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A GROWING TREND IN SOURCE APPLICATION BY OUR COURTS ILLUSTRATED BY A RECENT JUDGMENT ON RIGHT OF WAY*

1 Introduction

In this note an attempt will primarily be made to demonstrate how a subtle and, to the present author, unwarrantable shift in methodology regarding the application of source materials has been taking place in our courts over the last few years. This will be done by subjecting a specific recent judgment (*Johl v Nobre* case no. 2384/2010 (WCC)) to scrutiny. In the second place, this judgment will be critically analysed in respect of its application of the fairly settled principles pertaining to the ambit of a right of way.

A brief survey of South African legal sources reveals that the principles of the law of property pertaining to servitudes of right of way would seem to be fairly settled. This is a field of law which is still heavily dependent on Roman-Dutch principles – as is also the case in so many other parts of our modern law of property in a restricted sense (viz the law of things (“*sakereg*”) – a fact which appears from any cursory glance at our modern textbooks dealing with this area of law (see eg Hall *Servitudes* (1973); Van der Merwe *Sakereg* (1989) 457ff; Sonnekus and Neels *Sakereg vonnisbundel* (1994) 526ff; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman’s The law of property* (2006) 321 ff; Mostert *et al The principles of the law of property in South Africa* (2010) 235ff; Van der Merwe “Servitudes” 24 *LAWSA* (2010) 455ff). Most of the “uncertainty” found in branches of the law of things, such as the law of neighbours and the law of servitudes, centres around the application of the principles of reasonableness – as when determining whether a neighbour exercised his right of ownership reasonably or the holder of a servitude acted *civiliter modo* – which in itself does not render the law as such uncertain. (See the discussion of the *civiliter modo* aspect § 3 2 below, which makes it clear that reasonableness in this context has already given rise to “crystallised” rules of law.)

In spite of the solid common-law basis of our law of things, in particular our law of servitudes, the newest reported cases rarely contain references to our institutional writers like Simon van Leeuwen, Hugo Grotius, Johannes Voet or Johannes van der Linden. Since the first publication of law reports in South Africa the writings of these old authors have been quoted, evaluated and approved (or disapproved) in countless reported judgments of our high courts. This

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has resulted in the creation of such a vast corpus of case law on the topic of servitudes – praedial as well as personal – in particular, covering almost all branches of this field, that it has become customary for practitioners, judges and academics to refer almost exclusively to case law as relevant authority, notwithstanding the fact that a Roman-Dutch text could maybe also be found in support of a certain argument or decision. In this sense one could assert that the old authorities have become “positivised” in our case law (in many instances a welcome relief to those – probably the majority – who experience difficulties in finding their way through the old authorities).

A new trend that would appear to become increasingly popular, is the practice of quoting exclusively from modern textbooks, thereby elevating them to primary sources of law. The judgment of the Western Cape High Court in *Johl v Nobre supra* offers a sterling example of this approach.

2 *Johl v Nobre*

2.1 *Facts*

The applicants were the owners of immovable property adjacent to a public road (Gemini Way) in the plush Cape Town suburb of Constantia. This property was situated between the higher situated property of the respondents, namely a company owning the property (second respondent) and its sole director (first respondent), and the public road. In 1983, six years before the applicants acquired their property, a praedial servitude of right of way was registered over the property (servient tenement) in favour of the higher situated property (dominant tenement) which became the property of the second respondent in 2008. In terms of the original registered servitudinal agreement the servitude entitled the owner of the dominant tenement to a right of way. Although a further agreement in respect of the existing servitude was later registered in 1995, such extension was granted merely for purposes of extending the area of the servitude road and not to convey any further entitlements than those attaching to the original simple right of way (paras 1–2 5–6).

Since the extension of the servitude, ownership of the dominant tenement had changed several times before the present owner acquired it. The way in which the dominant owners exercised their servitudinal rights also varied: Originally a gate was placed at the spot where the road leading to the dominant tenement entered the servient property from Gemini Way, effectively blocking the owners of the servient tenement from entering that part of their property from the street. A later owner of the dominant tenement refrained from locking the gate, preferring to erect a gate at the spot where the servitude road entered the servient tenement at the boundary between the two properties. When the respondent became the owner of the dominant property, the gate on the border of the dominant and servient tenements was retained and an additional three steps were taken to beef up the security of the dominant tenement: A permanent armed guard was stationed at that gate, a security camera was erected to monitor movements through it and an electronic driveway gate replaced the original gate at the spot where the servitude road joined Gemini Way. The last-mentioned gate could only be opened and closed by means of a remote-control device (paras 7–8).

