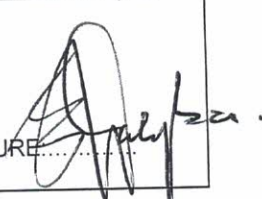




IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

CASE NO: 3701/2016
& 4987/2016

(1)	REPORTABLE: YES/ NO
(2)	OF INTEREST TO THE JUDGES: YES/ NO
(3)	REVISED.
DATE: <u>25/5/2017</u> SIGNATURE: 	

In the matter between:

P LOMBARD

FIRST APPLICANT

LJ ENGELBRECHT

SECOND APPLICANT

EATING HABITS (PTY) LTD

THIRD APPLICANT

and

GO LOKILE FARM (PTY) LTD

FIRST RESPONDENT

LL-L INVESTMENTS (PTY) LTD

SECOND RESPONDENT

JJPC BRAND ADMINISTRATORS

THIRD RESPONDENT

**THE TRUSTEES OF TIME TO TIME OF THE
PIETER FOURIE JUNIOR TRUST**

FOURTH RESPONDENT

BASIE BRAND
CARL D PLESSIS

FIFTH RESPONDENT
SIXTH RESPONDENT

ROAD AGENCY LIMPOPO

SEVENTH RESPONDENT

THE MEC: DEPARTMENT OF
PUBLIC WORKS, LIMPOPO

EIGHTH RESPONDENT

JUDGMENT

MAKGOBA JP

[1] The Applicants brought an application against the Respondents seeking an order in the following terms:

1.1. An order to declare that the disputed road marked in red on the map which is annexed to the founding affidavit and which appears on page 63 of the paginated papers is not a public road;

1.2. It is declared that the existing road over the aforementioned farms is to be replaced by the road depicted with blue line on

the sketch plan attached to the founding affidavit as “NOM1”
 (“the alternative road”);

- 1.3. The alternative road referred to on paragraph 3 above shall be not less than 4 meters wide;
- 1.4. The alternative road will be constructed by the Third Applicant at its own costs;
- 1.5. None of the Respondents will be entitled to use the existing road once the alternative road has been completed;
- 1.6. It is declared that the Applicants, through their attorney or otherwise, will inform in writing all the parties to this application once the alternative road is completed and from the 1st of the month commencing after delivering of the letter to the Respondents a permanent interdict shall be granted preventing and restraining the use of the existing road;
- 1.7. The Third and Fifth Respondents and all those holding under them are interdicted and restrained not to use the unlawful access point on the corners of the farms:

1.7.1. REMAINDER OF THE FARM KWAGGADRAAI
NO. 137, REGISTRATION DIVISION L.R,
LIMPOPO PROVINCE;

1.7.2. REMAINDER OF THE FARM RUSLAND
NO. 136, REGISTRATION DIVISION L.R,
LIMPOPO PROVINCE;

1.7.3. THE FARM VENTERSDRAAI NO. 153,
REGISTRATION DIVISION L.R, LIMPOPO
PROVINCE;

1.7.4. REMAINDER OF THE FARM WATERVAL NO.
151, REGISTRATION DIVISION L.R, LIMPOPO
PROVINCE;

which is the corner of the farms depicted with a
red line on the photograph attached to the
founding affidavit as annexure "P";

1.8. The Fifth Respondents is interdicted and restrained not to
steal or to damage any of the Third Applicant's property;

1.9. No costs order is requested against any of the Respondents, unless this application is opposed without success. In the event of opposition by the Third and / or Fifth Respondents the Applicants reserve the right to request a punitive costs order on the basis of attorney and own client costs;

1.10. No order or costs order is sought against the Seventh and Eight Respondents.

- [2] The Applicants have abandoned the order sought in prayer 1.7 of the Notice of Motion.
- [3] The subject matter of this dispute concerns a gravel road (“the road in dispute”) that links various farms owned by the parties to this dispute, to the tarred provincial road between Marken and Baltimore in Limpopo Province. The gravel road in dispute runs from the aforesaid provincial road (R561) to the farm Ventersdraai, and over Ventersdraai and the adjacent farm Morningstar.

- [4] This application was originally launched in the North Gauteng High Court, Pretoria during 2012. When the matter was launched there were six Respondents. The Seventh Respondent, the Road Agency Limpopo (Pty) Ltd and the Eighth Respondent, MEC Limpopo: Department of Public Works, were subsequently joined. By agreement between the parties and by order of the North Gauteng High Court, Pretoria the matter was transferred for hearing in the Limpopo Division, Polokwane. The Seventh and Eighth Respondents do not oppose this application. They have however filed the reports regarding the status of the road in dispute, that is whether the road is a public road or a private road.
- [5] It is significant to state that an *inspection in loco* was held at all the farms involved in the dispute on the 10 May 2017. At the *inspection in loco* the Court as well as the parties had an opportunity to acquaint themselves with the location of the farms, the road in dispute and the proposed alternative road. Therefore, the factual matrix in this case will be augmented by the observations made by the Court at the *inspection in loco*.

