

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE – PORT ELIZABETH)

Case No.: 2804/2006

Date heard: 09 March 2010

Date delivered: 08 June 2010

In the matter between:

JACQUELINE LE ROUX

Plaintiff

and

GUY EDWARD ANTHONY REID

First Defendant

**THE TRUSTEES FOR THE TIME BEING OF
THE FERNDAL FAMILY TRUST**

Second Defendant

J U D G M E N T

DAMBUZA, J:

[1] The defendants have, at the end of the plaintiff's case, brought an application for absolution from the instance.

[2] In the main action the plaintiff, as the owner of a property known as The Remainder of the Farm Saagkuilen No 57 ("the property"), seeks an order interdicting the defendant, in his personal capacity and in his capacity as the Trustee of the second defendant, and anyone acting through him, from entering upon the said property. In the alternative, the plaintiff seeks a declarator that the first defendant, in his personal

capacity and in his capacity as the trustee of the second defendant, may not use the plaintiff's property for recreational purposes.

[3] The plaintiff, in her summons, contends that the first defendant, his family and friends access the property for recreational purposes and she seeks a declarator that they may not do so. Access to the contentious portion of the property is gained through a gate which leads onto a road referred to in these proceedings as the "Remainder Road".

[4] The defendants plead entitlement to enter upon the property by virtue of the Remainder Road being a public road. They contend further that in terms of the first condition of title which appears in the Deed of Transfer relating to the property, they are entitled to use the Remainder Road. This title condition provides that:

"That all roads and thoroughfares being and existing on the said land, and as described in the plan or diagram of the same, shall remain free and uninterrupted; unless the same be closed or altered by competent authority"

[5] Further to the defences raised by the defendants, they have filed a counterclaim in terms of which their claim to right of use of the Remainder Road is founded on acquisitive prescription. They also rely, in their defence on *via necessitate*. The parties have, however, agreed that the issue of *via necessitate* be separated from the issues already mentioned and be dealt with at a later

stage. At this stage therefore, the only issues before me in the trial are the location of the minor public road 119H proclaimed as a public road in 1972 or whether the Remainder Road is the public road so proclaimed, and whether the first condition of title in respect of the property entitles the defendant to use the Remainder Road.

[6] It was common cause at the trial that a road, being a minor public road 119H was proclaimed as a public road on 23 June 1972 in Government Gazette No 1122 (the "Gazette"). In the Gazette the proclaimed road is described as:

"From a minor road in the Patensie Village Management Area on the boundary of the said area in a general north-westerly direction over Keurkloof and Saagkuilen to a point on Holrivier, at the boundary common thereto and the said Saagkuilen"

[7] The defendants contend that the proclaimed road (public road 119H) is the Remainder Road which starts from a nearby village of Patensie, and proceeds up to a point in front of an entrance to the property, where it then enters the property and follows a path across the property to the boundary thereof with another property, the farm Holrivier.

[8] The plaintiff's case is that she has a right to stop unauthorised use of the Remainder Road and her property. The defendants deny that their use thereof constitutes trespass as alleged by the

plaintiff. They further contend that this is a road which should remain free for use by members of the public as envisaged in the title condition referred to above. In this application the defendants contend that there is no evidence on which a court might find that the plaintiff has established a clear right to the interdict she seeks.

[9] The lines along which a court should address itself to the question whether it will grant absolution from the instance at the end of the plaintiff's case were laid down in **Gascoyne v Paul and Hunter** 1917 TPD 170 at 173 as:

"At the close of the case for the plaintiff, therefore the question which arises for the consideration of the Court is, is there evidence upon which a reasonable man might find for the plaintiff? ... The question therefore is, at the close of the case for the plaintiff was there a *prima facie* case against the defendant Hunter; in other words, was there such evidence before the Court upon which a reasonable man might, not should, give judgment against Hunter?"

[10] It has been held that in an application for absolution from the instance at the end of the plaintiff's case, if the plaintiff's evidence consists of the production of a document on which he sues, and the sole question is the proper interpretation of the document, the trial court should normally refuse absolution unless the proper interpretation appears to be beyond question.¹ Further, the court must assume, in the absence of very special

¹ **Gaforr v Unie Versekeringsadviseurs (Edms) Bpk** 1961 (1) SA 335

considerations, such as the inherent unacceptability of the evidence adduced, that the evidence is true.² I am mindful that in this case, both the Government Gazette in which the proclamation appears, and the Deed of Transfer in which the condition is found, are not documents on which the plaintiff relies. It is the defendants who rely thereon. It appears however, that they are documents to which the plaintiff had to answer. In my view, a court should also exercise the same caution when considering interpretation thereof.

