

SERVITUDE RIGHT OF WAY FENCED IN: WHEN WILL THIS BE AN INFRINGEMENT?

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

By its nature a servitude right of way gives one owner strong rights over the property of another. Our law therefore dictates that the ambit of such rights is to be interpreted narrowly in accordance with the wording of the relevant notarial deed. The Court here was challenged to decide whether there was an infringement on the servitude right when the road was enclosed by fences so that the right holder could not maintain the rocky road as he was obliged to do by the notarial document.

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

FACTS

In terms of a notarial deed executed in 2014, the farm owned by Langebosch (Pty) Ltd (“Langebosch” or “the dominant property”) enjoys a right of way over a neighbouring farm (“the servient property”) owned by Mr and Mrs Lubbe. The servitude was registered before the Lubbes and Langebosch became owners.

The servitude road runs along the southern boundary of the servient property and is described as a road three metres wide in the notarial deed. 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.
- 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.

The servitude road is about 2,5 km long. There is a fence running along the southern boundary of the servitude road. The cause of this dispute was the fact that Mr and Mrs Lubbe commenced with the erection of a fence on the northern (inner) boundary of the servitude road, leaving a width of 3,1 to 3,6m between the southern and northern fences.

Langebosch applied to Court for an interdict as it believed that:

1. the fence precludes vehicles from pulling over to allow oncoming traffic to pass;
2. the fence interferes with its right to enter on the servient property (of the Lubbes) for purposes of improving and maintaining the road.

The Magistrates’ Court refused the interdict and Langebosch appealed to the High Court.

HELD

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Does the fence preclude vehicles from pulling over to allow oncoming traffic to pass?

- The new fence made it impossible for vehicles travelling in opposite directions to use the road simultaneously. This however did not automatically mean that Langebosch's rights were infringed upon.
- This was because the servitude is defined in the title deed as a road three metres wide along its entire length - no more, no less. One has to accept that 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 metres.
- 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 (Langebosch) that the road cannot simultaneously be used by opposing traffic but it was 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 was not necessary to make the servitude practicably usable.

Does the fence interfere with Langebosch's right to enter on the servient property (of the Lubbes) for purposes of improving and maintaining the road?

- Langebosch delivered affidavits by two road contractors to the effect that it will not be possible - cost effectively - to improve, repair or maintain the road in the fenced area having a width of only 3,1 m to 3,6 m, due to the various lorries, bulldozers and the like machines required.
- The Lubbes however argued that the law required of a dominant owner to exercise its servitude in a civil manner and that if it were theoretically possible to improve and maintain the road without moving beyond its three-metre width, that is what Langebosch had to do.
- The latter contention could not be supported. In the present matter, the dominant owner (Langebosch) had 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 these rights has to be exercised in a civil manner.
- The civil exercise of the second right does not require the dominant owner (Langebosch) 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. Langebosch simply had to act reasonably and with due consideration to the Lubbes when exercising its right of entry for the stated purpose.
- It was clear that a fence of the intended width along the entire length of the servitude road will prevent Langebosch from reasonably exercising the right conferred on it by clause 3 of the servitude. Even if Langebosch could properly be confined to the construction methods proposed by the Lubbes' witnesses (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 maneuvering 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.
- The Lubbes were therefore not 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 Lubbes to fence off the road but this cannot be done in a way which interferes with Langebosch's rights.

CONCLUSION

The appeal was therefore successful.