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**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Case number: 1437/2022

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

ELIZABETH MARIA WEYERS

Applicant

and

FLEMIX PROPERTY INVESTMENTS (PTY) LTD

1st Respondent

REGISTRAR OF DEEDS, BLOEMFONTEIN

2nd Respondent

HEARD ON: 15 SEPTEMBER 2022

JUDGEMENT BY: LOUBSER, J

DELIVERED ON: 15 DECEMBER 2022

[1] This is an application that concerns the acquisition of a servitude of right of way over farm land by means of prescription, alternatively a servitude of that right of way caused by necessity. The applicant is a pensioner and owner of two adjacent farms, namely the farm S[...] and the farm E[...] in the district of B[...]. These farms are landlocked and they are surrounded by agricultural land. The only access route to the farms from the provincial road known as S313 runs through the farm K[...] Rand and then through the farm T[...]. It appears to be common cause that the Applicant, her late husband, their children and their farm workers had used this access route to reach their farms for a period of more than 30 years.

[2] The first respondent is the new owner of T[...], and is opposing the application. The owner of K[...] Rand is not opposing the application, and has consented to the relief prayed for in the Notice of Motion. At its own request, it has not been cited as a respondent in the application.

[3] In the Notice of Motion, the applicant firstly seeks an order declaring that she has by way of prescription acquired a servitude of right of way along the access road mentioned above over the farm T[...] of the first respondent. Secondly, she seeks an order declaring that she has by way of prescription acquired a servitude of right of way along the access road mentioned above over the farm K[...] Rand. Thirdly, and in the alternative, she seeks an order declaring that she has a servitude of right of way of necessity along the access road over the farm T[...], and fourthly. an order declaring that she has a servitude of right of way of necessity along the access road over the farm K[...] Rand.

[4] In the fifth place, the applicant seeks an order authorising her to take the necessary steps to register in the Bloemfontein Deeds Office servitudes of right of way over the farms T[...] and K[...] Rand along the route of the access road. In the sixth place she seeks an order directing the first respondent to cooperate with her in giving effect to the order authorising her to register the said servitudes. Lastly, she seeks an order authorising and directing the second respondent to register the contemplated servitudes accordingly.

[5] The acquisition of servitudes by prescription is governed by section 6 of the Prescription Act¹. In terms of this section, a person shall acquire a servitude by prescription if he has openly and as though he were entitled to do so, exercised the right and powers which a person who has a right to servitude is entitled to exercise, for an uninterrupted period of thirty years.

[6] The concept of acquisition by prescription is firmly rooted in Roman and Roman-Dutch law, as is evident from the wording of the corresponding section in the earlier Prescription Act². Section 2(1) of that Act provided that acquisitive prescription is the acquisition of ownership by the possession of another person's movable or immovable property or the use of a servitude in respect of immovable property, continuously for thirty years *nec vi, nec clam, nec precario*. This means neither by violence, nor covertly and in the absence of a grant on request.

[7] Theron, JA has explained the notion of a precarium as follows in **Pezula Private Estate v Metelerkamp**³ (with four other Judges of Appeal concurring): "In terms of the Prescription Act 18 of 1943, the use of the property must have been *nec vi, nec clam, nec precario* for a period of 30 years. *Nec precario*, the absence of a grant on request, has been subsumed into ss 1 and 6 of the current Prescription Act by the requirement that the potential acquirer of the servitude must act as though he or she was entitled to exercise the servitudal right. The notion of a precarium is based upon the application by one party for a concession which is granted by the other party; that other party reserving at all times the right to revoke that concession as against the grantee in terms of the particular conditions to which the grant is subject. Put differently, a precarium is a legal relationship which exists between parties when one party has the use of the property belonging to the other on sufferance, by leave and licence of the other. Precarium has its origin in the fact of the permission usually being obtained by a prayer."

[8] Consequently, this court has to determine on the application papers before it whether there is any evidence of a concession granted to the family of the applicant to use the access road leading over T[...] during the period of 30 years. Should it be

¹ Act 68 of 1969

² Act 18 of 1943

³ 2014 (5) SA 37 (SCA) at par [10]

found that there was such a concession or permission, then the application cannot succeed on the basis of prescription.

[9] In her founding affidavit the applicant states that she inherited the two farms from her late husband, Lambertus Weyers, who passed away in 2017. He was the registered owner of the farms since 1985. The 30 years period was therefore completed in 2015. When Lambertus Weyers became the owner of S[....] and E[....], the late mr. Adam Steenkamp was the owner of T[....], and he indicated the access route to the farms to mr. Weyers. There was never any request or agreement that the Weyers family could make use of the road over K[....] Rand and T[....]. Later, during about 2006, the daughter of mr. Steenkamp and her husband, Guy Stirk, took over the farming operations at T[....]. They started to make use of a lock at the entrance to T[....], but they provided the Weyers family with a key to the lock without any request having been made by the Weyers family. The Stirks later became the owners of T[....].

