THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case no: 886/2021

In the matter between:

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

and

MZIKI SHARE BLOCK LIMITED **Respondent**

Neutral citation: *Snowy Owl Properties 284 (Pty) Ltd v Mziki Share Block Limited* (Case no 886/2021) [2023] ZASCA 2 (19 January 2023)

Coram: ZONDI and MOTHLE JJA and KGOELE, MAKAULA and WINDELL AJJA

Heard: 2 September 2022

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 11:00am on 19 January 2023.

Summary: Arbitration award – application to make it an order of court – s 31(1) of the Arbitration Act 42 of 1965 – the award not sanctioning illegal activities – not vague and imprecise – award enforceable.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Radebe J sitting as court of first instance):

1 The application in terms of s 19*(b)* of the Superior Courts Act 10 of 2013 is dismissed.

2 The appeal is dismissed with costs.

JUDGMENT

Kgoele AJA (Zondi and Mothle JJA and Makaula and Windell AJJA concurring)

[1] A long-running dispute regarding a registered notarial agreement of servitude No. K1287/1990S (the servitude agreement) between the appellant, Snowy Owl Properties 284 (Pty) Ltd, and the respondent, Mziki Share Block Limited, sparked a plethora of arbitration awards that were made in terms of Clause 4.3 (the arbitration clause) of that agreement. The latest one (the award), which is a subject of this appeal, was made by Advocate Dodson SC (the arbitrator) on 2 April 2020. The appellant was, in terms of the award, directed to reopen certain roads closed by it in 2017 and further ordered to maintain others. The respondent applied to the KwaZulu-Natal Division of the High Court, Pietermaritzburg (the high court), to make the award an order of court in terms of s 31(1) of the Arbitration Act 42 of 1965 (the Arbitration Act). The appellant opposed the relief sought on the basis that the award was unenforceable.

[2] The high court made the award an order of court. Aggrieved by the order, the appellant sought and was granted leave to appeal to this Court, mainly on the basis that the award was incapable of enforcement. The appellant also seeks leave to admit further evidence in terms of s 19(*b*) of the Superior Courts Act 10 of 2013 (Superior Courts Act).

The Background

[3] The appellant and the respondent own farms that border each other. The appellant's farm falls within the boundary of the Mun-Ya-Wana Conservancy (the Conservancy), which was declared a protected area on 5 December 2019, in terms of the National Environmental Management Protected Areas Act 57 of 2003 (NEMPAA). On 27 August 1990, the appellant's and respondent's predecessors in title concluded a servitude agreement that reciprocally allows each of these owners to traverse over all of the lands of the other, solely for game viewing. The relevant provisions are clauses 3 and 4.1. Clause 4.2.2 requires each party to take all steps necessary to maintain 'existing roads' on their respective properties (road maintenance) whereas Clause 4.2.6 imposes an obligation on the parties to prevent veld fires and soil erosion on their respective properties.

[4] As already indicated above, after that outwardly optimistic start, the relationship between the parties deteriorated some ten years later and sparked a series of disputes and arbitration awards. With regard to the current dispute, the respondent instituted arbitration proceedings against the appellant for the reinstatement, re-opening, and repair of servitude roads used by it and its members for game viewing purposes in terms of the servitude rights it holds over the appellant's servient properties. The arbitration proceedings were triggered by the ripping up of roads by the appellant in July 2017, which commenced with Plover Drive, which used to be a boundary road between the appellant's farms and a farm known as Little Zuka, also subject to the servitude agreement. When the appellant's farm manager, Mr Anton Louw (Louw), was approached to explain this breach of the servitude agreement, he informed the Chairperson of the Board of Directors of the respondent, Mr Norman Celliers (Celliers), that the ripping up of Plover Drive formed part of a new road rehabilitation plan, a step that had been taken for environmental reasons. Celliers, in turn, expressed his concern about the failure of the appellant to consult with the respondent before any of the steps were taken.

