THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 291/10

In the matter between:

BEDFORD SQUARE PROPERTIES (PTY) LTD **Appellant**

and

ERF 179 BEDFORDVIEW (PTY) LTD **Respondent**

Neutral citation: *Bedford Square Properties v Erf 179 Bedfordview* (291/10) [2011] ZASCA 37 (28 March 2011)

Coram: Harms DP, Heher, Ponnan, Malan and Tshiqi JJA

Heard: 16 February 2011

Delivered: 28 March 2011

Summary: Servitude – in restraint of trade – invalidity of

ORDER

On appeal from: South Gauteng High Court (Johannesburg) (Willis J) sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

HARMS DP (HEHER, PONNAN, MALAN AND TSHIQI JJA concurring)

[1] The case concerns the validity of servitutal restraints of trade. The notarial deed of servitude (deed of restraint) prohibits the owner of the appellant's two properties (the servient properties) from letting rental space on the properties, for a period of eleven years as from 4 November 2003, to Woolworths or Mica Hardware, two chains of retail stores such as one finds with increasing frequency in major shopping centres.

[2] The servitudes were registered on 21 June 2004 pursuant to a settlement agreement. The background to the agreement was this. The appellant (Bedford Square Properties (Pty) Ltd), in order to use the properties for a shopping centre, office accommodation and a residential development, applied for the removal of restrictions contained in the title deeds of the properties, and for their rezoning to 'mixed use'. The application was granted by the Ekurhuleni Metropolitan Municipality but an appeal was lodged to the Gauteng Townships Board by the owners of two nearby shopping centres, Eastgate and Bedfordview. They are, respectively, Liberty Properties Ltd, and a company named Erf 179 Bedfordview (Pty) Ltd, the respondent on appeal.

[3] The parties settled the appeal and asked the Board to make an order reflecting that part of their agreement which dealt with matters such as the gross floor area that could be let for shops and the like, and the maximum dwelling units that could be erected on the properties. Another part of the

agreement did not concern the Board but dealt with side issues. There was an arrangement in respect of a possible road closure of a portion of a street in the vicinity. And it dealt with the grant of the mentioned praedial servitudes over the Bedford Square properties[1] in favour of the Eastgate and Bedfordview properties.

[4] The servitudes are not personal servitudes because they were created for the advantage of the two dominant tenements.[2] These properties are close enough to satisfy the requirement of *vicinitas.*[3] The object of the servitudes was obviously to prevent the owner of Bedford Square from letting retail space to Woolworths or Mica Hardware in Bedford Square for the eleven year period and thereby creating a trading advantage for the dominant tenements.

[5] The appellant sought a declaratory order in the South Gauteng High Court declaring the 'enforcement' of the servitude to be contrary to public policy and for consequential relief, namely the cancellation of the servitude. The application was dismissed by Willis J who, subsequently, granted leave to appeal to this court.

[6] It is important to note at the outset that Bedford Square did not allege that the settlement agreement that gave rise to the servitudes was contrary to public policy; its case was also not that the servitudes when registered were contrary to public policy. Its case was that the restraint became invalid because its 'existence and enforcement' no longer served to 'protect any legitimate, commercial, legal or other interest' of the owners of the dominant properties. All this was premised on the supposition that the principles that apply to contracts in restraint of trade, including the rule that the validity of a restraint is not necessarily to be determined with reference to the facts as they existed at its inception but at the date of enforcement, apply to real covenants.[4]

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[1] They have since been subdivided but nothing turns on this.

[2] *National Stadium South Africa (Pty) Ltd v Firstrand Bank Ltd* (670/10) [2010] ZASCA 164; 2011 (2) SA 157 (SCA).

[3] C G van der Merwe *Sakereg* (2 ed) p 470.

[4] *Magna Alloys & Research (SA) (Pty) Ltd v Ellis* [1984] 2 All SA 583 (A), 1984 (4) SA 874 (A); *Basson v Chilwan* [1993] 2 All SA 373 (A), 1993 (3) SA 742 (A).

[7] The respondent's first line of defence was that the case was brought in the wrong forum because it is a competition issue which belonged to the Competition Tribunal in terms of the Competition Act 89 of 1998. Although this 'defence' was abandoned it is necessary to mention that the high court and this court (when hearing an appeal from a high court) do not have any jurisdiction to consider competition matters. This means that the question whether the restraint may have been in conflict with the Act cannot feature in this judgment, one of consequences of compartmentalizing legal doctrines and of divided jurisdiction. It cannot do the rule of law any good if different results may follow depending on which court system has to deal with the matter.

