



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

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Appeal Case No: A98/2023
Case No in court *a quo*: 1437/2022

In the matter between:

FLEMIX PROPERTY INVESTMENTS (PTY) LTD

Appellant

and

ELIZABETH MARIA WEYERS

First Respondent

REGISTRAR OF DEEDS, BLOEMFONTEIN

Second Respondent

CORAM: DAFFUE, J, REINDERS, J *et* VAN RHYN, J

HEARD ON: 2 FEBRUARY 2024

DELIVERED ON: 2 MAY 2024

JUDGMENT BY: DAFFUE, J *et* VAN RHYN, J

Introduction

[1] This is an appeal against the judgment of a single judge of this division delivered on 15 December 2022 in which it was found that Elizabeth Maria Weyers ('Weyers'), was entitled to a servitude of right of way by necessity – a *via ex necessitate* - along a specified route over the property of Flemix Property Investments (Pty) Ltd ('Flemix').

[2] The court *a quo* dismissed Flemix' application for leave to appeal, but leave was granted by the Supreme Court of Appeal to the full bench of this division on 8 June 2023. No cross-appeal has been noted by Weyers against the court *a quo*'s dismissal of Weyers' claim for a right of way by means of prescription.

The parties and their immovable properties

[3] Flemix, the unsuccessful first respondent in the court *a quo* and appellant in this appeal, is the registered owner of the farm Tienfontein No 689 ("Tienfontein"), district Boshof, Free State Province. Flemix purchased Tienfontein during November 2019 and became the registered owner thereof on 9 December 2020. Tienfontein is landlocked and lies adjacent to and to the west of Weyers' farms, Strijd and Edom. To the west of Tienfontein and between Tienfontein and the S313 road is Portion 2 of the farm Koedoe's Rand ("Koedoe's Rand"), district Boshof, Free State Province. Chrismar Besigheidstrust is the owner of Koedoe's Rand.

[4] Weyers, a pensioner of Bloemfontein, the successful applicant in the court *a quo* and first respondent in this appeal, is the registered owner of the farm Strijd No 1008 ("Strijd") and the farm Edom No 1064 ("Edom"), both situated in the district of Boshof, Free State Province. These two farms are adjacent to one another and are also landlocked. They do not have direct access to the nearest public road, namely the S313 road ('the S313') between Boshof to the north and Petrusburg to the south. Weyers inherited the farms from her late husband who passed away during 2017. Her late husband became the registered owner of the farms during 1985 and held both farms under Title Deed No T6018/1985.

[5] The Registrar of Deeds, Bloemfontein, cited as the second respondent, did not file an affidavit or a report as provided for in s 97(1) of the Deeds Registries Act 47 of 1937 in the proceedings before the court *a quo*. The Registrar does not play any role in the appeal proceedings as well. In order to prevent confusion, the parties shall herein after referred to as Flemix and Weyers.

The background facts

[6] Weyers' application in the court *a quo* concerned the acquisition of a praedial servitude of right of way along an existing access route over Koedoe's Rand and Tienfontein by way of prescription, alternatively, a right of way by way of necessity along the same route. Weyers attached to her founding affidavit a sketch, marked 'X1', which depicts the position of the

various farms and the access route which the Weyers family have been using since 1985 for more than three decades to gain access from the S313 to Strijd. 'X1' was compiled by Mr D J Labuschagne, a professional surveyor who endeavoured to visit the various farms, but was denied access by the representatives of Flemix to physically inspect the proposed route. The route is marked with the points A, B, C, D, E, F and G on 'X1'.

