

SOUTH AFRICA / JUDGMENT

Morganambal Mannaru and another v Robert MacLennan-Smith and others (271/2021) [2022] ZASCA 137; 2023 (2) SA 150 (SCA) (24 October 2022)

[2022] ZASCA 137

COURT

Supreme Court of Appeal

BEFORE

Van der Merwe, Mothle, Mabindla-Boqwana,
Molefe, Masipa

CASE / FILE NUMBER

271/2021

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FLYNOTES:

Property law – Servitude – Right of way – Whether owners of dominant tenements entitled to erect gate across servitude road – Application of civiliter modo principle – Reasonable balancing of rights of dominant and servient owners required.

THE

SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 271/2021

In the matter between:

MORGANAMBAL MANNARU FIRST

APPELLANT

BODY CORPORATE OF KINGS SECOND

APPELLANT

AVENUE NO 1

and

ROBERT MCLENNAN-SMITH FIRST

RESPONDENT

PAIGE MCLENNAN-SMITH

SECOND RESPONDENT

LEITH ROSS CAWCUTT THIRD

RESPONDENT

GLENDA CAWCUT FOURTH

RESPONDENT

REGISTRAR OF DEEDS FIFTH

RESPONDENT

KWAZULU-NATAL NO

Neutral Citation: Morganambal Mannaru and another v Robert MacLennan-Smith and others
(271/2021)

[2022] ZASCA 137 (24 October 2022)

Coram:

VAN DER MERWE, MOTHLE and MABINDLA-BOQWANA JJA and MOLEFE and MASIPA AJJA

Heard:

24 August 2022

Delivered: 24 October 2022

Summary:

Property law – servitude of right of way – whether owners of dominant tenements entitled to erect gate across servitude road – in absence of agreement to the contrary, answer lies in application of *civilter modo* principle – reasonable balancing of rights of dominant and servient owners required – appeal dismissed.

ORDER

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

The appeal and the cross appeal are dismissed with costs.

Mothle JA (Van der Merwe and Mabindla-Boqwana JJA and Molefe and Masipa AJJA concurring):

- [1] This is an appeal and cross appeal against an order of the KwaZulu-Natal Division of the High Court, Durban (Pillay J). The crux of the dispute between the appellants and respondents turns on the construction of a gate erected across a servitude road on the property of the first appellant as the servient owner, providing access to the properties of the respondents, the servitude holders.
- [2] The parties reside in an area known as Westville, along Kings Avenue in Durban. The first appellant is the registered owner of sections 1 and 2 of the sectional title scheme known as King Avenue No 1 (the scheme) under sectional title deed of transfer ST064384/07. As these sections are the only ones in the scheme, the first appellant is, in terms of s 16(1) of the Sectional Titles Act 95 of 1986, also the owner of the common property of the scheme. The second appellant is the Body Corporate of the scheme, Scheme number 386/98. The first appellant is the chairperson of the Body Corporate. The scheme is situated on the remainder of Erf [...], Westville, (1 Kings Avenue).
- [3] The first and second respondents are the registered owners of Erf [...], Westville ([...]B and [...]C Kings Avenue) held under the deed of transfer T41108/03 and portion 1 of Erf [...], Westville ([...]E Kings Avenue) held under deed of transfer T027482/09. The third and fourth respondents are the registered owners of the immovable property described as the remainder of Erf [...], Westville ([...]D Kings Avenue) held under deed of transfer T014244/2012.
- [4] A road servitude over 1 King Avenue exists in favour of the properties of the respondents ([...]B, [...]C, [...]E and [...]D Kings Avenue). It is depicted on the approved sectional plan of the scheme (NPQRST, measuring 10.06 by 30 meters). The road servitude is registered against the title deeds of [...]B, [...]C, [...]D and [...]E Kings Avenue but not against that of 1 Kings Avenue, as the servient tenement. The respondents are of the view that this is simply

due to a conveyancing oversight. The servitude provides the only means of access to the respondents' properties.

