IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/~~NO~~

(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~

(3) REVISED

14/11/06
DATE

SIGNATURE

CASE NO: 05/24123

In the matter between:

EPWIN ESTATES CC	Applicant
and	
CHUNG FUNG (PTY) LIMITED	First Respondent
CHINA CONSTRUCTION BANK LIMITED	Second Respondent
LAM, PAK MAN	Third Respondent

JUDGMENT

MATHOPO, J:

[1] The applicant applied on Notice of Motion for:

(a) an order declaring the first and third respondents to be in contempt of court;

(b) demolition of structure falling within the servitude;

(c) an order directing the registration of the servitude.

The respondents in a counter-application applied for:

(a) the remittal of the question as to which structures, if any, on the servitude area require to be demolished so as to afford reasonable access to the applicant for a decision by a newly constituted Appeal Tribunal in terms of the Arbitration Act No. 42 of 1965.

(b) an order that the newly constituted Appeal Tribunal determine the terms of any notarial deed of servitude to be registered by the first respondent over its property in favour of the applicant.

BACKGROUND

[2] The applicant is the owner of Erf 213, Fordsburg on which is erected a commercial building called Epwin House, consisting of offices and warehouse, office space. A major part of the building is let by the applicant to the respondent although there are some tenants.

[3] The first respondent is the owner of a property called Dragon City which is adjacent to the applicant (Epwin House).

[4] Until 2003 the owner of both Epwin House and Dragon City was the Ismail family. They held the properties through two close corporations, Crown Plaza Investments and the applicant.

[5] By agreement dated 29 April 2003, Crown Plaza Investments CC sold the Dragon City property to the respondents. The agreement of sale included a provision to the effect that the sale was subject to a servitude being registered over the Dragon City property in favour of Epwin House to secure the unrestricted right of access. The relevant clause of the servitude provides as follows:

> *"The Parties record that the agreement of sale is subject to a servitude being registered over the title deeds over the property in favour of Erf 213 Fordsburg, for unrestricted right of access through the property."*

[6] On 8 May 2003, the respondents gave their erstwhile attorney, Mr Dasoo, a power of attorney to register the servitude. A suitable deed of servitude was drawn up and signed by the applicant in December 2005. The transfer of the property was effected without the registration of the servitude despite the applicant having signed same.

[7] During November 2004, the respondent commenced construction work on the servitude area, demolished the ramp and the loading platform and even built a wall blocking off the southern entrance to Epwin House (the applicant). It was during that period that the mandate of Dasoo was terminated and Attorney Singer was appointed in his stead.

[8] Following the transfer the respondent, set about converting the existing structures on the Dragon property to make a multilevel sectional title scheme, demolished the ramp, constructed a slab supported by a number of pillars over the area which the applicant had exercised a right of way over Dragon City property.

[9] These developments prompted the applicant to launch an application seeking to cancel the agreement of sale. Bruinders AJ dismissed the application. However, in the course of his judgment he found that the agreement of sale had indeed created an unregistered praedial servitude and that the applicant was entitled to have the servitude registered.

[10] Even after the judgment of Bruinders AJ, the respondent continued with further constructions over the servitude area by building and selling sectional title units to innocent purchasers. The applicant then instituted an urgent application in which it *inter alia* sought the following orders:

(a) An urgent interdictory relief to interdict the respondents' further constructions *pendent elite* and to preclude further interference with the servitude.

(b) An order directing the respondent to demolish all structures and any construction works on the servitude.

(c) An order directing the respondent to register the servitude as contemplated in the Deed of Sale.

[11] This matter came before Jajbhay J in the urgent court on 25 March 2005. On 30 March 2005, the parties concluded a settlement agreement which was made an order of court. The material terms are set out below:

"*1. Mr. Walter Klevansky SC is appointed as arbitrator to decide the issue set out in the next paragraph.*

2. The issue is to determine, in three dimensions the extent of the servitude that should be registered in favour of the applicant over the respondents property for reasonable access to Epwin House as well as the costs of the application before Jajbhay J.

3. .....

4. .....

5. Either party may appeal any award given by Mr. Klevansky ... and the appeal will be heard by three arbitrators ...

6. .....

7. The applicant and the respondent will take all necessary steps in order to have the servitude as determined above registered against the title deed of the relevant property in favour of Erf 213 Fordsburg.

8. .....

9. The 'B' part of the notice of motion is withdrawn.

10. The respondent undertakes to demolish any structure that may encroach on the servitude as determined by Mr. Klevansky or by the Appeal Tribunal within 14 days of the relevant award being published.

11. The respondent undertakes to register the servitude prior to the opening of the sectional title register."

[12] Pursuant to the order by Jajbhay J, the matter was referred to Klevansky SC for arbitration. The applicant filed its statement of position and the respondents served what it styled, as Points in Claim at the pre-arbitration hearing. Experts were called to give evidence at the arbitration hearing and in particular, one Mr Marais an architect, for the respondents in evidence conceded that the respondents were aware of the servitude and the pending litigation when they commenced and continued with the construction works.

