

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION – PORT ELIZABETH**

Case No: 3765/2015
Date Delivered: 16/09/2016
Date Heard: 22/06/2016
Not Reportable

In the matter between:

LOFTY DU BRUYN N.O. First Applicant

In his capacity as a Trustee of the

LOFTY DU BRUYN TRUST (IT No: 447/2004)

ELSABÉ DU BRUYN N.O. Second Applicant

In her capacity as a Trustee of the

LOFTY DU BRUYN TRUST (IT No: 447/2004)

and

**SOUTH AFRICAN
NATIONAL ROAD AGENCY LTD** First Respondent

MINISTER OF AGRICULTURE

FORRESTRY AND FISHERIES Second Respondent

MINISTER OF PUBLIC WORKS Third Respondent

REGISTRAR OF DEEDS Fourth Respondent

JUDGMENT

LAHER, AJ

[1] The Applicant seeks a mandamus to the effect that the Second and Third Respondents register a servitude in the form of a way of necessity over a property (erf ..2), which belongs to the State, and is held in custody by Third Respondent.

[2] The Applicant is the registered owner of portion 1 of the farm 510 Elandshoogte, which has informally been subdivided into portions A and B, subsequent to the building of the N2 national road. Portion A is landlocked by portion 511 to the north west of it, portion 512 to the east, and the N2 national road to the south.

[3] It is common cause that erf ..2 has access to a public road, the R102, which lies to the south of the N2. A dirt road runs north across erf ..2, from the R102 until it crosses the border at erf ..1 and joins a dirt road that runs along the border of erf ..1, past portion A.

[4] In the light of the overall view I hold on this matter I will not distinguish the Respondents' grounds of opposition, but deal with them together. The Respondents oppose the granting of the servitude on the following grounds:

- (a) The most suitable and shortest route for the servitude would require access to erf ..1, and construction work that amounts

to a listed activity in terms of the National Environmental Management Act 107 of 1998. Accordingly the Respondents argue, MTO Forestry (Pty) Ltd, ("MTO"), which manages and operates a plantation on erf ..1, as well as the Minister of Environmental Affairs and Tourism, are affected parties, and ought to have been joined. Since they were not, the application ought to be dismissed.

- (b) There are material disputes of fact, which cannot be resolved on the papers.
- (c) The Applicant has failed to satisfy the onus to establish that the route it seeks to register as a servitude, as well as the extent thereof, is necessary, and the most suitable route; and
- (d) The applicant failed to properly address the issue of compensation payable, if any, in respect of the right of way.

[5] The Applicant alleges that portion A currently enjoys access to the R102, via the dirt road traversing erf ..2, as indicated on the amended sketch plan, and that it has been using the road for the last 10 years.

[6] The Applicant however concedes that an approximately 25 meter stretch of this route consists of a fairly recently created diversion in the form of cleared path, running from portion A along the border between erf ..2 and erf ..1, until it joins the established

dirt road that runs across erf ..2 from erf ..1 to the R102. I will refer to this stretch of cleared path as “the diversion”. The material difference between the original and amended sketch plans (LBD 3.1 and LBD 3.2) is that the amended sketch plan includes the diversion, while the original does not.

[7] The Respondents, submit it is in dispute whether the diversion (as indicated on the amended sketch plan) in fact exists, and if so whether it is suitable for use as a way of necessity. In this regard the Respondents point out that a land surveyor has not plotted the diversion out on the amended sketch plan, and that the amended sketch plan can accordingly not be relied on as accurate. The Respondents do not accept as correct the photographs attached to the Applicants further affidavit, and dispute that the diversion is 25 meters long. They argue that it is not clear from the photographs that the diversion is sufficiently wide to allow vehicular traffic, or that it is otherwise suitable for the purpose contended by the Applicant.

