

## HOLDER OF RIGHT OF WAY SERVITUDE SEEKS A GATE OVER THE ROAD: MUST THE SERVIENT LAND OWNER AGREE?

**Morganambal Mannaru and another v Robert MacLennan-Smith and others (271/2021) [2022]  
ZASCA 137 (24 October 2022)**

*Property owners appreciate that when a servitude is registered over one property in favour of another, certain of the respective owners' rights are affected because one enjoys rights over another's property which the latter must bear with. As a result, our law determines that servitude rights are interpreted narrowly so as to ensure that the inroads on the owner 'suffering' the servitude are minimised. In this context, how should an owner react if the servitude holder, in addition to enjoying the servitude rights of way, insists on erecting a gate over the servitude road serving his land? The Court explained in this judgment that reasonableness must be the determining factor. The facts and outcome illustrate how this works practically.*

The Judgment can be viewed [here](#).

### FACTS

The dispute has to do with a few properties situated along Kings Avenue, Westville, in Durban. Mannaru owned sections 1 and 2 of the sectional title scheme known as King Avenue No 1, which are the only two sections in the scheme (which is also situated at 1 Kings Avenue). (Mannaru is, as a result, also the owner of the common property of the scheme.)

A road servitude over the 1 King Avenue scheme exists in favour of other owners in Kings Avenue ('the adjacent owners'). The servitude is depicted on the approved sectional plan of the scheme and is registered against the title deeds of the adjacent owners, but not against that of 1 Kings Avenue, as the servient tenement. (The adjacent owners were of the view that this was simply due to a conveyancing oversight.) The servitude provides the only means of access to the properties of the adjacent owners.

In May 2012, Mannaru and the schemes' body corporate, on the one hand, and the adjacent owners on the other, concluded an oral agreement at the instance of the adjacent owners. In terms of the agreement, consent was given to the adjacent owners to erect a temporary security gate across the servitude at their own expense. The adjacent owners contended that the servitude was accessible by anyone driving or walking on Kings Avenue and that their security was therefore compromised. The agreement was further that the adjacent owners would obtain the necessary building approval and that the maintenance of the temporary structure would be at the expense of the adjacent owners. The temporary structure was duly constructed and remained in place at the time of the institution of the present litigation.

A year later, the adjacent owners again approached Mannaru and the body corporate, this time with a request to construct a permanent gate over the servitude, to enhance the security of their properties. This was declined, resulting in an exchange of emails and a deterioration of the initial cordial relationship between the parties.

The adjacent owners then approached the High Court for an order interdicting and restraining Mannaru and the body corporate from removing, damaging, or opening the gate providing access to their properties and a declaration of their right to construct and maintain a permanent gate across the road servitude leading to their properties. The adjacent owners also requested an order directing Mannaru and the body corporate to register a Notarial Deed of Road Servitude over 1 Kings Avenue in their favour. Mannaru and the body corporate defended the action, stating that it would amount to a circumvention of the provisions of the National Building Regulations and Building Standards Act ('the Building Act') and to arbitrary deprivation of property in contravention of section 25(1) of the Constitution.

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The High Court granted an order in favour of the adjacent owners, in terms of which they were permitted to erect and maintain a gate over the servitude road and that a notarial servitude be registered against the scheme's common property (as per the servitude registered against the adjacent owners' title deeds and the sectional plan).

Aggrieved by the High Court's decision, Mannaru and the body corporate appealed.

## HELD

### ***Mannaru's arguments re the Building Act contravention and deprivation of property***

- These grounds are without merit. The order of the High Court would not permit the adjacent owners to disregard the provisions of the Building Act. Should the permanent gate fall within the definition of 'building' in the Building Act, there would in due course have to be compliance with the relevant provisions of the Act. As to the argument relating to the protection against arbitrary deprivation of property under section 25(1) of the Constitution, the High Court stated that its order would not constitute an arbitrary deprivation as the land was subject to a servitude.

### ***Exercise of rights and obligations under a servitude***

- A servitude is 'a limited real right that grants the servitude holder (the adjacent owners in this instance) 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. 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'.
- The approach adopted by our courts in resolving such disputes is reliance on the principle of *civilliter modo*. According to this 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.

### ***Gates that close off a servitude road***

- In respect of gates that close off a servitude road, in particular, our law holds that: '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 *civilliter* 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 ....

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 deprive the servient owner of continued reasonable access and use of her land (unless exclusive use of the servitude was foreseen in the grant).'

- The last-mentioned scenario in the passage above is applicable to this case. It was clear from the High Court's order that it had weighed the reasons for Mannaru's refusal against the prejudice that may befall the adjacent owners due to their exposure to security risks. The High Court found the adjacent owners' reasons for requiring a permanent gate compelling, acknowledging their rights to personal safety and security. The order also allowed reasonable access for Mannaru (and the body corporate to the servitude area). The order could therefore not be faulted.
- The same applied regarding the order to attend to the notation of the servitude against the common property of the scheme. The servitude is registered against the title deeds of the adjacent owners and clearly depicted in the approved sectional plan of the scheme. Importantly, Mannaru and the body corporate admitted the existence and extent of the servitude. The order for the notation of the servitude therefore merely serves to confirm what in fact is common cause between the parties.

## CONCLUSION

The appeal accordingly failed.