[11] **EDWARD WALTER BEAN (Bean)**, a previous owner of the property gave evidence on the background facts. In summary, prior to 1962, the property together with other farms, now known as portions 1, 2 and 3 formed one property known as the farm Saagkuilen. During the period 1962 or 1963, Saagkuilen was subdivided and devolved to the heirs of the original owner who was a grandparent to, amongst others, **Bean**. **Bean** inherited the Remainder property from his father. The first defendant and **Bean** are related. The second defendant, of whom the first defendant is a trustee, is the owner of Portion 3 of the farm Saagkuilen. Members of the original Bean family have, on occasion accessed the property to visit various sites of interests thereon. There is, on the property, a

² **Atlantic Continental Assurance Co of SA v Vermaak** 1973 (2) SA 525 (E) at 527

cave known as “the Bat’s Cave”, a lapa situated some distance further into the property from the Bat’s Cave, a waterfall and a monument. The lapa is used as a picnic spot and the monument was erected by **Bean** in memory of his father.

[12] According to **Bean**, when he still owned the farm, he kept the gate locked as he farmed in cattle. Persons visiting the property had to obtain a key to the gate from him. Accordingly anyone visiting the property, including the first defendant, had to obtain permission from him.

[13] **STUART JOHN RIDDLE (Riddle)** is the plaintiff’s partner and lives with the plaintiff on the property. The plaintiff acquired the property in 2003. According to **Riddle**, when he and the plaintiff came to live on the property in 2003, the practice of locking the gate to the Remainder Road was still in place and they continued to enforce it. As early as the first week-end of the plaintiff’s occupation of the property, members of the first defendant’s family, including the first defendant’s wife, told the plaintiff and **Riddle** that they have the right to free access of the Remainder Road and it would seem, some parts of the property, including the Bat’s Cave. At first the first defendant and his family would seek consent from the plaintiff or **Riddle** when they

wanted to access the property. At some later stage, according to **Riddle**, the first defendant and/or members of his family resorted to breaking a lock on one of the gates to gain access to the property.

[14] At the end of her case, the plaintiff filed an amended replication in which she contends, amongst others, that because the title condition referred to in paragraph [2] above, was imposed in terms of former Cape Colonial legislation which is no longer in existence or enforceable, it is no longer applicable to the property and the defendants are not entitled to rely thereon. I might as well, at this early stage, agree with the submission on behalf of the defendants that this contention is without merit. In as far as a title condition appears in a title deed, it is applicable to the property to which the title deed relates, until it is deleted or amended by an appropriate authority. Further no case has been made out that the condition was included in the title deed in error or that the condition, because of its content, is clearly not applicable to the property. This is by no means a pronouncement that the Remainder Road is a “road” or a “thoroughfare” as envisaged in the title condition. The plaintiff contends in her replication that the Remainder Road is merely an egress road from the property and consequently for private

use by the owner of the property. In my view, this contention merits consideration. And it seems to me that on the evidence before me at this stage, even in the face of the condition referred to, a court might reasonably find that the defendants are not entitled to use the road as they contend.

[15] With the exception of one, in all the maps and diagrams referred to during the trial the Remainder Road appears as a dotted line over the property from the entrance at which the contentious gate is located. It continues over the property to a point within the property where it stops abruptly. **JOHN ALLEN KOTZE (Kotze)**, a registered professional Land Surveyor who gave evidence on behalf of the plaintiff testified that generally minor roads are shown on maps as double lines rather than dotted lines. He then referred to the Remainder Road as a “path” or a “track”. It would not be unreasonable, in my view, for a court to find that such a track or path is intended for private use by the owner of the property.

[16] During the trial a number of problems regarding the interpretation of the Government Notice, particularly the description of the proclaimed road were highlighted.

[17] Firstly the proclamation describes the road stating “**from a minor road in the Patensie Village Management Area on the boundary of the said area**”. From what was as put to **Kotze** during cross examination, the defendants case is that there is another interpretation of the point where the road starts in Patensie, other than the one put forward by the plaintiff. In the Government Gazette, the proclaimed Road appears as 7,7 kilometres long. **Kotze’s** evidence was that he measured the Noaga Road (from a point on the boundary of the Patensie area, not more than 100m from an existing road (in Ramaposa Village), to be 7,6km. The Remainder Road measured from the same point to the boundary of the property with the farm Holrivier, measured 9,56km. The plaintiff’s contention therefore is that, based on these measurements, the probabilities are that the proclaimed road is the Noaga Road as it is closer in length to the proclaimed road. On cross examination however, **Kotze** conceded that on a different interpretation of the Government Notice the starting point could be elsewhere, thus affecting the measurements of the roads. But again, even in the face of such a concession, it would not, in my view, be unreasonable for a court to find for the plaintiff based on the measurements and the other aspects of the proclamation referred to below.

[18] A further difficulty with the description in the proclamation is that it refers to proclaimed road as running in “**a general north – westerly direction over Keurkloof and Saagkuilen**”. It was common cause during the trial that neither the Remainder Road nor the Noaga Road runs in a general north-easterly direction.

