary of which shall be parallel to the boundary marked DE on Diagram N. 5253/1981 in favour of the REMAINDER OF ERF 3[...] CONSTANTIA, held by the said Transferor, MARGOT BERZACK (born ILLMAN) married out of community of property to Jeffrey Cyril Berzack, under Deed of Transfer No. 3[...] dated 31st December 1970.

(b) The said servitude shall be subject to the follow [ing] terms and conditions, namely:

- (i) No wall or fence of any description shall be erected on the servitude boundary except extension of existing type of fencing (wooden pole fencing).
- (ii) The seller shall have the right to plant, control, care for and renew the existing garden situated within the servitude area more fully described above.
- (iii) The seller shall have full rights of access to such servitude area in fulfilment of the rights hereby granted.

(The term of Seller shall include her Successors-in-Title).’

I pause here to observe that these conditions of title had survived all three successive transfers from Mr Wellens without being contested.

[10] Mr Wellens filed an affidavit in support of Ms Berzack’s opposition confirming, in essence, that the reservation of the garden as a praedial servitude upon the Huntrex 277 property was agreed to between him and Ms Berzack. He stated further that the agreement was informed by common intention that the garden would remain on the Huntrex 277 property for the

sole and unfettered use of Ms Berzack and any subsequent successors-in-title of the remainder of erf 3[...], Constantia.

[11] As regards the counter-application, Ms Berzack contended that her intention and that of Mr Wellens could still be realized by rectification, if necessary, of clause P of the title deed of Huntrex 277, by inserting appropriate terms as shown in bold letters below:

‘P. SUBJECT FURTHER to the following conditions contained in said Deed of Transfer No. T. 3[...]/1983 imposed by MARGOT BERZACK in favour of herself and her successors in title as owner of the REMAINDER OF ERF 3[...] CONSTANTIA, which conditions are as follows:

(a) The property hereby transferred is subject to a servitude area 20 (TWENTY) meters wide, The Western Boundary of which shall be parallel to the boundary marked DE on Diagram No. 5253/1981 in favour of the REMAINDER OF ERF 3[...] CONSTANTIA, held by the said Transferor, MARGOT BERZACK (born ILLMAN) married out of community of property to Jeffrey Cyril Berzack, under Deed of Transfer No. 3[...] dated 31st December 1970.

(b) The said servitude shall be subject to the following terms and conditions, namely:

(i) No wall or fence of any description shall be erected on the servitude boundary **to enclose it** except extension of existing type of fencing (wooden pole fencing) **on its western side**.

(ii) The seller shall have the **exclusive** right to plant, control, care for and renew the existing garden situated within the servitude area more fully described above.

(iii) The seller shall have full **and exclusive** rights of access to such servitude area in fulfilment of the rights hereby granted.

(The term of Seller shall include her Successors-in-Title).’

[12] Further alternative relief sought by Ms Berzack in the high court, in the event of rectification not being successful, was that a praedial right that

she had exercised and enjoyed for more than thirty years be conferred on her and the Berzack property in terms of s 6 of the Prescription Act⁶ by virtue of acquisitive prescription.

[13] The high court decided the main application on the issues of whether the servitude articulated in clause P of the title deed is praedial or personal in nature and, if it is a personal servitude, whether the wording of clause P is capable of being rectified so that it may be converted into a praedial servitude. After considering the elements of a praedial servitude⁷ and finding that the element of *utilitas*⁸ was lacking, the high court came to the conclusion that clause P established a personal servitude of *usus* which could neither be rectified nor cured by acquisitive prescription, for the reason that s 66 of the Deeds Act prohibited such servitude from being registered by the Registrar of Deeds.

⁶ Section 6 reads:

‘. . . , a person shall acquire a servitude by prescription if he has openly and as though he were entitled to do so, exercised the rights and powers which a person who has a right to servitude is entitled to exercise, for an uninterrupted period of thirty years or, in the case of a praedial servitude, for a period which, together with any periods for which such rights and powers were so exercised by his predecessors in title, constitutes an uninterrupted period of thirty years.’

⁷ 24 *Lawsa* 2 ed para 546, the elements are listed as follows: ‘(a) there must be two tenements belonging to different owners; (b) the two tenements must be in close proximity to each other (*vicinitas*); (c) the servient tenement must be capable of serving the dominant tenement on a permanent basis (perpetual cause); (d) the servient tenement must enhance the utility of the dominant tenement (*utilitas*); (e) no positive obligation may be imposed on the owner of the servient tenement (passivity); and (f) praedial servitudes are indivisible.’

⁸ 24 *Lawsa* 2 ed para 549, *utilitas* is described as follows: ‘A praedial servitude must offer some permanent advantage or benefit to the owner of the dominant land *qua* owner and must not merely serve his or her personal pleasure or caprice. This is known as the requirement of *utilitas* (utility). It has already been intimated that utility is a fundamental requirement embodying both vicinity and permanent purpose . . . The strict view that benefit to the dominant tenement must take the form of some sort of agricultural advantage, was already relaxed in Roman-Dutch law. Voet states that where additional benefits accompany the pleasurable pursuits of a particular person, such servitude can validly be constituted as a praedial servitude. Examples are a servitude of view (*prospectus*) which simultaneously guarantees a free and useful supply of light . . . In present day law it is accepted that the utility requirement is not only satisfied if the particular servitude is of direct agricultural utility to the dominant tenement but also if it increases its economic, industrial or professional potential.’

[14] The high court also found that it was appropriate that the title deed of the Huntrex property be rectified by substituting the original clause P with a new clause that had been proposed by Huntrex 277, which reads:

‘P. SUBJECT FURTHER to the following conditions imposed by the Transferor in favour of herself personally, which conditions are as follows:

(a) The property hereby transferred is subject to a servitude area 20 (twenty) metres wide, the Western boundary of which shall be parallel to the boundary marked DE on Diagram No. 5253/1981 of the Remainder of Erf 3[...] Constantia, held by the said Transferor, Margaret Berzack (born Illman) married out of community of property to Jeffrey Cyril Berzack under Deed of Transfer No. 3[...] dated 31st December 1970.