[10] The Stirks thereafter rented T[....] out to a mr. Johan Pretorius and his wife. They installed an electric gate motor at the entrance to T[....], causing the gate to open by phoning a specific cellular number. Mr. Pretorius provided the Weyers family with the said number and listed the members of the family as the persons who could open the gate and gain access to the route to their farms. This also happened without any request from the Weyers family or a concession by mr. Pretorius.

[11] The Stirk family eventually decided to sell T[....], and the first respondent became the new owner, taking occupation of T[....] about early 2020. That is when the trouble started. According to the applicant, the first respondent was well aware of the fact that the Weyers family and their farm labourers were using the access road to their farms prior to purchasing T[....]. Despite having this knowledge, the first respondent terminated the telephone system at the gate and replace it with a remote control system. A representative of the first respondent informed the Weyers family that they would not be provided with a remote control device to open the gate. They would only be allowed to use the access road under the supervision of the first respondent.

[12] Only after further discussions between the Weyers family and the first respondent, were remote control devices provided to the son and the daughter of the applicant. They found this unacceptable since they have freely and openly and as though they were entitled to do so, made use of the access road since 1985. The situation became worse after the funeral of a family member of one of the farm labourers of the applicant. The farm labourers and their families were denied access through the gate of T[...], because the representatives of the first respondent alleged that the workers littered and were under the influence of alcohol. The representatives then also took back the two remote control devices, and the Weyers family can now only gain access to their farms through the intervention of the representatives of the first respondent.

[13] Meanwhile, the farm labourers are not allowed to travel on the access route to the farms S[....] and E[....]. The only way that they can travel on the route is if they are accompanied by the son or daughter of the applicant in the same vehicle. The applicant is aggrieved by this situation, as she submits that she has acquired a servitude of right of way by prescription in terms of section 6 of the Act.

[14] The first respondent makes it clear in an answering affidavit deposed to by its sole director, mr. Jaco Flemix, that it has no knowledge of the exercise of the alleged right of way during the statutory 30 years period, since the farm T[....] was only transferred into the first respondent's name on 9 December 2020, that is after the 30 years period. The first respondent purchased the farm during November 2019. Mr. Flemix does not deny that he was informed of the usage by the Weyers family of the access road running through T[....] when he negotiated the purchase of the farm.

[15] Furthermore, mr. Flemix does not deny the arrangements that were made by the first respondent to allow access through the gate of T[....] in broad terms, as alleged by the applicant. He pointed out, however, that the employees of the applicant were causing problems at the gate on different occasions, and that they even removed the gate from its rail and broke the rail on one of those occasions. As a result of these incidents, the relationship between him and the applicant's son has eventually broken down. It is for this reason that representatives of the first respondent took back the remote control devices from the Weyers family.

[16] Of far more importance is a supporting affidavit by mr. Guy Smook that is annexed to the answering affidavit of the first respondent. He now lives in Australia, but is the son-in-law of the late Adam Serfontein, the erstwhile owner of T[....]. According to mr. Smook, he accompanied mr. Serfontein from time to time to the farm to assist with farming activities since the year 2005. He has read the founding affidavit of the applicant, and he assumes that the applicant's reference to "Guy Stirk" is actually a reference to himself.

[17] In his affidavit mr. Smook says that, from what mr. Steenkamp had told him, he understood that the late mr. Weyers used the road in question with mr. Steenkamp's permission and consent. During 2009 mr. Smook took possession of T[....] with full control, although mr. Steenkamp was then still the registered owner of the farm. Mr. Smook then undertook extensive developments on the farm to establish a game farm by, inter alia, erecting a big entrance gate to the property. He attached locks to this gate without providing the applicant and her husband with a key to the locks of the gate. After this, the late mr. Weyers contacted him and asked whether he could "please provide him with a copy of a key to the entrance gate" in order for him to gain entrance to his farm S[....]. According to mr. Smook, he then agreed on condition that mr. Weyers keep the gate closed and locked at all times because the farm was stocked with game of high value. Mr. Weyers agreed to this condition, and mr. Smook then provided him with the required key. The farm workers of mr. Weyers also did not have free use of the road over T[....]. The arrangement was that if they needed to use the road, they would inform the farm manager, who would then accompany them on the road and open the entrance gate for them. This was the arrangement that prevailed between 2009 and early 2016.

