



Republic of South Africa

REPORTABLE JUDGMENT

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

Case No.: **23841/2010**

In the matter between:

WILFRIED AUGUST THEODORE JOHL	First Applicant
BIRTHE BENNY MARGRETHE MACUN	Second Applicant
and	
RUI MIGUEL RODRIGUES NOBRE	First Respondent
ERF 85 ATHOL TOWNSHIP (PTY) LTD	Second Respondent
THE CITY OF CAPE TOWN	Third Respondent

PRESIDING JUDGE	:	Y.S. MEER
Counsel for Applicant	:	Adv M O'Sullivan
Instructed by	:	Fairbridges Attorneys (Ref.: Ms Amanda Torr)
Counsel for Respondents	:	Adv L Hollander
Instructed by	:	Andrew De Jongh Attorneys (Ref.: Mr Andrew De Jongh) c/o Shepstone & Wylie
Date of Hearing	:	7 March 2012
Date of Judgment	:	20 March 2012

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ERF 85 ATHOL TOWNSHIP (PTY) LIMITED	Second Respondent
THE CITY OF CAPE TOWN	Third Respondent

JUDGMENT: 20 MARCH 2012

MEER J.

[1] The applicants seek a final interdict concerning their rights of access to a servitude over their immovable property, at Erf 7938 Constantia (“the servient property”). The servitude in question is registered in favour of the neighbouring immovable property, Erf 7939 Constantia, (“the dominant property”), which is owned by the second respondent. The first respondent, a businessman, is the sole director of the second respondent. No relief is sought against the third respondent, which is cited merely insofar it has an interest in the matter.

[2] The servitude entitles the second respondent as owner of the dominant property to a right of way across the servient property, and thereby granting access to a public road, Gemini Way from the dominant property, erf 7939. The servitude area is a driveway which goes uphill from Gemini Way across the servient property to the dominant property. The first respondent has erected a remote controlled automatic security gate (“the driveway gate”) at the Gemini Way entrance to the servitude area or driveway.

[3] The final interdict that applicants seek is both declaratory and mandatory in nature. They seek a declaration that they have the right to access the servitude area from Gemini Way, and that they are entitled to a remote, key or other opening device to the driveway gate. They also seek a mandatory order directing the respondents to provide them with such remote, key or opening device.

[4] The respondents oppose the relief on the basis that providing the applicants with the access sought by them to the servitude area would interfere with the first respondent’s exercise of the servitude right of way by compromising the security of the driveway and thereby the security of the first respondent’s home and family.

The facts

[5] Erf 7938 was transferred to the applicants in terms of Deed of Transfer T4168/1989 and registered in both the applicants’ names on 25 January 1989. The Deed of Transfer included a Notarial Deed of Servitude that existed across erf 7938 in favour of erf 7939, since 1983. The servitude entitles the dominant owner to a right of way. There are no other entitlements.

[6] In 1995 the applicants agreed to an extension of the servitude area from 4212 square metres to 7344 square metres as is stipulated in Notarial Deed of Servitude K41/1995S. The extension was for purposes of the servitude right of way and no further entitlements were agreed upon. The applicants received no compensation for the extension.

[7] Since the extension of the servitude area in 1995, the ownership of the dominant property, erf 7939, has changed a number of times. For a while there was a gate at the entrance to the servitude area from Gemini Way, which denied the applicants access to the western side of their property from Gemini Way. However that changed when ownership of the dominant property also changed. The next owner left open this gate but erected another security gate at the actual boundary of the dominant property.

[8] When the respondents acquired ownership of the dominant property in January 2008 they retained the security gate at the boundary of the dominant property and added a further security measure through the presence of an armed guard and a camera at this security gate. The first respondent also re installed the driveway gate at the entrance to the driveway from Gemini Way. The respondents' security arrangements thus comprise two security gates, an armed guard and camera surveillance. The applicants allege that the driveway gate is in fact now situated in the road reserve of Gemini Way which is owned by the City of Cape Town. The servitude area cannot be accessed from Gemini Way without the use of a remote control device to open the driveway gate. During 2009 the first respondent undertook extensive alterations to the property which included paving the servitude area and erecting fencing around it. A pedestrian gate through the western fence of the servient property links the servitude area to the servient property.

[9] The applicants require ingress and egress to Gemini Way through the servitude area so that they can use the servitude area as a walkway between their property and Gemini Way. The applicants, who are elderly, allege that their driveway is very steep whilst the servitude area which is sloped is not as treacherous, and a more convenient way for them to access Gemini Way. They allege also that by entering or exiting the servitude area from Gemini Way they will not have to walk an additional 100 metres using their own driveway and along Gemini Way, a busy road with no sidewalk. These allegations are disputed by the respondents.

