

[REPORTABLE]

**IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

Case No.: **A 36/2002**

In the matter between:

JOHANNES WILHELMUS SANDERS N.O.

First Appellant

BETTY CUYLER SANDERS N.O.

Second Appellant

(In their capacities as Trustees of the Chatellier Trust)

and

WILLIAM HENRY PHILLIP EDWARDS N.O.

First Respondent

JOHAN COLIN EDWARDS N.O.

Second Respondent

ALDYTH LOUISA EDWARDS N.O.

Third Respondent

(In their capacities as Trustees for the Ridgewood Trust)

JUDGMENT DELIVERED ON THE **7TH** DAY OF **NOVEMBER 2002**

COMRIE J. :

This is an appeal from a judgment of the magistrate at Knysna in which he found that the plaintiffs *a quo* (respondents on appeal) were entitled to a servitude of right of way, a *via ex necessitate*, in favour of their farmland over the adjacent farmland owned by the defendants *a quo* (now the appellants). For convenience I shall refer to the parties as at first instance.

The background to the case is as follows. The plaintiff's farm

consists of three registered portions, the main portion being no. 293. The farm as a whole, and portion 293 in particular, is divided by a steep ravine. That part of the farm to the north of the ravine is the cultivated and inhabited part. It enjoys direct access (over plaintiff's portion 293/8) to the national road known as the N2. Relatively little cultivation seems to have taken place to the south of the ravine, but the plaintiffs are keen to grow proteas there on a commercial basis. This enterprise, which meets with the approval of Mr. Fischer, the horticultural expert who testified for the plaintiffs, would entail the use of large vehicles and other agricultural equipment. The southern part of the farm does not border on a public road. In the past the plaintiffs have, for their limited needs, gained access from the south to the Keurbooms road across the land of Mr. Abrecht, and with his permission. The nature of that permission was debated on appeal. The Keurbooms road links up with the N2.

In addition to Mr. Abrecht's property (294/4), there are two other parallel properties between portion 293 and the Keurbooms road, namely the properties of Mr. de Greef (294/5) and the defendants (294/6). It was over the last mentioned property that the magistrate granted the right of way in favour of portion 293. *Prima facie* the order, if it stands, does not operate in favour of respondent's portion 388/3, part of which also lies to the south of the ravine. Among the issues debated on appeal was whether the right of way, if otherwise warranted, should not rather have been granted over Mr. Abrecht's land.

Compensation for the right of way, if granted over the defendants' property, was agreed by the parties at the trial in the sum of R7 500.

The evidence for the plaintiffs was further that unless they build an expensive road through the ravine, they cannot move vehicles from the southern part of their farm to the northern part. Absent such a road, the southern part is effectively cut off for farming purposes from the northern part and more especially from the northern part's egress to the N2. Hence the action for a way of necessity southwards (over the defendants' property) to the Keurbooms road. According to Mr. David Visser, the civil engineer who testified for the plaintiffs, the construction of such a road for all

weather use would at the time of the trial have cost in excess of R600 000 (inclusive of VAT). It was however put to him in cross-examination that a clement weather road through the ravine could be built at a fraction of that cost. I shall discuss this evidence later.

It will be apparent from this brief summary that the plaintiffs' farm, and in particular portion 293, already enjoys access to a public road (i.e. northwards to the N2). What the plaintiffs claimed, therefore, was a second such access (i.e. southwards to the Keurbooms road). The first question to be decided is whether such a claim for a way of necessity can be entertained as a matter of law. The leading case is *Van Rensburg v. Coetzee* 1979(4) SA 655 (A). It was said by **Joubert JA** at 671 A:

“Dit is egter nie nodig om vir die doeleindes van die onderhawige geval uitsluitel oor die fundamentele benadering te gee nie. Dit is genoeg om te aanvaar dat ‘n aanspraak op ‘n noodweg ontstaan as ‘n grondstuk geografies ingesluit is en geen uitweg het nie, of, as ‘n uitweg wel beskikbaar is, dit egter ontoereikend is en die posisie daarop neerkom dat die eienaar

“has no reasonably sufficient access to the public road for himself and his servants to enable him, if he is a farmer, to carry on his farming operations”

(*Lentz v Mullin* 1921 EDC 268 te 270; vgl ook die uitspraak van die Hof *a quo* te 134C).”