[5] Shortly thereafter, Plover Drive, Boundary Road, and several linking roads in the Plains (an open grassland area) referred to as 'the Links Road', which intersected with Plover Drive, were also ripped up and branches were placed across the entrances to prevent access by the respondent to the appellant's property. An exchange of

WhatsApp messages between Louw and Celliers revealed that the closures were made on the basis that it was a 'project to rehabilitate the old boundary lines; roads subject to excessive erosion and roads running through "wetlands" and "marsh areas"'. Further WhatsApp exchanges and telephone calls culminated in a meeting between Celliers and Louw on 27 July 2017. At this meeting, Louw claimed that the steps were taken following an environmental management plan, which had been developed for the entire Mun-Ya-Wana Game Reserve, of which the appellant's farm forms part. According to Louw, the appellant was legally obliged to destroy those roads, in compliance with the national environmental laws, as these roads were in low-lying or wetland areas. Celliers was not happy with the explanation and once more, expressed a further complaint about the appellant not having, at the least, attempted to engage the respondent beforehand. He demanded that the roads be repaired and re-opened and further that, the various documents to which Louw referred, be given to him.

[6] An exchange of correspondence, this time between the attorneys of both parties, ensued when the requested documents were not furnished. The correspondence did not yield an amicable solution. Instead, it fuelled the fire that was already burning between the parties, resulting in the appellant addressing a notice to the respondent and other parties traversing its farm on 29 September 2017 announcing the permanent closure of the areas: River Road, River Loop, and River Link (the 'Three River' roads). This notice was followed by the erection of chains with 'no entry' signs on them which were also hung between planted wooden poles at the entry points to the roads in question. The respondent retaliated by removing the chains and pole barriers of River Road and resuming the use of the road. As the pot on the fire was brewing at this time, the parties agreed to the activation of arbitration proceedings in terms of the arbitration clause.

The arbitration award

[7] The dispute before the arbitrator pertained not only to the road closures which were occasioned by the appellant, but also to the alleged failure to maintain the roads in their form. Whilst the respondent pleaded a breach of the servitude agreement by the appellant during the arbitration proceedings, the appellant pleaded that the servitude agreement, properly interpreted, does not prohibit the parties from closing

existing roads or making new roads. Alternatively, that it contains a tacit term to the effect that parties can close existing roads should it be necessary for ecological and or legislative reasons. Concerning road maintenance, the appellant denied any breach of the duty to maintain.

[8] At the conclusion of the arbitration, the arbitrator dismissed all of the appellant's defences. He found that the respondent had succeeded in making a case concerning its road maintenance claim. As regards the roads closure claim, the arbitrator found that none of the statutory instruments referred to by the appellant sanctioned the closure of roads nor did they preclude the reinstatement of existing roads that had been closed and destroyed. The arbitrator stated further that if authorisation was required by any provisions whatsoever, the appellant could make such an application and pursue it with the necessary vigor.

[9] In the result the arbitrator rendered the following award:

'234. I accordingly make the following award:

1. Subject to paragraphs 2 to 4 below, the respondent is ordered:

1.1 to complete the repair and maintenance of, and to reopen, River Road within 30 days of the termination of the lockdown imposed in terms of Chapter 2 of the regulations in Government Notice 318 of 18 March 2020, as amended,[1] or any extension of the lockdown that applies to the area in which the respondent's farms are situated ("the lockdown termination date");

1.2 to reinstate and reopen River Loop within two months of the lockdown termination date;

1.3 to reinstate and reopen by no later than nine months from the expiry of the time period referred to in paragraph 2, the following roads on respondent's properties as highlighted in black on annexure "C" to the statement of claim;

1.3.1 River Link;

1.3.2 Plover Drive;

1.3.3 The westerly group of three Links Roads that cross the Plains area, up to the point where, having converged, they intersect with Plover Drive, including the section where three of the Links Roads converge into a single road;

[1] GN 318 of 18 March 2020 issued in terms of section 27 (2) of the Disaster Management Act No. 57 of 2002 and contained in Government Gazette No. 43107, as amended by Government Notice R.398 in Government Gazette No. 43148 of 25 March 2020 and Government Gazette Notice R.419 contained in Government Gazette No. 43168 dated 26 March 2020.

