Regspraak

WAY OF NECESSITY: SHOULD BLOKLAND EVER BE LEFT STERILE?

Jackson NO v Aventura Ltd 2005 2 All SA 518 (C) and its sequel *Aventura Ltd v Jackson NO* 2007 5 SA 497 (SCA)

1 *General*

Jackson NO v Aventura Ltd decided in the Cape high court and its sequel in the supreme court of appeal, *Aventura Ltd v Jackson NO*, raise interesting questions about undeveloped mountainous agricultural properties being converted to holiday resorts or private family vacation areas without providing a sufficient exit to a public road. In the present case the dominant land concerned was landlocked or "blokland" – *ie* enclosed on all sides by neighbouring land without an exit to a public road. According to case law on *via necessitatis* this is a classic example where the owner of the dominant land would be entitled to a way of necessity to a public road in order to exploit the dominant land to its full potential. This case is, however, complicated by the fact that the property concerned as well as all the surrounding properties have been declared sensitive coastal areas in terms of regulations (reg 1526 of 27 Nov 1998) promulgated under the Environment Conservation Act 73 of 1989, which prohibit the disturbance of vegetation and earthworks in these areas and the construction of a road without the consent of the environmental authorities concerned. Consequently the court was faced with the dilemma of whether to decide the issue on common law principles alone or whether it was competent to take environmental issues into account in its decision to grant or not to grant a way of necessity.

Other issues that were raised or could have been raised were whether the granting of a way of necessity entitles the owner of dominant land to convert the way of necessity into an ordinary permanent praedial servitude. If this is the case, the servitude of way could be registered and the ordinary rules applicable to praedial servitudes would apply to the way in which it must be exercised. Another pertinent question not raised by the judges was whether a way of necessity was competent only to further agricultural purposes or whether it could also promote more esoteric exploitation of the dominant property for more recreational purposes. An interesting related question is whether the owners of the dominant land should be awarded a way of necessity to be used only in emergency situations (*via necessitatis precario*) rather than a full way of necessity (*via plenum*). It could also be enquired whether the compensation that has to be paid by the landowner who benefits from the way of necessity must be agreed upon by the parties or set by the court. Finally, the question could be raised whether in view of section 25 of the constitution landlocked property could ever be left sterile because environmental authorities are not prepared to authorise the construction of an exit road to the nearest public road.

2 *Facts of the case*

In 1992 the trustees of the Rondeklip Investment Trust acquired a portion of undeveloped farmland that will be referred to as the Rondeklip property. The property, situated in the division of Knysna, is adjacent to the Keurbooms Forest Reserve

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and is covered by pristine indigenous forest and bush. The Rondeklip property is landlocked in the sense that it has no access to a public road. Access to the property is only possible by crossing either one or both adjoining properties. A large undeveloped portion of land (Catwalk property) adjoins the Rondeklip property on the west while the Aventura property owned by the defendants (appellants in the supreme court of appeal) forms the southern boundary. The latter property is being developed as a recreational resort. It is common cause that the Rondeklip property as well as the surrounding Aventura and Catwalk properties have been declared sensitive coastal areas under the Environment Conservation Act 73 of 1989 (s 21). Regulations promulgated under this act purport to preserve the sensitive ecological balance in the area by prohibiting disturbance of the vegetation, earthworks and the construction of roads.

Apparently the Rondeklip property was proclaimed a *private nature reserve* prior to 1997. Under the relevant town planning scheme as it applied in 1997, the trust had a right to erect at least one dwelling for primary use on the land (528e-g, but see the SCA report 499G which states that the town planning scheme allows the use of the land as *agricultural property* and allows the erection of one dwelling on the property). It is not disputed that the use of the Rondeklip property for the purposes for which it is zoned will require prior authorisation by the environmental authorities contemplated by the Environment Conservation Act 73 of 1989 and the National Management Act 107 of 1998 (521 and SCA report 499G).

