



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

Case No: 10977/2014

In the matter between:

ROBERT MCLENNAN-SMITH

PAIGE MCLENNAN-SMITH

LEITH ROSS CAWCUTT

GLENDA CAWUTT

FIRST PLAINTIFF

SECOND PLAINTIFF

THIRD PLAINTIFF

FOURTH PLAINTIFF

and

MORGANAMBAL MANNARU

BODY CORPORATE OF KINGS AVENUE NO.1

REGISTRAR OF DEEDS, KWAZULU-NATAL

FIRST DEFENDANT

SECOND DEFENDANT

THIRD DEFENDANT

ORDER

The following order is granted:

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 metres (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 and anyone they authorize unsupervised access to use the servitude;
- (ii) The plaintiffs must use appropriate technology to give effect to this order;
- (iii) The costs of erecting, maintaining and securing the gate shall be for the plaintiffs' account;

- (iv) The plaintiffs must maintain the servitude.
- b. The order in 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 1719 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:
 - (a) Erf 1747 Westville (1B and 1C of Kings Avenue) held under the deed of transfer T41108/08; and
 - (b) Portion 1 of Erf 1746 Westville (1E Kings Avenue) held under deed of transfer T027482/09.
 - (ii) the third and fourth plaintiffs as owners of Remainder of Erf 1746, Westville (1D 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.

JUDGMENT

D. Pillay J

Introduction

[1] Is litigation the most appropriate process for resolving disputes amongst neighbours?

'In every society there is a wide range of alternatives for coping with the conflict stirred by personal disputes. Litigation is only one choice among many possibilities, ranging from avoidance to violence. The varieties of dispute settlement, and the socially sanctioned choices in any culture, communicate the ideals people cherish, their perceptions of themselves, and the quality of their relationships with others. They indicate whether people wish to avoid or encourage conflict, suppress it, or

resolve it amicably. Ultimately the most basic values of society are revealed in its dispute settlement procedures.¹

Consensus amongst neighbours about erecting gates across road servitudes to enhance the safety of people and property holds better prospects for solving problems than the limits of litigation usually allow. At least, this emerges on the facts of this case.

[2] The first and second plaintiffs are the registered owners of Erf 1747 Westville (1B and 1C of Kings Avenue) held under the deed of transfer T41108/03 and Portion 1 of Erf 1746 Westville (1E Kings Avenue) held under deed of transfer T027482/09. The third and fourth plaintiffs are the registered owners of the immovable property described as the Remainder of Erf 1746, Westville (1D Kings Avenue) held under deed of transfer T014244/2012.

[3] The first defendant is the registered owner of Sections 1 and 2 of the sectional titles scheme known as Kings Avenue No 1 (previously described as 'Remainder of Erf 1719, Westville'), together with an undivided share in the common property, held under Sectional Title Deed of Transfer ST064384/07 (1 Kings Avenue). The second defendant is the Body Corporate of Kings Avenue No 1 Scheme No 386/98. The first defendant is the chairperson of the second defendant. The registrar of deeds is the third respondent who elects to abide.

[4] Road servitude NPQRST forms part of 1 Kings Avenue and exists in favour of 1B, 1C, 1E and 1D Kings Avenue. Allegedly, by some conveyancing oversight, it is not registered over 1 Kings Avenue as a servient tenement but is depicted on the Surveyor General's diagram S.G. No. D212/1998 as NPQRST, measuring 10.06 by 30 metres (approximately).

[5] The plaintiffs are owners of a panhandle property to which they have access via the servitude over the property of the first and second defendants. They erected

¹ Auerbach J S '*Justice Without Law? Resolving Disputes Without Lawyers*' (1984) at 4; see also Julia Ann Gold '*ADR through a Cultural Lens: How Cultural Values Shape Our Disputing Processes*' (2005) 2 *Journal of Dispute Resolution* 289.

a gate across the servitude which limits the defendant's access.² This dispute is about the common law rights and obligations of the parties to use the servitude.

[6] Below, the chronology lays the basis for investigating the rights and obligations of owners and beneficiaries of servitudes under the common law. More specifically, does the common law permit the construction of a gate across a servitude. Is there a basis to balance the competing claims of the plaintiffs to enhance their security and the defendant's right of ownership of the land on which the servitude exists?

The Facts

[7] About 19 May 2012, the plaintiffs and defendant concluded an oral agreement in Westville, Durban. The material terms of that agreement, which are not in dispute, were the following;

- (a) The defendant permitted the plaintiffs to erect a gate across the servitude roughly between points P and S at their own expense.
- (b) The plaintiffs would obtain any necessary building approval for the erection of the gate.
- (c) The erection of the gate would not prejudice the defendant's plans to subdivide 1 Kings Avenue.
- (d) The defendant would have access to that portion of the servitude on the plaintiffs' side of the gate on reasonable notice.
- (e) The plaintiffs would maintain the gate and the servitude at their expense.

[8] About September 2012, the plaintiffs proceeded to erect the temporary gate after ascertaining that they did not need the municipality's approval. They maintained the servitude at their expense and tendered access to it on the plaintiffs' side of the gate on reasonable notice. This arrangement persisted for about a year.

[9] From March 2013, the plaintiffs tried to get the defendant's consent to replace the temporary gate with a permanent structure, which required municipal approval. The defendant ignored the plaintiffs' emails. On 2 April 2013, the defendant received

² For convenience, unless the circumstances require, I do not distinguish between the various plaintiffs and defendants who will be referred to as plaintiffs and defendant.

a lengthy motivation for the erection of permanent gates. That email concluded with a notice that if the defendant did not respond by 9 April 2013, the plaintiffs would assume that she consented.

[10] On 3 April 2013, the defendant expressly withheld her consent to any changes until she and her advisor were in a position to make informed decisions about her property. Until then, the temporary gate had to suffice.

[11] On 1 October 2013, the plaintiffs enquired from the defendants if she would object to the plaintiffs resurfacing portion PQRS of the servitude. The defendant objected, advising that she was in the process of subdividing 1 Kings Avenue.

