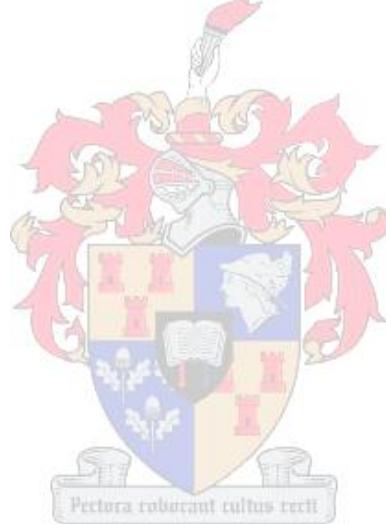


# **The Right of Way of Necessity: A Constitutional Analysis**

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*Thesis presented in fulfilment of the requirements for the degree of Master of Laws  
at Stellenbosch University*

Supervisor: Prof AJ van der Walt

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## **Declaration**

By submitting this dissertation electronically, I declare that the entirety of the work contained therein is my own, original work, that I am the authorship owner thereof (unless to the extent explicitly otherwise stated) and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

Raphulu Tshilidzi Norman

20 August 2013

## Summary

The right of way of necessity is a special type of praedial servitude that is established over neighbouring property in favour of landlocked property – that is, property without access to a public road. The purpose of granting the landlocked property a right of access to a public road is so that it can be put to efficient use. The servitude is created by operation of law and it binds the surrounding properties as of right at the moment when the property becomes landlocked. It can, however, be enforced only against a specific neighbouring property. This servitude can only be enforced by way of a court order, against the will of the owner of the neighbouring property. This servitude, specifically the manner in which it is established, may raise significant constitutional issues as regards the property clause of the South African Constitution. Therefore, it was necessary to investigate the constitutionality of the right of way of necessity in view of section 25 of the Constitution.

To this end, the study provides an overview of the law relating to the right of way of necessity and the general principles regulating this servitude in South African law. Subsequently, the justifications for the right of way of necessity and specifically for allowing the courts to enforce this servitude are analysed in terms of public policy, jurisprudential views and law and economics theory. The conclusion is reached that, in terms of these justifications, there are sufficient policy, social, and economic reasons for having the right of way of necessity and for the courts to enforce it without cooperation and against the will of the affected servient property owner.

These justifications are used to examine the constitutionality of the right of way of necessity, specifically to determine whether the enforcement of this servitude by court order constitutes a section 25(1) arbitrary deprivation or even a section 25(2) expropriation of the affected owner's property rights. The study concludes that the granting of the right of way of necessity will not amount to an expropriation and, following the *FNB* methodology, does not constitute arbitrary deprivation of property either. Therefore, if all the requirements are met, the granting of a right of way of necessity will be constitutionally compliant.

## **Opsomming**

Die saaklike serwituut wat ten gunste van grond wat van openbare verkeersweë afgesny is (blokland) oor naburige eiendom gevestig word, staan bekend as noodweg. Die rede waarom toegang tot 'n openbare pad aan blokland toegeken word, is sodat die grond effektief gebruik kan word. Hierdie serwituut word deur regswerking geskep en dit bind omringende eiendomme vanaf die oomblik dat die blokland van openbare verkeersweë afgesluit word. Dit kan egter slegs teen 'n spesifieke naburige eiendom afgedwing word. Die serwituut kan slegs deur middel van 'n hofbevel afgedwing word, teen die eienaar van die naburige eiendom se wil. Wat die eiendomsklousule van die Suid-Afrikaanse Grondwet betref, kan hierdie serwituut en veral die wyse waarop dit gevesig word belangrike grondwetlike vrae opper. In die lig van artikel 25 van die Grondwet was dit dus nodig om die grondwetlike geldigheid van noodweg te toets.

Om hierdie doel te bereik, verskaf die studie'n oorsig van die regsbeginsels aangaande noodweg en die algemene beginsels van hierdie serwituut in die Suid-Afrikaanse reg. Met verwysing na openbare beleid, regsfilosofiese benaderings en *Law and Economics*-teorie analyseer die tesis vervolgens die regverdigingsgronde vir noodweg, spesifiek vir die feit dat die Howe dit afdwing. Die gevolgtrekking is dat daar ingevolge hierdie regverdigingsgronde genoegsame beleids-, sosiale en ekonomiese redes bestaan vir die serwituut van noodweg en vir die Howe se bevoegdheid om dit sonder die dienende eienaar se medewerking en teen sy wil af te dwing.

Hierdie regverdigingsgronde word gebruik om die grondwetlike geldigheid van noodweg te ondersoek, spesifiek om vas te stel of die afdwining daarvan neerkom op 'n arbitrêre ontneming vir doeleinades van artikel 25(1) of op 'n onteiening vir doeleinades van artikel 25(2) van die Grondwet. Hierdie studie kom tot die slotsom dat die toestaan van 'n noodweg nie as 'n onteiening kwalifiseer nie en dat dit, indien die FNB-metodologie nagevolg word, ook nie op 'n arbitrêre ontneming van eiendom neerkom nie. Indien al die vereistes nagekom word, sal die toestaan van 'n noodweg dus aan die Grondwet voldoen.

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To my young sister, Cecilia Raphulu, as Dr Martin Luther King Jnr. said:  
“Intelligence plus character - that is the goal of true education.”

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# Chapter 1: Introduction

## 1.1 Introduction

A situation may occur where an owner (dominant owner) of a piece of land (dominant tenement) finds himself in a landlocked or geographically enclosed location that denies him access to the public transport system such as public roads and railroads. In these circumstances, the first option for the dominant owner is to seek assistance from the neighbouring land to negotiate for a connection to such public transport facilities. This situation is exacerbated when the neighbouring owner (servient owner) refuses to give access over his land (servient tenement) or when it is for some reason impossible to negotiate for such a right. When a particular dominant tenement does not have access to a public road and the dominant owner is unable through negotiation to acquire such access over the servient tenement, it is said that his property is landlocked. Land may become landlocked through various factors, for example natural causes and human action.

Landlocking problems may arise from subdivision and subsequent alienation of part of a tract of land with the consequence that either the land conveyed or retained loses access to a public road. This is usually caused by an omission or oversight to reserve a right of way for the landlocked piece of land by the parties to the subdivision, or when the owner of the subdivided piece of land does not immediately require the right of way due to other access arrangements over adjoining properties.<sup>1</sup>

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<sup>1</sup> AJ Bradbrook "Access to landlocked land: A comparative study of legal solutions" (1983) 10 *Sydney Law Review* 39-60 39.

In *Wilhelm v Norton*,<sup>2</sup> an omission to provide a right of way upon the subdivision of properties left the plaintiff landlocked. In that case, the defendant subdivided his farm into two portions and sold one of the portions to his son, who in turn mortgaged it as security to the plaintiff.<sup>3</sup> The portion sold to the son was landlocked in a way that denied the owner immediate access to a public road.<sup>4</sup> No servitude of way was registered in favour of the subdivided property. The son continued to use the road that his father had used before him, gaining access to the public road over his father's property, without the benefit of a registered right to do so. The son was later declared insolvent and his property was bought by the plaintiff at a public auction. The plaintiff's property became landlocked when the defendant denied the plaintiff a right of access over the defendant's land due to lack of a servitude agreement between them.<sup>5</sup>

Voluntary action or negligence on the part of the dominant owner can also cause landlocking, for example where the dominant owner neglects a road that connects him to a public road, allowing it to reach such a state of disrepair that it becomes unusable. This is what happened in *Rudolph v Casojee*.<sup>6</sup> In that case the plaintiff and his predecessors in title abandoned a road that had been used for more

<sup>2</sup> 1935 EDL 143. On the issue of subdivision, see *Lewis v S D Turner Properties (Pty) Ltd and Others* 1993 (3) SA 738 (W) 740D: "It is common cause that at all material times prior to 23 August 1944, the lot from which the respondents' properties were created by subdivision in later years was landlocked in the sense that it was not abutting on any public road." See further CG van der Merwe "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1365.

<sup>3</sup> *Wilhelm v Norton* 1935 EDL 143 148.

<sup>4</sup> *Wilhelm v Norton* 1935 EDL 143 147.

<sup>5</sup> *Wilhelm v Norton* 1935 EDL 143 148.

<sup>6</sup> 1945 EDL 190. See also AJ Bradbrook "Access to landlocked land: A comparative study of legal solutions" (1983) 10 *Sydney Law Review* 39-60 39.

than thirty four years to gain access to a public road,<sup>7</sup> and started using a road over the defendant's land.<sup>8</sup> The abandoned road reached such a state of disrepair that it became practically useless, unless it was repaired at substantial cost.<sup>9</sup> The plaintiff was left without access to the public road when the defendant eventually refused him access over his land.<sup>10</sup> Another example is where the dominant owner wilfully procures the closing of a public road or abandons an existing servitude of way, consequently denying himself access to the public road. A similar situation occurred in *Riddin v Quinn*.<sup>11</sup> In that case, the joint owners of a farm subdivided the farm and agreed to close all existing private roads.<sup>12</sup> Consequently, one of the subdivisions was left without direct access to the main road. The defendant subsequently bought the subdivision, only to find that it has no access to the public road. A similar example is found in *Bekker v Van Wyk*.<sup>13</sup> There, the appellant (dominant owner) and his brother jointly procured the closing of a public road which ran over their farms, in terms of legislation. Special arrangements were made between the appellant and his brother in law, allowing the appellant access over his brother in law's property, without a registered right of way being constituted.<sup>14</sup> However, this arrangement came to an end when the appellant's brother in law sold his property to the

<sup>7</sup> *Rudolph v Casojee* 1945 EDL 190 194.

<sup>8</sup> *Rudolph v Casojee* 1945 EDL 190 200.

<sup>9</sup> *Rudolph v Casojee* 1945 EDL 190 203.

<sup>10</sup> *Rudolph v Casojee* 1945 EDL 190 201.

<sup>11</sup> (1909) 23 EDC 373.

<sup>12</sup> *Riddin v Quinn* (1909) 23 EDC 373 375-376.

<sup>13</sup> 1956 (3) SA 13 (T). See also CG van der Merwe "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1365.

<sup>14</sup> *Bekker v Van Wyk* 1956 (3) SA 13 (T) 14. See also JE Scholtens "Law of property (including mortgage and pledge); unjust enrichment" 1956 *Annual Survey of South African Law* 125-153 143.

respondents, who subsequent to the purchase closed the appellant's road by means of a fence, thereby denying him access to the public road.<sup>15</sup>

Landlocking can also be caused by natural disasters, for instance where flooding destroys the road that connects the affected land to the public road.<sup>16</sup> Finally, a change in land use can also result in landlocking, for instance when the initial access road is no longer suitable for the new land use, which is what happened in *Naudé v Ecoman Investment*.<sup>17</sup> In that case the change in land use, from agricultural to public resort, left the initial access road redundant due to the heavy traffic the road had to endure for the new use of the dominant land.

Landlocking has the effect of depriving the landowner of the right to interact with the world at large.<sup>18</sup> It actually limits his freedom of movement. The owner is also barred from the effective exploitation of his land. He is unable to utilize his land for the purpose it had been acquired for or is being used for. Consequently, this could render the land useless, depreciating in value and causing the dominant owner to suffer economic loss. Furthermore, landlocking also causes loss for the public at large, who might have benefited from efficient use of the land in the form of job creation or production of food and other valuable produce.

South African property law, more notably servitude law, provides a solution for the abovementioned problem. It provides legal relief in the form of the possibility to acquire a servitude, in the form of a right of way over the neighbouring land, by

<sup>15</sup> *Bekker v Van Wyk* 1956 (3) SA 13 (T) 14.

<sup>16</sup> *Trautman NO v Poole* 1951 (3) SA 200 (C) 202. See also CG van der Merwe "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1365.

<sup>17</sup> 1994 (2) SA 95 (T).

<sup>18</sup> AFS Maasdorp *The institutes of Cape law: The law of things* (4<sup>th</sup> ed 1923) 200.

operation of law, in other words without the cooperation of the servient owner and even against his will. This servitude is known as the right of way of necessity, also referred to as *noodweg*.<sup>19</sup> A right of way of necessity accrues to a landowner, as of right, immediately when his land becomes landlocked, leaving him without access or reasonably sufficient access to a public road. It binds all the surrounding properties, but only one of these properties is directly affected by this servitude once it is established. In the absence of agreement between landowners to create a servitude that would give the affected land access to the public transport systems, the courts have the power to impose this servitude over a specified servient tenement and to identify the route that the servitude must follow. It can either be a permanent right of way or a temporary right of way, depending on the nature of the landlocking and the requirements of the affected landowner. A temporary right of way of necessity is usually limited to access in emergency situations. However, this study is limited to a permanent right of way of necessity.

## 1.2 Research question and hypothesis

The common law pertaining to the right of way of necessity gives courts the authority to enforce a servitude of right of way over the identified servient tenement against the will of the servient owner. This method of creating a servitude could obviously raise constitutional issues, specifically with reference to section 25 of the Constitution Republic South Africa 1996 ("the Constitution"), since the servitude is not created as usual by negotiation and agreement between the landowners involved, but instead by operation of law and court order, without the cooperation of the servient landowner and even against his will. Section 25 of the Constitution plays

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<sup>19</sup> M Nathan *The common law of South Africa* vol 1 (1904) 471.

a role to the extent that the imposition of a servitude of right of way by operation of law affects the servient owner's property rights to the extent that it brings about a forced transfer of rights. Section 25(1) provides that "[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property". When the courts by way of court order enforce a right of way of necessity against the servient tenement, they place restrictions on some of the servient owner's property rights. The effect of the creation of a right of way of necessity by way of court order can be described as a deprivation of the servient landowner's property. Unless there are sufficient reasons justifying this infringement of the servient owner's property rights, the infringement could constitute an arbitrary deprivation or even an expropriation of the concerned property rights. These effects of the creation of a servitude of right of way have to be analysed and explained in terms of section 25.

Taking into account the manner in which a servitude of way of necessity is created, the main question for purposes of this study is whether the creation and enforcement of this servitude by the courts amount to a deprivation of the servient owner's property rights, or even an expropriation of such rights, and whether such a deprivation or expropriation complies with the requirements in section 25 of the Constitution. The assumption on which the study is developed is that the creation of this servitude by operation of law may cause a deprivation of the servient owner's property rights and that such deprivation has to be justified in terms of section 25(1) of the Constitution. Furthermore, it is also assumed that the creation of this servitude could even constitute an expropriation of the servient owner's property rights and that such an expropriation has to be justified in terms of section 25(2) and 25(3) of the Constitution.

As a first step to determining the constitutional validity of the judicial creation of the right of way of necessity, this study sets out the background of the law pertaining to this servitude. This involves a brief overview of the law regarding the South African right of way of necessity and an analysis of the general principles regulating this servitude, particularly as they have been developed in case law. Regarding the general principles, this study discusses the place of the right of way of necessity in servitude law, the creation of the right of way of necessity, the requirements for the creation of the right of way of necessity, the conditions for the creation of the right of way of necessity, the real nature of this servitude, and finally its termination.

This study also analyses the rationale for the right of way of necessity and specifically the rationale for allowing courts to enforce this servitude. Three justifications concerning the right of way of necessity are discussed, namely public policy, jurisprudential views, and law and economics theory.

Finally, this study subjects the common law right of way of necessity to constitutional scrutiny. In this regard this study uses the methodology set out in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* (“FNB decision”)<sup>20</sup> for resolving constitutional property disputes. In terms of this methodology, the first question that has to be asked is whether the creation of a servitude of right of way of necessity by way of court order constitutes arbitrary deprivation of property. This entails asking the following questions: Firstly, does the granting of the right of the right of way of necessity affect property as recognised in terms of section 25(1)? This involves defining what property is for purposes of section 25. Secondly, does the effect of the creation of this servitude on the said

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<sup>20</sup> 2002 (4) SA 768 (CC).

property rights constitute deprivation as understood by section 25(1)? This entails defining the concept of deprivation. Thirdly, if it is established that the rights in question constitute property for purposes of section 25, and that the granting of the right of way of necessity constitutes deprivation, the question is whether the deprivation is in line with section 25(1).

For a deprivation to be in line with section 25(1), such deprivation must first of all be authorised by law of general application. Secondly, such law may not allow arbitrary deprivation. Hence it must first be established whether the common law regulating the right of way of necessity constitutes law of general application. If it does, the second question is whether such law allows arbitrary deprivation. In terms of the *FNB* decision, a deprivation is “arbitrary” in terms of section 25(1) when the law complained of “does not provide sufficient reason for the particular deprivation in question [substantive arbitrariness] or is procedurally unfair [procedural arbitrariness].”<sup>21</sup> Regarding procedural arbitrariness, this study raises the question whether a deprivation caused by court order can ever be procedurally unfair. As for substantive arbitrariness, the central question of the study is whether there is sufficient reason to justify the imposition of a servitude of right of way of necessity by court order. According to the *FNB* methodology, a complexity of relationships must be analysed in answering this question. The most important question in this regard is whether the justifications that have been identified for allowing the courts to establish a servitude of right of way by operation of law are sufficient to prevent the deprivation from being arbitrary.

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<sup>21</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

The final question in terms of the *FNB* methodology is whether the right of way of necessity amounts to expropriation contrary to section 25(2). Chapter four briefly considers the question whether the common law can authorise an expropriation under South African law and concludes that the common law right of way of necessity constitutes a deprivation but not an expropriation of property, since in South African law there is no authority for expropriation in the absence of legislative authority.

### **1 3 Chapter outline and methodology**

This study consists of five chapters, including the current introductory chapter. Chapter two sets out a brief overview of the law concerning the right of way of necessity as it has been developed in South African case law. Following the overview, the chapter discusses the general principles regulating the right of way of necessity, focusing specifically on the principles regarding the creation of this servitude, the requirements for the creation of the right of way of necessity, the conditions for the creation of the right of way of necessity, the principles regarding the registration of limited real rights in land, and the principles concerning termination of the right of way of necessity. To achieve the purpose of this chapter, Chapter two mainly relies on analysis of case law and academic literature.

Chapter three investigates and analyses the justifications for the right of way of necessity. This chapter investigates both the justifications for recognising the right of way of necessity in general and the justifications for allowing courts to enforce this servitude against the will of the servient landowner. In this regard, this chapter considers public policy arguments, jurisprudential arguments, and law and

economics theory relied on in the academic literature<sup>22</sup> and case law. Regarding the jurisprudential arguments, this study distinguishes between the individualistic approach and the social approach. It shows the implications of these approaches for the concept of ownership. Furthermore, this study shows the relevance of these approaches for current South African case law.

Chapter four assesses the constitutional validity of the right of way of necessity in relation to section 25 of the Constitution of the Republic of South Africa. The constitutional aspects concern firstly, whether the granting and the enforcement of the right of way of necessity amounts to an arbitrary deprivation of the servient owner's property rights in conflict with section 25(1) of the Constitution; secondly, whether the creation of this servitude could also amount to an expropriation of property rights and, if so, whether the deprivation or expropriation involved is in line with section 25 of the Constitution. The chapter relies on the methodology set out in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* ("FNB decision")<sup>23</sup> for resolving constitutional property disputes. The chapter considers the justifications identified in chapter three to come to a conclusion regarding the possible arbitrariness of the deprivation caused by the imposition of a servitude of right of way of necessity.

The concluding chapter provides an overview of the conclusions drawn from all the substantive chapters, and proposes a final conclusion on the question whether

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<sup>22</sup> Most of the sources cited in this chapter discuss foreign law, specifically the US law regarding the public policy arguments on the right of way of necessity, and also the Dutch law perspective concerning the right of way of necessity. The reason for this is that these sources are insightful on the justifications for the right of way of necessity, whereas there are relatively few South African academic sources that discuss this issue.

<sup>23</sup> 2002 (4) SA 768 (CC).

the right of way of necessity constitutes an arbitrary deprivation or even expropriation of the affected servient landowner's rights.

## Chapter 2: The law relating to the right of way of necessity

### 2 1 Introduction

This chapter aims to provide an overview on the law relating to the right of way of necessity in South African law. The chapter briefly traces the origin of the right of way of necessity and discusses the general principles regulating this servitude, focusing specifically on the principles regarding praedial servitudes (the place of the right of way of necessity in servitude law), principles regarding the establishment (the creation) of the right of way of necessity, the requirements for the creation of the servitude, the conditions precedent to the establishment of the right of way of necessity, the principles regarding the registration of limited real rights in land, and the principles concerning termination of the right of way of necessity. For purposes of this chapter the landlocked land and the neighbouring land are referred to as the dominant tenement and the servient tenement respectively, and their respective owners as the dominant owner and the servient owner. Case law and the academic literature often refer to this servitude as a ““way of necessity” or a “*via ex necessitate*”, however, for purpose of this chapter and the rest of the study it is referred to as a “right of way of necessity”.

### 2 2 The origins of the right of way of necessity

The origins of the right of way of necessity in South African law can be traced back to *Wilhelm v Norton*.<sup>1</sup> This servitude comes from two distinct legal systems and

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<sup>1</sup> 1935 EDL 143. See also CG Hall & EA Kellaway *Servitudes* (3<sup>rd</sup> ed 1973) 76. For a detailed discussion on the right of way of necessity, see CG van der Merwe & GF Lubbe “Noodweg” (1977) 40

constitutes a hybrid of Roman and Germanic law.<sup>2</sup> It originates from Roman law,<sup>3</sup> which acknowledged a right of way to a family grave (*iter ad sepulchrum*).<sup>4</sup> The right to a family grave was granted on account of necessity to a person who had a grave on his land but no approach to that grave.<sup>5</sup> Pomponius is regarded as authority for the principle that whenever land on which graves were built had been sold, access to such graves as well as to the surrounding spaces must be given to the former owners for purposes of funeral processions and the performance of sacrificial rites.<sup>6</sup> Van der Merwe<sup>7</sup> shows that Roman law did not only recognise the right to a family grave, but, earlier Roman law, also recognised the right of way of necessity for the public over private property in cases where the *via publica* became impassable as a result of flooding, and the private right of way of necessity in cases where the dominant tenement would otherwise remain undeveloped.<sup>8</sup> Germanic law, on the

<sup>2</sup> *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 111-125; CG van der Merwe *Sakereg* (2<sup>nd</sup> ed 1989) 484-492. See also *Van Rensburg v Coetzee* 1979 (4) SA 655 (A).

<sup>3</sup> CG van der Merwe “The Louisiana right to forced passage compared with the South African way of necessity” (1999) 73 *Tulane Law Review* 1363-1413 1366, 1367-1368. See also CG van der Merwe *Sakereg* (2<sup>nd</sup> ed 1989) 484.

<sup>4</sup> CG Hall & EA Kellaway *Servitudes* (3<sup>rd</sup> ed 1973) 76; MD Southwood *The compulsory acquisition of rights* (2000) 95; CG van der Merwe “The Louisiana right to forced passage compared with the South African way of necessity” (1999) 73 *Tulane Law Review* 1363-1413 1366. See also CG van der Merwe *Sakereg* (2<sup>nd</sup> ed 1989) 484-485.

<sup>5</sup> MD Southwood *The compulsory acquisition of rights* (2000) 95. See also CG van der Merwe *Sakereg* (2<sup>nd</sup> ed 1989); CG van der Merwe “The Louisiana right to forced passage compared with the South African way of necessity” (1999) 73 *Tulane Law Review* 1363-1413 1366-1367.

<sup>6</sup> *Wilhelm v Norton* 1935 EDL 143 152.

<sup>7</sup> *Wilhelm v Norton* 1935 EDL 143 152.