Although the first respondent had initially been willing to furnish the applicants with an electronic device to allow them access to their own property, he later had a change of heart and has since then consistently refused to supply such

remote-control device. The elderly applicants maintained that they wished to use the servitude road in order to gain easier access to their house. The reason submitted by the respondents for such refusal was that the entire purpose of erecting the gate would then be frustrated, as the respondents would thereby lose sole control over the gate, thereby compromising the security of the dominant tenement. Their submission was that the applicants' insistence on acquiring an opening device was unreasonable, because enabling them to control the gate in question would compromise the security of the dominant tenement, being the first respondent's family home, which amounted to an unreasonable interference by the applicants with the second respondent's right of way (paras 4 9–11).

Thereupon the owners of the servient tenement brought an application to court in which they prayed for an order in the first place declaring them entitled to gain access to the area covered by the servitude, secondly, declaring them entitled to a remote-control opener, key or other device enabling them to operate the gate from Gemini Way and, thirdly, directing the respondents to provide them with the necessary key or device (para 3).

2 2 *Judgment*

The court granted both the declaratory orders, as well as the mandatory order applied for. In respect of the first type of order, the court declared the applicants to be entitled to gain access to their property from Gemini Way and also to be provided with a remote controlled device to the security gate in question. With regard to the mandatory order, the court ordered the first respondent to provide the applicants with the relevant electronic opening device. An interesting aspect of the judgment lies in the fact that the court expressed its dissatisfaction with the respondents' course of action by issuing a punitive cost order against them (on a scale as between attorney and client) (para 22).

2 3 *Critical evaluation*

2 3 1 Preliminary remarks

The facts of this case do not pose a singularly difficult problem to be resolved in the light of the well-established rules pertaining to servitudes in general and, more specifically, to the praedial servitude of right of way. Attention will now be paid to the application of the relevant legal rules, after which some reflections on the use of legal source materials will follow.

2 3 2 Application of the law to the facts

After an initial statement of the general nature of praedial servitudes, in particular that they pertain to two pieces of land, either adjacent or in close proximity of one another, and are established to convey a perpetual benefit to the owner of the dominant tenement *qua* owner over the servient property, the court emphasised that (a) both the owners of the dominant and servient tenements are entitled to use the servitude area; and (b) the owner of the servient tenement retains "all the *rights* flowing from his or her ownership provided that the exercise of such *rights* may not interfere with the *rights* of the servitude holder" (para 12, my emphasis). Unfortunately, this terminology reflects the idiom of ownership as a so-called "bundle of rights," capable of being split up into various rights, which is a fundamentally erroneous depiction of the nature of ownership. (See eg Van der Merwe *Sakereg* (1989) 174 who warns against depicting ownership as "'n bondeltjie regte wat 'n eienaar stuksgewys van sy eiendom kan afsplits".

See also Mostert *et al* 93.) Meer J was probably influenced in this respect by one of the cases he quoted as authority, in which it was said that “the rights of the owner of the servient property must not be unduly burdened by the servitude” (per Griesel J in *Roeloffze v Bothma* 2007 2 SA 257 (C) 266G). The above-quoted *dicta* could be technically corrected by simply replacing the term “rights” with the term “entitlements”. Meer J also referred to “rights” instead of “entitlements” in para 14 where he stated that “the dominant owner has no right to change the subject matter of the servitude”. Interestingly, however, he nearly succeeded in applying the correct legal jargon in para 16, where it is stated that “the dominant owner should have no *entitlements* other than those necessary to exercise his *rights* as dominant owner, subject to specific further *entitlements* agreed to by the parties” (my emphasis). The only error in this statement is to be found in the reference to “*rights* as dominant owner”. What Meer J referred to here, is simply the dominant owner’s “right” (singular), namely, his servitude of right of way (which is a *ius in re aliena*).

In the rest of the judgment under the headings of “Legal principles” (paras 13–16) and “Finding” (paras 17–20) the apparent conflicting entitlements of the applicant as owner of the servient tenement and the respondents as holders of the praedial servitude in question are examined. The essential question that had to be answered was whether the granting of a mere right of way entailed such additional entitlements as to enable the servitude holders to secure their property in the most effective way, which entailed a greater restriction than usual on the owner’s entitlement to use his property. Meer J commenced from the assumption that if there had been a real conflict of interest between the parties, the interests of the servitude holder would have precedence over those of the owner of the servient property, subject to the principle of reasonableness or, as it is normally referred to in the law of servitudes, the principle of “*civiliter modo*”. This well-known principle was clearly enunciated, with reference to some of the old authorities and case law, in the leading judgment of *Kakamas Bestuursraad v Louw* 1960 2 SA 202 (A) 217Dff in which the essence of the exercise of a servitude holder’s entitlements *civiliter modo* was found to be use that caused the owner of the servient tenement the least damage or inconvenience. Although Meer J referred to the *Louw* case in general, he chose to quote from the judgment of a court of lower status, namely, the Cape Provincial Division in *Rabie v De Wit* 1946 CPD 346 351 in which the same explanation of the *civiliter modo* requirement had been afforded (quoting as further authority *Nolan v Barnard* 1908 TS 142 152–154; *Texas Co (SA) Ltd v Cape Town Municipality* 1926 AD 467 475; *Stuttaford v Kruger* 1967 2 SA 166 (C) 172F; and *Brink v Van Niekerk* 1986 3 SA 428 (T) 434). It can be concluded that the judge correctly reflected a well-established construction of the *civiliter modo* requirement.