[13] On 15 April 2005 Klevansky delivered his reasoned award and determined that, the applicant was entitled to the servitude and he also determined, its extent in three dimensions. The relevant part of his award read as follows:

"*C.1 I determine that the extent of the servitude in three dimensions is, as depicted in annexure 'L3' hereto which for the sake of certainty has been transcribed onto a diagram by the land surveyor Viljoen. These dimensions which traverse Erven 98 and 99 referred to in paragraph A.2.1 above appear more fully from Viljoen's diagram annexed hereto, marked 'L3-1' which reflects the dimensions and area of annexure 'L3' with the precision of the servitude diagram (although the servitude has not been beaconed).*"

"*C.2 I further determine that the height of the servitude is 5.950m being the agreed height of the top of the loading access point in the first floor of Epwin House on the Southern side which height was furnished to me by junior counsel for the parties by agreement of the parties after the hearing.*"

"D.3 *In order to give effect to my award and more particularly the determination of the extent of the servitude determined by me and reflected in annexure 'L3' and determined with precision by the land surveyor in annexure 'L3-1' and the evidence of Pather, I order that as access to the servitude area from Central Road Extension is only possible with the removal of columns 1 to 6 that columns 1 to 6 be demolished as well as any construction affecting the height of the servitude.*"

[14] The respondents noted an appeal to a panel of three arbitrators being Messrs Subel SC, Lane SC and Attorney M Hussain. Although the appeal was directed against Klevansky's award in terms of C.1, C.2 and D.3, the respondents abandoned the appeal in relation to C.1 and C.2 and persisted with the appeal in respect of D.3 (the demolition order).

[15] In terms of Klevansky's award the respondents were ordered to demolish 6 (six) out of the 15 (fifteen) columns that had been erected in the servitude area. The main thrust of the respondents' argument was the correctness of the arbitrators' finding that any columns had to be removed to give effect to the award (servitude). Counsel for the respondent at the arbitration hearing Mr Louw, contended that part of the determination of the dimensions included demolition and argued that the court order must be given effect thereto. On the contrary, counsel for the applicant Mr Bhana argued that the court order had been expanded or widened by the minutes of the pre-arbitral hearing as well as the pleadings which were exchanged in the arbitral hearing and argued for the demolition of the certain pillars to give effect to the

servitude. In response, to the argument that the issues had been widened or expanded Mr Louw vigorously opposed that submission.

[16] The Appeal Tribunal disagreed with both counsel and concluded that the arbitrator had in respect of the demolition order as set out in paragraph D.3 of his award exceeded the terms of his reference. The essence of the Appeal Tribunal award, was that once the area extent and the dimension of the servitude had been fixed or determined in terms of paragraph 2 of the court order there was no room for further award and consequently in their view paragraph 10 of the court order by Jajbhay J must be given effect thereto. The relevant part of the Appeal Tribunal's award is set out below:

> *"In our view, effect must be given to the order of the Court and the terms of reference within which the arbitrator and the Appeal Tribunal is to operate. Paragraph 2 of the order enjoins the arbitrator to determine in three dimensions the extent of the servitude that should be registered in favour of the Applicant over the Respondents' property for reasonable access to Epwin House. Once that issue is determined, paragraph 10 of the order will provide the consequences in respect of any encroachment on the servitude as determined. The order did not require the arbitrator nor did it empower him to make any award in relation to demolition."*

[17] Notwithstanding, the Appeal Tribunal award, the respondents continued to build on the servitude and this conduct prompted the applicant to institute the present proceedings.

[18] In essence, it is the applicant's case, that the respondents are disobeying the court order and the arbitrators' award. On the other

hand, the respondents' case, is that the Appeal Tribunal erred in finding that the issues pertaining to the demolitions of structures more particularly (columns 1 to 6) fell beyond the terms of reference and that it erred in setting aside paragraph D.3 of the arbitrators' award. As a result of that error or irregularity, Mr Pincus, for the respondents contended that the matter should be remitted to a newly constituted Appeal Tribunal.

ISSUES

[19]

19.1 The principal issue in these proceedings is whether the Appeal Tribunal erred in setting aside the award by Klevansky regarding the demolitions of 1 to 6 pillars.

19.2 Whether the court order had expanded by the minutes, pleadings, and counsel's submissions at the arbitral hearings.

[20] I now deal with the issues *seriatim*.

Whether the arbitrator had exceeded his powers or not

[21] Mr Slomowitz who appeared with Mr Nel on behalf of the applicant argued that the Appeal Tribunal was correct in concluding that the arbitrator had exceeded the terms of reference and that the only issue,

to be determined by the arbitrator was the extent of the servitude in terms of the court order. He submitted that once, the arbitrator had determined the servitude together with its dimensions in C.1 and C.2 of its award, paragraph 10 of the order by Jajbhay J, which authorises demolition of all the structures encroaching upon the servitude must be given effect to. He submitted that it was not the duty of either tribunal to determine both what the extent of the servitude was and having done so, to determine whether any structure encroached on it. The logical meaning of paragraph 10 of the court order, he submitted, is to record the respondents' undertaking. He submitted that Mr Louw, counsel for the respondents at the arbitral hearings did not have any problem with the court order, because he conceded during the Appeal Tribunal, that part of the determination of the three dimensions as contemplated in paragraph 2 of the order entailed demolition. He further submitted that the applicant's counsel Mr Bhana erroneously, asked for the demolition, when the court order was clear and unambiguous. He urged upon me to ignore the incorrect submissions by Mr Bhana, as irrelevant and not binding on the applicant, particularly since, the applicant at no stage abandoned or waived its rights in terms of the court order. Furthermore, he contended that applicant's attorney Mr Dolle, by way of an affidavit clearly dissociated the applicant from Mr Bhana's stance regarding the demolition.