1.3.4 The most easterly of the Links Roads that cross the Plains area up to the point where it intersects with Plover Drive, but excluding Boundary Road, and subject to the following:

(a) The reinstated roads must be no wider than is reasonably necessary for traverse by game-viewing vehicles and must in any event be no wider than 4 metres;

(b) Any watercourse of wetland crossing must be designed for the minimal impact reasonably possible on the natural functioning of such watercourse or wetland; and

(c) Upon completion of the reinstatement of any road, it must immediately be reopened, notwithstanding such completion having taken place prior to the expiry of the nine-month period provided for compliance with this paragraph;

1.4 Within 6 months of the lockdown termination date, to have taken and completed all steps necessary to adequately repair and maintain, the sections of the following roads identified in the minute of the site inspection of 12 and 13 October 2019, read with the annexures to it, as being in an unreasonable, unmaintained, undermaintained, eroded or otherwise unacceptable condition;

1.4.1 Valley View Road;

1.4.2 Brides Bush Road;

1.4.3 Nkulukulu Loop;

1.4.4 Lamara Loop;

1.4.5 Nsumo Drive (excluding the rocky ascending portion described in paragraph 45 of the site inspection minute);

1.4.6 Boma Road;

1.4.7 Sidestripe Road;

1.4.8 Amatchemthlope Drive.

1.5 to carry out the actions in subparagraphs 1.1 to 1.4 above in such a way as to minimise any negative impact upon the claimant's rights under the servitude; and

1.6 to pay 70 percent of the party and party cost of these proceedings, including the costs of the arbitrator, the recording services and senior counsel.

2. The duty to commence compliance with subparagraph 1.3 only, is suspended for a period of three months from the lockdown termination date to enable the parties to meet and attempt to reach agreement regarding-

2.1 the manner in which the reinstatement of any parts of the roads referred to in subparagraphs 1.3.2 to 1.3.4 that cross watercourses or wetlands, is to be dealt with, including any deviation from the original path of the road;

2.2 the manner in which River Link is to be reinstated, if at all; and;

2.3 such further matters as the parties may elect to reach an agreement on.

3. The parties may vary subparagraph 1.3 of this award or the time period in paragraph 2 of this award, by written agreement signed on behalf of each party by a duly authorised representative.
4. Failing agreement within the period referred to in paragraph 2 on the matters contemplated in paragraphs 2 and 3, subparagraph 1.3 shall become effective on the terms set out in that subparagraph.
5. Either party may seek an amendment of this award insofar as it pertains to the lockdown, by way of a short, written submission emailed within 5 court days of the date of the award, the other party having 2 court days to respond.'

Litigation history

[10] Subsequent to the grant of the award and during October 2020, the appellant seemingly continued to rip up and destroy roads on the servient property. This led to an interim interdict being granted in favour of the respondent on 20 October 2020.[2] Around the same time, the respondent brought an application to make the award an order of court.[3] On 4 December 2020, both matters served before the high court (Radebe J) and by agreement between the parties, the high court only proceeded with the latter application and postponed the interdict application for later determination. As already stated, the appellant opposed the application to have the award made an order of court. The basis for the opposition was that the terms of the award were at odds with some of the basic features of a court order and were thus unenforceable. On 18 February 2021, the high court granted the application with costs and made the award an order of court. Leave to appeal was granted to this Court on 27 July 2021.