The meaning ascribed to the Latin term “*civiliter modo*” in our modern South African textbooks calls, in parenthesis, for a few remarks of a philological nature. It would appear that most authors regard the two words as adverbs, where “*modo*” qualifies the conduct of the servitude holder and “*civiliter*”, in turn, qualifies “*modo*”. Thus, for example, it will typically be asserted that a servitude holder who acts reasonably, acts “in a civilised (ie *civiliter*) manner (ie *modo*)” (Mostert *al* 245. The same trend appears in Badenhorst, Pienaar and Mostert 331 who remark about *civiliter modo* that it “means that the servitude must be exercised in a proper and careful manner”; Sonnekus and Neels 550 who translate conduct *civiliter modo* as “op ’n beskaafde wyse”; and Van der Merwe 466 who

interprets the term as “op ’n beskaafde, bedagsame . . . wyse”.) However, in Hiemstra and Gonin *Drietalige regswoordeboek/Trilingual legal dictionary* (1986) *sv civiliter modo* (D 8 1 9), the following entry reveals the incorrectness of these translations/interpretations: “Ellipsis for **dum modo civiliter servitutum exerceat**: *Provided that he exercise the servitude with due regard to the other party.*” According to the authoritative *Latin dictionary* of Lewis and Short (1962) *sv dum* (I B 2 a (β)) the adverb “*dum*” is sometimes combined “[w]ith an emphatic modo, and often in one word, dummodo” to mean “*so long as, if so be that, provided that, if only,*” which explains Hiemstra and Gonin’s interpretation. It is therefore clear that the word “*modo*” should not be translated as “manner”/“*wyse*” at all. (Its primary meaning is, in any event, “only”, “merely”, or “but” (Lewis and Short *sv modo*), which accords with the above-mentioned explanation concerning “*dummodo*”). In this respect the description of *civiliter modo* by Hall 3 would seem to be closer to the mark, where he maintains “that the dominant owner may not make the position of the servient owner more burdensome than is necessary for the proper exercise of his right”. However, the fact that the popular erroneous translation acts as a handy shorthand way to express the gist of the (longer) Latin rule, will probably guarantee its continued application. (There are many analogies to be found in law, as evidenced by the adage “*communis error facit ius*”(a prevailing misconception passes into valid (accepted) law).

From the interpretation of the *civiliter modo* requirement as the exercise of a servituted right causing the owner of the servient tenement the least damage or inconvenience, the court came to the conclusion, on the strength of 24 *LAWSA* para 544, that the servitude holder “may not increase the burden on the servient property beyond the express or implied terms of the servitude” (para 14). Meer J sketched the practical implication of this rule for the case at hand as follows:

“It is accepted that he has the right to do what is requisite for the enjoyment of his servitude, but this right is subject to the condition that he imposes no greater additional burden upon the servient property than is absolutely necessary.”

For this statement of the law the court refers to *London and SA Exploration Company v Rouliot* (1891) 8 SC 75 97, which is perfectly relevant as an authoritative statement of the law in this regard.

The following statement made by the court simply concerned the logical impact of the application of the aforementioned rule, which is widely acknowledged in the existing case law quoted by the court (*Steyn v Zeeman* (1903) 20 SC 221 224; *Nolan v Barnard* 152; *Texas Co (SA) Ltd v Cape Town Municipality* 475; *Kakamas Bestuursraad v Louw supra*; *Van Rensburg v Taute* 1975 1 SA 279 (A); and *De Witt v Knierim* 1991 2 SA 371 (C) 385):

“The exercise of entitlements of the dominant owner cannot prevent the servient owner from the normal exploitation of his property. The owner of the servient property is entitled to use his land in the normal manner in so far as such is not in conflict with the entitlements of the holder of the servitude” (para 15).

From this statement it is clear that it is of paramount importance that certainty should exist as to the precise nature and ambit of the servitude holder’s entitlements, which aspect the court then proceeded to address (para 16). It was pointed out that a court will as a matter of course seek to determine the parties’ intention by having recourse to the terms of the registered servituted agreement: “The words in the agreement must be read in context and in the light of the surrounding circumstances prevailing at the time of the creation of the servitude” (with

reference to *De Witt v Knierim* 385C–E). The court then pointed out that the servitude agreement should be interpreted as narrowly as possible, which is a logical consequence of the established rule of Roman-Dutch law that a rebuttable presumption exists that the ownership of a thing is unencumbered and free from servitudes (Voet *Commentarius* 8 2 2 and sources quoted in 24 *LAWSA* para 543 fn 1). It was finally pointed out (on the strength of *De Kock v Hänel* 1999 1 SA 994 (C) 997E–998B) that “where the wording of the servitude is clear, it must be given the ordinary grammatical meaning and in such circumstances the Court will not have recourse to the surrounding circumstances”.

