

SOUTH AFRICA / JUDGMENT

Pfaiff and Another v Cameron

(7142/2010)

[2010] ZAWCHC 421 (10 June 2010)

[2010] ZAWCHC 421

COURT

Western Cape High Court, Cape Town

BEFORE

Louw

CASE / FILE NUMBER

7142/2010

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IN

THE HIGH COURT OF SOUTH AFRICA
(EASTERN
CIRCUIT LOCAL DIVISION, GEORGE)
CASE
NUMBER:7142/2010

DATE:

10 JUNE 2010

In

the matter between:

DAVID

MICHAEL PFAIFF

.....1st

Applicant

JACK

ALWORTH SMITH

.....2nd

Applicant

and

LORNA

FAY CAMERON

.....Respondent

In

the matter between: DAVID
 MICHAEL PFAIFF
 1st
 Applicant
 JACK
 ALWORTH SMITH
 2nd
 Applicant
 and
 LORNA
 FAY CAMERON
 Respondent

JUDGMENT

(Application for Leave to Appeal) LOUW, J: This is an opposed application for leave to appeal against the judgment and order made by me in this matter on 10 June 2010. The applicants were the defendants at the trial. It is trite that the criteria for leave to appeal are whether there is a reasonable prospect that another court will come to a different conclusion and also that the matter is of substantial importance to applicants or to both parties. The fact of the matter is that this is a case of substantial importance to the parties and this application turns on the reasonable prospect of another court coming to a different conclusion. I have set out in the history of the matter fully in the judgment. Mr Engelbrecht, who appeared for the applicants this morning submitted that the raising of the area of the right of way on the servient tenement was something which was reasonably foreseeable at the time that the servitude was created in order to gain access to the dominant

tenement. In any event, he contended that if there were an infringement, monetary compensation should have been ordered. Given

the lie of the land at the time, it was clearly foreseeable that in order to gain access to the dominant tenement some increase of the height of the road would be necessary. This would be determined by the state of the dominant tenement at the time and not by the improvements that were subsequently effected by the applicants on the dominant tenement. The increase in height beyond 500mm was necessitated by the improvements on the dominant tenement. This could have been avoided the applicants planning and thereafter carrying out the improvements, bearing in mind that they were not entitled to raise the servitude road to a higher level than the 500mm determined by the natural lie of the land. In addition, I exercised the discretion for the reasons set out in the judgment, not order that money be paid as compensation for the infringement. Mr Van der Merwe opposes the application on behalf of respondent. I am not satisfied that there is a reasonable prospect that another court will come to a different conclusion or will interfere with the exercise of the discretion not to order monetary compensation. The APPLICATION FOR LEAVE TO APPEAL IS REFUSED WITH COSTS. LOUW, J

JUDGMENT

(Application for Leave to Appeal)

LOUW, J:

This is an opposed application for leave to appeal against the judgment and order made by me in this matter on 10 June 2010. The applicants were the defendants at the trial. It is trite that the criteria for leave to appeal are whether there is a reasonable prospect that another court will come to a different conclusion and also that the matter is of substantial importance to applicants or to both parties.

The fact of the matter is that this is a case of substantial importance to the parties and this application turns on the reasonable prospect of another court coming to a different conclusion.

I have set out in the history of the matter fully in the judgment. Mr Engelbrecht, who appeared for the applicants this morning submitted that the raising of the area of the right of way on the servient tenement was something which was reasonably foreseeable at the time that the servitude was created in order to gain access to the dominant

tenement. In any event, he contended that if there were an infringement, monetary compensation should have been ordered. Given

the lie of the land at the time, it was clearly foreseeable that in order to gain access to the dominant tenement some increase of the height of the road would be necessary. This would be determined by the state of the dominant tenement at the time and not by the improvements that were subsequently effected by the applicants on the dominant tenement. The increase in height beyond 500mm was necessitated by the improvements on the dominant tenement. This could have been avoided the applicants planning and thereafter carrying out the improvements, bearing in mind that they were not entitled to raise the servitude road to a higher level than the 500mm determined by the natural lie of the land. In addition, I exercised the discretion for the reasons set out in the judgment, not order that money be paid as compensation for the infringement.

Mr Van der Merwe opposes the application on behalf of respondent.

I am not satisfied that there is a reasonable prospect that another court will come to a different conclusion or will interfere with the exercise of the discretion not to order monetary compensation.

The APPLICATION FOR LEAVE TO APPEAL IS REFUSED WITH COSTS.

LOUW, J

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