[8] The respondent's second line was that the appellant had failed to disclose a cause of action because, so it said, registered servitudes are real rights and, accordingly, can only be cancelled by agreement of all parties. In this regard the respondent relied on a series of cases, including *Florida Hills*,[5] in which it was held that a high court does not have inherent jurisdiction to cancel servitudes or to interfere with real rights of its own accord.[6]

[9] The appellant sought to counter this argument with reference to the recent judgment in *Linvestment.*[7] This was an instance where this court decided to revisit a previous judgment in relation to the question whether the owner of a servient tenement can, of his own volition, change the route of a defined right of way where the owner of the dominant tenement unreasonably refused to agree to an amendment, where the existing route involved undue inconvenience to the servient tenement, and where the proposed route was not inconvenient to the owner of the dominant tenement. Having regard to what the common law actually was and to comparative law this court decided to overrule existing authority in the interests of justice.

[10] In my view both missed the point. The *Florida Hills* line of cases dealt with the inherent jurisdiction of the court to delete a servitutal restraint. The

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[5] *Ex parte Florida Hills Township Ltd* 1968 (3) SA 82 (A) at 91H-92A and 97H.
[6] *Ex parte Gold* 1956 (2) SA 642 (T) at 649E; *Ex parte Uvongo Borough Council* 1966 (1) SA 788 (N) at 790H-791A; *Ex parte Rovian Trust (Pty) Ltd* 1983 (3) SA 209 (D) at 212E-213C.
[7] *Linvestment CC v Hammersley* 2008 (3) SA 283 (SCA).

appellant did not ask the court to exercise its 'inherent' jurisdiction – even in the broadest sense of the word. It relied on the law as it is or is supposed to be. These cases were also not concerned with the issue whether a servitutal restraint that is *contra bonos mores* can be lawful. I would have thought that something that is *contra bonos mores* and against public policy is by definition unlawful. I will assume for the sake of argument that it is also possible (although none was conceived by counsel) to envisage cases where a real right could in the course of time become invalid because its enforcement would be against public policy. *Linvestment*, too, has nothing to do with the case. It was not concerned with the possible invalidity of a servitude because of public policy considerations.

[11] Once one accepts that a servitude may be or in time become invalid because it was or is against public policy the next question is whether the guidelines that were developed to determine whether or not an agreement in restraint of trade is invalid can, without more, be used to determine if a restraint of trade in a servitude is invalid. An answer was given by O H Hoexter JP in *Venter v Minister of Railways* 1949 (2) SA 178 (E) at 185. He said:

> 'Generally speaking, the rules as to contracts in restraint of trade cannot be applied to praedial servitudes. The essence of a contract held to be unduly in restraint of trade is that it restrains the trading activity of a particular person. The restraint created by the servitude in the present case restricts the user of a particular piece of property and not the activity of a particular person.'

Applied to the facts of our case, the restraint does not prevent the appellant from entering into lease agreements with Woolworths or with Mica in respect of any property within the city – it binds the servient properties only. The reasoning in *Venter*, it need be mentioned, was adopted and applied to personal servitudes by the full bench in *Strathsomars Estate Co Ltd v Nel* 1953 (2) SA 254 (E) at 258F-H and 259E-H. Apart from relying on its common sense, the full bench also found some support in English law for its view.

[12] The problem with the argument to the contrary may be illustrated with reference to a case where someone sells a property subject to a restraint in favour of another property. The purchaser in such circumstances buys less

than full ownership and pays for less. To permit the purchaser to escape the consequences of his agreement appears to me to be unjustifiable. The situation is here not much different because the appellant, in exchange for the withdrawal of the appeal before the Board, was prepared to diminish the extent of its ownership by granting the servitudes to its opponents.

[13] It is, however, unnecessary for purposes of this judgment to decide which factors determine whether or not this particular restraint became unlawful under common-law principles. The problem the appellant faces is that it accepts that the restraint was initially valid. This it had to do in view of the fact that the restraint was agreed to by parties with equal bargaining power; that it was limited to these two properties; that it was limited to these two particular retailers and not all the others that provide the same or similar services; that the restraint was limited to eleven years; and that the protection of anchor tenants (as held by Willis J) was 'a legitimate part of commercial life in this country.' For the servitudes to have become invalid, circumstances must have changed. The onus was on the appellant to prove that the servitudes became *contra bonos mores*, which means that the appellant had to prove changed circumstances.[8] The appellant did not seek to make out such a case and, apart from generalized allegations, did not even rely on a single relevant fact. As far as I can gather, everything remained the same.

[14] This means that the court below was correct in dismissing the application and the appeal is dismissed with costs, including the costs of two counsel.

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L T C Harms
Deputy President

[8] This flows ineluctably from *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at paras 58 and 66 (per Ngcobo J).

APPEARANCES:

APPELLANTS:	J Peter SC Instructed by: Vining Camerer Inc, Johannesburg Honey Attorneys, Bloemfontein
RESPONDENTS:	D N Unterhalter SC (with him J Wilson) Instructed by: Rothbart Inc, Johannesburg Rosendorff Reitz Barry, Bloemfontein