[22] In support of the contention that the Appeal Tribunal had erred or committed an irregularity, when it concluded that the arbitrator had

exceeded his terms of reference, Mr Pincus who appeared with Mr G Myburgh for the respondent, submitted that the sole issue before the Appeal Tribunal was the question of the demolition and since neither party contended that the arbitrator had exceeded his powers, he submitted that for the Appeal Tribunal, *mero motu,* to find that the arbitrator had exceeded his powers constitute an irregularity. He submitted that Klevansky was correct, to determine the servitude in C.1 and C.2 and also determine D.3 relating to the six columns that had to be demolished, bearing in mind that there were a total of fifteen columns. He further submitted that if the applicant submissions is accepted, this would mean that a total of fifteen columns had to be demolished. This he argued, cannot be correct because this view will be contrary to the expert evidence of H S Joubert and Partner and Mr I Reutener.

[23] Finally he submitted, that the conclusion, by the Appeal Tribunal that the arbitrator had exceeded his mandate, notwithstanding any cross-appeal by the applicant is also correct because setting aside of D.3 by the Appeal Tribunal without giving any direction regarding the demolition of structures on the first respondent's property resulted in one of the issues in the terms of reference remaining undecided. He argued, that because of this error or irregularity, the matter should be remitted to a newly constituted Appeal Tribunal to properly ventilate all the issues. I do not agree

[24] On my reading of the award, the Appeal Tribunal did not make any award which was in conflict with or deviated from the court order. The Appeal Tribunal interpreted the court order by Jajbhay J, correctly to mean that there was only one issue before Klevansky and that once that issue had been determined, paragraph 10 of the court order became operative. The argument by Pincus, that the parties expanded the issues through the minutes, pleading and submissions by counsel the arbitration hearing cannot stand. I am fortified in my view by the fact that the respondents' counsel at the arbitral hearings dissociated himself from the submission made by counsel for the applicant. At page 118 of the record, he argued that the court order was clear and that part of the determination of the three dimensions as contemplated in paragraph 2 of the order entail demolition. In the circumstances I agree with Mr Slomowitz, that the respondents' present stance is opportunistic and cannot be correct. I am therefore not persuaded that the Appeal Tribunal erred or committed an irregularity in this matter.

Whether the court order had been expanded or widened

[25] Mr Pincus submitted that, the parties by their conduct and expression decided to widen or expand the issues. In support of his proposition, he argued that the submissions made by applicant's counsel at the arbitral hearings when he argued for the demolition of the pillars clearly indicate that the issues had been enlarged. He further submitted that the conduct of the parties at the arbitral hearings in calling all experts to

assist Klevansky with the determination of the servitude, according to its area, extent and dimension also indicated that the issues had been enlarged or expanded. He submitted that, support for the fact that the issues, had been enlarged was also strengthened by the fact that Klevansky found the servitude proposed by the expert Mr Pather in Annexure "L3" least cumbersome. He argued further that, even if it may be assumed, that the arbitrator's mandate did not extent to demolition, the scope of reference was enlarged by the parties to include that issue either expressly or tacitly. As authority for his proposition he referred me to the judgment of Corbett J (as he then was) in *Allied Mineral Development Corporation (Pty) Ltd v Gemsbok Vlei Kwartsiet* 1968 (1) SA 7 at 14/15:

"*Upon respondent's behalf it was submitted by Mr. Steyn that, even if clause 12 itself did not cover the dispute as to validity, the parties themselves had expressly or, alternatively, tacitly vested the arbitrator with jurisdiction to decide this issue. In this connection counsel referred to the aforementioned letter of 14th December, 1966 written by applicant's attorney to respondent's attorney in which they ask that one of the contentions as to the validity of the second agreement be included in the statement of reference and to clause 5 of the latter document which includes both the contentions as to validity relied upon by applicant. Counsel also referred to various passages in the affidavits before the Court from which it is clear that the issue as to validity was fully argued by both parties at the hearing before the arbitrator.*

In my view, this submission is sound. An examination of the statement of reference leaves me in no doubt that the parties, acting through their legal representatives, agreed that the arbitrator should determine the question of the validity of the second agreement. This agreement is to be found in the statement of reference itself. In para. 5 the issue of validity is pertinently raised by the parties and para. 6, which sets for various other disputes, commences with the words 'in the event of the said notarial lease being found to be valid and effective ...'.

It is clear to me that these words mean, and were intended to mean, in the event of the notarial lease being found by the arbitrator to be valid

and effective. This establishes beyond doubt that the parties submitted the issue of validity for decision by the arbitrator and their subsequent conduct in advancing argument – through their counsel – upon this issue to the arbitrator shows that this is precisely what they intended to do."