The court found no difficulty in applying these rules pertaining to praedial servitudes to the facts at hand in favour of the applicants: It held that the servitude in question was a “servitude of right of way” entitling the dominant owner a right of way across the property of the servient owner – no more, no less. Therefore, the assertion by the respondents that they were entitled to more than a simple right of way, namely the entitlement to exclude the applicants exit from and entry to the servitude area (to ensure them the utmost safety in respect of their property – which the court found to be irrelevant to the issues of the case (para 19)), amounts to the addition of a servitudal entitlement exceeding the terms of their registered agreement (para 17). This, as such, could be viewed as an exercise of their entitlements in conflict with the *civiliter modo* requirement, for they had been granted no more than a “reasonable enjoyment of the right of way” (para 18). In finally substantiating its order in favour of the applicants, the court declared the applicants’ request to be allowed the ordinary use and enjoyment of their own property as the only reasonable course of action that they could embark upon (para 20). It is suggested that they were probably even entitled to request the removal of the gate in question. However, their decision in favour of the lesser drastic option of merely requesting the respondents to issue them with an opening device, was probably the wiser course of action in that it avoided the other parties from further exploiting the *civiliter modo* requirement.

2 3 3 The court’s application of source materials

Meer J (paras 12 14 16) relied heavily on the title “Servitudes” in *LAWSA* as a primary source of reference for the following propositions: (a) that a praedial servitude pertains to two pieces of land that are in close proximity or next to each other (para 540); (b) that such servitude is established in respect of the servient property in perpetuity, irrespective of the identity of the owner (para 545); (c) that the holder of a servitude may not increase the burden on the servient property beyond the express or implied terms of the servitude (para 544); and (d) that a servitude should be interpreted as narrowly as possible to avoid that the dominant owner may be awarded more entitlements than those necessary for the exercise of the servitude (para 543). In the same fashion, the court (para 13) refers to the student textbook of Van der Walt and Pienaar *Introduction to the law of property* (2004) 274 as authority to assert (e) that the relationship between the owners of the dominant and servient properties is governed by the principle of reasonableness. This trend is finally discernable in the judge’s reliance (para 14) on the practitioner’s textbook of Hall *Servitudes* 133 for asserting (f) that the owner of the dominant land cannot change the subject matter of the servitude.

This method of applying source materials – *in casu* textbooks – would appear to be quite widespread nowadays, even in the ranks of judges of the Supreme Court of Appeal. Two recent examples will suffice in this regard: In *Crots v*

Pretorius 2010 6 SA 512 (SCA) Snyders JA relied heavily on CG van der Merwe's title "Things" 27 *LAWSA* in deciding that *dolus eventualis* on the part of a defendant was an acceptable form of intent for purposes of application of the *condictio furtiva* (for criticism of that judgment see Scott "Die *condictio furtiva*: gepaste remedie of *deus ex machina*" 2011 *TSAR* 383). In a recent judgment of the Supreme Court of Appeal, *Grigor v The State* (607/11) [2012] ZASCA 95 (1 June 2012), Tshiqi JA came to a decision on a crucial point of law concerning the ambit of a plea of private defence on the basis of a single secondary source of reference, namely the student textbook of Snyman *Criminal law* (2008), entirely failing to mention any case law dealing with the relevant issue (of which there is no dearth).

In the light of this tendency, it may be advisable to repose briefly to call in mind what the accepted formal sources of reference ("*kenbronne*") of our law are. When consulting leading academic references in this regard (for this issue relates to legal dogma) such as Hahlo and Kahn *The Union of South Africa – The development of its laws and constitution* (1960) 28–41, Hahlo and Kahn *The South African legal system and its background* (1973) Chs V–IX, Hosten *et al Introduction to South African law and legal theory* (1995) 378ff and Du Bois in Du Bois (ed) *Wille's principles of South African law* (2007) 35, it would appear that there is a great deal of unanimity as to what the formal sources of law are, namely, legislation (including the Constitution, 1996 as the most important in this category), works of the old institutional writers on Roman-Dutch law ("the old authorities"), custom and, last but not least, case law.