[7] When the late Mr Weyers became the owner of the farms during 1985, Mr Adam Serfontein was the owner of Tienfontein. Weyers averred that there was never a request or an agreement that the Weyers family could make use of the access road over Koedoe's Rand and Tienfontein. During 2006 Mr Serfontein's daughter and her husband, referred to as Mr Stirk (who in reality is Mr Smook), took over the farming operations at Tienfontein and started farming with game. He installed a lock at the gate which provided entrance to Tienfontein. Members of the Weyers family were provided with keys to make use of the access route to Strijd without any such request having been made by them. Thereafter Tienfontein was leased to a certain Mr Pretorius who installed an electric gate motor at the entrance to Tienfontein. The members of the Weyers family were provided with the cellular phone number to open the electric gate and continued to use the access route to Strijd without any request or a concession by Mr Pretorius. Therefore, Weyers contended that Mr Pretorius knew that the route was used by them as an access route.

[8] When Flemix became the new owner of Tienfontein during 2020 things changed and access to Tienfontein was denied by removing the telephone system through which the Weyers family obtained access through the gate. A representative of Flemix informed the Weyers family that they would only be allowed to use the access route under the supervision of the new owners. After further discussions, Weyers' son and daughter were provided with remote control devices to enable them to make use of the access route to Strijd.

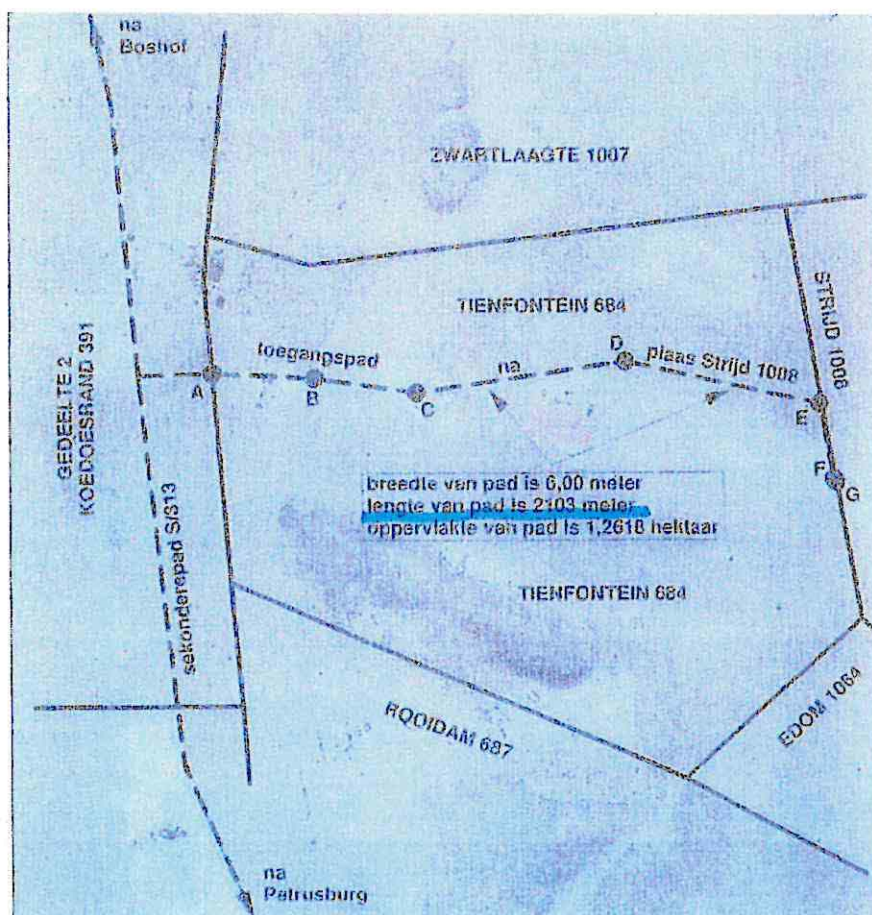
[9] The situation, however, became even more fragile when an incident occurred during December 2020 when farm workers from Strijd allegedly became aggressive and insulting when the gate was not opened for them to gain access to Tienfontein. Thereafter a further alleged incident involving the farmworkers of the Weyers family occurred during September 2021 after a funeral of a family member of one of the farm labourers. A representative of Flemix allowed access to the farm workers through a pedestrian gate by way of an intercom system, but discovered that the gate was not functioning due to the fact that Weyers'

employees had removed the gate from its rail and in the process damaging it. Allegations pertaining to littering in the vicinity of the gate by the farm labourers worsened the relationship between the parties. Since then the Weyers family could only gain access to or egress from Strijd to the S313 through the intervention of representatives of Flemix. The farm workers had to be accompanied by either Weyers' son or daughter.