[12] Relations between the plaintiffs and the defendant soured for reasons not pleaded but which emerged during their testimony. On 19 December 2013, the plaintiffs started complaining about the defendant's dogs keeping her family awake with their incessant barking. Yet, simultaneously, she conveyed seasonal greetings to the defendant. On 5 February 2014, the plaintiffs complained again, insinuating that the SPCA might be called. Uninvited the second plaintiff's diagnosis that the defendant's dogs barked because they were 'nervous, alone and uncontrolled' provoked the defendant to decline the plaintiffs' offer to find a home for her dogs saying that it was 'in very poor taste'. She objected to the plaintiffs complaining to the municipality about her conducting 'a very busy and noisy business on her property. In court, she testified that she had to pay a fine to the municipality following this complaint.

[13] About 18 February 2014, the defendant's dogs allegedly resumed barking again. So did the flow of emails from the plaintiffs. The defendant protested that this was 'tantamount to harassment'. She disputed that her dogs were barking and creating a nuisance. By email dated 9 May 2014, the plaintiffs informed the defendant that their attorneys had advised them that they could obtain an interdict against her on the grounds of nuisance. The third plaintiff is on record as attorney for all the plaintiffs.

[14] On 19 June 2014, the plaintiffs notified the defendant that they intended to consult with a senior Durban advocate to approach the High Court to stop the nuisance

created by her dogs. Responding belatedly, the first plaintiff explained that the defendant's business was unlawful because the defendant had approached other neighbours about conducting her business from residential premises, but she had not approached the first and second plaintiffs. This was the last straw for the defendant. By email on 11 July 2014, she gave the plaintiffs 7 days' notice to remove the temporary gate.

[15] On 17 July 2014, the third plaintiff, representing the plaintiffs as their attorney, emailed the defendant claiming that 'the law entitles us to close off the servitude, particularly in cases like this where its only purpose is to provide access into our properties, provided that we allow the owner of the land on which it is situated, access to the land.' The plaintiffs declined to remove the gates and advised that if the defendant attempted to do so, then they would approach the Durban High Court on an urgent basis to interdict her.

[16] On 23 July 2014, the plaintiffs' attorneys objected to the defendant instructing the plaintiffs' staff to open the gate. They insisted on her notifying them so that suitable arrangements could be made for her access the servitude beyond the temporary gate. They threatened to interdict her again about if she attempted to remove the gate.

[17] On 15 October 2014, the first and second defendants applied for an order directing the plaintiffs to remove the temporary gate. Kruger J dismissed that application with costs on 18 August 2017. The plaintiffs launched this action on 17 October 2017.

[18] At crucial stages of the litigation, the defendant instigated two notices against herself from the eThekweni Municipality informing her that the gate was erected without its approval, that it was unlawful and that she must remove it. The notices coincided with the commencement of the litigation and the trial. eThekweni took no action to enforce compliance. Nor were the plaintiffs aware of the notices until they started preparing for trial.

Issues in dispute

[19] The plaintiffs claim a right under the common law to erect a gate at their own expense to safeguard their persons and properties. In exchange for their use of the servitude, they continue to maintain it at their cost. They offer access to the defendant when she requests it. She has no genuine need for access to the gated portion of the servitude marked PQRS. Her resistance to them erecting a permanent gate is unreasonable. It is also a breach of their oral agreement. Her conduct is unlawful.

[20] Accordingly, the plaintiffs seek an interdict to restrain the first and second defendants from removing, damaging or opening the gate providing access to the plaintiffs' properties; a declarator that they may erect a permanent gate to replace the temporary one; and an order to rectify the defendant's title deeds by registering a Notarial Deed of Servitude in favour of the plaintiffs' properties.

[21] The defendant counterclaims that the plaintiffs erected a remote access gate across the servitude without her consent and have 'established a colony'. The gate denies her free access to use and enjoy that portion of the servitude marked PQRS, which adjoins the plaintiffs' properties. She claimed she might use portion PQRS to walk her dogs or park cars. She pleaded that the value of portion PQRS was R300 000. She prayed for an order for the removal of the gate, alternatively, transfer of portion PQRS to the plaintiffs against payment of R300 000. She did not seriously pursue her alternative claim.

Inspection in loco

[22] The trial commenced with an inspection in loco. To the general public, the servitude presented as a public road that led to a dead end. Even though there was signage, it attracted people who resorted to unsavoury behaviour at the entrance to properties 1B, 1C and 1E. A large gate separated the dead end from these properties. Property 1D was unprotected by any gate except the temporary one across the servitude between points P and S. Allegedly, erecting a security entrance gate at 1D is not feasible.

[23] Portion PQRS of the servitude lies between the boundaries of the plaintiffs' properties and the temporary gate. While the plaintiffs' dogs have free use of portion PQRS, the defendant does not.

[24] Servitude NPQRST is perpendicular to and adjoins servitude TUMN which runs parallel to Kings Avenue. TUMN adjoins the defendant's property. Access to the defendant's property is from Kings Avenue. NPQRST is not an access road to the defendant's property. Separating the defendant's property (1 Kings Avenue) from servitude NPQRST is 1A Kings Avenue. Therefore, servitude NPQRST is about 15 metres away from the defendant's property. Ordinarily, the defendant would have no use for the servitude.

Reasonableness

[25] Permitting the plaintiffs to erect a security gate across the servitude would be reasonable. Commendably, this is what the parties accomplished by their oral agreement in September 2012. The agreement came about in a spirit of neighbourliness, a willingness by the defendant to accommodate the plaintiffs. The defendant acceded to a temporary gate at a time when the plaintiffs had not threatened her or asserted that she had any legal obligation to encumber her ownership rights in any way. By consenting, the defendant did more than allow access to the plaintiffs. She allowed them to encroach on her property. She acknowledged their security needs.

