IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

REPORTABLE

CASE NO: 16225/2017

In the matter between:

QUEST PETROLEUM (PTY) LTD	Applicant
and	
MARLENE WALTERS	First Respondent
VAN ZYL'S GARAGE CC	Second Respondent

Coram: P.A.L.Gamble, J
Date of Hearing: 16 August 2016
Date of Judgment: 9 November 2018

JUDGMENT DELIVERED ON 9 NOVEMBER 2018

GAMBLE, J:

INTRODUCTION

[1] This matter concerns the enforcement by the applicant, Quest Petroleum (Pty) of Port Elizabeth, of what it terms "*a product servitude*" at a filling

station situated at 58 Main Road, Piketberg, Western Cape, more properly described as Erf 229, Piketberg and hereinafter referred to as "*the property*".

[2] In 2013 the property was owned Piet van Zyl Beleggings BK ("*Beleggings*") and the business was effectively conducted by a certain Dale Gentle utilizing the second respondent ("*Van Zyl's*") as his corporate entity. The petroleum products that were sold by Van Zyl's on the property were supplied to it by Quest under an existing written agreement ("*the 2013 agreement*"). In March 2014 the first respondent ("*Walters*") bought the property from Beleggings and accepted Van Zyl's as her tenant, with Gentle still in charge. Quest continued to supply Van Zyl's in terms of the 2013 agreement.

[3] In 30 March 2016[1] a new supply agreement ("*the 2016 supply agreement*") was concluded between Quest and van Zyl's which entitled Quest to be the exclusive supplier to the service station business for a period of 10 years, the effective date for the commencement of that period being the date upon which all suspensive conditions under the agreement had been fulfilled. One such suspensive condition provided that if Van Zyl's did not own the property, a Tripartite Agreement would have to be concluded between those parties and the owner "*to regulate their relationship.*"

[4] By virtue of Walters' ownership of the premises she was thus invited to enter into negotiations with Quest and Van Zyl's to give effect to the suspensive condition as aforesaid. Discussions then ensued involving Gentle, Quest (represented

[1] Date of last signature.

by its national retail manager, Adriaan le Roux), Walters, her husband (Willem Walters) and her attorney, James King of Oudtshoorn.

EVENTS PRECEDING THE REGISTRATION OF THE SERVITUDE

[5] A relevant clause in the draft Tripartite Agreement put up by Quest related to its demand for the registration of a servitude over the property in favour of Quest that only its products would be sold from the property. In the founding affidavit, Quest's marketing director, Jurgen Smith, explains that the commercial rationale for such a servitude was the fact that Quest had spent a significant amount of money in placing its branding material and pumps on site and that the registration of a servitude would ensure that its right to supply fuel to the site was secured for a sufficiently lengthy period of time to justify its capital expenditure. Whether such an arrangement is truly in the nature of a servitude is something I shall deal with later.

[6] Smith goes on to explain the position further.

> "*[19] To provide for the aforegoing, it is the practice of the Applicant to reach an agreement with the relevant property owner for the registration of what is termed a product Servitude (sic) in terms whereof the Applicant's exclusive right to supply fuel to the premises concerned, irrespective of who the actual retailer is, is secured and registered over the property for an extended period. Unless the Applicant has some interest in the property through for example a head lease, and can sublease to a retailer, the only way that the Applicant can secure its interests against the possible change in retailer at the behest of the owner for whatever reason, is to conclude a Servitude (sic) agreement with the*

owner in terms whereof the ongoing fuel supply to the premises is secured for the extended period."

[7] On 30 May 2016 the parties as described in para 4 above (save for Gentle) met in George and negotiated the terms of an agreement and draft notarial deed of servitude to provide for the so-called "*product servitude.*" The material terms thereof (with Walters as "*the Owner*" and Van Zyl's as "*the Customer*") were to the following effect.

"***9. <u>GRANT OF NOTARIAL DEED OF SERVITUDE</u>***

9.1 The Owner acknowledges Quest's right to exclusively supply the Customer or its successor in title with Petroleum Products.

9.2 The Owner acknowledges that Quest is entitled to secure its exclusive supply of the Petroleum Products and the Owner accordingly agrees that a Servitude be registered over the Immovable Property in favour of Quest substantially in accordance with the draft Notarial Deed of Servitude attached hereto marked 'Schedule 1'".

[8] The draft Notarial Deed of Servitude in turn (with Walters as "*the Grantor*" and Quest as "*the Grantee"*) made provision for registration as follows.

"*AND WHEREAS the Grantor has undertaken in the Tripartite Agreement to grant to the Grantee a personal Servitude over the Property on the terms hereinafter set forth;*

NOW THEREFORE the appearer declared that the Property shall be subject to the following Servitude:

Without the prior consent in writing of the Grantee-

(a) No automotive fuel or petroleum products shall be stored, handled, used, sold, dealt in or distributed on, through or from the Property or any portion thereof except those approved by the Grantee in writing…"

[9] It seems that at the time Walters was unhappy with Gentle's management of the month-to-month lease on behalf of Van Zyl's (the primary problem apparently being the irregular payment of rental) and that she was looking at other options. At the meeting in George the parties accordingly discussed the possibility that Walters might enter into a head lease with Quest which would then enable Quest to secure a suitable operator for the retail operation. Walters undertook to revert to Quest on that proposal.

[10] There was a further meeting between the parties (also *sans* Gentle) at King's offices in Oudtshoorn on 17 June 2016. Walters indicated that, notwithstanding the terms of the Tripartite Agreement and the draft notarial servitude, she was reluctant to proceed with the arrangement and wanted certain amendments to be effected. Her primary concern was that she felt that the proposed rental from the property was too low and she also raised queries in relation to the possible upgrading of the site.

THE 4c AGREEMENT

[11] Le Roux reverted to Walters on 5 July 2016 with a proposal which was linked to the literage of fuel to be sold at the property. Anticipating a turnover of about 90 000 litres per month, le Roux proposed that Quest would pay Walters R0,04/litre which would equate to approximately R3600 per month. The offer was conditional upon the continued registration of the product servitude and a lease for the remainder of the period of Van Zyl's lease - 10 years. The proposal was acceptable in principle to Walters and the parties (including Gentle) then proceeded to further negotiate the details. Ultimately, 2 agreements were concluded on 31 October 2016[2] :

- A revised Tripartite Agreement; and

- A memorandum of agreement between Quest and Walters which expressly traversed the payment of the 04c/litre referred to above and which, to use the term employed by the parties, became known as "*the 4c Agreement*".

