

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NUMBER: 14057/2024P

In the matter between:

MAXINE PAIGE SPALDING

FIRST APPLICANT

TYLER CASE MC MURTRIE

SECOND APPLICANT

And

ANDRODOX PROPRIETARY LIMITED

FIRST RESPONDENT

REGISTRAR OF DEEDS, PIETERMARITZBURG

SECOND RESPONDENT

JUDGMENT

P C BEZUIDENHOUT J:

[1] Applicants brought an application seeking an order that a four metre wide right of way servitude registered over the immovable property being portion 22 of Erf 6[...] A[...], Registration Division FD Province of KwaZulu-Natal in favour of the remainder of portion 2 of Erf 6[...] A[...] has lapsed. Further directing the Registrar of Deeds to record that it has lapsed. That First Respondent sign all documents necessary to do so and that in the event of it being refused that the Sheriff of the High Court be empowered to sign all the necessary documents. It also seeks relief that First Respondent restore the unfettered access to portion 22 of Erf 6[...] A[...], that previously constituted the servitude by removing all barriers, obstructions etc. and the costs be paid on an attorney and client scale. The application is opposed by First Respondent.

[2] Applicants purchased the property portion 22 of Erf 6[...] A[...], 2[...] A[...] Road on 23 August 2024 from one Meuskens. It is alleged in their founding affidavit that they were not informed of any encumbrances in respect of the property and further that the disclosure form to the Title Deed actually recorded that there were no boundary line disputes, encroachments etc. It was only after they took transfer of the property that they were informed by Meuskens that a right of way servitude is registered over the property in favour of the neighbouring property being the remainder of Portion 2 of Erf 6[...] A[...].

[3] What is recorded on the Title Deed of Portion 22 of Erf 6[...] A[...] is as follows:
 “Subject to a four metre wide right of way as shown by the figure FGCD on diagram S.G number 3038/1974 in favour of the remainder of sub 2 of Lot 6[...] A[...], to provide access to the remainder until such time as an alternate access to a public road is provided to such remainder by the administrator under the provisions of Ordinance number 27 of 1949 (as amended) as created in Deed of Transfer number T10139/1977.”

[4] The remainder of sub 2 of Lot 6[...] was thereafter consolidated with portion 1 in terms of the approved consolidation diagram SG number 1492/2022 and was approved by the Survey General on 7 December 2022. It is therefore contended that an alternate route to a public road has been provided to the dominant tenement as a result of the consolidation of the two properties to form Erf 6[...] and accordingly alternative access has been provided to First Respondent. Correspondence thereafter ensued between Applicants and First Respondents attorneys which is not necessary to deal with at this stage.

[5] It was contended on behalf of First Respondent that there had been an agreement between the previous owner of 2[...] A[...] Road (Portion 22 of Erf 6[...]) and the previous owner of the remainder sub 2 that an additional two metres strip of 2[...] A[...] Road be consolidated with First Respondent's remainder of portion 2 widening the

four metre right of way by a further two metres to six metres. This subdivision has not been registered in the Deeds office nor does it appear from the Title Deeds. It is therefore contended by Applicants that they are not bound by this purported panhandle agreement. First Respondent is still using the said right of way and also allows others to do so. Although First Respondent is still entitled to use the right of way as it still remains registered, he has no right to deny Applicants access to their own property which is being done.

[6] There is no written deed of sale in respect of the six metre panhandle. This is a condition in terms of the Alienation of Land Act 6[...] of 1981 and accordingly there was no valid sale. Even if it was agreed it was not registered.

[7] It is contended that in terms of section 76(1)(bis) of the Deeds Registry Act 47 of 1937 the Registrar can record that the right of way has lapsed on application by Applicants as the owners of the land affected by the right of way.

[8] On behalf of First Respondent it was contended that Meuskens consented to the panhandle agreement with the previous developer, Peter, when the properties were consolidated into Erf 6[...] and that a surveyor had surveyed the panhandle and that it was approved by the Survey General.

[9] First Respondent concedes that the remainder of portion 2 of Erf 6[...] and portion 1 of Erf 6[...] A[...] were transferred to First Respondent on 5 November 2022 and was consolidated as Erf 6[...] in the Deeds office on 9 September 2024. The consolidated property has 8 mini subdivisions registered for residential development. There are two panhandles. The first which is unregistered (the disputed one) and gives access from Assegay Road to the remainder of portion 2 of Erf 6[...] over portion 22 of Erf 6[...] and incorporates the four metre right of way servitude over Applicants property. The second panhandle forms part of portion 1 of Erf 6[...] which gives access to Assegay Road. This is a six metre wide panhandle and is registered. It is contended that the access via the panhandle on portion 1 of Erf 6[...] Assegay does not amount to

alternate access for the purposes of the servitude notwithstanding that portion 1 has now been consolidated with the remainder of portion 22 of Erf 6[...].