[26] The parties had agreed that the plaintiffs would erect a gate temporarily. When the temporary gate would be removed is now one of the issues in dispute. The plaintiffs contend that the temporary gate was to be replaced by a permanent gate once the fourth plaintiff, who was from the United Kingdom, had adjusted to the security arrangements. The defendant contends that the temporary gate was to be removed once the property of the third and fourth plaintiffs had been secured to their satisfaction.

[27] When and why the temporary gate was to be removed is inconsequential. What is clear is that the defendant did not consent to the erection of a permanent gate.

When she was pressed for her written consent in April 2013, she declined in the following terms:

‘Unfortunately we are still awaiting on Dave and the municipality to enable us to make an informed decision on the matter and therefore **do not Consent** to any changes until we have had precise rulings on the matter to enable us to move forward. Unfortunately until that stage you will not be able to proceed with your plans, since the area is part of my property and we would not like to be compromised in any manner, nor would we want you or any other neighbour to be jeopardized as well.

We have allowed you a temporary structure in the meanwhile which will have to be sufficient at this stage.

Apologies that your plans will need to be put on hold.’ (*sic*)

Furthermore, in October 2013, she cautioned against resurfacing the servitude as she was ‘in the process of a sub-division’.

[28] Once the underlying substratum of good faith neighbourliness fell away the agreement unravelled. Without an agreement, the parties turned to the courts to enforce their respective real rights.

[29] Conflicts amongst neighbours has been appropriately described as ‘sad’ and ‘unfortunate’.³ ‘These are matters that neighbours, having due regard for one another’s reasonable requirements and interests, ought to be able to sort out for themselves.’⁴ Such conflict is much more than a ‘regrettable and surely unnecessary falling out between neighbours who had lived as neighbours in apparent amity . . . sorting out questions of mutual concern regarding . . . access to their property . . . by sensible arrangements without recourse to the law.’⁵ Fundamentally, it symbolises an erosion of common aims and reciprocity.⁶

[30] Litigation’s capacity to fix dysfunctional relationships and societies is limited.⁷ What is reasonable use of a servitude is a matter of mutual interest best determined by the users and owners of real rights. Notwithstanding, ‘courts exist and judges are

³ *Moncrieff & another v Jamieson & another* [2007] UKHL 42 para 19, 105, contrast with para 66.

⁴ *Moncrieff & another v Jamieson & another* para 45.

⁵ *Moncrieff & another v Jamieson & another* above.

⁶ Lon L Fuller ‘Forms and Limits of Adjudication’ (1978) 92 *Harvard Law Review* at 357.

⁷ *Moncrieff & another v Jamieson & another* para 19, 105, contrast with para 66.

paid to resolve such disputes, which are indeed the life blood of the common law.’⁸ When the disputes relate to the exercise of servitude rights, they will do so ‘by reference to those reasonable requirements and interests.’⁹

[31] To determine reasonableness, I take my queue from the agreement between the parties. Erecting a security gate across the servitude is a reasonable response to remedy the security concerns of the plaintiffs. However, does the law permit the court to grant an order that would impose burdens on the ownership rights of the defendant?

The law

[32] The definition of servitude that I adopt is the following by Badenhorst, Pienaar and Mostert:

‘a servitude is a limited real right that entitles its holder either to use and enjoy another person’s property or to insist that the owner of the servient property refrain from exercising certain entitlements over his property that he would have been able to exercise if the servitude did not exist.’¹⁰

Manifestly, servitudes implicate s 25(1) of the Constitution of the Republic of South Africa, 1996.

[33] Under s 25(1), no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation off property.¹¹ In this case, the law at issue is the common law. More specifically, the plaintiffs claim is that the common law permits the erection of a security gate across their road servitude. Does the common law permit an owner of the dominant tenement or a beneficiary of a servitude (‘beneficiary’) to erect a security gate over a servitude? If ‘yes’, then does the common law deprive the owner of a servient property (‘owner’) of its property? If ‘yes’, is such deprivation arbitrary?

⁸ *Moncrieff & another v Jamieson & another* para 66; Allan C Hutchinson *Is Eating People Wrong? – Great legal cases and how they shaped the world* (2011) at 3, 5.

⁹ *Moncrieff & another v Jamieson & another* para 45.

¹⁰ Cited by A J van der Walt *The Law of Servitudes* (2016) at 70.

¹¹ *Ex Parte Optimal Property Solutions* CC 2003 (2) SA 136 (C) para 4-6; 19. Registered praedial servitudinal rights are included within the concept of ‘property’ under s 25(1). Accordingly, any removal or deletion of such rights is *pro tanto* a deprivation of property. See also AJ van der Walt *Constitutional Property Law* 3 ed (2011) at 139.

[34] Under the common law, the ownership of property confers the right to possess it, to use and enjoy it, to destroy it and to alienate it.¹² It is the sum total of all rights in a thing.¹³ Inferentially, absolute ownership (*dominium plenum*) also includes the right not to exercise any of these rights.¹⁴ Owners retain all the rights flowing from their ownership provided that the exercise of such rights does not interfere with the rights of the beneficiaries.¹⁵ Beneficiaries hold real rights in things the ownership of which vests in the owner of the servient tenement (*jura in re aliena*).¹⁶ Therefore, servitudes are something less than ownership, a subtraction from or sub-set of ownership.¹⁷

[35] Beneficiaries may prohibit the owners from exercising any one or more of their rights of ownership.¹⁸ They are entitled to the free use and exercise of their servitude.¹⁹ Applying the principle of effective use, beneficiaries must be enabled to exercise the servitude properly.²⁰ In giving effect to this principle, a court may not do more than what the deed of grant or servitude clause permits.²¹ It cannot render an ineffective servitude effective. Furthermore, it does not have the power to rewrite badly drafted servitudes.²² Beneficiaries are entitled to 'all things and subsidiary rights necessary for the proper enjoyment of the servitude.'²³ But they have no more rights than those required for the proper enjoyment of the servitude.²⁴

¹² T R Gibson *Wille's Principles of South African law* 6 ed at 198, fn 1 and 2 citing V.d.L.171, Grotius 2.3.9; and Voet 6.1.1.

