IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU NATAL DIVISION, PIETERMARITZBURG

CASE NO. 6997/2015

In the matter between:

SNOWY OWL PROPERTIES 284 (PTY) LTD **APPLICANT**

and

MZIKI SHAREBLOCK LTD **RESPONDENT**

J U D G M E N T

STEYN J

[1] Humans have always been fascinated by wild animals. In recent years the interest has moved from hunting them to watching them in their natural habitat, an act that is soothing for the soul and mind. Central to this dispute is the exercise of the parties' right to traverse over the land to watch the wildlife and game on the land situate in the KwaZulu-Natal province, an area well known for its astonishing wildlife.

Parties

[2] The applicant is Snowy Owl Properties 284 (Pty) Ltd, a private company and the respondent is Mziki Shareblock Ltd, a public shareblock company. The parties, respectively, own the land that includes the farms Fagolweni and Ntabankosi, which previously constituted one single cattle and hunting farm owned by the Van Rooyen family. The land is no longer used for farming or hunting purposes. It has developed into a private game reserve[1] that enhances the opportunities to observe the game on the farms. Mziki's land comprises of 248 hectares, whereas Snowy Owl's land comprises of two farms (Fagolweni and Ntabankosi) in the extent of 2116 hectares.[2] The hours during which the respondent is permitted to traverse over the property of the applicant has led to this dispute. Seasoned game watchers would tell you that wild game is generally most active and visible before sunrise and just after sunset. Throughout the years the applicant and respondent have distinguished between the concepts 'night driving' and 'the hours of sunset and sunrise' as will appear from the clauses in the servitudal agreement below.

Relief

[3] The following relief is sought by the applicant:

1. Interdicting and restraining the respondent together with any and all persons who derive any right, privilege or title through the respondent from traversing on the applicant's land, being the remainder of the Farm Fagolweni, No. 16156 situate in the County of Zululand, Province of Natal and the remaining extent of the Farm Ntabankosi No. 14594, between the hours of sunset and sunrise unless in accordance with clause 4.2.8 of servitude K1287/1990, and more particularly unless:

    1.1 the prior written consent of the applicant has been obtained; and

    1.2 under the supervision of a duly authorised representative of the applicant; and

[1] The Mun-ya-wana Game Reserve.
[2] Snowy Owl is the registered owner of the servient tenement and Mziki of the dominant tenement.

1.3 in accordance with such conditions as the applicant may in its sole discretion determine; and

1.4 upon payment of the charges as are determined from time to time by the applicant in terms of the "current charge list";

2. Directing that the hours of sunrise and sunset be determined with reference to the schedule that is attached hereto as annexure "AA":

3. Directing that the respondent pay the costs of this application.

[4] Incidental to the main application is a condonation application for the late filing of the answering affidavit by the respondent, which is opposed by the applicant on the basis that there is no prospect of success with any of the defences raised therein.

[5] The respondent has also filed a conditional counter-application wherein the respondent (as owner of the dominant tenement) seeks, firstly in the event of its procedural objection in the main application not being upheld, an order nullifying the legal effect of the said condition and, secondly in the event that it is not so nullified, further orders to enforce the conditions of the same registered traversing servitude in respect of the perimeter fences on the tenements being reinstated (clauses 4.2.3-4.2.4 thereof) and in respect of an accounting for game (clause 7 thereof).

[6] At the time when the concise heads of argument were filed on behalf of the respondent, the conditional counter-application was no longer pursued. Mr Burger SC, on behalf of the respondent, contended that the claim was conditional and the respondent elected to abandon the claim and not to argue it.[3] The respondent was convinced, so it was argued, that the applicant had failed in its onus and accordingly could not succeed in obtaining the relief sought in the main application. I shall return to this issue later in this judgment.

[3] The respondent had informed the applicant of its intention formally on 4 August 2016. See the heads of argument filed by the respondent that reads:

'5.1 The respondent no longer persists with the counterclaim, with the result that there are no third parties potentially affected who are not parties to the application.'

In limine

[7] The respondent raised the following point *in limine*, namely that the dispute resolution clause (clause 4.3) was not followed by the applicant which justifies a dismissal of the present application before court. It has been contended that the relief sought by the applicant is not for an interdict in the true sense, but it calls for an interpretation of clause 4.2.8, which renders it a matter of law, which should have been resolved in arbitration proceedings.