- [6] The parties to this dispute are owners of the properties / farms adjoining the road in dispute. As is clear from the affidavits herein, the main protagonists are the Third Applicant which acquired the farm Waterval in July 2010, and the Third and Fifth Respondents, who are collectively referred to as “the Brand family” and are owners of the farms Ventersdraai and Kwaggadraai. The various disputes before this Court stem from the desire of the Third Applicant to re-route the existing road that has been used by the Brand family for decades.
- [7] The Third Applicant effectively seeks to relocate the existing road which runs through its farm Waterval and replace same with an alternative road at its own costs. This is opposed by the Brand family on the basis that the existing road is a public road and far from being convenient, its relocation would involve prejudice to the Brand family; alternatively they contend that the Brand family as the owners of the dominant tenements Kwaggadraai and Ventersdraai, have acquired ownership of a praedial servitude in the form of a defiant right of way over the relevant farms up to the main road, R561. Furthermore, they contend that the relocation of

the existing road will entail prejudice in the form of substantial expense.

- [8] The Third Applicant's case is that the Third and Fifth Respondents ("the Band family") are using a road which runs over the farms belonging to the Applicants and over a farm owned by the First Respondent. The Applicants were unable to find proof that a real right exists for the Brand family to use this particular road which runs over the said farms. The Applicants contended that even if there exists some or other right for the Brand family to use the particular road, then, given the facts and circumstances in this matter, the Applicants request the Court to order an amendment of the path or route of this road so that, in essence, the road should run against the boundry lines of the farms affected by the road. The manner in which the road is used, and the location of the road as such, are, according to the Applicants, affecting negatively the property interests of the Applicants and certain of the Respondents. What is proposed is that the alternative road be made available so that the alternative road should substitute the existing road.

- [9] The issue about the road is the first issue in this application. The second issue is the unlawful use, as a point of access, of a portion of another property vesting in the Brand family. This specific point, which is the boundry point between four different farms is, according to the Applicants, used as an unlawful access point by the persons occupying and in charge a property vesting in the Brand family. In this regard an interdict is sought by the Applicants to stop the alleged unlawful activities. This interdict is sought in prayer 1.7 of the Notice of Motion which has since been abandoned by the Applicants – See [2] above. The third issue in this matter is the alleged intentional vandalism and malicious damaging of the property belonging Third Applicant. An interdict is also sought against the Brand family in this regard.
- [10] There is a map attached to the founding papers, as Annexure “D”, which depicts the location of the road in relation to the various farms over which it runs. Over and above that, the Court held an *inspection in loco* and can confirm that the area is correctly depicted on the said attached map.

[11] The road exits from the tarred public road onto the Remaining Extent of the Farm Morocco No. 143 LR ("Morocco"). It is a gravel road. The First Respondent is the registered owner of Morocco and supports the relocation of the existing road. From Morocco the road enters Lusthof Portion 1 ("Lusthof 1") a farm of which the First Applicant is the registered owner. The road runs alongside the extreme boundries of Morocco, but it enters Lusthof 1 at a point which is not on the boundry, so that the road cuts through a portion of Lusthof 1. From Lusthof 1 the road enters the Remaining Extent of Lusthof 150 LR ("Lusthof") of which the Second Applicant is the registered owner. The road also does not run along the boundry ends of Lusthof but cuts through Lusthof and proceeds into Waterval 151 LR ("Waterval") of which the Third Applicant is the registered owner. It also does not follow the outer boundries of Waterval, but cuts through the farm until it reaches Ventersdraai.

[12] The Applicants and the First Respondent tender an alternative location for the road, which they contend is more convenient and safer. The alternative road is depicted with a blue line on Annexure "D" as against the existing road which is depicted in a black line on Annexure "D". The Applicants contended that there is no right

registered against any of the title deeds of any of the relevant properties which allow, in the form of a servitude or otherwise, the use of the relevant road in the manner as is currently being used.

They contend further that as a gesture of goodwill, and to maintain good neighbour relationship, they tender a suitable, more convenient and safer alternative route.