¹³ T R Gibson *Wille's Principles of South African law* 6 ed at 166, fn 66 citing V.d.L.171, Grotius 2.3.9; and Voet 6.1.1.

¹⁴ *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services & another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* (CCT19/01) [2002] ZACC 5; 2002 (4) SA 768; 2002 (7) BCLR 702 (16 May 2002) para 54. 'The fact that an owner of a corporeal movable makes no, or limited use of the object in question, is irrelevant to the categorisation of the object as constitutional property. It may be relevant to deciding whether a deprivation thereof is arbitrary and, if it is, whether such deprivation is justified under section 36 of the Constitution.'

¹⁵ *Johl & another v Nobre & others* (23841/2010) [2012] ZAWCHC 20 (20 March 2012) para 12; *Roeloffze NO & another v Bothma NO & others* 2007 (2) SA 257 (C) at 266H-267C.

¹⁶ T R Gibson *Wille's Principles of South African law* 6 ed at 166; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 5 ed (2006) at 321.

¹⁷ T R Gibson *Wille's Principles of South African law* at 166; A J van der Walt *The law of Servitudes* at 63-64.

¹⁸ T R Gibson *Wille's Principles of South African law* at 167.

¹⁹ JT R Gibson *Wille's Principles of South African law* at 225 citing Voet 8.5.1.

²⁰ A J van der Walt *The law of Servitudes* at 226-230.

²¹ A J van der Walt *The law of Servitudes* at 226.

²² A J van der Walt *The law of Servitudes* at 226-227.

²³ JT R Gibson *Wille's Principles of South African law* at 225 citing Grotius 2.35.6 and Voet 8.4.16.

²⁴ T R Gibson *Wille's Principles of South African law* at 227 citing Grotius 2.35.6 and Voet 8.3.8; The South African Encyclopedia of Forms and Precedents vol 15 P170-171

[36] Servitude clauses in deeds of title and agreements must be interpreted strictly. Any additional entitlements must be specifically agreed to by the parties.²⁵ *Johl & another v Nobre & others*²⁶ crystallised the ordinary grammatical meaning of ‘a servitude of right of way’ as ‘nothing more, nothing less’ than an entitlement of the beneficiaries to a right of way across the property of the owner.

‘No other entitlements to the servitude are either express or implied. More specifically, a servitude of right of way anticipates no restrictions as to how it must be exercised. What is clear is that none may be imposed upon the servient owners without their consent.’²⁷

[37] A servitude cannot impose a positive duty on the owner to do something unless ‘the conditions are complementary or otherwise ancillary to a registration condition or right contained in the deed.’ This prohibition is reinforced by the passivity principle which means that imposing a positive obligation on the owner is irreconcilable with the nature of a servitude as a real right. Such an obligation would create personal rights which are not registrable real rights.²⁸

[38] A self-closing and self-locking gate across a servitude to protect life and property is a diminution of rights, including the rights of other people authorised to use the right of way, which is impermissible without the consent of the holders of the rights.²⁹ Special access arrangements could create positive obligations to be mindful of the security of the other. This would create personal obligations between the parties. Also, if the security gate is for the protection of the beneficiary, that would impose a burden on the owner. Such obligations are not registrable against the servitude, do not amount to real rights, and therefore are not enforceable by or against all others.³⁰

Subsidiary rights

²⁵ *Johl & another v Nobre & others* para 16 citing LAWSA Vol 24 para 543.

²⁶ *Johl & another v Nobre & others*.

²⁷ *Johl & another v Nobre & others* para 17.

²⁸ François Du Bois Wille’s *Principles of South African Law* 9 ed (2007) at 595-596; Badenhorst et al *Silberberg and Schoeman’s The Law of Property* 5 ed at 325.

²⁹ *Lodetti & another v Raykov & another* (12285/2013) [2015] ZAKZDHC 39 (15 May 2015) para 51; *Penny & another v Brentwood Gardens Body Corporate* 1983 (1) SA 487 (C).

³⁰ *Zeeman v De Wet en andere* NNO 2012 (6) SA 1 (SCA).

[39] Subsidiary, ancillary, accessory or auxiliary rights of the beneficiary are those rights and obligations reasonably necessary to make servitudes effective.³¹ What they are, is a question of fact. Rights subsidiary to a right of way would include e.g. the right to build steps or ramps to access the dominant property from the road servitude.³²

[40] In the Scottish case of *Moncrieff & another v Jamieson & another*,³³ the House of Lords recognised parking on the servient tenement as ancillary or accessory to entitlements under a right of way to enable the full effective use of the servitude.³⁴ The circumstances were such that it was 'not possible for the driver of a motor vehicle who wished to enter the dominant tenement from the branch public road to do so without parking his vehicle elsewhere.'³⁵

[41] A gate across a servitude is not an ancillary or subsidiary right to use the servitude.³⁶ In fact, it is an interference with real rights. Asserting an entitlement to exclude an owner's entry and exit to the servitude imposes restrictions which conflict with a right of way servitude. The beneficiaries would increase the burden on the servient tenement beyond the obligations imposed by the servitude. Changing the nature of the servitude into 'a security buffer to their property, for their exclusive use' was not upheld in *Johl*.³⁷ The court found that the beneficiary was not exercising the servitude 'with care and consideration in accordance with the concept of *civilliter modo*.'³⁸ Furthermore, security was largely irrelevant to the issues in that case.

[42] The legislature has enabled the expansion of complementary or ancillary rights. Although s 63(1) of the Deeds Registries Act 47 of 1937 below reinforces the passivity principle, it ameliorates the inflexibility of the common law by enabling the registration of ancillary rights case by case:

³¹ See e.g. ancillary servitudinal rights in s 30 of Sectional Titles Act, 95 of 1986.