[26] In response to the aforesaid submissions, Mr Slomowitz argued vigorously that if the respondent wanted to vary or set aside the court order, it should have brought the necessary application in terms of the rules of court and that it is improper to argue that the court order had been varied by submission from applicant's counsel, more particularly since the respondents' counsel at the arbitration hearings clearly dissociated himself from the applicant's counsel's submission regarding the demolition. As authority for his submission he referred me to the judgment of *Ex Parte Venter and Spain NNO* 1982 (2) SA 94 D&CLD at page 101 A-D He argued that in the absence of any express waiver by the applicant, it is wrong to contend that the issues had been expanded. As authority for his proposition he referred me to Harms, *Amler's Precedents of Pleadings fifth edition* at page 414 and the cases referred thereto.

[27] In my view, the onus rests upon the party relying on the waiver to allege and prove the waiver on a balance of probabilities. See *Feinstein V Niggli and Another 1981 (2) SA at 698 F-H* where Trollip JA said the following:

"The party alleging a waiver of a contractual right retains throughout the proceedings the overall onus of proving that the other party had full knowledge of the right when he allegedly abandoned it (Laws v

Rutherford 1924 AD 261 at 263; and cf Netlon Ltd and Another v Pacnet (Pty) Ltd 1977 (3) SA 840 (A) at 872G-873H and authorities there cited). And election generally involves a waiver: one right is waived by choosing to exercise another right which is inconsistent with the former. Indeed, election and waiver have been equated as being species of the same general legal concept".

The defence of waiver must be pleaded. It is only under exceptional circumstances that the court will consider the defence in the absence of proper pleadings. Such circumstances do not exist in this matter neither has counsel for the respondents drawn my attention to any. See also *Montesse Township and Investment Corporation (PTY) Ltd and Another V Gouws NO and Another* 1965(4) SA 373 (A) at page 381 A-D, Beyers JA said the following:

"Unless the defendants are therefore able to show affirmatively that the plaintiffs have either expressly or by their conduct abandoned their common law remedy, the argument based on election, if I may call it that, must fail. In Moyce v EstateTaylor; 1948 (3) S.A. 822 (A.D.), Davis AJ after saying at page 829 that:

"election seems to me to stand alon exactly the same footing as waiver: it is indeed a form of waiver",

Affirms that the onus of proving waiver is on the party alleging it. The defendants did not plead a waiver and not surprisingly, the matter was not investigated in evidence. We are therefore faced with the position with which this Court was confronted in Collen v Riefontein Engineering Works, 1948 (1) S.A. 413 (A.D.), in which Centlivers AJ had this to say at page 436:

"Apart from the fact that it would be too late, in the absence of pleadings alleging waiver and in the absence of any contention of waiver before the trial court, to raise the defence of waiver before an appellate tribunal, it should be pointed out as Innes CJ stated in Laws v Rutherford, 1921 A.D. 261, that the onus of proving waiver is strictly on the party alleging it and he must show that the other party with full knowledge of his right decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it"

In my opinion there is no foundation for the argument now advanced for the first time. A further submission was that the plaintiffs did not act

jointly in cancelling the contract. This is also a point which was raised for the first time on appeal, and that being so, one looks in the first place to see if it was pleaded".

In the present matter, no such evidence exist, that applicant waived or abandoned the court order either expressly or tacitly.

[28] In my view the necessity of calling experts to *inter alia* assist Klevansky to determine the area and extent of the servitude did not have the effect of expanding or widening the issues but was consistent the parties appreciation that to prove what was reasonable they had to show what had to be demolished or not. Similarly, I am also not persuaded that applicant's counsel's submissions at the arbitral hearing constitute a waiver by the applicant that the issues had accordingly been widened and the court order no longer operative. The applicant's counsel's submissions at the arbitral are not binding on the applicant, In the absence of any express waiver particularly since the court order by Jajbhay J is clear and unambiguous.

[29] Another factor which militates against the respondents, is the allegation made in the answering affidavit that Attorney Singer did not have the authority to bind the respondent at settlement negotiations. This argument has no merit because the issue of lack of authority was never raised at all arbitral hearings and the respondents failed to take any steps to vary or set aside the court order which it considers to have been agreed to by Mr Singer without its authority. I agree with Mr Slomowitz that these submissions are unfounded and falls to be

rejected. See *Paramount Stores Ltd v Hendry* 1957 (2) SA 451 (W) at 452E:

> *"... it is by no means clear to me that it is the law in South Africa that an attorney has either implied or ostensible authority to bind his client by agreeing to a compromise. But assuming that an attorney would normally have such authority, find it quite easy to conclude on the papers that on the applicant's own affidavits it is clear that it was known that the wife of the respondent, before she could agree to a compromise, had to obtain or wished to obtain the respondent's authority. The existence of that knowledge clearly negatives any question of implied authority or of ostensible authority, and I therefore find against the applicant on that issue."*

The aforesaid paragraph fortifies my view that the respondents' submission on attorney Singer's lack of authority has no merit, more particularly since the draft order of court was prepared by the respondents legal representative and agreed to after Mr Singer had taken instructions from the respondents.