The issues

[11] The primary question in this appeal is whether the high court was correct in making the award an order of court for the purposes of enforcement. The appellant raised three grounds in support of its contention that the award is unenforceable. The first complaint was that para 1.3 of the award cannot be enforced as the reinstatement, reopening, and maintenance of the relevant roads contemplated in para 1.3.2, 1.3.3, and 1.3.4 will require the appellant to perpetuate unlawful acts. The second was that para 1.4 of the award is vague and imprecise and cannot be made an order of the

[2] Application under case number 7003/2020P.
[3] Application under case number 4444/2020P, as aforesaid.

court. The last relates to the 'Three River' roads. The contention is that paras 1.1, 1.2, and 1.3 conflict with the provisions of para 11.10 of the Maintenance Management Plan (MMP) and will invite the appellant to conduct illegal activities.

The law

[12] Our law has long recognised that any act performed contrary to a direct and express provision of the law is void and has no force and effect.[4] In general, it will be contrary to public policy for a court to enforce an arbitral award that is at odds with a statutory prohibition. However, this is not always the case. As recognised by the Constitutional Court in *Cool Ideas 1186 CC v Hubbard and Another* (*Cool Ideas*), the force of the prohibition must be weighed against the important goals of private arbitration.[5] This is because a court's refusal to enforce an arbitration award will also erode, to some extent, the utility of the arbitration process. But converting an award into a court order does not follow as a matter of course. A court is entitled to refuse to make an award an order of court if the award is defective or sanctions illegalities.[6]

[13] It is trite that a servitude is a limited real right often registered in favour of the dominant property which amounts to a detachment from ordinary property rights in respect of the servient property and a concomitant attachment thereof to the proprietary rights of the dominant property. To that extent, the servient property owner is neither empowered nor competent to negotiate those rights away without the consent of the dominant owner. The relationship between the parties as dominant and servient owners is governed by the principle of reasonableness.[7]

[14] Another principle relied upon by our courts to calibrate the relationship between two reciprocal servitude holders is the *civiliter modo* principle. It regulates the reasonable exercise of servitudal rights between the servient owner and the servitude holder. This concept was recently explained by this Court in *Morganambal Mannaru*

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[4] *Schierhout v Minister of Justice* 1926 AD 99 at 109.
[5] *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (4) SA 474 (CC) para 136.
[6] Ibid paras 53-62.
[7] A J Van Der Walt and G J Pienaar *Introduction to the Law of Property* 4 ed, (2004) at 274.

and Another v Robert MacLennan-Smith and Others.[8] In *Gardens Estate Ltd v Lewis*[9] it was held that the owner of a servient property that is subject to a specified servitude of right of way cannot subsequently insist on changing the location or route of the servitude road unilaterally.[10] In *Linvestment CC v Hammersley and Another*,[11] this Court pronounced that the *civiliter* principle cannot be relied on to justify unilateral relocation of a specified right of way to a route that suits the servient owner better. However, the Court also found it justified to develop the common law to make unilateral relocation of a specified right of way by a court order (in favour of the servient owner) possible under certain circumscribed conditions.[12] In this regard, I echo the remarks by Van der Walt that 'This decision does not have a direct bearing on the *civiliter* principle because the order for unilateral relocation of the road was granted on application by the servient owner, but the decision confirms that consensual specified right of way cannot be amended unilaterally with an appeal to the *civiliter* principle'.[13]

The illegality opposition

[15] With this background I turn to deal with the appellant's contention that the order sought would require it to perform an unlawful act and thus, cannot be made an order

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[8] *Morganambal Mannaru and Another v Robert MacLennan-Smith and Others* [2022] ZASCA 137 para 13: 'Often the relationship arising from the exercise of a servitude is fraught with tensions that sometimes develop into disputes, for the most part, between the user rights of the dominant owner and the rights of the servient owner. The approach adopted by our courts in resolving such disputes is reliance on the principle of *civiliter modo*. Relying on J Scott, it has been pointed out that: "the principle of *civiliter*…is a particular expression of the principle of reasonableness..." And at 242-243 "in modern South African servitude law the Latin phrase *civiliter modo* is consistently read as a set of adverbs that both qualify the conduct of a servitude holder, so that a servitude holder who acts reasonably is said to be acting in a civilised (*civiliter*) manner (*modo*)." In modern South African servitude law the Latin phrase civiliter modo is consistently read as a set of adverbs that qualify the conduct of the servitude holder, so that a servitude holder who acts reasonably is said to be acting in a civilised (civiliter) manner (modo).'