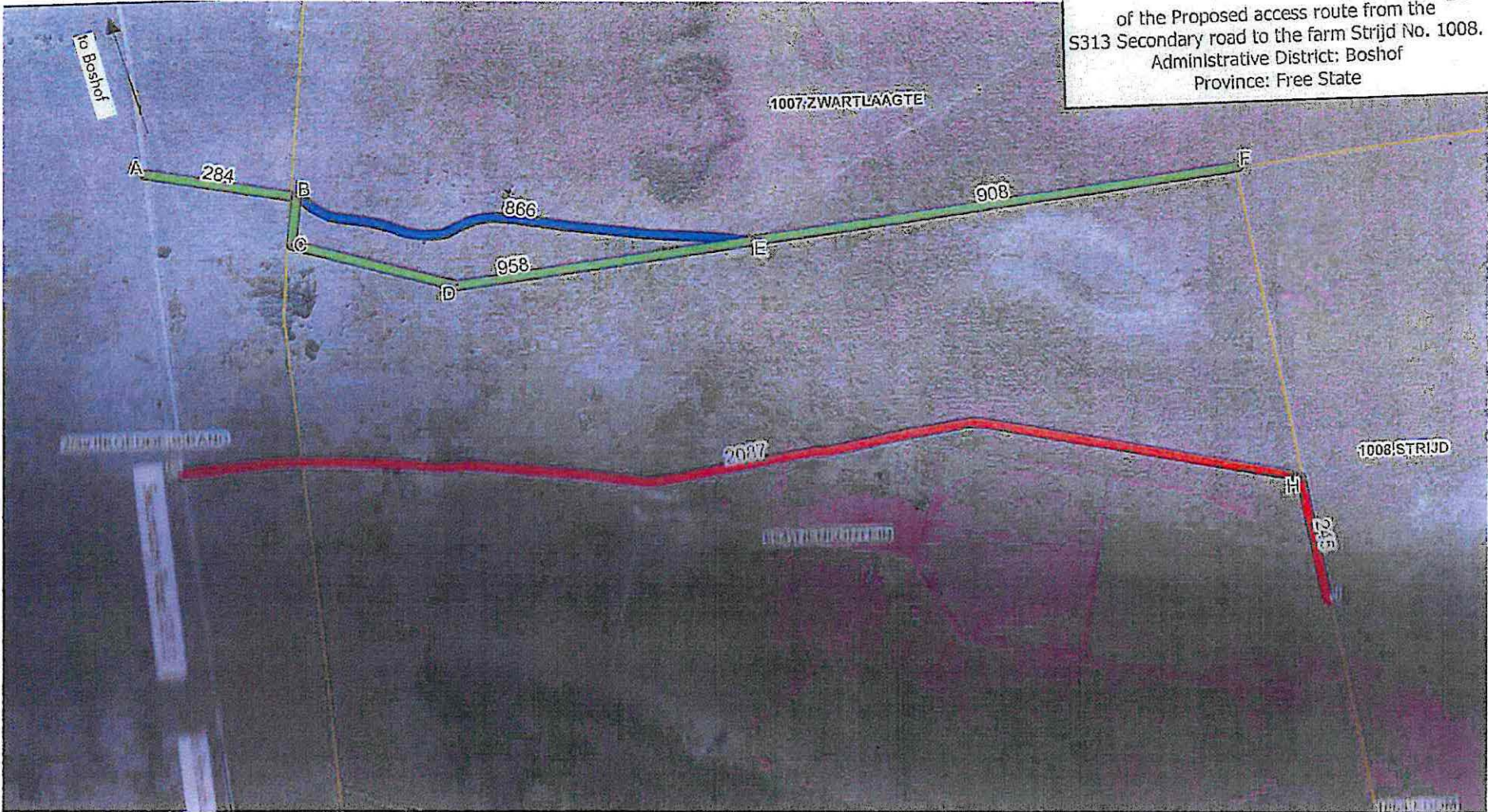
[10] The application in the court *a quo* was opposed on the basis that since, at least 2009, a gate and lock which provided entrance to Tienfontein, was installed by Mr Smook. Only after requesting a copy of the key to the gate, was the late Mr Weyers provided with a way to gain entrance to Tienfontein and the access route. The farm workers also did not have free use of the access route across Tienfontein. The arrangement was that if they required to make use of the access road across Tienfontein, they would have to inform the farm manager who would then accompany them and open the gate in order to traverse Tienfontein either way.