APPLICATION FOR REMITTAL

[30] This brings me to the question whether the applicant should have applied for the remittal of this matter to a newly constituted Appeal Tribunal in terms of section 32(2) of the Arbitration Act No 42 of 1965.

[31] The whole issue of remittal is introduced by the respondent on the basis that the applicant has abandoned the judgment through submission by its counsel at the arbitral hearing when he argued for the demolition of certain pillars. Mr Pincus submitted, that the issue before the Appeal Tribunal, was the question of the demolition and

since that issue was not determined, the matter should be remitted to a newly constituted Appeal Tribunal and argued that the applicant should have done so. He further submitted that the court order by Jajbhay J cannot be complied with without any remittal. On the other hand, Mr Slomowitz submitted that the remittal would be possible only if the applicant had abandoned the judgment and was dissatisfied with the arbitral awards. Having not done so, the applicant clearly aligned itself with the court order and arbitral awards. He submitted that the applicant pertinently addressed a letter to Mr Singer, the respondent's erstwhile attorney about the demolition, thus clearly indicating that it has no intention of abandoning the judgment. I agree fully with this submission. In my view, no proper basis has been established by the respondent for the remittal of this matter to a newly constituted Appeal Tribunal either by applicant or the respondent. Accordingly it is not necessary to express any view regarding the application for condonation in respect of the application for remittal by the respondents.

ENTITLEMENT TO SERVITUDE

[32] The question of the applicant's entitlement to a servitude first arose when attorney Dasoo was mandated to register a servitude during May 2003. Applicant signed the necessary deed but for some inexplicable reasons, transfer of the property was effected without the servitude, thereafter applicant sought to cancel the agreement of sale before

Bruiders AJ but was unsuccessful, however, the learned judge found that the applicant was entitled to a servitude.

[33] The court order by Jajbhay J recognised the applicant's right of servitude and directed the arbitrator to determine the dimension of the servitude to give reasonable access to the applicant. This issue was determined by Mr Klevansky. During the appeal tribunal hearing, the respondents abandoned the appeal in respect of the C1 and C2 relating to the servitude, thus recognising the applicant's entitlement to the servitude and making the issue *res judicata*. During argument both counsels were in agreement about the applicant's entitlement to the servitude, the only bone of contention was certain clauses which after argument was agreed upon as set out in Annexure "Z". In the light of the aforegoing it is my finding that the applicant is entitled to the servitude as in Annexure "Z".

CONTEMPT

[34] Cameron JA elonquently expressed himself in *Fakie v CCII Systems (Pty) LTD 2006 SCA 54* as follows:

> *"The dignity and authority of the courts as well as their functions to carry out their functions should always be maintained. The civil contempt procedure is a valuable and important mechanism for securing compliance with court order and survives constitutional serating in the form of a motion court application adopted to constitutional requirements".*

Against this background, it is trite that non compliance with a court order constitutes contempt if it is *mala fide* and wilful. Mr Slomowitz, with full vigour urged upon me to find the respondent to be in contempt, because they have deliberately disobeyed the court order by contending that no court order exists for demolition. Another reason, he submitted for the contempt, is the respondent conduct in continuing to build on the servitude area notwithstanding the court order and arbitral awards. Respondents further alleged in the answering affidavit that they have removed three (3) of the six (6) pillars ordered by the arbitrator, yet again omitted to disclose to the court that they had erected three other pillars in the area determined by the arbitrator. In response, Mr Pincus submitted that the respondent acted on the advice of its legal representatives including Senior counsel, which they *bona fide* believed to be correct. As a result of the aforesaid advice, he argued that the respondents failure to give effect to the court order and arbitral awards cannot be said to be *mala fide*. I agree with Mr Pincus. The main issue in this matter relates to interpretation of the court order, the fact that the court order was interpreted differently by counsels at the arbitration hearings clearly indicate to me that the conduct of the respondents was not *mala fide*. Furthermore, even the applicant's counsel Mr Bhana at the arbitration hearing argued for a different interpretation. Even at the present hearing both counsels asserted and attached different meaning and interpretation to the court order and arbitral awards. I am therefore not persuaded that the applicant proved

that the respondents acted deliberately or *mala fide* by disobeying the court order.

COURT'S DISCRETION

[35] Mr Pincus in support of his argument against demolition, argued that the discretion should be exercised in favour of the first respondent, because none of the experts at the arbitration hearing contended that the demolition was reasonably necessary and to demolish all structures would result in the demolition of a portion of the building itself, which is situated on the servitude area, which applicant has never contended sought to be demolished. He submitted that to order demolition, the entire building would collapse and respondent will suffer heavy financial losses. Furthermore, he submitted that no prejudice will be suffered by the applicant if such a relief is not granted and accordingly urged upon me to order damages instead of demolition.