See too *Van Schalkwyk v. Du Plessis and Others* 17 SC 454 at 463; and Van der Merwe: *Sakereg* (2 ed) at 486.

It is thus evident that the proposed dominant tenement does not have to be literally landlocked from a public road, but that it may constructively constitute “blokland”. However, the facts of the present appeal do not fit neatly into this mould, for the reason that the plaintiffs' land has existing access to the N2. In *Trautman NO v Poole* 1951(3) SA 200 (C) **Steyn J** said at 208 A – B:

“The northern portion of appellant’s farm in fact abuts on the public road above the point M, so that it cannot be said that she has no access from her farm, regarded as a whole, to the public road and the authorities cited above and others merely sanction the grant of a *via necessitatis* as a means of proceeding from a farm or other property to the public road; no authority has been cited to me, nor have I succeeded in finding any in the time at my disposal, to the effect that a *via necessitatis* can be granted from an owner’s homestead if not conveniently situated or that it should be granted so as to enable an owner to proceed to any part of his property; I shall, however, and without deciding the point, assume that a *via necessitatis* can also be granted under such circumstances.”

The lack of authority mentioned by the learned Judge was subsequently furnished, it may be thought, by *Natal Parks, Game and Fish Preservation Board v. Maritz* 1958(4) SA 545 (N). A portion of a game reserve was effectively cut off from the remainder by a steep and almost perpendicular gully. The appellant board wished to establish a ranger’s station on the portion cut off for the purpose of properly carrying out its statutory duties, especially in order to combat poaching. It accordingly sought a way of necessity over the respondent’s property so that in effect the two portions of the game reserve would be linked. The appeal succeeded. The case is distinguishable on three grounds: firstly, because it was decided under (a Natal) statute; secondly, because what was sought was a right of detour, rather than access to a public road; and thirdly, because the game reserve (so linked) would still enjoy a single access to a public road. Nonetheless, I respectfully find the approach by **Holmes J** (with whom **James J** concurred) instructive. The learned Judge said at 550:

“Mr. *Will*’s final point was that the Board could have no jurisdiction to grant the application since the proposed detour was not a way of necessity at common law. (It was common cause that in terms of secs. 17 and 19 of Act 35 of 1901

the proposed detour would have to fall within the concept of a way of necessity at common law, if the Board were to have any jurisdiction in the matter.) Mr. *Will's* contention was that at common law a way of necessity is only available if *the whole* of an applicant's property is landlocked and lacks any access to a public road. In other words he contended that if one extremity of a person's land has access to a road, there can never in any circumstances be a way of necessity in relation to the other extremity. I agree with Mr. *Feetham* that this proposition is too narrowly stated. The test at common law is necessity. In the present case the Southern end of this 60,000 acre reserve has access to a public road, but the 1,500 acres comprising the Tongue at the Northern extremity is effectively cut off from the remainder by a steep gully. Thus the Tongue is isolated and inaccessible. The only way to link it with the remainder, or to give it needed access to the public road in the South, is by circumventing the gully, which necessarily involves a detour on to adjoining owner's land. I cannot imagine that the common law would be so lacking in common sense as to deny a way of necessity in such a case. I can find no support for Mr. *Will's* restrictive proposition in the Roman-Dutch authorities to which we were referred by counsel. I do not propose to discuss them in detail because they are conveniently summarised in Hall and Kellaway on *Servitudes*, 2nd ed. (by Mr. JUSTICE HALL) at p. 66; and Lee's *Introduction to Roman-Dutch Law*, 5th ed., p. 165, defines a way of necessity as

"a way to be used only for the harvest, for carrying a corpse to burial, or other necessary purpose, or a way of giving access to a public road."