- [13] Again with reference to the map, the alternative road is described herein. What the Applicants and the First Respondent propose is that the current / existing road, with reference to its route, be amended so that instead of turning towards the right and running alongside the boundry of Lusthof 1 and Morocco, the road be extended straight forward so that it runs continuously, without turning right, within the boundry of Lusthof 1 alongside Lusthof and Portion 2 of the Farm Buuren 154 LR ("Buuren 2"), thereafter within the boundry of Portion 1 of Waterval 151 LR ("Waterval") and alongside the boundry between Waterval 1 and Portion 3 of the farm Buuren 148 LR ("Buuren 3") towards the point where the farms Buuren 3, Waterval 1, Ventersdraai, Remainder of the farm Paalkraal 152 LR ("Paalkraal") and Portion 3 of the farm Paalkraal 152 LR ("Paalkraal 3") meet and from there into Ventersdraai.

[14] The Applicants are prepared to establish and construct such a road at their own costs, without burdening at all the owners, occupiers or users of Ventersdraai. The Applicants propose, in addition, that this substitute road be enclosed and fenced off so that there is no need for gates, as is presently the case, to be opened and locked at various different boundary points between the farms.

[15] The Applicants explain that the purpose of the application is not to deprive the owners, occupiers or users of Ventersdraai of a road to reach Ventersdraai, but to establish, in the interests of all concerned, an alternative route which would curtail and avoid the many undesirable consequences and features of the road as it is currently used. The following are some of the disadvantages caused by the current / existing road:

15.1. The location of the current road poses a serious security threat in that the road runs close to not less than six residential dwellings;

- 15.2. The road poses a problem in the sense that it provides uncontrolled access to persons who have no business and / or right to be on any of the farms. It is thus difficult to ascertain whether the person so entering on the road do so for a legitimate or illegitimate purpose;
- 15.3. There is uncontrolled use of the road. As the road in its current format does not run along the extreme outer boundaries of the farms, there is a number of gates which are supposed to serve as a controlled access and exit point. However, the gates are not locked, thereby constituting a breach of security;
- 15.4. Another disadvantage of the existing route of the road is that it runs very close to boreholes, pumps and other water drinking facilities. The Third Applicant alleged that it suffered sabotage on engines used to pump water. Petrol was added to the diesel engine, and diesel to the petrol engine. It cost a great expense to overhaul the engines.

[16]. The Applicants allege that there are many adverse consequences flowing from a road dividing a farm in half. In this regard it contended that, *inter alia*:

16.1. It is practically undesirable to have a road, used by other persons, running in the middle of a farm. It makes the management more difficult and the control less effective. A road at the end of the farm, next to the boundry line, is far more desirable;

16.2. All the Applicants and the First Respondent derive their income on the farms from hunting activities. A road which divides a farm in two is highly undesirable and in fact unsafe from a hunting perspective;

16.3. The farms are not fenced or camped in the inside portion. This allows game to roam free right across the entire farm. This poses threat for game running over the farm and striking accidentally motor vehicles which may drive on the road.

[17] In contradistinction to the disadvantages of the existing road, the Applicants contended that there are in fact attractive advantages in the alternative road and these are:

17.1. The farms will not be divided by the road and all the disadvantages mentioned earlier will fall away;

17.2. The new road would be much faster and is in fact shorter. The existing road has a distance of 11.04 km from the public road to the entrance gate to Ventersdraai. The distance of the new road would be only 7.75 km to the new point of access;

17.3. The Applicants tender to fence off the alternative road at their own costs. This would have the result that there will not be unnecessary obstacles such as gates that have to be closed and opened. The necessary passage way will be fenced off and users of the road will be able to travel safely.

[18] After the Third Applicant acquired Waterval in July 2010 attempts were made to meet with the representatives of the Brand family in

order to discuss a possible alternative road. This attempts were unsuccessful as the Fifth Respondent contended that any alternative proposed road would be sandy. The Third Applicant further discussed the possibility that the gates be locked. This suggestion too did not find favour with the Fifth Respondent.

On 15 December 2010 the attorney representing the Applicants wrote a very comprehensive and detailed letter (Annexure "K" to the founding papers) to the Third and Fifth Respondents (the Brand family) and motivated the relocation of the road. The Applicants had difficulty in serving the said letter on the Brand family but it appears that they ultimately received the letter. During further discussion with the Brand family the latter again raised the point that the proposed alternative location of the road would run over portions which are too sandy.

- [19] The Applicants then requested a qualified civil engineer, Mr Jock Pretorius, to visit the farms and to do a comparison of the upper soil types of the existing road in comparison with that of the proposed alternative route. He was particularly requested to physically visit the location and route of the new proposed alternative road and to verify whether there is merit in the

complaint raised by the Fifth Respondent to the effect that parts of the alternative road would be too sandy.