[12] The material terms of the 4c Agreement were to the following effect.

[12.1] The Agreement was suspended until Walters had signed all documents necessary to enable Quest to register the product servitude over the property;

[2] Once again date of last signature.

[12.2] Quest would pay Walters the sum of 4c per litre of petroleum products purchased per month by Gentle from Quest, with the price to escalate at the rate of 1c per litre every second year from the date of anniversary of the agreement;

[12.3] The Agreement would commence upon fulfilment of all suspensive conditions and would endure for so long as Quest exclusively supplied petroleum products to the property;

REGISTRATION OF THE SERVITUDE

[13] On 17 October 2016, and at the time that she signed each of the aforementioned agreements, Walters signed a special power of attorney authorizing le Roux to register the product servitude over the property. Le Roux, in turn, signed the requisite documentation for the registration of the servitude before a notary public in Port Elizabeth on 21 October 2016 and the latter procured the registration thereof in the Deeds Office on 7 February 2017 against the property which was termed the "*servient tenement*."

[14] The material terms recorded in the registered servitude were as follows.

[14.1] Walters was the registered owner of the property;

[14.2] Walters (*qua* grantor) had undertaken in the Tripartite Agreement to grant Quest (*qua* grantee) a personal servitude over only that portion of the property where the filling station business was conducted and the underground fuel storage equipment was located;

[14.3] The property would be subject to a servitude in the following terms:

> "*no automotive fuel or petroleum product shall be stored, handled, used, sold, dealt in or distributed on, through or from the portion of the immovable property where the fuel filling station business is conducted and the underground fuel storage equipment is located except those approved by the Grantee in writing, it being agreed that the Servitude does not extend to other businesses of any movable property which do not form part of the fuel filling station business."*

[14.4] The servitude would endure for a period of 10 years calculated from the date of registration thereof and would be for the benefit of, and would be enforceable by, Quest (or its cessionaries or assigns) and no application for alteration, suspension or removal of the servitude could be made without the prior written consent of Quest.

[14.5] Notwithstanding that Quest might become obliged by a separate agreement to consent to the cancellation of the servitude, it would remain enforceable until the cancellation thereof;

[14.6] At the instance of Quest, the servitude was to be registered against the title deed under which Walters held the title in the servient tenement.

It is common cause that, upon the registration of the servitude, all of the suspensive conditions of both the Tripartite and 4c Agreements were fulfilled.

TERMINATION OF VAN ZYL'S TENANCY

[15] On 9 December 2016 there was a meeting at Mossel Bay between Walters, le Roux and 2 representatives of Quest's agent in the Western Cape, Messer's Morne and Christie Coetzee. At that meeting Walters said that she was unhappy with the way that Gentle was running Van Zyl's business and indicated that she was looking for a replacement tenant, possibly even Quest. Le Roux responded positively on 12 December 2016 and on 11 January 2017 forwarded to Walters the draft of a proposed head lease that Quest was willing to conclude with her.

[16] At a further meeting on 9 February 2017, Walters informed le Roux and Christie Coetzee that she intended cancelling the lease with Van Zyl's and that she and her husband would take over the running of the fuel station business themselves: It appears from the answering affidavit that Van Zyl's lease was terminated with effect from 31 March 2017.

[17] Thereafter, on 2 March 2017, King's office sent le Roux an e-mail in which it was claimed that Walters was reasonably entitled to payment under the 4c Agreement with effect from 1 November 2016. Quest was asked to furnish details of the volumes of fuel delivered at the property from that date to enable Walters to calculate what was due to her under that agreement. Quest was asked to comply with Walters' request within 7 days and to immediately pay what was due to her. Quest

was further advised in terms that if it did not adhere to Walters' request she reserved her right to cancel the 4c Agreement.

[18] Le Roux replied on 8 March 2017, saying that as far as Quest was concerned the suspensive conditions under the 4c Agreement had only been fulfilled on 19 December 2016 and that that date constituted the date for calculation of the amount due. He further informed Walters that Quest was in the process of calculating the volumes supplied to the filling station and undertook that these would be supplied to Walters the following day to enable her to submit an invoice to Quest for payment under the 4c Agreement.

[19] It appears that Quest did not honour le Roux's undertaking of 8 March 2017 to supply the figures the following day. Accordingly, at 10h33 on 23 March 2017, King e-mailed le Roux informing Quest that it had not supplied the volumes required for Walters to compile an invoice of what was allegedly due to her. Quest was informed that in the circumstances Walters had elected to cancel all existing agreements with it. King requested that, in the event that Quest had not yet registered the notarial servitude, this be put on hold, and if it had been registered, that Quest consent to the cancellation of the servitude.

[20] At 10h52 on 23 March 2017 le Roux's personal assistant, Melandri van Rooyen, e-mailed the figures directly through to Walters and copied King in on the mail[3]. An invoice was requested of Walters. 5 minutes later le Roux (who was clearly not in office – the e-mail is recorded as having been sent from his cell phone)

[3] The fuel volumes were recorded therein with effect from 20 December 2016.

informed King's office that the figures had been sent and asked that an invoice be sent so that Quest could pay what was due.

DEVELOPMENTS SUBSEQUENT TO CANCELLATION

[21] The papers do not reflect any further correspondence between the parties until 4 May 2017 when Quest's legal adviser, John Finlaison, wrote to Walters care of King's offices. In the interim, however, it is common cause that both of the Coetzee's attended at the property during April 2017 in an attempt to procure Walters' compliance with the Tripartite Agreement and the servitude. She refused to accede to their demands.

[22] In the letter of 4 May 2017 Finlaison informed Walters that Quest demanded that no petroleum products be sold at the property other than in terms of the servitude. She was further informed that Quest would approach the High Court, if necessary, to enforce the rights accruing to it from the servitude in the event that no written undertaking was furnished within five days confirming such compliance by her. Walters did not provide such an undertaking and on 15 May 2017 King informed van Rooyen by e-mail that Walters had "*effectively cancelled all agreements with Quest on 23 March 2017"* and that she "*no longer consider[ed] herself to be bound by any agreements with Quest"*, promising to resist any legal action instituted against her. There is no evidence of any further communication between the parties until 11 September 2017 when this application was served on King's offices.