(b) The said servitude shall be subject to the following terms and conditions, namely:

(i) [deleted]

(ii) The Transferor shall have the right to plant, control, care for and renew the existing garden situated within the servitude area more fully described above.

(iii) The Transferor shall have full rights of access to such servitude area in fulfilment of the rights hereby granted.

P bis: SUBJECT FURTHER to the following condition imposed by the aforesaid Transferor in favour of the aforesaid Remainder of Erf 380 Constantia, namely, that no wall or fence of any description shall be erected on the aforesaid servitude area except extension of existing type of fencing (wooden pole fencing).’

[15] It is worth noting that the rectification of the servitude on the terms that were proposed by Huntrex 277 was designed to convert the original praedial servitude into a personal servitude.

Appeal

[16] The appeal against the judgment of the high court is premised on two main grounds. Firstly, it was submitted on behalf of Ms Berzack that the

high court erred in interpreting the existing clause P on a narrow ground that in the absence of proof that the servitude inscribed in the title deed served the element of *utilitas*; the servitude was, therefore, personal in nature. It was contended on behalf of Ms Berzack that the interpretation of the servitude is not supported by the plain language of the servitude, the intention of the relevant parties when registering the servitude and the subsequent conduct of the various owners of the Huntrex property.

[17] Secondly, it was contended that the high court erred in failing to take into cognizance the fact that the existing servitude enures in favour of the Berzack property, and having economic potential that effectively increases the size of the Berzack property. Counsel placed reliance on the interpretational tool espoused in *Natal Joint Municipal Pension Fund v Endumeni Municipality*⁹ (*Endumeni*) that: ‘the “inevitable point of departure is the language of the provision itself”, read in context and having regard to the purpose of the preparation and the background to the preparation and production of the document.’¹⁰ Such an approach to the interpretation of contractual instruments, including those creating servitudes, had been applied by this Court in *Kruger v Joles Eiendom (Pty) Ltd and Another*,¹¹ with reference to the dictum in *Kempenaars v Jonker, Van der Berg and Havenga*,¹² where the following was said:

⁹ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (*Endumeni*).

¹⁰ *Ibid* para 18.

¹¹ *Kruger v Joles Eiendom (Pty) Ltd and Another* [2008] ZASCA 138; [2009] 1 All SA 553 (SCA); 2009 (3) SA 5 (SCA).

¹² *Kempenaars v Jonker, Van der Berg and Havenga* 1898 5 OR 223.

‘It is clear that incidents and the extent of the servitude must depend on the circumstances under which it was created . . . I think . . . that much must depend on the circumstances under which the servitude was created, and on the *causa et origo servitutis*.’¹³

[18] In argument, it was submitted on behalf of Ms Berzack that regard being had to the language used, clause P should be read in the context in which it appears in the title deed, the purpose of the servitude and the background circumstances giving rise to the creation of the servitude. That exercise begins with the conception of the garden by Ms Berzack and the subsequent negotiations that culminated in the sale of the property to Mr Wellens in 1983. It was submitted that it was wrong of the high court to adopt a sequestered approach by excising different aspects of the same servitude, preserving as praedial P(b)(i) and then severing it from P(b)(ii) and (iii), which form an integral part thereof. It was submitted further that the erroneous deletion of the words ‘her successors-in-title’ and P(b)(i) and substitution thereof with a newly worded and self-standing paragraph P *bis*, resulted in the removal of all the servitudal features of the garden and benefits due to the Berzack property.

[19] Huntrex 277 supports the judgment of the high court on the basis that clause P(b)(i) embodied a praedial servitude as contended for on behalf of Ms Berzack, which is typically regarded as servitude *irregulars*. Such a clause, Huntrex 277 argued, should be interpreted in the same way as clauses P(b)(ii) and (iii), i.e. personal servitude, and not the other way. Therefore, the clauses being interpreted purposively and contextually, and as a whole, are personal to Ms Berzack. It was also contended on behalf of

¹³ Footnote 11 para 6.

Huntrex 277 that clause P(b)(i) is severable from the personal servitude of *usus* embodied in clause P(b)(ii) and (iii) despite the fact that they appear in the same principal clause.

[20] These submissions were premised on the approach to interpretation of a building contract by separation of its parts as applied in *Bondev Midrand (Pty) Ltd v Puling and Another; Bondev Midrand (Pty) Limited v Ramokgopa (Bondev)*¹⁴ They were also premised on the Roman-Dutch law foundations of servitudes, it being contended on behalf of Huntrex 277 that in the absence of the element of *utilitas* in clause P of the existing servitude, the garden servitude is quintessentially not one of the recognized traditional rural servitudes of a right of way or access to drinking water on land belonging to another person. Relying on this, it was argued that the existing servitude is by definition a personal servitude of *usus* whose registration is hit by the prohibition in section 66 of the Deeds Registries Act.

Issues

¹⁴ *Bondev, Midrand (Pty) Limited v Puling and Another; Bondev Midrand (Pty) Limited v Ramokgopa* [2017] ZASCA 141; 2017 (6) SA 373 (SCA) (*Bondev*), paras 19 and 20:

‘But that is a far cry from the circumstances in the present cases. The burden created by the first clause, namely the obligation to build a dwelling on the property, is binding on the transferees (the respondents) and their successors in title. The latter have no right under the second clause to bring that restriction to an end. All clause two provides is that in the event of a failure to build a dwelling in the requisite time the appellant, as the transferor, can recover the land against the payment of the purchase price if it so chooses. This is akin to providing the appellant with an option to purchase which is essentially a personal right. But the appellant is not obliged to demand or claim re-transfer of the land and the obligation to build will remain extant as long as the respondents retain their ownership. Thus the restriction upon ownership created by clause 1 remains binding and will not be terminated should the appellant elect not to seek retransfer. The two clauses read together therefore do not constitute what Streicher JA referred to as “a composite whole” restricting the respondents’ use of the property.