[11] In order to assist the reader in understanding the parties' contentions as to the different access routes relied upon by them, we provide the following sketches, the first being 'X1' relied upon by Weyers and the second being 'FPI 2.1' relied upon by Flemix. The distance of the access route in 'X1' from Strijd to the S313 is 2 337 meters and the distance of the route from the northwestern boundary of Strijd across Zwartlaagte to the S313 is 2 058 meters, a difference of 237 meters.

'X1'



SKETCH PLAN
of the Proposed access route from the
S313 Secondary road to the farm Strijd No. 1008.
Administrative District: Boshof
Province: Free State



It must be recorded that the distance of 2 103 meters shown on 'X1' refers to the distance over Tienfontein only and excludes the distance over Koedoe's Rand.

[12] In reply, Weyers appended no less than five affidavits of deponents to *inter alia* deny the allegations set out by Mr Smook. Typical of the response of an applicant in motion procedure facing serious disputes of fact raised by the respondent, the replying affidavit and annexures thereto are found from pages 143 to 349 of the appeal record, *ie* a total of 207 pages. That should be compared with the answering affidavit and annexures totalling a mere 63 pages.

The judgment of the court a quo

[13] The court *a quo* found that a dispute of fact existed on the papers regarding the relief sought for the acquisition of a servitude of right of way by means of prescription. The court *a quo* remarked that this is one of the pitfalls of proceedings by way of application.

[14] The court *a quo* found that there was a dispute of fact on the papers which goes to the heart of the requirement of *nec precario*, namely whether Mr Smook had in fact granted permission on request of Mr Weyers to make use of the access route for the period from 2009 to 2015. Because motion proceedings are not designed to determine probabilities, the question of *nec precario* had to be adjudicated on the version set up by the respondent, Flemix, as conveyed by Mr Smook, as a result of which the application for a servitude based on prescription did not succeed.

[15] The alternative relief, *ie* the registration of a servitude of right of way of necessity was however granted. The court *a quo* considered the matter on equity and fairness, stating that 'an equitable balance' had to be struck 'between the interests of the dominant and servient owner.' It referred to *English v CJM Harmse Investments CC and Another*¹, but the *dictum* quoted did not support the court *a quo*'s reasoning. *In casu*, it is not a situation that 'the existing route is simply longer or more inconvenient than a right of way over the neighbour's property would be.' The court *a quo* also relied on *Van Rensburg v Coetzee*² for its ultimate conclusion, *ie* that the maxim *ter naaste lage en minster schade* does not lay down an inflexible rule as circumstances could dictate otherwise. It held that although the alternative

¹ 2007 (3) SA 415 (N) at 419B.