THE RELIEF SOUGHT IN THE APPLICATION AND COUNTER APPLICATION

[23] On 6 September 2017 Quest launched the present application in which it seeks the following orders:

> "*1. that Marlene Walters (the First Respondent) is interdicted and prohibited from allowing automotive fuel or petroleum product to be stored, handled, used, sold, dealt in or distributed on, through or from the portion of the servient tenement (Erf 229, Piketberg, in the Berg River Local Municipality, Western Cape) where the fuel filling station business is conducted and the underground fuel storage equipment is located, except where authorised by the Applicant in writing;*
>
> *2. costs of the application on an attorney and client scale…"*

The notice of motion was drawn in the long form and provided that, in the event that it was not opposed, the matter would be heard in the Motion Court on 3 October 2017.

[24] The application was opposed by Walters who, simultaneously with her answering affidavit which was filed on 24 October 2017, gave notice of a "*counter-motion"* which was later amended (without objection) shortly before the matter was heard by this court on 16 August 2018. The amended counter application reads as follows.

> "*1. that the Court shall declare that it was a tacit term of the Tripartite Agreement (annexure 'D' to the main application), the Memorandum of*

Agreement (annexure 'JS 16, to the main application)[4]*, and of the servitude (annexure 'JS 18' to the main application) that in the event that any one of the agreements is to be void and unenforceable alternatively is to be lawfully cancelled or otherwise lawfully terminated, the other agreements suffer the same fate and in any of (sic) such events occurring, the servitude will be of no force of (sic) effect anymore and will be cancelled.*

2. that the Court shall declare that the Tripartite Agreement…, the Memorandum of Agreement… and the servitude… are void and unenforceable alternatively that the agreements have been lawfully cancelled alternatively lawfully terminated;

3. ***Alternatively to paragraphs 1 and 2 above,*** *that the Court shall declare that notarial deed of servitude no SK402/2017S dated 21 October 2016 (annexure 'JS 18' to the founding affidavit) registered against title deed no 14281/2014 in terms of which first respondent hold (sic) erf 229 Piketberg in the Berg River Local Municipality, Western Cape, has permanently lost its utility and has been extinguished and is cancelled.*

4. that notarial deed of servitude no SK 402/2017S dated 21 October 2016…. be cancelled;

5. that the applicant be directed to give effect to the order in paragraphs 3 and 4 above to (sic) sign on demand of first respondent's attorneys all documents required to have the registration of the said servitude appearing in

[4] i.e. The 4c Agreement

the deed of transfer of Erf 229 Piketberg cancelled and deleted, failing which the Sheriff for the district of Piketberg be authorised and ordered on behalf of the applicant to sign all documents required to have the said servitude cancelled and deleted from the deed of transfer in terms of which I (sic) hold of (sic) erf 229 Piketberg;

6. that the applicant be ordered to pay the costs of or incidental to the cancellation and deletion of the said servitude from the deed of transfer of erf 229, Piketberg;

7. that the applicant be ordered to pay the costs of the counter-application on the scale of (sic) attorney and client…"

THE CLAIM FOR ENFORCEMENT OF THE SERVITUDE

[25] In the founding affidavit, Smith, after setting out the factual background (little of which is in dispute) makes the following assertions in relation to Quest's rights. It bears mention at the outset, however, that Quest does not take issue with Walters' cancellation of the 4c Agreement which must therefore be taken to have been lawfully terminated.

"*55. In all the circumstances it is submitted that through the Deed of Servitude and its registration [Quest] acquired a personal right against [Walters] in terms whereof [Quest] had to consent in writing to any fuel or petroleum product to be stored, handled, used, sold, dealt in or distributed on,*

through or from the fuel filling station and which right would endure for a period of 10 years from date of registration.

56. Effectively therefore, and through the Servitude, [Quest] secured the right to exclusively supply whoever operated the fuel filling station on the premises with all petroleum products for a 10 year period…

68. I deny that [Walters] had any grounds to cancel the Servitude, or that the purported unlawful cancellation in fact, constituted a cancellation of the Servitude. The purported cancellation of the Memorandum of Agreement did not result in the cancellation of the Servitude which was valid for a period of 10 years. I am advised that the Servitude Agreement had its own provisions concerning termination and that none of these applied in this case. I submit that the remedy of [Walters] would have been to enforce specific performance of the Memorandum of Agreement and that no grounds existed for the cancellation of the Servitude…

75. As appears clearly from [Annexure] 'JS 25', [Walters] has expressly stated that she does not consider herself bound by the terms of any agreement with [Quest]. This, I am advised, constitutes a repudiation of the Servitude.

76. Further to the aforegoing [Walters] has continued to conduct the fuel filling station and has for this purpose been supplied with fuel, stored fuel and sold fuel on and from the Servient Tenement, not supplied by the applicant. [Walters] has done so and continues to do so without the consent of [Quest]

and in breach of the Servitude. [Quest] does not know who has and/or is, supplying such fuel to [Walters].

77. [Quest] does not accept [Walters'] repudiation and accordingly through an interdict seeks specific performance of the provisions of the Servitude…

79. [Walters] conducts the business of a fuel service station at the Servient Tenement without the express written consent of [Quest].

80. [Quest] has a clear right to an interdict prohibiting [Walters] from using the Servient Tenement to continue storing or selling fuel from the fuel filling station without the consent of [Quest]. Such use by [Walters] is in breach of the terms of the Servitude.

81. I am advised that as [Quest] is in reality seeking specific performance in the negative form of the non-performance of a forbidden act, [Quest] is not required to meet the normal requirements for an interdict."

THE CLAIM FOR CANCELLATION OF THE SERVITUDE

[26] In the answering affidavit (which also serves as the affidavit in support of the counter application), Walters raises a number of legal points which are claimed to serve as a defence to the purported enforcement by Quest of the servitude and found a basis for the cancellation thereof. Those allegations may be summarized as follows.

[26.1] The original supply agreement between Quest and Van Zyl's, the Tripartite Agreement and the 4c Agreement "*are inextricably linked and inter-*

dependent of each other" and as such they "*collectively form the causa of the servitude registered against [the] property…i.e. these agreements constitute the 'servitude agreement'."*

[26.2] It is further alleged that it was a tacit term of the Tripartite Agreement, the 4c Agreement and the servitude that in the event that any one of the agreements was to be void and unenforceable or lawfully cancelled or terminated, the other agreements would "*suffer the same fate"* and were liable to be cancelled and be of no force and effect.