In the court *a quo* the trust sought an order from the Cape high court compelling Aventura to register a right of way in favour of the Rondeklip property over its land. The trust claimed that they required vehicular and other access by means of a road 3,5 metres in width to the southeastern portion of the dominant land from the nearest public road adjoining the defendant's Aventura property. The trust contended that such road would allow the plaintiffs to enjoy the landlocked property and in future to erect one or two dwellings on that portion to be used and enjoyed by the persons concerned for private holiday purposes (522). They averred that no other public road was within reasonable reach of the dominant land and that the most practical access to the dominant land from the nearest public road would cross the Aventura property. The Aventura property is situated along the national road to Humansdorp. From the national road, a private road has been constructed to the entrance of the recreational resort on the Aventura property. This resort comprises a cluster of chalets and other buildings. From the entrance of the resort a lightly constructed tarred road provides access to the chalets. A natural watercourse located mainly on the adjoining Catwalk property that extends into the surrounding hills bounds the furthermost chalet. The right of way requested by the trust allows for passage from the national road, along the private road described above to a point short of the furthermost chalet. From that point it moves away from the tarred road, by-passes the furthermost chalet, crosses about 30 metres of pristine land and enters the Catwalk property near the foot of the watercourse. From there it proceeds up the watercourse along the route of a servitude of right of way over the Catwalk property registered in favour of the Rondeklip property, until it enters the Rondeklip property.

It was contemplated that the trust would construct a road over the last 30 metres of the Aventura property and along the remainder of the route up to the Rondeklip property (see SCA report 499D-E). This would require the grading only of the 30 metres extension over the Aventura property and would mean that the proposed route would not in any way interfere with the buildings on the property or diminish the beneficial use of the Aventura property or the private roads thereon (523). The defendants denied that the public road to Humansdorp was the nearest national road

to the landlocked property and suggested two alternative access roads that would traverse the Catwalk property and link up with the Wittedrift national road without traversing the Aventura property. They further averred that the construction of the proposed road would involve the destruction of highly sensitive and protected forest areas and that such activity could not be undertaken without authorisation of the environmental authorities concerned.

3 *Decision of the Cape high court*

Zondi AJ accepted that the dispute involved the consideration of both environmental issues and common law principles (523). Since the properties concerned had been declared sensitive coastal areas the likely destructive effect of the construction of the proposed road would require consent from the authorities concerned. The defendant's expert land surveyor testified that the plaintiffs' proposed road was environmentally inappropriate and that its construction would be "inappropriate, ill conceived and ecologically irresponsible". In view of the ecological features of the properties concerned, it was not the most practical access to the landlocked property. By contrast, the roads proposed by the defendant were testified to be considerably less damaging to the natural environment, as they are much higher up in the catchment and situated on a spur rather than in a valley (526).

The court, however, found it inappropriate to pronounce on the complex nature of the environmental legislation and to give a decision on both common law and environmental issues. The judge reasoned that it is the function of the court to decide common law issues, namely the possible acquisition of a way of necessity. If the plaintiffs succeed in acquiring a right of way they would have to comply with the necessary environmental legislation when they want to exercise that right. He reasoned as follows:

> "A totally different body is tasked by the legislature to deal with issues regarding the compliance with the provisions of environmental legislation. If the Court were to apply environmental considerations in determining the issues between the parties, it will be usurping the powers of the administrative bodies who, by reason of their expertise, are empowered to exercise those powers" (531d-f).

Having discussed the applicable environmental statutory provisions at length, he concluded:

> "Thus if a court in a claim to a right of way, were to apply both the common law and environmental considerations in considering the claim, the whole environmental legislative framework would be rendered nugatory. Clearly that would never have been the intention of the legislature to do so. The legislature has created and authorized various administrative bodies with necessary expertise on environment issues to regulate the exercise of the right …. At this stage of the process the claim has no effect on the environment" (532).