² 1979 (4) SA 655 (A) at 675C.

route proposed by Flemix is 279 meters shorter than the access route over Tienfontein, that measurement did not take into consideration that Edom lies at the other side of Strijd, and also, the existing access route enters Strijd at a point much nearer to the boundary between Edom and Strijd. 'In addition, [the court *a quo* stated] some works will be necessary to make that route [the alternative route] fully accessible for vehicles, trucks and farm implements.' The court *a quo* made the point that the problems with Weyers' employees could not stand in the way of granting the relief sought. It was satisfied with the compensation offered by Weyers. In summary, and as set out in the judgment refusing leave to appeal, the court *a quo* held first, that the existing access route had been used by the Weyers family for many years and second, the proposed route was not that much shorter and some work will have to be undertaken and costs incurred to make it accessible for the Weyers family.

The grounds of appeal

[16] The grounds of appeal relied upon by Flemix are, inter alia, that the court *a quo* erred in its approach to the matter, by adjudicating upon the application from the perspective of the defences raised by Flemix and not by addressing the issue whether Weyers had in fact discharged the onus of proving that the access route over Tienfontein is factually *ter naaste lage en minster schade*. Furthermore, the court *a quo* erred in holding that the difference of 279 meters with which Flemix' proposed route is shorter than the other route should not play a significant role in the adjudication of the matter. The court *a quo* incorrectly considered that the proposed shorter route does not take into account that the access route enters Strijd at a point much nearer than the dividing line between Strijd and Edom whilst the two farms were always farmed as a collective farming enterprise. It also incorrectly found that the issues pertaining to Weyers' employees should not stand in the way of granting a servitude on the basis of necessity and that such issues must be resolved in the spirit of cooperation and understanding. The court *a quo* furthermore found that the access route over Tienfontein is the only serviceable road to the landlocked farms and that it has been used for decades, while some work will have to be done to the alternative route. Weyers did not deal at all with work to be done on the alternative route identified by Flemix in the answering affidavit.

Legal principles relating to a via ex necessitate also known as a way of necessity

[17] A *via ex necessitate* is awarded on the basis of what is necessary. In *Van Schalkwyk v Du Plessis and Another*³ De Villiers CJ considered the circumstances which would justify the granting of such a praedial servitude and held as follows:

"As to the road being one of necessity to the plaintiff, the Court has never laid down any definite rule as to what circumstances would constitute such a necessity, nor is it advisable that such a rule should now be laid down. It is not necessary for the purpose of the present case to go so far as to hold that there can be no road of necessity over a neighbour's land, unless the only possible approach to a public road is over such land. There may perhaps be cases in which the alternative route would be as difficult and inconvenient as to be practically impossible, and in such cases the Court might be justified in affording relief subject to compensation, and the other restrictions mentioned by Voet (8.3.4). The present case is not, however, of such a nature. It is an inconvenience I must say, a great inconvenience for the plaintiff not to be able to use the road in question in order to bring his cattle from his mountain farm on to the nearest public road or to his other farms. But the inconvenience to the plaintiff is not so great as to justify the Court in putting the defendants out to the still greater inconvenience of having a cattletrack through their narrow and cultivated strip of land. The plaintiff can reach the public road by a track over the farms 'Lous Legplek' and 'Pampoenfontein', and although that track is more circuitous and less convenient than the one claimed, it is certainly not impracticable as a means of access to and egress from his farm". (emphasis added)

Steyn J accepted the correctness of these *dicta* in *Trautman NO v Poole*⁴.

[18] Years later the court considered the legal principles again in *Van Rensburg v Coetzee*⁵. A way of necessity (*via ex necessitate*) is classified as a 'legal servitude' that exists over the servient land which offers the nearest exit to the public road. Such a way originates either from an agreement between the parties, or from an order of court. A court may grant a right of way over the property of a non-consenting owner (subject to payment of appropriate compensation), but only when it is shown that the right of way is necessary to provide access to the nearest public road. A way of necessity takes the form of the shortest route to the nearest public road along a route that causes the least damage to the servient tenement according to the principle *ter naaste lage en minster schade*.