In the circumstances, the first clause of this condition must be regarded as providing a real right and a restriction upon the ownership of the property of the respondents and their successors in title. On the other hand, the second clause under which the appellant has the election to claim re-transfer of the property, creates no more than a personal right akin to an option to purchase which is not inseparably bound up with the first clause. As the appellants sought to enforce the second clause, the issue then becomes whether the debt which is the subject of such a claim has prescribed.’

[21] The main issues for determination on appeal are whether the terms of clause P amount to a praedial or personal servitude of *usus*; and, depending on the nature of servitude that is created in clause P, whether such servitude is capable of being registered in terms of s 66 of the Deeds Registries Act. The determination of two secondary issues, namely, rectification and prescription, depend on the outcome of the determination of the main issues.

Interpretation of contract of servitude

[22] The interpretation of clause P lies at the heart of this matter. Both parties submitted as much. To the extent that the high court did not interpret clause P with regard to the grammatical meaning of the words used therein in light of the context, purpose and the background circumstances under which the servitude creating contract was made between Ms Berzack and Mr Wellens in 1983, it erred. It applied a narrow and sequestered method of interpretation, misconstrued the meaning of *utilitas*, excised the aspects of what a praedial servitude was, which resulted in a constrained meaning given to each of those subclauses and mischaracterising the praedial servitude as a personal servitude of *usus*. Immediately the servitude was so construed, an opportunity was missed to unravel the *causa et origo* of the contract that was concluded between Ms Berzack and Mr Wellens in 1983. The process of separating and excising the aspects of clause P is an isolationist approach to interpreting a contract that is not consonant with what this Court propounded in *Endumeni*. Nor do I agree with counsel for Huntrex 277 that the approach applied by this Court in *Bondev* finds application in this case.

[23] There, it was held that although the conditions in a title deed of land transferred by Bondev to each of the respondents entitling Bondev to claim re-transfer against payments of the original purchase price if neither the transferee nor their successors-in-title erect a dwelling thereon within a certain period gave rise to both a real right (to have a dwelling erected) and a personal right (to claim re-transfer). Each of those rights were interpreted as they stood on the building contract. They were not denuded of their inherent characteristics by excision and word alteration processes that we have seen in this case. To the extent that only the right to claim re-transfer was susceptible to prescription in terms of the provisions of s 11(d) of the Prescription Act, those rights were found not to be inextricably wound up together, but were capable of separate existence. Therefore, *Bondev* does not support the argument advanced on behalf of *Huntrex 277*. In this case, we are dealing with one composite contract creating a praedial servitude in accordance with what the parties had intended at the outset.

[24] The meaning of clause P, read as a whole, shows that the element of *utilitas* is present. The *Huntrex 277* property has been serving the Berzack property continuously for a period spanning more than thirty years. The right to the garden is reserved on the servient land and it enures in favour of the Berzack property, serving the pursuit of Ms Berzack's personal pleasure or caprice. Subclauses P, P(a) and P(b)(i) demonstrate this fact. In the same way, the ancillary clauses in P(b)(ii) and (iii), read together with other subclauses, describe the manner of access to the servitudal area. The fact that the servitudal rights are enjoyed by the owner of the dominant tenement is a natural feature of the praedial right. That the servitude as described in clause P increases the economic potential of the Berzack property is not in

dispute. Just as the argument advanced on behalf of Ms Berzack that the modern praedial servitude of view is similar in substance to the garden servitude has not been contradicted. That said, I have no doubt in my mind that, on the facts of this case, the intention expressed in writing by Ms Berzack and Mr Wellens in 1983 was that the garden should be reserved on the Huntrex 277 property for the former's benefit and subsequent successors-in-title of the Berzack property in perpetuity, hence the registration of the servitude.

[25] The finding made by the high court that clause P does not meet the definition of *utilitas* is erroneous. In *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd*,¹⁵ this Court stated that in the absence of an ambiguity in the words used in a servitude-creating contract, the golden rule applies in favour of a praedial servitude having been proved by the person who claims the existence thereof. In such event, as stated in *Northview Properties (Pty) Ltd v Lurie*,¹⁶ 'there is a presumption of fact arising from registration'¹⁷ and the presumption against the existence of a real servitude does not arise.

[26] The adjunct to the attack against the recognition of a garden servitude simply on the basis that it is not one of the traditional servitudes does not have a legal basis. The correct position in our law is that there is no exhaustive list of real servitudes. On this score, what the Constitutional

¹⁵ *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1918 AD 1 at 16.

¹⁶ *Northview Properties (Pty) Ltd v Lurie* 1951 (3) SA 688 (A).

¹⁷ *Ibid* at 689.

Court said in *City of Tshwane v Link Africa (Pty) Ltd and Others*¹⁸ (*Link Africa*) is instructive. The Court said:

‘In modern South African law, types of rights and restrictions found in traditional servitudes have been relaxed. This relaxation has been so extensive “that their number is “practically unlimited” although certain general requirements have to be fulfilled”. To determine whether a right in property is a servitude is often a matter of judicial policy. It depends in part on whether the nature of the right is capable of being recognised as a real right:

“The essence of a servitude is therefore, that it confers “a real right [to use and enjoyment of the property of another]”, and it is this direct relationship between the holder of the servitude and the property to which it relates that distinguishes it from a mere contractual right against the owner of the property.”

The crucial point is this: the common law on servitudes illustrates that property rights have dimension, colour and complexity far beyond any barefaced general proposition about ownership. Servitudes limit the rights of ownership and place certain burdens on property by affording power of use and enjoyment to another. That has been the case for thousands of years, for our law of servitudes, both consensual and non-consensual, is derived from the Roman law.’¹⁹

[27] In this case the features of the garden servitude with which we are concerned meet the distinctive characteristics of a praedial servitude, not a personal servitude, as shown in *Link Africa*, where the following was said:

‘A praedial servitude is one where there are at least two pieces of land implicated. The servitude confers benefits on one piece of land, the dominant tenement, while imposing corresponding burdens on the other, the servient tenement. A praedial servitude vests in the owner of the dominant land. But neither its benefit nor its burden can be detached from the land. These are passed from one land owner to the next.