Zondi AJ also dealt with the contention by the defendants that the evidence that the road proposed by the plaintiffs was unfeasible both from an engineering and environmental perspective made it highly unlikely that the plaintiffs would obtain the necessary authorisation. The defendants quoted various authorities in support of their contention that the court should not deal with or pronounce upon abstract or academic points of law (528). Zondi AJ countered this by reference to section 19(1)(a)(iii) of the Supreme Court Act 59 of 1959, which gives a provincial or local division a discretion, at the instance of any interested person, "to enquire into and determine any existing, future or contingent right or obligation, notwithstand-

ing that such person cannot claim any relief consequential upon determination". He pointed out that there was a real and pertinent dispute between the parties on whether or not the plaintiffs should be granted a right of way over the defendants' property. Although if granted, the plaintiffs might not be able to exercise that right on account of environmental requirements pertaining to sensitive coastal areas, he concluded that this did not mean that the questions presented were abstract, academic or hypothetical (529).

Thus Zondi AJ cleared the way for deciding the issue on common law principles applicable to ways of necessity. He examined the expert evidence given by the engineers and environmentalists on both sides (524-526) and concluded that the issues had to be determined in the light of the geographical location of the plaintiff's property as well as the conflicting interests of the parties concerned. The plaintiffs had a real right (ownership) in the landlocked land that cannot be exercised to its full potential without an access to the southeastern part of their property where they could build a house on a flatter site offering the best view. At the same time the defendants were entitled to the full ownership of their property, and this would certainly be diminished if the right of way were to be granted (527).

The judge referred to the *locus classicus* in *Van Rensburg v Coetzee* 1979 4 SA 655 (A) 671 that the owner of landlocked land could claim a way of necessity if his land is landlocked and has no way out or if an exit is in fact available but is inadequate in that the owner does not have reasonably sufficient access to the public road to enable him, if he is a farmer, to carry out his farming operations (the last part with reference to *Lentz v Mullin* 1921 EDC 268 270). In such a case the owner is entitled to an exit to the public road against payment of a reasonable price. The route the way of necessity must take must be determined by the *ter naaste lager en minster schade* maxim that means that such way must traverse the adjoining land that lies between the landlocked and the nearest public road and along a route on that land which causes the least damage to the servient land (529). He quoted a dictum in *Van Rensburg v Coetzee* to the effect that such a maxim was not inflexible and could be deviated from if the servient land was so impassable that it provides no practical exit or if the land concerned would be so detrimentally affected by the granting of the way of necessity that another neighbouring property must be considered as servient land (529-530).

Zondi AJ then found that the dominant land was geographically landlocked, which made the need for access clear. He also found that the close proximity of the defendants' property to the national road made it the most likely candidate to provide the landlocked property with access to the public road in line with the maxim *ter naaster lage en minster schaden* (528). In this context it must be remembered that the direct route to the nearest boundary of Rondeklip property was much nearer than the route eventually decided upon but that the steep terrain made it impossible to construct a road in that area. Applying the first exception mentioned in the *Van Rensburg* case, the judge reasoned that topographical and geographical features of both the servient land and the dominant land (for instance if there was a ravine between the two properties) must be considered in order to determine whether the proposed servient land was so impassable that it provided no practical exit. He then concluded (531) that, in his opinion, environmental and engineering difficulties should not be taken into account in determining whether or not the identified land will be impassable. This is controversial because engineering difficulties in constructing a road would be the single most important reason why the servient property could qualify as impassable. The second exception concerns the detrimental impact the granting of the way of necessity would have on the defendant's

right to use and enjoy the servient land. Since the defendants planned to exploit their property as a resort *cum* conference centre development, they contended that the granting of such a way would seriously limit their plans to construct two hotels, a conference centre and restaurant, which will involve rerouting of internal roads within their resort (532). It was earlier argued that the proposed road would dramatically affect the privacy of occupants of the chalet closest to the route and would probably require the demolition of that chalet since the space between the chalets, existing parking area and electrical boards is severely limited and insufficient to allow for the proposed extension road (525).