[18] In her replying affidavit, the applicant denied the gist of mr. Smook's affidavit, and she annexed no less than five affidavits by deponents who apparently had intimate knowledge of the circumstances surrounding the access road and T[....]. These deponents were her two children, mr. Christiaan Nigrini of the adjacent farm K[....] Rand, mr. Leon Botha, a game capturer residing in the area, and mr. Cornelius Pretorius, who previously rented T[....] from the trust controlled by mr. Smook. In effect, all these affidavits were aimed at discrediting the allegations made by mr. Smook as incorrect and untrue, and confirming the applicant's version that she and

her family and their employees had freely, openly and as though they were entitled to do so, used the access road during a period of many years.

[19] The position is therefore that there is a dispute of fact on the papers before the court which goes to the heart of the requirement of *nec precario*. Put differently, there is a dispute between the parties whether Mr. Snook had granted a permission on request of Mr. Weyers to make use of the access road. If the court were to decide this question, it will have to consider the probabilities raised in the abovementioned replying affidavits filed by the applicant. This the court cannot do, because motion proceedings are not designed to determine probabilities.

[20] In **National Director of Public Prosecutions v Zuma** (Mbeki and Another Intervening)⁴ Harms, DP (as he then was) had the following to say in this respect:

“Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special, they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers. The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the NDPP's version.”

[21] Without considering the probabilities in the present case, I have no reason to find that the version of Mr Smook raises fictitious disputes of fact, is palpably implausible, far-fetched or clearly untenable. In the premises, and in terms of the *Plascon Evans* rule, the question of *nec precario* must be adjudicated on the version

⁴ 2009 (2) SA 277 (SCA) at [26]

put up by the respondent, as conveyed by Mr Smook. This is one of the pitfalls of proceeding by way of application and not by way of action proceedings. The application for a servitude based on prescription can therefore not succeed.

[22] The next question is then whether the applicant is entitled to a servitude of right of way based on necessity, in the alternative. As mentioned earlier, the owner of K[....] Rand has no objection to such a servitude being granted as far as the present access route traverses K[....] Rand from the provincial road to the gate of T[....]. The owner of T[....], namely the first respondent, objects to such a servitude being granted in respect of the rest of the access road which traverses T[....] from that gate up to the entrance to S[....].

[23] I have already indicated at the outset that the present access road to S[....] and E[....], which traverses T[....], is still the only road that give access to S[....] and E[....]. These two farms, belonging to the applicant, is geographically enclosed and has no other way out. It is in respect of this access road that the applicant seeks a servitude of right of way by necessity. The road has been used for many decades by the owners of S[....] and E[....] to access their property.

[24] Since the applicant has shown that the right of way that she seeks is necessary in the present circumstances to provide access to the public road, the court may grant a right of way over the property of the non-consenting owner.⁵ In terms of the common law such right of way must be established over the neighbouring property along the shortest route to the public road and where it will cause the least damage or discomfort to the servient owner.⁶ In the matter of **English v CJM Harmse Investments CC and Another**⁷ it was stated, however, that the mere fact that an existing route is simply longer or more inconvenient than a right of way over the neighbours property would be, is not a ground for granting that right of way. As for the requirement of the least damage or discomfort, it has been said that, in many instances, it would mean that the use of an existing road is preferable to the building of a new one.⁸ In every case the court must find an equitable balance

⁵Aventura Ltd v Jackson N.O. and Others 2007 (5) SA 497 (SCA) at par [8]

⁶ Van Rensburg v Coetzee 1979 (4) SA 655 (A) at 675 C

⁷ 2007 (3) SA 415 (N) at 419 B

⁸ The Law of Servitudes, AJ van der Walt, p357

between the interests of the dominant and servient owner.⁹ This court is also mindful of the fact that it was stated in **Van Rensburg v Coetzee**, *supra*, that the maxim of “shortest route and least damage” does not lay down an inflexible rule, because circumstances could dictate otherwise.¹⁰

[25] With these principles in mind, it is necessary to refer to the main defences raised by the first respondent. The first respondent says that an alternative and shorter route is available to the applicant, namely one over the adjacent farms K[....] Rand and Swartlaagte up to the farm S[....] of the applicant. The first respondent has attached a sketch plan by a land surveyor to prove his point. This sketch plan shows that the proposed alternative route is indeed 279 metres shorter than the existing access road. This measurement, however, does not take into account that the farm E[....] of the applicant lies on the other side of S[....], viewed from the point where the proposed route would enter S[....].¹¹ The sketch plan shows that the existing route enters the farm S[....] at a point much nearer to the dividing line between S[....] and E[....]. The result is that it is uncertain whether the proposed route will provide shorter access to the two farms of the applicant. In any event, I regard the distance of a mere 279 metres as a distance that should not play a significant role in this matter.