¹⁸ *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd and Others* [2015] ZACC 29; 2015 (6) SA 440 (CC); 2015 (11) BCLR 1265 (CC) (*Link Africa*).

¹⁹ *Ibid* para 138 - 139.

By contrast, a personal servitude is a real right that attaches to the burdened land, but is also always connected to an individual. He or she holds the right to use and enjoy another's property. That right is non-transferable: it cannot be passed on to another. However, personal servitudes are always enforceable against the owner of the property burdened by it – even when that owner changes.²⁰

[28] On the contrary, the description of a personal servitude of *usus* makes it plain that the garden servitude in this case is not a personal servitude of *usus*. The authorities state that in the case of a personal servitude of *usus* involving a piece of land, the usufructuary of land may take fruit, vegetables and other produce for the household's needs, leaving the remaining produce to the landowner who may enter and gather it. With regard to using a house, the usufructuary may occupy it with his or her family, servants and guests, and may let out part of the house, provided he or she remains in occupation.²¹

[29] For the aforementioned reasons, I am driven to the conclusion that the meaning of the original clause P is that it bears the hallmarks of a praedial servitude, not a personal servitude of *usus*. The servitude of the kind spelt out in the original clause P does not fit the description of a personal servitude of *usus*, but points to it being a praedial servitude not only when viewed in line with the common intention of the parties but also when interpreted purposively, contextually and having regard to the background to its preparation and production. In the event, the registration of the servitude by the Registrar of Deeds cannot be faulted.

²⁰ Ibid paras 136 - 137.

²¹ See, in this regard: F du Bois *Wille's Principles of South African Law* 9 ed (2007) in Chapter 23.

[30] The order authorising Huntrex 277 to demolish the existing wooden pole fence and erect its fence on the servitudal area, thereby restricting access by Ms Berzack to the garden ought not to have been granted.

Rectification and prescription

[31] The conclusion reached above that clause P constitutes a praedial servitude undercuts the submission that s 66 of the Deeds Act prohibits registration of the servitude. Similarly, there will be no need to decide the appeal based on rectification and prescription. Suffice it to say that the judgment and order of the high court cannot stand. And the costs of the appeal should follow the result.

[32] Before concluding, I need only to say that I have read the judgment authored by my colleagues, Plasket JA and Goosen AJA. While I agree that the permanent advantage derived from a feature or attribute of the servient tenement is not to be confused with the concept of utility, I disagree with the proposition that there is no feature or attribute of the servient tenement which can be said to provide an advantage to the dominant tenement. An obvious concomitant of the garden servitude is that the servient tenement entitles the dominant tenement to a view of the grounds. The servitudal rights created indirectly serve as a guarantee that no structure can be constructed on the grounds designated as the garden area. In this fashion, the dominant tenement's poolside entertainment area will always be an area with a view as it is and will always be adjacent to a section of vacant land. That a view adds *utilitas* and enhances the value of residential property is incontrovertible. The fact that in tending the garden, Ms Berzack is, in the process, able to pursue her personal pleasure or caprice does not detract from

the advantages alluded to. The argument that the servitude area was identified in order to circumvent area restrictions imposed by the applicable town planning scheme is a red-herring, in my view, and is above all belied by the facts emerging from the record.

Order

[33] In the result, the following order is made:

- 1 The application for leave to appeal is granted.
- 2 The appeal is upheld with costs, including the costs of two counsel.
- 3 The order of the high court is set aside and replaced with the following order:

‘The application is dismissed with costs including the costs of two counsel where so employed.’

Z M NHLANGULELA
ACTING JUDGE OF APPEAL

Plasket JA and Goosen AJA

[34] We are unable to agree with the order that our colleague, Nhlangulela AJA, proposes. We only agree with him that leave to appeal should be granted in respect of paragraphs 1, 2, 3, 4 and part of paragraph 8 of the order of the high court, and that the appeal should be upheld to that extent.

For the rest, we would dismiss the application for leave to appeal with costs, including the costs of two counsel.

[35] This matter turns ultimately on whether the servitude in question is a praedial servitude or personal servitude of *usus*. The implications of a finding that the servitude is a praedial servitude are that it accrues to successors in title to the current owner, Ms Berzack, and will burden the servient tenement in perpetuity. If, however, the servitude is a personal servitude, it accrues only to Ms Berzack while she owns the dominant tenement. The consequences that flow from the decision as to the nature of the servitude are thus far-reaching and of immense importance, not least to the owners of the servient tenement and their successors in title. The high court found that the servitude was a personal servitude of *usus* and granted all the relief claimed by Huntrex.

[36] The effect of the judgment of Nhlangulela AJA is that it recognises as a praedial servitude the right to develop and maintain a garden upon a servient tenement. As such it marks a significant development of the scope of presently recognised praedial servitudes at common law. For reasons which we elucidate below, the development is premised upon a misapplication of the principles of law which govern the field of servitudes.

[37] When Ms Berzack sub-divided erf 380, Constantia, she sold part of it, now known as erf 8[...] Constantia, to Mr A G Wellens on 21 September 1983. A servitude was embodied in the deed of transfer and subsequently registered in her favour. The servitude, contained in clause P of the deed of transfer, reads as follows:

‘SUBJECT FURTHER to the following conditions imposed by the Transferor in favour of himself and his successors in title as owner of the REMAINDER of ERF 3[...] Constantia, which conditions are as follows:

- (a) The property hereby transferred is subject to a servitude area 20 (twenty) metres wide, the Western boundary of which shall be parallel to the boundary marked DE on Diagram No. 5253/1981 in favour of the Remainder of ERF 3[...] CONSTANTIA, held by the said Transferor, MARGOT BERZACK (born ILLMAN) married out of community of property to Jeffrey Cyril Berzack under Deed of Transfer No. 3[...] dated 31st December 1970.
- (b) The said servitude shall be subject to the following terms and conditions namely:
 - (i) no wall or fence of any description shall be erected on the servitude boundary except extension of existing type of fencing (wooden pole fencing).
 - (ii) The Seller shall have the right to plant, control, care for and renew the existing garden situated within the servitude area more fully described above.
 - (iii) The Seller shall have full rights of access to such servitude area in fulfilment of the rights hereby granted.

