

FITCHAT v. CENTRAL SOUTH AFRICAN  
RAILWAYS.1910.    *March* 9.    MAASDORP, C.J., and WARD, J.*Interdict.—Right-of-way.—Servitude.—Railway crossing.*

Where F, a general storekeeper of Bloemfontein, alleged damage to his business owing to loss of customers due to the closing of a railway crossing, and where a right-of-way across the railway line at that crossing had been reserved to the town council under an agreement to give transfer of municipal lands to the predecessors in title of the Central South African Railways, *Held*, that F was entitled personally to institute proceedings under the servitude and to obtain an interdict restraining the railway from obstructing the crossing.

This was an application for the removal of a fence erected by the respondents on the western boundary of the railway line at a crossing at the end of Bree Street, Bloemfontein, and for an interdict restraining the defendants from obstructing the crossing. It appeared that, on the report of a roads commission appointed under sec. 6, sub-sec. 3, of Ordinance 17 of 1905, a proclamation had been issued under sec. 10 declaring a portion of the public road leading from Bloemfontein to Winburg to be closed, as it was considered desirable to divert the road. This road had originally crossed the railway line at the end of Bree Street, but had by the proclamation been diverted so that it ran parallel with the railway line to a point further north, where a new crossing was made. The portion of the road that was closed ran from the eastern side of the old crossing along the road to Winburg. The applicant owned some property near the crossing, consisting of a large general store and also shop premises he had let. The ground for the application was that the applicant's property and business had suffered damage by reason of the erection of the fence, in that he was losing the custom he had previously received from farmers passing his

store on their way along the public road into Bloemfontein, and also that of the residents in a large native location on the eastern side of the line. By an agreement made in 1898 between the railway authorities and the town council, whereby the former had obtained transfer of the property over which the railway line now runs, the right to all roads and ways previously used was expressly reserved to the town council.

*Blaine, K.C.* (with him *Brebner*), for the applicant: Owing to the servitude granted under the agreement of 1898 the railway authorities had no right to erect a fence on the western side of the line. The reservation was made in favour of the inhabitants of Bloemfontein.

*Williamson* (with him *P. U. Fischer*), for the respondents: If it is intended that the order of the roads commission should be set aside, the members of the commission should first be heard.

[MAASDORP, C.J.: If the applicant has a servitude as against you, has he not the right to make use of the right-of-way?]

He would commit a trespass by crossing the eastern boundary of the railway line, although he had the right to walk up to the fence there erected from either side. Neither a member of the general public nor an erf-holder is entitled to claim damages unless he can prove particular damage to himself. See *Pollock on Torts* (6th ed.), pp. 387 *et seq.*

[MAASDORP, C.J.: See the case of *Aliwal North Municipality v. Oxer and Smith* (Buch. 1875, p. 138).]

The interdict in that case was refused on appeal. See *Ricket v. Directors of the Metropolitan Railway Co.* (L.R. 2 H.L. 175).

[MAASDORP, C.J.: The passage in *Pollock* and the cases quoted apply to nuisances. The Roman-Dutch law does not look upon the blocking of a right-of-way as a nuisance, but as the breach of a right.]

The reservations are made in favour of the town council, and they alone have a right of action. The servitude was granted in respect of this road expressly for the road to Winburg. That portion of the road has been closed, and consequently the utility of the servitude ceases, and it cannot, therefore, be enforced any

longer. See Maasdorp's *Institutes of Cape Law*, vol. 2, p. 167. The applicant has waived his right to protest, as he has had time to institute action, and the respondents are a substantial body, and are in a position to pay compensation for any damage the applicant can prove in an action.

*Blaine, K.C.*, in reply.

MAASDORP, C.J.: In this case the applicant moves for an order compelling the respondents to remove a fence and obstruction placed across Bree Street, and an interdict restraining them from in any way obstructing the road at any point. In the view the Court takes of this matter it is not necessary to confine our reasons to any particular part of the road. Our decision will be based on the general principles of ownership, and without inquiring into the validity of the proceedings of the roads commission or of the proclamation of the 2nd February, 1910.

The applicant is a landowner and ratepayer of Bloemfontein, and for the purposes of this application may be treated as standing in the same position as if the corporation of Bloemfontein had been the applicant in this matter. Now the town lands of Bloemfontein are vested in the corporation, which is therefore in the eye of the law the owner of those lands. Of those lands the corporation in 1898 by two separate deeds of transfer made over two portions to the State for railway purposes, but with the reservation that all ways and roads passing over such ground, which were in existence at that time, should continue to exist as a servitude on the same in favour of the public, and should not be obstructed or diverted otherwise than in consultation with the town council. The respondents are now vested with all the rights of the State in this matter, and have attempted, with the assistance of the aforesaid roads commission, to close a road, which as regards one portion forms one of the roads reserved for the public by the servitude already referred to, and as regards the remainder lies entirely within the limits of the town lands of Bloemfontein. In other words, they are attempting to prevent the owner of the ground from using a road situate partly on his own ground and partly on ground over which he has a right of servitude.

Now it is not necessary for the purposes of this case to inquire into the rights and powers of the roads commission under Ordinance 17 of 1905. They may have acted quite within their rights in closing a portion of the public road running from Bloemfontein to Winburg, but such closure could only have effect as against outsiders, and could not deprive any landowner of his rights of ownership, and consequently not of the right of using any road that might be in existence on his own land or of any right of servitude he might have over the land of another. But the inhabitants of Bloemfontein, including the applicant, stand in regard to the road in question in the position of private landowners, and consequently, though such road may be closed as a portion of the public road from Winburg to Bloemfontein, it is not closed as a municipal road against the public of Bloemfontein.

Mr. *Williamson* urges that, though the inhabitants of Bloemfontein may have a right to go up to the boundary of the railway line on either side, they cannot step over it. But why not? This right has been specially reserved to them by the servitude. There is nothing to prevent them from stepping over the boundary and exercising their right-of-way across the railway line: no authority is required for such a decision. As to Mr. *Williamson's* argument that it was for the corporation, and not for the applicant, to move in this matter, every member of the public who suffers damage from a special interruption of his rights is entitled to institute proceedings to protect those rights. In this case the applicant says he is suffering damage. He has a business which is being interfered with by the existence of this fence, and it was not necessary for him to wait longer in order to bring an action. The interdict must be granted, and the order framed in terms of the prayer with costs.

WARD, J., concurred.

Applicant's Attorney: *G. A. Hill*; Respondents' Attorney: *F. S. Webber*.