[36] In response, Mr Slomowitz argued that the court order is clear, and absent any waiver, effect must be given to paragraph 10 of the court order, in terms of which the respondents undertook to remove all the structures encroaching upon the servitude. He argued that once Mr Klevansky, had determined the servitude in C1 and C2 of his award, which the respondent have not appealed against, the court order must be given effect to and cannot be set aside without any application by the respondent. He further argued that the respondents failed to make

a case that the costs of removal would be excessive in comparison with the advantages which the applicant would obtain as a result of the removal. See *Naude v Bredenkamp 1952 (2) SA (O) 452 D-F.* Another compelling reason against the respondent, is that the respondents deliberately continued to build on the servitude area despite the court order and arbitral awards. Again I agree with Mr Slomowitz, that it is a fallacy that the entire building will collapse if the demolition is granted. In my view C1 and C2 of Klevansky's award clearly delineated the area and dimension of servitude consequently any structure encroaching, must be demolished in terms of the court order. During argument I asked Mr Slomowitz about the difficulty in carrying out any demolition, he assured me that the respondents or the sheriff can easily ascertain the area of encroachment by following Klevansky's award. Again I agree with Mr Slomowitz on this point.

COSTS

[37] Counsel for both parties were in agreement that the successful party would be entitled to costs, including the costs occasioned by the employment of two counsels. Since I consider this to be a fair costs order, that is the order I propose to make.

ORDER

[38] I grant the following order:

i) Authorising and empowering the applicant, under the supervision of the sheriff of this Honourable Court, to demolish all structures in the defined servitude area, being the area demarcated by the points A,B,C and ,D of survey diagram number 4884/2005 relating to Erf 98 Crown North Extension 1 as depicted an annexure "A" hereto and points A,B,C and D of survey diagram 4886/2005 relating to Erf 99 Crown North Extension 1 (as depicted on Annexure "B" hereto);

ii) Authorising and empowering the applicant to enlist the services of professional demolishers and/or architects and/or engineers to give effect to the demolition order;

iii) Ordering the first respondent to pay all costs associated with the demolition, including the costs of the sheriff of this Honourable court;

iv) Ordering the first respondent to sign the Notarial Deed of Servitude, being Annexure "Z" hereto ("the Notarial Deed of Servitude") and to do all things necessary for the purpose of registration of the Notarial Deed of Servitude in terms of the Deeds Registries Act No 47 of 1937 ("the Act"), within 10 (ten) days of the date of the granting of this order;

v) Authorising and empowering the sheriff of this Honourable Court to sign the Notarial Deed Servitude, and to do all things necessary for the purpose of registration of the Notarial Deed of Servitude in terms of the Act, in the event of the first respondent not complying with the relief ordered in paragraph (iv) supra;

vi) Directing the second respondent to furnish its written consent for the registration of the Notarial Deed of Servitude within 5 (five) days of the date of the granting of this order;

vii) Authorising and empowering the sheriff of this Honourable court to sign the consent required from the second respondent in order to permit the applicant to proceed with the registration of the Notarial Deed of Servitude, In the event of the second respondent not complying with the relief ordered in paragraph 10 above;

viii) The application for contempt against the respondents is dismissed.

COSTS

ix) Directing the first and third respondents jointly and severally, the one paying the other to be absolved, to pay the costs of this application including the costs occasioned by the employment of two counsels.

RS MATHOPO
JUDGE OF THE HIGH COURT

Appearances:

For the Applicant	:	MR H SLOMOWITZ SC AND MR G NEL
instructed by	:	SHAHEED DOLLIE ATTORNEYS
For 1st and 3rd Respondents	:	MR B PINCUS SC AND MR G MYBURGH SC
instructed by	:	BICCARI, BOLLO & MARIANO INC
Date of hearing	:	18 AND 19 SEPTEMBER 2006
Date of Judgment	:	14 NOVEMBER 2006

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FROM : FAX NO. : 0 Aug. 04 2005 04:07PM P1

000008

"A"

FROM : BRIAN ... FAX NO. : 2113144679 Aug. 04 2005 04:07PM P1

REGISTRATION COPY

SERVITUDE DIAGRAM

SIDES Metres		ANGLES OF DIRECTION		CO-ORDINATES Y System: WG 29°	X
		Constants:		± 0,00	+2 800 000,00
AB	19,72	255 48 00	A	+97 853,27	+100 393,91
BC	48,75	8 07 50	B	+97 834,16	+100 389,07
CD	20,29	85 18 40	C	+97 841,06	+100 437,33
DE	24,83	214 59 10	D	+97 861,28	+100 438,99
EA	25,51	165 51 20	E	+97 847,04	+100 418,68
	CROWN MINES	712	△	+97 800,87	+101 297,98
	TOP STAR	730	△	+98 074,51	+101 210,02

