

CREATING A SERVITUDE TO SOLVE AN ENCROACHMENT DISPUTE: A SOLUTION OR CREATING ANOTHER PROBLEM?

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SUMMARY

The main focus of this note is the case of *Roseveare v Katmer, Katmer v Roseveare* 2013 ZAGPJHC 18, which provides an interesting (though possibly constitutionally problematic) perspective to the encroachment problem. The decision in this case has opened the door for courts to create servitudes in instances where encroachments are left intact based on policy reasons. Concerning these policy reasons, the note investigates the reasonableness standard as it was applied in the case. It is argued that it is important to differentiate between the applications of reasonableness in encroachment cases and alleged nuisance disputes.

The decision in this case creates the impression that courts may now order that a servitude be registered in favour of the encroacher against the affected landowner's property. It seems as though the court had in mind the creation of a praedial servitude to justify the continued existence of the encroachment. The servitude is created by court order against the will of the affected landowner. At common law, the creation of a servitude in this respect does not exist, and the authority from which the power derives to make an order like this is not entirely clear. The court also does not provide any authority for the creation of the servitude in favour of the encroacher. Consequently, it is argued that this may have serious constitutional implications.

For one, lack of authority for the deprivation that results may be unconstitutional because there is no law of general application that authorises the deprivation in terms of section 25(1). The creation of a servitude to explain the continued

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existence of the encroachment is not automatically included in the general discretion to replace removal with compensation. It is contended that an order that forces the affected landowner to register a servitude in favour of the encroacher to preserve the existing encroachment situation will be in conflict with section 25(1) as far as the common law does not authorise such an order. Furthermore, an order creating a servitude against the affected landowner's will need to be separately justified in terms of the non-arbitrariness requirement in section 25(1). In this respect, the order will be unjustified and therefore arbitrary on both a general and personal level.

Although this decision eliminates the enduring problem in encroachment law concerning the rights of the respective parties to the affected land where encroachments are not removed, it is reasoned in this note that the solving of this problem may have created another one. The decision is undoubtedly a step in the right direction, in so far as the court has attempted to provide clarity in terms of the rights to the encroached-upon land. However, the absence of authority either in terms of the common law or legislation to create a servitude in this context, indicates that courts should avoid orders of this nature because of their implications. If legislation is enacted to regulate building encroachments, it may be useful to explain what happens when the encroachment is not removed and it may also provide the required law of general application to prevent constitutional infringement. The legislation should specify the nature of the right acquired by the encroacher, which in the South African context should probably be a servitude created against the affected landowner's property. This may ensure that the required authority exists for the creation of the servitude and would also provide the necessary justification to prevent the arbitrary deprivation of property. It is accordingly submitted that the unnecessary confusion that results from the inability to explain the outcome (or provide sufficient reason) on the one hand, and the possible constitutional infringement due to the lack of authority on the other, may therefore be cleared up by the suggested legislation.

KEYWORDS: Encroachment, Servitude, Reasonableness, Arbitrary deprivation, Property, *Roseveare v Katmer*, *Katmer v Roseveare*.