[8] In the light of the point *in limine* it is necessary to cite parts of the notarial agreement[4] relevant to the dispute and the issue raised. Clauses 2.4, 3 and 4 of the agreement read:

> '2.4 Mziki, Elimans, Catharina and Martha have agreed for mutual interests and with the payment of certain consideration, to create a reciprocal servitude of traverse over the land, on the terms and conditions hereinafter set out.
>
> 3. **AGREEMENT**
>
> Mziki, Elimans, Catharine and Martha hereby agree to give and grant to one another and their successors-in-title as owners of the land reciprocal servitudes in perpetuity for the purpose of traverse over all the land on the following terms and conditions:
>
> 4. **TERMS AND CONDITIONS**
>
> 4.1 The right of traverse is for the purpose of only viewing wild game and for no other purpose whatsoever.
>
> 4.2 Bearing in mind that it is intended that the land shall be traversed for the purposes only of game viewing as provided for in 4.1, it is agreed that the parties shall have the following rights and duties in regard to the land, namely:
>
> 4.2.1 Mziki undertakes to maintain its land in such a condition so as to comply with 4.2.3;
>
> 4.2.2 Each of the parties shall take all steps necessary to adequately maintain the existing roads on its land;

[4] Servitude K1287/90 registered on 27 August 1990. See LAWSA Vol 24 para 540 where a servitude is defined as:

> 'A servitude is a limited real right that imposes a burden on movable or immovable property by restricting the rights, powers or liberties of its owner in favour of either another person (in the case of a personal servitude) or the owner of another immovable property (in the case of a praedial servitude). Put differently, it is a right of one person in the property of another entitling the former either to use and enjoy that person's property or to prevent the latter from exercising certain entitlements flowing from the normal rights of ownership. The fact that a servitude confers a real right on its holder distinguishes it from contractual rights with a similar content against an owner of property.'

4.2.3 Each of the parties shall take all steps necessary to adequately maintain the fencing on its land to ensure that as far as possible the game cannot leave the area comprising all the land. In this regard, it is recorded that there will be no boundary fences separating the land from each other;

4.2.4 Each of the parties shall be obliged to ensure that the external boundaries of its land are fenced as in 4.2.3, provided that Mziki shall be obliged, at own expense, to erect and maintain such internal camps within the land in which is kept any dangerous animals or such other wild game as in such manner as Elimans and Catharina may from time to time decide.

Elimans and Catharina may in their sole discretion determine that the internal camps referred to above or certain areas thereof, may not during certain periods, be traversed for game viewing purposes. It shall be incumbent upon Mziki or a holder to ensure that the internal camps or any portion thereof are open for game viewing purposes before exercising its rights in terms of this agreement in respect of such internal camps.

4.2.5 Mziki shall not be entitled to interfere with or hinder Elimans and Catharina in exercising its rights in respect of the land;

4.2.6 Mziki, Elimans and Catharina shall take all necessary steps to prevent veld fires and soil erosion on their land;

4.2.7 The party using the other party's land in terms hereof, shall do so at its own risk;

4.2.8 Subject to 4.2.9, should the right of traverse for the purpose of viewing wild game granted in terms of this agreement be desirous of being exercised by Mziki or a holder between the hours of sunset and sunrise, such rights shall only be capable of being exercised with the consent and under the supervision of the duly authorised representative of the registered owner of the land concerned upon such conditions as the registered owner of the land in his sole discretion may determine and provided that a party wishing to exercise such right between the hours of sunset and sunrise pays the charges as are determined from time to time by the owner of the land concerned in terms of the "current charge list" published from time to time by such owner in respect of the viewing of wild game between such aforesaid hours;

4.2.9 Overnight camping on any area or part of any area of the land shall only be permitted with the consent or approval of the registered owner of the land concerned and in the manner and upon such conditions as the owner in his sole discretion may determine, provided that a party wishing to use such overnight camping facilities pays the charges as are determined from time to time by the owner of the land upon which the overnight camping facilities are situate in terms of the "current charge list" published from time to time by such owner in respect of the use of such facilities.

4.3 **DETERMINATION OF DISPUTES**

4.3.1 Any dispute, arising out of or in connection with this servitude, including the cancellation thereof except where an interdict is sought or urgent relief may be obtained from a Court of competent jurisdiction, must be determined in terms of this clause.

4.3.2 If a dispute arises, the party who wishes to have the dispute determined must notify the other party thereof. Unless the dispute is resolved amongst the parties to that dispute within 30 (thirty) days of such notice, either of the parties may refer the dispute for determination in terms of clause 4.3.3 hereof.

4.3.3 If a party exercises his right in terms of clause 4.3.2 to refer the dispute for determination, such dispute shall be referred to a senior advocate practicing as such at any Bar, and nominated by Elimans and/or Catharina within a period of 30 (thirty) days of the notice referred to in 4.3.2.

4.3.4 The person agreed nominated as aforesaid (the expert) shall in all respects act as an expert and not as an arbitrator.

4.3.5 Subject to 4.3.6, the expert shall decide the matter according to the general principles of South African law.

4.3.6 The expert shall be vested with the entire discretion as to the procedure to be followed in arriving at his decision, including the giving and acceptance of evidence.

4.3.7 The parties shall use their best endeavours to procure that the decision of the expert shall be given within 21 (twenty one) days or so soon thereafter as possible, after it has been demanded.

4.3.8 The expert's decision shall be final and binding on all the parties affected thereby, and shall be carried into effect and may be made an order of any competent Court at the instance of any of the parties and at his cost.

