THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 1224/2021

In the matter between:

MARTINA CHRISTINA CATHARINA WULFFERS **APPELLANT**

and

BOXER DALE HOLDINGS (PTY) LTD **FIRST RESPONDENT**

HENRY ANTHONY KLITSIE **SECOND RESPONDENT**

ANTON HEINRICH GENADE **THIRD RESPONDENT**

Neutral citation: *Wulffers v Boxer Dale Holdings (Pty) Ltd and Others* (1224/2021) [2022] ZASCA 172 (1 December 2022)

Coram: PONNAN, PLASKET, MABINDLA-BOQWANA JJA and NHLANGULELA and WINDELL AJJA

Heard: 7 November 2022

Delivered: 1 December 2022

Summary: Property law – servitude and way of necessity (*via ex necessitate*) over immovable property – parties unable to agree on a route – clear dispute of fact – application procedure not suitable – application dismissed.

ORDER

On appeal from: Eastern Cape Division of the High Court, Port Elizabeth (Naidu AJ, sitting as court of first instance):

1 The appeal is upheld and the cross-appeal is dismissed, in each instance with costs.

2 Paragraph 2 and 3 of the high court's order are set aside and replaced with the following:

'The application is dismissed with costs.'

JUDGMENT

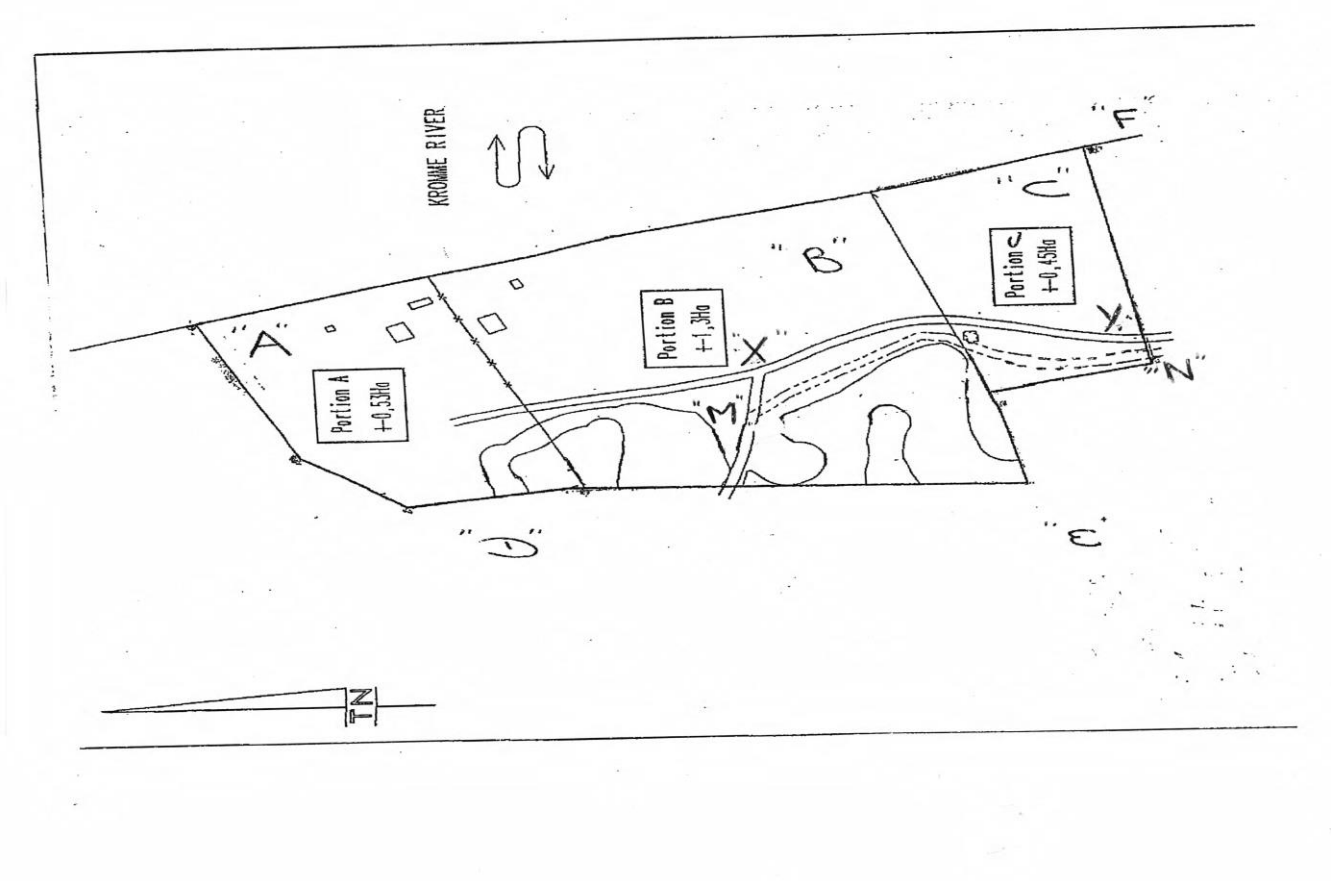
Windell AJA (Ponnan, Plasket, Mabindla-Boqwana JJA and Nhlangulela AJA concurring):

[1] This is an appeal and cross-appeal from the Eastern Cape Division of the High Court, Port Elizabeth (the high court). The matter concerned a dispute as to whether a servitude exists over a portion of land owned by the appellant, Martina Christina Catharina Wulffers (Ms Wulffers).