[9] *Gardens Estate v Lewis* 1920 AD 144. See also C G van der Merwe *Sakereg* 2 ed (1989) at 467, where this decision is still discussed as the current law.

[10] See ch 4.7 on amendment of existing servitudes. In the case of a specified consensual servitude of right of way, the parties not only agreed upon the creation of the right to use a road but also on the location or route of the road. Both are bound to that route and it can in principle only be changed by consensus. In the case of a general (*simpliciter*) consensual servitude of right of way, the parties agree on the creation of the servitude but not on the route, in which case the servitude holder can select a route, subject to the principle that it must impose the least possible burden on the servient owner. Thereafter the servitude holder is bound to the selected route, but the servient owner can change the route unilaterally if her continued reasonable use of the servient land demands it, provided the change does not infringe upon effective use of the servitude.

[11] *Linvestment CC v Hammersley* [2008] ZASCA 1: 2008 (3) SA 283 (SCA) para 20. See also *LAWSA* 2 ed para 544 fn 4. See also para 559 discussing this decision.

[12] 24 *LAWSA* 2 ed para 25.

[13] A J Van der Walt *The Law of Servitudes* (2018) at 259.

of court. Paragraph 1.3 of the award obliges the appellant to reinstate and reopen River Link, Plover Drive, and large parts of the Links Roads. The appellant claimed, initially during the arbitration proceedings, that these roads were closed because of the adverse ecological impact they had as they were situated within a wetland area. Before the high court, the appellant further attempted to rely on the expert evidence of Mr David Rudolph, an environmental assessment practitioner (the EAP), Mr Jacques Du Plessis, a civil engineer, and Mr Jeanrick Janse van Rensburg, an ecologist, to the effect that para 1.3 of the award cannot be enforced because the permanently closed roads implicated in paras 1.3.2, 1.3.3 and 1.3.4 of the award are all within a wetland and the scope of works identified in the award cannot be carried out without obtaining prior environmental authorisation. The appellant argued that the high court's order required it to perform unlawful acts which may not be performed without prior authorisation in terms of:

(a) Section 24 of the Constitution of the Republic of South Africa;

(b) The National Environmental Management Act 107 of 1998 (NEMA);

(c) The National Water Act 36 of 1998 (NWA);

(d) NEMPAA;

(e) The relevant Environmental Impact Assessment Regulations (EIA regulations) published under ss 24(2), 24(5), 24D and read with s 47A(1)(*b*)(i) of NEMA promulgated and amended on 7 April 2017 in the Government Notice Regulations (GNR) Nos 324, 326 and 327.

[16] The appellant submitted that in terms of the NEMA, certain activities with potentially detrimental impacts on the environment may not be undertaken without prior authorisation. According to the appellant, the environmental authorisation required for all the works to be done in terms of para 1.3 of the award has been confirmed by the EAP who indicated in his report that at least four listed activities are triggered by the works required to be done in terms of the award. As a consequence of the above, the appellant would have to obtain environmental authorisation from the competent authority, the KwaZulu-Natal Department of Economic Development, Tourism, and Environmental Affairs before it undertakes the scope of works described by the civil engineer, to comply with para 1.3 of the award concerning the roads in paras 1.3.2, 1.3.3 and 1.3.4. If it were to proceed to perform in terms of the award, the

appellant submitted, its performance will be illegal because a person who conducts a listed activity without authorisation commits an offence in terms of s 49A(1) of NEMA read in conjunction with s 24F(1).