Zondi AJ reasoned that this matter could be resolved only by balancing the competing interests of the parties to decide on an approach least burdensome to the parties (531). The plaintiffs wanted to use the defendants' existing private access road to the border of their property. Since the land there is too steep to gain direct access to the landlocked property, the plaintiffs suggested an access road to the registered road servitude that they had established over the other neighbouring land, the Catwalk property. This would affect a certain portion of the defendants' property: movements around the chalet closest to the proposed route would affect the peace and tranquility in that area. However, the additional route to be built on the defendant's property would only be approximately thirty metres from the point where the private road ends (532).

In balancing the parties' conflicting interests, Zondi AJ considered the viability of the routes proposed by the defendants to provide alternative access to the plaintiffs' property. He pointed out that these routes were designed to provide access to the northwestern portion of the landlocked land, being the closest portion of the landlocked property to the private servitude road connecting the Catwalk property to another public road to Wittedrift. Zondi AJ concluded that none of these roads would provide access to the spot where the plaintiffs intended to construct a dwelling, namely the southeastern portion of the property where the terrain is less steep and the best view is provided. These routes would further require the construction and use of a road from the existing road on Catwalk property to the boundary of the landlocked property and that construction would have to traverse a ravine over steep and extremely difficult terrain (532).

On these facts, Zondi AJ reached the conclusion that the interests of the plaintiff could only be protected if they had an exit over the defendants' property. He therefore held that the maxim *ter naaster lage en minster schaden* applied to the landlocked land in the present case and that none of the exceptions to the maxim was applicable. He decided that the only practical access from the landlocked land to the public road was by way of the registered servitude over the Catwalk property and the existing road on defendants' property. Consequently, the plaintiffs were entitled to a right of way over the defendants' property against payment of the amount of compensation, which was still to be determined between the parties (532).

To address the concerns of the first defendant that the right of way would adversely affect his future development plans and prevent rerouting of the internal roads on the property, the judge suggested that a general servitude be granted providing an opportunity for the plaintiffs to select a particular route later. This selection should then be performed in a civilised way (*civiliter modo*) (533).

The defendants were also anxious that the routes proposed by the plaintiffs would provide access from the national road not only to the plaintiffs' property but also to the Catwalk property. The judge pointed out that such user would not be allowed under the principle that the owner of a dominant tenement cannot transfer the benefit of a servitude to another tenement without the consent of the owner of the servient

tenement (see *Louw v De Villiers* (1893) 10 SC 324). To justify this, the judge again used the *civiliter modo* maxim to indicate that the owners of the dominant land are required to exercise the servitude over the servient property in a civilised way (533).

The court therefore granted an order for the registration of a right of way 3,5 metres in width over the servient tenement in favour of the landlocked property. On the authority of *Naudé v Ecoman Investments* 1994 2 SA 95 (T) 101E-G, the court made this subject to the plaintiffs' compliance with the provisions of the Environment Conservation Act 73 of 1989 and the National Environmental Management Act 107 of 1998 relating to the construction of the road. The question of the reasonable compensation payable by the trust to the defendants (Aventura) was to be determined at a later date (534).

4 *Decision by the supreme court of appeal*

The supreme court of appeal per Nugent JA relied on *Van Rensburg v Coetzee* and authorities collected in that judgment for its authority to grant a right of way over the property of a non-consenting owner, subject to the payment of appropriate compensation where the necessity exists for the landlocked land to be linked to a public road (499H-500B). It rejected the contention of the appellants (Aventura) that until such time as the trust obtained authorisation from the relevant environmental authorities to put the landlocked property to the use for which it was zoned, and to construct a road along the proposed access route, the "necessity" for the right of way has not been established. The court rejected this interpretation of "necessity" and concluded with reference to *Trautman NO v Poole* 1951 3 SA 200 (C) 207D-208A: "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" (500A).

The court reasoned that the fact that restrictions existed before the land may be used for its intended purpose was not relevant to whether a right of way was necessary (500B).