³² Sonja van Staden *Ancillary rights in servitude law* (Dissertation presented in partial fulfilment of the degree of Doctor of Laws at Stellenbosch University) (2015) at 207 citing Voet 8 4 16. Stellenbosch University <https://scholar.sun.ac.za> (accessed 1 April 2020).

³³ *Moncrieff & another v Jamieson & another* [2007] UKHL 42.

³⁴ *Moncrieff & another v Jamieson & another* para 3, 36.

³⁵ *Moncrieff & another v Jamieson & another* para 10.

³⁶ For a discussion on ancillary, accessory, auxiliary and implied rights see Sonja Van Staden *Ancillary rights in servitude law* at 209.

³⁷ *Johl & another v Nobre & others* para 18.

³⁸ *Johl & another v Nobre & others* para 20-22.

'No deed, or condition in a deed, purporting to create or embodying any personal right, and no condition which does not restrict the exercise of any right of ownership in respect of immovable property, shall be capable of registration: Provided that a deed containing such a condition as aforesaid may be registered if, in the opinion of the registrar, such condition is complementary or otherwise ancillary to a registrable condition or right contained or conferred in such deed.'

Owners of real rights have an entry point for registering ancillary rights to servitudes.

Civiliter modo

[43] Whereas the effective-use principle and the subtraction test discussed above determine whether the right in property is registrable as a servitude, the *civiliter* principle regulates the reasonable exercise of servitudes.³⁹ Reasonableness implies lawfulness.⁴⁰ The *civiliter* principle kicks in only after the servitude is established.⁴¹ This principle protects owners from 'unnecessary and unwarranted burdens,' that is, 'burdens that are neither required for the proper exercise of the servitude nor clearly specified or included by implication in the servitude grant.'⁴² Beneficiaries must exercise their rights *civiliter modo*, that means, in such a way that the servitude does not become more burdensome on the owner.⁴³

[44] If the beneficiaries claim greater rights under the servitude than they actually have, the owners may institute an action to free the servitude of excessive burdens.⁴⁴ Any changes beneficiaries make must be with the consent of the owners.⁴⁵ Nor can they prevent the owners from using (or not using) their land as they choose.⁴⁶ Concomitantly, the owner may not encroach or do anything which derogates from the servitude.⁴⁷ These are no more than the application of the general rule that all rights must be exercised reasonably with due regard to the rights of others.⁴⁸ Implicitly,

³⁹ A J van der Walt *The Law of Servitude* at 230-248.

⁴⁰ A J van der Walt *The Law of Servitude* at 252.

⁴¹ A J van der Walt *The Law of Servitude* at 249.

⁴² A J van der Walt *The Law of Servitude* at 247.

⁴³ A J van der Walt *The Law of Servitude* at 247; *Johl* para 13-14 citing *Rabie v De Wit* 1946 CPD 346 at 351 and *Texas Co (SA Ltd v Cape Town Municipality* 1926 AD 467 at 475.

⁴⁴ T R Gibson *Wille's Principles of South African Law* 6 ed at 227 citing Voet 8.5.5; The South African Encyclopedia of Forms and Precedents vol 15 at 170-171. See Badenhorst et al *The Law of Property* at 331, fn 90 for a discussion on the view that the *actio negatoria* is obsolete.

⁴⁵ *Linvestment CC v Hammersley* (634/2006) [2008] ZASCA 1 (28 February 2008) para 11.

⁴⁶ *Johl & another v Nobre & others* para 15; A J van der Walt *The Law of Servitude* at 252.

⁴⁷ *Linvestment CC v Hammersley* para 27.

⁴⁸ The South African Encyclopedia of Forms and Precedents at 170.

applying the *civiliter* principle involves a balancing of the interests of the beneficiaries and owners, a pointer towards renovating the common law.

Common law and security gates

[45] This is how we find the common law pertaining to servitudes. Under the common law, without consensus, the plaintiffs have no rights whatsoever to burden the defendant's ownership of the servitude land. Erecting a gate is an encroachment and therefore a prohibited burden. No subsidiary rights mitigate the potentially inconvenient and detrimental impact of the common law prohibition against erecting security gates over servitudes.

[46] Currently, the common law regarding security gates over servitudes is unhelpful to both owners and beneficiaries alike who wish to secure their persons and property. However, security is a need for both owners and beneficiaries. The case law to which counsel have referred is dominated by owners seeking to impose encroachments in the exercise of their rights of ownership of the land over which the servitude exists.⁴⁹ *Johl* is unusually about a security gate encroachment on the servitude by the beneficiaries. So is this case.

[47] The distinction between security gate encroachments on servitudes by owners and beneficiaries have all but evaporated under the constitutional protection of property. Beneficiaries are holders of real rights to property and, like owners, are protected against interferences that result in arbitrary deprivation. However, a beneficiary will always require an owner's consent. An owner will also require a beneficiary's consent unless the security gate manifestly does not impact adversely on the beneficiary's rights. This view finds fortification in *Moncrieff v Jamieson*.⁵⁰

'[T]he owner is entitled to exercise a servitudinal right over the land of his neighbour, to exercise the right reasonably and without undue interference with the servient owner's enjoyment of his own land. The converse of this principle is that an interference by the servient owner with the dominant owner's exercise of the servitude will not be an actionable interference unless it

⁴⁹ *Linvestment CC v Hammersley; Roeloffze & another v Bothma NO & others* 2007 (2) SA 257 (C); *Penny & another V Brentwood Gardens Body Corporate* 1983 (1) SA 487 (C); *Malan & another v Green Valley Farm Portion 7 Holt Hill 434 CC & others* 2007 (5) SA 114 (E); *Lodetti & another v Raykov & another* (12285/2013) [2015] ZAKZDHC 39 (15 May 2015); *Stuttaford v Kruger* 1967 (1) SA 481 (C).