- [5] On 19 May 2012, the appellants and respondents concluded an oral agreement at the instance and request of the respondents. In terms of the agreement, the appellants gave consent to the respondents to erect a temporary security gate across the servitude roughly between points P and S, at their own expense. The respondents contended that

the servitude was accessible by anyone driving or walking on Kings Avenue. Consequently, their properties were exposed to the presence of undesirable persons that created a security risk. It was agreed that the respondents were to obtain the necessary building approval and to ensure that the appellants have the use of the servitude on the respondents' side of the gate on reasonable notice. It was a further part of the agreement that the gate's construction would not prejudice the appellants' plans to subdivide 1 Kings Avenue in the future. Further, it was agreed between the parties that the maintenance of the temporary structure would be at the expense of the respondents. The temporary structure was duly constructed and remained in place at the time of the institution of the present litigation.

- [6] About a year later, in March 2013, the respondents approached the appellants with a request to construct a permanent gate, to enhance the security of their properties. The appellants declined. The refusal led to an exchange of emails, trading accusations and counter-accusations, in tones that led to a deterioration of the initial cordial relationship between the parties. The respondents complained of the constant barking of the first appellant's dogs and reported her for operating an illegal business. The appellants countered by demanding that the temporary gate be removed due to the respondents having failed to obtain municipal approvals. Litigation ensued when the respondents instituted action proceedings in the high court.
- [7] In the action, the respondents sought an order interdicting and restraining the appellants from removing, damaging, or opening the gate providing access to their properties and a declaration of the respondents' right to construct and maintain a permanent gate across the road servitude leading to their properties. The respondents also requested an order directing the appellants to register a Notarial Deed of Road Servitude over 1 Kings Avenue in favour of the respondents. The appellants defended the action by delivering a plea and a claim in reconvention, wherein they sought an order compelling the respondents to remove the temporary gate, which they viewed as an encroachment; alternatively, that the plaintiffs be ordered to take transfer of the servitude against payment of R300 000.
- [8] After having considered the oral evidence of witnesses, on 20 April 2020, the high court granted the following order:

‘a. The plaintiffs are permitted to erect and maintain a gate on the road servitude marked on the Surveyor General’s diagram S.G. No. D212/1998 as NPQRST, measuring 10.06 by 30 meters (approximately) (the servitude) at approximately between the points P and S, subject to the following conditions:

- (i) The plaintiffs must give the first and second defendants or anyone they authorise unsupervised access to use the servitude;
 - (ii) The plaintiffs must use the appropriate technology to give effect to this order;
 - (iii) The cost of erecting, maintaining and securing the gate shall be for the plaintiffs account;
 - (iv) The plaintiffs must maintain the servitude.
- b. The order in the paragraph a. above remains in force:
- (i) For as long as the first or second defendant is the owner of servitude;
 - (ii) Until the parties agree to vary any of its terms.
- c. At the plaintiffs’ expense, the defendant, as owner of the Remainder of Erf [...] Westville comprising the common property of the Sectional Title Scheme known as Kings Avenue No 1 and as more fully described on Sectional Plan No. SS386/1998, is directed to sign a Notarial Deed of Road Servitude to register the servitude over the common property in favour of:
- (i) The first and second plaintiffs as owners of:

Erf [...] Westville ([...]B and [...]C of Kings Avenue) held under the deed of transfer T41108/08; and

Portion 1 of Erf [...] Westville ([...]E Kings Avenue) held under deed of transfer T027482/09.
 - (ii) to the third and fourth plaintiffs as owners of Remainder of Erf [...], Westville ([...]D Kings Avenue) held under deed of transfer T014244/2012.
- d. Each party shall pay its own costs.
- e. The defendant’s claim in reconvention is adjourned indefinitely; with no order as to costs.’

[9] Aggrieved by the high court’s decision, the appellants lodged an unsuccessful application for leave to appeal to it in July 2020. The respondent also lodged an application for leave to cross appeal

the cost order, which was not granted. The appellants then turned to this Court with an application for leave to appeal, which application was granted on 2 March 2021. The respondents were also granted leave to cross appeal on costs. It is thus with leave of this Court that the matter is before us.