The court then pointed out that the submission made on behalf of Aventura raises questions of practicality rather than of legal principle. Without first establishing a right of access the trust could hardly be expected to approach the relevant environmental authorities. The court therefore agreed with the court *a quo* that this practical conundrum could be overcome by making the grant of the right of way conditional upon the appropriate authorisation being obtained. The court reasoned that while a way of necessity ordinarily comes into being upon an order of court to that effect, it is usually desirable for this to be followed by the registration of a servitude to give notice to third parties. In the circumstances of the present case the court reasoned that it would be convenient for the right of way to come into effect only when a servitude is registered (500E).

Consequently the court considered it too early to define the route of the way of necessity precisely and to prepare a servitudinal diagram to reflect this. Bearing in mind that the trust was entitled to reasonable access and that the recreational activities of Aventura should not be unreasonably disturbed, the parties should leave this to later agreement. Furthermore, the dominant land is only entitled to its right of way upon payment of appropriate compensation, the amount of which still had to be determined. The court therefore held that this matter must also be provided for in the order (500G).

Consequently, the supreme court of appeal set aside the orders of the court *a quo* and ordered the following (500H-501D):

> "1 Subject to the owner … [of the dominant land]
>
> (a) obtaining all necessary permissions and authorisations to develop the dominant tenement in accordance with its permitted use as provided for in the applicable town planning regulations, and to construct an access road to the dominant tenement … [over the Aventura property as servient land; and]
>
> (b) paying the owner of the servient tenement such compensation for the grant of the right of way as may be agreed upon by the owners of the two properties, or otherwise established by a court, the owner of the servient tenement is ordered to take all reasonable steps to register a servitude of right of way over the servient tenement in favour of the dominant tenement, at the cost of the owner of the dominant tenement, substantially in accordance with the terms set out in para 2 below.
>
> 2 (a) The servitude is to follow a route to be agreed upon by the owners of the two properties or, in the absence of agreement, to be determined by a court, which route is to provide reasonably direct and convenient access from the national road to the dominant tenement via … [the Catwalk property].
>
> (b) The right of way may be used only to obtain access to the dominant tenement for its use of the purposes that are permitted by the applicable town planning regulations at the time of this order."

5 *Evaluation*

It is submitted that Zondi AJ could have reached his decision in a much more direct way. If land is landlocked, as in the present case, it must be granted a way of necessity. Once this is established, the maxim *ter naaster lage en minster schaden* applies. The first part of the maxim instructs the judge to determine which neighbouring property affords the nearest exit to a public road. This is where the judge has to choose between the roads proposed by the trust and the defendants. On the facts of the case it was clear that the nearest exit to the public road was over the defendants' land. The fact that the land nearest to the dominant land was steep and impassable does not make a difference at this stage.

The land chosen as servient land can only avoid the burden if it is proved to be impassable in its entirety – for example, where it is a fully built-up urban plot or if the granting of the way of necessity would prove to be (extremely) detrimental to the interests of the owner of the servient land. If that were the case, one would have to turn to other neighbouring properties to find an alternative exit to the same or another public road. Once the nearest exit road is established, the second part of the maxim kicks in and instructs the judge to choose a route (which need not be the shortest route to the public road) that would be the least damaging to the interests of the owner of the would-be servient land.

The choice of the nearest exit to the public road is an objective choice and does not depend on a balancing of the interests of the owners of the dominant and servient land. The interests of the owner of the landlocked land are always paramount: he must be granted an exit to a public road. If one accepts that the institution of a way of necessity is based on the principle that in the public interest every plot of land should be capable of being exploited to its full potential, the balancing of interests should rather take place between the properties adjoining the landlocked land that could provide an exit to a public road. If the land with the nearest exit to the public road falls under one of the exceptions to the maxim mentioned in the *Van Rensburg* case, the adjoining land which is the second nearest to the public road should carry the burden. This might be the principle on which the judge in the *Van Rensburg* case framed his two exceptions to the maxim.