[20] Mr Pretorius then visited the scene and compiled a comprehensive expert report. In the report the engineer *inter alia* stated:

“An evaluation of the proposed alternative route indicated that it was comprised of the same sandy gravel soil structure, and possessed the same dense to medium dense micro structure as the existing road. It is thus our opinion that if the road through farm Waterval is relocated to the proposed new position, the level of service would remain the same.”

And furthermore:

“In our opinion the riding surface of the new proposed servitude road is better equipped for traffic than the existing road. There will thus not be a reduction of the level of service if the road is relocated to the south eastern boundry of the farm Lusthof and farm Waterval.”

[21] It is clear from the expert report and the opinion of Mr Pretorius that there is no difference whatsoever and that, according to him, the alternative route is even better for purposes of a road than the existing one. *Cadet questio* the issue of the sandy alternative road.

[22] In view of the Fifth Respondent's unsubstantiated allegations that the soil would be too sandy at the spot where the alternative road is suggested, the Applicants requested another expert, Mr Tjaart De Beer, to do a more comprehensive investigation, on this occasion with reference to scientific tests. Mr. De Beer collected 12 samples of soil at the depths between zero and 300 mm from 6 sample pits. The samples were taken at different positions but covering both the existing road and the road on the new proposed route.

The samples were then delivered at Matrolab Group (Pty) Ltd in Pretoria with the request to perform tests on the soil conditions. From the results it is clear that according to the scientific tests there are no differences whatsoever in the soil conditions on the existing road compared to the proposed new location of the road.

[23] Further objections raised by the Brand family against the relocation of the existing road are:

23.1. The existing road is a public road;

23.2. The relocation of the existing road will be costly to them;

23.3. Environmental impact.

[24] The issue as to whether the existing road is a public road will be dealt with fully later in this judgment.

[25] The Brand family contends that the aspect of costs for construction of the alternative road is a factor which must be taken account and which cannot justify the deviation of the existing road. The Third Applicant has already tendered all costs associated with the construction of the alternative road – See prayer 1.4 of the Notice of Motion. The objection raised by the Brand family based on this ground is therefore flawed.

[26] The Brand family relies on an environmental report compiled by one Mr. GJ De Klerk to the effect that:

(a) The road will have a negative impact on the pan;

(b) The road will impact on the bullfrogs;

(c) Protected trees will be affected.

This report of Mr. De Klerk was crashed and rendered of no value by a scientific report of a renowned Environmentalist, Dr Gwen Theron who opined that De Klerk did not present a scientific study and that his observations are without any substantiated scientific proof.

[27] Dr Theron's opinion is that:

(a) According to standard engineering practices, the road can be lifted above the pan with adequate culverts and drainage pipes be installed that can ensure the pan is not impacted and is retained;

(b) The bullfrog is no longer a protected species. In any event during construction the bullfrogs can be lifted from the pan, held in a safe area and relocated to the pan after construction;

(c) The road can be taken around the trees and where not possible the trees can be removed with a tree permit from DAFF. The requirements of such permit is usually the replanting of 3 trees of the same species of each tree removed.

[28] At the hearing of this matter Counsel were directed to focus on the following issues which in my view are regarded as crucial to the resolution of the dispute between the parties in this matter:

28.1. Is the existing road a public road or a private road?

28.2. If the Court finds that the existing road is not a public road, on what basis should the 3rd and 5th Respondents persist on the use of the existing road, moreso that the Applicants has tendered providing an alternative road at own expense?

28.3. It appears the existing road is not being used by the Respondents on the basis of a registered servitude. On what basis do the Respondents claim their right to use the existing road?

28.4. Do the 3rd and 5th Respondents as owners and / or residents of the farms, Ventersdraai and Kwaggadraai presently not have any alternative access road to the main public road, Marken-Baltimore or any other public road?

28.5. Does any statutory authority or any relevant state functionaries have any authority or jurisdiction to regulate or make any determinations regarding the use of a private road?

Whether the existing road is a public road or a private road

[29] When this matter was still before the Gauteng Division, Pretoria it came before Mothle J on 14 March 2016. The Learned Judge ordered the then already joined Seventh and Eighth Respondents to file a report on the status of the road. The Applicants and the Brand family were afforded an opportunity to make submissions to the Seventh and Eighth Respondents and they did so. The Seventh and Eighth Respondents concluded that the road is not a public road.