⁵⁰ *Moncrieff v Jamieson* [2007] UKHL 42 para 45.

prevents the dominant owner from making a reasonable use of the servitude. Thus, for example, the erection by the servient owner of a building that encroached by, say, one foot on to a ten foot wide domestic driveway would not constitute an actionable interference with a right of way over the driveway’

[48] Two judgments strike a path towards renovating the common law.⁵¹ In *Linvestment CC v Hammersley*, the SCA remarked that a modification of our existing law may better serve the interests of justice when it is uncertain or does not adequately serve modern demands on it. It observed:

‘The rigid enforcement of a servitude when the sanctity of the contract or the strict terms of the grant benefit neither party but, on the contrary, operate prejudicially on one of them, seems to me indefensible. Servitudes are by their nature often the creation of preceding generations devised in another time to serve ends which must now be satisfied in a different environment.’⁵²

[49] The SCA introduced the concepts of ‘manifest convenience’ and ‘absence of detriment’ as tools to develop the common law. These concepts were invoked in the context of the owner seeking to divert an existing servitude at no inconvenience or cost to the beneficiary.⁵³ Permitting an owner to unilaterally relocate a servitude is ‘purely utilitarian’ for the purposes of promoting efficient use of land.⁵⁴

[50] In reaching this conclusion, the SCA exposed the tension between change and resistance to it, between preserving stability in the system of property ownership and permitting modernisation, adaptation and, in a word, transformation. If transformation is achievable without destabilising the system, it should be permitted. Another cause for change would be to avoid existing rights becoming ‘obsolete or inefficient burdens on land.’⁵⁵

⁵¹ A J van der Walt *The Law of Servitude* at 12-14, 32.

⁵² *Linvestment CC v Hammersley* para 31.

⁵³ *Linvestment CC v Hammersley* para 29. Sonja Van Staden *Ancillary rights in servitude law* (Dissertation presented in partial fulfilment of the degree of Doctor of Laws at Stellenbosch University) (2015) at 209 Stellenbosch University <https://scholar.sun.ac.za> (accessed 1 April 2020.),

⁵⁴ A J van der Walt *The Law of Servitude* at 42.

⁵⁵ Sonja Van Staden *Ancillary rights in servitude law* at 213

[51] In *Jersey Lane Properties (Pty) Ltd t/a Fairlawn Boutique Hotel & Spa v Hodgson & another*⁵⁶ the full court, independently of *Linvestment CC v Hammersley*, which was decided four years earlier, endorsed its support for a 'progressive' and 'wide interpretation' of a servitude, so that it would not violate the common law principles.⁵⁷ Instead of undertaking the exercise, it referred the matter for trial. In that case the beneficiary, without the prior consent of the owner, constructed a large security gate entrance over an existing servitude of right of way to enhance its security. The structure blocked the views enjoyed by the owner, increased the burden on the servient property, and deprived the owner of various incidents of ownership.

[52] *Jersey Lane Properties (Pty) Ltd t/a Fairlawn Boutique Hotel & Spa v Hodgson & another* is criticized for several reasons. The court omitted to consider whether the erection of the security gate was strictly necessary for the proper and effective use of the servitude. If it was, then whether building it on the owner's land was strictly necessary and justified in view of the principle that the servitude must be exercised so as to impose the smallest possible burden on the owner's land. Furthermore, without a clear right in the grant, there was no justification for allowing a beneficiary to build on the owner's land unless there was proof that the servitude could only be exercised effectively if an entrance structure was built on the owner's land.⁵⁸

[53] Inducing some flexibility in the common law favours both owners and beneficiaries if it does not undermine the value of stability of the system of property law. Stability is achieved by providing adequate protection of the respective rights of owners and beneficiaries to their real right entitlements but without giving the beneficiaries more extensive rights than their servitudes under the common law would allow, nor imposing more burdens on owners.⁵⁹

⁵⁶ *Jersey Lane Properties (Pty) Ltd t/a Fairlawn Boutique Hotel & Spa v Hodgson & another* (A5030/11) [2012] ZAGPJHC 86 (7 May 2012)

⁵⁷ *Jersey Lane Properties (Pty) Ltd t/a Fairlawn Boutique Hotel & Spa v Hodgson & another* para 9-10.

⁵⁸ A J van der Walt *The Law of Servitude* at 238.

⁵⁹ Sonja Van Staden *Ancillary rights in servitude law* at 216.

Renovating the common law⁶⁰

[54] Life in the twenty-first century commends renovating the common law to align with the security needs of both owners and beneficiaries. Recognising the plaintiffs' security concerns compels modernising its application to previously indeterminate circumstances. A legal peg is needed on which to ground a principle to cater for current exigencies.

[55] Ideally, renovation of the common law must be undertaken with full participation of the parties. It must be properly researched, pleaded and argued with due regard to the polycentric ramifications of the outcomes. Furthermore, the system of precedents compels us to tread with extreme caution. For, we cannot anticipate fully the implications of such an enterprise beyond the case at hand and for the future of constitutional jurisprudence.

[56] The plaintiffs did not invite the court to develop or renovate the common law, at least, not specifically in these terms. However, the remedies they seek cannot be reached otherwise. Additionally, the courts have not a mere discretion, but 'a general obligation to develop the common law appropriately where it is deficient, as it stands, in promoting the s 39(2) objectives.'⁶¹ We have a single system of law shaped by the Constitution. The law of servitudes is part of that system.⁶² Therefore, no renovation of the common law is permissible as if the Constitution does not exist.

[57] As indicated above, the erection of a gate by a beneficiary would impact on existing rights of the owner in ways that could amount to a deprivation of the owner's property in conflict with s 25(1) of the Constitution. Ironically, it is not the common law but permission to erect security gates that could deprive them of their property, arbitrarily, and in conflict with the provisions of s 25.

⁶⁰ Dennis M Davis and Karl Klare 'Transformative constitutionalism and the common and customary law' (2010) 26 SAJHR 403.

⁶¹ *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services & another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* (CCT19/01) [2002] ZACC 5; 2002 (4) SA 768; 2002 (7) BCLR 702 (16 May 2002) para 31, citing *Carmichele v Minister of Safety and Security & another* 2001 (10) BCLR 995; 2001 (4) SA 938 (CC) para 39.