[26.3] There is a further attack on the constitutionality of these agreements which are severally and jointly alleged to be "*so prejudicial, unjust, unreasonable, onerous and oppressive"* in relation to Walters and in favour of Quest that the enforcement thereof will allegedly violate her rights of ownership in, and use of, her property and her right to freely trade as enshrined in the Constitution, 1996 and the Consumer Protection Act, 68 of 2008. It is alleged in this context that the purported enforcement of the agreements and the servitude is against public policy and that the agreements are thus void *ab initio* thereby rendering them unenforceable.

[26.4] In amplification of the constitutional argument it is said further that, to the knowledge of Quest, neither Walters nor Van Zyl's were the holders of valid retail licenses as prescribed by the Petroleum Products Act, 120 of 1977 and the regulations promulgated thereunder. Attached to the affidavit are, firstly, a "*Site Licence Certificate*" issued to Van Zyl's Garage (Pty) Ltd in 2007 and a "*Retail Licence Certificate"* issued to Beleggings also in 2007.

[26.5] It is further alleged by Walters, on the assumption that the agreements are not void *ab initio*, that the 4c Agreement has in any event terminated by virtue of the occurrence of the defined event contained in cl 5 thereof.[5] Walters claims that since Quest stopped delivering petroleum products to the fuel station at the end of March 2017, the 4c Agreement has terminated and the *causa* for the servitude had fallen away.

[26.6] Finally, Walters claims that both the Tripartite Agreement and the 4c Agreement were lawfully cancelled by King in the letter of 23 March 2017. She goes on to point out that the cancellation of the latter (at least) was not in dispute and that Quest had not made any payments to her in terms of the 4c Agreement.

THE NATURE OF THE "*PRODUCT SERVITUDE* "

[27] Mr. Nepgen, who appeared on behalf of Quest, accepted in argument that the "*product servitude"* was not a servitude properly so called and as recognized in our law but rather embraced a commercial turn of phrase utilized by Quest in its business dealings with its clients which sought to record the terms of the parties' consensus in a publicly registered document.

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[5] "*5. COMMENCEMENT AND DURATION*

This Agreement shall commence on the effective date endure (sic) for as long as Quest exclusively supplies Petroleum Products to the Premises."

[28] Servitudes may be either praedial or personal.[6] The former are constituted in favour of the successive owners of landed property while the latter are construed in favour of a particular person: the object of a praedial servitude always being immovable property, while a personal servitude is granted in respect of a particular person. Accordingly, a praedial servitude will survive the transfer of ownership of the land in question while a personal servitude attaches to the person in whose favour it is granted and is incapable of alienation.

[29] Although they may be classified as rural or urban, there is no longer a *numerous clausus* of praedial servitudes. They do, however, have the following characteristics[7].

- There must be two properties ("*tenements*") belonging to different owners which are in immediate or close proximity to each other;

- The servient tenement must be capable of serving the dominant tenement on a permanent basis – the requirement of so-called "*perpetual cause*";

- The servient tenement must enhance the utility of the dominant tenement; and

- No positive obligation may be imposed on the owner of the servient tenement.

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[6] LAWSA, 2nd ed Vol 24 at p457 para 541

[7] LAWSA *op cit* at p461 para 546

[30] The more common examples of rural praedial servitudes are rights of way (roads, tracks and footpaths) granted to others over the land of the grantor, the right of drawing or leading water to one's property over one's neighbour's land or a servitude of pasturage where a neighbour's cattle are permitted to graze on adjacent land. Examples of an urban praedial servitude, on the other hand, would be the right of a neighbour to demand that a building on an adjacent property does not exceed a specified height, or be restricted so that it does not interfere with natural light reaching the other land.

[31] A personal servitude, on the contrary, is a limited real right pursuant whereto a burden is imposed over the servient tenement (or a movable object) for the benefit of a particular person.[8] Importantly, a personal servitude is constituted in respect of the holder personally and not in his/her capacity as an owner of land. The most common examples of personal servitudes are usufructs and rights of *usus* and *habitatio.* In the case of the latter, by way of further example, the holder of the personal servitude is entitled to live in a particular building for the duration of the servitude. In the case of a usufruct, the holder of the servitude is entitled, for example, to the use and control of a herd of cattle and is entitled to all the fruits thereof but is obliged to return the herd to its owner upon expiry of the period of the usufruct.

[32] On the basis of the aforgoing analysis, it is clear that the so-called "*product servitude*" could never have qualified as a personal servitude: while the notarial deed of servitude purports to grant Quest a personal servitude over the property, it is manifestly not of such a nature. And, while there was no attempt to

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[8] LAWSA *op cit* p485 para 579

construe Quest's rights arising from the notarial deed as a praedial servitude, it must be observed that there is similarly no room for such a categorization in light of the fact that there is only one tenement involved which is neither a servient nor a dominant tenement.

[33] In the result, the "*product servitude*" is no more than a recordal of ordinary contractual rights and obligations whose registration in the Deeds Office serves as notice to the public at large of the consensual arrangement between two parties.[9] It has no special status in law and falls to be interpreted, not in accordance with the law relating to servitudes but in terms of the customary approach to the interpretation of written instruments which are the product of agreement.

LINKED AGREEMENTS

[34] In light of the arguments advanced on behalf of the parties it is convenient to commence by determining the inter-relationship between the three contracts and the extent thereof. Mr. Nepgen readily conceded that the Tripartite Agreement, the 4c Agreement and the product servitude were linked but insisted that such linkage did not preclude the latter from standing on its own and, importantly, being enforced by Quest in the terms sought herein. Mr. van der Merwe, for Walters, sought to persuade the court otherwise and argued that the three agreements were inextricably linked to each other, so much so that the termination of any one of them led inevitably to the immediate termination of the others.

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[9] For the sake of convenience, however, the document will further be referred to as "the Product Servitude".

[35] The clue to the puzzle may be found in *Cash Converters*[10] upon which both counsel relied in argument. In that matter, the Supreme Court of Appeal was called upon to determine whether an agreement of sale of a business and a franchise agreement concluded by the same parties on the same day were so interlinked that the cancellation of the latter necessarily implied the termination of the former. Lewis AJA held that they were, while the majority of the court agreed with the main judgment by Navsa JA which went the other way.