(the term SELLER shall include her Successors in Title).’

[38] When Huntrex purchased erf 8[...] from Mr K W Sander in 2017, the deed of transfer referred, in clause P, to the sale being subject to ‘the following conditions contained in the said Deed of Transfer No. T.3[...] /1983 imposed by MARGOT BERZACK in favour of herself and her successors in title as owner of the REMAINDER OF ERF 3[...], CONSTANTIA’. It then recorded, in clauses P(a) and P(b), the terms of the servitude as agreed by Ms Berzack and Mr Wellens in 1983.

[39] Erf 3[...] and erf 8[...] lie on an east to west line bounded along their northern boundary by Alphen Drive and along their southern boundary by Peter Cloete Avenue. The servitude area extends for 20 metres westward from the westerly boundary of erf 3[...]. One wooden fence crosses the area.

[40] This fence was the catalyst that led to this application. Because it could not contain the dogs belonging to Mr and Ms Bain, the members of Huntrex who reside on erf 8[...], they wished to remove it and replace it with what they called a ‘visually permeable’ fence that they had commissioned an architect to design.

[41] Mr and Ms Bains sought Ms Berzack’s permission to remove the old fence and construct the new fence. She refused. As a result, they began to research the position that pertained to the servitude area. When they discovered the extent of the right that Ms Berzack claimed – and the prejudice it caused to Huntrex as owner – they launched the application in the high court with the aim of rectifying the situation.

[42] In their notice of motion, they sought orders to the effect that they could remove the fence then in place and construct a new one (prayers 1-4); that it be declared that Ms Berzack’s servitude was only a personal servitude of *usus* over erf 8[...] which ceased to have effect on her death; that it was not capable of being registered in the title deeds as a praedial servitude in favour of Ms Berzack and her successors-in-title (prayers 4-7); and that the Master – the second respondent, who took no part in the proceedings in the high court or in this court – be directed to rectify the deed of transfer (prayer 8).

[43] The central issue in this application for leave to appeal is what the true nature of the servitude is. This involves the interpretation of the servitude-creating instrument. But, as van der Walt has said, the interpretation of a servitude created by the juristic act of the parties, as opposed to legislation or the common law, is not simply a matter of ascertaining the intention of the parties through giving meaning to the words that they chose. In some instances, ‘the law will override the clearly stated intention of the parties to a servitude-creating contract if the contract conflicts with certain peremptory principles of property law’, the underlying reason being that ‘contracting parties are not allowed to create real rights in land at will’.²²

[44] Furthermore, since a servitude is a limitation on the right of ownership of land, the common law recognises a presumption that land is free of a servitude, unless the contrary is established.²³ This presumption has three implications. They are:²⁴

‘Firstly, it is presumed that property (particularly land) is free of servitudes and therefore the existence of a servitude has to be proved by the person who claims to hold it. Logically speaking this presumption precedes interpretation of a servitude-creating contract (the presumption is rebutted as soon as the servitude is proved) and therefore the presumption will seldom compete with interpretation of the contract. Secondly, once the existence of a servitude has been proved, the *in favorem libertatis* principle means that the contract from which the servitude originates must be interpreted strictly so as to impose the least cumbersome burden on the servient property. In this case, the presumption gives effect to an underlying property principle that directs that interpretation of the contract. The logic is again that the servitude limits ownership, that

²² A J van der Walt *The Law of Servitudes* (2016) at 189 (Van der Walt).

²³ Van der Walt at 192.

²⁴ Van der Walt at 193-194.

ownership must be protected against unnecessary restrictions, and that the contract must therefore be interpreted restrictively so as to protect freedom of ownership. Thirdly, in the same vein, if the existence of a servitude has been proved but it is unclear whether the servitude is praedial or personal, the presumption favours a personal servitude because that usually imposes a lesser burden on the servient land. Interpretation therefore again takes place under the guidance of a property principle.’

[45] The approach to the interpretation of servitudes was set out authoritatively by Innes CJ in *Willoughby’s Consolidated Co Ltd v Copthall Stores Ltd*²⁵ as follows:

‘Whether a contractual right amounts in any given case to servitude – whether it is real or only personal – depends upon the intention of the parties to be gathered from the terms of the contract construed in the light of the relevant circumstances. In case of doubt the presumption will always be against a servitude, the *onus* is upon the person affirming the existence of one to prove it.’

[46] The presumption that Innes CJ spoke of was described by Cloete JA in *Kruger v Joles Eiendomme (Pty) Ltd and Another*²⁶ as ‘the well-established rule of construction that because a servitude is a limitation of ownership, it must be accorded an interpretation which least encumbers the servient tenement’. The rule applies not only to whether the servient tenement is burdened with a servitude but also, if it is, to whether it is praedial or personal. This was explained by Corbett J in *Jonordon Investment (Pty) Ltd v De Aar Drankwinkel (Edms) Bpk*²⁷ when he held that ‘where it is doubtful whether a servituted burden placed on land was intended to be for the benefit of another property and, therefore, praedial and

²⁵ *Willoughby’s Consolidated Co Ltd v Copthall Stores Ltd* 1918 AD 1 at 16.

²⁶ *Kruger v Joles Eiendomme (Pty) Ltd and Another* [2008] ZASCA 138; 2009 (3) SA 5 (SCA) para 8.

²⁷ *Jonordon Investment (Pty) Ltd v De Aar Drankwinkel (Edms) Bpk* 1969 (2) SA 117 (C) at 126A-B.

perpetual or for the benefit of a particular person and, therefore, personal and limited in its duration, the latter interpretation must be adopted as being the one which places the lesser burden upon the subject-matter of the servitude’.