[26] In addition, there is no existing road on the proposed route, and some works will be necessary to make that route fully accessible for vehicles, trucks and farm implements. This is in stark contrast to the existing route which has been in use for decades as the only access road. The first respondent was aware of this fact when he purchased T[....].

[27] The first respondent alleged that the applicant’s son is already making use of the alternative route. According to the son, this happened on only one occasion when he could not gain access to the existing route.

[28] What seems to be common cause between the parties is that the members of the applicant’s family only visit the farms S[....] and E[....] on very rare occasions.

⁹ **Van Rensburg v Coetzee**, *supra*, at 675 E-F

¹⁰ At 672 H

¹¹ See annexure FPI 2.1 on page 132 of the papers. The existing route is marked in red, and the alternative route in blue and green.

According to the first respondent, the applicant has never visited her farms since the first respondent took occupation of T[...] more than 2 years ago. According to the applicant, she lives in a retirement home in Bloemfontein, and she was born in 1942. Her son is also living in Bloemfontein where he is an orthopaedic surgeon. The daughter lives in Bayswater, Bloemfontein. It is therefore clear that the family of the applicant will not cause any inconvenience of significance to the first respondent should a servitude on the existing access route be granted.

[29] At the same time, it is clear to this court that the employees of the applicant is a cause of concern as far as their use of the existing route is concerned. I have already referred to problems between the employees and representatives of the first respondent when they wanted to use the access gate to T[...]. On the papers before me, at least one of them lives permanently on S[...].

[30] In my view, the issues around employees cannot stand in the way of granting a servitude on the basis of necessity, because such issues can and must be resolved by the parties in a spirit of cooperation and understanding. Those issues are simply far outweighed by considerations such as practicality and finding an equitable balance between the interests of the applicant and the first respondent. The fact remains that the present access road is the only serviceable route to the landlocked farms S[...] and E[...], and it has been there for decades. The application for a servitude on the road therefore has to succeed.

[31] When such a servitude is granted on the basis of necessity, a plaintiff or applicant should offer a particular amount as compensation for consideration¹², because a kind of expropriation is involved. This the applicant has done. She mentions that the access road is merely a two spoor road, and that she does not have a problem in continuing to make use of the road as it is. She further mentions that the proposed servitude is 6 metres wide and stretches over approximately 1.9 kilometre. It therefore comprises 1.14 hectares. Having regard to the price per hectare when first respondent purchased T[...], she submits that an amount of R5 700.00 is reasonable compensation for the servitude, and she tenders same. She further mentions that the first respondent also makes use of this road to gain

¹² **Van Rensburg v Coetzee**, *supra*, at 677 H

entrance to the house and other buildings on T[....], for a distance of approximately one kilometre.

[32] In the premises, the following orders are made after due consideration of all the facts and circumstances:

1. It is declared that the applicant, as owner of the farms S[....] No [....] and E[....] No [....], district of B[....], Free State Province, has a servitude of right of way by necessity along the route marked A, B, C, D, E, F and G on the sketch plan annexed to the founding affidavit as Annexure X1 over the property of the first respondent known as the farm T[....] No [....], district of B[....], Free State Province.

2. It is declared that the applicant, as owner of the farms S[....] No [....] and E[....] No [....], district of B[....], Free State Province, has a servitude of right of way by necessity along the route marked A to B on the sketch plan annexed to the founding affidavit as Annexure X2 over the property known as Portion 2 of the farm K[....] Rand No [....], district of B[....], Free State Province, registered in the name of the Chrismar Besigheidstrust.

3. The applicant is authorized to take all steps necessary to register in the Bloemfontein Deeds Office the servitudes of right of way over the aforesaid property of the first respondent and over the property known as Portion [....] of the farm K[....] Rand No [....], district of B[....], Free State Province, along the routes indicated on the sketch plans annexed to the founding affidavit as Annexures X1 and X2.

4. The first respondent is ordered and directed to cooperate with the applicant, to make available the Title Deed of the property T[....] and, to the extent necessary, to ensure that its director cooperates with the applicant and signs all and any documentation that may be necessary to give effect to the order in terms of paragraph 3 above.

5. The second respondent is authorized to register the servitudes referred to in paragraphs 1 and 2 above in the name of the applicant, as owner of the farms S[....] No [....] and E[....] No [....], district of B[....], Free State Province.

6. The first respondent to pay the costs of the application on the party and party scale.

P. J LOUBSER, J

For the Applicant:

Instructed by:

Adv. J. Els

McIntyre van der Post Inc.

Bloemfontein

For the First Respondent:

Instructed by:

Adv. P.J.J. Zietsman SC

Muller Gonsior Inc.

Bloemfontein