In the present case the Aventura property was the property which was situated between the landlocked property and the nearest public road. The fact that a direct

link could not be established because of extremely difficult terrain (529-530), and that therefore the link with the Rondeklip property *via* the servitude road was almost as long as the link provided by the alternative route suggested by the defendants (appellants), should not play a role in deciding the first part of the maxim. This factor only becomes important when the second leg of the maxim is considered, namely that the route chosen must be the least burdensome to the servient land. This is what in fact happened in the present case. Since it was impracticable to construct an exit over the steep and highly sensitive terrain on the defendants' land that would have afforded the shortest exit to the Humansdorp road, the court suggested that the exit proposed by the plaintiffs would cause the least damage to the defendants. This means that the way of necessity not only encompasses the 30-metre strip on the defendants' land which had to be graded but also the registered servitude road over the Catwalk property, as well as the private road over the defendants' property leading to the Humansdorp road. In such a case it does not seem to matter whether this access road traverses more than one servient land.

It is interesting to note that the judge took into account that the plaintiffs wanted the way of necessity to link up with the southeastern part of the property, which was the most suitable location for building a holiday house. One of the reasons for rejecting the alternative roads over the Catwalk property proposed by the defendants was that these roads would provide access to the northwestern part of the property which was not suitable for the proposed exploitation of the land as a place where the trustees and their families could spend a private holiday. Another reason was based on the first exception mentioned in the *Van Rensburg* case, namely that the alternative routes proposed by the defendant would have to cross a ravine to reach the landlocked property (525) and that construction would be over steep and extremely difficult or impassable terrain. In view of the proposed exploitation of the dominant land, the judge in my opinion was correct in linking the way of necessity to the most suitable location on the property. A connection of the northwestern part of the landlocked land with a way of necessity to the public road would not have led to a full exploitation of the land in accordance with the purpose of the land. But the remarks on the difficulties of construction involved if the route proposed by the defendants were chosen are only pertinent where the Catwalk property was found to be *ter naaster lage*, namely to offer the nearest exit to a public road.

A related question is whether a way of necessity is competent to promote agricultural purposes but not the type of exploitation envisaged by the plaintiffs. In principle the use to which the enclosed land is put is immaterial. What is material is whether a situation of necessity exists, namely whether the dominant land is landlocked with no exit to a public road.

Grotius in his *Inleidinge* 2 35 7 states clearly: "Noodweg is een weg alleen te gebruicken tot den oogst (harvest), tot een lijk (corpse, grave) *ofte andere noodzakelickheid*" (my emphasis). This is echoed by Van der Keessel *Praelectiones* on Grotius 2 35 7 and 8 (Afrikaans translation by Van Warmelo and others): "[N]et so is dieselfde reg in 'n verskeidenheid keure by ons in verband *met enige ander noodgeval* (*de alia quacumque necessitate*) bepaal."

This principle has been codified in article 682 of the French Civil Code, the official English translation of which reads as follows:

> "An owner whose tenement is enclaved and who has no way out to the public highway or only one which is insufficient for an agricultural, industrial or commercial exploitation of the property, or for carrying out operations of building or development, is entitled to claim over his neighbours' tene-

ments a way sufficient for the complete servicing of his own tenement, provided he pays compensation in proportion to the damage he may cause."

See also *SA Yster en Staal Industriële Korporasie Bpk v Van der Merwe* 1984 3 SA 706 (A), where the way of necessity was needed with a view to preliminary planning and exploitation of an iron-ore deposit on the enclosed farm.

It is therefore submitted that the purpose for which the dominant tenement is used is irrelevant and that a purely residential use of the dominant land would also qualify for the granting of a way of necessity if it has no exit to a public road. Put differently, a way of necessity is a legal servitude or an *ex lege* limitation on the servient land in order to allow the exploitation of landlocked land to its fullest potential. This means that it automatically binds the servient land and that it must be granted if the requirements are met irrespective of the uses to which the dominant land are put. The use of the dominant land or the purpose for which it is exploited thus does not play a role in the *establishment* of a way of necessity. It does, however, have an effect on the *scope and content* of the way of necessity once granted. Once granted, the owner of the dominant land must use the exit from his or her enclaved land in a manner commensurate to the use his or her land is put or the purpose for which his or her land is exploited. If he or she exceeds this limit, he or she can be interdicted to reduce the use to acceptable levels.