4.3.9 The provisions of this clause –

4.3.9.1 constitutes the irrevocable consent by the parties to any proceedings in terms thereof and none of the parties shall be entitled to withdraw therefrom or claim that any such proceedings that it is not bound by such provisions;

4.3.9.2 severable from the rest of this agreement and shall remain in effect even if this servitude is terminated for any reason whatsoever;

4.3.9.3 the senior advocate appointed in terms of 4.3.3 hereof, shall be entitled to nominate any other person if he is of the opinion that such person is better qualified to determine the issue. In such event such nominee shall be the expert for the purpose of this clause.'[5]

(My emphasis.)

[9] Clauses 4.1 and 4.2 deal with the conditions of the servitudal right. In terms of clause 4.1 the right of traverse is for the specific purpose of viewing wild game. The rights and obligations of the parties are, in my view, set out in clause 4.2, whilst clause 4.2.5 provides that Mziki shall not be entitled to interfere with or hinder Elimans and Catherine in exercising their rights in respect of the land. Clause 4.3 of the deed of servitude regulates that a party who wishes to have a dispute

[5] The entire notarial agreement of servitude appears at pages 240 to 257.

determined must refer it to a senior advocate who 'shall in all respects act as an expert and not as an arbitrator'. Clause 4.3.1 compels a party to seek relief through an arbitration process, unless an interdict or any urgent relief is sought.

History

[10] The historical background to the dispute gives context to the existing agreement between the parties and the purpose for the 'traverse servitude'. Snowy Owl is the successor in title to EJ van Rooyen, CP van Rooyen and MM Moolman. When the servitude was registered in 1990, Snowy Owl's owners, i.e. the present shareholders, were not part of the negotiations, but as successors in title became legally bound by the servitude once they acquired ownership of the property.

[11] Snowy Owl purchased Fagolweni and Ntabankosi in 2003. The 1990 servitude not only binds the respective successors in title as the owners of the land but endures in perpetuity. Ever since the applicant discontinued all hunting activities on its farms and removed the fences that enclosed various parts of the land, it became clear to both parties that amendments ought to be sought to the servitudes in order to protect their rights. A proposed Code of Conduct was suggested by the applicant but not accepted by the respondent.[6] At this juncture, for the sake of completeness, it is important to state that in operation between the parties are three servitudes. There is a reciprocal traversing servitude between the applicant and respondent, a restraint servitude and a right of pre-emption servitude. I do not consider it necessary, for purposes of this judgment, to deal with all of the servitudes or the negotiations and meetings that followed over the years to draft a new Code of Conduct between the parties that would cater for the various developments and needs of the parties. The inter-relationship between the parties has been concisely summarised by the Van der Linde referee report, para 65:

> 'One accepts too that the relationship between the Mziki share block scheme development on the Mziki farm and the Snowy Owl game farming and viewing activities, are integrated to a significant extent. Mziki views game, Snowy Owl provides traversing rights. Snowy Owl places camps, Mziki constructs them. Snowy Owl culls, Mziki shares in the spoils. Both sides fence perimeters, neither fences

[6] See page 301.

> internally. The parties have joint responsibility for road maintenance, veld fire and soil erosion control, and game levels control. They share, to an ostensibly appreciable extent, the profits derived from the game farming and viewing.'[7]

What is relevant to the point *in limine* however are the rights pertaining to the traversing servitude and the interpretation thereof.

[12] Since the parties decided that their disputes should be resolved by way of arbitration as per clause 4.3 of the agreement, it is essential to evaluate the agreement against the relevant provisions of the Arbitration Act 42 of 1965.[8] The content should be interpreted by applying the rules of interpretation as it developed in recent years. In *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk*[9] the Supreme Court of Appeal departed from the approach expressed in *Coopers & Lybrand & others v Bryant.*[10] It held in para 12:

> 'That summary is no longer consistent with the approach to interpretation now adopted by South African courts in relation to contracts or other documents, such as

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[7] See pages 598 and 599.

[8] Hereinafter referred to as 'the Act'.

[9] 2014 (2) SA 494 (SCA). Also see *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) and *Unica Iron & Steel (Pty) Ltd & another v Mirchandani* 2016 (2) SA 307 (SCA) where Leach JA held at para 21:

> 'In considering the validity of this argument, it is unnecessary to deal in any depth with the principles applicable to the interpretation of contracts. They must now be regarded as well settled, particularly in the light of recent judgments of this court in cases such as *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* 2009 (4) SA 399 (SCA) ([2009 2 All SA 523; [2009] ZASCA 7); *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund* 2010 (2) SA 498 (SCA) ([2009] ZASCA 154); *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) ([2013] ZASCA 176); *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 (5) SA 1 (SCA) ([2013] ZASCA 76); and, most recently, *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* [2015] ZASCA 111. As Lewis JA stated in *North East Finance:*
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> > "The court asked to construe a contract must ascertain what the parties intended their contract to mean. That requires a consideration of the words used by them and the contract as a whole, and, whether or not there is any possible ambiguity in their meaning, the court must consider the factual matrix (or context) in which the contract was concluded."
>
> All that needs to be added is that it can be accepted that the way in which the parties to a contract carried out their agreement may be considered as part of the contextual setting to ascertain the meaning of a disputed term – see eg *Rane Investments Trust v Commissioner, South African Revenue Service* 2003 (6) SA 332 (SCA) (2003 (8) JTLR 216; 65 SATC 333; [2003] 3 All SA 39) para 27. As is stated in Christie & Bradfield *Christie's The Law of Contract in South Africa* 6 ed (2011) at 117, relying upon *Breed v Van den Berg and Others* 1932 AD 283 at 292-293, this is because the parties' subsequent conduct "may be probative of their common intention at the time they made the contract".'