[47] Two observations concerning the approach to the interpretation of servitudes are necessary. First, Nestadt J, in *Lorentz v Melle and Others*²⁸ made the point that the registration of rights in land does not ipso facto ‘render the rights of a servituted character’ because it may have been that ‘only personal rights were created and that registration should not have taken place’. In other words, the nature and character of the right created must be analysed. Secondly, the intention of the parties as expressed in their agreement has its limits. Nestadt J, with reference to the passage cited above in the *Willoughby’s Consolidated* case, expressed those limits thus:²⁹

‘I would add that I do not read the passage and authorities quoted as meaning that the parties’ intention (as gathered from the terms of the contract) is the sole criterion in deciding the issue. If a contractual right is of such a nature that it is incapable of constituting a servitude then obviously the intention of the parties (as expressed) to do so is irrelevant.’

[48] Apart from the issue of interpretation, there are limits imposed by principles and provisions of property law that seek to restrict the unbounded creation of praedial servitudes, given their perpetual character and their drastic effect of restricting the rights, powers and liberties of owners of property. One such limit is s 66 of the Deeds Registries Act 47 of 1937. It provides:

²⁸ *Lorentz v Melle and Others* 1978 (3) SA 1044 (T) at 1049H (*Lorentz*).

²⁹ At 1050G-H.

‘No personal servitude of *usufruct*, *usus* or *habitation* purporting to extend beyond the lifetime of the person in whose favour it is created shall be registered, nor may transfer or cession of such personal servitude to any person other than the owner of the land encumbered thereby, be registered.’

[49] We turn now to the servitude. The wording of clause P pulls, at times, in different directions but that notwithstanding, it seems to us that the type of servitude contemplated by the parties is nonetheless evident. It is important to bear in mind that the character of the servitude, rather than what the parties who created it chose to call it, is decisive.

[50] In clause P’s introductory recordal, it is stated that the servitude set out in the remainder of the clause was ‘imposed’ by Ms Berzack in favour of herself as owner of erf 3[...], and her successors in title. Clause P(a) then identifies the servitude area, and in doing so refers to the ‘property hereby transferred’ as being ‘subject to a servitude area’. It also identifies the property in favour of which the servitude operates.

[51] The servitude area in favour of Ms Berzack and her successors in title having thus been identified, clause P(b) defines the rights that the servitude grants. The operative provisions are clauses P(b)(ii) and (iii), as clause P(b)(i) only concerns the fence and has no bearing on the character of the servitude. Clause P(b)(ii) defines the servitutorial right that ‘the Seller’ obtained (or, in the words of the recordal, ‘imposed’ on the owner of erf 8[...]) as the right to ‘plant, control, care for and renew’ the garden in the servitude area. In other words, the servitude gave Ms Berzac the use of the servitude area in order to garden. Clause P(b)(iii) adds little, as all it does is

emphasise that Ms Berzack and her successors in title have a right of access to the servitude area in order to garden.

[52] The only indications that a praedial servitude was in the contemplation of the parties are the reference to successors in title to Ms Berzack and the identification in clause P(a) of two properties, one that is subject to a servitude area and one in whose favour the servitude area operates. These factors must be seen in the context of the servitude as a whole, particularly: the statement in the recordal that it was ‘imposed’ by Ms Berzack in favour of herself and her successors in title, as opposed to being ‘imposed’ over the servient tenement in favour of the dominant tenement; the statement in clauses P(b)(ii) and (iii) that ‘the Seller’ obtained the rights listed therein; and the fact that the only purpose in referring to the two properties in clause P(a) was to identify the servitude area.

[53] As against these limited indicators that a praedial servitude may have been intended, there are two strong indicators that a personal servitude was intended. First, on the first sale of erf 8[...], the terms of the servitude were ‘imposed’ in favour Ms Berzack ‘as owner’ of erf 3[...]. Secondly, the nature of the rights in clauses P(b)(ii) and (iii) are, by their nature, personal to Ms Berzack. They indicate that the intention of the parties was to create a personal servitude – ‘a limited real right that imposes a burden on the servient tenement . . . for the benefit of a particular person’³⁰ – for no reason other than enabling Ms Berzack to enjoy gardening in the servitude area. As stated above, in the case of uncertainty, the authorities are clear: the

³⁰ Du Bois (ed) *Wille’s Principles of South African Law* (9 ed) (2007) at 604 (Du Bois).

servitude must be held to be a personal servitude rather than a praedial servitude.

[54] We turn now to a more precise characterisation of the rights created by clause P(b)(ii). The personal servitude of *usus* is defined as follows by van der Walt:³¹

‘The personal servitude of use (*usus*, *bruick* in Roman-Dutch law) is similar to but narrower than *usufruct*. The beneficiary of a servitude of use (referred to as a “usuary”) can, like the usufructuary, use the property of another person, for her lifetime or for the specified term of the servitude, for her own benefit or for the benefit of her family, provided that the substance of the property is preserved and returned to the owner when the servitude is terminated.’

Put in slightly different terms, the servitude of *usus* ‘entitles the usuary to use the usuary property but not to appropriate its fruits’.³²

[55] Ms Berzack, in her answering affidavit stated that one of the ‘unavoidable consequences’ of her sub-dividing her property and selling part of it had been that ‘a significant portion’ of her garden fell within the portion that was to be sold. She wished to protect for her benefit and that of successors in title, ‘the exclusive right to use, access and tend to that portion of the garden by creating [a] servitude over the Huntrex property at the same time as selling and transferring it’. When Ms Berzack’s stated intention is matched with clauses P(b)(ii) and (iii), there can be little doubt that she sought to, and did, create a right of use for herself. It seems clear to us that the servitude thus created falls squarely into the definition of the personal servitude of *usus*.

³¹ Van der Walt at 488.

³² Du Bois at 610.

[56] Van der Walt states that ‘the nature and content of a servitude’ depends only to an extent on the intention of the parties who created it because ‘the law will not give effect to the intention of the parties if they intended to do something that is not possible according to the principles of property law’, such as creating ‘a personal servitude that is transferable or perpetual’.³³ As s 66 of the Deeds Registries Act prohibits the registration of a personal servitude of *usus* that purports to extend beyond the lifetime of the person who created it, Ms Berzack was not legally capable of ‘imposing’ the servitude on the purchaser of her property in favour of herself and her successors in title. That has the result that, irrespective of what the servitude says or what Ms Berzack intended, the servitude expires on her death. The import and effect of s 66 of the Deeds Registries Act cannot be ignored. It reflects a legislative purpose to bolster the common law impediments to the extension of perpetual restrictions on the ownership of property. Its effect is that once a servitude bears the hallmarks of a personal servitude, it precludes registration.