<sup>8</sup> CG van der Merwe “The Louisiana right to forced passage compared with the South African way of necessity” (1999) 73 *Tulane Law Review* 1363-1413 1367.

other hand, recognised a road of egress (*uitweg*).<sup>9</sup> Roman-Dutch law adopted the Roman law rule of *iter ad sepulchrum* together with the Germanic rule of *uitweg* and developed them into a general right of way of necessity.<sup>10</sup> It was then extended to all lands which had no way out or did not abut on a high road.<sup>11</sup> These lands became entitled to the right of way of necessity over the servient tenement to enable the dominant owner access to the high road by the shortest route and with the least damage to the servient tenement.<sup>12</sup> The right of way of necessity was received into South African law from Roman-Dutch law where it has since been developed to a modern legal rule, entitling the owner of an inaccessible piece of land to a right of way providing access to a public road over neighbouring land.<sup>13</sup>

In the late eighteenth century the Natal government granted the Roads Board the power to create ways of necessity over land regardless of the servient owner's consent.<sup>14</sup> The power was granted through statutes that were in force at the time and this power was finally replaced by the Road Ordinance 40 of 1978.<sup>15</sup> Apart from

<sup>9</sup> CG van der Merwe "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1367; CG van der Merwe & GF Lubbe "Noodweg" (1977) 40 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 111-125 111; CG van der Merwe *Sakereg* (2<sup>nd</sup> ed 1989) 484.

<sup>10</sup> CG van der Merwe "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1368. See also MD Southwood *The compulsory acquisition of rights* (2000) 95.

<sup>11</sup> *Wilhelm v Norton* 1935 EDL 143 152.

<sup>12</sup> *Wilhelm v Norton* 1935 EDL 143 152.

<sup>13</sup> CG van der Merwe "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1367. See also CG van der Merwe "Servitudes and other real rights" in F du Bois (ed) *Wille's Principles of South African law* (9<sup>th</sup> ed 2007) 591-629 598; CG van der Merwe *Sakereg* (2<sup>nd</sup> ed 1989) 484; WM Gordon & MJ De Waal "Servitudes and real burdens" in R Zimmermann, D Visser & K Reid (eds) *Mixed legal systems in comparative perspective* (2004) 735-757 747; MD Southwood *The compulsory acquisition of rights* (2000) 95.

<sup>14</sup> MD Southwood *The compulsory acquisition of rights* (2000) 96.

<sup>15</sup> MD Southwood *The compulsory acquisition of rights* (2000) 96-97.

these statutory developments, case law has since played an important role in the development of the law relating to the right of way of necessity.<sup>16</sup>

## **2 3 General principles relating to the right of way of necessity**

### **2 3 1 The place of the right of way of necessity in servitude law**

The right of way of necessity forms part of servitude law. Servitudes are divided into two categories, namely personal and praedial servitudes.<sup>17</sup> Personal servitudes are limited real rights in the movable or immovable property of another, which grant entitlements of use and enjoyment over the servient tenement to the servitude holders in their personal capacity and not in their capacity as owners of dominant tenements.<sup>18</sup> Furthermore, personal servitudes cannot exist beyond the life time of

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<sup>16</sup> The 1979 decision of *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) is a good example of this development. The case covered almost all the important aspects of the right of way of necessity. See in general the following textbooks where the decision is referred to and discussed: CG van der Merwe *Sakereg* (2<sup>nd</sup> ed 1989) 485-491; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 328-330; H Mostert, A Pope, PJ Badenhorst, W Freedman, JM Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 247; MD Southwood *The compulsory acquisition of rights* (2000) 99.

<sup>17</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 321; CG van der Merwe *Sakereg* (2<sup>nd</sup> ed 1989) 459; CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 (2<sup>nd</sup> ed 2010) para 541; CG van der Merwe "Servitudes and other real rights" in F du Bois (ed) *Wille's Principles of South African law* (9<sup>th</sup> ed 2007) 591-629 592; H Mostert, A Pope, PJ Badenhorst, W Freedman, JM Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 237.

<sup>18</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 338; CG van der Merwe *Sakereg* (2<sup>nd</sup> ed 1989) 506; H Mostert, A Pope, PJ Badenhorst, W Freedman, JM Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 237; CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 (2<sup>nd</sup> ed 2010) para 579; CG van der Merwe "Servitudes and other real rights" in F du Bois (ed) *Wille's Principles of South African law* (9<sup>th</sup> ed 2007) 591-629 604.

the servitude holders.<sup>19</sup> Praedial servitudes, by contrast, are defined as limited real rights in the land of someone else, which grant the holders of the servitudes certain entitlements of use and enjoyment over the servient tenement in their capacity as owners of the dominant tenements.<sup>20</sup> In other words, the dominant owner does not merely benefit in his personal capacity but as the owner of the dominant tenement.<sup>21</sup>

The right of way of necessity forms part of praedial servitudes, also referred to as “land-servitudes”<sup>22</sup> or “real servitudes”.<sup>23</sup> Praedial servitudes are further divided into either rural or urban servitudes.<sup>24</sup> Rural and urban servitudes are distinguished

<sup>19</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 322; CG van der Merwe *Sakereg* (2<sup>nd</sup> ed 1989) 460; CG van der Merwe & MJ de Waal “Servitudes” in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 (2<sup>nd</sup> ed 2010) para 579; CG van der Merwe “Servitudes and other real rights” in F du Bois (ed) *Wille's Principles of South African law* (9<sup>th</sup> ed 2007) 591-629 592; H Mostert, A Pope, PJ Badenhorst, W Freedman, JM Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 239. See also *Lorentz v Melle and Others* 1978 (3) SA 1044 (T) 1049D: “[a personal servitude,] [n]ormally ... terminates (at the latest) on the death of the beneficiary (in the case of a natural person).”

<sup>20</sup> CG van der Merwe & MJ de Waal “Servitudes” in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 (2<sup>nd</sup> ed 2010) para 545; CG van der Merwe “Servitudes and other real rights” in F du Bois (ed) *Wille's Principles of South African law* (9<sup>th</sup> ed 2007) 591-629 593; CG van der Merwe *Sakereg* (2<sup>nd</sup> ed 1989) 467; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 322; H Mostert, A Pope, PJ Badenhorst, W Freedman, JM Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 237.

<sup>21</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 322; CG van der Merwe *Sakereg* (2<sup>nd</sup> ed 1989) 459; H Mostert, A Pope, PJ Badenhorst, W Freedman, JM Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 240.

<sup>22</sup> U Huber *Heedendaagse rechtsgeleertheyt* (translated by P Gane *The jurisprudence of my time* vol 1 1939) 323. Huber distinguishes between servitudes over land (rural servitudes) and servitudes over a house (urban servitudes). According to him, rural servitudes consist of servitudes of footpath, driving cattle, driving vehicles, leading water, discharging water, drawing water, watering cattle or grazing them, burning lime, digging sand, gathering and storing fruits, cutting or gathering stone and piling it up, chopping wood, planting huts, boating and fishing on another man's land.

<sup>23</sup> M Nathan *The common law of South Africa* vol 1 (1904) 445.

<sup>24</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 326; CG van der Merwe & MJ de Waal “Servitudes” in WA Joubert & JA Faris (eds) *The law of*

from each other by the use which they serve on the land and not on the locality of the land.<sup>25</sup> Urban servitudes relate to land situated in town or country, with buildings primarily used for habitation, commercial, industrial or other related purposes.<sup>26</sup> Rural servitudes, on the contrary, concern those tenements situated in town or country and used for agricultural or pastoral purposes.<sup>27</sup> Rural servitudes are mainly confined to rights of way, servitudes of water and grazing or pasturage servitudes.<sup>28</sup> Although a right of way of necessity falls under rights of way, which generally belongs to rural servitudes, a right of way of way of necessity may still fall under urban servitudes. The reason for this argument is that the purpose for which the

*South Africa* vol 24 (2<sup>nd</sup> ed 2010) para 554; CG van der Merwe *Sakereg* (2<sup>nd</sup> ed 1989) 479; CG van der Merwe "Servitudes and other real rights" in F du Bois (ed) *Wille's Principles of South African law* (9<sup>th</sup> ed 2007) 591-629 597; AFS Maasdorp *The institutes of Cape law: The law of things* (4<sup>th</sup> ed 1923) 186-187; DP de Bruyn *The opinions of Grotius as contained in the Hollandsche consultatien en advisen* (1894) 423; M Nathan *The common law of South Africa* vol 1 (1904) 445-457; H Mostert, A Pope, PJ Badenhorst, W Freedman, JM Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 246.

<sup>25</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 326; M Nathan *The common law of South Africa* vol 1 (1904) 446; AFS Maasdorp *The institutes of Cape law: The law of things* (4<sup>th</sup> ed 1923) 186.

<sup>26</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 326; CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 (2<sup>nd</sup> ed 2010) para 554; CG van der Merwe *Sakereg* (2<sup>nd</sup> ed 1989) 479; AFS Maasdorp *The institutes of Cape law: The law of things* (4<sup>th</sup> ed 1923) 186; M Nathan *The common law of South Africa* vol 1 (1904) 445.

<sup>27</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 326; CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 (2<sup>nd</sup> ed 2010) para 554; CG van der Merwe *Sakereg* (2<sup>nd</sup> ed 1989) 479; M Nathan *The common law of South Africa* vol 1 (1904) 445-446; AFS Maasdorp *The institutes of Cape law: The law of things* (4<sup>th</sup> ed 1923) 186.

<sup>28</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 326-327; CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 (2<sup>nd</sup> ed 2010) para 557; CG van der Merwe *Sakereg* (2<sup>nd</sup> ed 1989) 479; DP de Bruyn *The opinions of Grotius as contained in the Hollandsche consultatien en advisen* (1894) 423.

landlocked dominant tenement is used for is irrelevant; the land can be used for agricultural, habitation purposes.<sup>29</sup> Therefore, depending on the use which the dominant tenement is subjected to, a right of way of necessity can either be a rural or urban servitude. Like all other praedial servitudes, the right of way of necessity must comply with certain requirements necessary for the establishment of valid praedial servitudes. What follows is a discussion of the most important requirements necessary for the establishment of valid praedial servitudes.

The right of way of necessity as a praedial servitude must be established in respect of two pieces of land, namely, the dominant tenement and the servient tenement.<sup>30</sup> Both tenements must be owned by different persons, which is in accordance with the principle “*nemini res sua servit*”<sup>31</sup> prohibiting an owner from having a servitude over his own land.<sup>32</sup> Praedial servitudes only exist in respect of

<sup>29</sup> CG van der Merwe & MJ de Waal “Servitudes” in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 (2<sup>nd</sup> ed 2010) para 560.

<sup>30</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* (5<sup>th</sup> ed 2006) 323; CG van der Merwe & MJ de Waal “Servitudes” in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 (2<sup>nd</sup> ed 2010) para 546; CG van der Merwe “Servitudes and other real rights” in F du Bois (ed) *Wille’s principles of South African law* (9<sup>th</sup> ed 2007) 591-629 593; CG van der Merwe *Sakereg* (2<sup>nd</sup> ed 1989) 469; H Mostert, A Pope, PJ Badenhorst, W Freedman, JM Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 239, 240.

<sup>31</sup> This means that nobody can constitute a servitude over his or her own land. See PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* (5<sup>th</sup> ed 2006) 323; H Mostert, A Pope, PJ Badenhorst, W Freedman, JM Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 24; CG van der Merwe “Servitudes and other real rights” in F du Bois (ed) *Wille’s Principles of South African law* (9<sup>th</sup> ed 2007) 591-629 592. This principle was also confirmed in *Lewis v S D Turner Properties (Pty) Ltd and Others* 1993 (3) SA 738 (W) 740F, where the court held that it was not only the issue of “no practical need”, but it was also not legally possible to register a servitude of way in favour of the lot (dominant tenement) against the adjacent properties belonging to one and the same person.

<sup>32</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* (5<sup>th</sup> ed 2006) 323; CG van der Merwe & MJ de Waal “Servitudes” in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 (2<sup>nd</sup> ed 2010) para 546; CG van der Merwe “Servitudes and other real rights” in F

immovable properties and cannot be established in anything else except in land.<sup>33</sup>

The court in *Mienie h/a M and J Scrap Metal v Heidebaai Vakansieprojek (Edms) Bpk*<sup>34</sup> refused to recognize a stranded shipwreck as a tenement for purposes of allowing a right of way over two adjoining properties to the wreck. The dominant and the servient tenement must be neighbouring. This is in accordance to the *vicinitas* principle.<sup>35</sup> In terms of this principle, the dominant and servient tenement must be situated in the vicinity of each other.<sup>36</sup> However, this does not necessarily mean that

du Bois (ed) *Wille's Principles of South African law* (9<sup>th</sup> ed 2007) 591-629 593; CG van der Merwe *Sakereg* (2<sup>nd</sup> ed 1989) 468-469; WM Gordon & MJ de Waal "Servitudes and real burdens" in R Zimmermann, D Visser & K Reid (eds) *Mixed legal systems in comparative perspective* (2004) 735-757 738; AFS Maasdorp *The institutes of Cape law: The law of things* (4<sup>th</sup> ed 1923) 161; H Mostert, A Pope, PJ Badenhorst, W Freedman, JM Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 239, 240. See also *Lewis v S D Turner Properties (Pty) Ltd and Others* 1993 (3) SA 738 (W) 740D.

<sup>33</sup> CG van der Merwe "Servitudes and other real rights" in F du Bois (ed) *Wille's Principles of South African law* (9<sup>th</sup> ed 2007) 591-629 592; H Mostert, A Pope, PJ Badenhorst, W Freedman, JM Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 239. See also *City Deep v Mccalgan* 1924 WLD 276 279.

<sup>34</sup> [1996] 1 All SA 110 (SE) 112: "[T]he Applicant [a scrap metal dealer] had bought the wreck of a stranded ship with the intention of cutting it up into pieces and selling the pieces as scrap metal. The wreck was lodged in the rocks in such a position that the Applicant had to transport the pieces across the farms of the Respondents for part of the way. The Respondents refused to grant permission to the Applicant to do this. The Applicant then applied for an order compelling the Respondents to grant him a right of way across the relevant portions of their farms". The court therefore "rejected the Applicant's argument that the wreck could be seen as a landlocked property to which he had no access through circumstances beyond his control and therefore needed a right of way thereto".

<sup>35</sup> For more on this principle, see JL Neels "Naburigheid as vereiste vir erfdiensbaarhede" (1990) *Tydskrif vir die Suid-Afrikaanse Reg* 254-263; JL Neels "Naburigheid as vereiste vir erfdiensbaarhede" (1990) *Tydskrif vir die Suid-Afrikaanse Reg* 447-464; MJ De Waal "Vicinitas of nabuurskap as vestigingsvereiste vir grondserwitute" (1990) *Tydskrif vir die Suid-Afrikaanse Reg* 186-206. See also CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 (2<sup>nd</sup> ed 2010) para 547; CG van der Merwe *Sakereg* (2<sup>nd</sup> ed 1989) 471.

<sup>36</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 323; CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 (2<sup>nd</sup> ed 2010) para 547; PJ Badenhorst, W Freedman, JM Pienaar & J van Wyk

they must be contiguous or adjoining, but it is required that they be situated so closely together that there is a possibility of the servitude affording some benefit to the dominant tenement.<sup>37</sup> It follows that the right of way of necessity may even be established in circumstances where the dominant tenement and the servient tenement are separated by intervening properties.<sup>38</sup> However, in such a case the intervening properties should first be subjected to some kind of servitude or other right in order to connect the dominant tenement and the servient tenement,<sup>39</sup> which need not necessarily be the same servitude to which the servient tenement is subjected to.<sup>40</sup>

*The principles of the law of property in South Africa* (2010) 240. See also J Scott “The difficult process of applying easy principles: Three recent judgments on *via ex necessitate*” (2008) 41 *De Jure* 164-174 171.

<sup>37</sup> CG van der Merwe & MJ de Waal “Servitudes” in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 (2<sup>nd</sup> ed 2010) para 547; CG van der Merwe “Servitudes and other real rights” in F du Bois (ed) *Wille’s Principles of South African law* (9<sup>th</sup> ed 2007) 591-629 594; AFS Maasdorp *The institutes of Cape law: The law of things* (4<sup>th</sup> ed 1923) 184; H Mostert, A Pope, PJ Badenhorst, W Freedman, JM Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 240; J Scott “The difficult process of applying easy principles: Three recent judgments on *via ex necessitate*” (2008) 41 *De Jure* 164-174 171; U Huber *Heedendaagse rechtsgeleertheyt* (translated by P Gane *The jurisprudence of my time* vol 1 1939) 330: “In country [rural] servitudes the rule [that tenements must be neighbouring or contiguous] is not so strict...”. See also J Scott “The difficult process of applying easy principles: Three recent judgments on *via ex necessitate*” (2008) 41 *De Jure* 164-174 171, who seems to be of the view that the landlocked and the servient tenement does not necessarily have to be close to each other for the right of way of necessity to be established.

<sup>38</sup> AFS Maasdorp *The institutes of Cape law: The law of things* (4<sup>th</sup> ed 1923) 184-185. See also CG van der Merwe & MJ de Waal “Servitudes” in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 (2<sup>nd</sup> ed 2010) para 547; H Mostert, A Pope, PJ Badenhorst, W Freedman, JM Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 240.

<sup>39</sup> AFS Maasdorp *The institutes of Cape law: The law of things* (4<sup>th</sup> ed 1923) 185. See also CG van der Merwe & MJ de Waal “Servitudes” in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 (2<sup>nd</sup> ed 2010) para 547; H Mostert, A Pope, PJ Badenhorst, W Freedman, JM Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 240.

<sup>40</sup> AFS Maasdorp *The institutes of Cape law: The law of things* (4<sup>th</sup> ed 1923) 185; also CG van der Merwe & MJ de Waal “Servitudes” in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 (2<sup>nd</sup>

The purpose of having the dominant and servient tenement close to each other is to enable the servient tenement to afford some benefit to the dominant tenement, which is in accordance with the utility (*utilitas*) requirement.<sup>41</sup> In terms of the utility requirement, a praedial servitude must offer some permanent benefit to the dominant tenement,<sup>42</sup> but not just a mere personal benefit to the dominant owner.<sup>43</sup> This means that a praedial servitude (including a right of way of necessity) must be capable of increasing the agricultural, economic, industrial or professional utility of the dominant tenement.<sup>44</sup> The utility must be capable of being passed from one owner to the next upon transfer of the dominant tenement because praedial

ed 2010) para 547; CG van der Merwe “Servitudes and other real rights” in F du Bois (ed) *Wille’s Principles of South African law* (9<sup>th</sup> ed 2007) 591-629 594: “As long as a further servitude is established over the intervening tenement.”

<sup>41</sup> CG van der Merwe & MJ de Waal “Servitudes” in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 (2<sup>nd</sup> ed 2010) para 547; H Mostert, A Pope, PJ Badenhorst, W Freedman, JM Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 240. See also MJ De Waal “Vicinitas of nabuurskap as vestigingsvereiste vir grondserwitute” (1990) *Tydskrif vir die Suid-Afrikaanse Reg* 186-206 206, who argues that the vicinity requirement is closely related to the utility requirement. On this point, see further CG van der Merwe *Sakereg* (2<sup>nd</sup> ed 1989) 471.

<sup>42</sup> *De Kock v Hänel and Others* 1999 (1) SA 994 (C) 998G. See also CG van der Merwe & MJ de Waal “Servitudes” in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 (2<sup>nd</sup> ed 2010) para 549; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* (5<sup>th</sup> ed 2006) 323.

<sup>43</sup> *De Kock v Hänel and Others* 1999 (1) SA 994 (C) 998G. See also CG van der Merwe & MJ de Waal “Servitudes” in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 (2<sup>nd</sup> ed 2010) para 549; CG van der Merwe *Sakereg* (2<sup>nd</sup> ed 1989) 469-471; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* (5<sup>th</sup> ed 2006) 323; H Mostert, A Pope, PJ Badenhorst, W Freedman, JM Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 241; J Scott “The difficult process of applying easy principles: Three recent judgments on *via ex necessitate*” (2008) 41 *De Jure* 164-174 171 and the cited authorities.

<sup>44</sup> CG van der Merwe & MJ de Waal “Servitudes” in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 (2<sup>nd</sup> ed 2010) para 547; H Mostert, A Pope, PJ Badenhorst, W Freedman, JM Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 241; CG van der Merwe *Sakereg* (2<sup>nd</sup> ed 1989) 469-471.

servitudes attach to the land and not to the owner in his personal capacity.<sup>45</sup> Furthermore, just like a benefit offered by any praedial servitude, the benefit offered by the right of way of necessity must be permanent in nature, which is in accordance to the *perpetua causa* (permanent cause) principle.<sup>46</sup> In terms of this principle, the use made of the servient tenement must be based on some permanent feature or attribute of the servient tenement.<sup>47</sup> Therefore, the servient tenement must always be capable of continuously satisfying the needs of the dominant tenement (landlocked tenement).<sup>48</sup> In sum, the right of way of necessity forms part of servitude law and specifically belongs under praedial servitudes. The above discussed requirements regarding the establishment of praedial servitudes apply in respect of the right of way of necessity.

<sup>45</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 322; CG van der Merwe "Servitudes and other real rights" in F du Bois (ed) *Wille's Principles of South African law* (9<sup>th</sup> ed 2007) 591-629 592; H Mostert, A Pope, PJ Badenhorst, W Freedman, JM Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 239. See J Scott "The difficult process of applying easy principles: Three recent judgments on *via ex necessitate*" (2008) 41 *De Jure* 164-174 172, who analyses the decisions of *Jackson NO and Others v Aventura Ltd and Others* [2005] 2 All SA 518 (C); *Aventura Ltd v Jackson NO and Others* 2007 (5) SA 497 (SCA) and observes that the court did not adhere to the utility principle in the process of granting the right of way of necessity.

<sup>46</sup> J Scott "The difficult process of applying easy principles: Three recent judgments on *via ex necessitate*" (2008) 41 *De Jure* 164-174 171, analysing the decisions of *Jackson NO and Others v Aventura Ltd and Others* [2005] 2 All SA 518 (C); *Aventura Ltd v Jackson NO and Others* 2007 (5) SA 497 (SCA).

<sup>47</sup> CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 (2<sup>nd</sup> ed 2010) para 557; H Mostert, A Pope, PJ Badenhorst, W Freedman, JM Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 241; CG van der Merwe *Sakereg* (2<sup>nd</sup> ed 1989) 469-471.

<sup>48</sup> CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 (2<sup>nd</sup> ed 2010) para 548; CG van der Merwe *Sakereg* (2<sup>nd</sup> ed 1989) 471; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 323 and the cited authorities at fn 18; H Mostert, A Pope, PJ Badenhorst, W Freedman, JM Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 241.

## 2.3.2 Types of right of ways of necessity

Depending on the nature and the extent of necessity, the dominant owner can claim either a permanent right of way (*ius via plenum*) or a temporary right of way (*ius viae precario*).<sup>49</sup> The two differ from one another in that the temporary right of way is claimed in emergency situations only or occasionally when necessity requires,<sup>50</sup> for example in cases of fire, poaching, stock theft or illness of stock<sup>51</sup> or during harvesting season when existing exits are insufficient to accommodate the urgent need of transporting produce to the markets.<sup>52</sup> The temporary right of way gives to the dominant owner a right to a “short cut” across the servient tenement, whenever the existing means of access would not permit him to deal effectively with the

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<sup>49</sup> CG Hall & EA Kellaway *Servitudes* (3<sup>rd</sup> ed 1973) 76; see also JE Scholtens “Law of property (including mortgage and pledge); unjust enrichment” (1956) *Annual Survey of South African Law* 125-153 144. On the distinction between a permanent and temporary right of way of necessity, see in general PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* (5<sup>th</sup> ed 2006) 328-329; CG van der Merwe & GF Lubbe “Noodweg” (1977) 40 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 111-125 114-115; CG van der Merwe & MJ de Waal “Servitudes” in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 (2<sup>nd</sup> ed 2010) para 563; CG van der Merwe *Sakereg* (2<sup>nd</sup> ed 1989) 484-485; CG van der Merwe “The Louisiana right to forced passage compared with the South African way of necessity” (1999) 73 *Tulane Law Review* 1363-1413 1375-1377; CG Hall & EA Kellaway *Servitudes* (3<sup>rd</sup> ed 1973) 76; H Mostert, A Pope, PJ Badenhorst, W Freedman, JM Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 247. See also *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) 671-672.