[30] The pronouncement of the Seventh Respondent in this regard is noteworthy:

“17. It can be accepted that the existing road was not declared a public road in the Provincial Gazette by the Administrator. If it was so declared the Brands would have submitted the proclamation in the Provincial Gazette”

The Seventh Respondent concludes:

“22. For the reasons set out above, it is clear that the public at large does not have a right to use the existing road and it therefore does not fall within the definition of public road. ”

[31] The Seventh and Eighth Respondents stated that they refrain from becoming involved in a private dispute between neighbours by supporting the relocation of the existing road or not. This then answers the question I raised in my directive (Item 5) as to whether any statutory authority or state functionary have any authority or jurisdiction to regulate or make any determinations regarding the use of a private road. The answer to the question is therefore no.

[32] In his opposing affidavit the Fifth Respondent stated that it is common cause that the road under consideration has been a public road as defined in the Roads Ordinance 22 of 1957 since the early 1980's and has been in use since the early 1900's at the latest. The Roads Ordinance upon which the Fifth Respondent relies has been repealed and substituted with, in this instance, the Limpopo Roads Agency Proprietary Ltd and Provincial Roads Act, 7 of 1998 ('the Provincial Act').

[33] In the repealed Ordinance a public road was defined as follows:

"Public road means –

*(1) Any road declared as such under this Ordinance ,
or designated as a public road under this Ordinance
or any other law, and includes any temporary
deviation thereof;*

*(2) Any road, however created (not traversing any land
proclaimed under or for the purpose of any law
relating to mining for precious or base metals or
precious stones, or land held by any person under*

mining title as by such law defined) which has been in the undisturbed use of the public during a continuous period of not less than 15 years”

Section 5(2) of the repealed Ordinance required from the erstwhile Administrator of the province to declare a road by notice in the Provincial Gazette.

[34] *In causa*, notwithstanding a very comprehensive search and investigation into the matter and with the assistance of expert town planners, neither the Applicants nor this Court were able to procure any proof that the road in issue herein was declared by the Administrator to be a public road.

[35] The expert, Mr Gawie Makkink, a Town Planner, filed a report wherein he states that his investigations were carried out by:

35.1. Discussions with relevant Officials from the Road Agency

Limpopo;

35.2. Perusal of the records of the Surveyor General;

35.3. Perusal of the records of the Registrar of Deeds; and

35.4. Perusal of the records of the Government Printers.

The expert concluded that he is of the opinion that the road under consideration does not hold the status of a public road. According to him the road serves a function of an access road that traverse several farms to provide access to certain farm portions.

[36] I am of the view that the Applicants were able to rule out the possibility that the road was declared a public road. In the circumstances the only possible basis upon which the road could have attained the status of a public road is if the road was in the undisturbed use of the public during a continuous period of not less than 15 years. Even in this context the public means the general public using the road and not only the limited number of persons that would use the road to gain access to the relevant farms.

[37] In my view and given the location, this particular road was never used by the general public, for there would be no purpose in doing so. The public utilizes a road to move to a destination or from one point to another. As far as this road is concerned, there is no public destination at the end of the road. It is common cause on

this papers and also on the *inspection in loco* that the gate which provides access to Ventersdraai, at the end of the road, between Ventersdraai and Waterval, remains always locked with a lock and chain.

- [38] For the foregoing reasons I agree with the Applicants' submission that the road could also not have been rendered a public road through continued use by the public for 15 years uninterrupted.
- [39] The enquiry as to whether the relevant road is a public road or not, should be embarked upon in two stages. The first stage is an investigation as to what the law regards as a public road and, secondly, there should be a factual enquiry in relation to this specific road and the relevant facts and to then apply the facts to the legal principles. I proceed to deal with the legal aspects of what is required by law for a road to be a public road. A number of judgments are for assistance in this regard.
- [40] In **Rex v. Erasmus 1947 (3) SA 568 (T)** the accused was charged with contravention of certain provisions of the then Transvaal Road Ordinance, 9 of 1933, in that he caused a fence to be built across

a road said by the crown to be a public road. The then Ordinance, *inter alia*, defined a public road as meaning any road or path, however created, which has been in the undisturbed use of the public or which the public has had the right to use during a period of not less than 15 years. The Court came to the conclusion that the relevant road was not a public road and, *inter alia*, commented as follows at 570:

“The common sense of the matter is this: whoever used it in the past, whether Europeans or natives, used it in the way that a thousand or ten thousand other farm roads are used in the Transvaal today; it is not a road leading from anywhere to anywhere, except from the main road to this farm. That being the case, it does not matter whether it was used for 2, 15 or 35 years; it never did acquire the character of a public road and was never used by the public at large.