- [10] On appeal the appellants challenged the order mainly on the grounds that it would amount to the circumvention of the provisions of the National Building Regulations and Building Standards Act 103 of 1977 (the Act) and to arbitrary deprivation of property in contravention of s 25(1) of the Constitution. They also contended that there was no justification or basis for the parts of the order obliging the registration of the servitude over 1 King Avenue (para c.) and adjourning the claim in reconvention indefinitely (para e.).
- [11] The first-mentioned two grounds were not pleaded. They are in any event without merit. The appellants appear to think that the order would permit the respondents to disregard the provisions of the Act. But that is clearly not so. Should the permanent gate fall within the definition of ‘building’ in the Act (on which I express no opinion), there would in due course have to be compliance with the relevant provisions of the Act. The Constitutional Court has in various cases provided guidance in respect of the protection against arbitrary deprivation of property under s 25(1) of the Constitution.[1] And it suffices to say that the order demonstrates that the high court was at pains to ensure that the appellants would not unreasonably be deprived of access to and use of the portion of 1 Kings Avenue, which is subject to the servitude. I shall return to the remaining aforesaid contentions.
- [12] What the appellants describe as a ‘right of way’ is a servitude derived from the common law. According to AJ van der Walt,[2] a servitude is ‘a limited real right that grants the servitude holder specified use entitlements over someone else’s property and correspondingly reduces or burdens

the servient owner’s entitlement to use and enjoy her own property’. (Emphasis added)

In addition, this author posits that:

‘Generally, an owner who grants a servitude over her property to someone else retains her right to also use, enjoy and exploit the property, but she can exercise these entitlements only insofar as doing so does not interfere with the effective exercise of the servitude. This indicates a tension between the servitude holder’s right to use the property in terms of the servitude and the servient owner’s right to use her own property insofar as the servitude allows.’

- [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,[3] 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).’[4]

[14] In this regard, Van der Walt (p249) states:

‘According to the civiliter principle, the servitude holder must exercise the servitude so as to impose the least possible burden on the servient owner. This implies that a balance must be struck between the right of the servitude holder to do anything that is necessary for proper and effective exercise of the servitude; the right of the servitude holder to exercise those entitlements that are clearly granted in the servitude; and the residual right of the servitude owner to use her servient property insofar as that does not interfere with legitimate exercise and enjoyment of the servitude entitlements.’

[15] The approach of adopting a wider and relaxed interpretation of the common law to accommodate modern day imperatives, was endorsed by this Court in *Linvestment CC v Hammersley and Another* [2008] ZASCA 1; 2008 (3) SA 283 (SCA), where the common law’s strict interpretation of the terms of the servitudes was developed in terms of s 173 of the

Constitution. In that case, the owner of the servient tenement wanted to relocate the right of way. This Court concluded that the owner of the dominant tenement had no acceptable reason to subject the servient tenement to the terms of the servitude as it was registered. The circumstances had changed since the servitude had been registered, and considerations of convenience and prejudice determined whether the relocation should be granted. (Own emphasis)

[16] In *Roeloffze NO and Another v Bothma NO and Others* 2007 (2) SA 257 (C), the court dealt with a dispute concerning the erection of a gate across a road servitude. The roles of the parties in that case, were reversed compared to those in the case before us. The property owner erected the gate. The court held that the mere placing of a gate across a right of way did not per se amount to unlawful interference with the rights of the servitude holder. Of importance, the court referred to weighing the respective rights of the dominant owner and servitude holder. This balancing act ensured that the respondents’ proposed electronic gate would not constitute an unlawful interference with the rights of the servitude holder.