(My emphasis.)

[10] 1995 (3) SA 761 (A).

> statutory instruments or patents. Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is "essentially one unitary exercise". Accordingly it is no longer helpful to refer to the earlier approach.'

[13] In addition to the aforesaid, the Constitution[11] and the impact of the Constitution, especially s 34 of the Constitution,[12] will be considered.

[14] In the light of the issues raised by the respondent in its point *in limine*, this court has to decide whether the dispute between the parties falls squarely within the arbitration clause, and whether it should disturb the intended process by utilising its powers. I refer to these powers since the applicant in its alternative argument asked the court to utilise its powers in terms of s 3(2) of the Act.

[15] Section 3 of the Act regulates the binding effect of an arbitration agreement and the power of a court to interfere in relation thereto. The provision provides as follows:

> '**Binding effect of arbitration agreement and power of court in relation thereto.** – (1) Unless the agreement otherwise provides, an arbitration agreement shall not be capable of being terminated except by consent of all the parties thereto.
>
> (2) The court may at any time on the application of any party to an arbitration agreement, on good cause shown –
>
> (a) set aside the arbitration agreement; or
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> (b) order that any particular dispute referred to in the arbitration agreement shall not be referred to arbitration; or
>
> (c) order that the arbitration agreement shall cease to have effect with reference to any dispute referred.'[13]

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[11] The Constitution of the Republic of South Africa, 1996.
[12] See *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews & another* 2009 (4) SA 529 (CC).
[13] Section 3 should be read with s 1 of the Act that defines an 'arbitration agreement' as: 'a written agreement providing for the reference to arbitration of any existing dispute or any future dispute relating to a matter specified in the agreement, whether an arbitrator is named or designated therein or not.'

[16] The Supreme Court of Appeal in *De Lange v Presiding Bishop, Methodist Church of Southern Africa & another*[14] reaffirmed that the onus resting on a party that aims at avoiding the consequences of an arbitration clause is not easily discharged. It held:

> 'Such an onus is not easily discharged (per Colman J in *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd* 1971 (2) SA 388 (W) at 391E-F). It has been said that the discretion of the court is to be exercised judicially, and only when a very strong case has been made out (*Universiteit van Stellenbosch v JA Louw (Edms) Bpk* 1983 (4) SA 321 (A) at 334A). As Nugent JA pointed out (*South African Forestry Co Ltd v York Timbers Ltd* 2003 (1) SA 331 (SCA) para 14), "good cause" is a phrase of wide import that requires a court to consider each case on its merits in order to achieve a just and equitable result in the particular circumstances.'[15]

[17] I align myself with the authorities listed by Gorven AJA in *Zhongji Development Construction Engineering Company Ltd v Kamoto Copper Company SARL*:[16]

> 'This Court has said that parties who refer matters to arbitration "implicitly, if not explicitly, (and subject to the limited power of the Supreme Court under section 3(2) of the Arbitration Act), abandon the right to litigate in courts of law and accept that they will be finally bound by the decision of the arbitrator". The Constitutional Court dealt with the question whether section 34 of the Constitution applied directly to arbitrations. In finding that it did not do so, O'Regan ADCJ said:
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> > "The decision to refer a dispute to private arbitration is a choice which, as long as it is voluntarily made, should be respected by the courts. Parties are entitled to determine what matters are to be arbitrated, the identity of the arbitrator, the process to be followed in the arbitration, whether there will be an appeal to an arbitral appeal body and other similar matters."
>
> O'Regan ADCJ went on to state pertinently that:
>
> > "Given the approach not only in the United Kingdom (an open and democratic society within the contemplation of s 39(2) of our Constitution), but also the international law approach as envinced in the New York Convention (to which South Africa is a party) and the UNCITRAL Model Law, it seems to me that the values of our Constitution will not necessarily best be served by interpreting s 33(1) in a manner that enhances the power of courts to set aside private arbitration awards. Indeed, the contrary seems to be the case. The international and comparative law considered in this judgment suggests that courts should be careful not to undermine the achievement of the goals of private arbitration by enlarging their powers of scrutiny imprudently. Section 33(1) provides three grounds for setting aside an arbitration award: misconduct by an arbitrator; gross irregularity in the conduct of the

[14] 2015 (1) SA 106 (SCA).
[15] *Ibid* para 23.
[16] [2014] 4 All SA 617 (SCA).

> proceedings; and the fact that an award has been improperly obtained. In my view, and in the light of the reasoning in the previous paragraphs, the Constitution would require a court to construe these grounds reasonably strictly in relation to private arbitration."

It seems to me that the note of caution about enlarging the powers of courts in matters concerning arbitrations, although made in relation to section 33(1) of the Act, applies with equal force to powers of courts in dealing with arbitrations in general.