[8] It is common cause that the portion now referred to as portion A became separated from portion 1 of erf ..0 when the State, in order to construct the N2 national road, expropriated a tract of land running across portion 1 of erf ..0. In the result portion

A became landlocked by erf ..1, erf ..2 and the N2 (to which it has no access).

[9] The State appreciated that portion A was landlocked, and that this severely prejudiced the owners of the property, as a result of which it had in the past offered to purchase the property at fair compensation. There was of course no obligation on the previous or current owners of portion A to sell the property to the State, and their refusal to do so cannot impact on the question whether a way of necessity ought to be declared over erf ..2. Accordingly, their reasons for refusing such offers to purchase are not material to the present application.

[10] The owners of portion A, some ten years ago, allowed the Lupus Foundation to establish a wolf sanctuary thereon. Being landlocked, the wolf sanctuary has relied on the dirt roads traversing erf ..1 and erf ..2 to give its staff and members of the public access to portion A.

[11] The Third Respondent allows MTO, which operates on portion ..1, to use the dirt road running across erf ..2 as an emergency access, but denies that it has permitted the road to be used for general public access.

[12] The Applicant has since undertaken to sell portion A to the Lupus Foundation, and for that purpose seeks to register a formal subdivision of portion 1 of erf ..0 into portions A and B. However, in order to complete such subdivision it is necessary to establish access to a public road from portion A, which can only be done by traversing erf ..2.

[13] The Applicant therefore contends that it needs a servitude in the form of a way of necessity across erf ..2, as set out in an amended sketch plan attached to the Applicant's further affidavit dated 24 August 2016 as "LBD3.2" (the amended sketch plan).

[14] I pause to note that the sketch plan originally attached to the Applicant's founding affidavit, and attached to his further affidavit dated 24 August 2015 as "LBD3.1" (the original sketch plan), plots out a road along a different path, with markedly different implications. The route plotted on the original sketch plan runs onto erf ..1, the owners of which have not been joined, while the route indicated on the amended sketch plan diverts westwards towards portion A just before it reaches the northern edge of erf ..2, and accordingly does not involve erf ..1.

[15] It is apparent from the papers that portion A is landlocked and that a servitude over neighbouring property is necessary to

provide portion A with access to a public road. What remains in issue however is whether a 5-meter wide right of way over erf ..2, along the route indicated on the amended sketch plan (LBD 3.2), meets the criteria for the grant of a servitude in the form of a way of necessity.

[16] The Respondents further take issue with the width of the servitude sought by the Applicant, in that he seeks a 5-meter wide servitude, but has not alleged and proved facts sufficient to establish that a servitude of this width is necessary or suitable.

[17] The Respondents argue that, due to the material disputes of fact, and the non-joinder of MTO Forestry (Pty) Ltd and the Minister for Environmental Affairs and Tourism, the application should be dismissed with costs.

[18] The Respondents further raise issue with the fact that the Applicant has not tendered compensation in respect of the envisaged servitude. The Applicant's position is, in a nutshell, that the State caused portion A to become landlocked, and as such it is reasonable and equitable that the State bear the cost of providing access by way of servitude. Accordingly the Applicant seeks that the court exercises its discretion to award the servitude without payment of compensation.

[19] It is trite that motion proceedings are, as a rule, not suited to resolving disputes of fact, and save for a few exceptions such as liquidation, motion proceedings should only be utilised in cases where the application of the law, rather than the facts, are in dispute (*Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 3 SA 1155 (T)). Accordingly, when an Applicant elects to proceed by way of motion, while there are foreseeable disputes of fact, he does so at his own peril. For this reason, a court faced with material disputes of fact in motion proceedings will rely on the version of the Respondents, together with those facts in the Applicant's affidavits that have not been disputed by the Respondents (*Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] 2 All SA 366 (A)).

[20] A bare denial of the facts alleged by the Applicant would not be sufficient to create a material dispute of fact. The Respondents are required to say enough in their affidavits to enable the court to conduct a preliminary examination to determine whether the Respondent's denials are not fictitious or intended merely to delay the matter (*Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 3 SA 1155 (T)).

