

SOUTH AFRICA / JUDGMENT

Langebosch (Pty) Ltd v Lubbe and Another (A221/2019) [2019] ZAWCHC 169 (10 December 2019)

[2019] ZAWCHC 169

COURT

Western Cape High Court, Cape Town

BEFORE

O L Rogers, C Fortuin

CASE / FILE NUMBER

A221/2019

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THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION)

JUDGMENT

Case No: A221/2019 In the matter between LANGEBOSCH (PTY) LTD APPELLANT and DEWALD LUBBE FIRST RESPONDENT HANLIE LUBBE SECOND RESPONDENT

Coram: Fortuin & Rogers JJ

Heard: 8 November 2019

Delivered: 10 December 2019

Rogers J (Fortuin J concurring)

- [1] At issue in this appeal is whether a fence which the respondents, as servient owners, have erected, and intend to extend, along the boundary of a servitude road is an unlawful interference with the rights of the appellant as dominant owner. An interdict which the appellant sought in the court below was dismissed by the magistrate, the parties to pay their own costs.
- [2] The servient and dominant properties are farms. A previously unregistered right of way was superseded by a notarial deed registered on 21 February 2014. This deed was executed by the predecessors in title of the current servient and dominant owners. The servitude road as registered runs along the southern boundary of the servient property. It is defined as a road three metres wide. The deed includes the following terms and conditions:

- (a) Clause 1: The dominant owner is to improve and maintain the road at its own cost.
- (b) Clause 2: The dominant owner must take all reasonable steps to prevent soil erosion which might be caused by the presence of the road and must ensure that the road is thoroughly drained.
- (c) Clause 3: The dominant owner is granted access to the servient property in respect of itself, its guests, its contractors and their employees, together with all necessary vehicles and equipment, for the purpose of improving and maintaining the road. ('Die Heersende Eienaar het toegang tot die Dienende Eiendom ten opsigte van haarself, haar gaste, haar kontrakteurs en hulle of haar

werknemers tesame met all nodige voertuie en implemente met die doel om die voormelde pad te verbeter en in stand te hou.')

- (d) Clause 6: The dominant owner must ensure that all users of the road take care to close, and where necessary lock, any gates opened.
- [3] The servitude road is about 2,5 km in length. There is already a fence running along the southern boundary of the servitude road. The fence which the respondents have erected runs just short of the northern (inner) boundary of the servitude road, leaving a width of 3,1 to 3,6 m between the southern and northern fences. When the application was launched in February 2019, two sections of northern fencing had been erected, each about 250 m in length, from the beginning and end respectively of the road. It follows that about 2 km has not yet been fenced on the northern side (or had not been when the application was launched).
- [4] The appellant advanced two main contentions in the court below and before us: (a) that the fence precludes vehicles from pulling over to allow oncoming traffic to pass; (b) that the fence interferes with its right to enter on the servient property for purposes of improving and maintaining the road.
- [5] As to the first contention, I accept, as did the court below, that the fence makes it impossible for vehicles travelling in opposite directions to use the road simultaneously. I do not accept that this infringes the appellant's rights. The servitude is defined as a road three metres wide along its entire length, no more, no less. It would have been obvious to those who negotiated the servitude that a road three metres wide would not allow opposing traffic to use the road simultaneously but they made no allowance for this. They also made no allowance for agricultural vehicles which might be wider than 3 m. If the appellant, for agricultural purposes, needs a road that is wider than 3 m (there is no evidence that it does), it will need to apply for a way of necessity.
- [6] A servitude must be interpreted in such a way as to impose the least burden on the servient property. It might be modestly inconvenient for the dominant owner that the road cannot simultaneously be used by opposing traffic but it is by no means impossible for the servitude to be exercised meaningfully without this right. In order to find that the dominant owner is

entitled to layby spaces one would need to find that such a right is a tacit term of the servitude. The implication of such a term is not necessary to make the servitude practicably usable.