<sup>50</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* (5<sup>th</sup> ed 2006) 328; CG Hall & EA Kellaway *Servitudes* (3<sup>rd</sup> ed 1973) 76; CG van der Merwe & GF Lubbe “Noodweg” (1977) 40 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 111-125 114; CG van der Merwe *Sakereg* (2<sup>nd</sup> ed 1989) 485; CG van der Merwe & MJ de Waal “Servitudes” in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 (2<sup>nd</sup> ed 2010) para 563; H Mostert, A Pope, PJ Badenhorst, W Freedman, JM Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 247. See also *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) 671-672.

<sup>51</sup> *English v C J M Harmse Investments and Another* 2007 (3) SA 415 (N) 420I-J, 421A.

<sup>52</sup> CG van der Merwe “The Louisiana right to forced passage compared with the South African way of necessity” (1999) 73 *Tulane Law Review* 1363-1413 1375-1376.

emergency in the interest of his farming operations.<sup>53</sup> However, this servitude is very limited in that the owner of the adjoining property is entitled to close up the road, provided he opens it up and allows it to be used when requested in cases of emergency.<sup>54</sup> The precarious right of way is granted without any monetary consideration (compensation).<sup>55</sup> On the contrary, a permanent right of way of necessity is a permanent and regular means of access over the servient tenement and it is granted against payment of reasonable compensation to the servient owner.<sup>56</sup>

However, this distinction may in the near future fall into disuse because the court in *Van Rensburg v Coetze*<sup>57</sup> questioned the distinction between these two

<sup>53</sup> *English v C J M Harmse Investments and Another* 2007 (3) SA 415 (N) 421A.

<sup>54</sup> S van Leeuwen *Het Roomsche Hollandsche recht* (1783 edited and translated by CW Decker & JG Kotzé *Commentaries on Roman-Dutch law* 2<sup>nd</sup> ed 1921) 296 para 8; CG Hall & EA Kellaway *Servitudes* (3<sup>rd</sup> ed 1973) 80. See also *Wilhelm v Norton* 1935 EDL 143 177.

<sup>55</sup> *Wilhelm v Norton* 1935 EDL 143 177-178; *Van Rensburg v Coetze* 1979 (4) SA 655 (A) 671-672. See also CG van der Merwe & GF Lubbe "Noodweg" (1977) 40 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 111-125 114; CG van der Merwe "Law of property (including mortgage and pledge)" 1979 *Annual Survey of South African Law* 217-257 246; CG van der Merwe "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1376; CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 (2<sup>nd</sup> ed 2010) para 563; H Mostert, A Pope, PJ Badenhorst, W Freedman, JM Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 247.

<sup>56</sup> *Wilhelm v Norton* 1935 EDL 143 177-178; *Van Rensburg v Coetze* 1979 (4) SA 655 (A) 671-672. See also CG van der Merwe & GF Lubbe "Noodweg" (1977) 40 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 111-125 114; CG van der Merwe *Sakereg* (2<sup>nd</sup> ed 1989) 491-492; CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 (2<sup>nd</sup> ed 2010) para 563; CG Hall & EA Kellaway *Servitudes* (3<sup>rd</sup> ed 1973) 76; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 328-329; H Mostert, A Pope, PJ Badenhorst, W Freedman, JM Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 247.

<sup>57</sup> 1979 (4) SA 655 (A) 697C. See also PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 329; CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 (2<sup>nd</sup> ed 2010) para 563; H Mostert, A

ways of necessity, in particular challenging the relevance of the temporary right of way of necessity in light of the characteristics of the modern agricultural industry.<sup>58</sup>

For this reason, this chapter and the rest of the study is limited to a permanent right of way of necessity.

### 2.3.3 Constitution of the right way of necessity

It is important to realise that the right of way of necessity differs from all other servitudes in its mode of creation.<sup>59</sup> Unlike other servitudes, the right of way of necessity is created by operation of law<sup>60</sup> as soon as land becomes landlocked. It binds the surrounding properties (as of a right)<sup>61</sup> immediately when the dominant tenement becomes landlocked,<sup>62</sup> but only a specific property, amongst the surrounding properties, can effectively be burdened with this servitude. Therefore, the establishment of a right of way of necessity does not depend on or require the

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Pope, PJ Badenhorst, W Freedman, JM Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 247; CG van der Merwe “Servitudes and other real rights” in F du Bois (ed) *Wille’s principles of South African law* (9<sup>th</sup> ed 2007) 591-629 598.

<sup>58</sup> WM Gordon & MJ de Waal “Servitudes and real burdens” in R Zimmermann, D Visser & K Reid (eds) *Mixed legal systems in comparative perspective* (2004) 735-757 747; CG van der Merwe & MJ de Waal “Servitudes” in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 (2<sup>nd</sup> ed 2010) para 563.

<sup>59</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* (5<sup>th</sup> ed 2006) 328; CG van der Merwe “The Louisiana right to forced passage compared with the South African way of necessity” (1999) 73 *Tulane Law Review* 1363-1413 1373; H Mostert, A Pope, PJ Badenhorst, W Freedman, JM Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 247. See also CG van der Merwe & GF Lubbe “Noodweg” (1977) 40 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 111-125 122.

<sup>60</sup> JE Scholtens “Law of property (including mortgage and pledge)” 1960 *Annual Survey of South African Law* 190-226 209.

<sup>61</sup> *Wilhelm v Norton* 1935 EDL 143.

<sup>62</sup> CG van der Merwe “The Louisiana right to forced passage compared with the South African way of necessity” (1999) 73 *Tulane Law Review* 1363-1413 1373.

consent of the servient owner whose land is effectively burdened by the servitude.<sup>63</sup> The servitude is imposed against his will.<sup>64</sup> In this sense, the servient owner is forced by law to allow the dominant owner to have a right of way over the servient tenement, which gives the dominant owner access to the public road. This servitude can, however, only be effectively assigned to the dominant owner by a court order.<sup>65</sup> In other words, the right of way of necessity may not be exercised without a court order.<sup>66</sup> However, it is argued that the court order does not establish this servitude but only serves to confirm the existence of a right of way of necessity.<sup>67</sup> This confirms the argument that this servitude is created by operation of law immediately when the dominant tenement becomes landlocked. In essence the court order merely serves to provide for the enforcement of the right by allocating and defining a

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<sup>63</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 328; see also H Mostert, A Pope, PJ Badenhorst, W Freedman, JM Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 247. See further CG van der Merwe "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1373. See also CG van der Merwe & GF Lubbe "Noodweg" (1977) 40 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 111-125 122.

<sup>64</sup> CG van der Merwe *Sakereg* (2<sup>nd</sup> ed 1989) 485 distinguishes between an ordinary servitude of way and a permanent right of way of necessity. See also CG van der Merwe "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1373-1374; H Mostert, A Pope, PJ Badenhorst, W Freedman, JM Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 247; CG van der Merwe & GF Lubbe "Noodweg" (1977) 40 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 111-125 114.

<sup>65</sup> *Wilhelm v Norton* 1935 EDL 143; *Van Rhyn NO and Otherrs v Fleurbaix Farm (Pty) Ltd* (A 488/2012) [2013] ZAWCHC 106 (8 August 2013) paras 15-16.

<sup>66</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 334, 328 fn 61. See also the recent judgement of *Van Rhyn NO and Otherrs v Fleurbaix Farm (Pty) Ltd* (A 488/2012) [2013] ZAWCHC 106 (8 August 2013) paras 15-16, where this point was argued and accepted by the court.

<sup>67</sup> CG van der Merwe & JM Pienaar "The law of property (including real security)" 2007 *Annual Survey of South African Law* 961-1038 1030.

particular route upon which the right is to be exercised,<sup>68</sup> without which the right may not be exercised. Therefore, a distinction should be drawn between the establishment of the general right by law and the actual enforcement of the right by courts. The right is established by operation of law, while the way along which the right may be exercised is granted by order of court to give effect to the right. The essence is that the right of way of necessity precedes a court order that declares its existence and exercise. This distinction is influenced by the views of Scholtens<sup>69</sup> and Van der Merwe.<sup>70</sup> According to Scholtens the right of way of necessity is constituted by operation of law and only the route used in exercise of the right is established by the court or by agreement between the parties.<sup>71</sup> For Van der Merwe the right of way of necessity automatically burdens the neighbouring tenements and that an agreement or a court order only serves to give a declaratory effect to the right.<sup>72</sup> Therefore, it can be argued that where the landlocked dominant owner acquires from the servient owner a negotiated right of way, without the interventions of the courts, such a servitude cannot qualify as a right of way of necessity but an ordinary right of way.

The court order declaring the right of way of necessity and determining the way can either be obtained from a magistrate's court, in terms of section 29(1)(c) of the

<sup>68</sup> *Wilhelm v Norton* 1935 EDL 143 152-153.

<sup>69</sup> JE Scholtens "Law of property (including mortgage and pledge)" 1960 *Annual Survey of South African Law* 190-226, analysing *Wynne v Pope* 1960 (3) SA 37 (C).

<sup>70</sup> CG van der Merwe "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413.

<sup>71</sup> JE Scholtens "Law of property (including mortgage and pledge)" 1960 *Annual Survey of South African Law* 190-226 208-209.

<sup>72</sup> CG van der Merwe "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1373.

Magistrates' Courts Act,<sup>73</sup> or from the High Court.<sup>74</sup> Both courts have the jurisdiction to deal with cases concerning the right of way of necessity, and such jurisdiction includes the power to order the registration of the right of way of necessity,<sup>75</sup> and the power to grant an interim right of way of necessity pending the determination of an action to register the servitude,<sup>76</sup> as was confirmed in *Cloete v Karee-Aar Landgoed Bpk*.<sup>77</sup> In that case, the appellant (dominant owner), a farm owner who had no access to a public road, instituted an action against the respondent (the servient owner) of an adjoining farm in which he sought the registration of a right of way of necessity over the respondent's farm.<sup>78</sup> Pending the determination of that action, the dominant owner sought an urgent interdict for an interim right of way of necessity.<sup>79</sup> In the latter proceedings the servient owner successfully raised an argument that the Magistrates' Courts Act<sup>80</sup> did not make provision for such interim relief and the court

<sup>73</sup> Act 32 of 1944. Section 29(1)(c) reads: "Subject to the provisions of this Act [Magistrates' Court Act] and the National Credit Act, 2005 (Act 34 of 2005), the Court, in respect of causes of action, shall have jurisdiction in ... actions for the determination of a right of way...". See *Martins v De Waal and Others* 1963 (3) SA 787 (T) 790. See also H Luntz "Law of property (including mortgage and pledge)" 1963 *Annual Survey of South African Law* 190-226 209; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 328 fn 61. See further CG Hall & EA Kellaway *Servitudes* (3<sup>rd</sup> ed 1973) 77.

<sup>74</sup> *Wynne v Pope* [1960] 3 All SA 1 (C) 4: "For the owner of a dominant tenement to be able to claim the right of *via ex necessitate* along a specific or defined route it would be necessary for such servitude to have been duly constituted, for example, by an order of Court, or by prescription, or by any form recognised by the law". Compare *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) 659. See also CG van der Merwe "Law of property (including mortgage and pledge)" 1979 *Annual Survey of South African Law* 217-257 247.

<sup>75</sup> *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) 659.

<sup>76</sup> *Cloete v Karee-Aar Landgoed Bpk* [1997] 2 All SA 700 (NC).

<sup>77</sup> [1997] 2 All SA 700 (NC).

<sup>78</sup> *Cloete v Karee-Aar Landgoed Bpk* [1997] 2 All SA 700 (NC) 702.

<sup>79</sup> *Cloete v Karee-Aar Landgoed Bpk* [1997] 2 All SA 700 (NC) 702.

<sup>80</sup> Magistrates' Courts Act 32 of 1944.

dismissed the application. The dominant owner appealed against the decision.<sup>81</sup> The issue on appeal was whether a Magistrates' Court had jurisdiction to grant an interim interdict in respect of the right of way of necessity.<sup>82</sup> After considering the provisions of section 29(1)(c) of the Magistrates' Courts Act<sup>83</sup> concerning the jurisdiction of the Magistrates Courts, the court held that this provision, read together with section 30 of the same Act, includes an interim order in respect of a right of way as well as the right of way of necessity<sup>84</sup> and therefore upheld the appeal.<sup>85</sup>

Another interesting aspect to consider is whether the dominant owner is under a duty to first try and negotiate for a right of way with the servient owner before he (dominant owner) can approach the court for an order declaring his right of way of necessity enforceable. It appears that this question has never been considered explicitly in South African law. Only the case of *Wilhelm v Norton*<sup>86</sup> discussed the position in Roman law regarding the duty to negotiate. It was held in *Wilhelm v Norton* that in Roman law, before the dominant owner could claim a *servitus necessaria* (servitude of necessity) from the court, he had an obligation to first try and negotiate with the servient owner for an ordinary servitude of way.<sup>87</sup> The court could only be approached for assistance after all attempts to reach an agreement have failed, and the servient owner had refused to recognise the friendly request by

<sup>81</sup> *Cloete v Karee-Aar Landgoed Bpk* [1997] 2 All SA 700 (NC) 702.

<sup>82</sup> *Cloete v Karee-Aar Landgoed Bpk* [1997] 2 All SA 700 (NC) 702.

<sup>83</sup> Magistrates' Courts Act 32 of 1944.

<sup>84</sup> *Cloete v Karee-Aar Landgoed Bpk* [1997] 2 All SA 700 (NC) 703.

<sup>85</sup> *Cloete v Karee-Aar Landgoed Bpk* [1997] 2 All SA 700 (NC) 704.

<sup>86</sup> 1935 EDL 143 175. See also CG van der Merwe "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1367.

<sup>87</sup> *Wilhelm v Norton* 1935 EDL 143 175. See also CG van der Merwe "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1367.

the dominant owner.<sup>88</sup> Although there is no specific requirement in South African law for parties to first negotiate between themselves before bringing a claim for the right of way of necessity before the court, it appears that most of the cases are only brought to court following unsuccessful negotiations between parties. On this note, it can be argued that the dominant owner has a duty to first negotiate for a right of way, with the servient owner, before approaching the court for an order declaring the right of way of necessity enforceable. The reason for this argument is that the duty to negotiate enables the dominant owner to satisfy the necessity requirement, which is a requirement in a claim for a right of way of necessity.

## 2 3 4 Requirements for the acquisition of the right of way of necessity

### 2 3 4 1 *Introduction*

There are certain requirements which the dominant owner must establish in a claim for a permanent right of way of necessity, and these requirements were expressly mentioned in passing in *Van Rensburg v Coetzee*.<sup>89</sup> In that case, the Appellate Division stated that the dominant owner must establish the “particular necessity.”<sup>90</sup> This must prove the necessity to have a right of way. Furthermore, the court also stated that the dominant owner must also establish the reason why the right of way

<sup>88</sup> *Wilhelm v Norton* 1935 EDL 143 175. See also CG van der Merwe “The Louisiana right to forced passage compared with the South African way of necessity” (1999) 73 *Tulane Law Review* 1363-1413 1367.

<sup>89</sup> 1979 (4) SA 655 (A) 678A.

<sup>90</sup> *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) 678A. See also a case note by CG van der Merwe “Law of property (including mortgage and pledge)” 1979 *Annual Survey of South African Law* 217-257 244.

of necessity should traverse the servient owner's land.<sup>91</sup> This could be interpreted to mean that the dominant owner is required to establish that his property is landlocked to the extent that it lacks connection or sufficient connection to a public road, and that the particular servient land is a suitable land by which he can gain access to a public road.<sup>92</sup> In other words the dominant owner must establish that his property is landlocked. On that note, it can be argued that for the dominant owner to succeed on a claim for a right of way of necessity, his property must be "landlocked". Furthermore, it must be landlocked in such a manner that it is "necessary" for him to obtain a right of way of necessity over a particular servient tenement. The necessity and landlocking requirements are discussed in detail below. However, neither the courts nor legal writers expressly refer to these two as requirements for purposes of a claim of the right of way of necessity.<sup>93</sup>

## 2 3 4 2     *Landlocking*

In principle, the dominant tenement must be landlocked for the dominant owner to be entitled to a claim for a right of way of necessity. Considering the hybrid nature of the South African law on the right of way of necessity, landlocking includes complete landlocking without access to public transport systems, which is more of a strict

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<sup>91</sup> 1979 (4) SA 655 (A) 678A. See also a case note by CG van der Merwe "Law of property (including mortgage and pledge)" 1979 *Annual Survey of South African Law* 217-257 244.

<sup>92</sup> See PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 330.

<sup>93</sup> For instance, in PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 328 ffn 64, 66, the authors mention landlocking and the need of a way of access (necessity) as the main aspects for a claim of way of necessity. See also *Jackson v Aventura Ltd* [2005] 2 All SA 518 (C) 519: "Once a claimant shows that his land is geographically landlocked and identifies the need of access, he will be entitled to a way of necessity..." .

approach,<sup>94</sup> and also landlocking in the sense that the dominant tenement does have an access to public transport systems but such access is not sufficient for the proper exploitation and economic development of the landlocked dominant tenement.<sup>95</sup> The latter is more of a flexible approach. The flexible approach has become more prevalent in case law. The court in *Sanders NO and Another v Edwards NO and Others (Sanders case)*<sup>96</sup> also held that the dominant tenement does not have to be literally landlocked from the public road, but it should “constructively” constitute a “blokland”.<sup>97</sup>

In *Van Schalkwijk v Du Plessis and Others*,<sup>98</sup> the court held that cases may arise in which the alternative route would be so difficult and inconvenient as to be practically impossible, and such cases may justify the granting of the right of way of

<sup>94</sup> See in general CG van der Merwe & GF Lubbe “Noodweg” (1977) 40 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 111-125. See also CG van der Merwe “The Louisiana right to forced passage compared with the South African way of necessity” (1999) 73 *Tulane Law Review* 1363-1413 1382.

<sup>95</sup> This principles was confirmed in *Van Rensburg v Coetze* 1979 (4) SA 655 (A) 670H-671A. See also J Scott “The difficult process of applying easy principles: Three recent judgments on *via ex necessitate*” (2008) 41 *De Jure* 164-174 166; CG van der Merwe “The Louisiana right to forced passage compared with the South African way of necessity” (1999) 73 *Tulane Law Review* 1363-1413 1385.

<sup>96</sup> 2003 (5) SA 8 (C) 11E. See also CG van der Merwe & J Pienaar “Law of property (including mortgage and pledge)” (2003) *Annual Survey of South African Law* 375-428 413-415.

<sup>97</sup> See also in this regard MD Southwood *The compulsory acquisition of rights* (2000) 100; CG van der Merwe “Law of property (including mortgage and pledge)” 1979 *Annual Survey of South African Law* 217-257 245. See also CG van der Merwe & GF Lubbe “Noodweg” (1977) 40 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 111-125 115-121. See also *Van Rensburg v Coetze* 1979 (4) SA 655 (A) 671A.

<sup>98</sup> (1900) 17 SC 454. See also *Neilson v Mahoud* 1925 EDL 26 33. For a discussion on the importance of the *Van Schalkwijk* decision, see CG van der Merwe “The Louisiana right to forced passage compared with the South African way of necessity” (1999) 73 *Tulane Law Review* 1363-1413 1384-1385. See also CG van der Merwe & GF Lubbe “Noodweg” (1977) 40 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 111-125 117-118.

necessity. In *English v C J M Harmse Investments*,<sup>99</sup> Hurt J referred to Van der Merwe and Lubbe<sup>100</sup> and stated that:

“The authors [Lubbe and van der Merwe] dealt with a number of decisions prior to 1977 in which the Courts granted rights of way to properties which were not actually landlocked but where the existing means of access to public roads or railway sidings were unduly complicated.”<sup>101</sup>

A claim for a right of way of necessity may therefore still arise where the dominant tenement has existing access, but the access is unsuitable for the owner’s proposed use or for the optimal exploitation of the dominant tenement,<sup>102</sup> like in the *Sanders* case,<sup>103</sup> where the court granted a way of necessity where only a part of the land was landlocked. In that case the dominant owners (respondents) had access to the public road through the northern part of their land. However, the dominant owners sought access to another public road over the servient owners’ (appellants’) land to connect to the southern part of the dominant land where they planned on conducting extensive protea farming operations. The court, with reference to the decisions of *Trautman NO v Poole*<sup>104</sup> and *Natal Parks, Game and Fish Preservation Board v Maritz*,<sup>105</sup> extended the scope of a right of way of necessity to cover instances where property is effectively cut in two, holding that it may be necessary in such instances

<sup>99</sup> 2007 (3) SA 415 (N) 419B-C.

<sup>100</sup> CG van der Merwe & GF Lubbe “Noodweg” (1977) 40 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 111-125.

<sup>101</sup> *English v C J M Harmse Investments and Another* 2007 (3) SA 415 (N) 419B-C. See also CG van der Merwe “The Louisiana right to forced passage compared with the South African way of necessity” (1999) 73 *Tulane Law Review* 1363-1413 1383-1385.

<sup>102</sup> MD Southwood *The compulsory acquisition of rights* (2000) 100.

<sup>103</sup> *Sanders NO and Another v Edwards NO and Others* 2003 (5) SA 8 (C).

<sup>104</sup> 1951 (3) SA 200 (C) 208A-B.

<sup>105</sup> 1958 (4) SA 545 (N).

for each half to have its own right of way to a public road.<sup>106</sup> According to the court the law could not be so lacking in common sense as to deny a way of necessity in the circumstances.<sup>107</sup> On that basis, the court concluded that the dominant owners are entitled to the access sought despite them having alternative access.<sup>108</sup> Courts have also granted a right of way of necessity to the dominant owner because the alternative way was very long,<sup>109</sup> tortuous<sup>110</sup> or over difficult terrain.<sup>111</sup> However, the right of way of necessity cannot be claimed based on the mere fact that an existing route is simply longer or more inconvenient than the way sought.<sup>112</sup> Convenience is not the basis for the claim of a right way of necessity.<sup>113</sup> Furthermore, the right of way of necessity cannot be claimed merely on the basis that the servient tenement alone separates the dominant tenement from the public road, if the dominant tenement already has access to the public road (by agreement) by a route passing

<sup>106</sup> *Sanders NO and Another v Edwards NO and Others* 2003 (5) SA 8 (C) 12F-G. See also CG van der Merwe & GF Lubbe "Noodweg" (1977) 40 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 111-125 117, 119-120.

<sup>107</sup> *Sanders NO and Another v Edwards NO and Others* 2003 (5) SA 8 (C) 12G.

<sup>108</sup> *Sanders NO and Another v Edwards NO and Others* 2003 (5) SA 8 (C) 12H.

<sup>109</sup> *Illing v Woodhouse* 1923 NPD 166 168. See also H Mostert, A Pope, PJ Badenhorst, W Freedman, JM Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 247.