S.G. No. 4884/2005

Approved

J.S. WEYERS

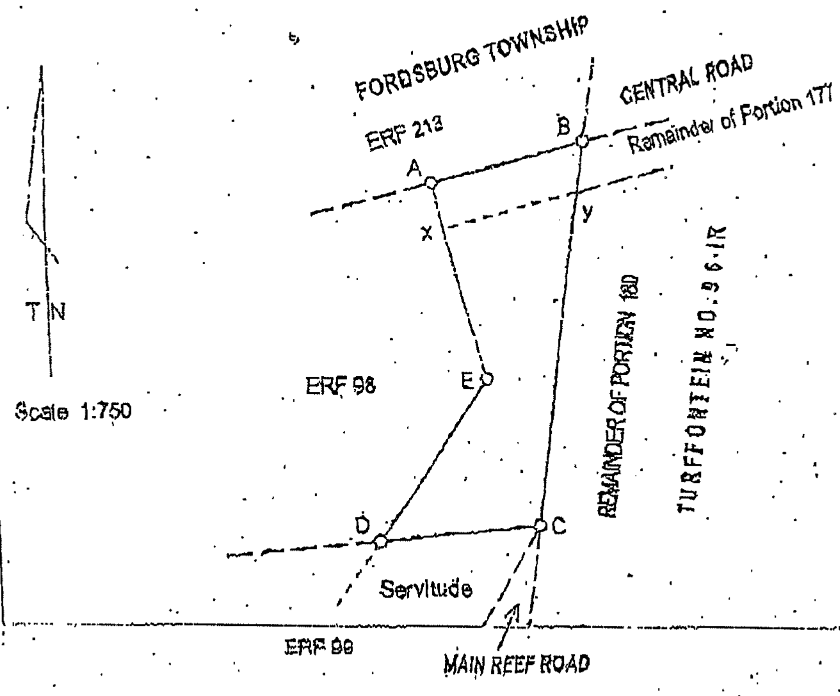
for SURVEYOR-GENERAL

2005-07-18

Description of Beacons

~~A,B,C,E : 12mm Round Iron Peg~~

D : Not Beaconed.



The figure represents ABCDE 654 square metres of land being Servitude over Erf 98 CROWN NORTH EXTENSION 1

Province of Gauteng

Surveyed in July 2003 and May 2005 by me

B.S. VILJOEN
Professional Land Surveyor
Registration Number PLS 0762

This diagram is annexed to	The original diagram is	File : ERVEN VOL1
No.	S.G. No.: 7312/2003	S.R.: 1896/2005
d.d. :	Transfer No. T 5974/1998	G.P.: A 9111/1992
i.f.o.	Grant :	Comp.: IR 10-18/A4
Registrar of Deeds JHB	- -	T.P.: 9176

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SERVITUDE DIAGRAM

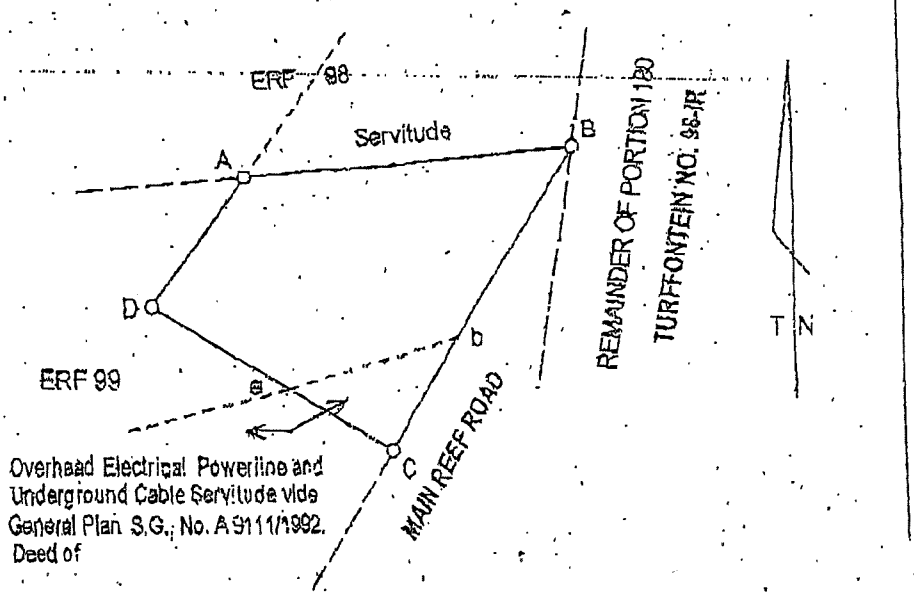
	SIDES Metres	ANGLES OF DIRECTION		CO-ORDINATES Y System: WG 29° X	
		Constants:		± 0,00	+2 800 000 00
AB	20,29	265 18 40	A	+97 861,28	+100 438,99
BC	21,75	31 34 00	B	+97 841,06	+100 437,33
CD	16,94	121 34 00	C	+97 852,44	+100 455,86
DA	9,77	214 59 30	D	+97 866,83	+100 446,99
	CROWN MINES 712		△	+97 800,87	+101 297,98
	TOP STAR 730		△	+96 074,51	+101 210,02

S.G. No. 4886/2005

Approved

J.S. WEYERS
for
SURVEYOR-GENERAL
2005 -07- 19

Description of Beacons
A : Not Beaconed
B,C,D : 12mm Round Iron Peg



Scale 1:400

The figure A B C D

represents 260 square metres Servitude over Erf 99 CROWN NORTH EXTENSION 1 of land being