[19] A party claiming a right of way of necessity must allege and prove⁶:

- (a) the need to a road of necessity and the reason why it must traverse the defendant's property;
- (b) the width of the road claimed and the reason for that claim;

³ 1900 17 SC 454 at p 464; *LAWSA*, vol 24 and the discussion of Van der Merwe and De Waal, paras 560 - 564.

⁴ 1951 (3) SA 200 (C) at p 207.

⁵ 1979 (4) SA 655 (A) at pp 670 F – 678 C for a general discussion.

⁶ Harms, *Amler's Precedents of Pleadings*, 9th ed, at p 320.

(c) a suitable route;

The claimant must tender compensation in a fixed sum.'

[20] In *Aventura Ltd v Jackson NO and Others*⁷ (*Aventura*) Nugent JA, writing for a unanimous court, held the following:

'What is meant by 'necessity' is that the right of way must be the only reasonably sufficient means of gaining access to the landlocked property and not merely a convenient means of doing so.' (emphasis added)

[21] In *Sanders v Edwards*⁸ a way of necessity was granted because the maintenance of an existing road was found to be too expensive for continuing farming operations.

Evaluation of the parties' submissions

[22] The first question to be decided is whether the claim for a way of necessity can be entertained as a matter of law. The farms, Strijd and Edom, farmed as a unit, are landlocked. It is common cause that Weyers, her family, employees and other visitors have to traverse other farms to reach the S313 to enable them as farmers to carry on farming operations on the said farms. Weyers is entitled to access to the S313, but the question is over which property.

[23] The second question is whether necessity was established on the evidence presented by Weyers, *ie* whether she has no reasonably sufficient access to the S313, save for traversing Flemix' property. As pointed out in *Aventura*,⁹ she cannot rely on convenience. The alternative route must be so difficult and inconvenient as to be almost impassable. She opted to present her case by way of application, rather than by way of the usual action procedure. Due to the troubled relationship between the Weyers family and the representatives of Flemix, the situation at the time when the founding affidavit was deposed to was that Weyers' son or daughter had to telephonically request access from the representatives of Flemix who would then travel to the gate that barred them from entering Tienfontein, open the gate and travel with them to the next gate at the border of Tienfontein and Strijd which is also kept locked by Flemix. The farm workers are not allowed to travel on the access route without being

⁷ 2007 (5) SA 497 (SCA) at para 8.

⁸ 2003 (5) SA 8 (C).

⁹ Footnote 7 *supra*.

accompanied by either Weyers' son or daughter, following the same procedure as mentioned above. Clearly, the Weyers family is not prevented from using the access route across Tienfontein, but needs to comply with certain prescripts.

[24] Adv PJJ Zietsman SC submitted, relying on the *Plascon-Evans* principle¹⁰, that the application should have been adjudicated on the version put up by the first respondent (the present appellant) together with those facts in the founding affidavit which the first respondent did not deny (save for exceptions to the rule which is not applicable *in casu*). The factual dispute between the parties could not be resolved on the papers. He submitted that the issue on appeal turns on the question whether Weyers had discharged the *onus* to establish a servitude of right of way of necessity *ter naaste lage en minster schade* over Flemix' property and the incorrect application of the law by the court *a quo*. According to him the court *a quo* should have dismissed the application on the basis that Weyers' case was that the access route over Tienfontein is the nearest route to the S313 which is factually incorrect.

[25] Mr Zietsman submitted that Flemix had proved that the route from the S313 across the farm Zwartlaagte, which is the farm to the north of Tienfontein and Strijd, is factually the shortest route to Strijd. This is evident from the sketches relied upon by the parties to be found in paragraph 11 *supra*. Zwartlaagte, the neighbouring farm to the north of Tienfontein and Strijd, is also owned by Chrismar Besigheidstrust, the owner of Koedoe's Rand. Flemix' sketch, marked 'FPI 2.1', indicates that the distance from points A, B, E to F is the shortest distance from the S313 to the boundary between Strijd and Zwartlaagte. Furthermore, points A, B to E is an existing farm road on Zwartlaagte. A new road will have to be created along the border fence at points E to F, but Mr Zietsman submitted that the owner of Zwartlaagte has a statutory obligation to create a firebreak along the border fence from point E to F which firebreak may also serve as an access route.