As regards legislation, no comment is necessary to explain the fact that it is probably the most important source of law in any legal system (if one were theoretically able to accord higher or lesser importance to these sources). Without digressing further on the matter, it can safely be stated that, in terms of modern practice, it is not normal to refer to the old authorities. This is probably to be explained on the basis that our earlier judges did just that and in the process encapsulated most of the wisdoms of the institutional writers in their judgments, so that one could assert that case law has in fact become the mirror reflecting the most important Roman-Dutch rules. Although, theoretically speaking, custom can be regarded as an important substratum of our Roman-Dutch common law, it rarely rears its head in modern legal practice. Judgments like those in *Van Breda v Jacobs* 1921 AD 330, *Catering Equipment Centre v Friesland Hotel* 1967 4 SA 336 (O) and *Golden Cape Fruits (Pty) Ltd v Fotoplate (Pty) Ltd* 1973 2 SA 642 (C), where the court had to determine whether a specific custom constituted a legal rule, are few and far between. Finally, an evaluation of case law – particularly in the sphere of private law – would most likely warrant a conclusion that it is the most important source of law after legislation. The fact that South African courts are bound to follow the judgments of our high courts in terms of an intricate set of rules of English origin underlying the so-called "*stare decisis* doctrine" or "system of precedent", attests to this high regard of case law as a primary legal source. The gist of this doctrine is that such court decisions are binding and the rules contained in the *rationes decidendi* contained in them can only be varied or ignored in terms of strict rules (*inter alia* on the ground that a previous decision of the same division was erroneous). It is finally to be observed that legal textbooks are not usually contained in the list of primary legal sources (although Du Bois *Wille's principles of South African law* 112–113 would appear to regard legal scholarship as a contemporary source of law,

mainly in view of the numerous references to such materials in modern times; however, he does not in the least suggest that modern academic writing can supplant clear authority reflected in the writings of the Roman-Dutch authors or case law).

On the subject of textbooks as source material, it is well worth consulting English writers on jurisprudence and introductory courses (seeing that our system of *stare decisis* is of English origin). In *A first book of English law* (1953) 170ff Phillips furnishes a useful overview of the salient aspects of the system of precedent. He points out that English courts follow the general rule that textbooks are not treated as authorities and on the authority of Lord Goddard CJ in *Bastin v Davies* [1950] 2 KB 579, he states:

“[A]n English court would never hesitate to disagree with a statement in a textbook, however authoritative, or however long it had stood, if it thought right to do so. Textbooks, are, of course, looked at by judges and practitioners, but this is for the purpose of acquiring personal information and ideas for argument, and for finding *references to statutes and reported cases*” (170, my italics).

Phillips 170ff also teaches that statements contained in textbooks should not as a general rule be quoted or in any sense be relied on by a court on the authority of their authors. He explains that arguments founded on statements contained in textbooks (to which one could certainly add articles in legal periodicals and doctoral or master’s theses) differ from arguments based on statute or precedent, stand or fall by their intrinsic merits. This does not, however, mean that counsel are not allowed to rely on statements by textbook-writers as part of their arguments, or that judges are absolutely precluded from accepting such textbook material as a correct statement of the law. (Phillips refers to case law where that in fact happened.) This puts the use of textbooks or similar material in the correct perspective: textbooks can thus definitely be referred to in a judgment, but then strictly as a source of *argument*, not as a primary source of a legal *rule* or *principle*. One can thus conclude that a healthy approach in this context would be two-fold: first, the utilising of relevant textbooks by practitioners to acquire information making it possible to uncover relevant primary sources; as well as an application of such material for the same reason by judges, who may subsequently decide to refer to it as a source or argument, but not as a *primary source* of law, *stricto sensu*. (A prime example of the latter is to be found in the judgment of Brand JA in *Butters v Mncora* 2012 4 SA 1 (SCA) 5I–6F.) In passing it may be observed that when textbooks are consulted by practitioners and judges, it is self-evident that those books should at least be the latest editions available. The reference *in casu* to the student text by Van der Walt and Pienaar is unfortunately to the fourth edition published in 2002, which was already followed by a fifth edition published in 2006, preceding the judgment date by about six years. Recurrent academic lamentation of the fact that (some) judges rarely or never refer to academic writing should not be interpreted as a plea for academic literature to be elevated to the status of a primary source of law (see eg Sonnekus “Die notariële verband, ’n bekostigbare figuur teen heimlike sekerheidstelling vir ’n nuwe Suid-Afrika?” 1993 *TSAR* 110 115 fn 46; and cf Sonnekus “Vloerplan-ooreenkomste, *actio ad exhibendum* en estoppel” 2012 *TSAR* 172 174ff). To my mind, the gist of such blame has an exclusive bearing on the argumentative value of academic writing and not on its status as a primary source of law, and is thus reconcilable with my opinion expressed above.

Should the suggested approach not be observed and academic writing be elevated to the status of a primary legal source, it could ultimately lead to the law

falling into total disarray. If our judges are to continue applying academic writing in this sense, ranging from student textbooks to authoritative statements of the law by eminent authors in *LAWSA*, the implication is unavoidable that genuine primary source materials like decided judgments may not only be ignored, but even contradicted. This would in fact be arriving at a stage where each judge could choose the way he or she wishes to decide – a tendency sternly warned against by Middleton JA in the Canadian case of *Sweney v The Department of Highways* [1933] OWN 783 783–784:

“But, in my view, liberty to decide each case as you think right, without regard to principles laid down in previous similar cases, would only result in a completely uncertain law in which no citizen would know his rights or liabilities until he knew before what Judge his case would come and could guess what view that judge would take on a consideration of the matter, without any regard to previous decisions.”