Hence, in the present case, one can say that the detour is required for the necessary purpose of linking the Tongue with the remainder of the Reserve. Or one can say that it is required so that the otherwise inaccessible portion of the Reserve may have necessary access to the public road which serves the remainder. In either event, in my opinion, it is a way of necessity."

From this reasoning it is but a small step to hold that when a farm is cut in two, for example by the Berg River, it may be necessary that each half should have

its own right of way to a public road or roads. To borrow the language of **Holmes J**, “I cannot imagine that our law would be so lacking in common sense as to deny a way of necessity” on appropriate facts. Further, on the need for this branch of the law to continue developing, see *Naudé v. Ecoman Investments en Andere* 1994(2) SA 95(T). I conclude therefore that the existing access from the northern part of the plaintiff’s farm to the N2 is not in principle inimical to the grant of a way of necessity from the southern part of the farm to another public road.

The second issue for decision is whether necessity was established on the evidence. Here, in the light of the cross-examination and the argument on appeal, I return to the *locus classicus*, *Van Rensburg v. Coetzee* supra, for guidance. At 671 E **Joubert JA** said:

“Dit volg uit die aanhaling hierbo uit *Lentz v Mullin* tap dat die omvang van die noodweg sodanig moet wees dat, in die geval van ‘n boer, dit redelikerwys voldoende is om hom in staat te stel om sy boerdery behoorlik voort te sit. In hedendaagse omstandighede soud dit dus nodig wees om voorsiening te maak vir die in- en uitgang van, bv, landbouimplemente en –masjiene, vragmotors en gewone motorvoertuie.”

And at 672C the learned Judge of Appeal added:

“Die vraag kan egter gestel word of die omstandighede van die boerderybedryf vandag nie dusdanig kan wees dat die feitlik daaglikse in- en uitgang van motorvoertuie noodsaaklik is nie.”

I have already mentioned that the construction of an all-weather road through the ravine would cost in excess of R600 000, which the engineer regards as economically prohibitive in relation to the proposed protea venture. I agree with him. What was put to him in cross-examination (and to a lesser extent to Mr. Edwards) was the expert summary of Mr. de Gouveia which was filed for the defendants.

Mr. de Gouveia did not, however, actually testify. According to the summary he holds a T2 in civil engineering, and has long experience in the civil engineering industry, including in respect of “earthworks, dams, roads, farm roads”. The summary continued:

- “4. On the 5th June 1999 he inspected the road through the indigenous forest on the farm in question. He was informed that the road was built approximately 15 years ago and he noted that there has been little or no maintenance done on it for a number of years, which is evident by the number of trees having encroached into the road. He found, however, that the base of the road is still in very good condition and to make the road suitable for the use of tractors again, a bulldozer would be required to grade the road, but to make it suitable for light delivery vehicles, improvements at the stream crossing are required. He suggests that a concrete slab of approximately 3m wide by 10m long should be cast across the stream and approximately 15m long concrete strips on the north side of the slab.
5. He estimates that the total cost of the work would be R39 500,00 plus VAT.
6. In the witness’ opinion the road constructed in this manner would be perfectly suitable for use by two-wheel drive light delivery vehicles, tractors and any other vehicles normally used for farming operations.”

Mr. Edwards explained in chief that the existing road/path was so steep that in one direction, from south to north, it was impassable to vehicles. He recounted an episode when a tractor tilted back on to its rear wheels, leaving the nose pointing up in the air. He explained further that protea farming on a commercial scale would “need bigger forms of transport to cope with it. Proteas are based on a volumetric capacity. So there is quite a lot of volume as far as proteas are concerned”. And:

“They are not very heavy but they take up a lot of bulk? - - -

They are bulk.”