<sup>110</sup> *Neilson v Mahoud* 1925 EDL 26 33: "The difficulty, and I think sometimes danger, of the krantz road [the alternative way] puts it out of practical consideration; and seeing that it is a very long and tortuous way from defendant's house [the dominant owner's house], I think there is an additional reason for giving a road of necessity where the broken gate is situated just adjoining his house ... I therefore find that defendant is entitled to a way of necessity over lot 74 [the servient tenement] at and through the gate broken by defendant."

<sup>111</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 329; H Mostert, A Pope, PJ Badenhorst, W Freedman, JM Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 247.

<sup>112</sup> *English v C J M Harmse Investments and Another* 2007 (3) SA 415 (N) 419B.

<sup>113</sup> H Mostert, A Pope, PJ Badenhorst, W Freedman, JM Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 247. One cannot claim a way of necessity just to shorten the distance of one's access to the public road.

over one or more intervening properties whose owners have raised no objections to its use.<sup>114</sup> In such instances the dominant owner has no claim for a right way of necessity until the contractual right of way has been revoked by the servient owner.<sup>115</sup> In sum, a right of way of necessity could be granted in instances where the dominant tenement is geographically landlocked, that is where the land is totally landlocked or landlocked in a way that an alternative way is available for the dominant tenement but it is inadequate to enable the dominant owner reasonable access to a public road.<sup>116</sup>

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<sup>114</sup> *Lentz v Mullin* 1921 EDC 274: “I can find no authority in support of the proposition that a person may claim a *via necessitate* over his neighbour’s property on the grounds that such property alone separates him from a public road, when he already has access to another public road by a route passing over one or more intervening properties whose owners have raised no objections to its use. It would be imposing an unreasonable and onerous servitude on many properties if such a doctrine was accepted.” See also *Rudolph v Casojee* 1945 EDL 190 204; CG van der Merwe “The Louisiana right to forced passage compared with the South African way of necessity” (1999) 73 *Tulane Law Review* 1363-1413 1383.

<sup>115</sup> CG van der Merwe “The Louisiana right to forced passage compared with the South African way of necessity” (1999) 73 *Tulane Law Review* 1363-1413 1376-1377.

<sup>116</sup> The following authorities confirm this principle: *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) 670H, 671A-B; *English v C J M Harmse Investments and Another* 2007 (3) SA 415 (N) 419E; *Neilson v Mahoud* 1925 EDL 26 33. See also CG van der Merwe “Law of property (including mortgage and pledge)” 1979 *Annual Survey of South African Law* 217-257 245; CG van der Merwe “The Louisiana right to forced passage compared with the South African way of necessity” (1999) 73 *Tulane Law Review* 1363-1413 1383-1385; CG van der Merwe & GF Lubbe “Noodweg” (1977) 40 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 111-125 115-121; J Scott “The difficult process of applying easy principles: Three recent judgments on *via ex necessitate*” (2008) 41 *De Jure* 164-174 166.

## 2 3 4 3 Necessity

As already stated above, necessity is an important requirement for purposes of claiming a right of way of necessity.<sup>117</sup> In *Van Rensburg v Coetzee*,<sup>118</sup> the court recommended that the dominant owner should allege and establish the particular necessity.<sup>119</sup> “Necessity” is said to be interpreted strictly.<sup>120</sup> In Holland no owner of land could obtain a right of way of necessity to a public road across the servient tenement if he had convenient access to public water.<sup>121</sup> This was also applied in cases of subdivision, where the back portion had a right of way over the portion fronting the road, but the back portion was so situated that it had an outlet by water.<sup>122</sup> These principles can no longer find obvious application in South African law, given the different circumstances.

In principle, the right of way of necessity cannot be claimed further than the actual necessity of the case.<sup>123</sup> In essence, it can only be claimed when necessity demands it.<sup>124</sup> The right of way of necessity is awarded on the basis of what is

<sup>117</sup> See section 2 3 4 above. See also CG van der Merwe “The Louisiana right to forced passage compared with the South African way of necessity” (1999) 73 *Tulane Law Review* 1363-1413 1384.

<sup>118</sup> *Van Rensburg v Coetzee* 1979 (4) SA 655 (A).

<sup>119</sup> *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) 678A. Jansen J specified these aspects as a guideline for practitioners. See also PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* (5<sup>th</sup> ed 2006) 330.

<sup>120</sup> CG Hall & EA Kellaway *Servitudes* (3<sup>rd</sup> ed 1973) 76.

<sup>121</sup> CG Hall & EA Kellaway *Servitudes* (3<sup>rd</sup> ed 1973) 76.

<sup>122</sup> S van Leeuwen *Het Roomsche Hollandsch recht* (1783 edited and translated by CW Decker & JG Kotzé *Commentaries on Roman-Dutch law* 2<sup>nd</sup> ed 1921) 297 para 12; CG Hall and EA Kellaway *Servitudes* (3<sup>rd</sup> ed 1973) 76. In this set of circumstances the back portion had to be satisfied with the water outlet and therefore could not claim a right of way of necessity over the portion fronting the road.

<sup>123</sup> DP de Bruyn *The opinions of Grotius as contained in the Hollandsche consultatien en advisen* (1894) 425.

<sup>124</sup> CG Hall & EA Kellaway *Servitudes* (3<sup>rd</sup> ed 1973) 77.

necessary and not merely what is reasonably required.<sup>125</sup> It is unclear what constitutes necessity, as there is no definite rule in our law to determine the circumstances that would constitute necessity,<sup>126</sup> as was confirmed in *Trautman v Poole*.<sup>127</sup> In that case, Steyn J stated that the court had the opportunity to consider the circumstances which would justify the grant of the right of way of necessity,<sup>128</sup> but refrained from doing so:

“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.”<sup>129</sup>

The test is necessity and not even great inconvenience is sufficient to justify the granting of a way of necessity.<sup>130</sup> According to Nugent JA in *Aventura v Jackson*,<sup>131</sup> necessity means that the right of way must be the only reasonable sufficient means of gaining access to the landlocked tenement but not just a convenience means of doing so.<sup>132</sup> Maasdorp states that the right of way of necessity is limited to the absolute necessity of the case.<sup>133</sup> However, he goes further to qualify this argument

<sup>125</sup> *Trautman NO v Poole* 1951 (3) SA 200 (C) 207; *English v C J M Harmse Investments and Another* 2007 (3) SA 415 (N) 419D. See also CG van der Merwe “The Louisiana right to forced passage compared with the South African way of necessity” (1999) 73 *Tulane Law Review* 1363-1413 1384.

<sup>126</sup> *Trautman NO v Poole* 1951 (3) SA 200 (C) 207; *Van Schalkwyk v Du Plessis and Others* (1900) 17 SC 454 464.

<sup>127</sup> 1951 (3) SA 200 (C).

<sup>128</sup> *Trautman NO v Poole* 1951 (3) SA 200 (C) 207E.

<sup>129</sup> *Trautman NO v Poole* 1951 (3) SA 200 (C) 207F. See also *Van Schalkwyk v Du Plessis and Others* (1900) 17 SC 454 464.

<sup>130</sup> *Natal Parks, Game and Fish Preservation Board v Maritz* 1958 (4) SA 545 (N) 546.

<sup>131</sup> *Aventura Ltd v Jackson NO and Others* 2007 (5) SA 497 (SCA) 500.

<sup>132</sup> *Aventura Ltd v Jackson NO and Others* 2007 (5) SA 497 (SCA) 500A, citing *Trautman NO v Poole* 1951 (3) SA 200 (C) 207D-208A. See also CG van der Merwe & MJ de Waal “Servitudes” in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 (2<sup>nd</sup> ed 2010) para 560.

<sup>133</sup> AFS Maasdorp *The institutes of Cape law: The law of things* (4<sup>th</sup> ed 1923) 201.

by stating that the term “absolute necessity” does not necessarily mean there can be no way of necessity over a servient tenement, except where such a way is the only connection to the public road.<sup>134</sup>

It can be argued that necessity is also dependent on the use of the dominant tenement. Accordingly, as stated above,<sup>135</sup> a situation of necessity may still arise in instances where the dominant tenement has an existing access but, due to the unsuitability of such access to the purpose of use of the dominant tenement alternative access is necessary. This confirms Nugent JA’s definition of necessity in *Aventura v Jackson*.<sup>136</sup> According to Nugent JA necessity means that the right of way must be the only reasonably sufficient means of gaining access to the landlocked tenement but not just a convenient means of doing so.<sup>137</sup> Therefore, absolute necessity is not the sole basis upon which a right of way of necessity can be granted.<sup>138</sup> Courts go beyond absolute necessity.<sup>139</sup> The courts, when deciding on the issue of necessity, have to strike a balance of convenience, that is weighing the balance between the inconvenience suffered by the owner of the dominant tenement without access and the inconvenience that the right of way will cause for the servient owner, with due regard to the nature of the servient tenement and its use.<sup>140</sup> For

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<sup>134</sup> AFS Maasdorp *The institutes of Cape law: The law of things* (4<sup>th</sup> ed 1923) 201.

<sup>135</sup> See section 2 3 4 2 above.

<sup>136</sup> *Aventura Ltd v Jackson No and Others* 2007 (5) SA 497 (SCA) 500.

<sup>137</sup> *Aventura Ltd v Jackson No and Others* 2007 (5) SA 497 (SCA) 500A.

<sup>138</sup> *English v C J M Harmse Investments and Another* 2007 (3) SA 415 (N) 420D.

<sup>139</sup> AFS Maasdorp *The institutes of Cape law: The law of things* (4<sup>th</sup> ed 1923) 201; CG van der Merwe & GF Lubbe “Noodweg” (1977) 40 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 111-125. See also *English v C J M Harmse Investments and Another* 2007 (3) SA 415 (N) 420A.

<sup>140</sup> *English v C J M Harmse Investments and Another* 2007 (3) SA 415 (N) 420A, Hurt J citing *Van Schalkwyk v Du Plessis and Others* (1900) 17 SC 454.

instance, in the *Sanders* case<sup>141</sup> the topography of the dominant owners' property included steep slopes and a ravine which was impassable in wet weather conditions, making the cost of construction of the existing road (a road necessary for the dominant owner's proposed farming operations) more expensive. The court accepted that the expenditure would have the effect of making the proposed farming operations uneconomical<sup>142</sup> and held that the proposed right of way of necessity would provide a more feasible solution and cause minimal inconvenience to the servient owner.<sup>143</sup>

A similar decision was reached in *Illing v Woodhouse*.<sup>144</sup> There, the court held, considering the distance that the dominant owner had to travel and the cost involved to reach the alternative railway station as compared to the distance and cost to the proposed railway station, that the necessities of the dominant owner's farming operations were so reasonable that he should have access to the nearest railway station via the road claimed.<sup>145</sup> In this case the dominant owner (the applicant - a farm owner) had to travel about 2,000 miles more to the alternative railway station to transport his farm produce, compared to the much shorter claimed road to the intended railway station. This had the consequence of more expensive transport costs, excluding the extra time that had to be occupied in deliveries to the station.<sup>146</sup> It is clear from these two judgements that the right of way of necessity can be granted in view of the dominant owner's necessity of conducting economically viable farming operations. On the basis of the "balance of convenience" principle, the right

<sup>141</sup> 2003 (5) SA 8 (C).

<sup>142</sup> *Sanders NO and Another v Edwards NO and Others* 2003 (5) SA 8 (C) 13.

<sup>143</sup> *Sanders NO and Another v Edwards NO and Others* 2003 (5) SA 8 (C) 18.

<sup>144</sup> 1923 NPD 166 171.

<sup>145</sup> *Illing v Woodhouse* 1923 NPD 166 171.

<sup>146</sup> *Illing v Woodhouse* 1923 NPD 166 171.

of way of necessity is likely to be granted to the dominant owner where the cost involved in the use of an alternative road would economically inconvenience the owner in his farming operations far more than the minimal inconvenience that would be occasioned to the servient owner by the proposed right of way.<sup>147</sup>

However, the court may refuse to grant the right of way of necessity where the prejudice to be suffered by the servient owner far more exceed the prejudice to be suffered by the dominant owner without access.<sup>148</sup> Again, it is not admissible for the dominant owner to claim the right of way of necessity over the servient tenement if he already enjoys access to the public road via an existing road over neighbouring properties which he uses without objection.<sup>149</sup> Furthermore, the dominant tenement cannot claim the right of way of necessity to the best and nearest public road over the servient tenement in circumstances where he already has a road that is more circuitous or less convenient but still reasonable.<sup>150</sup> The onus is on the dominant owner to prove the necessity of the servitude sought,<sup>151</sup> proving, for instance, that it is necessary for the purpose of conducting viable farming operations.<sup>152</sup> The

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<sup>147</sup> CG Hall & EA Kellaway *Servitudes* (3<sup>rd</sup> ed 1973) 79, citing *Neilson v Mahoud* 1925 EDL 26, where the claimant was held to be entitled to a right of way of necessity after the court had established that the alternative road to the one claimed over the adjoining property could have been built with great difficulty and expense and involving danger in rainy weather. See also *Sanders NO and Another v Edwards NO and others* 2003 (5) SA 8 (C).

<sup>148</sup> *English v C J M Harmse Investments and Another* 2007 (3) SA 415 (N) 425A.

<sup>149</sup> *Lentz v Mullins* 1921 EDC 268 274; *Rudolph v Casojee* 1945 EDL 190 194, 204. See CG Hall & EA Kellaway *Servitudes* (3<sup>rd</sup> ed 1973) 78-79.

<sup>150</sup> *Van Schalkwyk v du Plessis* (1900) 17 SC 454. See also CG Hall & EA Kellaway *Servitudes* (3<sup>rd</sup> ed 1973) 78.

<sup>151</sup> CG Hall & EA Kellaway *Servitudes* (3<sup>rd</sup> ed 1973) 77. See also *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) 677F.

<sup>152</sup> *English v C J M Harmse Investments and Another* 2007 (3) SA 415 (N) 424I. See also CG Hall & EA Kellaway *Servitudes* (3<sup>rd</sup> ed 1973) 77 and the case cited there.

necessity for having the right of way can also be proved by showing the impossibility to obtain a negotiated right of way.<sup>153</sup>

Self-created necessity does not entitle the dominant owner to claim the right of way of necessity. This includes landlocking that results from voluntary conduct or negligence of the dominant owner.<sup>154</sup> This is in accordance with the principle that the owner who has only himself to blame for the enclosure cannot claim a right of way of necessity.<sup>155</sup> Although it has been argued that this principle finds no basis in Roman-Dutch law,<sup>156</sup> the principle has been applied successfully in South African case law, and most authors also recognise this principle, arguing that a right of way of necessity cannot be claimed by an owner who has through his own fault, design or negligence cut his land off from access to a public road.<sup>157</sup> According to Dowling J in *Bekker v Van Wyk*,<sup>158</sup> the authority for this principle can be traced back to Ross' *Executors v Ritchie*.<sup>159</sup> Dowling J held that this principle was introduced to prevent the dominant owner from placing himself in a position where he could "virtually

<sup>153</sup> This argument corresponds with the argument about the duty to negotiate discussed in section 2.3 above.

<sup>154</sup> For negligence, see *Rudolph v Casojee* 1945 EDL 190. For examples of voluntary conduct that cause landlocking, see *Riddin v Quinn* (1909) 23 EDC 373; *Bekker v Van Wyk* 1956 (3) SA 13 (T).

<sup>155</sup> CG Hall & EA Kellaway *Servitudes* (3<sup>rd</sup> ed 1973) 77; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 329; AFS Maasdorp *Institutes of South African law: The law of things* vol 2 (7<sup>th</sup> ed 1948 edited and revised by Hall CG) 182; JE Scholtens "Law of property (including mortgage and pledge); unjust enrichment" (1956) *Annual Survey of South African Law* 125-153 143. See also *Rudolph v Casojee* 1945 EDL 190 203; *Wilhelm v Norton* 1935 EDL 143 171.

<sup>156</sup> *Bekker v van Wyk* 1956 (3) SA 13 (T) 13E, 14G.

<sup>157</sup> AFS Maasdorp *Institutes of South African law: The law of things* vol 2 (7<sup>th</sup> ed 1948 edited and revised by Hall CG) 182; CG Hall & EA Kellaway *Servitudes* (3<sup>rd</sup> ed 1973) 77; CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 (2<sup>nd</sup> ed 2010) 561.

<sup>158</sup> 1956 (3) SA 13 (T) 14D.

<sup>159</sup> 19 NLR 103.

expropriate some of his neighbour's real rights".<sup>160</sup> For instance, if the dominant owner whose property borders on the main street builds on the whole of his street frontage, thereby blocking his access to the main street, he caused the lack of access through his own action.<sup>161</sup> Again, the dominant owner who voluntarily or negligently abandons an existing way which gives him access to the public road;<sup>162</sup> voluntarily takes part in securing the closure of a public road that he benefits from;<sup>163</sup> or closes a private road which connects him to a public road<sup>164</sup> places himself in a similar position.

This principle has been considered and applied in a number of decisions,<sup>165</sup> at the same time; however, courts have in certain instances ignored the principle. For instance, in *Illing v Woodhouse* the court granted the right of way of necessity despite the dominant owner's contribution to the situation of necessity.<sup>166</sup> Following the dominant owner's relocation of his farmstead from the southern part to the northern part of the farm, the existing access to the public road from the southern

<sup>160</sup> *Bekker v van Wyk* 1956 (3) SA 13 (T) 14H. See also CG van der Merwe "Servitudes" in WA Joubert (ed) *The law of South Africa* (2<sup>nd</sup> ed 2010) para 561.

<sup>161</sup> CG Hall & EA Kellaway *Servitudes* (3<sup>rd</sup> ed 1973) 77; CG van der Merwe "Servitudes" in WA Joubert (ed) *The law of South Africa* (2<sup>nd</sup> ed 2010) para 561.

<sup>162</sup> *Rudolph v Casojee* 1945 EDL 190; SA Yster en Staal Industriële Korporasie Bpk v Van der Merwe [1984] 2 All SA 403 (A). See also CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 (2<sup>nd</sup> ed 2010) para 561.

<sup>163</sup> *Bekker v van Wyk* 1956 (3) SA 13 (T). For the facts of this case, see chapter 1 section 1 1 above. See also CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 (2<sup>nd</sup> ed 2010) para 561.

<sup>164</sup> *Riddin v Quinn* (1909) 23 EDC 373. For a brief summary on the facts of the case, see chapter 1 section 1 1 above.

<sup>165</sup> *Bekker v van Wyk* 1956 (3) SA 13 (T); *Rudolph v Casojee* 1945 EDL 190.

<sup>166</sup> 1923 44 NPD 166. See also CG van der Merwe "Servitudes" in WA Joubert (ed) *The law of South Africa* (2<sup>nd</sup> ed 2010) para 561 fn 6.

part of the farm became unsuitable for the dominant owner's farming operations.<sup>167</sup> A similar approach was followed in *Naude v Ecoman Investments en Andere*.<sup>168</sup> In that case the dominant owner successfully acquired a right of way of necessity over the servient owner's land following his own decision to change the land use from agricultural to tourism. The same approach was also followed in *SA Yster en Staal Industriële Korporasie Bpk v Van der Merwe*.<sup>169</sup> In that case, the dominant owner (appellant) and the servient owner (respondent) concluded a temporary agreement permitting the dominant owner to construct and use a road over the servient owner's land. Following an unsuccessful attempt to acquire a permanent right of way over the road from the servient owner, the dominant owner terminated the agreement, leaving himself without access, and applied to the court for an order granting him a right of way of necessity over the servient tenement. The Appellate Division found that the dominant owner would have been entitled to a way of necessity even before he concluded the agreement with the servient owner and also found that the terms of the agreement and preceding circumstances did not contain anything amounting to a waiver of the dominant owner's rights to claim a way of necessity. The court also found that the agreement was intended to be a temporary one and therefore held that the dominant owner's decision to terminate the agreement did not bar him from claiming the right of way of necessity. According to Van der Merwe, this approach is mostly aimed at encouraging the efficient economic exploration of the dominant tenement.<sup>170</sup>

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<sup>167</sup> *Illing v Woodhouse* 1923 44 NPD 166. See also CG van der Merwe "Servitudes" in WA Joubert (ed) *The law of South Africa* (2<sup>nd</sup> ed 2010) para 561 fn 6.

<sup>168</sup> 1994 (2) SA 95 (T) 99-101. For the facts of this case see section 2 3 7 above.

<sup>169</sup> [1984] 2 All SA 403 (A).

<sup>170</sup> CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 (2<sup>nd</sup> ed 2010) para 561.

A similar principle is found in subdivision of land cases, specifically in instances where parties to the subdivision failed to make provision for a servitude of right of way in favour of one of the portions that has become enclosed. In these instances the enclosed portion may not seek a right of way anywhere else but over the other portion. This principle entails that the owner who acquires the back portion that has no outlet retains his right of outlet over the front portion, even though nothing was said about this at the time of the sale agreement.<sup>171</sup> This was confirmed in *Van Rensburg v Coetzee*,<sup>172</sup> where the Appellate Division held that in cases of subdivision of land a right of way is conferred by tacit agreement. In other words, the right of way is implied over the front portion (implied consent). Therefore, the dominant owner may not acquire a right of way of necessity over neighbouring properties. The reason for this principle is that the splitting of the land cannot impose a servitude upon the neighbours<sup>173</sup> and that it is against equity for the seller of partitioned land to refuse proper access (over his front portion), thereby attempting to impose an improper burden upon his neighbours.<sup>174</sup> However, this principle was

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<sup>171</sup> S van Leeuwen *Het Roomsche Hollandsche recht* (1783 edited and translated by CW Decker & JG Kotzé *Commentaries on Roman-Dutch law* 2<sup>nd</sup> ed 1921) 297 para 12. See also *Riddin v Quinn* 1909 EDC 373 378; *Matthews v Road Board for the District of Richmond and Others* 1967 (3) SA 244 (N) 247.

<sup>172</sup> 1979 (4) SA 655 (A) 675B. This means that when land is subdivided, the back portion that has no way out to the public road is entitled to a way of necessity over the front portion abutting the road. See also CG van der Merwe "Law of property (including mortgage and pledge)" 1979 *Annual Survey of South African Law* 217-257 246.

<sup>173</sup> *Wilhelm v Norton* 1935 EDL 143 170; *Matthews v Road Board for the District of Richmond and Others* 1967 (3) SA 244 (N) 247D. See also CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 (2<sup>nd</sup> ed 2010) para 562.

<sup>174</sup> *Wilhelm v Norton* 1935 EDL 143 180.

rejected by Kennedy J in *Matthews v Road Board for the District of Richmond and Others*,<sup>175</sup> the court stating that

“what van Leeuwen there had to say is but of small practical value in a country like South Africa where vast tracts of land, as we know, exist for farming purposes; it would be impractical; from the distance point of view alone, if any such an owner sub-divided his land, to compel the owner of the sub-division to use the right of way enjoyed by the seller, and none other, when a closer and more reasonable means of access is available by the grant of a way of necessity over a neighbour's property.”

These principles bind the dominant owner's successors in title because their right to a way of necessity depends upon those of their predecessors in title.<sup>176</sup> For instance, if the dominant owner's predecessor in title abandoned a right of way giving access to a public road, the succeeding dominant owners will be bound by such decision and therefore will not be entitled to a way of necessity. Again, subdivision cases may prevent the dominant owner from claiming a right of necessity from the surrounding properties. Nevertheless, these principles are in certain instances qualified.

## 2 3 5 Conditions attached to a right of way of necessity

### 2 3 5 1 *Introduction*

The Court in *Van Rensburg v Coetzee*<sup>177</sup> suggested in passing that the dominant owner must take the following aspects into consideration in a claim for a permanent right of way of necessity. The dominant owner must state the width of the road he claims, together with the grounds upon which that claim is founded, and he should

<sup>175</sup> 1967 (3) SA 244 (N) 247F-G. See also JE Scholtens “Law of property (including mortgage and pledge)” (1963) *Annual Survey of South African Law* 181-194 192.