[17] In respect of gates that close off a servitude road, in particular, Van der Walt (p255) states:

‘The first question is whether either having or not having a gate is essential for effective use of the servitude – if having a gate is essential, the effective-use principle takes precedence and the dominant owner may install a gate. The civiliter principle will then indicate what is necessary, in terms of providing others with access to the road by way of remote control devices or access codes, to render use of the servitude reasonable. If not having a gate is essential to use of the servitude, the effective-use

principle prescribes that the dominant owner can prevent the servient owner from installing one. If neither having nor not having a gate is essential, the next question is whether either having or not having a gate was clearly foreseen and provided in the servitude grant, in which case the consensual arrangement must be given effect. Finally, if either having or not having a gate was neither necessary for effective use of the servitude nor explicitly provided for in the servitude grant, any arrangement regarding the installation and use of a gate must be decided on the basis of reasonableness (the civiliter principle). From the side of the servitude holder, access to the servitude road is obviously necessary for effective use and therefore

the servient owner can never install a gate without giving the servitude holder effective access to the road by way of remote control devices, access codes and the like. From the side of the servient owner, installation of a gate by the servitude holder will be reasonable provided it does not prevent the servient owner of continued reasonable access and use of her land (unless exclusive use of the servitude was foreseen in the grant).'

[18] In my view, this passage should be adopted as a correct exposition of our law on the subject. The last-mentioned scenario reflected in the passage is applicable to this case. In granting the order, the high court had to weigh the reasons for the refusal of the request by the appellants against the prejudice that may befall the respondents due to their exposure to security risks. It is clear from the judgment that in fashioning the order, the high court performed the balancing act referred to above. The high court found the respondents' reasons for requiring a permanent gate compelling. The order rightly recognised the respondents' rights to personal safety and security. By the same token, paras a. (i) and (ii) of the order effectively provided for reasonable access by the appellants to the servitude area. In the result, paras

a. and b. of the order cannot be faulted.

[19] The same applies to para c. of the order. As I have said, the servitude is registered against the title deeds of the respondents' properties and clearly depicted in the approved sectional plan of the scheme. Importantly, the appellants admitted the existence and extent of the servitude in the pleadings. Therefore, para c. of the order merely serves to confirm what in fact is common cause between the parties.

[20] The high court did not provide reasons for the indefinite adjournment of the claim in reconvention in para e. of the order. The main claim in reconvention was for the removal of the temporary gate. The high court correctly held that the parties had agreed to the erection of the temporary gate. Thus, it is difficult to fathom the reasons for this order. There is no need to dwell on this, however, because the effect of para a. thereof is that an appeal against para e. could have no practical effect or result.

[21] The cross appeal is against the order that each party shall pay its own costs (para d.). It is trite that a costs order is made in the exercise of a strict or true discretion, that may only in limited circumstances be interfered with on appeal. The respondents were unable to point to any misdirection in respect of the costs order. Consequently, both the appeal and the cross appeal falls to be dismissed with costs.

[22] In the result, I make the following order:

SP MOTHLE

JUDGE OF APPEAL

APPEARANCES

For appellants: RBG Choudree SC (with RR Kisten)

Instructed by: Gosai

and Company, Durban

Honey Attorneys, Bloemfontein

For the respondents: HA De Beer SC

Instructed by: NSG

Attorneys, Durban

Webbers Attorneys, Bloemfontein

[1] First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance

[2002] ZACC 5; 2002 (4) SA 768; 2002 (7) BCLR 702. See also Mkontwana v Nelson Mandela Metropolitan Municipality

[2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC), Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another

[2009] ZACC 24; 2009 (6) SA 391 (CC); 2010 (1) BCLR 61 (CC) and Arun Property Development (Pty) Ltd v City of Cape Town

[2014] ZACC 37; 2015 (3) BCLR 243 (CC); 2015 (2) SA 584 (CC).

[2] AJ van der Walt The Law of Servitudes

(2016) at 187. (Emphasis added.)

[3] J Scott 'A growing trend in source application by our courts illustrated by a recent judgment on a right of way' (2013) 76 THRHR at 239-251 at 242-243.

[4] Tshilidzi Norman Raphulu ‘The Right of Way of Necessity: A Constitutional Analysis’ (2013) page 52.

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