THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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Status: Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

Martina Christina Catharina Wulffers and Boxer Dale Holdings (Pty) Ltd and Two Others [2022] ZASCA 172

Today the Supreme Court of Appeal (SCA) upheld an appeal and dismissed a cross-appeal from the Eastern Cape Division of the High Court, Port Elizabeth:

Ms Wulffers and the respondents are all owners of portions of the farm Goed Geloof 745, in the district of Humansdorp (the farm), which is situated along the Krom River (the river) in St Francis Bay. The farm was subdivided in October 2010. Prior to the subdivision of the farm, it was jointly owned by the Klitsie and Wulffers families in equal shares since 1968. Currently, the second respondent, Henry Anthony Klitsie, and his two brothers (the Klitsies), are the owners of the remainder of Portion 133 of the farm. Ms Wulffers is the owner of Portion 233, which is a partition of Portion 133. The partition was registered on 19 August 2015. The first respondent, Boxer Dale Holdings (Pty) Ltd (Boxer Dale), represented by Pieter Jansen van Vuuren, and the third respondent, Anton Heinrich Genade (Mr Genade), are the owners of two adjacent properties, namely, Portions 159 and 51.

Essentially, the Klitsies own the two non-contiguous portions of land, in extent 0,53 Ha and 0,45 Ha each (Part A and Part C). Part B, which is owned by Ms Wulffers, is in the middle of Part A and Part C. Part C is landlocked (the landlocked property) and the Klitsies can only access it by traversing Part B, the Wulffers property. The properties of Boxer Dale and Mr Genade are situated on the western side of Part A. The properties of Boxer Dale and Mr Genade are not landlocked. They only require a route over the Wulffers property to enjoy access to the river on an adjacent property, where they and the Klitsies plan to build a jetty to launch their boats. In that regard, Boxer Dale and Mr Genade rely on a general reciprocal praedial road servitude, 6 metres wide, that was registered in 1993 over Portion 133

(Portions A, B and C). The servitude is defined as being *from* 'Property One' *to* 'Property Three'. It further provides that the servitude road must be agreed upon by the owners of 'Property Two', 'Property Three' *and* 'Property One'. According to the descriptions of the properties, 'Property Two' is Portion 133 (Part A, B and C) before the subdivision and partition. 'Property One' is Portion 134 and 'Property Three' is Portion 22 (belonging to Boxer Dale).

The respondents approached the court on application in two parts. In Part A they sought an interim order, operating as a rule *nisi*, for Ms Wulffers to remove the fence and the boom gate she had erected on her property. They further sought an order that Ms Wulffers be interdicted and restrained from erecting further installations on her property which would have the effect of interfering with the respondents' access to the landlocked property. Part A was granted operating as an interim order pending the outcome of Part B. In Part B the respondents sought an order that a 'servitude of right of way' be registered over Ms Wulffers property in favour of the respondents as depicted on a sketch map 'x-y'.

SCA found that there was insufficient information to determine the route from 'Property One' to 'Property Three'. As a result, Boxer Dale and Mr Genade failed to establish their entitlement to any relief under Part B of the application. As far as the Klitsies are concerned, it may well be that the Klitsies are entitled to a way of necessity (*via ex necessitate*) over Ms Wulffers' property to access the landlocked property. There is however a real dispute of fact on the papers as to which route would be the most appropriate and least onerous for the servient owner.

It is trite that motion proceedings are not suited to resolving these kinds of disputes of fact. They cannot be resolved on paper. When the respondents elected to proceed by way of application when there were foreseeable disputes of fact, they did so at their own peril. As none of the respondents had established any entitlement to relief under Part B, they were not entitled to any ancillary relief under Part A either. The high court therefore erred in determining the matter on affidavit and the application should have been dismissed with costs. While costs ought to follow the result, the costs of only one counsel are merited.

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