It is suggested that the minority judgment of Froneman J in the recent Constitutional Court judgment of *F v Minister v Safety and Security* 2012 1 SA 536 (CC) provides a good example of judicial disregard for clear and binding precedent in favour of a certain academic trend represented in textbooks, articles in legal journals and judicial opinions expressed in courts of lower standing (where he held the state to be directly liable in delict for wrongs committed by a policeman, notwithstanding an authoritative judgment of his own court that the principles of vicarious liability are applicable in such cases). This is precisely what Middleton J’s above-mentioned warning is levelled against: if judges start behaving like scholars of critical legal studies (which represents an inherent questioning of existing legal rules and dogma) instead of acting as applicators of rules and principles duly established in terms of a time-honoured and legally established methodology of finding the correct solution, our law would indeed fall into a state of total disarray (see Brand JA’s clear warning that an individual judge’s idiosyncrasies should not be allowed to influence his or her judgment in *Potgieter v Potgieter* NO 2012 1 SA 637 (SCA) 651C–F; see further *Bloemfontein Town Council v Richter* 1933 AD 195 232; Scott “Staatsaanspreeklikheid vir opsetsdelikte van die polisie – die Hoogste Hof van Appèl kry nogmaals bloedneus” 2012 *TSAR* 541 554–556 and authorities quoted). This threat is even more real in present-day South Africa where the traditional criteria for appointment to the bench, namely legal brilliance reflected by success in practice and prolonged experience, have been aggressively extended to include criteria such as race and gender (where some appointees have virtually no experience of legal practice in the high court).

The eminent authors, Hahlo and Kahn, provide meaningful insight into the status of academic writing in South African courts (*The South African legal system and its background* 324–325). They draw attention to the fact that, similar to the position in England, “[t]he views of modern legal writers . . . are in no ways binding on the South African Bench”, although they concede that “though they are not authoritative, the views of legal writers – be they judges in an extra-mural capacity, teachers of law or practitioners – may prove of considerable persuasive force for a judge having to enunciate a rule of law”. They also point out that it is particularly in cases where there is a lack of old authority or modern case law that leading textbooks have in fact exerted a meaningful influence (as in the leading case of *Sachs v Dönges* NO 1950 2 SA 265 (A)). However, in the normal course of events it would seem that our law accords with English law in respect of the status of academic writing – namely, that such materials are not to be

treated as formal sources of law – a conclusion drawn as follows by Hahlo and Kahn: “But in the final analysis, for the judge a treatise or disquisition is only a repertory of argument that, however eminent the author – be he *Mackeurtan on Sale* or *Mars on Insolvency* – may fail to convince.” The eminent English author, Glanville Williams (*Learning the law* (1957) 88, italics supplied) provides a further interesting perspective in this respect, not sparing academic writers in the process:

“It should be added that textbooks stand in a very different position from decisions of the courts. If English lawyers have an undue veneration for the pronouncement of judges, they have a healthy irreverence for the views of text writers. Propositions in textbooks are always read by lawyers with a critical eye upon the authorities cited for them. *The reason is that a writer is frequently carried away by his desire to establish a particular doctrine, and he may then state the doctrine with more exuberance than the precedents justify.*”

Hahlo and Kahn 325 furthermore draw attention to the fact that the writings of eminent jurists enjoy recognition as a formal source of public international law, but explains that this is due to the measures contained in article 38(1)(d) of the Statute of the International Court of Justice which emphatically identifies “the teachings of the most highly qualified publicists as subsidiary means for the determination of rules of law”: see in particular Dugard *International law – A South African perspective* (2005) 27.

3 A suggestion as to how primary sources could have been applied in *Johl v Nobre*

In view of the aforementioned, it is proposed that the following source materials would have been more aptly quoted as primary references for the following statements by the court of the applicable law:

- (a) A praedial servitude pertains to two pieces of land that are in close proximity or next to each other (for which Van der Merwe 27 *LAWSA* para 540 was quoted in para 12 as a reference): At the outset it is quite clear that the court’s reference to *LAWSA* does not support the statement at all, for it does not even remotely touch upon the requirement of (i) two tenements belonging to different owners; and (ii) that of *vicinitas*. In respect of (i) Van der Merwe refers in para 546 (fn 5) to a plethora of relevant formal sources: five common-law texts (including texts from the *Digest* of Justinian to Grotius, Voet, Van Leeuwen and Huber) and 24 judgments (ranging from 1830 to 1992). It is suggested that a single reference to one of the Roman-Dutch sources, eg Voet *Commentarius ad Pandectas* 8 1 2 which explains how dominant and servient tenements are indispensable requirements for a praedial servitude (see Gane’s translation under the title *The select Voet* Vol 2 (1955) 433–434), or even a case reference would have been more apt, for example the judgment of Joubert JA in *Malan v Ardconnel Investments (Pty) Ltd* 1988 2 SA 12 37C–D. As regards the *vicinitas* requirement, the correct reference to *LAWSA* would have been para 547 (fn 1), in which Van der Merwe quotes three common-law texts (from the *Digest* to Voet and Huber), two fairly recent cases and three academic sources). A reference to Voet *Commentarius ad Pandectas* 8 4 19 (see Gane’s translation Vol 2 505–506) where that institutional writer directly addresses the issue of how far all servitudes demand adjacency of tenements would have been spot-on, whereas a reference to *Briers v Wilson* 1952 3 SA 423 (C) 433E–434D would even have sufficed.

- (b) A praedial servitude is established in respect of the servient property in perpetuity, irrespective of the identity of the owner (for which 27 *LAWSA* para 545 was quoted in para 12): The only primary source quoted by Van der Merwe (fn 1) for this proposition, is *Dreyer v Ireland* (1874) Buch 193 199 which merely mentions the fact that real servitudes are “*jura quibus praedia praediis serviunt*”, without mentioning the element of perpetuity. It is suggested that a far better reference for the proposition in question would have been the more recent and well-known judgment of Nestadt J in *Lorentz v Melle* 1978 3 SA 1044 (T) 1049E–F, which is much more to the point in that it explains that “the servitude is incidental to and passes with the ownership of the dominant land, to which it is inseparably attached, while it burdens the servient land irrespective of who the owner is”.
- (c) A servitude holder may not increase the burden on the servient property beyond the express or implied terms of the servitude (for which the court referred in para 14 to 27 *LAWSA* para 544): There Van der Merwe (fn 4) refers to a multitude of sources in this regard, namely, Roman and Roman-Dutch authorities (ranging from the *Digest* to Van Leeuwen, Grotius, Voet, Van der Keessel and even Glück (who was strictly speaking no Roman-Dutch author, but a member of the German *Usus modernus Pandectarum*)), case law (no less than 24 references) and academic writing (seven references). Van der Keessel *Praelectiones* 2 35 6 (see the admirable Afrikaans translation of Van Warmelo, Coertze, Gonin and Pont *Voorlesinge oor die hedendaagse reg na aanleiding van De Groot se “Inleiding tot de Hollandse Rechtsgeleerdheid”* Vol 3 (1964) 151) states and explains the rule in question lucidly and would have served admirably as a primary reference. In respect of case law, it is suggested that *Rubidge v McCabe & Sons* 1913 AD 433 441, *Kakamas Bestuursraad v Louw* 1960 2 SA 202 (A) 217Dff and *Pieterse v Du Plessis* 1972 2 SA 597 (A) 599G–H would have sufficed.
- (d) A servitude must be interpreted as narrowly as possible to avoid the dominant owner being awarded more entitlements than those necessary for the exercise of the servitude (for which reference was made in para 16 to 27 *LAWSA* para 543): In that paragraph (fn 2) Van der Merwe again refers to numerous sources, namely, three common-law texts (from the *Digest*, Huber and Voet) and no less than 16 cases. To my mind his references in this respect do not lend any support to the rule in issue (demonstrating the danger of reliance on secondary sources). It is suggested that a reference to the *Praelectiones* of Van der Keessel 2 35 11 (Van Warmelo *et al* Vol 3 151) would have been accurate in this respect. Even references to the judgments in *Pieterse v Du Plessis* 599H and *Van Rensburg v Taute* 1975 1 SA 279 (A) 301H would have sufficed.
- (e) The relationship between the owners of the dominant and servient properties is governed by the principle of reasonableness: (in respect of which the court referred in para 13 to Van der Walt and Pienaar *Introduction to the Law of Property* (4 ed) 274; the court’s unfortunate reference to the previous edition of this work is, fortuitously, not of any account, as the exposition in the latest (fifth) edition of 2006 (243) has remained unaltered). A reference to Van Leeuwen *Het Rooms-Hollands Recht* 2 21 6 covers this aspect well (see Sir John Kotzé’s translation *Simon van Leeuwen’s commentaries on Roman-Dutch Law* (1921) Vol 1 294–295) and would have

served as a good point of reference. Alternatively, references to *Kakamas Bestuursraad v Louw* 217ff 231A and *Brink v Van Niekerk* 1986 3 SA 428 (T) 434C–I would have sufficed. In parenthesis Meer J augmented his references to sources by referring to the *Kakamas Bestuursraad* and *Brink* judgments (both mentioned as sources in Van der Walt and Pienaar), as well as to *Nolan v Barnard* 1908 TS 142 152–154 and *Texas Co (SA) Ltd v Cape Town Municipality* 1926 AD 476 475. (It is interesting that Van Zyl J also referred to modern South African textbooks – viz Van der Merwe *Sakereg* and Hall and Kellaway *Servitudes* – in his judgment in the *Brink* case, but in addition quoted primary common-law texts and case law, even referring the reader to specific footnotes in the textbooks in which additional “bewysplase” (primary authorities in the strict sense) could be consulted. This provides a good example of a balanced approach to the use of modern academic writing. See also my earlier reference under this heading to the same methodology followed by Brand JA in *Butters v Mncora* 5I–6F.)