Province of Gauteng
Surveyed in July 2003 and May 2005 by me

B.S. VILJOEN
Professional Land Surveyor
Registration Number PLS 0768

This diagram is annexed to	The original diagram is	File: Erven vol. 1
No.	S.G. No.: 4885/2003	S.R.: 1896/2005
d.d.:	Transfer No. T 5974/1995	G.P.: A 9111/1992
l.f.o.	Grant:	Comp.: IR 10-16/A4
Registrar of Deeds Johannesburg	—	T.P.: 9176

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N 7 b

Protocol No

NOTARIAL DEED OF SERVITUDE

BE IT HEREBY MADE KNOWN THAT :

On JUNE 2005

before me

STANLEY BRASG

Notary Public, by lawful authority, duly admitted and sworn, practising at Johannesburg, Province of Gauteng; and in the presence of the subscribing witnesses, personally came and appeared

SYLVIA ALVIRA ANN ELLETT

she being duly authorised thereto under and by virtue of a Power of Attorney granted to her at JOHANNESBURG on JUNE 2005

by

1 CHUNG FUNG (PROPRIETARY) LIMITED
NO. 2002/027288/07

(hereinafter referred to as "the Owner")

therein represented by PAK MAN LAM
he being duly authorised thereto by virtue of a Resolution of the board of Directors of the owner passed at JOHANNESBURG on JUNE 2005;

which said power of attorney and resolution have been exhibited to me the Notary, and now remain filed in my Protocol.

A N D

SYLVIA ALVIRA ANN ELLETT

she being duly authorised thereto under and by virtue of a Power of Attorney granted to her at JOHANNESBURG on JUNE 2005
by

2 EPWIN ESTATES CC

NO. CK1986/010910/23

(hereinafter referred to as "Epwin")

therein represented by FAIZEL MOHAMED ISMAIL

he being duly authorised thereto by virtue of a Resolution passed at a meeting of the Members of Epwin held at JOHANNESBURG on JUNE 2005,

which said power of attorney and resolution have been exhibited to me the Notary, and now remain filed in my Protocol;

A AND THE APPEARER DECLARED THAT -

1 The Owner is the registered owner of -

1.1 ERF 98 CROWN NORTH EXTENSION 1 TOWNSHIP

Registration Division I.R., Province of Gauteng

MEASURING 7755 (SEVEN THOUSAND SEVEN HUNDRED AND FIFTY FIVE) Square Metres

1.2 ERF 99 CROWN NORTH EXTENSION 1 TOWNSHIP

Registration Division I.R., Province of Gauteng

MEASURING 1, 0981 (ONE comma NOUGHT NINE EIGHT ONE) Hectares

BOTH held by Deed of Transfer No T45683/2003 which properties are notarially tied and regarded as one property for all intents and purposes;

("the Servient Property")

2 EPWIN is the registered owner of –

ERF 213 FORDSBURG TOWNSHIP

Registration Division I.R., Province of Gauteng

MEASURING 1074 (ONE THOUSAND AND SEVENTY FOUR) Square Metres

HELD by Deed of Transfer No T6846/1944

("the Dominant Propety")

3 The Dominant Property and the Servient Property are adjacent to each other and share a common boundary.

4 In terms of an arbitration award made by the arbitrator W H Klevansky on 15 April 2005, the Dominant Property is entitled to a servitude of access [redacted] and right of way over the Servient Property, as will more fully appear from the said arbitrator's award and it's dimensions as set out in prayers C1 and C2 thereof read together with annexures L3 and L3-1 thereto.

5 To secure the rights to which the Dominant Property is entitled, the Owner is obliged to incorporate the details of the servitude in a notarial deed and to cause the same to be registered against the Owner's title deed to the Servient Property.

B NOW THEREFORE, -

1 The OWNER hereby gives and grants to EPWIN, a perpetual servitude of right of way and access over a portion of the Servient Property being 915 (NINE HUNDRED AND FIFTEEN) square metres in extent represented by the figure ABCDEFA on Diagram S.G. No /2005 hereunto annexed and to a height of 5,95 (FIVE coma NINE FIVE) metres, ("the servitude area") with the right to EPWIN to use the servitude area in perpetuity.

2 The OWNER undertakes to demolish any structure that may encroach on the servitude.

3 This notarial deed shall be registered as a servitude against the OWNER'S title deed to the Servient Property and shall be binding upon the OWNER, its successors in title or assigns. The OWNER hereby undertakes to inform any purchaser, lessee or occupier of the Servient Property of the terms hereof.

4 No consideration shall be payable by EPWIN for the grant of this servitude.

5 The costs of preparation, execution and registration of this deed and of any necessary diagram shall be paid by the Owner.

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AND the said appearer in his capacity aforesaid, declared in the name and on behalf of EPWIN to accept the grant of the rights and the servitude hereinbefore set forth, agreeing on behalf of EPWIN to fulfil all and singular the conditions imposed upon EPWIN subject to which this servitude is granted.

THUS DONE AND EXECUTED at JOHANNESBURG on the day, month and year first aforewritten, in the presence of the undersigned witnesses.

AS WITNESSES :

1 _____ _____

for the OWNER

2 _____ _____

for EPWIN

QUOD ATTESTOR

NOTARY PUBLIC