



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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Status: Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

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

Today the Supreme Court of Appeal (SCA) handed down judgment and dismissed an appeal and cross-appeal with costs against the decision of the KwaZulu-Natal Division of the High Court of South Africa, Durban (the high court).

On 19 May 2012, the appellants and respondents concluded an oral agreement at the instance and request of the respondents. In terms of the agreement, the appellants gave consent to the respondents to erect a temporary security gate across the servitude at their own expense. The respondents contended that the servitude was accessible by anyone driving or walking on Kings Avenue. Consequently, their properties were exposed to the presence of undesirable persons that created a security risk. It was agreed that the respondents were to obtain the necessary building approval and to ensure that the appellants have the use of the servitude on the respondents' side of the gate on reasonable notice. It was a further part of the agreement that the gate's construction would not prejudice the appellants' plans to subdivide 1 Kings Avenue in the future. Further, it was agreed between the parties that the maintenance of the temporary structure would be at the expense of the respondents. The temporary structure was duly constructed and remained in place at the time of the institution of the present litigation. About a year later, in March 2013, the respondents approached the appellants with a request to construct a permanent gate, to enhance the security of their properties. The appellants declined. The refusal led to an exchange of emails, trading accusations and counter-accusations, in tones that led to a deterioration of the initial cordial relationship between the parties. The appellants countered by demanding that the temporary gate be removed due to the respondents having failed to obtain municipal approvals. Litigation ensued when the respondents instituted action proceedings in the high court. The high court ruled in the respondent's favour.

On appeal the SCA dismissed the appeal and cross-appeal and upheld the high court order. In doing so, the SCA held that:

The first question was whether either having or not having a gate was essential for effective use of the servitude – if having a gate was essential, the effective-use principle took precedence and the dominant owner may install a gate. The civiliter principle would then indicate what was 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 was essential to use of the servitude, the effective-use principle prescribes that the dominant owner could prevent the servient owner from installing one. If neither having nor not having a gate was essential, the next question was 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 (the civiliter principle). From the side of the servitude holder, access to the servitude road was 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 did not prevent the servient owner of continued reasonable access and use of her land (unless exclusive use of the servitude was foreseen in the grant).

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