[36] The main judgment recorded that Cash Converters was

> "*[3]…a South African company that sells franchise rights to persons enabling them to trade in second-hand goods under the name and style of 'Cash Converters', using a system and method developed by an Australian company from which it acquired the right to act as the South African franchisor. It also sells to others (as in the present case), the right to act as Cash Converter sub- franchisors.*

[37] Navsa JA went on to observe[11] that in 1997 Cash Converters and Rosebud concluded two written agreements that were the subject matter of the appeal. The first was a sale agreement in terms whereof

> "*[4]…Cash Converters… sold to Rosebud…, as a going concern, its business in the Western Cape, the operation of which was concerned*

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[10] Cash Converters Southern Africa (Pty) Ltd v Rosebud, Western Province Franchise (Pty) Ltd 2002 (5) SA 494 (SCA)

[11] At [4]

with the selling of franchise rights to persons to carry on business in the Western Cape under the Cash Converters banner as dealers in second-hand goods."

[38] The second agreement concluded by the parties was a franchise agreement (entitled the '*Submaster franchisor agreement*') pursuant whereto Rosebud, in consideration for purchasing the business through the franchise agreement, was granted franchise rights and the use of Cash Converters' intellectual property in order to enable it to conduct the business.

"*[5]…The franchise agreement regulated the manner in which the business acquired in terms of the sale agreement was to be conducted. The franchise agreement deals with matters such as the logos to be used, the slogans to be employed in promoting the business, marketing and operational manuals etc. It bound Rosebud to observe strict secrecy in relation to information or data incidental to the Cash Converter business methods and systems and to intellectual property connected therewith. It also prescribed how fees received from subfranchisees were to be divided between Cash Converters (the master franchisor) and Rosebud."*

[39] When Rosebud failed to comply with a term of the franchise agreement that required it to open a certain number of stores per year, Cash Converters gave it notice of termination of the franchise agreement. Thereafter Cash Converters applied for an order declaring that the franchise agreement had been validly cancelled and sought further relief aimed at protecting its intellectual property rights.

[40] Rosebud opposed the application and filed a counter application seeking repayment of that which it had already paid towards the purchase price. Rosebud's case was that cancellation of the franchise agreement (the basis wherefore was not in dispute) necessarily implied the end of the sale agreement and that it was entitled to repayment of that which it had already paid to Cash Converters.

[41] Navsa JA held that since the appeal turned upon an interpretation of the two agreements a detailed examination of the various clauses therein was necessary. Having done so exhaustively, the learned Judge of Appeal found as follows.

> "*[23] I accept…that the two agreements are linked. They were both concluded on the same day and the sale agreement clearly served as the basis for the conclusion of the franchise agreement and vice versa. However, the fact is that there are two agreements, related but distinct, each serving a specific purpose. The purchase price for the business as set out in the sale agreement was intended to ensure that Cash Converters received value for the transfer of the franchisor rights which would be given effect to with the conclusion of the franchise agreement. The sale agreement thus served as a springboard for the franchise agreement. Once the franchise agreement was concluded the sale agreement had served its purpose. Save for regulating the payment of the balance of the purchase price the sale agreement had no further part to play. The franchise agreement regulated the future relationship between the parties and determined the manner in which the franchise business was to be conducted.*

[24] Each agreement records that the document embodying it is the entire agreement between the parties and may not be varied except in writing. Nowhere in the franchise or sale agreement is it recorded that in the event of the franchise agreement being cancelled because of a breach on the part of either party the sale agreement would terminate. Each agreement has its own breach provisions and there is no cross-referencing. The franchise agreement has been cancelled in terms of clause 11.2. There was no cancellation of the sale agreement either in terms of clause 17.8 thereof or at all and it is thus still extant. In principle, apart from the question of prescription, there appears to be no obstacle to Cash Converters claiming the balance of the purchase price. In these circumstances there can be no talk of restitution. I agree… that the ostensible purpose behind ***two*** *agreements was to ensure that the failure of the franchise agreement did not impact on the sale agreement and that in the event of a failure of the franchise agreement the rights of the parties are to be determined solely by reference to that agreement."*

[42] In the minority judgment, Lewis AJA agreed that the two agreements were not one indivisible transaction but went on to find, on the basis of a tacit or implied term, that the cancellation of the franchise agreement necessarily implied the termination of the sale agreement. In his separate concurring judgment, Brand JA agreed with the reasoning of Navsa JA and dealt with Lewis AJA's judgment thus.

"*[61] I agree with both Navsa JA and Lewis AJA that the two contracts cannot be regarded as one indivisible transaction, as was contended for*

by Rosebud. There are two separate contracts and, although interlinked, they represented two separate transactions. Once this is accepted, the notion that termination of the franchise agreement ('the franchise') automatically leads to the termination of the sale, can only be founded, as is accepted by Lewis AJA, on a tacit or implied term. This must be so. My difficulty lies with Lewis AJA's conclusion that 'there must surely be a tacit term that if the business sold is taken back by Cash Converters it would be a 'rescission and restitution' of the purchase price. With regard to this conclusion the complications are threefold. First, no such tacit term is referred to in the papers and in argument before this Court Rosebud's counsel expressly disavowed any reliance on any such term. Secondly, the hypothesis of the tacit term relied upon by Lewis AJA for conclusion militates against the express provision in clause 16.4 of the sale that 'no agreed cancellation of this agreement shall be of any force and effect unless in writing and signed by the parties…' Thirdly, I am satisfied that the tacit term contended for will not meet the requirements of the so-called bystander test regularly applied by this court. According to this test the inference of such a term would only be justified if, at the time when the contract were entered into, the bystander's question as to what would happen to the purchase price upon termination of the franchise, would have elicited the prompt and unanimous response from both parties that, in that event, the whole of the purchase price will be repaid. I have no doubt that, whatever Rosebud's response might have been, that would not have been the response of Cash Converters."

[43] There is further short judgment by Schutz JA who concurred with Navsa and Brand JJA but for present purposes it is not necessary to refer thereto.