[57] We note that Nhlangulela AJA accepts that the rights created by the registered servitude were intended to enable ‘the pursuit of Ms Berzack’s personal pleasure or caprice’ – the essence of a personal servitude – and that clauses P(a) and (b) confirm this.³⁴ He concludes, however, that the requirement of *utilitas* is met by the enhancement in value which accrues to the dominant tenement, and the beneficial acquisition of a ‘view’ of the garden. We deal with this hereunder.

³³ Van der Walt at 217.

³⁴ See para 24 of Nhlangulela AJA’s judgment.

[58] Having concluded from an interpretation of the servitude and from the nature of the rights created, that a personal servitude of *usus* was, in fact, created, we now approach the issue from a different angle. We turn now to consider the essential requirements for the creation of a praedial servitude and whether the servitude at issue meets those requirements. There are five general requirements. These embody certain principles which characterise the servitude as praedial, ie as perpetual constraints upon the rights of ownership of the servient tenement whilst conferring real rights that attach to the dominant tenement.³⁵ Only two of these need be considered.

[59] The first is that the servient tenement must be capable of serving the dominant tenement on a permanent basis, and therefore that the use made of the servient tenement must be based on some permanent feature or attribute of the servient land. This requirement is expressed in the principle of perpetual cause. It was stated in *Lorentz* that it is ‘the essence of a praedial servitude that it burdens the land to which it relates and that it provides some permanent advantage to the dominant land, as distinct from serving the personal benefit of the owner thereof’.³⁶

[60] The advantage provided by the servient tenement to the dominant tenement must derive from a feature or attribute of the servient tenement

³⁵ Du Bois at 593-596.

³⁶ *Lorentz* at 1049G.

which is permanent. In *Lorentz*,³⁷ this was expressed in a citation from Hahlo and Kahn³⁸ who wrote:

‘The old example of the Roman law, which was duly repeated in the Romanistic literature, was that one cannot have a praedial servitude to pluck fruit or to stroll or to have dinner on another's land. On the other hand, the use made of the servient land must be based on some permanent attribute or feature of it. This is expressed in the requirement of the existence of a *causa perpetua*.’

[61] The second is that the servient tenement must provide some utility or benefit to the dominant landowner, as owner, and must not merely serve that owner's personal pleasure or caprice.³⁹ This requirement is embodied in the principle of *utilitas*. We have already pointed to the fact that the main judgment, correctly in our view, recognises that the servituted rights created by the clause in the title deed served Ms Berzack's personal pleasure and caprice. The servitude was created to enable her to enhance her personal pleasure derived from gardening, rather than to exercise dominium over her property and enjoy all the elements of that dominium.

[62] While we accept that the principle of *utilitas* may be met by enhancement in value of, or the advancement of the economic, industrial or commercial potential of a dominant tenement to which a servitude over a servient tenement attaches,⁴⁰ the enhancement must flow from the right which is conferred by the servitude. A right of way, or a right to draw water

³⁷ *Lorentz* at 1052C.

³⁸ Hahlo and Kahn, *The Union of South Africa; The Development of its Laws and Constitution* (1960) at 602.

³⁹ Du Bois at 594. See also *Briers v Wilson and Others* 1952 (3) SA 423 (C) at 433H-434F; *Bisschop v Stafford* 1974 (3) SA 1 (A) at 11F-12A.

⁴⁰ *Hollman and Another v Estate Latre* 1970 (3) SA 638 (A) at 644F-645B.

from a stream or to lead water over a servient tenement no doubt may facilitate the use, and therefore value, of a dominant tenement otherwise deprived of such services. So too, a restrictive condition imposing limitations on the right to trade upon a servient tenement may protect the value that attaches to such rights as vest in a dominant tenement. These are the types of value enhancement envisaged as fulfilling the *utilitas* requirement. *Non constat* the ‘increased market value’ which might ensue from a beautiful garden developed upon a servient tenement, establishes utility as required by the common law. In any event, even if it is assumed that some market value benefit may flow from the gardening activities of Ms Berzack, such ‘utility’ cannot alter the fact that the rights were reserved by her in pursuit of her personal pleasure and enjoyment.

[63] The assertion by Nhlangulela AJA that additional utility is to be found in the fact that the servitude will also ensure a view of the garden, which will attach to the dominant tenement, merits comment. In the first instance, there was no evidence before the court about the nature of this ‘view’. The record contains only general assertions that the garden is directly adjacent to a pool area on the dominant tenement and that it serves to enhance the visual appreciation of the area. More importantly, the utility in a view, if it is to serve as a basis for recognition of a praedial servitude, requires more than the mere assertion of the existence of a ‘view’. The reason is this: a view lies across or over an adjacent property. If it is to attach as of right to a dominant tenement, it must necessarily do so by restricting the use to which the servient tenement may be put insofar as such use would obstruct or destroy the ‘view’ across the servient land. This difficult conundrum has been the subject of numerous disputes before our courts, mostly in the context of

challenges to the lawful use of property which serves to ‘detract’ from the value of an adjacent, neighbouring property.⁴¹

[64] Our law does not recognise a natural entitlement, based upon the mere ownership of land, to enjoy a view across adjacent land. The authorities also do not, as a general entitlement, recognise the protection of value in a property by imposing upon the owner of adjacent land restrictions on the lawful use of such land. The circumstances in which this may occur are not germane to this case. The point is made to demonstrate that the ‘utility’ of a view of the garden can, in the context of this case, serve no more than to assert the ‘value’ of the garden itself.