'The need to respect the provisions of arbitration agreements was underscored by Harms JA in *Telcordia Technologies Inc v Telkom SA Ltd* when he decried the approach of the High Court in setting aside an arbitration award, saying that, in doing so, the court had – "disregarded the principle of party autonomy in arbitration proceedings and failed to give due deference to an arbitral award, something our courts have consistently done since the early part of the 19th Century. This approach is not peculiar to us; it is indeed part of a worldwide tradition. Canadian law, for instance, "dictates a high degree of deference for decisions. . .for awards of consensual arbitration tribunals in particular." And the "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes" have given rise in other jurisdictions to the adoption of "a standard which seeks to preserve the autonomy of the forum selected by the parties and to minimise judicial intervention when reviewing international commercial arbitral awards."'[17]

(Original footnotes omitted.)

[18] In *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd*[18] the court held:

> 'There are certain advantages, such as finality, which a claimant in an arbitration enjoys over one who has to pursue his rights in the Courts; and one who has contracted to allow his opponent those advantages will not readily be absolved from his undertaking. In *Rhodesian Railways v. Mackintosh,* 1932 AD 359, WESSELS, A.C.J. (as he then was), held that the discretion of the Court to refuse arbitration under a submission was to be exercised judicially, and only when a "very strong case" for its exercise had been made out (see p. 375). The Court was there acting under a different statute from the one before me. But the observation of WESSELS, A.C.J., is none the less apposite here, because it was based upon general principles. Similarly, in *Halifax Overseas Freighters, Ltd v. Rasno Export; Technoprominport and Polskie Linie Oceaniczne PPW (The "Pine Hill"),* 1958 (2) Lloyd's List Law Reports 146, MCNAIR, J., held that there should be "compelling reasons" for refusing to hold a party to his contract to have a dispute resolved by arbitration. JESSEL, M.R. in *Russell v. Russell,* (1880) 14 Ch. D 411, said that the cases in which the discretion against arbitration should be exercised were "few and exceptional".'[19]

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[17] *Ibid* paras 56 to 57.
[18] 1971 (2) SA 388 (W).
[19] *Ibid* at 391E-H. Also see *Universiteit van Stellenbosch v JA Louw (Edms) Bpk* 1983 (4) SA 321 (A) at 333H-334C.

[19] The respondent has submitted that the relief sought by the applicant results in an interpretation of clause 4.2.8 of the servitude, which means that it should be referred to arbitration in terms of the arbitration clause. Determining the rationale for clause 4.2.8 is done by interpreting the clause, such interpretation of the content and construction should be regarded as a 'matter of law', and therefore the dispute should be resolved in arbitration proceedings as intended and agreed to by the parties. Should the court find that the dispute is essentially all about the interpretation of clause 4.2.8, then the point *in limine* succeeds and the application ought to be dismissed.

[20] The papers filed on behalf of the respondent are indicative of the fact that the dispute has its genesis in an annual traversing fee that was charged by Snowy Owl in 2012 in the amount of R1.6 million. This fee was opposed by the respondent's shareholders. Subsequent to various exchanges between the parties, the applicant proffered an apology and no fee was charged. However, on Christmas Eve 2014, the claim resurfaced in an email to Mziki shareholders.[20] It so happened that an appeal award that favours the respondent was granted on 15 December 2014. The award was made an order of court and reflects the outcome of the appeal hearing. It provides as follows:

> '1. The determination of WHG Van Der Linde SC of 16 August 2014, as amended by the Appeal Award of December 2014 by the Honourable CT Howie, JW Smalberger and JH Conradie JJA, is hereby made an order of court in the following terms:
>
> 1.1 The Respondent does not have the right to use the following farms for anything than game farming and game viewing:
>
> 1.1.1 the remainder of the Farm Fagolweni, No. 16156, measuring 986,9628 (nine eight six comma nine six two eight) hectares; and

[20] See email from Anton Louw at 616 that reads:

> 'To the Mziki Shareblock Board and Mziki Shareblock Members,
> I write to you on the instructions of the Directors of Snowy Owl.
> In accordance with Paragraph 4.2.7 of the Notarial Agreement of Servitude, please note that with immediate effect there will be no driving on the Snowy Owl properties after sunset and before sunrise.
> All Mziki vehicles must be back at Mziki Shareblock by sunset at the latest and may resume traversing at sunrise the following day…
> …
> For certainty, we have applied the earliest sunrise times and latest sunset times for the period December 2014 to December 2015, as set out in the table below:
> …
> Please ensure that all of the Mziki Shareblock members are made aware of the contents of this email.'

1.1.2 the remaining extent of the farm Ntabankosi, No. 14594, measuring 1129.7840 (one one two nine comma seven eight four zero) hectares;

1.2 The respondent does have the right to grant the right to third parties to traverse the properties;

1.3 The respondent does not have the right to:

1.3.1 erect lodges on the properties; and

1.3.2 grant the right to third parties to erect lodges on the properties;

1.4 The respondent bears the costs of the appeal, which costs shall include the costs of senior counsel, the costs of the appeal venue, if any, and the fees of the members of the appeal panel.