INTERPRETING THE AGREEMENTS AND THE SERVITUDE

[44] All of the judgments in *Cash Converters* proceed from the premise that the two agreements were required to be interpreted in accordance with the applicable principles relevant to written instruments. There is a tendency these days, in matters of contractual interpretation, to simply resort to *Endumeni*[12] as the alpha and the omega. That was the approach of counsel in this matter. While the case assuredly provides a useful compendium of the relevant principles and the approach to be adopted in interpreting written agreements, the authorities go back a century or more.

[45] In *Smith*[13] Wessels CJ stated that the first rule of interpretation is to look to the language of the instrument itself.

> "*It is our first duty to see what the parties intended by the language they used."*

[46] And in *Worman*[14]Greenberg JA explained that point of departure further.

> "*It must be borne in mind that in an action on a contract, the rule of interpretation is to ascertain, not what the parties' intention was, but*

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[12] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)

[13] Union Government v Smith 1935 AD 232 at 241

[14] Worman v Hughes 1948 (3) SA 495 (A) at 505

what the language used in the contract means i.e. what the intention was as expressed in the contract."

[47] The relevance of examining the contextual setting is nothing new either. So, for instance, in ***Richter***[15] Innes CJ remarked that -

"*Every document should, of course, be read in the light of the circumstances existing at the time, and evidence may rightly be given of every material fact which will place the Court as near as may be in the situation of the parties to the instrument."*

[48] In ***List***[16] Diemont JA referred to the importance of context.

"*It is, in my view, an unrewarding and misleading exercise to seize on one word in a document, determine its more usual ordinary meaning, and then, having done so, to seek to interpret the document in the light of the meaning so ascribed to that word. Apart from the fact that to decide on the more usual ordinary meaning of the word may be a delicate task…it is clear that the* ***context i****n which the word is used is of prime importance."* (Emphasis added)

[49] The relevance of a businesslike approach to the interpretation of

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[15] Richter v Bloemfontein Town Council 1922 AD 57 at 69

[16] List v Jungers 1979 (3) SA 106 (A) at 118

commercial documents was taken up by Conradie JA in *Lloyds*[17].

> "*Sophisticated semantic analysis is not the best way of arriving at an understanding of what the parties meant to achieve by paragraph 1 of section IV. A better way is to look at what, from the point of view of commercial interest, they hoped to achieve by the incorporation provision. It is quite clear that without the incorporation of exclusions from the hull policy, the war policy would have left the appellants [with] potential liabilities they could not have intended to assume and which the respondent could not have thought they were assuming."*

[50] The more recent inclination towards a so-called "*purposive interpretation"* is consistent with the commercial-interest approach as the judgment of FH Grosskopf JA in *Venter*[18] (which followed *Public Carriers*[19]) illustrates.

> "*The undertaking should be construed in its context, and with a view to what the parties intended to achieve… Insofar as the words used in the undertaking are capable of bearing meanings different meanings, a 'purposive construction' may be applied."*

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[17] Lloyds of London Underwriting Syndicates 969,48,1183 and 2183 v Skibya Property Investments (Pty) Ltd [2004] 1 All SA 386 (SCA) at 391

[18] Venter and Others v Credit Guarantee Insurance Corporation of Africa Ltd and Another 1996 (3) SA 966 (A) at 973C-E

[19] Public Carriers Association and Others v Toll Road Concessionaries (Pty) Ltd and Others 1990 (1) SA 925 (A) at 942I-944A

[51] And, finally, in *KPMG*[20]Harms DP settled the arcane debate which had gone on for years around the admissibility of evidence to interpret a document, stressing the importance of a contextual approach.

> "*…(T)o the extent that evidence may be admissible to contextualise the document (since '**context is everything**') to establish its factual matrix or purpose or for purposes of identification, one must use it as conservatively as possible… The time has arrived for us to accept that there is no merit in trying to distinguish between 'background circumstances' and 'surrounding circumstances'. The distinction is artificial and, in addition, both terms are vague and confusing. Consequently, everything tends to be admitted. The terms 'context' and 'factual matrix' ought to suffice…"* (Emphasis added)

[52] Recently, in *Daikin Air Conditioning*[21] the Supreme Court of Appeal referred to the so-called "*speaker meaning*" when interpreting written contracts that were "*created after negotiations between a defined group who participate actively in the process."* The court emphasized that the resultant product should then "*easily fit into an objectively determined shared purpose of sharing information."*

[53] When all is said and done, the current approach sanctioned by the Supreme Court of Appeal comes down to the following.

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[20] KPMG Chartered Accountants (SA) v Securefin Ltd and Another 2009 (4) SA 399 (SCA) at [39]

[21]CSARS v Daikin Air Conditioning [2018] ZASCA 66 (25 May 2018) at [30] – [33] and in particular footnotes 1 and 2.

> "*.. the interpretation of language, including statutory language, is a unitary endeavour requiring the consideration of text, context and purpose."*[22]

[54] For present purposes that approach requires the court to establish the intended inter-relationship between the 4c Agreement, the Tripartite Agreement and the terms of the product servitude with reference to the chosen language of each document, the contextual setting (with particular regard for the relevant factual matrix) and the commercial rationale which motivated the parties to do business with each other.

THE RELEVANT TERMS OF THE 4c AGREEMENT, THE TRIPARTITE AGREEMENT AND THE PRODUCT SERVITUDE

[55] It is convenient to commence by considering the Tripartite Agreement which regulates the relationship between the fuel supplier (Quest), the erstwhile customer (Van Zyl's) and the owner of the property (Walters). The first observation of any significance is that this document does not contain a sole memorial clause, which purports to render it the parties' exclusive recordal of their three way relationship. There is therefore room, for example, for the importation of terms orally discussed and agreed upon, provided only that these do not run counter to the written terms contained in the agreement itself.[23]

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[22] Betterbridge (Pty) Ltd v Masilo and Others 2015 (2) SA 396 (GP) at [8]

[23] Johnston v Leal 1980 (3) SA 927 (A) at 943D-945E

[56] Unlike the situation in *Cash Converters* there is nothing in the Tripartite Agreement which precludes consideration of a tacit term. And, importantly, terms of other agreements may also be referred to provided they do not violate the terms of the Tripartite Agreement, and are consistent with the factual matrix. This seems to be confirmed in cl.4 of the Tripartite Agreement which records the "*Reservation of Quest's Rights"* in the following terms.