[17] A similar argument was raised in respect of the two additional listed activities identified by the EAP in terms of the NWA. The appellant contended in this regard that the fact that the roads will impede or divert the flow of water in a watercourse and alter the beds, banks, course, or characteristics of a watercourse, will require a water use license in terms of section 21 of the NWA. Without such a licence, the appellant submitted, it will be committing an offence. Lastly, the appellant also contended that para 1.3 is in conflict with the provision of the MMP. The appellant relied heavily on the principle outlined in *Cool Ideas* to support the contention that the award cannot be enforced as it sanctions illegal conduct.

[18] In relation to para 203 of the award, in which the arbitrator urged the appellant to pursue the authorisation with vigor in case one is needed, the appellant argued that the arbitrator overlooked these statutory provisions referred to above. The appellant argued that the high court's order falls short of being immediately capable of execution because statutory authorisation is required before it could be enforced. It contended that it will be unable to successfully apply for environmental authorisation as, if it were to do so, it would not have any support from an independent and objective EAP for the re-opening of the roads, as there is a viable alternative route.

[19] Firstly, to debate what an EAP may or may not recommend *if* the appellant applies for authorisation is both irrelevant and unhelpful. But more importantly, the appellant's contentions must be rejected for the simple reason that the justification for the closure of the roads concerned was raised before the arbitrator and he rejected it after considering the factual and expert evidence presented to him. The arbitrator found that there were no legislative reasons for the closure nor was there any provision in the servitude agreement that mandated the closure of any of the existing roads. The evidence in the affidavit of the EAP seems to be another version of the evidence already presented by the witnesses of the appellant, including, an environmental expert, Mr Neary, before the arbitrator. This is not an appeal against the factual finding

of the arbitrator. It is therefore not permissible, nor appropriate for the appellant to engage in a factual debate on matters already considered in the arbitration proceedings and decided upon by the arbitrator. As a result, the high court cannot be faulted for equating the evidence in the affidavit of the EAP as the introduction of 'new evidence' which will amount to an appeal against the award.

[20] Secondly, the appellant sought to further justify its actions by relying on the MMP. This justification, too, cannot salvage the appellant's case. First, there was no decision by a Mun-Ya-Wana Conservancy Warden to close any of the roads including the three "River Roads". In fact, from the report of the EAP, it would appear that no recommendation could have been made to the competent authority. Moreover, the evidence presented at the arbitration indicated that River Road was closed for maintenance purposes while River Link was closed because it went straight up the side of a very steep hill.

[21] Lastly, the record of the arbitration proceedings reveals that the arbitrator also dealt with the argument relied upon by the appellant which was based on this plethora of environmental legislative instruments to the effect that the relief sought by the respondent compelling the appellant to reinstate the roads amounted to the creation of 'new' roads. The arbitrator, after a thorough analysis of the servitude agreement, found that the issues in this matter relate to 'existing roads' and therefore, 'none of the statutory instruments relied upon by the appellant preclude the reinstatement of existing roads which have been closed and destroyed. Nor do any of them sanction the original closure by Snowy Owl [the appellant] of the roads'. Mr Neary, the legal expert of the appellant, had also, prior to this finding, accepted the fact that existing roads in the servitude were thus not affected by the legal requirements in relation to environmental impact assessments.

[22] Reliance on the *Cool Ideas* authority to support the introduction of the new 'expert evidence' before the high court, was also in my view, correctly rejected by the high court as the facts thereof are distinguishable from this matter. Unlike in the *Cool Ideas* matter, the award that was made an order of court in this matter does not infringe any law. The arbitrator made a definitive conclusion that none of the legislative

instruments referred to by the appellant during the arbitration hearing precludes the maintenance or reinstatement of existing roads that had been closed or destroyed, nor do any of them sanction the original closure or the ripping up of these roads. In addition to this, I find the remarks made by the Constitutional Court in *Cool Ideas* that '. . . If a court refuses to freely enforce an arbitration award, thereby rendering it largely ineffectual, because of a defence that was raised only after the arbitrator gave judgment, that self-evidently erodes the utility of arbitration as an expeditious, out–of–court means of finally resolving the dispute,' apposite in this matter.