This links up with the question whether a way of necessity should be treated as an ordinary praedial servitude of way, as has apparently been done by both the judge *a quo* and the judges of the supreme court of appeal (Cape HC report 4, 5, 7, 9, 16-18 and 33 and the SCA report par 3, 8, 9, 10 and 12). In my opinion the legal nature of a way of necessity differs considerably from that of a praedial servitude of way. A way of necessity is classified as a "legal servitude" that exists automatically over the servient land which offers the nearest exit to the public road; a praedial servitude is one of the recognised real rights which can be established over neighbouring land by agreement and registration or by prescription. A way of necessity automatically limits the content of the ownership of the servient land for the purpose of allowing the landlocked land (against payment of compensation) to be exploited to its full potential. A way of necessity therefore does not need be registered. The court order would render it enforceable. Since it is not an ordinary servitude, the rule that a praedial servitude must be exercised *civiliter modo* does not apply to a future selection by the plaintiff of the route the way of necessity should take or the manner in which the way of necessity should be used. The fact that a way of necessity must be exercised in accordance with the purpose for which the dominant land is used does, however, boil down to the use of the way in a civilised manner. This would limit the use thereof in the present case to ordinary vehicular use by the family and friends of the trustees (and not mere visitors to the Catwalk property). The compensation to be paid for the way does not depend upon an agreement being reached between the parties, but on the court deciding a fair price. The view of the court that a way of necessity should be registered in order to provide publicity to outsiders and certainty to the owner of the dominant land finds support in our case law but is in conflict with the basic nature of a way of necessity which arises automatically and terminates also automatically as soon as the necessity for an exit disappears. In my opinion, a way of necessity can only be replaced by an ordinary servitude of way if the parties agree on the compensation to be paid and the servitude is subsequently registered.

In the present case the dominant land is going to be used only during certain periods of the year, namely during holidays. This raises the question whether it was necessary to grant a full way of necessity (*via plenum*) to the owner of the dominant

land. Would it not have been sufficient if the owner's entitlement was restricted to a *via necessitatis precario*? This kind of way of necessity entitles the owner to use the exit only in emergency situations – for instance, during harvests and floods. In my opinion this principle could be extended to circumstances when the landlocked property is not utilised on a regular basis but only during certain times of the year. This would also decrease the burden on the servient land and the environmental impact of the use of the road.

The final question to be looked at is whether landlocked land should ever be allowed to become sterile. In the present case the court has decided in principle that the land because of its landlocked status should be entitled to an exit to the nearest public road and over a route that causes the least damage to the owner of the servient land. This entitlement was, however, granted on the condition that the environmental bodies concerned grant the necessary consent for a road to be constructed over ecologically sensitive terrain on the servient land. To my mind this is putting the cart before the horse. The question about access to and exit from the dominant land should have been dealt with at the stage when the land which now constitutes the dominant land was partitioned off (Cape HC report 3 mentions that it was partitioned off in 1959) or zoned no longer as agricultural land. The difficulty here is that it seems that subdivision and zoning had been completed before the applicable environmental legislation was promulgated and that the trust is now burdened with an additional hurdle, namely to obtain the consent of environmental authorities for the building of an exit road. From the judgment it is clear that the route suggested by the plaintiffs would not only cause the least damage to the owners of the servient land but would also be, from an ecological point of view, the most appropriate route. Ultimately, it is unthinkable that the environmental authorities could refuse to grant some kind of ecologically sensitive exit to the public road. The fact that the trust were allowed to register ownership of the land renders them worthy of constitutional protection by virtue of section 25 of the Constitution of the Republic of South Africa, 1996. This protection would in my opinion enjoin the environmental authorities to grant the dominant land some kind of access to the public road to prevent the dominant land from becoming totally sterile.

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