> "*This Agreement shall not prejudice any right Quest has, or may acquire, against [Walters], or in any way prejudice the continued validity of any of the agreements subsisting between [Walters] and Quest or any deeds registered over the Immovable Property in Quest's favour, except to the extent specifically otherwise herein provided."*

[57] It is important, I think, to bear in mind that the point of departure for the conclusion of the Tripartite Agreement was that the filling station business being supplied by Quest was not being run by the owner of the property, but was dependent on a lease concluded between her and the customer, hence the cross reference therein to the 2016 supply agreement between Quest and Van Zyl's, and the specific incorporation of that existing supply agreement into the Tripartite Agreement.

[58] But what is critical about the Tripartite Agreement is the fact that the customer is defined only as Van Zyl's, and not its successor in title. That agreement clearly did not contemplate a scenario where Walters was the customer. Indeed cl.8, which is entitled "*Termination of Right of Customer to Occupy"* provides that –

"*8.1 [Walters] shall be entitled to elect to terminate the rights of [Van Zyl's] to occupy the Premises, and the said the election shall not be withheld unreasonably; and*

8.2 in the event that [Van Zyl's] is ejected from the Premises, [Walters] shall be entitled to replace [Van Zyl's] with an operator of their [i.e.Walters'] choice subject to Quest's input regarding the suitability of the proposed operator.

8.3 in such an event [Van Zyl's] undertakes to sign all documents acquired by the Department of Energy to enable the new operator to apply for its retail licence."

The clause tells the reader that there was consensus that Walters was at liberty, in future, to lease the property to whomsoever she wished provided she sought Quest's "*input*" (significantly, it must be stressed, not its approval) before concluding such lease.

[59] Consideration of the Tripartite Agreement in its entirety, and in the context of what the parties' sought to achieve commercially, leads one to conclude that if Van Zyl's was to quit the premises Walters was at liberty to put in a new tenant after obtaining Quest's input and that Quest was thereafter entitled to demand that such new tenant become its exclusive customer. Presumably the obligation on Walters to obtain Quest's input was to put Quest in a position to approach the new tenant and conclude a new exclusive supply agreement.

[60] As far as Quest's entitlement to demand that it be the exclusive supplier of fuel to Van Zyl's was concerned, one must have regard to the provisions of cl.10 of the Tripartite Agreement, under the rubric "*Grant of Notarial Deed of Servitude"* which reads as follows.

> "*10.1 [Walters] acknowledges Quest's right to supply [Van Zyl's] or its successor in title with Petroleum Products.*
>
> *10.2 [Walters] acknowledges that Quest is entitled to secure its exclusive supply of the Petroleum Products and [Walters] accordingly agrees that a servitude be registered over the portion of the Immovable Property where the business is operated, in favour of Quest substantially in accordance with the draft notarial deed of servitude attached hereto marked Schedule 1."*

[61] The clear language of the Tripartite Agreement, to my mind, means that the three parties were in agreement that Quest had negotiated the right to exclusively supply its products to Van Zyl's (or any tenant which replaced it at the property) and that Van Zyl's (or any such replacement tenant) was precluded from selling any other company's fuel from the premises. But, in light of the provisions of cl.4 thereof, this arrangement was always going to be subject to Walters' entitlement to the benefits of the 4c Agreement.

[62] In this regard, the negotiation process between the parties in mid-2016 gives one a good idea of what Walters in particular was seeking to achieve from a commercial perspective: she would only participate in the exclusivity arrangement

between Quest and Van Zyl's if she was guaranteed additional income through the 4c/litre arrangement, otherwise the deal was not financially viable for her.

[63] The question that immediately springs to mind is, if Quest failed to honour its agreement and pay her 4c/litre, what was Walters to do? Clearly, she was not obliged to demand specific performance and was entitled to make an election and exercise her right to cancel.[24] If Walters then elected to cancel the 4c Agreement in circumstances where she was entitled to do so (as was the case here), what value was the Tripartite Agreement to her thereafter? She would suffer on-going financial loss month after month without being able to recoup that loss elsewhere. Certainly, she would have no recourse against her tenant. That is manifestly not a commercially sound arrangement.

[64] And, if the tenant defaulted in its obligations to Walters and failed to pay the rent would she not be entitled to cancel the lease and evict? Certainly, the terms of cl.8 of the Tripartite Agreement make provision for Walters to exercise her ordinary common law contractual rights *qua* lessor – once again a commercially sensible approach.

[65] What would the status of the Tripartite Agreement then be in the event that Walters lawfully cancelled the lease with her tenant? Undoubtedly, Quest then had no party to which it was entitled or obliged to supply fuel and it would have to negotiate the terms of a fresh supply agreement with a different tenant, after providing Walters with its "*input*" as aforesaid. Further, it is logical to infer that a new tenant

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[24] Frost v Leslie 1923 AD 276 at 279.

would be required by Walters to conclude a new lease with her. What would Quest's position then be if Walters was able to make up the equivalent of 4c/litre through an increase in rental payable by the new tenant? Could it seek to resile from the 4c Agreement on the basis of an implied or tacit term to that effect?

[66] Further, would Quest be obliged to continue paying Walters 4c/litre if she decided, not to put in a new tenant but rather to run the filling station business herself? In those circumstances she would no longer have the benefit of monthly rental income but she would enjoy the benefit of the net profit of the business accruing to her. In such circumstances it could be argued that the commercial rationale for the 4c Agreement had fallen away.

[67] It is not in issue that Quest was in default of its obligations to Walters under the 4c Agreement, nor is it disputed that, having been duly put to terms under that agreement, it failed to remedy its default thus affording Walters the right to elect to terminate the 4c Agreement. That termination took place in accordance with the relevant terms of the 4c Agreement. The issue however is whether, in cancelling the 4c Agreement, Walters was also permitted to put an end to the Tripartite Agreement. To do so lawfully, there would, at the very least, have to be a tacit or implied term to that effect in the Tripartite Agreement.

IMPLIED TERM

[68] Prior to considering whether any implied terms are to be imported into any of the agreements, it is necessary to examine the status of the product servitude and to ask the question whether it is a stand-alone document or whether it derives its

validity elsewhere. I have already found that the product servitude is not a servitude properly so-called is no more than the public recordal of a contractual arrangement conferring a personal right on Quest. The origin of that personal right is to be found in cl.10 of the Tripartite Agreement which is cited in para [60] above. In addition there is a brief reference in cl 4.1.1 of the 4c Agreement to the servitude – essentially recording that one of the suspensive conditions of that agreement was the signature by Walters of all documents necessary to enable Quest to register the product servitude.