In cross-examination counsel for the defendants, Mr. **Fourie**, broached the De Gouveia summary. The passage reads as follows:

“And there, I do not want to traverse matters which are of an expert nature, but just maybe in all fairness to you what Mr De Gouveia on behalf of the defendants will testify that on the northern side you could lay concrete strips which would then enable you to traverse the northern slope so to speak with a 4 X 4 vehicle and with a tractor? - - - As I mentioned earlier even if you did put concrete strips the gradient is far too great for a vehicle to go up. The tractor as I mentioned as well is that we did have a situation where we were going up and the tractor’s front wheels lifted off the ground and it slewed round. It is a huge drop, precipice drop on the one side of the road and I have never attempted it since then. It was, my staff it took us, it was a terrifying experience I might just add and ally my staff which I still have will testify to that. And we then had, so even if you put concrete strips on the gradient with a slight bit of moisture on it, vehicles could slew off that road quite easily.

Would that only be tractors or other vehicles too? - - -

Well I assume a five ton . . . (intervenes)

Would you be satisfied with a concrete strip with two by four bakkies for example? - - - As I say it is impractical in the sense that it is just so steep. That is the problem with the steepness. It is not so much anything else. It is far too steep and you know as we know in forestry if it gets algae or moss on it it has hardly got any more tracks than a normal road would have.

Would it be correct to say that since the plaintiffs have bought that farm it appears that no real maintenance or the road through the *kloof* was not really maintained as such, it was not used nor maintained? - - - Not at all no, it was not used or maintained.

At all? - - - It was used, I attempted to use it and as I say

earlier it is as you can see we cannot use it no. It has been used as a track for cattle.”

And later:

“. . . the evidence Mr. De Gouveia intends to give is that a concrete slab should in fact be lain across or put across the crossing so as to reduce the steepness of the ascent of the northern side. Would you like to comment on that? - - - I think what he said was the concrete slab would basically as I understand it would be in case there was flood water or something like that coming through one could go over but you know, it goes up a 120 metres. So how that would change the gradient of 120 metres I do not think so.

By means of filling up that could be done or not? - - - Basically, the only way, if you look at the map you can see that it is steep cliffs all the way around, very steep, it shows on the map is the gradients that there is no ways a concrete slab at the bottom is going to change the gradient of the road.”

In his evidence Mr. Fischer, the horticulturist, pointed to the unsuitability of conveying protea plants by tractor. He elaborated :

“It is a seasonal planning besides now the land preparation and everything where you have to bring the seedlings on site before winter during the moist time where there is a regular moisture and it is the best planting out for the season say from April onwards.”

Notwithstanding this evidence, Mr. Fischer was not cross-examined on the de Gouveia summary.

Turning to the evidence of Mr. Visser, the engineer, he explained in chief that his “brief was to look at the economic viability of up

grading the existing track . . . to suit the needs of the farming operations in the southern section". He stated:

"One does not want a track that you cannot access 365 days of the year due to various rainfall, the rainfall in the area. So with that in mind"

He stated further that "the highest rainfall recorded is 111mm in August and the lowest monthly rainfall is about 61 mm in December". He referred to the catchment area of 1,2 hectares, to the indigenous canopy and the seepage, and to other difficulties and dangers for which his design for "an all weather road surface" would have to cater. The witness was referred to the tractor episode and asked whether his design would resolve the problem. He said that a tractor, pulling a heavy implement, might still experience problems and might have to have "special waits (sic) on the front wheels or something like that because you know that gradient is very steep".

Mr. Visser expressed serious reservations about the de Gouveia report, including:

"So it is just a tamperer (sic) solution and as soon as it rains one is going to get the same erosion and one will not be able to access the, utilise the road as soon as you have rainfall. You know one can look at this, in a tree canopy there as well, so one day's rain might be three or four days, we call it consequential delay because the moisture is still in the ground and one cannot get through. So it is not just the day that it rains on. It might be two or three days thereafter before it has time to dry out and one can access the road again."

And:

"The concrete slab at the foot of the stream, that is, they call it like I presume he is referring to like a little drift. It is not going to improve the whole gradient of that. He is using the *in situ* ground levels. So it is not going to improve the gradient situation. So you are going to be sitting with exactly the same scenario. The concrete is going to

provide a little bit of better traction over that 15 metres just to get up that very steep section but it is not going to be a major improvement through the river bed.”