- (f) The owner of the dominant land cannot change the subject-matter of the servitude (for which proposition Meer J referred in para 14 to the third edition of Hall *Servitudes* 133 which was published nearly forty years ago): The case law referred to by Hall for this proposition includes the judgments in *London and SA Exploration Company v Rouliot* (1891) 8 SC 75 97 and *Van Heerden v Coetzee* 1914 AD 167 172–173. Those primary sources eminently bear out the proposition in question and would have sufficed as primary references. Meer J did in fact augment his reference to Hall’s work by referring additionally to the *Rouliot* case, which source had probably been detected by consulting Hall’s textbook.

A final remark pertaining to the nature of the academic writing referred to by the court may be apt in this context: Although professor WA Joubert’s legacy to the South African legal fraternity, the encyclopaedic *Law of South Africa*, is without any doubt an extremely valuable tool to enable practitioners, judges and academic researchers to find their way through the law and to locate primary sources, it is *qua* status no more than a textbook, notwithstanding its object to provide a mere statement of the law, as well as the fact that the authors of most titles are respected academics, practitioners and judges. However, a glimpse over the law reports of recent years readily reveals that this work has definitely attained a “higher” status, if one were to record how often it is quoted as a main source of reference (see eg the following random selection of judgments reported since January 2012 in the *South African Law Reports: Mthimunya v RCP Media* 2012 1 SA 199 (T) 202J; *Resnekov v Cohen* 2012 1 SA 314 (WCC) 316 fn 1; *Scholtz v Scholtz* 2012 1 SA 382 (WCC) 385E; and *Gainsford v Tiffski Property Investments* 2012 3 SA 35 (SCA) 48 fn 22). It has already been remarked earlier that Van der Walt and Pienaar’s property-law textbook is primarily to be regarded as a student textbook. (The entire section dealing with servitudes span a mere 22 pages in the latest edition of this work.) Finally, judge CG Hall’s work on servitudes is more in the nature of a practitioner’s guide, but this does not alter its position as a mere textbook. It is interesting what Phillips (171) has to say in this regard (referring to the old English case of *Johnes v Johnes* (1814) 3 Dow 1 15: “It has been well said that ‘our judges are our jurists’. But the fact that an author was, or became, a judge does not lend authority to his literary utterances.”

4 Conclusion

In view of the unremarkable facts of *Joel v Nobre* and the normally applicable legal rules, it is one of those cases – so frequently reported in present times – which should never have made its way to the high court. It is suggested that a cursory glance into the secondary literature should immediately have made it clear that the applicants' conduct had from the outset been in conformity with their rights and obligations in terms of the established rules pertaining to praedial servitudes, particularly those in respect of the so-called *civiliter modo* requirement. This could easily have been verified by reading one or two of the cases referred to in such literature (eg the old Natal judgment in *Estcourt Corporation v Chadwick* 242ff, the facts of which displays notable similarities with the present case and in which the court came to a similar conclusion). This is indeed borne out by the fact that the court awarded the successful applicants a punitive cost order.

In commenting on the court's application of source materials, it has been pointed out that even the original Roman-Dutch sources can still serve as fitting points of reference. Has the time not arrived that no effort should be spared to substantiate general propositions and specialised rules from the field of the law of property that have their origins in our Roman-Dutch common law, by means of references to the works of our great institutional writers (in conjunction with references to the applicable case law)? In this way the strong civil law foundation of this important branch of our law will receive far better recognition than by the fairly wide-spread modern trend of falling back on modern textbook materials. Such plea does not necessarily call for renewed research in the yellow pages of our "musty tomes", since the great majority of our old authorities (eg Van Leeuwen, Grotius, J and P Voet, Groenewegen, Huber, Arntzenius, Brouwer, Van der Keessel and Van der Linden, to mention but a few) have already been translated into English and Afrikaans. Most of the available translations are of an exceptional quality and could stand on their own as a true reflection of the original text, or they could be utilised by those, still eager to consult the originals, as keys in translating those Latin or Dutch sources. This suggestion should not in the least be interpreted as a renewed call for the continuation of the so-called "purism debate" (to borrow the term from the recent monograph by Van der Walt *The law of neighbours* (2012)), the crux of which entailed weighing up Roman-Dutch rules against rules of English common-law origin and then deciding which to apply (see in particular Van der Walt 1–5 17–24).

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