[65] How would the *utilitas* requirement be affected if a successor in title had no interest in gardening? Let us assume that they simply abandoned the cultivation and care of the garden in the servitude area, allowing it to become a rodent infested eye-sore. Could it still be said in these circumstances that the value of the dominant tenement has been enhanced by the servitude? In our view, the obvious answer is ‘no’. In similar vein it could not be said that the servient tenement has continued to provide a permanent advantage or perpetual cause to the dominant tenement in the absence of the maintenance and renewal of the garden. This example also highlights, it seems to us, the personal nature of the rights claimed by Ms Berzack.

⁴¹ *Paola v Jeeva NO and Others* 2004 (1) SA 396 (SCA); *Clark v Faraday* 2004 (4) SA 564 (C); *Muller NO and Others v City of Cape Town and Another* 2006 (5) SA 415 (C); *True Motives 84 (Pty) Ltd v Madhi (Ethikwini Municipality as Amicus Curiae)* 2009 (4) SA 153 (SCA).

[66] It must be emphasised that the permanent advantage derived from a feature or attribute of the servient tenement is not to be confused with the concept of utility. The requirements are interlinked, but they are not co-extensive. In this case there is no feature or attribute of the servient tenement which can be said to provide an advantage to the dominant tenement. The fact that it is contiguous is of no moment. That serves only to meet the requirement of *vicinitas*. There is no evidence that the portion of land used for the development and cultivation of a garden offers some peculiar facility for the development of such a garden. The service that the servient tenement provides consists of no more than the space upon which a garden has been developed. Indeed, the expedient of a servitude and the servitude area was identified in order to circumvent area restrictions that applied to subdivisions of land, in terms of the applicable town planning scheme.

[67] One final point warrants emphasis, and that is the entirely subjective and value-laden-aesthetic of what constitutes a ‘garden’ which would serve to enhance market or economic value of the dominant tenement. The fact that Ms Berzack may have created a garden which satisfies the sensibilities of a particular segment of society is no basis to infer intrinsic advantage provided by the servient tenement to the dominant tenement. This is particularly so in the light of the fact that the ‘advantage’ conferred by the servient land constitutes a permanent diminution of the rights of dominium exercised by the owner of the servient tenement.

[68] In our view, for the reasons set out above, the servitutorial rights conferred by the terms of the agreement do not meet two of the essential requirements for recognition as a praedial servitude. It is, as indicated above,

no more than a servitude of *usus*, which is personal to Ms Berzack. It follows that in respect of the principal issue, namely whether the servitude is praedial or personal in nature, and the remedial consequences that flowed therefrom, there is no prospect of success on appeal. The high court's conclusion is correct that clauses P(b)(ii) and (iii) operate as a personal servitude of *usus* in favour of Ms Berzack; that they will cease to have force or effect on her death; and they are not capable of operating or being registered as a praedial servitude and ought not to have been registered as such. The result is that paragraphs 5, 6 and 7 of the high court's order were correctly granted. As we shall explain, paragraph 8 – the rectification of clause P to bring it into conformity with s 66 of the Deeds Registries Act – requires limited amendment, only in relation to the fence.

[69] As regards paragraphs 1, 2, 3 and 4 of the high court order, we agree that no basis was established for the relief granted by the high court. These paragraphs concern the fence, its demolition and the construction of a new fence. Clause P(b)(i) provides that 'no wall or fence of any description shall be erected on the servitude boundary except extension of existing type of fencing (wooden pole fencing)'. Simply stated, clause P(b)(i), although not a model of the legal drafter's art, clearly prohibits the construction of a fence on the servitude boundary except to the extent that it is an extension of the existing fence and is constructed of wooden poles.

[70] We can see no basis upon which clause P(b)(i) can be interpreted to mean that the owner of the servient tenement may demolish the existing fence and then construct a new fence on the boundary of the servitude area. That being so, there was no basis for the granting of paragraphs 1, 2, 3 and 4

of the order. There was also no basis for the rectification of the clause P of the deed of transfer by deleting clause P(b)(i). Paragraph 8 of the order will have to be amended to that extent. As that does not qualify as substantial success, there will be no costs order in favour of Ms Berzack in that regard.

[71] We conclude that except for paragraphs 1, 2, 3 and 4 of the order of the high court, which deal with the fence, and the deletion of clause P(b)(i) in the rectified servitude, which also relates to the fence, there are no reasonable prospects of success on appeal. We would grant leave to appeal in relation to those paragraphs, as well as paragraph 10 which deals with costs, uphold the appeal and set aside those paragraphs of the order of the high court. For the rest, we would dismiss the application for leave to appeal with costs, including the costs of two counsel. It would, in the light of Ms Berzack's partial success be necessary to re-visit the costs order of the high court.

[72] We would accordingly make the following order.

1 Leave to appeal is granted in respect of paragraphs 1, 2, 3, 4, 8 and 10 of the high court's order.

2 The appeal against paragraphs 1, 2, 3 and 4 of the high court's order is upheld with costs, including the costs of two counsel.

3 Paragraphs 1, 2, 3 and 4 of the high court's order are set aside and replaced with the following order:

'Prayers 1, 2, 3 and 4 of the notice of motion are dismissed with costs, including the costs of two counsel.'

4 The appeal against paragraph 8 of the high court's order is upheld to the limited extent set out in paragraph 5 below.

5 Paragraph 8 of the high court's order is amended by the insertion in the rectified clause P of the deed of transfer, at clause P(b)(i), of the following words:

'No wall or fence of any description shall be erected on the servitude boundary except extension of existing type of fencing (wooden pole fencing).'

6 The application for leave to appeal is otherwise dismissed with costs including the costs of two counsel.

C PLASKET
JUDGE OF APPEAL

G GOOSEN
ACTING JUDGE OF APPEAL

Appearances:

For appellant:	J G Dickerson SC (with S G Fuller)
Instructed by:	Dorrington Jessop Incorporated, Cape Town Webbers Attorneys, Bloemfontein
For first respondent:	S P Rosenberg SC (with T Tyler)
Instructed by:	Lamprecht Attorneys, Cape Town Symington De Kok, Bloemfontein
For the second respondent:	Abides the decision of the Court
For the third respondent:	Abides the decision of the Court