[19] Even further, the Government Gazette provides that the proclaimed road ends at “**a point on Holrivier, at the boundary common thereto and Saagkuilen**”. At this stage as I have stated, the evidence is that the Remainder Road stops within the property. I have already referred to the maps and diagrams depicting the Remainder Road as ending within the property, and to the plaintiff’s contention that the road is intended for private use by the owner of the property.

[20] **GORDON HAROLD WEBSTER (Webster)**, a registered surveyor, who has worked with the erstwhile Cape Provincial Administration, the Uitenhage Divisional Council and the Regional Services Council, in the region wherein the property is located, gave evidence explaining, the process of declaring roads to be public roads in general. His evidence, is briefly that local and/or regional authorities only maintain public roads and not private roads. For eligibility for maintenance, existing

roads used by members of the public, have to be proclaimed to be public roads. In this way, a portion of the funds (subsidy) for maintenance of the road, is obtained from higher Government authorities. The evidence is that in this case, it is the Noaga Road, rather than the Remainder Road that is maintained by public authorities. Further, **Bean** and **Riddle** denied that Remainder Road is/or was used by members of the public.

[21] The defendants contend that there is no evidence that they have trespassed on the property, or have been outside the road onto the property for recreational purposes. The plaintiff has therefore, so the argument goes, not established real disputes concerning infringements of her existing, future or contingent right(s). She had not established that the defendants have utilised her property for recreational purposes or that they would do so in the future. Consequently, so it was submitted, there is no evidence upon which a court might find for the plaintiff on the declarator sought. This submission is made on the basis that the plaintiff relies on the following facts:

- (a) That the first defendant and members of his family were twice seen walking on the Remainder Road. On another occasion he, together with friends and family, were seen near one of the gates along the Remainder Road on a bakkie;

- (b) That the first defendant had admitted that he had traversed the property and turned around at the lapa as it was getting dark;
- (c) Unidentified footprints had been observed by Riddle in the vicinity of the lapa and near the Bat's Cave;
- (d) Riddle had also observed unidentified children, who were visiting the first defendant's family, throwing rocks into the river from a cliff on the property. On another occasion he observed children walking from the property with pellet guns. On a different occasion he observed the first defendant's wife walking to the monument on the property.

The defendants argue that there is no evidence that these persons acted through the first defendant.

[22] Whilst it is true that the plaintiff relies on this evidence for the relief she seeks, it is not the only evidence that she relies on.

[23] It is common cause that the first defendant considers himself, and even members of the public, entitled to be on the Remainder Road by virtue of that road being public road 119H. It is not in dispute that at some stage the first defendant broke

the lock on one of the gates on the property to access the road and/or the property. Bearing in mind that at this stage, the issue of *via necessitates* which is raised in the pleadings, is not before me, there seems to be no purpose for the first defendant and any other persons to use the Remainder Road. This issue must be viewed in conjunction with other aspects of the case, such as the plaintiff's assertion that the Remainder Road is for her private use, the evidence that the road ends within the property, the difficulties regarding the interpretation of the Government Gazette and the condition in the title deed.

[24] There is evidence that the first defendant has in the past, with permission from **Bean**, accessed the property for recreational purposes in the form of a letter written by the first defendant to Bean in January 1993, in which he thanked Bean for allowing him access to the property. In the letter the first defendant mentions that he brought someone referred to as "Linda's dad" on his visit to the property and also expresses a wish to bring another friend who is a "caver" to have a look at the Bat's Cave. He also asks for permission to bring the friend in April 1993. Further evidence is that, at some stage, the first defendant brought a curator of an art gallery in East London to look at a certain plant on the property. A letter from the curator in which he thanked Bean for allowing them to go up the

“Keurkloof” confirms this. All this evidence might persuade a court to conclude that the purpose of the first defendant’s visits to the property was recreational. This is particularly so in the absence of an obvious alternative purpose. Although I agree that the interdict “against anyone, acting through the first defendant”, as sought by the plaintiff, will be unenforceable,³ on the evidence before me a court might, in my view, reasonably grant the interdict or the declarator sought against the defendants.

[25] Consequently:

The application for absolution from the instance is dismissed with costs. The defendants shall be liable jointly and severally for such costs, the one paying, the other to be absolved.

N. DAMBUZA
JUDGE OF THE HIGH COURT

Appearances:

For the plaintiff: Adv A Beyleveld SC instructed by Friedman Scheckter of Port Elizabeth

³ **Woolworths (Pty) Ltd v SACCAWU & Another** [2006] JOL 16643 (LC); **Makhado Municipality v SAMWU 7 Others** [2006] JOL 17074 (LC)

For the defendant: Adv I Smuts SC and Adv D Taljaard instructed by
Randell-Oswald Inc of Port Elizabeth