*Our attention was drawn by Counsel for the crown to the case of **Wilhelm v. Norton (1935, EDL 143)** and on p.163 the Learned Judge who gave evidence in this case refers to the ‘Stonehenge case’. In that case Farewell J said that the cases establish that the public road is prima facie a road that leads from one public place to another public place, a*

remark with which I entirely agree and which would seem to be in accordance with common sense and the use of the word 'public'. Then he goes on to say: "But the want of a terminus ad quem is not essential to the legal existence of a public road. I quite agree. It is possible that there may be a road leading to well - known spot – a well – known place of recreation or amusement – and the public have been, in the course of many years, accustomed to go to that spot; it may even be a picnic or camping ground that may convert it into a public road because it is used by the public at large.

In the present case, if people go to that farm presumably they want to visit that farm; if they were natives, we must assume that they were farm natives who use the road to get on the main road. There is nothing, therefore, in the evidence which shows us that the road was used as a public road by the public at large. Its user, when it was of a general character, was by these farm people themselves."

On appeal the Court set aside the conviction of the accused and held that the relevant road was not a public road. The guiding principles set in **Rex v. Erasmus** supra were thereafter followed in

a number of subsequent cases in which the Courts had to decide whether a road is a public road or not.

[41] The principles in **Rex v. Erasmus** were applied and followed in **Roos v. Mossop 1952 (1) SA 8 (T)**. In the **Roos** matter, supra, the Respondent, who was the Plaintiff, sued the Appellant for damages for trespass. Following **Rex v. Erasmus** Steyn J, with whom Price J agreed, held as follows at p.13:

“What the Defendant has to show, therefore, is that members of the public at large have used this road as a matter of general right and that it is not merely certain individuals who have found it convenient to do so for a more limited purpose in going from the one to the other because they happened to reside on the adjoining farms. He must further show regular use by the public, that is, use in each of the 15 years of the period upon which he relies. The question is whether he has succeeded in doing so.”

See also: **R v. Ndaba 1953 (4) SA 13(T) at 15 A – B**

Ethekwini Municipality v. Brooks and Others SA 2010 (4) 586 (SCA) at para [17] and [23]

[42] The question whether a relevant road is a public road again arose for consideration in **Botha v. Bukes & Another 1955 (1) SA 581 (O)**.

At 586C – E the Court said the following in its analysis as to whether the relevant road is a public road or not:

*“Mnr Smuts se verde betoog is gegrond op die mening van Farwell, R, uitgespreek in **Attorney – General v. Antrobus 1905 (2) CH. 188 op p.206**, naamlik: ‘The cases establish that the public road is prima facie a road that leads from one place to another public place (see per Lord Cranworth in **Cambell v. Lang 1853 (1) MACQ.451**, and **Young v. Cuthbertson, 1854 (1) MACQ.455**) OR AS Holmes LJ suggest in the Giant’s Causeway case, there cannot prima facie be a right for the public to go to a place where the public have no right’.”*

In the **Botha** case the Court also investigated the consequences of what happens if a portion of an erstwhile public road is closed. In this regard the Court said the following at 586 E – F:

“Oorspronklik het die pad van een publieke pad na ‘n ander gelei. Daarna, volgens Bredell, is ‘n deel van die pad ‘amptelik” gesluit.”

At 586 – 587 the Court investigated the consequences of a partial closure of an erstwhile public road. The Court came to the conclusion that whether or not the closure of a portion of a public road necessarily leads to the conclusion that the remaining portion which was not deproclaimed automatically also fails to be a public road is a question that has to be determined with reference to the facts of the particular matter. The assessment seems to be this: if a relevant road linked two public roads, and was a public road, and a portion thereof was closed, whether or not the remaining portion which was not officially closed retains the status of a public road or not depends whether the general public would still use that relevant portion which was not deproclaimed. One can think of many examples in this regard. Notwithstanding the deproclamation of a certain portion of a road, the public may still use the road to reach, for example, a public place for recreational purposes. On the other hand, on the strength of this judgment, if the public had no purpose to utilize the portion not officially closed, then that portion will also fail to be a public road.

[43] The abovementioned judgments emphasize the fact that a public road is that road where members of the public at large have used this road as a matter of general right and that it is not merely certain individuals who have found it convenient to do so for a more limited purpose in going from the one point to the other because they happened to reside on adjoining farms. *In causa* the Brand family happen to be residing on adjoining farms and therefore use the road in dispute for their convenience and as an access from their farms to the main public road, that is R561. It cannot be said that other members of the general public have that latitude, without more, to use the road through Waterval and for their own purposes or convenience.

[44] In the result I come to the conclusion that the relevant road, that is the existing is not a public road.

Respondents' right to use the existing road

[45] Having made a finding that the existing road is a private road, it remains to be determined on what basis does the Brand family claim their right to use the existing road and thus object to the

relocation thereof. It is common cause that there is no registered servitude in favour of the Brand family on the existing road.