[21] I am mindful of what was said in *Soffiantini v Mould* [1956] 4 All SA 171 (E), where the court cautioned that:

"If by a mere denial in general terms a respondent can defeat or delay an applicant who comes to Court on motion, then motion proceedings are worthless, for a respondent can always defeat or delay a petitioner by such a device.

It is necessary to make a robust, common-sense approach to a dispute on motion as otherwise the effective functioning of the Court can be hamstrung and circumvented by the most simple and blatant stratagem. The Court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits."

[22] It is apparent from both the sketch plans that the only public road, abutting portion A, is the N2 national road. From the papers filed by the Respondents it is clear that no access to the N2 will be granted. The Applicant therefore correctly contends that portion A is landlocked. The Respondents, in argument, suggested that the dirt road depicted on the original sketch plan, traversing the southern border of erf ..1 along its border with erf ..0 and erf ..2, eventually joins up with the N2. As such, it was argued, that the dirt road

traversing erf ..1, from the entrance to portion A up to the alleged connection with the N2, represents the shortest and most suitable route over which a way of necessity could be declared.

[23] The affidavits filed by the Respondents do not establish that the dirt road on erf ..1 connects directly to the N2, and I am unable to make a finding to this effect. As such it appears that the route running across erf ..2 to the R102 is in all probability the most suitable, if not the only, route by which excess to a public road could be obtained from portion A.

[24] It is common cause that the road running from the R102 across erf ..2 up to erf ..1, as depicted on the original sketch plan, is an already constructed and well established road, as is evident from the 27 photographs attached to the Applicants further affidavit dated 24 August 2016. Photographs 1 to 22 depict the established road, as it runs across erf ..2, until it reaches the border with erf ..1 ("the road"), at which point the pictures follow the diversion that allegedly runs a distance of approximately 25 meters along the border with erf ..1, until it crosses onto portion A. It is this route, appearing on the 27 photographs, that is depicted on the amended sketch plan that the Applicant seeks to have registered as a way of necessity.

[25] From the photographs the diversion appears be a reasonably well-established path that has been in use for some time. It is further clear that the diversion constitutes a small portion of the total route over which the Applicant seeks a servitude. However, regard must be had to the affidavit of State Attorney Michelle Botha, who states under oath that she inspected the dirt road running along erf ..2 and was unable to locate the diversion. The Respondents accordingly dispute the existence of the diversion. The Respondents further argue that the photographs and sketch plans are insufficient to determine the true path, length, width or suitability of the diversion, since a land surveyor has not confirmed it.

[26] The Respondents have done more than raise a bare denial, and I am satisfied that a real dispute of fact exists as to the placement and nature of the diversion. Further, in regard to what constitutes the most suitable route from portion A to the established dirt road traversing portion ..2, there exists a real dispute as to whether the dirt road running across erf ..1 represents a more suitable link than the diversion indicated on the amended sketch plan. It does not appear that the dispute can be resolved on the papers, and the Applicant has not requested that the matter be referred for oral evidence, or an inspection in loco.

[27] In the circumstances I agree with the Respondents that the suitability of the road traversing erf ..1 ought to have been dealt with, and that MTO Forestry ought to have been joined.

[28] I do not however agree that the Minister of Environmental Affairs and Tourism need to be joined. The registration of a 5-meter wide way of necessity would not amount to approval of the construction of a 5-meter wide road. Any proposed construction of a road may well require the Applicant to approach the Department of Environmental Affairs and Tourism in so far as such construction may constitute a listed activity. That, however, remains a bridge to be crossed at a later stage, if and when the construction of such a road is undertaken. The construction of such a road does not form part of the relief sought in the present application.