[2] 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.

[3] On a sketch plan (see below), the subdivision of Portion 133 is indicated. 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, and their approximate positions are marked on the sketch plan as ‘D’ (Boxer Dale) and ‘E’ (Mr Genade). 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 (marked ‘F’), 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).



[4] The respondents assert that they had access to the landlocked property by traversing Ms Wulffers' property via the route depicted as 'x-y' on the sketch plan. Ms Wulffers, describes that route as a 'foot path', which she says the Klitsies established without obtaining her permission. She contends that it bisects her property and expressed a preference for a route that would run along the western boundary of her property. However, there may be a difficulty with obtaining permission from the relevant government department for this route, because of its proximity to a wetland. In February 2019, Ms Wulffers suggested as an alternative, the route depicted as 'm-n' on the sketch map, which she described as the 'fairest route'. However, that did not appear to have been acceptable to the respondents. When attempts to resolve the impasse failed, Ms Wulffers felt compelled to erect a fence at a point close to her property on the 'x-y' route in March 2019.

[5] The respondents then launched urgent application proceedings in the high court, in which they sought an interim order (Part A), 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. On 17 December 2019, the rule *nisi* was granted, pending the final determination of the relief sought in 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 the sketch map 'x-y'.

[6] On 29 September 2020, the high court discharged the rule *nisi*, but found in favour of the second respondent only as far as the relief sought in Part B was concerned. It granted an order that a 'route of registered servitude of right of way' be registered over the Wulffers property, in favour of the remainder of Portion 133 as depicted on the sketch map as 'x-y'. It further ordered that such servitude of right of way was to measure not less than five (5) metres in width.

[7] Ms Wulffers and the respondents respectively sought leave to appeal and cross appeal from the high court. Ms Wulffers contended that the high court should have dismissed the respondents' application *in toto*, instead of granting relief to the Klitsies in the terms set out in the order (the appeal). The respondents complained that the high court erred in discharging the rule *nisi* and in dismissing the relief sought by Boxer Dale and Mr Genade under Part B of the Notice of Motion (the cross-appeal). The appeal and cross-appeal are with leave of the high court.

[8] In the founding affidavit (deposed to by the second respondent) all the respondents relied on what they described as a registered reciprocal praedial servitude that was registered over Portion 133 (Portion A, B and C) in 1993, the relevant part of which reads:

'"Property Two" shall be subject to a General Servitude of Road Six (6) metres wide, from "Property One" to "Property Three" the route of which is to be agreed upon by the registered owners, in favour of "Properties Three to Thirteen", subject to the terms and conditions more fully set out in paragraph 9.'

[9] 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).

[10] Putting aside for the moment the dispute between Ms Wulffers and the respondents about which route is most suitable, there is no evidence on the papers to indicate where 'Property One' (Portion 134) is situated in relation to 'Property Two' and 'Property Three', or who the current owner of 'Property One' is. It seemed to have been accepted before this court that those property owners may well have a direct and substantial interest in these proceedings, because any route fixed here will likely impact their properties as well. Further, the route from 'Property One' to 'Property Three' has never been agreed upon by the registered owners. There is no evidence that the owner of 'Property One' had been consulted in determining the road and if they consulted, what such owner's attitude is to its location. In the absence of these crucial facts, it is impossible to determine the route from 'Property

One' to 'Property Three' on the evidence available. As a result, Boxer Dale and Mr Genade failed to establish their entitlement to any relief under Part B.

[11] This brings me to the relief claimed by the Klitsies. Part C is landlocked. 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.[1] But, such a case was not advanced in the respondents' founding papers. However, Ms Wulffers appears in principle to accept that the Klitsies may indeed have such a right. It is the route on which they seem unable to agree.

[12] Rights over the property of another must be exercised *civiliter modo*.[2] A way of necessity over the servient land must be a route that causes the least damage and prejudice to the latter and compensation in proportion to the advantage gained by the dominant owner and the disadvantages suffered by the servient owner is payable when this happens (*ter naaster lage en minster schaden*).[3]

[13] Despite a tender by Ms Wulffers to agree to register a right of way ('m-n') in favour of the Klitsies, that was not accepted. There is a real dispute of fact on the papers as to which route would be the most appropriate and least onerous for the servient owner. There is also a dispute as to the width of the road. In principle, the width of the road depends on the needs of the enclosed property.[4]

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[1] See *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) at 671.
[2] *Hollmann and Another v Estate Latre* 1970 (3) SA 638 (A) at 645D; *Tshwane City v Link Africa and Others* 2015 (6) SA 440 (CC) paras 142-144.
[3] See Van der Walt *The Law of Servitudes* 357-358.
[4] *Van Rensburg* at 675 G.

[14] It is trite that motion proceedings are not suited to resolving the kinds of disputes of fact that we have here. 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.

[15] In the result, the following order is made:

1 The appeal is upheld and the cross-appeal is dismissed, in each instance with costs.

2 Paragraph 2 and 3 of the high court's order are set aside and replaced with the following:

'The application is dismissed with costs.'

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L WINDELL

ACTING JUDGE OF APPEAL

Appearances

For appellant:	P Jooste and T Rossi
Instructed by:	Nel Mentz Steyn Ellis Attorneys, Humansdorp
	McIntyre Van der Post, Bloemfontein
For respondent:	O Ronaasen SC and L Ellis
Instructed by:	Greyvensteins Incorporated, Port Elizabeth
	Muller Gonsior Incorporated, Bloemfontein