[46] The Brand family contended that the road had been use for a very long time and the Applicants accept the possibility that the Brand family may have acquired a right in respect of the road. The Applicants explain that the purpose of the application is not to deprive the owners, occupiers or users of Ventersdraai of a road to reach Ventersdraai, but to establish, in the interest of all concerned, an alternative route which would curtail and avoid the many undesirable consequences and features of the road as it is currently used. To this end the Applicants submit that even if the Fifth Respondent had established a right of use over the road, such right does not prevent or oust the jurisdiction and authority of this Court to order a change in route of the road.

[47] The legal position was properly set out in a judgment of the Full Court of the then Transvaal Provincial Division in **Moulder v. Thom & 'n Ander 1974 (1) SA 336 (T)**. In this case it was decided that: where a definite right of way is established it can only be varied by mutual consent. Where it was established simpliciter it is

for the owner of the dominant erf to indicate where the route of the road should run, but this right must be exercised *civilter modo*. Once he has exercised his choice he may not change it. The owner of the servient erf on the other hand has the right after due notice to the owner of the dominant erf to vary the route on condition that the new route is as convenient the old route. The owner of a property has also the right to a *via necessitate*, in other words a way of necessity over the adjacent property where it is possible for him to gain access to the public road. Such servitude is created simpliciter and the route of such a road that may be created may also be varied by the owner of the servient erf if he is able to provide another route which is as convenient as the old one.

[48] In my view the present case fits the circumstances encapsulated in the **Moulder case** supra. The Applicants in this matter as owners of the servient property gave due notice to the Brand family as the owners of the dominant property that they desire to change the route of the existing road. The Applicants recognise the Brand family's right of way to access the public road, hence they have tendered to construct the alternative road at their own costs. Such

an alternative road is even more convenient to the Brand family than the existing road, distance wise.

[49] In **Garden Estate Ltd v. Lewis 1920 AD 144 at 150** the Appellate Division held that a definite servitude having been constituted, can only be altered by mutual consent. The **Garden Estate** judgment has been overruled in **Linvestment CC v. Hammersley & Another 2008 (3) SA 283 (SCA)**.

[50] In **Linvestment** the Supreme Court of Appeal investigated the historical development of the mitigation of the burden of servitudes. The Court found that a right of relocation of a defined servitude was recognised by most foreign jurisdictions subject to the duty that the servient owner must prove that the dominant owner's right of enjoyment would not thereby be reduced.

Heher JA concluded as follows in **Linvestment on 292 E – F**:

"I am persuaded that the interest of justice do indeed require a change in our established law on the subject. The rigid enforcement of a servitude when the sanctity of the contract or the strict terms of the grant benefit neither party, on the contrary, operate prejudicially on one of them, seems to me

*indefensible..... Imagine a right of way over a farm portion registered fifty years ago. Since then new public roads have been created providing new access to the dominant tenement, the nature of the environment has changed, the contracting parties have long gone. Why should a present owner, on no rational ground, be entitled to rely on his *summum eus* derived from the alleged sanctity of a contract or a grant or prescriptive acquisition to which he was not privy. Properly regulated flexibility will not set an unhealthy precedent or encourage abuse. Nor will it cheapen the value of registered title or prejudice third parties."*

- [51] The new legal principle established in **Linvestment** case is to the effect that the common law is developed to provide that even if the dominant and servient tenements still remained in the ownership of the original contracting parties, the opportunity for relocation should not be excluded if the circumstances prevailing at the time of the original agreement had changed and the dominant owner no longer possessed any acceptable reason to subject the servient property to the strict terms of the grant. In such a case the

respective interests of the parties could fairly be regulated by reliance on the concept of convenience and prejudice.

[52] It is clear that the circumstances in the present case favour the Applicants. The Applicants accordingly have made out a case for the relocation of the existing road. The Brand family will not suffer prejudice since an alternative road will be constructed at the costs of the Third Applicant. Such an alternative road will be as good as the existing road if not more convenient.

Interdict – Theft of Third Applicant's Camera and Malicious Damage to Property

[53] The issue herein is whether an interdict ought to be granted against the Fifth Respondent, interdicting and restraining him not to steal or damage in any way the property of the Third Applicant.

[54] It is common cause that during 2011 the Fifth Respondent damaged and / or stole the Third Applicant's camera. A civil claim was instituted against him in the Magistrates Court of Mokopane under case number 1285/2011. Judgment was obtained against the Fifth Respondent and the latter paid the judgment debt plus costs.