Still in chief Mr. Visser expressed the view that Mr. de Gouveia’s estimate of R39 500 plus Vat sounded like a reasonable cost for what was proposed, but that the proposal was “still not solving the problem”. Thus the de Gouveia road would not take a truck unless the road was widened.

In cross-examination Mr. Visser confirmed that his own design was for an all weather, 365 days a year road, which he considered to be not economically viable. The cross-examination proceeded:

“The impression I gained if I look at Mr De Gouveia’s report and I look at your report is that he opts for what I would call a rudimentary low class so to speak, farm road? - - - Yes.

As opposed to your upper class so to speak farm road. Would you go along with that general statement? - - - Ja I think what we have discussed is that from what I have heard from Mr De Gouveia’s report is that it is not going to be a solution. So he is not providing the solution to their problem. Their problem is to get from north to south and from south to north at any time. So he is offering a tamperer (sic) solution which can be taken away during adverse weather conditions and when there is too much water around.

Right. - - - So it is not a permanent solution and his solution is also obviously got a lot of maintenance involved with it as well. Because every time it rains you have got to go and fix up the dongas. So it is a tamperer (sic) solution and it is not a fulltime access.”

As I have shown by these extracts, substantial criticisms of the de Gouveia proposal were voiced by two of the plaintiff’s witnesses, while the proposal was not canvassed with the horticulturist. Something must turn, it seems to me, on the degree of access which a protea farmer reasonably requires to his lands and on the times when he needs access. Compare the remarks of **Joubert JA** at 762 C quoted earlier. There was some evidence that seedlings should be planted in the rainy

season, which *prima facie* means that access would be materially restricted because of the rain. Faced with this difficulty, Mr. **Fourie** went so far as to submit that the plaintiffs could claim a right of way in wet weather. And it is not just the rain, there were also unanswered questions of steepness and road width. In the absence of evidence for the defence from Mr. de Gouveia and/or other appropriate witnesses, I think the conclusion is warranted that the de Gouveia proposal would not adequately meet the needs of the situation.

Mr. **Fourie** submitted in the alternative that necessity, as distinct from convenience, was not established because the plaintiffs enjoy an existing right of way over the property of Mr. Abrecht. It is settled law that a land owner cannot claim a way of necessity if he has (sufficient) alternative access to a public road, albeit over a route which is longer or less convenient. This principle applies where the owner enjoys a consensual right of way over his neighbour's land. As it was put by **Graham JP** in *Lentz v Mullin*, cited earlier, at 274:

“But although these roads have been long in use, it is not suggested that any objection has at any time been raised to such use. Until the plaintiff has been debarred from the use of the existing approach to the Cwengewe road, he is premature in claiming a road of necessity over the defendant's property.

I can find no authority in support of the proposition that a person may claim a *via necessitatis* over his neighbour's property on the grounds that such property alone separate his from a public road, when he already has access to another public road by a route passing over one or more intervening properties whose owners have raised no objections to its use. It would be imposing an unreasonable and onerous servitude on many properties if such a doctrine was accepted.”

See too *Gray v. Gray and Estcourt Road Board* 1907(28) NLR 151 at 155; *Carter v. Driemeyer and another* 1913(34) NLR 1; *Van Rensburg v. Coetzee* 1977(3) SA 130(T) at 134.

In reading the evidence of Mr. Edwards on this point one should distinguish between: (i) his testimony as to the pro's and con's of a way of necessity over the defendants' property or over the Abrecht property; and (ii) his testimony as to the basis upon which passage over the Abrecht property had been allowed in the past. I confine myself to the latter. Mr. Edwards stated in chief:

“What is the basis of the arrangement to yourself and Mr Abrecht in the past . . . (indistinct). - - - It is basically just down to a day to day basis. We call him up and ask him if we may use the road to, for any purpose that we may find necessary. And he grants you permission from time to time? - - - He does. You have no lease agreement with him? - - - Nothing no. No permanent arrangement no . . . (indistinct) on a long term basis in order to hire the access route from . . . (indistinct). - - - No no.”

