THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

Seale and Others v Minister of Public Works and Others **(899/2019) [2020] ZASCA 130 (15 October 2020)**

From: **The Registrar, Supreme Court of Appeal**
Date: **15 October 2020**
Status: **Immediate**

Please note that the media summary is for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

Today the Supreme Court of Appeal (SCA) dismissed the appeal by the appellants with costs including costs of two counsel and adjusted the order of the court a quo to provide that the second respondent pay the costs of Ontspan Beleggings in the court a quo.

The first appellant in this case is Mr Kingsley Jack Whiteaway Seale. He a director of both the second appellant, Ontspan Beleggings (Pty) Ltd and the third appellant, HI Frank Components (Pty) Ltd. The fourth appellant is the Schoemansville Oewerklub, a voluntary association that acts in the interest of its members. The appellants launched an application in the Gauteng Division of the High Court, Pretoria for orders declaring and enforcing servitudal rights. The second respondent, the Minister of Water and Sanitation, opposed the application on behalf of the State. The fourth respondent, the Transvaal Yacht Club, a voluntary association that owns property adjacent to the foreshore, also opposed the application. The application was dismissed but the appellants were granted leave to appeal. The appeal concerns servitudal rights of access over a narrow strip of State land between the edge of the water and the boundaries of adjoining properties (the foreshore), for purpose of boating and fishing on the Hartbeespoort Dam (the Dam).

The history of the matter spans more than a century. At the time when the Union Government determined to construct the Dam, the Schoeman family owned

portions of the freehold farm Hartebeestpoort. The Crocodile River, which would be the main source of water for the Dam, traversed the original farm. Mr Johan Hendrik Schoeman and members of his family owned portions of the farm Hartebeestpoort that would be submerged by the Dam. On 25 January 1918 the Union Government and the owners of the portions of the farm Hartebeestpoort, represented by Mr Schoeman, entered into an agreement of sale (the 1918 agreement). The Union Government purchased the portions of land that would be submerged by the Dam from the Schoeman family. The boundary between this land and the State land ran above the actual (fluctuating) waterline of the Dam. Clause 3(k) (clause K) of the 1918 agreement provided for the retention of rights of access to the Dam to Johan Hendrik Schoeman in his individual capacity or his assigns, on certain three places which were to be mutually agreed upon by the parties. The agreement never took place. Mr Schoeman nevertheless desired the registration of these rights. Later, the Union Government during 1922 entered into a notarial contract with Mr Schoeman (the notarial contract) which envisaged the registration of a servitude. Mr Schoeman later persuaded the Union Government to retransfer a portion of the land that had been transferred pursuant to the 1918 agreement, to him and the decision was recorded in Cabinet Minute 3125 (the Cabinet Minute).

Part of the Cabinet Minute was given effect to by Crown Grant 67 of 1926 (the Crown Grant). It was registered in the Deeds Office. In terms thereof portion 43 of the farm Hartebeestpoort (portion 43) was transferred to Mr Schoeman and the rights of access to the foreshore in front of portion 43 that had been approved therein were registered as a servitude against the title deed of the servient tenement. The first, third and fourth appellants (appellants) essentially claimed an order for the registration of praedial servitudes of access to the Dam for purposes of boating and fishing. The second appellant (Ontspan Beleggings), in essence, sought a declarator that it is entitled to free use of the foreshore in front of portion 43. The SCA emphasised that it is trite that a servitude is a right to use the property of another in a particular manner. The right may be attached to a particular (dominant) tenement (praedial servitude) or to a particular person (personal servitude). A personal right to claim the registration of a servitude (praedial or personal) may, of course, arise from an agreement. The appellants contended that the rights to obtain the registration of

the servitudes emanated from clause K on its own, or together with the notarial contract. The SCA noted that a personal servitude held by a natural person inevitably terminates when that person dies. Mr Schoeman passed away in 1967. It is trite that a praedial servitude is characterised by the fact that it attaches to a dominant tenement, regardless of the identity of the owner thereof from time to time. Therefore an agreement cannot give rise to the right to a praedial servitude without the express or implicit identification of a dominant tenement. The rights were granted to Mr Schoeman ‘in his individual capacity or his assigns’. In context the ‘assigns’ meant persons to whom Mr Schoeman in his individual capacity might have ceded his rights. The SCA agreed with the fourth respondent that the use of the word ‘or’ instead of ‘and’ was significant and indicated that ‘assigns’ did not refer to successors in title. The SCA therefore held that clause K did not give rise to a right to praedial servitude.

The SCA held that an agreement to agree without a deadlock-breaking mechanism was not enforceable. It therefore held that because the right of access could only be determined by a further agreement, clause K was unenforceable. The unenforceability of clause K was destructive of the enforceability of the notarial contract and similar title deed provisions that had been relied upon. The therefore had to fail. About the acquisitive prescription, the onus rested on the appellants to prove the requirements. The appellants did not show the acquisition of the servitudes by prescription. In dealing with the declarator claimed by Ontspan Beleggings, the second respondent unreservedly recognised Ontspan Beleggings’ servitude, meaning there was no need for the declarator that Ontspan Beleggings had sought. In the result the appeal was dismissed with costs, including the costs of two counsel. The order of the court a quo was adjusted to provide that the second respondent pay the costs of Ontspan Beleggings in the court a quo.

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