2. …'[21]

[21] Snowy Owl in its replying affidavit[22] however contends that the purpose of its application was:

> 'The purpose of the applicant's application is simply to interdict and restrain the respondent from traversing on the applicant's land in a manner that is inconsistent with and/or in breach of the conditions of the Servitude. Put differently, the applicant wishes the respondent to comply with the provisions of clause 4.2.8 of the Servitude before the respondent traverses on applicant's land between the hours of sunset and sunrise, and thus wishes to enforce clause 4.2.8 of the Servitude which is an integral part of the traversing right in question.'[23]

[22] Mr Gautschi SC, on behalf of the applicant, has in his oral argument for the first time relied on *De Lange v Bell & others.*[24] He submitted that rule 71(1) in the application before Ploos Van Amstel J is akin to clause 4.3.1 of the servitudal agreement *in casu* and accordingly the court should find that the arbitrator would lack the necessary jurisdiction to decide upon the issue. In my view, counsel

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[21] See pages 614 and 615.

[22] To the extent that the applicant seeks interdictory relief by way of motion, the trite rules of practice find application. See *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 26:

> 'Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers. The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the NDPP's version.'

(Original footnotes omitted)

[23] See page 736.

[24] (013203/12) [2013] ZAKZDHC 36 (6 August 2013).

followed a very narrow interpretation of the *De Lange* case. Ploos Van Amstel J in his judgment weighed and considered the management rules and compared the wording of the management agreement to the provisions of the Arbitration Act and whether it was agreed between the parties that a dispute relating to an interdict would be referred to arbitration. No general rule was proposed by the court. I am therefore not persuaded that the *De Lange* case supports the applicant in its contention. What makes this case distinguishable from *De Lange* is that the servitudal agreement *in casu* provides specifically for arbitration in the event of a dispute arising out of the agreement and prescribed who should act as an arbitrator in the event of a dispute.[25]

[23] Mr Gautschi, in an attempt to explain the relief sought in terms of prayer 2, maintained that prayer 2 is not needed by the applicant and was merely requested as a convenience in order to avoid future disputes. He also conceded that the website cited in annexure “AA” as part of the schedule attached to the papers is no longer available.

[24] I was informed from the bar that the website belonged to the US Navy and was accordingly inaccessible. This information however was not contained in the papers. Counsel submitted that the non-availability of the site only became known to the applicant after the papers were filed. What is evident from the papers is that the applicant sought a declaratory from this court by requesting that the hours between sunrise and sunset be determined with reference to a document that is no longer available. As much as the applicant requires the relief in terms of prayer 2, as a convenience, it failed to make out a case for such declarator in using “AA”. Mr Burger, correctly in my view, submitted that the applicant failed to address how the typography and location compares to the land owned by the parties.

[25] Mr Gautschi was at pains to steer away from any interpretation of the agreement but had to concede that this court might have to interpret a part of the agreement before the interdict can be granted. He however specified that the clause

[25] See clause 4.3 of the agreement.

that requires interpretation is clause 4.3.1 and not 4.2.8. According to Mr Gautschi, clause 4.3.1 excised the jurisdiction of an arbitrator. I disagree. It was further argued that the matter that was previously dealt with by Adv van der Linde and the one pending before Kuper SC, were for declaratory relief and not interdictory relief and hence distinguishable from the present matter. I have carefully considered counsel's submission on this issue. Whilst it is true that clause 4.3.1 pertinently excludes 'an interdict' or 'urgent relief' from the arbitration clause, it is necessary to analyse the relief sought and determine whether the applicant is asking for an interdict.[26] What applicant seeks to enforce is compliance with clause 4.2.8. Prayer 1 mirrors the wording of clause 4.2.8. The dilemma however is that the parties differ on the interpretation of clause 4.3.1 which is the clause that regulates the process of determining a dispute. Presently the parties disagree on the interpretation on the aforesaid clause and its construction. This issue, in my view, cries out to be dealt with by an arbitrator. Having considered the argument on behalf of the applicant, I am not persuaded that there is an urgency to preserve or restore any right.[27]

[26] Counsel for the applicant in the alternative argued that the dispute falls within the exceptions as per s 3(2) of the Act. Counsel submitted that the main application raises difficult points of law and/or legal interpretation that need to be decided by a court of law. In the long heads of argument submitted to this court, it was stated that the resolution of the dispute will not only impact on the present owners of the two tenements in their personal capacity, but given the fact that real rights are at stake, the outcome in this matter will also affect the successors in title for years to come.