[69] The registration of the product servitude was effected by a notary public pursuant to a special power of attorney signed by Walters at Oudtshoorn on 17 October 2016 in which she authorized le Roux to appear before a notary public and to execute a notarial deed of servitude in the form of an identified annexure to that special power. That annexure contains the terms of the contemplated servitude which Walters was prepared to grant to Quest and, as appears from para [8] above, further contains a cross reference to the Tripartite Agreement as the source of Quest's entitlement to demand registration of the servitude.

[70] There is no other agreement concluded by the parties which can be regarded as the source of the product servitude, and there is no basis in law for Quest's entitlement to the registration of the product servitude other than the Tripartite Agreement. In the circumstances I am in agreement with Mr. van der Merwe's submission that the notarial deed of servitude *per se* does not constitute the servitude agreement and therefore cannot stand on its own. As an external, public recordal of a personal right granted by Walters in favour of Quest, it is entirely accessorial to the

Tripartite Agreement and if the rights and obligations under the latter are extinguished it is rendered unenforceable. Simply put, if the Tripartite Agreement falls away so does the product servitude.

[71] On this construction of the product servitude, it follows, in my view, that any tacit or implied term which is found to have been imported into the Tripartite Agreement must also be considered to apply to the product servitude. The importation of a tacit term was described as follows by Nienaber JA in *Wilkins* [25] following the seminal judgment of Corbett JA in *Alfred Mc Alpine*[26].

> "A *tacit term, one so self-evident as to go without saying, can be actual or imputed. It is actual if both parties thought about a matter which is pertinent but did not bother to declare their assent. It is imputed if they would have assented about such a matter if only they had thought about it - which they did not do because they overlooked a present fact or failed to anticipate a future one. Being unspoken, a tacit term is invariably a matter of inference. It is an inference as to what both parties must or would have had in mind. The inference must be a necessary one, after all, if several conceivable terms are all equally plausible, none of them can be said to be axiomatic. The inference can be drawn from the express terms and from admissible evidence of surrounding circumstances. The onus to prove the material from which the inference is to be drawn rests on the party seeking to rely on the tacit term. The*

[25] Wilkins NO v Voges 1994 (3) SA 130 (A) at 136I – 137C

[26] Alfred Mc Alpine & Son (Pty) ltd v Transvaal Provincial Administration 1974 (3) SA 506 (A) at 531E *et seq.*

practical test for determining what the parties would necessarily have agreed on the issue in dispute is the celebrated bystander test. Since one may assume that the parties to a commercial contract are intent on concluding a contract which functions efficiently, a term will be readily be imported into a contract if it is necessary to ensure its business efficacy: conversely, it is unlikely that the parties would have been unanimous on both the need for the content of the term, not expressed, when such a term is not necessary to render the contract fully functional."

[72] Applying that approach to the facts at hand it is, in my considered view, axiomatic that if, during their deliberations leading up to the conclusion of the Tripartite Agreement, Quest and Walters were asked by the notional innocent bystander whether either of them would be entitled to exercise the right to cancel that agreement in the event that either of them had lawfully cancelled the 4c Agreement, the answer would have been a resounding "yes". That response is not only not inconsistent with the express terms of the Tripartite Agreement (nor for that matter the 4c Agreement), it is a necessary response to ensure the business efficacy of their commercial arrangement for the reasons already referred to.

[73] In the result I am satisfied that Walters has established the tacit term as contended for in prayer 1 of the counter application and that the Tripartite Agreement was lawfully cancelled by King in the e-mail sent at 10h33 on 23 March 2017. In the circumstances, it follows that the product servitude was no longer capable of enforcement by Quest either and was lawfully cancelled in the same e-mail.

CONCLUSIONS

[74] In light of the findings that both the Tripartite Agreement and the 4c Agreement have been lawfully cancelled and that the product servitude is no longer capable of enforcement, it follows that Quest has not established the requisite right entitling it to the interdictory relief sought in prayer 1 of its notice of motion. The application accordingly falls to be dismissed with costs.

[75] Walters, on the other hand, has been successful in establishing the grounds for the relief sought in her counter application which should succeed on the basis set forth hereunder. No purpose will be served by granting a declaration in relation to the establishment of a tacit term of the Tripartite Agreement. The fact that Walters has proved the existence of such a term and the fulfilment thereof affords her the basis for the lawful cancellation of the agreement. She is therefore entitled to a declaratory order that the two agreements were lawfully cancelled and that the product servitude falls to be cancelled together with the consequential relief which flows from the cancellation of that servitude.

[76] As far as costs are concerned, each party asked for an award of attorney – client costs in the respective notice of motion and counter application. However, neither counsel pressed in argument for such an order. There is no basis for the granting of a punitive costs order in this matter and costs on the party and party scale should follow the result.

ORDER OF COURT

IN THE RESULT THE FOLLOWING ORDERS ARE MADE:

A. The applicant's application is dismissed with costs.

B. The first respondent's counter application succeeds with costs.

C. It is declared that the Tripartite Agreement (Annexure "D" to the main application), the Memorandum of Agreement (Annexure "JS 16" to the main application) and the Product Servitude (Annexure "JS 18" to the main application) have been lawfully cancelled.

D. It is directed that the notarial deed of servitude no SK 402/2017S dated 21 October 2016 (Annexure "JS 18" to the main application) registered against title deed no 14281/2014 in terms of which the first respondent holds Erf 229 Piketberg, in the Berg River Local Municipality, Western Cape, be cancelled forthwith.

E. The applicant is directed to give effect to the order in D above and to sign on demand by the first respondent's attorneys all documents required to have the registration of the said servitude appearing in the deed of transfer of Erf 229 Piketberg cancelled and deleted, failing which the Sheriff for the District of Piketberg is hereby authorised and ordered on behalf of the applicant to sign all documents required to have the said servitude cancelled and

deleted from the deed of transfer in terms whereof the first respondent holds Erf 229 Piketberg.

F. The applicant is ordered to pay the costs of, or incidental to, the cancellation and deletion of the said servitude from the deed of transfer of Erf 229 Piketberg.

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GAMBLE, J