The vagueness opposition

[23] The second ground of attack on the award is that it is vague and thus incapable of enforcement. It is contended by the appellant that para 1.4 of the award orders it, within six months of the lockdown termination date, to have taken and completed all steps necessary to adequately repair and maintain the sections of the various roads listed in this paragraph and identified in the minute of the site inspection of 12 and 13 October, read with the annexures to it. The complaint is that the order made by the high court does not identify the minute of the site inspection and the annexures, nor are these documents attached to the order. Further, it is contended that the order does not identify the roads referred to in para 1.3 of the award which are '. . . *highlighted in black on annexure "C" to the statement of claim.*' To substantiate this contention, the appellant listed a host of examples in an attempt to demonstrate that it is impossible to interpret the award without reference to these documents. According to the appellant, this renders the order of the high court vague and incapable of enforcement.

[24] This complaint is ill-conceived. The record of the arbitration proceeding reveals that the minute of the inspection *in loco* was dictated by the arbitrator in the presence and concurrence of the representatives of all the parties during the inspection. It is simply not open to the appellant to now claim a lack of understanding of the roads in question, including the contents of this minute, when its representative was present during the inspection *in loco* and is fully aware of which roads and parts thereof the arbitrator referred to in the award. Secondly, the record of the proceedings reveals that the minute and annexures were placed before it and the high court referred to

them. In my view, the appellant would be able to ascertain which roads are affected by the award by having regard to this documentation.

[25] The second leg relied upon by the appellant to substantiate this complaint is the ‘changed circumstances’. The argument is that the state of the roads observed by the arbitrator in October 2019, bore little or no resemblance to the state of the roads three months later because of the torrential rains that fell in January 2020. As a result of these significant changes, the argument continued, the appellant does not know where the parts of the roads that are to be repaired are situated; the award is subject to uncertainty which can result in further litigation, and the dispute between the parties cannot be resolved by the award because road maintenance and repair is a never-ending cycle. To bolster these arguments, the appellant submitted that the constant state of flux within the Conservancy causes the conditions of defects to change in form. Fixing a position to a specific date and expecting that snap-shot to remain unaltered and require remediation, is according to the appellant not competent on the facts. Once one problem is addressed, others arise due to rain, erosion, or poor driving skills. Therefore, according to the appellant, para 1.4 of the award cannot be made an order of court.

[26] The ‘changed circumstances’ arguments cannot salvage the appellant’s case. Firstly, in para 52 of their answering affidavit, the appellant alleged that an application to have the evidence of the torrential rains and flooding to be admitted was refused by the arbitrator before he made his award on 2 April 2020. Therefore, with the risk of repetition, the appellant cannot, before the high court and us, as already indicated above, re-argue factual matters that were already dealt with by the arbitrator.

[27] Secondly, the appellant’s duty to maintain the roads is a servitudal obligation that takes into account the reserve's conditions, including rainfall. As a result, the submission that the award will not resolve the issues between the parties cannot assist the appellant’s case. Maintenance, in various forms, forms part of the duties of any owner, and such is the nature of the beast, more particularly so in this matter as this duty is specifically entrenched in the servitude agreement of the parties. Therefore, maintenance hardships cannot be used to the detriment of another owner. If the duties

imposed become unbearable, avenues provided for by the arbitrator in the award itself which replicate the principles governing reciprocal servitudes as espoused in the previous paragraphs ought to be explored whereby the two parties can find a mutually beneficial solution. There is therefore nothing vague or imprecise about the award contained in para 1.4 as to what the appellant is required to do, and the torrential rains cannot make the award unenforceable either.