- [7] On the basis that clause 3 refers to 'guests' ('gaste'), the appellant's counsel argued that the right to go onto the servient property in terms of that clause must include the right of users to pull over onto the servient property to allow oncoming traffic to pass, since guests would not be involved in improving and maintaining the road.
- [8] I reject that argument. The purpose of entry, as stated in the concluding portion of clause 3, applies to all the users specified in the preceding portion. If other purposes were intended, such other purposes would have been stated; the servient owner would hardly have agreed to an unqualified right on the part of guests to enter upon the servient property. The appellant's argument is also contrary to the syntax of the clause. There is a simple comma between 'gaste' and 'haar kontrakteurs', showing that they are part of the same list qualified by the concluding portion. The word 'gaste' might be anomalous in this list but is perhaps merely an unhappy translation of the more technical English 'invitee',

which would be less anomalous.

- [9] As to the second contention, the appellant delivered affidavits by two road contractors. Mr Jacobus Labuschagne said that he is familiar with the servitude road because he has used it when doing construction on the appellant's property. It is a sand road with some hard outcrops here and there. To improve and maintain the road it is necessary to use vehicles like bulldozers, steamrollers and lorries.
- [10] The method Labuschagne recommends is the following. A lorry, typically 2,3 m to 2,5 m wide, drops off sand heaps in intervals along the road. When its load has been fully discharged, the lorry turns around, driving back past, but not over, the sand heaps. A bulldozer, typically 2,6 m wide and 8 m long, then spreads the sand heaps out evenly across the road surface. Initially the bulldozer has to move past, not over the sand heaps, since sand is cut from each heap gradually and spread with the blade. The lorry and bulldozer need space to navigate past sand heaps and to pass each other in opposite directions. Finally the steamroller compacts the surface. It will often have to do move forwards and backwards while other construction vehicles are busy on the road.
- [11] In Labuschagne's opinion, it will not be possible cost effectively to improve, repair or maintain the road in a fenced area having a width of only 3,1 m to 3,6 m. To the extent that it were theoretically possible, it would involve massive cost. He considers that the enclosed width should be not less than 4,5 m.
- [12] The other expert, Jacobus Groenewald, differed to some extent from Labuschagne, whose affidavit he had read. Groenewald thought that Labuschagne's method was more suitable for a hard surface and less appropriate for a sandy one. He was worried that a

lorry would get stuck in the sand if it drove off the road in order to get around the sand heaps.

- [13] In his opinion it would be better for the lorry to drive with a full load to a certain point, turn around, and drop off sand heaps as it drives back to the starting point. He envisages that this would be done in stretches of 250-300 m and thus recommends that turning areas be created at such intervals. After levelling such a stretch of road, the bulldozer would wait in the turning area while the lorry offloads sand on the next stretch. Standard practice would be to rehabilitate the turning areas at the end of the job.
- [14] He states categorically that his construction company would not accept an assignment to do any construction work on this road if it were fenced at a width ranging from 3,1 m to 3,6 m. In his experience in Still Bay, it is not the norm to fence a sand road as narrowly as these widths.
- [15] The respondents did not present countervailing expert evidence. The magistrate, who inspected the servitude road, found that it would be impossible to improve and maintain the road if it were fenced in the way proposed. That finding was correct. The magistrate nevertheless refused to grant the interdict because he considered it to be within the servient owners' right to fence the servitude road so as to prevent their animals from wandering off the property or causing damage to vehicles. He thought that if the appellant needed access to the servient property to carry out road works it would have to lift or move the fence temporarily and reposition it afterwards.
- [16] In support of the magistrate's judgment, the respondents' counsel submitted that the dominant owner must exercise its servitude in a civil manner. Counsel's submission appeared to be that if it were theoretically possible to improve and maintain the road without moving beyond its three-metre width, that is what the appellant had to do.
- [17] I disagree. The dominant owner in this case has two relevant rights: (a) to use the servitude road; (b) to enter upon the servient property in order to improve and maintain the road. Each of those rights must be exercised in a civil manner. The civil exercise of the second right does not require the dominant owner to refrain from exercising it just because theoretically it would be possible, albeit at great inconvenience and cost, to improve or maintain the road without entering upon the servient property. The appellant must simply act reasonably and with due consideration to the respondents when exercising its right of entry for the stated purpose.
- [18] It is clear that a fence of the intended width along the entire length of the servitude road will prevent the appellant from reasonably exercising the right conferred on it by clause 3. Even if the appellant could properly be confined to the construction method proposed by Mr Groenewald (involving temporary turning areas at intervals of 250 to 300 m), a bulldozer 2,6 m wide could not, if it were confined to an area 3,1 m to 3,6 m in width, do the manoeuvring necessary to carve out and level the sand heaps in the stretch of road between turning areas. So it would not suffice to have a fence which made doglegs every 250-300 m to create turning areas.