[26] Weyers alleged several times in her founding affidavit that the access route over Tienfontein was the only access to a public road and that it was impossible to farm effectively without having access to that route 'which must be traversed in order to reach the nearest public road.'¹¹ She then offered to pay reasonable compensation as calculated by her. She

¹⁰ *Plascon-Evans Paints v Van Riebeeck Paints* 1984 (3) SA 623 (SCA) at pp 634 – 635.

¹¹ Record, p 29, paras 19.3 – 19.5 and also in other paragraphs, but contrary thereto she mentioned in para 17.3

did not advance any reasons why the court *a quo* should have exercised its discretion in her favour, save to mention that they have to travel a certain distance 'through the veld' if the route across Zwartlaagte is used.

[27] Although it is sometimes permissible to supplement allegations contained in the founding affidavit in reply, Mr Zietsman submitted that Weyers failed to comply with the general rule that applicants must stand or fall by their founding affidavits. Flemix was called upon to meet the case presented in Weyers' founding affidavit which it successfully did. The servitude required over Flemix' property is over a longer distance than the alternative route pointed out by Flemix.

[28] Adv J Els, counsel for Weyers, submitted that it is common cause that both Strijd and Edom are landlocked. Weyers is therefore entitled to a right of way of necessity. The only issue is therefore which route such a right of way should follow. On the basis that Flemix indicated in the answering affidavit that it will elaborate upon the burden of the use of the access road and then only mentioned three of four incidents involving the farm workers and/or their families who caused disturbances or damage, no other reasons were advanced to show that its farming activities were hampered by the use of the access road.

[29] Mr Els submitted that a proper case was indeed made out in the founding affidavit for obtaining a servitude of right of way of necessity in that all the necessary allegations were made. When Flemix responded in the answering affidavit that there was a shorter alternative route available to Weyers in order to access Strijd, Weyers was entitled to reply to the averments contained in the answering affidavit and to introduce further corroborating facts in her replying affidavit.

[30] As mentioned, the issue in dispute between Flemix and Weyers is the actual route of the way of necessity to Weyers' farms, Strijd and Edom. Flemix instructed a professional land surveyor, Mr Johan Nortje. His sketch plan, attached as annexure 'FPI 2.1' to the answering affidavit and reproduced in paragraph 11 *supra*, provides for two alternative routes. Point F is the alternative entrance gate to the farm Strijd. The distance of the alternative route from point A to F over Koedoe's Rand and Zwartlaagte, F being on the northwestern corner of Strijd and

that the route over Zwartlaagte had been used 'in case of emergency.'

on the boundary with Zwartlaagte, is 2 058 meters. We repeat that the distance of the access route proposed by Weyers is 2 337 meters from the S313 to point G, the current entrance gate to Strijd. Therefore, Flemix contended that the shortest route to traverse the adjoining land which lies in between the landlocked land, being Strijd, and the nearest public road, the S313, is the alternative route depicted in green and blue between points A, B, C and F on 'FPI 2.1'. Furthermore, the route between points A, B and E of the alternative route is an existing route on Koedoe's Rand and Zwartlaagte.

[31] In reply Weyers averred that the access route 'is not only the shortest route but also the route which causes the lightest burden to the servient land'. It was furthermore contended that Weyers' son only installed a gate as a temporary measure at the border of Zwartlaagte pending the outcome of the application. It was contended that 'there is no alternative route' and that Weyers' son drove through the veld on Zwartlaagte with permission of Mr Nigrini, the representative of the Chrismar Besigheidstrust (the owner of Koedoe's Rand and Zwartlaagte) in case of an emergency when access could not be obtained from Flemix. Mr Nigrini does not consent to a servitude being registered over any portion of Zwartlaagte.