[10] Upon request from the applicants, the first respondent initially indicated that he would provide the applicants with the necessary remote controlled access to the servitude area *via* the driveway gate. He however changed his mind and refuses to grant them the access they seek. Since May 2010 there have been several communications between the legal representatives of the parties in an attempt to resolve the matter, but without success. It is the persistent refusal by the respondents to give the applicants a remote control device to operate the driveway gate that has caused them to bring this interdict.

[11] The thrust of respondents' opposition to applicants being allowed remote access to the driveway gate, is that if this were granted, they, the respondents, will then no longer have control over the gate, in as much as the applicants will have a remote to the gate which could fall into the wrong hands. The suggestion is made that this could occur if the elderly applicants are mugged whilst walking their dogs along Gemini Way. The entire purpose of the gate, say respondents, will be negated and the security risk in respect of the servitude area will then have increased and the whole purpose of the servitude area will have been

compromised. The servitude would in those circumstances be unreasonably interfered with by the applicants.

Legal principles

[12] The servitude pertinent to this matter is a praedial servitude which pertains to two pieces of land that are in close proximity to, or next to each other. See LAWSA Vol 24 Second Edition p 456 para 540. A praedial servitude is established over the servient property for the benefit of the dominant property in perpetuity, irrespective of the identity of the owner. See LAWSA *supra* p 461 para 545. Both the dominant and servient owners are entitled to use the servitude area. The owner of the servient property 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. See *Roeloffze NO and Another v Bothma NO and Others* 2007 (2) SA 257 at 266 H – 267 D; See also *Estcourt Corporation v Chadwick* 1925 NPD 239

[13] The relationship between the dominant and servient owners is governed by the principle of reasonableness. See *Van der Walt and Pienaar, Introduction to the Law of Property* 4th edition Juta 2004 at 274. Where there is a conflict of interests, the interests of the dominant owner will have precedence over those of the servient owner, subject to the principle of reasonableness. The holder of the servitude must exercise the servitude *civiliter modo*, that is, in a civilized and considerate way. In *Rabie v De Wit* 1946 CPD 346 at 351 *civiliter modo* conduct was found to be use “*in a manner that will cause the least damage or inconvenience to the servient property*”. (See also *Nolan v Barnard* 1908 TS 142 at 152 – 4; *Texas Co (SA Ltd v Cape Town Municipality* 1926 AD 467 at 475; *Kakamas Bestuursraad v*

Louw 1960 (2) SA 202 (A); *Stuttaford v Kruger* 1967 (2) SA 166 (C) at 172F; and *Brink v Van Niekerk en 'n Ander* 1986 (3) 428 (T) at 434).

[14] It follows that the holder of the servitude may not increase the burden on the servient property beyond the express or implied terms of the servitude. See LAWSA Vol 24 at para 544. The dominant owner cannot make changes to the servient land that would cause the servitude to be more limiting to the servient owner as could have been reasonably foreseen at the time when the servitude was agreed upon. Importantly, the dominant owner has no right to change the subject matter of the servitude. See Hall, *Servitudes* 3rd Edition Juta, 1973 at 133. 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. See also *London and SA Exploration Co v Rouliot*, 1890 Vol VIII S.C. 74 at 97.

[15] 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 use is not in conflict with the entitlements of the holder of the servitude. See *Steyn v Zeeman* 1903 20 SC 221 at 224; *Nolan v Barnard* 1908 TS 142 at 152 – 4; *Texas Co (SA) Ltd v Cape Town Municipality* 1926 AD 467 at 475; *Kakamas Bestuursraad v Louw* 1960 (2) SA 202 (A); *Van Rensburg en Andere v Taute en Andere* 1975 (1) SA 279 (A) and *De Witt v Knierim* 1991 (2) SA 371 (C) at 385).

[16] In interpreting the servitude agreement the Court seeks the intention of the parties from the terms of the agreement itself. 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. See *De Witt v Knierim* 1991 (2) SA 371 AT 385 C-E. A servitude agreement should be interpreted as narrowly as possible and 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. See LAWSA Vol 24 paragraph 543. 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. See *De Kock v Hanel* 1999 (1) SA 994 (C) at 997 E – 998 B.