[27] In consideration of this argument, I shall be mindful of the approach to arbitration clauses as has been succinctly referred to by Wallis J, as he then was, in *Aveng (Africa) Ltd (formerly Grinaker-LTA Ltd) t/a Grinaker-LTA Building East v Midros Investments (Pty) Ltd*:[28]

> '[13] I am fortified in this approach to clause 40 by the fact that the modern approach to arbitration clauses is to respect the parties' automony in concluding the arbitration agreement, and to minimise the extent of judicial interference in the process. The

[26] Cf. s 21(1)(f) of the Act.
[27] Cf. *Brink v Van Niekerk en 'n ander* 1986 (3) SA 428 (T).
[28] 2011 (3) SA 631 (KZD).

historical desire of courts to protect their own jurisdiction, and their consequent suspicion of arbitration as a means of resolving disputes, has been replaced by a recognition that arbitration is an acceptable form of dispute resolution with which the courts should not interfere. As O'Regan ADCJ said in *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews:*

> "[219] The decision to refer a dispute to private arbitration is a choice which, as long as it is voluntarily made, should be respected by the courts. Parties are entitled to determine what matters are to be arbitrated, the identity of the arbitrator, the process to be followed in the arbitration, whether there will be an appeal to an arbitral appeal body and other similar matters."

[14] An arbitration clause is inserted in a contract at the time of its conclusion because the parties contemplate as a matter of commercial convenience that it is desirable to adopt this as a mechanism for resolving the disputes that may arise in the course of their business relationship. Its construction should therefore be influenced by a consideration of the underlying commercial purpose of including such a clause in the agreement. Lord Hoffman explained this in *Fiona Trust & Holding Corporation and Others v Privalov and Others* when he said:

> "[4]. . I shall for the sake of convenience discuss the clause as if it was a simple arbitration clause. The owners say that for two reasons it does not apply. The first is that, as a matter of construction, the question is not a dispute arising under the charter. The second is that the jurisdiction and arbitration clause is liable to be rescinded and therefore not binding upon them.
>
> [5] Both of these defences raise the same fundamental question about the attitude of the courts to arbitration. Arbitration is consensual. It depends upon the intention of the parties as expressed in their agreement. Only the agreement can tell you what kind of disputes they intended to submit to arbitration. But the meaning which parties intended to express by the words which they used will be affected by the commercial background and the reader's understanding of the purpose for which the agreement was made. Businessmen in particular are assumed to have entered into agreements to achieve some rational commercial purpose and an understanding of this purpose will influence the way in which one interprets their language.
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> [6] In approaching the question of construction, it is therefore necessary to inquire into the purpose of the arbitration clause. As to this, I think there can be no doubt. The parties have entered into a relationship, an agreement or what is alleged to be an agreement or what appears on its face to be an agreement, which may give rise to disputes. They want those disputes decided by a tribunal which they have chosen, commonly on the grounds of such matters as its neutrality, expertise and privacy, the availability of legal services at the seat of the arbitration and the unobtrusive efficiency of its supervisory law. Particularly in the case of international contracts, they want a quick and efficient adjudication and do not want to take the risks of delay and, in too many cases, partiality, in proceedings before a national jurisdiction.
>
> [7] If one accepts that this is the purpose of an arbitration clause, its construction must be influenced by whether the parties, as rational businessmen, were likely to have intended that only some of the questions arising out of their relationship were to be submitted to arbitration and others were to be decided by national courts. Could they have intended that the question of whether the contract was repudiated should be decided by

> arbitration but the question of whether it was induced by misrepresentation should be decided by a court? If, as appears to be generally accepted, there is no rational basis upon which businessmen would be likely to wish to have questions of the validity or enforceability of the contract decided by one tribunal and questions about its performance decided by another, one would need to find very clear language before deciding that they must have had such an intention.
>
> [8] A proper approach to construction therefore requires the court to give effect, so far as the language used by the parties will permit, to the commercial purpose of the arbitration clause. But the same policy of giving effect to the commercial purpose also drives the approach of the courts (and the legislature) to the second question raised in this appeal, namely, whether there is any conceptual reason why parties who have agreed to submit the question of the validity of the contract to arbitration should not be allowed to do so."'[29]

(Original footnotes omitted.)

[28] Mr Gautschi, in support of his argument that this court should exercise jurisdiction over the present matter, has referred the court to *Booz-Allen & Hamilton Inc v Sbi Home Finance Ltd & Ors*,[30] a civil appeal of the Indian Appeal Court. As much as reliance was placed on the judgment *supra*, this court was not referred to the Indian code of civil procedure nor was any comparative analysis conducted of the Indian civil procedure *vis-à-vis* the South African civil procedure. What was argued was that a right which would affect successors in title should be dealt with in a public forum. In substantiating his argument, Mr Gautschi submitted that as much as the earlier declaratory relief was sought through the arbitration process, the parties might have erred in referring the disputes to an expert where the dispute involved a right *in rem*. I find this argument unconvincing and without substance given the conduct of the parties over the last few years.[31]

[29] The alternative submission by the applicant requires of this court to determine whether the issue before court is so exceptional that this court should exercise its jurisdiction and decide upon the issue rather than it being dealt with by an arbitration process. Mr Burger SC, on behalf of the respondent, has argued that the relief

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[29] Paras 13 and 14.
[30] Civil Appeal No. 5440 of 2002, 15 April 2011, [2011] 7 S.C.R. 310.
[31] See pages 581 to 613 and 320 to 321.

sought in prayers 1 and 2 is not framed in the form of an interdict. What is asked of the court is to issue a declaratory which remains the subject of arbitration.