- [55] It is alleged that during 2011 the Fifth Respondent maliciously removed and internationally damaged the Third Applicant's gate. Furthermore that there was an act of sabotage on the petrol and diesel engines. The Applicants laid a criminal charge at the South African Police Service with case number CA25/5/2011.
- [56] The aforesaid conduct of the Fifth Respondent amounts to both a criminal offence and a delict of which the Third Applicant has already obtained an appropriate remedy. It is not alleged that the Fifth Respondent is in the process of repeating the unlawful conduct, that such conduct will be repeated or is about to occur. It cannot be said that the harm is reasonably apprehended so as to justify a remedy in the form of an interdict.
- [57] I am not persuaded that the requirement for an interdict have been satisfied in the circumstances. In any event the Applicants have an alternative remedy which they have already embarked upon. In the result I am not inclined to grant an order in the form of an interdict as sought by the Applicants.

Spoliation

- [58] While the proceedings in this matter were still pending the Brand family brought a spoliation application against the Applicants under case number 4987/2016 in this Court for an order interdicting and prohibiting the Applicants from interfering with Brand family's use of the existing road. An interim order was accordingly granted in their favour on 24 October 2016. The parties had agreed that the return day of the *Rule Nisi* be heard on the same date as the present application under case number 3701/2016 ("the main proceedings").
- [59] The spoliation application was brought on an *ex parte* basis. This was done while the Brand family were aware that the Applicants were parties in the main proceedings and that they were likely to oppose the spoliation application due to the pending dispute regarding the existing road. In my view the Brand family should not have approached the Court on *ex parte* basis. On this basis alone the *Rule Nisi* should be discharged.
- [60] The spoliation issue has now become a moot point in view of the judgment and order I granted in the main proceedings.

The effect of this judgment in the main proceedings is that the Brand family will continue to use the existing road until such time that the Third Applicant shall have completed the construction of the alternative road.

[61] The *Rule Nisi* granted on the 24 October 2016 under case number 4987/2016 is discharged and there shall be no order as to costs in respect of the spoliation proceedings.

[62] In respect of all other issues in this matter I grant the following order:

1. It is declared that the disputed road marked in red on the map which is annexed to the founding affidavit and which appears on page 63 of the paginated papers is not a public road;

2. It is hereby declared that the Applicants are entitled to relocate the existing road which runs over the farms:

- 2.1. REMAINDER OF THE FARM MOROCCO NO. 143,

- REGISTRATION DIVISION L.R, LIMPOPO PROVINCE;

2.2. PORTION 1 OF THE FARM LUSTHOF NO. 150,

REGISTRATION DIVISION L.R, LIMPOPO PROVINCE

2.3. REMAINDER OF THE FARM LUSTHOF NO. 150,

REGISTRATION DIVISION L.R, LIMPOPO PROVINCE;

2.4. REMAINDER OF THE FARM WATERVAL NO. 151,

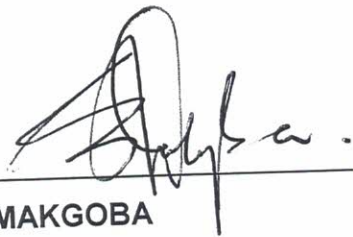
REGISTRATION DIVISION L.R, LIMPOPO PROVINCE;

3. It is declared that the existing road over the aforementioned farms is to be replaced by the road depicted with a blue line on the sketch plan attached to the founding affidavit as "NOM1" ("the alternative road");

4. The alternative road referred to on paragraph 3 above shall be not less than 4 meters wide;

5. The alternative road will be constructed by the Third Applicant
at its own costs;
6. None of the Respondents will be entitled to use the existing
road once the alternative road has been completed;
7. It is declared that the Applicants, through their attorney or
otherwise, will inform in writing all the parties to this application
once the alternative road is completed and from the 1st of the
month commencing after the delivering of the letter to the
Respondents a permanent interdict shall and is hereby granted
preventing and restraining the use of the existing road;

8. The costs of this application shall be paid by the Third and Fifth Respondents jointly and severally the one paying the other to be absolved, such costs to include the costs previously reserved.

A handwritten signature in black ink, appearing to read 'E M Makgoba', is written over a horizontal line.

E M MAKGOBA
JUDGE PRESIDENT OF THE HIGH
COURT OF SOUTH AFRICA,
LIMPOPO DIVISION, POLOKWANE

APPEARANCES

Heard on : 11 MAY 2017

Judgment delivered on : 25 MAY 2017

For the Applicants : Adv. M P Van der Merwe SC

**Instructed by : Jarvis Jacobs Raubenheimer Inc
c/o DDKK Attorneys**

For the 3rd & 5th Respondent : Adv. S W Davies

**Instructed by : J W Wessels & Partners Inc
c/o Kampherbeek & Porgrund
Attorneys**