<sup>176</sup> *Rudolph v Casojee* 1945 EDL 190 203.

<sup>177</sup> 1979 (4) SA 655 (A) 678A-C.

also indicate a particular route for the court's consideration;<sup>178</sup> and he should offer an amount of compensation for the court's consideration.<sup>179</sup> It may be argued that the abovementioned aspects are conditions precedent the exercise of a right of way of necessity, and for the purposes of this section they are referred to as "conditions" attached to a right of way of necessity. However, neither the courts nor legal writers refer to these factors as conditions. They are relevant as soon as the two main requirements have been successfully established.

### 2 3 5 2     *The route*

In the event the dominant owner is to succeed in his claim for a right of way of necessity over a particular servient tenement, then the next step is to determine the route over the servient tenement that a right of way of necessity must traverse.<sup>180</sup> In doing so, the courts are guided by the principle "*ter naaste lage en minster schade*" or the shortest route that causes the lightest burden for the servient tenement.<sup>181</sup>

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<sup>178</sup> *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) 678A-C. See also PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 330. See further CG Hall & EA Kellaway *Servitudes* (3<sup>rd</sup> ed 1973) 77.

<sup>179</sup> *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) 678A-C. See also PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 330 and in general CG van der Merwe & GF Lubbe "Noodweg" (1977) 40 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 111-125.

<sup>180</sup> *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) 678A-B. See also CG van der Merwe "Law of property (including mortgage and pledge)" 1979 *Annual Survey of South African Law* 217-257 244; CG van der Merwe "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1401; CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 (2<sup>nd</sup> ed 2010) para 560.

<sup>181</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 329; CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 (2<sup>nd</sup> ed 2010) para 560; CG van der Merwe *Sakereg* (2<sup>nd</sup> ed 1989) 488; CG van der Merwe "Servitudes and other real rights" in F du Bois (ed) *Wille's Principles of South African law*

This means that a right of way of necessity must traverse an adjoining servient tenement that lies between the landlocked land and the nearest public road along a route over the servient tenement which causes the smallest amount of damage to the servient tenement.<sup>182</sup>

The principle is, however, not absolute.<sup>183</sup> It can be departed from where it is foreseen that the identified servient tenement, which a right of way of necessity must traverse is so impassable that it provides no practical way out or if the identified servient tenement would be detrimentally affected by the proposed way.<sup>184</sup> In such circumstances another plan would have to be found.<sup>185</sup> It was decided in *Jackson v Aventura Ltd*<sup>186</sup> that the environmental and engineering implications which may arise as a result of the exercise of the right of way of necessity ought not to serve as a

(9<sup>th</sup> ed 2007) 591-629 598-599; CG van der Merwe "Law of property (including mortgage and pledge)" 1979 *Annual Survey of South African Law* 217-257 245; H Mostert, A Pope, PJ Badenhorst, W Freedman, JM Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 247. See also *Wilhelm v Norton* 1935 EDL 143 168; *Jackson v Aventura Ltd* [2005] 2 All SA 518 (C) 528.

<sup>182</sup> *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) 657; *Jackson v Aventura Ltd* [2005] 2 All SA 518 (C) 528. See also CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 (2<sup>nd</sup> ed 2010) para 560; CG Hall & EA Kellaway *Servitudes* (3<sup>rd</sup> ed 1973) 78.

<sup>183</sup> *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) 657-658. See also PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 329; CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 (2<sup>nd</sup> ed 2010) para 560; CG van der Merwe "Law of property (including mortgage and pledge)" 1979 *Annual Survey of South African Law* 217-257 245; H Mostert, A Pope, PJ Badenhorst, W Freedman, JM Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 247.

<sup>184</sup> *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) 658. See also CG van der Merwe "Law of property (including mortgage and pledge)" 1979 *Annual Survey of South African Law* 217-257 245. See further PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 329; CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 (2<sup>nd</sup> ed 2010) para 560; H Mostert, A Pope, PJ Badenhorst, W Freedman, JM Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 247.

<sup>185</sup> *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) 658. See also CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 (2<sup>nd</sup> ed 2010) para 560.

<sup>186</sup> [2005] 2 All SA 518 (C).

defence for avoiding application of the principle. In other words, such factors ought not to be taken into consideration in an action for the possible acquisition of a right of way of necessity.<sup>187</sup> The court held that its duty was to decide the matter in accordance to the principles of the common law (in that case the common principle of *ter naaster lage en minster schade*) reserving the environmental aspect to the relevant legislative authorities.<sup>188</sup> The shortest route principle does not necessarily entitle the dominant owner to insist on using the shortest route over the servient tenement.<sup>189</sup> This is because access over the servient tenement to the nearest main road does not mean the shortest possible “cut” from the dominant tenement to the nearest main road;<sup>190</sup> it must be the least burdensome and nearest route to the public road, seen from the perspective of the servient tenement.<sup>191</sup>

In principle the size of the route required for the exercise of the right of way of necessity depends on the needs of the dominant tenement.<sup>192</sup> However, in the

<sup>187</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 329.

<sup>188</sup> *Jackson v Aventura Ltd* [2005] 2 All SA 518 (C) 532. See also PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 329. See further CG van der Merwe & MJ de Waal “Servitudes” in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 (2<sup>nd</sup> ed 2010) para 560.

<sup>189</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 329.

<sup>190</sup> *Carter v Driemeyer and Another* 1913 34 NPD 1 6; *Wilhelm v Norton* 1935 EDL 143 169. See also PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 329; H Mostert, A Pope, PJ Badenhorst, W Freedman, JM Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 247; CG Hall & EA Kellaway *Servitudes* (3<sup>rd</sup> ed 1973) 78.

<sup>191</sup> *Wilhelm v Norton* 1935 EDL143 168.

<sup>192</sup> *Van Rensburg v Coetze* 1979 (4) SA 655 (A) 675H; CG van der Merwe “Law of property (including mortgage and pledge)” 1979 *Annual Survey of South African Law* 217-257 246. See also PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 329 fn 79.

absence of evidence to substantiate the need, the common law rules will apply.<sup>193</sup> The common law rules entail that the road must follow the boundaries of the servient tenement as far as possible, rather than to cut through it unnecessarily.<sup>194</sup> The width of the road is fixed at eight feet in common law.<sup>195</sup> Other than that, the dominant owner, in his claim for a permanent right of way of necessity, who requires a wider route than is allowed for in common law, will have to prove the need for such a route.<sup>196</sup> However, the dominant owner should indicate a suitable route if the servient owner disputes its suitability, unless he relies on the common-law rule that the road must follow the boundary.<sup>197</sup> This, however, does not often happen in practice because if the servient owner disputes the suitability of the route claimed by the dominant owner and fails to indicate an alternative route, the *prima facie* “reasonable” choice of the dominant owner will be decisive.<sup>198</sup> Generally, the right of

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<sup>193</sup> *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) 675H. See PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 329 fn 79; S van Leeuwen *Het Roomsche Hollandsche recht* (1783 edited and translated by CW Decker & JG Kotzé *Commentaries on Roman-Dutch law* 2<sup>nd</sup> ed 1921) 296 para 11: “The width of a road is by law [common law] fixed at eight feet where the road is straight, and sixteen feet where it turns...”.

<sup>194</sup> *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) 660. See also PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 329.

<sup>195</sup> *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) 675. See also CG van der Merwe “Law of property (including mortgage and pledge)” 1979 *Annual Survey of South African Law* 217-257 246; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 329 fn 79; see further S van Leeuwen *Het Roomsche Hollandsche recht* (1783 edited and translated by CW Decker & JG Kotzé *Commentaries on Roman-Dutch law* 2<sup>nd</sup> ed 1921) 296 para 11.

<sup>196</sup> *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) 675H. See also PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 329 fn 79.

<sup>197</sup> CG van der Merwe “Law of property (including mortgage and pledge)” 1979 *Annual Survey of South African Law* 217-257 246.

<sup>198</sup> CG van der Merwe “Law of property (including mortgage and pledge)” 1979 *Annual Survey of South African Law* 217-257 246.

way of necessity is created *simpliciter*,<sup>199</sup> and therefore, a route over which the right is exercised could be altered by the servient owner if he can afford to the dominant owner another route as convenient as the first route.<sup>200</sup> The altering cannot constitute a dispossession provided it is reasonable and does not prejudice the dominant owner.<sup>201</sup> The right of way of necessity can only be established along a specified or defined route if such a route is constituted by an order of court or by prescription.<sup>202</sup> Basically, a distinction is made between an application *de servitute constituenda* and an application *de servitute constituta*.<sup>203</sup> The former entails an application for a declaration of a general right of way of necessity; and the latter, entails an application for a specific route for the purpose of exercising the right of way of necessity.<sup>204</sup> It is not clear as to whether a specified right of way of necessity

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<sup>199</sup> *Wynne v Pope* [1960] 3 All SA 1 (C). See also *Wilhelm v Norton* 1935 EDL 143 152; CG van der Merwe "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1371. See in general CG van der Merwe & GF Lubbe "Noodweg" (1977) 40 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 111-125 121.

<sup>200</sup> *Wynne v Pope* [1960] 3 All SA 1 (C); CG Hall & EA Kellaway *Servitudes* (3<sup>rd</sup> ed 1973) 78.

<sup>201</sup> *Van Rhyn NO and Others v Fleurbaix Farm (Pty) Ltd* (A 488/2012) [2013] ZAWCHC 106 (8 August 2013) paras 23-24. In this case the respondent (dominant owner) used a spoliation remedy against the appellants (the servient owner) claiming back the use of an access route (they exercised as of a *simpliciter* right of way) which the servient owners had altered by closing and substituting with an alternative access route.

<sup>202</sup> *Wynne v Pope* [1960] 3 All SA 1 (C) 5. See also *Wilhelm v Norton* 1935 EDL 143 152; CG van der Merwe "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1371; CG Hall & EA Kellaway *Servitudes* (3<sup>rd</sup> ed 1973) 77.

<sup>203</sup> CG van der Merwe "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1371; CG van der Merwe & GF Lubbe "Noodweg" (1977) 40 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 111-125 121. See also *Wilhelm v Norton* 1935 EDL 143 152; *Wynne v Pope* [1960] 3 All SA 1 (C) 3 and in general CG van der Merwe *Sakereg* (2<sup>nd</sup> ed 1989) 490.

<sup>204</sup> CG van der Merwe "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1371; CG van der Merwe & GF Lubbe "Noodweg" (1977) 40 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 111-125 121; CG van der

can also be relocated like any ordinary right of way. Van der Merwe, however, simply argues that the principles governing the relocation of a right of way of necessity differs from the ones governing relocation of ordinary rights of way.<sup>205</sup> In the event it is possible to relocate a specified right of way of necessity, then one can infer that such relocation should be done following the guideline principles laid down in the Supreme Court of Appeal decision of *Linvestment CC v Hammersley and Another*.<sup>206</sup> In terms of that decision, the relocation of a specified servitude (ordinary servitude) can only be allowed if the servient owner is materially inconvenienced in the use of the servient tenement by the continued existence of the established route; the dominant owner would not be prejudiced by the relocation; and provided the costs of such relocation are borne by the servient owner.<sup>207</sup> One can add that relocation of a specified right of way of necessity may further require from the servient owner a court order allowing the relocation.

Like in the exercise of any ordinary servitude, the dominant owner likewise in the exercise of a right of way of necessity, over a particular route, must exercise such right with due regard for the servient owner's rights so as to cause the least inconvenience to the servient owner (the so-called *civiliter modo* principle).<sup>208</sup>

<sup>205</sup> Merwe *Sakereg* (2<sup>nd</sup> ed 1989) 490. See also *Wilhelm v Norton* 1935 EDL 143 152; *Wynne v Pope* [1960] 3 All SA 1 (C) 3.

<sup>206</sup> CG van der Merwe "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1372.

<sup>207</sup> [2008] 2 All SA 493 (SCA). See also H Mostert, A Pope, PJ Badenhorst, W Freedman, JM Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 245.

<sup>208</sup> *Linvestment CC v Hammersley and Another* [2008] 2 All SA 493 (SCA) 501 para 35. See also in general L Kiewitz *Relocation of a specified servitude of right of way* (2010) unpublished LLM thesis Stellenbosch University.

<sup>209</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 331; CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 (2<sup>nd</sup> ed 2010) para 544; CG van der Merwe *Sakereg* (2<sup>nd</sup> ed 1989) 466-467; H

Furthermore, the dominant owner also has a duty to repair and maintain the route over which he exercise his right of way, and should he allow such a route to become so eroded that he can no longer use it, he, including his successors in title, cannot claim a new way of necessity from his neighbours.<sup>209</sup>

### 2 3 5 3 Public road

In principle, a right of way of necessity is claimed for the purpose of connecting the dominant tenement with a public road.<sup>210</sup> Therefore, the dominant owner must establish that the road that he seeks connection to is indeed a public road.<sup>211</sup> South African law has always recognised two kinds of public roads,<sup>212</sup> namely the high roads (*viae publicae*) and neighbours' roads, otherwise called sufferance roads (*viae*

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Mostert, A Pope, PJ Badenhorst, W Freedman, JM Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 245. Regarding the correct meaning of the concept *civiliter modo*, see J Scott "A growing trend in source application by our courts illustrated by a recent judgment on right of way" (2013) 76 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 239-251 242-243 points out that in modern South African servitude law the Latin phrase *civiliter modo* is consistently read as a set of adverbs that qualify the conduct of the servitude holder, so that a servitude holder who acts reasonably is said to be acting in a civilised (*civiliter*) manner (*modo*). Scott points out that the word *modo*, particularly when used together with *dum*, means 'so long as' or 'provided that', with the effect that the phrase *civiliter modo* in *D* 8.1.9 (more fully *dum modo civilier servitatem exerceat*) means "provided that he exercise the servitude with due regard for the other party". Scott at 243 accepts that "the popular erroneous translation acts as a handy shorthand" for the longer phrase and will therefore probably survive.

<sup>209</sup> *Rudolph v Casojee* 1945 EDL 190 194.

<sup>210</sup> S van Leeuwen *Het Roomsche Hollandsche recht* (1783 edited and translated by CW Decker & JG Kotzé *Commentaries on Roman-Dutch law* 2<sup>nd</sup> ed 1921) 295 para 7.

<sup>211</sup> *Wilhelm v Norton* 1935 EDL 143 156.

<sup>212</sup> DP de Bruyn *The opinions of Grotius as contained in the Hollandsche consultatien en advisen* (1894) 425.

*vicinales).*<sup>213</sup> The former are constituted and declared as public roads by the relevant authorities<sup>214</sup> and maintained at public expense.<sup>215</sup> Public roads, in general, can be regarded as those roads that are there for the use by the public at large,<sup>216</sup> and they can be classified either as proclaimed or unproclaimed roads.<sup>217</sup> The former are further divided into main roads and divisional roads and they are proclaimed as such by the relevant authorities.<sup>218</sup>

Sufferance roads are roads that generally had been made by private persons over their own land,<sup>219</sup> leading to a town or village that had been used by others from time immemorial.<sup>220</sup> Through lapse of time the original purpose and institution of these roads were forgotten and their use became so common that almost all the roads had to be kept in repair and they ended up being regarded as public roads.<sup>221</sup>

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<sup>213</sup> DP de Bruyn *The opinions of Grotius as contained in the Hollandsche consultatien en advisen* (1894) 425; AFS Maasdorp *The introduction to Dutch jurisprudence of Hugo Grotius* (3<sup>rd</sup> ed 1903) 151 para 9-10. Grotius defines high roads as “roads common to all and which may be used by everyone, [with] the profits thereof going to the Crown”. On the other hand, he defines neighbours’ roads as “roads belonging to several neighbours in common, and may not be closed except by common consent, [with] the profits thereof going to neighbours”.

<sup>214</sup> DP de Bruyn *The opinions of Grotius as contained in the Hollandsche consultatien en advisen* (1894) 425.

<sup>215</sup> S van Leeuwen *Het Roomsche Hollandsch recht* (1783 edited and translated by CW Decker & JG Kotzé *Commentaries on Roman-Dutch law* 2<sup>nd</sup> ed 1921) 296 para 9.

<sup>216</sup> AFS Maasdorp *The institutes of Cape law: The law of things* (4<sup>th</sup> ed 1923) 204.

<sup>217</sup> AFS Maasdorp *The institutes of Cape law: The law of things* (4<sup>th</sup> ed 1923) 204.

<sup>218</sup> AFS Maasdorp *The institutes of Cape law: The law of things* (4<sup>th</sup> ed 1923) 204.

<sup>219</sup> *Wilhelm v Norton* 1935 EDL 143 156.

<sup>220</sup> DP de Bruyn *The opinions of Grotius as contained in the Hollandsche consultatien en advisen* (1894) 425; M Nathan *The common law of South Africa* vol 1 (1904) 471; AFS Maasdorp *The institutes of Cape law: The law of things* (4<sup>th</sup> ed 1923) 206. See also *Wilhelm v Norton* 1935 EDL 143 156: “In our law that would mean beyond the period of prescription...”.

<sup>221</sup> S van Leeuwen *Het Roomsche Hollandsch recht* (1783 edited and translated by CW Decker & JG Kotzé *Commentaries on Roman-Dutch law* 2<sup>nd</sup> ed 1921) 296 para 9. See also *Wilhelm v Norton* 1935 EDL 143 163.

Sufferance roads were also regarded as public roads if they were on private property and repaired by private individuals.<sup>222</sup> For a sufferance road to be deemed a public road Roman law required it to have been built by contributions from private individuals.<sup>223</sup> However, an exception applied if the road had been in existence since time immemorial.<sup>224</sup> If a land owner allows public money to be spent on his private road it could be assumed that he had dedicated such a road to the public.<sup>225</sup>

Legislation was introduced to regulate matters relating to public roads.<sup>226</sup> These included the classification, definition, construction, repair and maintenance of such roads.<sup>227</sup> Some of the earlier road legislation defined a public road as

“Every road, not being a proclaimed road, over which a right of way exists in favour of the public and which is or may be constructed for the use of wheeled vehicles.”<sup>228</sup>

The current National Road Traffic Act defines a public road as

“any road, street or thoroughfare or any other place (whether a thoroughfare or not) which is commonly used by the public or any section thereof or to which the

<sup>222</sup> *Wilhelm v Norton* 1935 EDL 143 156-157.

<sup>223</sup> *Wilhelm v Norton* 1935 EDL 143 157.

<sup>224</sup> *Wilhelm v Norton* 1935 EDL 143 163. The court also stated that the use by the public of a given road over private property for a long period could constitute a public road.

<sup>225</sup> *Wilhelm v Norton* 1935 EDL 143 164, citing Kay J in *Bourke v Davis* (1 Macq 455 and 457): “[T]he landowner who has permitted the expenditure cannot be heard to say that a roadway on which he has allowed public money to be spent is his private property ... the landowner ... by conduct inducing the expenditure of money on the track in question may be shown to have dedicated even a cul-de-sac to the public.”

<sup>226</sup> *Wilhelm v Norton* 1935 EDL 143 157, referring to Part XII of Ordinance 13 of 1917.

<sup>227</sup> *Wilhelm v Norton* 1935 EDL 143 157, referring to section 173 of the Road Ordinance 13 of 1917. Various legislative measures concerning roads were later introduced, including the Road Traffic Ordinance of 1966, Roads Ordinance 19 of 1976, Road Traffic Act 29 of 1989 and the current National Road Traffic Act 93 of 1996.

<sup>228</sup> *Wilhelm v Norton* 1935 EDL 143 157, referring to section 173 of the Road Ordinance 13 of 1917.

public or any section thereof has a right of access, and includes the verge of any such road, street or thoroughfare-, any bridge, ferry or drift traversed by any such road, street or thoroughfare; and any other work or object forming part of or connected with or belonging to such road, street or thoroughfare.”<sup>229</sup>

From the above, it is clear that the dominant owner must prove that the alleged public road that he seeks connection to is a public road recognised by law.

The above discussion on the need to prove that a way of necessity would provide access to a public road gives rise to two interesting questions. Firstly, it is unclear whether a claim for a right of way of necessity is only limited to connecting the landlocked land to a single transport system, namely public road.<sup>230</sup> Secondly, it is unclear whether such a claim for a right of way of necessity is limited to connecting the landlocked dominant tenement to public transport systems or it can also be given for any other purpose.<sup>231</sup>

Regarding the first question, in principle a right of way of necessity is mainly associated with connecting the dominant tenement to a public road. It is unclear whether this servitude can also be granted to connect the dominant tenement to other transport systems. Southwood argues that the institutional writers, with the exception of Van Leeuwen, seem not to recognise any other transport system except

<sup>229</sup> Section 1(iv) of the National Road Traffic Act 93 of 1996. This definition includes freeways as well as roadways (see section 1(xxii) and section 1(xiii) respectively). The latter section defines a “roadway” as “that portion of a road, street or thoroughfare improved, constructed or intended for vehicular traffic which is between the edges of the roadway”.

<sup>230</sup> *Illing v Woodhouse* (1923) 44 NPD 166. See also CG van der Merwe “The Louisiana right to forced passage compared with the South African way of necessity” (1999) 73 *Tulane Law Review* 1363-1413 1387.

<sup>231</sup> *Natal Parks, Game and Fish Preservation Board v Maritz* 1958 (4) SA 545 (N). See also JE Scholtens “Law of property (including mortgage and pledge)” 1958 *Annual Survey of South African Law* 108-126 117; CG van der Merwe “The Louisiana right to forced passage compared with the South African way of necessity” (1999) 73 *Tulane Law Review* 1363-1413 1388.

for public roads for the purposes of the right of way of necessity.<sup>232</sup> He argues that only Van Leeuwen recognised a right of way of necessity connecting a dominant tenement to public water.<sup>233</sup> Van der Merwe also argues that waterways might have played an important role in Holland during the seventeenth and eighteenth century in providing connection for landlocked properties.<sup>234</sup> Access to waterways is however, of little practical importance in South Africa, taking into account the country's "totally different traffic conditions", where there is only one navigable river found in the Eastern Cape.<sup>235</sup>

The Natal government recognised railways for the purposes of granting a right of way of necessity under its legislation,<sup>236</sup> which gave the Road Board the power to create such ways of necessity.<sup>237</sup> In *Illing v Woodhouse*,<sup>238</sup> the applicant claimed a way of necessity to a railway station and the court referred to section 17(b) of Road Board Act 35 of 1901, which reads as follows:

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<sup>232</sup> MD Southwood *The compulsory acquisition of rights* (2000) 108.

<sup>233</sup> MD Southwood *The compulsory acquisition of rights* (2000) 108; CG van der Merwe "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1387 and sources there cited in fn 165; S van Leeuwen *Het Roomsche Hollandsche recht* (1783 edited and translated by CW Decker & JG Kotzé *Commentaries on Roman-Dutch law* 2<sup>nd</sup> ed 1921) 295 para 7.

<sup>234</sup> CG van der Merwe "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1387.

<sup>235</sup> CG van der Merwe "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1387.

<sup>236</sup> Section 17(b) of the Road Board Act 35 of 1901. See also *Illing v Woodhouse* (1923) 44 NPD 166 170. See further MD Southwood *The compulsory acquisition of rights* (2000) 108.

<sup>237</sup> MD Southwood *The compulsory acquisition of rights* (2000) 96-97.