The 'Three Rivers' roads opposition

[28] The argument before the high court related to paras 1.1, 1.2, and once again,1.3 of the award in terms of which the appellant was directed to repair, maintain and reinstate River Link, River Loop, and River Road within the stipulated period. The argument advanced is that the closure of these roads was done as the appellant wanted to reinstate the ecological attributes and systems to prevent further environmental degradation and to ensure compliance with para 11.10 of the MMP, which was approved by the MEC: Environmental Affairs in KwaZulu-Natal. Paragraph 11.10 provides that in the event that the Mun-Ya-Wana Conservancy Warden, in conjunction with the relevant landowner, decides certain roads need to be closed for ecological reasons, this will also fall under maintenance. The appellant contends that to comply with the provisions of the MMP, the closure of the 'Three Rivers' roads was imperative. The granting of the orders in paras 1.1, 1.2, and 1.3 are thus, argues the appellant, in conflict with the provisions of the MMP.

[29] This argument is once more raised before us but in a reformulated manner. As an example and to lay this argument to rest, the Mun-Ya-Wana Conservancy was declared a Protected Area on 5 September 2019 in terms of s 23 of NEMPAA. The arbitration hearing took place on 15 March 2020 and the MMP was approved on 5 March 2020. The latter date pre-dates the hearing of the arbitration and the resultant award which was made on 2 April 2020. Therefore, the conclusion I reached regarding the MMP in the previous paragraphs equally applies here. Much reliance was also placed on the Mun-Ya-Wana Conservancy or its Warden, but we are also not told what its/his attitude is to the debates raised by the appellant including the authorisations bemoaned about. Another important consideration to make in this regard is that the respondent is not a member of the Mun-Ya-Wana Conservancy. The respondent was

never consulted before the MMP, heavily relied upon by the appellant, was prepared and allegedly approved as required by s 39(1) of NEMPAA. This section is peremptory and provides that when a management plan for a protected area is being prepared, all the affected parties who have an interest must be consulted.

[30] It is important to add that the arbitrator was alive to the principles that govern the rights of the parties under a reciprocal servitude agreement as set out in the previous paragraphs. This is the reason why he made a finding that there is a servitude over the land and any road closure had to be made jointly with the dominant landowner, which did not happen. Also, the other difficulty with the appellant's argument stems from the fact that the arbitrator, in refusing the defence raised by the appellant that the servitude was subject to a tacit term, remarked: '. . . it is highly improbable that, in a contract based on reciprocity, the one party would have allowed the other to act unilaterally and on the basis of its exclusive assessment of what sustainable environmental management required, in closing the roads.' Therefore, the arguments in this regard cannot salvage the appellant's case at all. The 'wetland' argument raised on this issue was also analysed above and needs no repetition here.

Application in terms of s 19*(b)* of the Superior Courts Act

[31] The application relates to the admission of the affidavit of the appellant's attorney to introduce a notarial deed which was registered on 18 June 2021. The appellant contends that it could not file this document as it was not available at the time of the hearing before the high court. The importance thereof, according to the appellant, is to bring to this Court's attention that a real right has been registered; that it is the final step in the process of declaring the Conservancy as a Nature Reserve, and that the consequence of this registration is that the appellant is obliged henceforth, to protect the environment for the benefit of present and future generations by complying with the provisions of the Constitution, NEMPA, the Protected Area Management Plan (PAMP) and the MMP, failure of which will invite the appellant to perpetrate unlawful acts. The application falls to be summarily dismissed because the registration is irrelevant, does not affect, and did not alter the tenor of the issues that were raised in this appeal including the resultant findings.

[32] The conclusion I reach is that the award meets the requirements of an order that is capable of being enforced.

[33] Consequently, the following order is made:

1 The application in terms of s 19*(b)* of the Superior Courts Act 10 of 2013 is dismissed.

2 The appeal is dismissed with costs.

A M KGOELE

ACTING JUDGE OF APPEAL

APPEARANCES:

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