[30] The requirements of an interdict are well known. The Constitutional Court in *Masstores (Pty) Ltd v Pick 'n Pay Retailers (Pty) Ltd*[32] reaffirmed it:

> 'The requirements for a final interdict are usually stated as (a) a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the lack of an adequate alternative remedy. In order to succeed in obtaining the remedy of an interdict against a third party like Masstores, Pick 'n Pay thus had to show: (a) that the contractual right it obtained from Hyprop protects an interest that is also enforceable against third parties outside the contract (part of the "clear right" enquiry); (b) that the third party, Masstores, unlawfully infringed or threatened to infringe that right (part of the "injury actually committed or reasonably apprehended" enquiry); and (c) that there was no adequate alternative remedy.'[33]

[31] As stated earlier, a close analysis of the relief in prayer 1 shows that the applicant wants this court to interdict and restrain the respondent from traversing between the hours of sunset and sunrise, unless certain conditions are met. The servitude however has always provided for those conditions as per clause 4.2.8. It was always referred to as night viewing.[34] The parties are however in dispute over the interpretation of the concept sunrise and sunset. Without a declaration from this court regarding sunrise and sunset, the relief sought under prayer 1 becomes meaningless. I am not persuaded that the mere fact that the relief sought is couched in interdictory terms results in it being an interdict. To the extent that the applicant is applying for an interdict that is final in substance, I am not persuaded on the papers that the applicant has succeeded to prove that it has no alternative remedy than an interdict to enforce its rights. The respondent has always maintained that it takes no issue with the enforcement of the night driving provision, i.e. clause 4.2.8.

[32] This brings me to the applicant's submission that the application is so exceptional that the court ought to use its jurisdiction in terms of s 3(2) of the Act. I have referred to the cases dealing with a s 3(2) application *supra* and undoubtedly the onus that rests on a party seeking the court's assistance is onerous. In fact, there

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[32] 2017 (1) SA 613 (CC).
[33] *Ibid* para 8.
[34] See para 52 of the referee report at 594.

should be compelling reasons not to refer the matter to arbitration. This dispute is not complex in nature nor has it been shown that an arbitrator would not be able to decide upon the content of clause 4.2.8. What would be required of the arbitrator is to interpret a clause in a servitude and to apply the trite principles of interpretation as it developed. This is something generally entrusted to an arbitrator. The applicant, in my view, has failed in its endeavour to prove that there are compelling reasons not to give effect to the parties' wishes to have the dispute determined before an arbitrator.

[33] Counsel for the applicant has conceded that the relief in terms of prayer 2 is no longer needed, so there is no need to take it into consideration in determining the point *in limine.* What is apparent from the papers filed is that the content of "AA" attached to the notice of motion was introduced to the respondent decades after the servitude was registered. It is significant that the parties interpreted clause 4.2.8 of the agreement from 1990 to 2004 without the assistance of any preferred schedule.

[34] Finally, counsel for the applicant raised the constitutional argument that the applicant has a right to a public hearing. In my view the argument is not so much based on a public hearing as it is based on the fact that the applicant is deprived or denied access to court.[35] The Constitutional Court in *Lufuno supra* has decided that arbitration proceedings are regulated by law and the Constitution. The court did not decide upon the issue whether s 34 has any indirect application in the case of private arbitrations.[36] In my view the applicant is not deprived of its access to court given the powers of a court in terms of s 33 of the Act[37] to set an award aside.

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[35] See s 34 that reads:

'34. Access to courts. – Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

[36] See *Lufuno supra* para 215.

[37] Section 33 of the Act reads:

'(1) Where –

(a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or

(b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or

(c) an award has been improperly obtained,

[35] In conclusion the condonation application for the late filing of the respondent's answering affidavit, which was opposed by the applicant, is granted. I am not persuaded on the grounds raised by the applicant that it should be refused.

[36] Accordingly the point *in limine* succeeds. In consequence I make the following order:

> The application is dismissed with costs, including the costs consequent upon the employment of two counsel.

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STEYN J

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the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.
(2) An application pursuant to this section shall be made within six weeks after the publication of the award to the parties: Provided that when the setting aside of the award is requested on the grounds of the commission of an offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Compating of Corrupt Activities Act, 2004, such application shall be made within six weeks after the discovery of that offence and in any case not later than three years after the date on which the award was so published
(3) The court may, if it considers that the circumstances so require, stay enforcement of the award pending its decision.
(4) If the award is set aside the dispute shall, at the request of either party, be submitted to a new arbitration tribunal constituted in the manner directed by the court. '

Application heard on:	10 August 2016
Counsel for the applicant:	Adv A Gautschi SC, Adv MM Oosthuizen SC, Adv JL Mÿburgh
Instructed by:	Errol Goss Attorneys c/o Tatham Wilkes
Counsel for the respondent:	Adv SF Burger SC, Adv L Combrink
Instructed by:	Cliffe Dekker Hofmeyer Inc c/o Stowell & Co.
Judgment handed down on:	10 February 2017