<sup>238</sup> (1923) 44 NPD 166 170. See also *Saner v Inanda Road Board* (1892) 13 NLR 225 226; CG van der Merwe "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1365; MD Southwood *The compulsory acquisition of rights* (2000) 96 fn 11.

"The expression 'by-road' as used in this Act means: ... (b) A way of necessity, including a reasonably necessary means of access to a public road or a railway station, stopping place or siding."

Despite the provision being criticised for being in conflict with the original common law principle of the right of way of necessity,<sup>239</sup> the court reached the conclusion that the law also recognised access to a railway station<sup>240</sup> and held that the applicant was therefore entitled to a reasonable necessary means of access to the station.<sup>241</sup>

The Board's powers to create such ways of necessity were finally taken away by the Road Ordinance 40 of 1978 (N)<sup>242</sup> and it appears that no cases have subsequently been reported concerning claims for a right of way of necessity to connect the dominant tenement to a railway transport system. It is argued that cases dealing with a right of way of necessity connecting landlocked land to other public transport systems are not in accordance with common law.<sup>243</sup> However, the fact that the institutional writers did not recognise other forms of public transport systems for the purposes of granting the right of way of necessity, and the fact that our legal system has always discussed a right of way of necessity in the context of public roads<sup>244</sup> does not necessarily mean that our courts should not consider them. Van der Merwe argues that a right of way of necessity should be granted considering the

<sup>239</sup> CG van der Merwe "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1387.

<sup>240</sup> *Illing v Woodhouse* (1923) 44 NPD 166 168: "Surely, if there is a railway station close to the man's farm, is he not entitled to reasonably necessary means of access to that station if he wants a station, just as if he wanted to get to a road he is entitled to reasonably necessary means of access to the road." See also CG Hall and EA Kellaway *Servitudes* (3<sup>rd</sup> ed 1973) 76.

<sup>241</sup> *Illing v Woodhouse* (1923) 44 NPD 166 170.

<sup>242</sup> MD Southwood *The compulsory acquisition of rights* (2000) 97.

<sup>243</sup> MD Southwood *The compulsory acquisition of rights* (2000) 108.

<sup>244</sup> CG van der Merwe "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1387.

needs of the landlocked dominant tenement irrespective of the mode of transport facility that the landlocked land is sought to be connected with.<sup>245</sup> It is therefore necessary for courts to take into account modern developments when deciding cases regarding the grant of right of way of necessity. One can agree with Southwood, who is of the view that courts are likely to grant a right of way of necessity connecting the dominant tenement to other public transport systems.<sup>246</sup> Southwood argues that there were no trains and airplanes in the 1600s.<sup>247</sup> It can therefore be argued that the mere fact that these transport systems did not exist at the time when the right of way of necessity was in force should not serve as a bar for recognising other forms of public transport systems for the purposes of granting the right of way of necessity. It is further argued that the application of an extension of the right of way of necessity to other forms of traffic facilities, particularly where the dominant owner has access to a public road, can be justified by the use of the dominant tenement, for instance its agricultural operations.<sup>248</sup>

Regarding the second question, South African case law has considered this question on numerous occasions, asking whether the aim of the right of way of necessity is limited to giving the dominant tenement access to public roads (public transport system).<sup>249</sup> In *Trautman NO v Poole*,<sup>250</sup> the court was faced with a similar

<sup>245</sup> CG van der Merwe "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1387.

<sup>246</sup> MD Southwood *The compulsory acquisition of rights* (2000) 109.

<sup>247</sup> MD Southwood *The compulsory acquisition of rights* (2000) 109.

<sup>248</sup> CG van der Merwe "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1387-1388.

<sup>249</sup> *Trautman NO v Poole* 1951 (3) SA 200 (C) 208B; *Natal Parks, Game and Fish Preservation Board v Maritz* 1958 (4) SA 545 (N). See also CG van der Merwe "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1387-1388.

question, namely whether the right of way of necessity could be granted over the servient tenement to enable the dominant owner to proceed to any other parts of his own property.<sup>251</sup> Steyn J could not find any authority under Roman-Dutch law to this effect, but assumed that the right of way of necessity could be granted under such circumstances.<sup>252</sup> A similar question arose in *Natal Parks, Game and Fish Preservation Board v Maritz*.<sup>253</sup> In that case the court had to decide whether the right of way of necessity was limited to a connection to a public road.<sup>254</sup> A portion of a game reserve was cut off from the remainder by a steep and deep gully,<sup>255</sup> making it difficult to reach.<sup>256</sup> Following numerous incidences of poaching, the appellant constructed a vehicle track in the reserve with the purpose of facilitating control of poachers, including trespassers and fire incidence.<sup>257</sup> However, this security measure could not be implemented on the cut-off portion due to the difficulty in question,<sup>258</sup> and as a result of this, poaching incidences escalated on that portion.<sup>259</sup> The appellant, the Natal Parks Board, therefore applied for a right of way of necessity over the respondent's property, to connect the cut-off portion with the

<sup>250</sup> 1951 (3) SA 200 (C).

<sup>251</sup> *Trautman NO v Poole* 1951 (3) SA 200 (C) 200E.

<sup>252</sup> *Trautman NO v Poole* 1951 (3) SA 200 (C) 208B. See also CG van der Merwe "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1387-1388.

<sup>253</sup> 1958 (4) SA 545 (N). See also JE Scholtens "Law of property (including mortgage and pledge)" 1958 *Annual Survey of South African Law* 108-126 117.

<sup>254</sup> 1958 (4) SA 545 (N) 550 A-B. See also JE Scholtens "Law of property (including mortgage and pledge)" 1958 *Annual Survey of South African Law* 108-126 117.

<sup>255</sup> *Natal Parks, Game and Fish Preservation Board v Maritz* 1958 (4) SA 545 (N) 548A.

<sup>256</sup> *Natal Parks, Game and Fish Preservation Board v Maritz* 1958 (4) SA 545 (N) 548A. See also CG van der Merwe "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1387-1388.

<sup>257</sup> *Natal Parks, Game and Fish Preservation Board v Maritz* 1958 (4) SA 545 (N) 548A.

<sup>258</sup> *Natal Parks, Game and Fish Preservation Board v Maritz* 1958 (4) SA 545 (N) 548A.

<sup>259</sup> *Natal Parks, Game and Fish Preservation Board v Maritz* 1958 (4) SA 545 (N) 548B.

remainder portion with the aim of establishing a ranger's station.<sup>260</sup> The respondent contended that the proposed way did not qualify as a common law right of way of necessity<sup>261</sup> for the reason that the dominant tenement was not landlocked and, most importantly, that the way was not sought to connect to the public road but for connecting the two portions with the aim of preventing poaching.<sup>262</sup> The court held that a right of way of necessity can also be granted for any other necessary purpose other than connecting the dominant tenement to a public road, dismissing the view in *Trautman NO v Poole*<sup>263</sup> that common law does not recognise such.<sup>264</sup> The court reached the conclusion that a necessary detour connecting the cut-off portion with the remainder of the reserve qualified as a justification for granting a right of way of necessity.<sup>265</sup>

<sup>260</sup> *Natal Parks, Game and Fish Preservation Board v Maritz* 1958 (4) SA 545 (N) 548C-E. See also CG van der Merwe "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1387-1388.

<sup>261</sup> *Natal Parks, Game and Fish Preservation Board v Maritz* 1958 (4) SA 545 (N) 550A.

<sup>262</sup> *Natal Parks, Game and Fish Preservation Board v Maritz* 1958 (4) SA 545 (N) 550A.

<sup>263</sup> 1951 (3) SA 200 (C).

<sup>264</sup> *Natal Parks, Game and Fish Preservation Board v Maritz* 1958 (4) SA 545 (N) 550D-E: "I cannot imagine that the common law would be so lacking in common sense as to deny a way of necessity in such a case. I can find no support for Mr. Will's (for the respondent) restrictive proposition in the Roman-Dutch authorities to which we were referred by counsel. I do not propose to discuss them in detail because they are conveniently summarised in Hall and Kellaway on Servitudes, 2nd ed. (by Mr. JUSTICE HALL) at p. 66; and Lee's Introduction to Roman-Dutch Law, 5th ed., p. 165, defines a way of necessity as 'a way to be used only for the harvest, for carrying a corpse to burial, or other necessary purpose, or a way of giving access to a public road.' See also MD Southwood *The compulsory acquisition of rights* (2000) 107; JE Scholtens "Law of property (including mortgage and pledge)" (1958) *Annual Survey of South African Law* 108-126 118; U Huber *Heedendaagse rechtsgeleertheyt* (translated by P Gane *The jurisprudence of my time* vol 1 1939) 330.

<sup>265</sup> *Natal Parks, Game and Fish Preservation Board v Maritz* 1958 (4) SA 545 (N) 550F. See also JE Scholtens "Law of property (including mortgage and pledge)" 1958 *Annual Survey of South African Law* 108-126 118.

Therefore, an argument can be made, on the strength of the above discussion that a right of way of necessity may be granted for any other necessary purpose than just connection to public transport systems.<sup>266</sup> Van der Merwe argues that this extension accords with the interests of society.<sup>267</sup> This extension also resemble the position in Louisiana, which shares the same Roman roots on a right of way of necessity with South African law.<sup>268</sup> The Louisiana Civil Code provides that a right of way of necessity can also be granted for the purpose of connecting the dominant tenement to public utilities,<sup>269</sup> such as electricity, water, sewer, gas, telephone, cable television, and other commonly used power and communication networks required for the operation of an ordinary household or business.<sup>270</sup>

#### **2 3 5 4     *The relevance of the use of the dominant tenement***

This section partly overlaps with the previous section although this one is mainly concerned with the question whether the granting of a right of way of necessity is restricted to land used for agricultural purposes. There are mixed views on this aspect. The Appellate Division in the *Van Rensburg* case could have easily cleared this uncertainty but according to Southwood it did not have to do so for the reason

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<sup>266</sup> For a similar argument, see also CG van der Merwe “The Louisiana right to forced passage compared with the South African way of necessity” (1999) 73 *Tulane Law Review* 1363-1413 1388-1389.

<sup>267</sup> CG van der Merwe “The Louisiana right to forced passage compared with the South African way of necessity” (1999) 73 *Tulane Law Review* 1363-1413 1387-1389.

<sup>268</sup> CG van der Merwe “The Louisiana right to forced passage compared with the South African way of necessity” (1999) 73 *Tulane Law Review* 1363-1413 1363, 1366, 1368.

<sup>269</sup> Louisiana Civil Code article 689: “The owner of an estate that has no access to a public road or utility may claim a right of passage over neighbouring property to the nearest public road or utility. He is bound to compensate his neighbour for the right of passage acquired and to indemnify his neighbour for the damage he may occasion.”

<sup>270</sup> Louisiana Civil Code article 696.1.

that the claimant in that case was a farmer.<sup>271</sup> There are divided views on this aspect. Some authorities argue that a right of way of necessity is mainly used in cases involving rural land used for agricultural purposes, whereas others argue that the purpose for which the land is used is irrelevant.

Huber<sup>272</sup> argues that neighbours are bound to allow the right of way of necessity for the sake of “saving agriculture”. Steyn J in *Trautman v Poole*<sup>273</sup> held that the right of way of necessity is limited to the necessity of the owner’s farming operations.<sup>274</sup> According to Steyn J there was no authority that allows the right of way of necessity for the purpose of allowing the public to use a specific portion of the dominant owner’s farm for camping purposes.<sup>275</sup> In *Beukes v Crous en ’n Ander*,<sup>276</sup> the court held that the owner of inaccessible land cannot make the burden on the servient tenement heavier by extending his activities to commercial or mining undertakings.<sup>277</sup> In *Natal Parks, Game and Fish Preservation Board v Maritz*,<sup>278</sup> Holmes J took a slight turn, holding that:

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<sup>271</sup> MD Southwood *The compulsory acquisition of rights* (2000) 100.

<sup>272</sup> U Huber *Heedendaagse rechtsgeleertheyt* (translated by P Gane *The jurisprudence of my time* vol 1 1939) 330. See also CG van der Merwe “The Louisiana right to forced passage compared with the South African way of necessity” (1999) 73 *Tulane Law Review* 1363-1413 1382.

<sup>273</sup> 1951 (3) SA 200 (C).

<sup>274</sup> *Trautman NO v Poole* 1951 (3) SA 200 (C) 207.

<sup>275</sup> *Trautman NO v Poole* 1951 (3) SA 200 (C) 207.

<sup>276</sup> 1975 (4) SA 215 (NC).

<sup>277</sup> *Beukes v Crous en ’n Ander* 1975 (4) SA 215 (NC) 221. See also CG van der Merwe “The Louisiana right to forced passage compared with the South African way of necessity” (1999) 73 *Tulane Law Review* 1363-1413 1391.

<sup>278</sup> 1958 (4) SA 545 (N).

"A way of necessity can be granted not merely to afford access to a public road but also to afford access to a tomb, for carrying the harvest and for 'any other necessary purpose'.<sup>279</sup>

It is clear from the above passage that Holmes J was trying to highlight that a right of way of necessity could be granted for "any other necessary purpose" besides its agricultural purpose. Lee<sup>280</sup> argues that the right of way of necessity could be provided for any "other necessary purposes". Southwood is not convinced that a right of way of necessity must be limited to farming operations.<sup>281</sup> He argues that there is no logical reason for restricting the use of a right of way of necessity to farming operations.<sup>282</sup> According to him disputes may also arise where the dominant owner proposes to use the dominant tenement for anything from a rudimentary dwelling to the most elaborate commercial enterprise.<sup>283</sup> He argues that although the Roman-Dutch authorities dealt with the right of way of necessity in the context of agriculture, none of them actually limited it to agricultural use.<sup>284</sup> He refers to *Lentz v Mullin*<sup>285</sup> and *Naude v Ecoman Investments en Andere*<sup>286</sup> where the respective decisions did not limit the right of way of necessity to agricultural land. In the latter case there was a change in the use of the first respondent's land (dominant tenement) from agricultural to tourism (public holiday resort). This change had the effect that the existing way of necessity over the applicant's farm (servient tenement) to the first respondent's farm had to carry more traffic. The court held that there was

<sup>279</sup> *Natal Parks, Game and Fish Preservation Board v Maritz* 1958 (4) SA 545 (N) 546.

<sup>280</sup> RW Lee *An introduction to Roman-Dutch law* (5<sup>th</sup> ed 1953) 16.

<sup>281</sup> MD Southwood *The compulsory acquisition of rights* (2000) 105-106.

<sup>282</sup> MD Southwood *The compulsory acquisition of rights* (2000) 106-107.

<sup>283</sup> MD Southwood *The compulsory acquisition of rights* (2000) 100.

<sup>284</sup> MD Southwood *The compulsory acquisition of rights* (2000) 105-106.

<sup>285</sup> 1921 EDC 268.

<sup>286</sup> 1994 (2) SA 95 (T) 99-101.

no reason why recognition could not be given to the first respondent's reasonable use requirements merely because the character of the use had changed from the time when the first (original) right of way of necessity vested.<sup>287</sup> Van der Merwe, adopting the Louisiana approach on the right of way of necessity, argues that the right of way of necessity can be established to accommodate not only the agricultural needs of the landlocked dominant tenement, but also the commercial as well as the residential needs.<sup>288</sup> He argues that the purpose for which the dominant tenement is used is irrelevant and it could be for agricultural, residential or any other use.<sup>289</sup> Regarding the use of the right of way of necessity in respect of residential land, the court in *Lewis v S D Turner Properties (Pty) Ltd and Others*<sup>290</sup> decided on a claim regarding the right of way of necessity in respect of residential properties. Although the court dismissed the application for an order declaring a certain servitude of way over the applicant's property to be a right of way of necessity, it is clear that had the applicant succeeded in its claim the court could have still ruled in its favour despite the properties in question being residential. Therefore, in light of the present day conditions and the authorities referred to above, one can conclude that a right of way of necessity can be granted for the benefit of land used for any purpose, and not just for agricultural purposes. The courts should, however, be careful not to overburden

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<sup>287</sup> *Naude v Ecoman Investments en Andere* 1994 (2) SA 95 (T) 102. See also CG van der Merwe & J Pienaar "Law of property (including mortgage and pledge)" 1994 *Annual Survey of South African Law* 296-353 331

<sup>288</sup> CG van der Merwe "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1412-1413. It appears that Louisiana law, just like French law, recognises a claim of a way of necessity for residential, commercial, agricultural and industrial exploitation of the dominant tenement: see 1389-1319.

<sup>289</sup> CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 (2<sup>nd</sup> ed 2010) para 560.

<sup>290</sup> 1993 (3) SA 738 (W).

the servient tenement, to avoid the exercise of this servitude contrary to the basic servitude principle *civiliter modo*.

### 2 3 5 5 Compensation

In principle, the dominant owner who seeks a permanent right of way of necessity must pay compensation to the servient owner. Regarding the determination of the amount of compensation payable, the dominant owner is required to pay a just or reasonable price.<sup>291</sup> In *Wilhelm v Norton*,<sup>292</sup> the court held that compensation must be in accordance with “Gluck’s measure”, thus “compensation must be in proportion to the advantage gained by the plaintiff and the disadvantages suffered by the defendant”.<sup>293</sup> As stated in *Wiles v Praeg*,<sup>294</sup> the disadvantage would include the servient owner’s need to fence the road and the inconvenience of being deprived of full enjoyment of his property.

The dominant owner and the servient owner may agree on the amount of compensation amongst themselves.<sup>295</sup> The dominant owner may even offer the

<sup>291</sup> CG Hall & EA Kellaway *Servitudes* (3<sup>rd</sup> ed 1973) 80; CG van der Merwe & MJ de Waal “Servitudes” in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 (2<sup>nd</sup> ed 2010) para 563; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* (5<sup>th</sup> ed 2006) 329; MD Southwood *The compulsory acquisition of rights* (2000) 113. See also *Neilson v Mahoud* 1925 EDL 26 33.

<sup>292</sup> 1935 EDL 143 152.

<sup>293</sup> *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) 665H and the sources cited there; *Wiles v Praeg* 1952 (1) SA 87 (T) 88B. See also CG van der Merwe “Law of property (including mortgage and pledge)” 1979 *Annual Survey of South African Law* 217-257 246; MD Southwood *The compulsory acquisition of rights* (2000) 114; CG Hall & EA Kellaway *Servitudes* (3<sup>rd</sup> ed 1973) 80.

<sup>294</sup> 1952 (1) SA 87 (T) 88C.

<sup>295</sup> See for example *Sanders NO and Another v Edwards NO and Others* 2003 (5) SA 8 (C) 10H: “Compensation for the right of way, if granted over the defendants’ property, was agreed by the parties at the trial in the sum of R7 500.”

servient owner an amount of compensation.<sup>296</sup> However, if the latter is not satisfied with the amount offered, he may produce information to the effect that the amount is not reasonable.<sup>297</sup> The servient owner's failure to produce the required information runs the risk of the court awarding the amount offered by the dominant owner.<sup>298</sup>

In *Van Rensburg v Coetzee*<sup>299</sup> Jansen JA held that it is impossible to determine the compensation that is payable without evidence regarding the nature and extent of the servitude demanded.<sup>300</sup> The court further held that the amount of compensation is not necessarily dependent on the value of land only, but other relevant factors could have an effect on the value of the servitude.<sup>301</sup> Such factors include the value of the servient tenement itself, the potential locality of the proposed way as well as other surrounding circumstances.<sup>302</sup> Regarding the value of the servient tenement the court in *Van Rensburg v Coetzee*<sup>303</sup> awarded the servient owner compensation equivalent to the market value of the surface area.<sup>304</sup> However, it is not the servient tenement itself which is effectively being sold, but the right of

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<sup>296</sup> *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) 677H.

<sup>297</sup> *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) 677H. See also CG van der Merwe "Law of property (including mortgage and pledge)" 1979 *Annual Survey of South African Law* 217-257 246; MD Southwood *The compulsory acquisition of rights* (2000) 114.

<sup>298</sup> *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) 677H. See also CG van der Merwe "Law of property (including mortgage and pledge)" 1979 *Annual Survey of South African Law* 217-257 246.

<sup>299</sup> 1979 (4) SA 655 (A).

<sup>300</sup> *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) 666A.

<sup>301</sup> *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) 664B.

<sup>302</sup> *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) 664B-C.

<sup>303</sup> 1979 (4) SA 655 (A).

<sup>304</sup> MD Southwood *The compulsory acquisition of rights* (2000) 114. See also *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) 680G.

servitude over it.<sup>305</sup> Southwood is of the view that the market value of the servitude must be the amount by which the dominant owner benefits.<sup>306</sup> He suggests that in determining the amount of compensation for the servitude, it must be established what the willing buyer would pay a willing seller for such a servitude.<sup>307</sup> The court in the *Van Rensburg* case just mentioned the other factors relevant for the determination of compensation but did not discuss them in detail.

## 2 3 6 Registration of the right of way of necessity

Praedial servitudes are limited real rights in land, which in terms of South African law must be registered in the deeds registry as soon as they are created.<sup>308</sup> These servitudes must be registered in terms of section 76 of the Deeds Registry Act<sup>309</sup> for such servitudes to have real effect. However, a right of way of necessity is an exceptional praedial servitude which does not necessarily require registration. The Appellate Division in the *Van Rensburg* case asked if it was necessary to have the right registered in the deeds registry for it to become a real right.<sup>310</sup> The Court, however, refrained from deciding this issue holding that there was no need for it to decide on the question.<sup>311</sup> Nevertheless, the court recommended that it is preferable, especially, for the acquirer of a permanent right of way of necessity to have the right

<sup>305</sup> MD Southwood *The compulsory acquisition of rights* (2000) 114. See also *Wilhelm v Norton* 1935 EDL 143 177 and particularly the following comment in *Wiles v Praeg* 1952 (1) SA 87 (T) 88A: "The quantum is a fair price for the servitude, not the value of the ground affected...".

<sup>306</sup> MD Southwood *The compulsory acquisition of rights* (2000) 114.

<sup>307</sup> MD Southwood *The compulsory acquisition of rights* (2000) 114.

<sup>308</sup> See section 63(1) of the Deeds Registry Act 47 of 1937.

<sup>309</sup> Act 47 of 1937.

<sup>310</sup> *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) 676D.

<sup>311</sup> *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) 676D. See also MD Southwood *The compulsory acquisition of rights* (2000) 115.

registered.<sup>312</sup> The same dictum was reiterated by Nugent JA in *Aventura Ltd v Jackson NO and Others* stating that it is usually desirable for a court order granting the right of way of necessity to be followed by the registration of a servitude to ensure that third parties have notice of the right of way.<sup>313</sup>

As a general rule, unregistered servitudes do not bind third parties unless such persons knew of its existence before entering into an agreement with the landowner.<sup>314</sup> Southwood<sup>315</sup> argues that the judicially enforced right of way of necessity without registration does not amount to a real right but to a mere personal right that does not bind the servient owner's successors in title. According to him, South African law only recognises a few exceptions to the rule of registration of real rights, which excludes the right of way of necessity.<sup>316</sup> Southwood seems to be wrong though. Van der Merwe and Lubbe argue that registration of the right of way of necessity is unnecessary for the very reason that it is enforced by a court order and its existence is dependent on the continued existence of a situation of necessity.<sup>317</sup> Van der Merwe argues that registration of the right way of necessity

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<sup>312</sup> *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) 676E. See also CG van der Merwe "Law of property (including mortgage and pledge)" 1979 *Annual Survey of South African Law* 217-257 247.

<sup>313</sup> *Aventura Ltd v Jackson NO and Others* 2007 (5) SA 497 (SCA) 500D.

<sup>314</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 85; H Mostert, A Pope, PJ Badenhorst, W Freedman, JM Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 62-63.