[19] The magistrate erred in finding that respondents were entitled to erect the fence for purposes of keeping their animals enclosed. If enforcement of clause 6 of the servitude is not sufficient, it might be reasonable for the respondents to fence off the road but this cannot be done in a way which interferes with the appellant's rights.

[20] It appears to be Mr Labuschagne's view that a fence which allows a width of 4,5 m would be in order. However, the magistrate did not have to decide precisely where a lawful fence could be erected. He was not being asked to order the respondents to move the fence to a different place. He did not need to decide whether a reasonable exercise by the appellant of its rights in terms

of clause 3 included a right to have construction vehicles travelling simultaneously in opposite directions. The only point for decision was whether the fence, as it was actually erected and intended to be extended, was lawful.

[21] It is no answer, in my opinion, to say that the appellant could cut or lift the fence during road works and restore it afterwards. That proposition necessarily acknowledges that the fence as it stands prevents the appellant from exercising its rights. The servitude does not confer on the appellant the right to damage or interfere with structures belonging to the respondents. Even if the respondents consented to the cutting or lifting of the fence as and when needed (and they did not tender this in their opposing papers or say what it might entail), there is no reason why the appellant should have to incur the inconvenience and cost associated with doing

so.

[22] For these reasons the appeal must succeed. As to the precise relief to be granted, paras 1 and 2 of the notice of motion cover the removal of the existing fence. Para 3 of the notice of motion seeks an interdict preventing the respondents in the future from erecting any fence which directly or indirectly infringes the appellant's right to use and enjoy its servitude effectively.

Although para 3 is theoretically justified, it will not be of practical use, since we will not be deciding precisely what width or type of fence would constitute an interference with the appellant's rights. Put differently, an order in terms of para 3 would not clearly convey to the respondents what they can and cannot do.

[23] All we can definitely say is that a fence which results in a width of 3,6 m or less will infringe the appellant's rights. We shall grant an interdict on this basis. The restricted terms of the interdict do not necessarily mean that a fence which results in a width of, say, 3,7 m or 3,8 m will be acceptable.

[24] During the hearing of the appeal we suggested to counsel that the parties should seriously consider engaging a skilled mediator to assist them in finding a reasonable compromise. This would naturally include matters such as the width and configuration of any future fence. Unless this happens, the present case is unlikely to be the last one in which they become embroiled, a process

which will benefit nobody apart from the lawyers.

[25] Although he dismissed the appellant's application, the magistrate said that because the case had cried out for sensible settlement he intended to penalise both parties by ordering them to pay their own costs. Although we will be reversing the magistrate's order on the merits, his sentiments remain applicable and on balance I am not inclined to interfere with his costs order. An added consideration, in this regard, is that the appellant sought to justify the interdict not only with reference to clause 3 but on the basis that ordinary vehicles travelling in opposite directions should be entitled to use the road simultaneously, a ground on which the appellant has failed. In this court, however, costs must follow the result.

[26] The following order is thus made:

(a) The order of the court a quo is set aside and replaced with the following:

'(i) Orders are granted in terms of paras 1 and 2 of the applicant's notice of motion dated 13 February 2019.

(ii) The respondents are interdicted from erecting any fence along the southern boundary of the servitude road described in notarial deed of servitude 152/2015 which results in the fenced width which encompasses the said road being equal to or less than the width of the fence contemplated in para 1.2 of the notice of motion, ie a width of 3,6 m or less.

(iii) The parties shall pay their own costs.'

(b) The respondents shall pay the appellant's costs on appeal, such liability being joint and several.

O L Rogers

Judge of the High Court

Western Cape Division

C Fortuin

Judge of the High Court

Western Cape High Court

APPEARANCES

For Appellant TD Potgieter SC Instructed by MJ Vermeulen Inc, Riversdale c/o Walker Inc 9th Floor, The Terraces 34 Bree Street Cape Town For Respondent FA Ferreira Instructed by Johan Cronje Attorneys, Still Bay c/o Herold Gie 3 Wembley 30 McKenzie Street Cape Town

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