⁶² A J van der Walt *The Law of Servitude* at 38.

[58] Renovating the common law is possible from two directions. First, by importing reasonable use as the standard through the *civilliter* principle, the common law can be applied to determine the rights of beneficiaries and owners in regard to modern security gates. Second, security gates can be erected in ways that avoid or minimise arbitrary deprivation. This dual utilitarian approach of combining law with technology is a way to harmonise property owners' need for security with the law of servitudes under with the Constitution.

[59] If deprivation of property is unavoidable, then it must not be arbitrary. If a gate is manifestly inconvenient or detrimental to other users of the servitude that it deprives them of their rights to property, then the deprivation would be impermissible, unless no other or less onerous means is available to achieve the desired end. A security gate that is imposed arbitrarily would automatically be unreasonable and unjustifiable under the limitations in s 36(1) of the Constitution.

[60] Gates placed across a road servitude which do not hinder the free passage of the beneficiary are not automatically a denial of rights.⁶³ A gate will interfere with the use by the holder of the rights to use the servitude. Whether such interference amounts to a deprivation of property, whether such deprivation is rational, reasonable and not arbitrary depends on the facts of each case.⁶⁴ Consent of the other holder of rights to use the servitude would dispose of these questions. However, if permission from a municipality to erect a gate is required, then mutual consent would not be enough. Left to the courts, each case will have to be determined on its own facts having regard to the needs and affordability of the parties, the topography and the available technology, amongst other things.

Remedies

[61] By granting flexible or utilitarian remedies in the following three cases, the courts encouraged the litigants to dialogue over and adapt the courts' remedies for themselves. To ensure that injustice did not result, the SCA granted a conditional declarator.⁶⁵ If the owner offered a relocation of an existing servitude of right of way,

⁶³ *Allen v Colonial Government* (1907) 24 SC 1 at 8-9 citing Voet 8, 3, 4.

⁶⁴ *Roeloffze NO & another v Bothma NO & others* 2007 (2) SA 257 (C).

⁶⁵ *Linvestment CC v Hammersley & another* 2008 (3) SA 283 (SCA).

the beneficiary was obliged to accept such relocation, if the owner would be materially inconvenienced in the use of his property if the *status quo ante* remained; the relocation would occur on the servient tenement; the relocation would not prejudice the beneficiary; the owner would pay the costs of the relocation and amendments of title deeds of both properties. Effectively, the SCA permitted the relocation in principle, but left the details of what would amount to inconvenience and prejudice to the owner and beneficiary to determine.

[62] Throughout the judgment, the SCA emphasized that deviations from the common law are possible by agreement. Unsurprisingly, therefore, the order left open the option of further dialogue between the parties, especially as the hearing, which had proceeded on a stated case, had raised unforeseen issues. The order for each party to pay its own costs in both courts reinforced the court's drive for consensus.

[63] In *Jersey Lane Properties (Pty) Ltd t/a Fairlawn Boutique Hotel & Spa v Hodgson & another*,⁶⁶ the beneficiary commenced the construction of the gate without the consent of the owner and the local authority. The full court referred the matter for trial because:

'A number of other factors affecting the reasonableness of the appellant's exercise of its rights under the servitude, such as the general aesthetics of the surroundings, the security requirements of the property and the general tendency to erect porticos at entrances to upmarket business premises, residential estates and even private residential properties in that area ... may well be relevant for consideration by the trial court.'⁶⁷

[64] In *Johl & another v Nobre & others*⁶⁸ the court directed the beneficiaries to provide a remote device to the security gate to the owners. That was what the owners wanted and were prepared to pay for it. The beneficiaries were mulcted with an adverse costs order.⁶⁹

⁶⁶ *Jersey Lane Properties (Pty) Ltd t/a Fairlawn Boutique Hotel & Spa v Hodgson & another* (A5030/11) [2012] ZAGPJHC 86 (7 May 2012)

⁶⁷ *Jersey Lane Properties (Pty) Ltd t/a Fairlawn Boutique Hotel & Spa v Hodgson & another* para 10.

⁶⁸ *Johl & another v Nobre & others* (23841/2010) [2012] ZAWCHC 20 (20 March 2012) para 18.

⁶⁹ *Johl & another v Nobre & others* para 20-22.

[65] As mentioned above, s 63(1) of the Deeds Registries Act gives the registrar the power to register on a case by case basis conditions that are 'complementary or otherwise ancillary to a registrable condition or right contained or conferred in such deed.' In the longer term, the registrar, jointly with local authorities and other stakeholders concerned about property rights, is the appropriate authority for renovating the common law to meet the security needs of both owners and beneficiaries. In the short term, the courts have to hold the fort.

[66] Balancing the countervailing rights against each other and with the constitutional limitations in matters of mutual interest is complex. Many variables are at play. Left to a judge to choose, the permutations are multiple. Not all would necessarily satisfy the mutual interests of the parties. Hence, the best outcome for a dispute of mutual interest remains one that the parties devise for themselves.

Distinguishing the dispute from the conflict

[67] Erecting security gates across servitudes escalates in frequency as a source of conflict amongst neighbours.⁷⁰ In and of itself, property ownership and security manifest as the source or cause of the conflicts. But the manifestation is not necessarily the reality. Festering beneath the articulated need for security is the possibility of layers of unarticulated social discord. Security gates symbolise exclusion, wealth, class and privilege.

[68] In this case, the parties articulated the issues in their pleadings to conform with the requirements for a justiciable dispute. They presented the cause of the conflict as infringements of their rights under the common law, in particular the law of property, ownership of real rights and contract. What triggered the conflict did not feature at all in the pleadings but in the evidence.

[69] The foundation for their agreement namely, neighbourliness, fell apart when the plaintiffs complained about the defendant's dogs being a nuisance, and her business being an illegal operation. Threatening her with litigation aggravated their animosity.