[29] It is inappropriate for this court to pronounce on the complex nature of the environmental legislation that would be applicable to the construction of a more durable road along the diversion, and to give a decision on both common law and environmental issues. The court's function is to decide common law issues, namely the possible acquisition of a way of necessity. If the Applicant succeeds in acquiring a way of necessity, he would have to comply with the necessary environmental legislation when he wants to exercise that right by constructing a more durable road along the diversion. (*Aventura Ltd v Jackson* 2007 5 SA 497 (SCA)).

[30] It follows that the Minister of Environmental Affairs and Tourism is not affected by the relief sought in this application, and I am accordingly of the view that he need not have been joined to these proceedings.

[31] A *via necessitates* is awarded on the basis of what is necessary. De Villiers, C.J., in *van Schalkwyk v. Du Plessis and Others*, 17 S.C. 454, considered the circumstances which would justify the grant of a *via necessitatis*, and at p. 464 said:

"As to the road being one of necessity to the plaintiff, the Court has never laid down any definite rule as to what circumstances would constitute such a necessity, nor is it advisable that such a rule should now be laid down. It is not necessary for the purpose of the present case to go so far as to hold that there can be no road of necessity over a neighbour's land, unless the only possible approach to a public road is over such land. There may perhaps be cases in which the alternative route would be as difficult and inconvenient as to be practically impossible, and in such cases the Court might be justified in affording relief subject to compensation, and the other restrictions mentioned by Voet (8.3.4). The present case is not, however, of such a nature. It is an inconvenience I must say, a great inconvenience for the

plaintiff not to be able to use the road in question in order to bring his cattle from his mountain farm on to the nearest public road or to his other farms. But the inconvenience to the plaintiff is not so great as to justify the Court in putting the defendants out to the still greater inconvenience of having a cattletrack through their narrow and cultivated strip of land. The plaintiff can reach the public road by a track over the farms 'Lous Legplek' and 'Pampoenfontein', and although that track is more circuitous and less convenient than the one claimed, it is certainly not impracticable as a means of access to and egress from his farm".(Trautman NO v Poole [1951] 3 All SA 149 (C)).

[32] A way of necessity takes the form of the shortest route to the nearest public road and the route that causes the least damage to the servient tenement. (*Jackson v Aventura Ltd* 2005 2 All SA 518 (C)).

[33] In the present case there is clearly no access to portion A, and there is a need to declare a way of necessity over neighbouring land.

[34] However, despite the obvious need for a servitude of the kind suggested by the Applicant, the Applicant bore the onus to establish

that the particular servitude it seeks is necessary and suitable, and that no other more convenient route of access exists. To this end the Applicant was required to establish that the suggested route presented the shortest most direct route of access and caused the least interference with the servient tenement. The Applicant likewise bore the onus to establish why the right of way should be 5-meters wide. (*Van Rensburg v Coetzee* [1979] 4 ALL SA 848 (AD)) This the Applicant has not done.

[35] There is a real dispute as to what the most appropriate route would be, and about the existence itself of the diversion, which is a crucial portion of the route argued for by the Applicant. The Applicant has not indicated why the way of necessity should be 5-meters wide, and there is insufficient information on which to determine what a reasonable width would be. On this ground alone the application must fail.

[36] I am of the view that there simply remain too many issues that cannot be resolved on the papers. The material disputes of fact, and non-joinder of MTO Forestry, leaves this court with no option but to dismiss the application with costs.

[37] In the result the following order is made.

"The application is dismissed with costs, including costs of two counsel for second and third respondent".

RB LAHER
Acting Judge of the High Court

Counsel for the applicant, Adv B Pretorius, instructed by Nel Mentz Incorporate c/o Greyvensteins Attorneys

Counsel for the first respondent, Adv B Dyke instructed by Brown Braude & Vlok Incorporate.

Counsel for the second and third respondent, Adv A Beyleveld (SC) and Adv M Pango instructed by State Attorneys Port Elizabeth

Date Heard: 15 September 2016

Date Delivered: 22 September 2016