<sup>315</sup> MD Southwood *The compulsory acquisition of rights* (2000) 115.

<sup>316</sup> MD Southwood *The compulsory acquisition of rights* (2000) 115. The exceptions amongst others include prescription, marriage in community of property, and *fideicommissum*, expropriation, forfeiture, attachment, death of the owner. See in this regard, PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 82-83.

<sup>317</sup> CG van der Merwe & GF Lubbe "Noodweg" (1977) 40 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 111-125 122.

does not affect its enforceability against the world<sup>318</sup> and therefore the dominant owner is not bound by the public record doctrine.<sup>319</sup> Van der Merwe and Lubbe are correct in arguing that a court enforced servitude does not necessarily require registration. This argument is also supported by Maasdorp,<sup>320</sup> who argues that a court established servitude binds all the servient owners' successors in title, whether the servitude had been registered or not.

In conclusion, a right of way of necessity differs from other praedial servitude in that it does not necessarily have to be registered for it to be binding against the world. It is an exception to the rule on registration of real rights in land.

### 2 3 7 Termination of the right of way of necessity

The right of way of necessity differs from ordinary rights of way in its manner of termination.<sup>321</sup> Unlike ordinary servitudes, the right of way of necessity terminates when the situation of necessity ceases to exist.<sup>322</sup> This could be a situation where for

<sup>318</sup> CG van der Merwe "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1374.

<sup>319</sup> CG van der Merwe "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1374.

<sup>320</sup> AFS Maasdorp *The institutes of Cape law: The law of things* (4<sup>th</sup> ed 1923) 233.

<sup>321</sup> CG van der Merwe & JM Pienaar "The law of property (including real security)" 2007 *Annual Survey of South African Law* 961-1038 1030.

<sup>322</sup> CG van der Merwe & GF Lubbe "Noodweg" (1977) 40 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 111-125 125; CG van der Merwe "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1406; CG van der Merwe & JM Pienaar "The law of property (including real security)" 2007 *Annual Survey of South African Law* 961-1038 1030.

example a new public road is constructed adjacent to the enclosed land.<sup>323</sup> It could also be in instances where the economic activities that brought about the need for a right of way of necessity is terminated, for example, where agricultural activities are moved to another side of the dominant tenement that does not require the use of a right of way of necessity.<sup>324</sup>

If the situation of necessity ceases to exist, the servient owner can ask the dominant owner to cancel the servitude, if it was registered, and also to stop using it regardless of whether it was registered or not.<sup>325</sup> Alternatively, the servient owner can approach the court for a declaratory order lifting the right of way of necessity.<sup>326</sup> Otherwise, the right of way of necessity can also be terminated just like any other servitude, for example by merger,<sup>327</sup> agreement or expropriation.

## 24 Conclusion

The aim of this chapter was to give an overview on the law relating to the right of way of necessity, with the specific focus on the general principles. The chapter starts by tracing the origin of the South African law regarding the right of way of necessity. According to this chapter, the South African law on the right of way of necessity is

<sup>323</sup> CG van der Merwe & GF Lubbe “Noodweg” (1977) 40 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 111-125 125; CG van der Merwe “The Louisiana right to forced passage compared with the South African way of necessity” (1999) 73 *Tulane Law Review* 1363-1413 1406.

<sup>324</sup> CG van der Merwe & GF Lubbe “Noodweg” (1977) 40 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 111-125 125. See also CG van der Merwe “The Louisiana right to forced passage compared with the South African way of necessity” (1999) 73 *Tulane Law Review* 1363-1413 1406.

<sup>325</sup> MD Southwood *The compulsory acquisition of rights* (2000) 117.

<sup>326</sup> CG van der Merwe & GF Lubbe “Noodweg” (1977) 40 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 111-125 125; CG van der Merwe “The Louisiana right to forced passage compared with the South African way of necessity” (1999) 73 *Tulane Law Review* 1363-1413 1406.

<sup>327</sup> MD Southwood *The compulsory acquisition of rights* (2000) 117.

traced back to Roman law, which recognised the right of way to a family grave, and also to Germanic law, which recognised the road of egress. These two respective servitudes were adopted by the Roman-Dutch law and developed into a general right of way that includes all land which had no way out or did not abut on a high road. This was then received into South African law from Roman-Dutch law where it forms part of the law of servitudes falling under the category of praedial servitudes.

In the third part of the chapter, section 2 3 1 indicates that the right of way of necessity forms part of servitude law and is categorised under praedial servitudes. In that regard the right of way of necessity is a servitude that exists in respect of immovable property, either rural or urban. Section 2 3 2 identifies various forms of rights of way of necessity. In terms of this section, there are two kinds of rights of way of necessity, namely the permanent right of way and the temporary right of way. The two differ from each other depending on the nature and the extent of the situation of necessity, and in that the permanent right of way of necessity is granted against payment of reasonable compensation by the dominant owner to the servient owner. The rest of the chapter discusses the permanent right of way of necessity.

Section 2 3 3 of the chapter discusses the manner in which the right of way of necessity is established. This section illustrates how the right of way of necessity differs from other ordinary servitudes in its mode of creation. Unlike other rights of way that are created by contract, the right of way of necessity is established by operation of law immediately when the dominant tenement becomes landlocked. This right is, however, enforceable against a specific servient tenement by way of a court order, without the servient owner's consent. Courts enforce this servitude by confirming the existence of the right and allocating and defining a route upon which the right must be exercised. The general trend is that the dominant owner may only

approach the court for enforcement of this servitude after an unsuccessful attempt to get a negotiated right of way by contract.

The next section, namely section 2 3 4 discusses requirements that must be satisfied before the dominant owner could claim a right of way of necessity. It is argued in this section that the dominant owner must prove two requirements, namely landlocking and necessity. This entails showing the court that her property is enclosed in a way that she has no way out to a public road or that an alternative way is available but is inadequate to enable her reasonable access to the public road. Again, she must establish and prove to the court why it is necessary for her to be granted access to a public road through a route over the servient tenement. The dominant owner could for instance show that the access is necessary for conducting viable farming operations. This section indicates that an owner who through her own fault, design or negligence cut her land off from public road access would not be entitled to a right of way of necessity. However, courts have in certain instances ignored this principle.

Section 2 3 5 discusses ancillary conditions precedent to the enforcement of the right of way of necessity. This section looks at specific aspects without which the right of way of necessity cannot be exercised. First of all, regarding the route, the court must determine the shortest route that causes the least amount of burden to the servient owner. In doing so courts are guided by the principle "*ter naaste lage en minster schade*," which entails that the right of way of necessity must traverse the neighbouring land that lies between the landlocked land and the nearest public road in the least damaging or burdensome place. Where a court finds the identified servient tenement unsuitable to carry the right of way of necessity either because it is impassable or because it will be detrimentally affected, it may refuse to declare the

right of way of necessity enforceable and may refer the dominant owner to seek access elsewhere. Secondly, regarding the condition of the public road, the identified route over the servient tenement must connect the dominant tenement to a public road. The road which the dominant owner seeks connection to must be recognised as a public road. However, this section argues that the right of way of necessity could also be granted to connect to other public transport systems besides a public road: the right of way of necessity should be granted for connection to any public transport system and not just for connection to a public road. Thirdly, the section considers the relevance of the use of the dominant tenement, and asks whether the granting of the right of way of necessity is restricted to land used for a specific purpose, namely agricultural purposes. The section concludes that the right of way of necessity may be granted for the benefit of land used for any purpose, and not just for agricultural purposes. Lastly, the section considers the compensation requirement and shows that a permanent right of way of necessity can only be granted upon payment of compensation by the dominant owner to the servient owner. It further sets out how the amount of compensation is determined. The court in most instances determines the amount of compensation payable, but the parties are not precluded from agreeing on the amount of compensation.

Section 236 considers whether registration of the right of way of necessity is necessary. This section shows the real nature of the right of way of necessity. It is argued in this section that a right of way of necessity like all other praedial servitudes is a limited real right in land, which in principle must be registered in the deeds office. However, this section shows that the right of way of necessity differs from other praedial servitudes in that it is not necessary for it to be registered to have real effect against the world. In other words, the dominant owner and all his successors in title

are not bound by the public record. Nevertheless, it is still recommended that the right be registered.

Lastly, section 2 3 7 discusses the manner in which the right of way of necessity is terminated. It is indicated that this servitude is mostly terminated when the situation of necessity ceases to exist. One of the examples given in this section is a situation where a new public road is built adjacent to the dominant tenement. In such an instance, the servient owner may ask the dominant owner to cancel the servitude and to stop using it regardless of whether it's registered or not. Alternatively, the servient owner may approach the court for a declaratory order lifting the right of way of necessity.

## Chapter 3: Justification of the right of way of necessity

### 3 1 Introduction

This chapter evaluates the reasons justifying the possibility of acquiring a right of way of necessity and the reasons justifying the enforcement thereof by a court order instead of the usual acquisition of servitude by agreement. The chapter starts by showing the practical necessity for having the right of way of necessity in certain circumstances. Following this, the chapter discusses the public policy reasons that are the primary basis for the right of way of necessity. In the process, the chapter refers to two conflicting jurisprudential approaches regarding the right of way of necessity as discussed by the Dutch scholar Van Apeldoorn in his treatment of the Dutch right of way of necessity.<sup>1</sup> Van Apeldoorn distinguishes between what he calls the “individualistic” and the “social” approach.<sup>2</sup> The individualistic approach offers a strict view of the right of way of necessity, based on the individualistic nature of ownership. On the other hand, the social approach favours a more flexible approach towards the right of way of necessity on the basis of social reasons. In this perspective, the chapter considers the approach followed in South African case law, relying mainly on the work of Van der Merwe and Lubbe<sup>3</sup> and early case law. It is important to ascertain the approach adopted by the courts and the reasons behind each approach, since these reasons could justify the power of the courts to grant a

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<sup>1</sup> LJ van Apeldoorn “De nood- of uitweg” (1937) 3512 *Weekblad Voor Privaatrecht Notaris-Ambt en Registratie* 185-187. See also *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) 670G-H.

<sup>2</sup> LJ van Apeldoorn “De nood- of uitweg” (1937) 3512 *Weekblad Voor Privaatrecht Notaris-Ambt en Registratie* 185-187 185.

<sup>3</sup> CG van der Merwe & GF Lubbe “Noodweg” (1977) 40 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 111-125.

right of way of necessity and the negative effects that has on the freedom of ownership. In Chapter four it is shown that the validity of the justification for the right of way of necessity is an important consideration in deciding whether the deprivation of the servient landowner's property that is brought about by an award of a right of way of necessity is arbitrary or not.

Finally, this chapter also considers the right of way of necessity from a law and economics perspective. This part of the chapter focuses on the Coase theorem,<sup>4</sup> together with Calabresi and Melamed's distinction between property rules and liability rules.<sup>5</sup> Law and economics theory is useful in determining the justification for legal rules that promote efficiency or utility by awarding resources to those who value them most<sup>6</sup> and rules that discourage conduct that wastes resources.<sup>7</sup> The implications of this theory are considered to determine when courts are justified to enforce a right of way of necessity against the will of the servient landowner.

### **3 2 Why is the right of way of necessity necessary?**

This section seeks to show the practical need for an owner of landlocked land to have a right of way of necessity. The right of way of necessity has proved to be of

<sup>4</sup> RH Coase "The problem of social cost" (1960) 3 *Journal of Law & Economics* 1-44.

<sup>5</sup> This part of law and economics theory regarding the rules for transferring rights was developed by G Calabresi & AD Melamed "Property rules, liability rules, and inalienability: One view of the cathedral" (1972) 85 *Harvard Law Review* 1089-1128, extending the Coase theorem formulated by RH Coase "The problem of social cost" (1960) 3 *Journal of Law & Economics* 1-44. See TJ Miceli "Property" in JG Backhaus (ed) *The Elgar companion to law and economics* (2<sup>nd</sup> ed 2005) 246-260 249.

<sup>6</sup> TJ Miceli "Property" in JG Backhaus (ed) *The Elgar companion to law and economics* (2<sup>nd</sup> ed 2005) 246-260 248; EJ Marais *Acquisitive prescription in view of the property clause* (2011) unpublished LLD thesis Stellenbosch University 216.

<sup>7</sup> EJ Marais *Acquisitive prescription in view of the property clause* (2011) unpublished LLD thesis Stellenbosch University 216.

great practical importance in promoting the efficient use of landlocked land for agricultural,<sup>8</sup> mining, tourism and habitation purposes, as is evident from facts of the following decided cases.

The right of way of necessity has always been associated with the efficient use of landlocked agricultural land. The Appellate Division in *Van Rensburg v Coetze*<sup>9</sup> stated that a right of way of necessity must be able to assist the dominant owner of landlocked land, if he is a farmer, to continue with viable farming operations. This servitude is necessary for landlocked agricultural land which requires access to a public road for regular entrance and exit of agricultural implements,<sup>10</sup> and also for purposes of transporting farm produce to the market. In *Illing v Woodhouse*,<sup>11</sup> the court also granted the right of way of necessity over the servient owner's farm in favour of the dominant owner (applicant), a farmer. The dominant owner required the right of way for purposes of transporting his anticipated substantial crop harvest to the railway station. Furthermore, the court in *Sanders NO and Another v Edwards NO and Others*,<sup>12</sup> granted the dominant owners a right of way of necessity, which was necessary for them to conduct extensive protea farming operations.

The right of way of necessity has also been granted in favour of landlocked land used for mining purposes. This is evident from *SA Yster en Staal Industriële*

<sup>8</sup> See in this regard MJ de Waal "Servitudes" in R Zimmermann & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785-817 806. See also *Van Rensburg v Coetze* 1979 (4) SA 655 (A) 674B, where the role of land in South Africa's farming activities was mentioned in passing.

<sup>9</sup> *Van Rensburg v Coetze* 1979 (4) SA 655 (A) 671E.

<sup>10</sup> *Van Rensburg v Coetze* 1979 (4) SA 655 (A) 671E.

<sup>11</sup> (1923) 44 NPD 166. In this case the right of way of necessity was claimed in terms of the Natal Road Board Law 36 of 1888, sec 17(b), which provided that: "The expression 'by-road' as used in this Act means: ... (b) A way of necessity, including a reasonably necessary means of access to a public road or a railway station, stopping place or siding." See *Illing v Woodhouse* (1923) 44 NPD 166 170.

<sup>12</sup> *Sanders NO and Another v Edwards NO and Others* 2003 (5) SA 8 (C).

*Korporasie Bpk v Van der Merwe.*<sup>13</sup> In that case the court granted the dominant owner the right of way of necessity to connect its land to a public road for the purposes of conducting mining activities. This servitude has also been established in favour of landlocked land used for production, tourism and residential purposes. For instance, in *Saner v Inanda Road Board*,<sup>14</sup> the court confirmed the decision by the Road Board to reopen a road on the servient owner's land in favour of the dominant owner, who required the road to connect his landlocked land to a public road to transport his factory products (sugar) to a closer railway station. The court acknowledged that access to the road in question was necessary for the owner of a "large central sugar-factory" to conduct his business operations.<sup>15</sup> In *Naudé v Ecoman Investments en Andere*,<sup>16</sup> the right of way of necessity was granted to enable the use of the dominant tenement for tourism purposes. In *Jackson v Aventura Ltd*<sup>17</sup> the court granted the right of way of necessity in favour of plaintiffs who sought the servitude for the purposes of constructing a road intended to provide vehicular access to their landlocked land, upon which they intended to erect residential dwellings.<sup>18</sup>

The above discussion indicates the need for having a right of way of necessity in different sets of circumstances where the owner of landlocked land needs access to the public transport systems. Without this servitude, the owner of landlocked land could suffer great inconvenience, particularly if the economically efficient use of such

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<sup>13</sup> [1984] 2 All SA 403 (A).

<sup>14</sup> (1892) 13 NLR 227.

<sup>15</sup> (1892) 13 NLR 227.

<sup>16</sup> 1994 (2) SA 95 (T) 99-101.

<sup>17</sup> *Jackson v Aventura Ltd* [2005] 2 All SA 518 (C).

<sup>18</sup> See also in this regard *Neilson v Mahoud* 1925 EDL 26, where the court granted the defendant (dominant owner) a right of way of necessity over the plaintiffs land to enable him (dominant owner) access in and out of his farm dwelling.

land is impossible or not viable without access to the public transport systems. The lack of access to the public transport system could result in the removal of the landlocked land from commercial, public and private use,<sup>19</sup> and as such no landowner would want to reside on or conduct business in an inaccessible location.

### **3.3 Public policy and the right of way of necessity**

The previous section showed the practical need for making a right of way of necessity available to the owner of landlocked land in certain situations. This section takes the discussion further and considers the basis for the right of way of necessity. In other words, this section deals with the justifications for having a right of way of necessity and also for allowing the courts to enforce this servitude. Servitudes like a right of way are normally acquired by way of agreement between the relevant landowners, and therefore it is necessary to determine whether it is justified to allow the courts to grant such a servitude in the absence of agreement, or even against the will of the servient landowner. The reasons for acknowledging this possibility in the form of a right of way of necessity that is acquired by operation of law, and for allowing the courts to grant such a right in individual cases are mainly based on policy considerations. These policy considerations and the arguments based on them are considered in this section of the chapter.

South African law and a few other jurisdictions<sup>20</sup> recognise public policy as the basis for granting a right of way of necessity by operation of law, in other words

<sup>19</sup> CG van der Merwe "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1369.

<sup>20</sup> For instance, the US states of Louisiana, Maryland and Vermont. See in this regard Anonymous "Way of necessity: *Hancock v Henderson*" (1965) 25 *Maryland Law Review* 254-259 258. See also

without agreement by the relevant parties. Public policy in this sense is particularly concerned with ensuring or promoting the efficient use of land.<sup>21</sup> In terms of public policy, valuable land situated in desirable and strategic areas should not be taken out of use and commerce,<sup>22</sup> and for that reason the law discourages sterilisation of land due to insufficient access to the public transport networks.<sup>23</sup> In simple terms, public policy favours the full utilisation of valuable land and discourages the possible loss of efficient use of that land due to landlocking.<sup>24</sup>

This policy argument is similar to the one advanced by Kiewitz<sup>25</sup> in her discussion of the decision in *Linvestment CC v Hammersley (Linvestment)*<sup>26</sup> concerning the unilateral relocation of a specified servitude of right of way. The policy reasons justifying the right of way of necessity are related to the ones advanced for allowing unilateral relocation of a specified servitude of right of way. In *Linvestment* the court established the principle that allows for the unilateral relocation of a specified servitude of right of way. According to this principle, the

*Rockholt v Keaty* 237 So2d 633 (La 1970) 668; *Joyce Tenney v Town of Athens et al* 987 A2d 337 (Vt 2009) para 1.

<sup>21</sup> See in general CG van der Merwe “The Louisiana right to forced passage compared with the South African way of necessity” (1999) 73 *Tulane Law Review* 1363-1413 1369; MD Southwood *The compulsory acquisition of rights* (2000) 99; Anonymous “Way of necessity: *Hancock v Henderson*” (1965) 25 *Maryland Law Review* 254-259 258. See also *Rockholt v Keaty* 237 So2d 633 (La 1970) 668; *Joyce Tenney v Town of Athens et al* 987 A2d 337 (Vt 2009) para 1.

<sup>22</sup> CG van der Merwe “The Louisiana right to forced passage compared with the South African way of necessity” (1999) 73 *Tulane Law Review* 1363-1413 1369. See also *Rockholt v Keaty* 237 So2d 633 (La 1970) 668, a Louisiana decision upon which Van der Merwe founds his argument.

<sup>23</sup> MD Southwood *The compulsory acquisition of rights* (2000) 99. See also Anonymous “Way of necessity: *Hancock v Henderson*” (1965) 25 *Maryland Law Review* 254-259 258.

<sup>24</sup> Anonymous “Way of necessity: *Hancock v Henderson*” (1965) 25 *Maryland Law Review* 254-259 258.

<sup>25</sup> L Kiewitz *Relocation of a specified servitude of right of way* (2010) unpublished LLM thesis Stellenbosch University.

<sup>26</sup> [2008] 2 All SA 493 (SCA).

landowner concerned (servient owner) can unilaterally relocate a specified servitude of right of way, provided that she is or will be materially inconvenienced in the use of her property by the continued existence of that specified servitude in the present location, that the relocation occurs on the servient land, that the relocation will not materially prejudice the affected land owner (dominant owner), that the servient owner pays all the costs involved in the relocation of the servitude, and that the relocation is ordered by a court after having considered all these factors.<sup>27</sup>

The *Linvestment* decision did not concern a right of way of necessity but a mutually agreed servitude of right of way, but this decision is still relevant because both the right of way of necessity and the unilateral relocation principle concern forced transfer of property rights, based on similar policy reasons. Like a grant of a right of way of necessity, the unilateral relocation of a specified servitude of right of way is concerned with the efficient use of the affected land. According to Kiewitz, unilateral relocation is justified when it helps increase the value of the land by encouraging the landowner to make improvements on the land and to use it efficiently.<sup>28</sup> It makes the landowner better off by enabling her to make use of her land to its maximum utility,<sup>29</sup> without making the affected servient landowner worse off.<sup>30</sup> In other words, like the granting of a right way of necessity, unilateral relocation of a specified servitude of right of way will be allowed if the forced transfer of

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<sup>27</sup> *Linvestment CC v Hammersly* [2008] 2 All SA 493 (SCA) para 35. See also L Kiewitz *Relocation of a specified servitude of right of way* (2010) unpublished LLM thesis Stellenbosch University 2.

<sup>28</sup> L Kiewitz *Relocation of a specified servitude of right of way* (2010) unpublished LLM thesis Stellenbosch University 117.

<sup>29</sup> L Kiewitz *Relocation of a specified servitude of right of way* (2010) unpublished LLM thesis Stellenbosch University 118.

<sup>30</sup> L Kiewitz *Relocation of a specified servitude of right of way* (2010) unpublished LLM thesis Stellenbosch University 117.

property rights (by court order) will promote efficient use of the dominant land, without prejudicing the rights of the affected servient owner.<sup>31</sup>

However, an important aspect of the public policy argument is that it is not based purely on the individual benefit of the dominant owner who acquires a right of way of necessity or who is allowed to have the existing right of way relocated unilaterally. Public policy in this regard safeguards and benefits both the dominant owner's economic interests and the social interest. Regarding the economic interest of the dominant owner, Southwood argues that the right of way of necessity encourages the economic use of landlocked land.<sup>32</sup> Van der Merwe similarly argues that the right of way of necessity can, in principle, be granted to advance the economic exploitation of land in general.<sup>33</sup> To this extent, the granting of a right of way of necessity benefits the individual (dominant) landowner. Regarding the social interest, it is argued that the right of way of necessity is also based on social considerations concerned with encouraging the efficient use of land because society disapproves landlocking that renders land useless.<sup>34</sup> In other words, the demands of society do not allow for a person to hold land in perpetual idleness resulting from landlocking.<sup>35</sup> The right of way of necessity is viewed as a way to open the potential of land as a means of production and to allow the use of private property to benefit society.<sup>36</sup> In this perspective, the public policy-based reason for allowing a right of

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<sup>31</sup> L Kiewitz *Relocation of a specified servitude of right of way* (2010) unpublished LLM thesis Stellenbosch University 118.

<sup>32</sup> MD Southwood *The compulsory acquisition of rights* (2000) 106.

<sup>33</sup> CG van der Merwe & JM Pienaar "Law of property (including mortgage and pledge)" 2003 *Annual Survey of South African Law* 375-428 415. See also CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 (2<sup>nd</sup> ed 2010) para 564.

<sup>34</sup> *Joyce Tenney v Town of Athens et al* 987 A2d 337 (Vt 2009) para 1.