[32] In any event, so Mr Els submitted based on the replying affidavit, the alternative route proposed by Flemix fails to take in consideration that Edom is also landlocked and that the distance on the route to the buildings on Strijd and to Edom from point J on annexure X3 attached to the replying affidavit - point F on 'FPI 2.1' – must be calculated as well. If this extra distance is added, according to Mr Labuschagne in his affidavit in support of the replying affidavit, the proposed alternative route is 2 910 meters long and thus about half a kilometer longer than the access route over Tienfontein.

[33] In our view there is a real dispute of fact on the papers as to which route would be the most appropriate and/or the shortest, bearing in mind Mr Els' submissions. The distance not taken into account by Flemix which would enable the Weyers family to also gain access to Edom was not addressed in the founding affidavit. The possibility that a shorter route across Zwartlaagte is in existence and that only a short section of the alternative route does not consist of an already existing farm road is placed in dispute by Weyers. As said, we are of the view that a real dispute of fact exists. It is not possible to make any finding on the papers in this regard. In fact, the court *a quo* accepted, as clearly indicated in the judgment when leave

to appeal was refused, that the route proposed by Flemix was 279 meters shorter than the access route over Tienfontein.

[34] When applicants elect to proceed by way of motion procedure while there are foreseeable disputes of facts, they do so at their own peril. A bare denial of facts alleged by an applicant would not be sufficient to create a material dispute of fact, but Flemix has done more than raising a bare denial. It accepted the challenge presented by Weyers in her founding affidavit and showed that the alternative route over Zwartlaagte is shorter than the access route over Tienfontein. As mentioned, the court *a quo* accepted this. In *Wulffers v Boxer Dale Holdings (Pty) Ltd and Others*¹² the Supreme Court of Appeal recently had to deal with a dispute pertaining to a way of necessity and its position on the servient tenement. Based on the facts of that case the Supreme Court of Appeal held that there was a real dispute of fact on the papers – motion proceedings having been instituted in the court *a quo* – as to which route would be the most appropriate and least onerous for the servient owner, the width of the road and the needs of the landlocked property. Therefore, it upheld the appeal, finding that the court *a quo* erred in determining the factual disputes on affidavit and held that the application should be dismissed with costs.

[35] Despite the obvious need for a servitude of way by necessity by the Weyers family and their farm workers, Weyers as the applicant bore the *onus* to establish that the particular praedial servitude, a way of necessity along the access route over Tienfontein, is the shortest route to the nearest public road that causes the least damage to the servient tenement according to the principle *ter naaste lage en minster schade*. Insofar as Flemix pointed out that an alternative and shorter route is available, it was incumbent on her to show that that alternative route would be difficult, inconvenient and thus practically impossible to traverse.¹³ This she failed to do. We are of the view that too many issues that cannot be resolved on papers existed and that the court *a quo* ought to have dismissed the application with costs.

¹² (1224/2021) [2022] ZASCA 172 (1 December 2022).

¹³ Refer to footnote 3 *supra*, the *dictum* of De Villiers, CJ in *Van Schalkwyk v Du Plessis and Another* and the discussion in LAWSA.

Order

[36] Consequently, the following order is issued:

1. The appeal is upheld with costs.
2. The court *a quo*'s order is set aside and substituted with the following order:
The application is dismissed with costs.



JP DAFFUE J



I VAN RHYN J

I concur



C REINDERS J

On behalf of the Appellant:
Instructed by:

Adv PJJ Zietsman SC
Muller Gonsior Attorneys
BLOEMFONTEIN

On behalf of the First Respondent:
Instructed by:

Adv J Els
Mcintyre Van Der Post Attorneys
BLOEMFONTEIN