Finding

[17] The ordinary grammatical meaning of the words of the servitude in the title deed, namely “a servitude of right of way”, is clear. It entitles the dominant owner to a right of way across the property of the servient owner, no more, no less. There are no other entitlements relevant to the servitude, either express or implied. Nor are there any restrictions as to how the right of way is to be exercised and certainly none imposed upon the servient owner. The respondents in asserting that they are entitled to exclude the applicants’ exit from and entry to the servitude area *via* the driveway, are in fact imposing a restriction which is contrary to the servitude agreement. They are increasing the burden on the servient land beyond the express or implied terms of the servitude. Accordingly, as argued on behalf of the applicants, they are changing the nature of the servitude to a security buffer to their property, for their exclusive use.

[18] In so doing it cannot be said that they are exercising the servitude with care and consideration in accordance with the concept of *civiliter modo*. For, as was said in *Estcourt Corporation v Chadwick* 1925 NPD 239 and relied upon in *Roelofze NO and Another v*

Bothma NO and Others 2007 (2) SA 257 CPD at 267. "It is well settled that a right of way involves no exclusion of the owner of the servient tenement, or his grantees, from the use of the road by which the right of way is exercised, so long as use by them does not impede or prevent the reasonable enjoyment of the right by the owner of the dominant tenement. . . ."

Giving the applicants a remote opening device to the automatic gate would not impede the respondents' reasonable enjoyment of the right of way, the only entitlement accorded by the servitude to them. The servitude agreement does not lend itself to the interpretation that the respondents' enjoyment of their right of way permits them to change the nature of the servitude to a security buffer and prevent the applicants from accessing the servitude area *via* the driveway from Gemini Way.

[19] I agree with applicants that the question of security is largely irrelevant to the issues in this case, pertaining as they do to the entitlement of the dominant owner to a servitude right of way, only. I note also that in so far as the first respondent views the normal use of the servitude area by the applicant as being limited to access to a borehole through a pedestrian gate, such interpretation of the rights of the servient owner also has no basis in the wording of the servitude and, as alluded to by the applicants, further evidences that the respondents are not using the servitude *civiliter modo*.

[20] The applicants' request is simply that they be allowed to use the servitude area as a walkway between their property and the public road, Gemini Way, for which purpose they need to be provided with a remote control device for the automatic gate. This relief sought falls entirely within the ambit of the normal use of the servitude area. The applicants in my view have a clear right to access the servitude area from Gemini Way and not only *via* the pedestrian gate. The respondents' denial of their right to the normal use of the servitude area

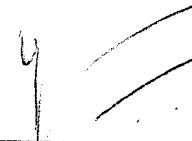
is an infringement of that right and accordingly an injury to the applicants. The applicants had no other adequate alternative remedy but to bring these proceedings after repeated appeals to the first respondent to remedy the situation by granting them access, came to naught. The applicants are in the circumstances entitled to the declaratory interdict they seek. The applicants are also entitled to a remote device giving them access to the driveway gate to the servitude area from Gemini Way. The applicants are willing to bear the costs of the remote control device.

Costs

[21] Ms O'Sullivan for the applicants submitted that having regard to the unreasonable conduct of the respondents it is appropriate that they be ordered to pay the costs of this application on a scale as between attorney and client, jointly and severally. It is unfortunate, I believe, that a case of this nature between neighbours who should have been able to resolve, what ought not to have been an insurmountable difference between them, found its way to this Court. The respondents' intransigence, especially given that at one stage they had agreed to give the applicants remote control access to the driveway gate, is regrettable and somewhat difficult to comprehend, given that there appears to be technology available to prevent remote devices from functioning should they get into the wrong hands. The fact that the respondents have an armed guard, another security gate and a security camera at the entrance to their property infuses their continued refusal to grant applicants remote devices for security reasons, with a further element of unreasonableness. The proceedings were in the circumstances vexatious, and the conduct of the respondents attracts the punitive costs order sought.

[22] I grant the following order:

1. The first and second applicants are entitled to access from Gemini Way the portion of Erf 7938, Constantia that is subject to a servitude right of way in favour of Remainder Erf 7939, Constantia, created by virtue of Deed of Transfer: T4444 of 1983, as depicted by Surveyor General Diagram no. 512/78 and Notarial Deed of Servitude K14/1995S and the Surveyor General Diagram;
2. The first and second applicant are entitled to be provided with a remote device to the security gate erected at the entrance to the servitude area on Gemini Way, Constantia;
3. The first respondent is directed to provide the first and second applicants with a remote device to the security gate at the entrance of the servitude area on Gemini Way, Constantia;
4. The first and second respondents are directed to pay the costs of this application on a scale as between attorney and client, jointly and severally, the one paying the other to be absolved.



Y.S. MEER J.