[10] The panhandle on portion 1 of Erf 6[...] which is six metres wide only provides one way access in terms of the town planning scheme. In order to provide two-way access it must be a minimum of seven metres wide. Ingress is via the right of way servitude because the panhandle can only provide egress. It is also contended that an agreement was reached with the previous owner of a six metre panhandle and that an amount of R35 000.00 was paid therefore. It sets out that the sub division and consolidation of the panhandle did not take place in 2012 despite transfer duties and rates clearance certificates having been obtained. It is further contended that the combined decision notice by the eThekweni Municipality dated 21 July 2022 in paragraph 8.2 sets out that the ingress to the consolidated land is via the existing four metre right of way servitude and the egress via the six metre panhandle.

[11] It was submitted on behalf of Applicants that the right of way servitude had lapsed. It was submitted that Title Deed 10139/1977, which created the servitude provided, that the servitude would “provide access to the remainder until such time as an alternate access to a public road is provided to such remainder and whereafter such right of way shall lapse.”

[12] Title Deed 10139/1977 is referred to in paragraph (f) of the Title Deed of Applicants number 747/2024. The remainder and the neighbouring property were consolidated into one property. It was therefore submitted that the remainder having been consolidated had access to the public road. Accordingly the condition had been fulfilled and the temporary servitude must therefore lapse. In support thereof I was referred to the decision in Baront Investments Pty Ltd v West Dune Properties 296 Pty Ltd 2014 (6) SA 286 (KZP) at paragraph 8.2 where it was held that the servitude which was temporary had to run its course until alternative access had been provided to the affected properties. Once this was done the temporary servitude lapsed and it remained to have it expunged.

[13] It was submitted on behalf of First Respondent that the servitude would lapse when the condition is fulfilled that remainder of portion 2 has access. It was submitted that a portion of the access was egress and only if there was an alternative access would it no longer be valid. This has not been satisfied and further that there is a dispute of fact and that Applicants are therefore bound by the version of First Respondent. In this regard I was referred to paragraph 8.2 of the combined decision notice which I have already referred to. It was further submitted that the combined decision notice included the four metre right of way servitude as the ingress road. The right of way servitude will continue until an alternative access road is approved by the local authority. The decision in Baront was not factually similar as there was a primary entrance available to Respondents in that matter.

[14] Although the facts in the Baront matter may not be exactly similar it specifically found at paragraph 63:

“In the light of the above the first, second and third respondents submission that an oral agreement- even a taut one as contended, in the alternative, by first respondent- can validly create a servitude capable of being enforced cannot be correct and fail to be rejected.”

The six metre panhandle is therefore not valid and cannot be enforced. The question of whether money was paid by the previous owner does to assist and cannot be considered as there is no written agreement of sale of the piece of land. There is accordingly no dispute of fact which requires consideration in this regard.

[15] The question then remains whether the four metre right of way servitude to the remainder of sub 2 of Erf 6[...] has lapsed. The remainder of sub 2 of Erf 6[...] no longer exists as it has been consolidated with portion 1 to create Erf 6[...]. There is accordingly no longer a remainder of sub 2 of Erf 6[...] which require access. The consolidated Erf 6[...] has a registered six metre panhandle. As the remainder of sub 2 of Erf 6[...] is now part thereof it also has access through the panhandle.

[16] The combined decision notice referring to ingress and egress to Erf 6[...] cannot create or grant a servitude and does not assist First Respondent. The question then still remains whether the four metre right of way is no longer required as the condition of alternative access to a public road has been fulfilled. In my view the fact that the combined decision notice refers to it does not mean that the condition has not been fulfilled. That refers to the further 8 subdivisions of Erf 6[...] and does not affect portion 22 of Erf 6[...]. The subdivisions were never an issue when the provisional servitude was registered.

[17] As there is a registered six metre panhandle to Erf 6[...] (of which remainder of sub 2 of Erf 6[...] is a part) the condition has been fulfilled. There is also no longer a remainder of sub 2 of Erf 6[...]. The other issues that Applicants are being refused access to the right of way as a gate has been installed was not dealt with by either of the parties during agreement. It is indeed so that Applicants cannot be refused access thereto and such must be granted. However due to the conclusion reached this is no longer an issue.

[17] I am satisfied that Applicants have made out a case for the relief claimed.

Order:

An order is granted in terms of paragraphs 1 to 7 of the Notice of Motion, except for paragraph 7 as amended.

P C BEZUIDENHOUT J.

JUDGMENT RESERVED: 21 JULY 2025

JUDGMENT HANDED DOWN: 31 JULY 2025

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