In another context the witness stated that “Mr. Abrecht could stop us using that road at any short notice”, and:

“While it is still available through Mr Abrecht, that is not really a permanent access. So that is, it would make a huge difference to know that we did have a permanent access and therefore could increase and utilise that land for [farming operations].”

In cross-examination Mr. Edwards stated that in about 1990, after the defendants' refused access, the plaintiffs were desperate and they went to see Mr. Abrecht, who gave permission to bulldoze a road over his land. It was put to Edwards that for:

“about 10/11 years now, you were entitled to use this road . . . over Abrecht's property? Correct. We were entitled to use it on a day to day basis. We never had any undertaking by him that

he would give it to us more than that.”

Asked why the plaintiffs had not planted proteas sooner, Edwards replied:

“We discussed it on numerous occasions with my family and we felt that it would be foolhardy to actually cultivate a crop and get it to a position where one would need to harvest and to spray it and to tend to it and then to actually get vehicles in and out and if for any instance Mr Abrecht had to sell his property or the arrangement between us which I mentioned earlier was on a day to day basis was closed, we would sit with a problem where we would not after spending a lot of money, would not be able to harvest that crop. So that is the reason for that.”

And:

“You were allowed access via Mr Abrecht’s property for the past ten years on your own evidence. - - - But he never gave it to us for ten years. He started allowing us sort of access on a day to day basis as an emergency to help us with our farming activity on that side.

But he has never refused you access across his land as I understand it? - - - No he has never refused us access.

So why . . . (intervenes) - - - We have to phone him on each occasion that we want to use it and things like that, it is a gentleman’s agreement.”

Mr. Abrecht did not testify. On a conspectus of this evidence it appears to me that the plaintiffs did not enjoy a right of way, even *precarium*, over the Abrecht property. There was a hope, and a reasonable expectation, that they would be allowed to make use of the road from time to time, according to their *ad hoc* needs, but on each occasion (from day to day) they had to obtain Mr. Abrecht’s permission.

It follows in my view that Mr. Abrecht, if so minded, could have refused permission on any occasion without any preceding warning or notice. In my assessment the “gentleman’s agreement” was of a kind which conferred no enforceable right of way upon the plaintiffs. The use now under consideration (for protea farming) differs *toto caelo* from that which has been historically exercised. One cannot infer that Mr. Abrecht would raise no objections to the proposed new usage. In my view, therefore, the historical use over the Abrecht land did not constitute an obstacle to the grant of a way of necessity over the defendants’ land.

The remaining two points argued by Mr. **Fourie** on appeal can be disposed of briefly. Counsel submitted that the plaintiffs were not *bona fide* intending protea farmers, and that they were seeking the *via necessitatis* for some other undisclosed purpose. On the evidence the submission is without any merit whatsoever. Counsel submitted further that if a way of necessity was established, then the Abrecht property should be the servient tenement rather than the defendants’ property. (Mr. de Greef’s property was not suggested). The relative merits of the routes were canvassed in evidence. The existing road over the Abrecht land is longer and for roughly half its distance bisects that property. The route over the defendants’ property would be shorter, straighter and along the boundary. It was in this context that Mr. Edwards described the latter as the most “convenient”. Other aspects were raised in evidence. Furthermore, at the commencement of the trial, the magistrate was taken on an informal inspection *in loco*. I can see no reason to interfere with the magistrate’s finding that the proposed road over the defendants’ land would not only be shorter, but also would “inflict the least damage . . . or impediment to the defendants’ land” (*ter naaste lage en minste schade*).

The appeal is dismissed with costs.

R.G. COMRIE
JUDGE

I agree.

J.A. VAN DER WESTHUIZEN
ACTING JUDGE

REPORTABLE

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First Respondent
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(in their capacities as Trustees for the Ridgewood Trust)

—
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Date of hearing : **Friday, 30 August 2002**

Date of judgment : **Thursday, 7 November 2002**