⁷⁰ For the distinction between sources, causes and manifestations of conflict see M Anstey *Negotiating Conflict – Insights and Skills for Negotiators and Peacemakers* (1991) at 13-42.

The plaintiffs' unsolicited diagnosis and offers of assistance to relocate her dogs and her veiled threats to report the defendant to the SPCA fuelled the antagonism. Unimpressed by the civility of the plaintiffs, she recalled instead the chipped mugs in which the plaintiffs served her tea. Their persistent emails irritated the defendant, a business woman who had other priorities. Her request for time to consider the further information she awaited, fuelled the plaintiffs' impatience, even though they had the protection of the temporary gate.

[70] As the third plaintiff was also the attorney of record, the inequality of arms disadvantaged the defendant. His warning that the defendant had an obligation to first seek and obtain permission from his law firm to access portion PQRS was grist to the mill.

[71] The defendant retaliated. Asserting her ownership rights, she claimed unrestricted access to portion PQRS for the purpose of walking her dogs and parking cars. Manifestly, her claim was contrived for the occasion.

[72] Against this backdrop, the defendant rejected several offers from the plaintiffs. The plaintiffs' concern for their safety is genuine and they are prepared to pay to protect themselves and to compensate the defendant.

Options for problem solving

[73] The plaintiffs made several open tenders since 2015 to resolve the dispute. Those tenders and other permutations of them offer more substantive remedies. What's possible by consensus is not necessarily permissible by judicial decree. Whether in resolving this dispute the court also succeeds in solving the conflict, depends on how the parties respond to this judgment.

[74] Imposing an obligation on the defendant to access the servitude between specified hours or only after prior arrangement with the plaintiffs, is a deprivation of her property. It is also arbitrary as less onerous options are available. An order compelling the first and second defendants to sell portion PQRS or NPQRST would be a far reaching, impermissible deprivation tantamount to expropriation. The

defendant is free to dispose of her property at will, even to a third party. Nor can the order impose personal obligations of the defendant's successors in title.

[75] In the order I make, I recognise the right of the first and second defendants to their property. I also recognise the right of the plaintiffs to their personal safety and security. Applying a reasonable use standard, both rights must be balanced against each other. This balance is struck if the plaintiffs are permitted to erect a gate across the servitude; the gate must comply with the requirements of the eThekweni Municipality; and the first and second defendants must have access to the servitude beyond the gate without prior permission from the plaintiffs or their attorneys. What technology would enable the defendant and anyone else she authorises to access portion PQRS of the servitude without prior permission from the plaintiffs or their attorneys, is a matter of detail for the parties to resolve amongst themselves. Similarly, the size and design of the gate are for the parties to agree. At their own costs, the plaintiffs would have to install the appropriate technology that gives the defendant unsupervised access. Authorising the sheriff to step in if any party defaults, offends against the spirit of neighbourliness that this judgment seeks to encourage.

[76] The effect of this order would be that the plaintiffs' dogs cannot be left unattended in portion PQRS. Allowing the plaintiffs' dogs access to portion PQRS would mean that the defendant and her authorised users would have no access except at the instance of the plaintiffs. The parties are encouraged to vary or substitute the orders granted below by agreement amongst themselves.

Rectification of title deeds

[77] The plaintiffs allege that, due to a conveyancing oversight, the title deeds of the defendants' properties do not reflect the road servitude in favour of the plaintiffs' properties. They seek an order directing the defendant to register, at the plaintiffs' expense, a Notarial Deed of Road Servitude over the common property, 33 feet wide lettered as NPQRST, in favour of the plaintiffs' properties.

[78] Manifestly, the plaintiffs have no other means of accessing their properties other than through NPQRST. Such access is recognised in the Surveyor General's diagram S.G. No. D. 212/1998 but not in the conditions of the first defendant's Sectional Deed

of Title ST064384/07. Nor do they appear in the Conveyancer's Certificate in terms of section 11(3)(b) submitted in respect of Sectional Plan SS386/98 registered for the scheme Kings Avenue No.1. Road servitude NPQRST in favour of the plaintiffs' properties was dropped from the sectional deeds of transfer of the defendant and her predecessor in title.

[79] In the face of resistance from the defendant (for reasons unclear) and without evidence that the apparent discrepancy is the result of a conveyancing oversight, I hesitate to grant the relief claimed. If this was a conveyancing oversight, then the conveyancer must explain how the error came about. The registrar of deeds must explain how such error went unchecked. For the system of property registration to be reliable, it has to be maintained meticulously. However, both the registrar of deeds and the eThekweni Municipality have been notified of this action. Neither has chosen to participate. Additionally, the entire action was premised on the plaintiffs being beneficiaries of the servitude and the defendant the owner.

Order

[80] The following order is granted:

- 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 metres (approximately) (the servitude) between the points P and S, subject to the following conditions:
 - (i) The plaintiffs must give the first and second defendants and anyone they authorize unsupervised access to use the servitude;
 - (ii) The plaintiffs must use appropriate technology to give effect to this order;
 - (iii) The costs of erecting, maintaining and securing the gate shall be for the plaintiffs' account;
 - (iv) The plaintiffs must maintain the servitude.
- b. The order in 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 1719 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:
 - (a) Erf 1747 Westville (1B and 1C of Kings Avenue) held under the deed of transfer T41108/08; and
 - (b) Portion 1 of Erf 1746 Westville (1E Kings Avenue) held under deed of transfer T027482/09.
- (ii) the third and fourth plaintiffs as owners of Remainder of Erf 1746, Westville (1D 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.



D. Pillay J
Judge of the High Court of KwaZulu-Natal

APPEARANCES

Counsel for the plaintiff	:	A De Beer SC
Instructed by	:	NSG Attorneys
		Tel: (031) 202 9751
		Email: leithc@nsg.co.za
 Counsel for the defendant	 :	 R.B.G Choudree SC, R.R Kisten
Instructed by	:	Gosai & Company Attorneys
		Tel: (031) 303 5549
		Email: vinay@gosaiattorneys.co.za

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handed down electronically : 30 April 2020