<sup>35</sup> *Joyce Tenney v Town of Athens et al* 987 A2d 337 (Vt 2009) para 1.

<sup>36</sup> *Joyce Tenney v Town of Athens et al* 987 A2d 337 (Vt 2009) para 1.

way of necessity does more than just to benefit a private individual in his capacity as landowner; it also benefits the public. In other words, the right of way of necessity fulfils both a primary and a secondary role, which includes the individual's interests and the public interest respectively. For example, unlocking landlocked land that could be used efficiently for agricultural or mining purposes does not only benefit the individual landowner (primary role), but also the public or society at large, including the state (secondary role). The unlocking of landlocked land in these situations creates employment opportunities for the public and the state derives tax benefits from the productive use of the land. However, if land lacks access to a public road it could become useless and the landowner could lose his business; jobs could be lost; the market may be deprived of the potential produce of the land;<sup>37</sup> and the state may not derive any benefits in the form of taxation or increased productivity.

In this regard it is worth considering the concept of "reasonableness," which is one of the criteria sometimes referred to in cases concerning the right of way of necessity. This concept was considered in *English v C J M Harmse Investments CC and Another*,<sup>38</sup> but the court cautioned against unnecessary interference with ownership rights unless the interference is necessitated by the dictates of reasonableness and fairness.<sup>39</sup> The court found that reasonableness was not the only criterion on the basis of which a permanent right of way of necessity is

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<sup>37</sup> *Joyce Tenney v Town of Athens et al* 987 A2d 337 (Vt 2009) para 1.

<sup>38</sup> 2007 (3) SA 415 (N).

<sup>39</sup> *English v C J M Harmse Investments CC and Another* 2007 (3) SA 415 (N) 422B-D. See also CG van der Merwe & JM Pienaar "The law of property (including real security)" 2007 *Annual Survey of South African Law* 961-1038 1028.

granted<sup>40</sup> and pointed out that reasonableness is not a justification for the right of way of necessity. In fact, the right of way of necessity is a servitude that is not based on reasonableness but on necessity. Reasonableness does feature in right of way of necessity cases, but only after a right of way of necessity has been declared by a court in favour of a particular dominant tenement on the basis of necessity. Once the right of way has been awarded on the basis of necessity, reasonableness features as one of the criteria used to determine the route upon the servient tenement that causes the smallest amount of damage to the servient tenement ('*ter naaste lage en minste schade*').

In sum, the reasons for having a right of way of necessity that is awarded by operation of law are largely based on public policy. In terms of public policy, valuable land should be used efficiently whenever possible and therefore, landlocked land should be opened up to the public road system to make efficient use possible. The policy reasons for the award of this right take into account that efficient use of land does not benefit the private land owner only, but also benefits society in general by raising productivity; creating valuable produce; creating jobs; and providing a basis for state revenue in the form of taxation.

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<sup>40</sup> *English v C J M Harmse Investments CC and Another* 2007 (3) SA 415 (N) 422E. See also CG van der Merwe & JM Pienaar "The law of property (including real security)" 2007 *Annual Survey of South African Law* 961-1038 1028.

### 3 4 Two jurisprudential views on the right of way of necessity

In Dutch law two jurisprudential approaches to the right of way of necessity are distinguished.<sup>41</sup> Van Apeldoorn distinguishes between the individualistic and the social view.<sup>42</sup>

Van Apeldoorn shows that supporters of the individualistic view argue that the right of way of necessity infringes on the individualistic nature of ownership.<sup>43</sup> They believe that protection of your own benefit is the best guarantee for general well-being and that state interference with private ownership should be restricted to the minimum.<sup>44</sup> Van Apeldoorn further states that supporters of this view strongly believe that individual ownership should not be limited, for it creates a hateful infringement.<sup>45</sup> In terms of this approach, rules regarding the right of way of necessity should be interpreted as strictly as possible and a right of way of necessity should only be allowed where it is absolutely necessary (complete isolation of property), for example where there is a state of emergency, and when the right of way of necessity could be

<sup>41</sup> See in this regard LJ van Apeldoorn “De nood- of uitweg” (1937) 3512 *Weekblad Voor Privaatrecht Notaris-Ambt en Registratie* 185-187.

<sup>42</sup> LJ van Apeldoorn “De nood-of uitweg” (1937) 3512 *Weekblad Voor Privaatrecht Notaris-Ambt en Registratie* 185-187. See also *Van Rensburg v Coetze* 1979 (4) SA 655 (A) 670G-H. Dutch law refers to a way of necessity as ‘*nood-* of *uitweg*’ but not ‘*noodweg*’. The former source is relevant for the fact that the South African legal institution of right of way of necessity originated from the Germanic law principles of *uitweg* and the Roman law principles of *iter ad sepulchrum*. See in this regard CG van der Merwe “The Louisiana right to forced passage compared with the South African way of necessity” (1999) 73 *Tulane Law Review* 1363-1413 1368.

<sup>43</sup> LJ van Apeldoorn “De nood-of uitweg” (1937) 3512 *Weekblad Voor Privaatrecht Notaris-Ambt en Registratie* 185-187 185.

<sup>44</sup> LJ van Apeldoorn “De nood-of uitweg” (1937) 3512 *Weekblad Voor Privaatrecht Notaris-Ambt en Registratie* 185-187 185.

<sup>45</sup> LJ van Apeldoorn “De nood- of uitweg” (1937) 3512 *Weekblad Voor Privaatrecht Notaris-Ambt en Registratie* 185-187 185.

established with minimum impact on the servient tenement.<sup>46</sup> It is clear from this discussion that supporters of the individualistic view argue strongly in favour of protection of ownership. They discourage any form of interference with property rights. For them ownership should only be limited in exceptional circumstances, which should be in the nature of an emergency.<sup>47</sup> Otherwise, the dominant owner has to negotiate with the servient owner to have a right of way over the servient tenement.<sup>48</sup> In this sense, followers of the individualistic approach disapprove of the law imposing a servitude of right of way upon the servient tenement without the consent of the servient owner. In other words, courts should not be allowed to enforce rights of way of necessity except in genuine emergency situations.

The social view offers a different perspective on the right of way of necessity. In terms of this approach, each piece of land should be exploited fully for the general benefit of everyone.<sup>49</sup> In terms of this view, the public interest prevails over individual interests<sup>50</sup> and accordingly the servient owner will have to deal with limitations on his rights if the public interest demands it.<sup>51</sup> Van Apeldoorn favours the social view; he argues that an owner of land has a social function to fulfil, which is to use his

<sup>46</sup> LJ van Apeldoorn “De nood-of uitweg” (1937) 3512 *Weekblad Voor Privaatrecht Notaris-Ambt en Registratie* 185-187 185.

<sup>47</sup> LJ van Apeldoorn “De nood-of uitweg” (1937) 3512 *Weekblad Voor Privaatrecht Notaris-Ambt en Registratie* 185-187 185.

<sup>48</sup> LJ van Apeldoorn “De nood- of uitweg” (1937) 3512 *Weekblad Voor Privaatrecht Notaris-Ambt en Registratie* 185-187 185.

<sup>49</sup> LJ van Apeldoorn “De nood- of uitweg” (1937) 3512 *Weekblad Voor Privaatrecht Notaris-Ambt en Registratie* 185-187 186. However, Van Apeldoorn states that a way of necessity is not only based on the general benefit (that a piece of land would otherwise lie unused) but also on Christian morals – as Jesus says: ‘We should do to others as we would like them to do to us,’ see page 185.

<sup>50</sup> LJ van Apeldoorn “De nood- of uitweg” (1937) 3512 *Weekblad Voor Privaatrecht Notaris-Ambt en Registratie* 185-187 187.

<sup>51</sup> LJ van Apeldoorn “De nood- of uitweg” (1937) 3512 *Weekblad Voor Privaatrecht Notaris-Ambt en Registratie* 185-187 187.

property in accordance with its purpose and for the benefit of society.<sup>52</sup> It follows that the social view allows limitations of ownership, as long as such limitations benefit the general public in some material way. This in effect means that imposing the right of way of necessity over the servient tenement is justified if it offers some kind of benefit to society. The social view argument effectively corresponds with the public policy argument discussed in the previous section.

One can draw the conclusion from these arguments that it is more easily justified to grant a right of way of necessity when there are public interests at stake. Therefore, this servitude is not just about the benefit of the individual owner but also about the benefits that efficient use of the land holds for the public in general. In other words, the efficient use of land by the dominant owner should offer some benefit to the public, for instance in the form of employment, food production, and tax, before the interference with private ownership that is implied by granting a right of way of necessity would be justified.

It can be said in conclusion that the individualistic and the social approach differ from each other in an important respect. The former is in principle against the granting of the right of way of necessity, whereas the latter is not opposed to it in principle. The individualistic approach is primarily concerned with the protection of private ownership against state interference, whereas the social approach is concerned with efficient use of land for the public benefit. The social approach

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<sup>52</sup> LJ van Apeldoorn "De nood- of uitweg" (1937) 3512 *Weekblad Voor Privaatrecht Notaris-Ambt en Registratie* 185-187 187. According to Van Apeldoorn the most authoritative Dutch jurists, except for Ulrich Huber, are silent regarding the question of the purpose which the land must serve for the purposes of the right of way of necessity. According to Van Apeldoorn only Huber says that the right of way of necessity serves the interests of agriculture. See U Huber *Heedendaagse rechtsgeleertheyt* (translated by P Gane *The jurisprudence of my time* vol 1 1939) 330 para 19.

features a public policy element about the public interest in ensuring or promoting efficient use of land.

In an influential article, Van der Merwe and Lubbe<sup>53</sup> demonstrate the importance of these two approaches for the South African law regarding the right of way of necessity. Arguing that both Roman law and Germanic law influenced the development of South African law on the right of way of necessity,<sup>54</sup> the authors show how the local law regarding the right of way of necessity developed from a strict, individualistic approach to a more flexible, social approach.<sup>55</sup> The strict approach was based on the traditional Roman concept of ownership as an individualistic, absolute and exclusive right,<sup>56</sup> which restricted the right of way of necessity to cases of absolute landlocking.<sup>57</sup> On this basis, followers of the traditional Roman concept of ownership, relying on the individualistic approach, requires absolute landlocking of land.<sup>58</sup> By contrast, the flexible Germanic community-based approach allows for the granting of the right of way of necessity not only in cases of absolute landlocking, but also where the community interests are at stake.<sup>59</sup> On this

<sup>53</sup> CG van der Merwe & GF Lubbe “Noodweg” (1977) 40 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 111-125.

<sup>54</sup> Hybrid in a sense of the influence of Roman law and Germanic law. See in this regard chapter 1 section 2 2.

<sup>55</sup> CG van der Merwe & GF Lubbe “Noodweg” (1977) 40 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 111-125 118-119.

<sup>56</sup> CG van der Merwe “The Louisiana right to forced passage compared with the South African way of necessity” (1999) 73 *Tulane Law Review* 1363-1413 1366.

<sup>57</sup> CG van der Merwe “The Louisiana right to forced passage compared with the South African way of necessity” (1999) 73 *Tulane Law Review* 1363-1413 1367.

<sup>58</sup> CG van der Merwe “The Louisiana right to forced passage compared with the South African way of necessity” (1999) 73 *Tulane Law Review* 1363-1413 1382.

<sup>59</sup> CG van der Merwe “The Louisiana right to forced passage compared with the South African way of necessity” (1999) 73 *Tulane Law Review* 1363-1413 1367-1368.

basis, followers of the community based approach argues that a right of way of necessity should not be limited to absolute landlocking, but also to cases where the landlocked land does have access to the public road, but the existing access is not reasonably sufficient for the efficient exploitation of the land (for example, for efficient conduct of viable farming operations).<sup>60</sup> Van der Merwe<sup>61</sup> argues that early South African case law seems to follow the individualistic approach to a right of way of necessity.

The granting of a right of way of necessity in spite of existing access to the dominant tenement would require a shift from an individualistic approach to a social approach that takes the needs of society into consideration.<sup>62</sup> More recently, South African case law has apparently formulated and approved circumstances under which a move from an individualistic approach to a social approach can be justified.<sup>63</sup> In essence, the dominant owner must be able to show that she has no reasonably sufficient access to the public transport systems for herself and her servants to enable her, if she is a farmer, to conduct viable farming operations.<sup>64</sup> This move to a social approach is based on public policy promoting the efficient use of land. This is evident from case law where a right of way of necessity has been granted to promote

<sup>60</sup> CG van der Merwe "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1382.

<sup>61</sup> CG van der Merwe "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1383.

<sup>62</sup> CG van der Merwe "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1383.

<sup>63</sup> This move was formulated in *Lentz v Mullins* 1921 EDC 268 and expressly approved in *Van Rensburg v Coetzee* 1979 (4) SA 655 (A). See also J Scott "The difficult process of applying easy principles: Three recent judgments on *via ex necessitate*" (2008) 41 *De Jure* 164-174 172; CG van der Merwe "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1385.

<sup>64</sup> *Lentz v Mullins* 1921 EDC 268 confirmed in *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) 671B.

the economic viability of a farming operation or to satisfy the operational needs of the dominant tenement.<sup>65</sup> According to Van der Merwe and Lubbe,<sup>66</sup> South African case law indicates a reconciliation of the individualistic approach with the social approach. Courts adopt the individualistic approach (protecting the institution of ownership) where the use of the existing access route does not cause serious prejudice for the dominant owner to justify the enforcement of a right of way of necessity on the servient tenement.<sup>67</sup> This approach involves evaluating the prejudicial effects of the existing access route for the continuing viable farming operations, compared to the prejudicial effects that would follow for the servient owner's property rights if the proposed right of way of necessity were granted. This is referred to as "an appropriate balance of convenience".<sup>68</sup> This criterion will only apply in cases where

<sup>65</sup> See *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) 670H-671. See also *Neilson v Mahoud* 1925 EDL 26 32-33; *Lentz v Mullins* 1921 EDC 268 270; *Illing v Woodhouse* 1923 NPD 166 170-171. See further CG van der Merwe "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1385.

<sup>66</sup> CG van der Merwe & GF Lubbe "Noodweg" (1977) 40 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 111-125 116. See also CG van der Merwe "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1385; *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) 670H-671.

<sup>67</sup> See for instance *English v C J M Harmse Investments and Another* 2007 (3) SA 415 (N), where the plaintiff was denied a permanent right of way of necessity for the reason that he placed no evidence before the court to the effect that absence of the sought permanent right of way of necessity would result in the inability to conduct viable farming operations. See also in this regard *Van Schalkwijk v Du Plessis and Others* (1900) 17 SC 454.

<sup>68</sup> *English v C J M Harmse Investments and Another* 2007 (3) SA 415 (N) 421I-J. See also J Scott "The difficult process of applying easy principles: Three recent judgments on *via ex necessitate*" (2008) 41 *De Jure* 164-174 167. See further CG van der Merwe "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1385.

something less than absolute necessity is considered,<sup>69</sup> in other words when the courts adopt the flexible approach to justify the granting of a right of way of necessity for purposes of promoting the efficient exploitation of land that is not absolutely landlocked but the efficient use of which is hampered by the insufficiency of the existing access.

Adopting a more flexible, social approach does not mean that rights of way of necessity would be granted without any consideration of the servient owner's property rights. In this respect, the conflicting interests of the affected landowners would have to be balanced as well. According to Van der Merwe, granting a servitude of right of way that imposes a heavy burden on the servient tenement will only be justified if the dominant owner is in desperate need of access to a public road.<sup>70</sup> In the same vein, Scott argues that a necessary corollary of the economic viability of the dominant tenement is the servient owner's peaceful occupation of her property, to which she has a right *qua* owner.<sup>71</sup> Therefore, even if the South African courts are in the process of shifting from an individualistic towards a social approach, with the implication that they would grant a right of way of necessity more readily than before, this does not mean that the interests of the affected servient owner would be ignored or underestimated.

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<sup>69</sup> CG van der Merwe & GF Lubbe "Noodweg" (1977) 40 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 111-125. See also *English v C J M Harmse Investments and Another* 2007 (3) SA 415 (N) 420C.

<sup>70</sup> CG van der Merwe "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1385.

<sup>71</sup> J Scott "The difficult process of applying easy principles: Three recent judgments on *via ex necessitate*" (2008) 41 *De Jure* 164-174 167.

### 3.5 Law and economics analysis of the right of way of necessity

This section analyses the justification of the right of way of necessity in view of the Coase theorem,<sup>72</sup> considered together with Calabresi and Melamed's distinction between property rules and liability rules.<sup>73</sup> In terms of the Coase theorem, when transaction costs are low, in other words, when it is easy to negotiate the transfer of property, the market will normally ensure that rights move to the person who wants them the most.<sup>74</sup> This in effect means that when transaction costs are low, parties can easily reach the most efficient outcome without state intervention.<sup>75</sup> What this means for servitude law is that, where a servitude of right of way can easily be acquired through negotiation, courts should not interfere and it should be left to the parties to reach a negotiated agreement. In other words, if a landlocked owner can easily negotiate with the servient owner for an ordinary servitude of right of way, there is no justification for courts to enforce a right of way of necessity by operation of law or in the absence of agreement. Sometimes there could be a market failure that results in significant transaction costs, thereby prohibiting the realisation of an efficient outcome through bargaining. Examples of market failures of this nature in

<sup>72</sup> RH Coase "The problem of social cost" (1960) 3 *Journal of Law & Economics* 1-44.

<sup>73</sup> G Calabresi & AD Melamed "Property rules, liability rules, and inalienability: One view of the cathedral" (1972) 85 *Harvard Law Review* 1089-1128. This is a theory regarding rules for transferring rights. This theory is viewed as an extension of the Coase theorem. See also TJ Miceli "Property" in JG Backhaus (ed) *The Elgar companion to law and economics* (2<sup>nd</sup> ed 2005) 246-260 249.

<sup>74</sup> See in general RH Coase "The problem of social cost" (1960) 3 *Journal of Law & Economics* 1-44 1-19. See also TJ Miceli "Property" in JG Backhaus (ed) *The Elgar companion to law and economics* (2<sup>nd</sup> ed 2005) 246-260 247. See further L Kiewitz *Relocation of a specified servitude of right of way* (2010) unpublished LLM thesis Stellenbosch University 125; EJ Marais *Acquisitive prescription in view of the property clause* (2011) unpublished LLD thesis Stellenbosch University 217.

<sup>75</sup> TJ Miceli "Property" in JG Backhaus (ed) *The Elgar companion to law and economics* (2<sup>nd</sup> ed 2005) 246-260 247. See also L Kiewitz *Relocation of a specified servitude of right of way* (2010) unpublished LLM thesis Stellenbosch University 125.

the context of servitude law would be situations where the dominant owner would have to negotiate with a very large number of potential servient owners who might be difficult to identify and contact; or a holdout situation where the potential servient owner abuses her position to enforce an unreasonably high price for the servitude. In terms of the Coase theorem, state intervention might be justified in those instances because high transaction costs prevent the parties from reaching an efficient outcome through negotiations.<sup>76</sup> For servitude law this means that enforcing a right of way of necessity by a court order will only be justified when it is impossible or unreasonably difficult for the dominant owner to negotiate for an ordinary right of way.<sup>77</sup>

In essence, the Coase theorem concerns the question when the state is justified to enforce a transfer of a servitude by way of court order, instead of leaving it to negotiations; according to the theorem state interference is only justified when transaction costs are too high and there is a “market failure”.<sup>78</sup> Ordinarily, the dominant owner should acquire a right of way through negotiations. The main implication of the Coase theorem is that courts are only justified to enforce a right of way of necessity once the dominant owner can prove that it is unreasonably difficult or impossible for her to acquire a negotiated right of way from the servient owner. In

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<sup>76</sup> See in general RH Coase “The problem of social cost” (1960) 3 *Journal of Law & Economics* 1-44 1-19. See also TJ Miceli “Property” in JG Backhaus (ed) *The Elgar companion to law and economics* (2<sup>nd</sup> ed 2005) 246-260 248.

<sup>77</sup> This could happen in a situation where the servient owner and the dominant owner are unable to reach an agreement regarding the creation of a servitude of right way for the benefit of the dominant tenement. For instance, this could be as a result of financial disagreements, cultural impediments, and procedural obstacles between the parties.

<sup>78</sup> For more on the concept market failure see JM Buchanan & WC Stubblebine “Externality” (1962) 29 *Economica* 371-384; TJ Miceli “Property” in JG Backhaus (ed) *The Elgar companion to law and economics* (2<sup>nd</sup> ed 2005) 246-260 246.

the absence of proof that the dominant owner has tried unsuccessfully to acquire an ordinary servitude of right of way by contract, the courts should therefore find that necessity has not been proved and should refuse to grant a right of way of necessity.

A similar result appears from consideration of Calabresi and Melamed's distinction between property rules and liability rules.<sup>79</sup> Property rules protect property rights strictly in so far as they do not allow any person to acquire property rights from the owner unless the owner voluntarily agrees to the transfer.<sup>80</sup> In other words, property rules protect property rights to the extent that the owner can insist on keeping them and refuse to transfer them to anyone else. In fact, property rules do not provide room for state intervention in the transfer of property rights.<sup>81</sup> Under property rules, any person who wishes to acquire property rights from the property owner must negotiate with the owner through a voluntary transaction of which the terms and conditions are agreed to by the owner.<sup>82</sup> Like property rules, liability rules protect property rights. However, unlike property rules, under liability rules a transfer of property rights is sometimes enforced against the will of the property owner, against payment of reasonable compensation, usually by way of an order of the

<sup>79</sup> This is regarded as a natural extension of Coase's analysis of the externality problem. See G Calabresi & AD Melamed "Property rules, liability rules, and inalienability: One view of the cathedral" (1972) 85 *Harvard Law Review* 1089-1128. See also TJ Miceli "Property" in JG Backhaus (ed) *The Elgar companion to law and economics* (2<sup>nd</sup> ed 2005) 246-260 247; A Bell & G Parchomovsky "Pliability rules" (2002) 101 *Michigan Law Review* 1-79 3.

<sup>80</sup> G Calabresi & AD Melamed "Property rules, liability rules, and inalienability: One view of the cathedral" (1972) 85 *Harvard Law Review* 1089-1105.

<sup>81</sup> G Calabresi & AD Melamed "Property rules, liability rules, and inalienability: One view of the cathedral" (1972) 85 *Harvard Law Review* 1089-1128 1092.

<sup>82</sup> G Calabresi & AD Melamed "Property rules, liability rules, and inalienability: One view of the cathedral" (1972) 85 *Harvard Law Review* 1089-1128 1092, 1105; L Kaplow & S Shavell "Property rules versus liability rules: An economic analysis" (1996) 109 *Harvard Law Review* 713-790 757; A Bell & G Parchomovsky "Pliability rules" (2002) 101 *Michigan Law Review* 1-79 3.

courts or other relevant bodies.<sup>83</sup> Liability rules allow for state intervention to ensure the efficient transfer of property rights, without the agreement and even against the will of the property owner, by replacing the property rights that are forcibly transferred with compensation in the form of a money payment.<sup>84</sup> The state normally intervenes in this way to impose obligations on individuals that would never have been created by way of private negotiations; the most obvious example being expropriation of private property for a public purpose and against payment of compensation.<sup>85</sup> The main difference between property rules and liability rules is that under property rules, the owner's consent is necessary for the transfer of property rights, whereas consent is not necessary under a liability rule and the owner is compensated for the forcible loss or transfer of property instead.<sup>86</sup>

The implication of this distinction for servitude law is that, in a system dominated by property rules, servitudes can only be created by way of voluntary agreement. By contrast, in a system that allows for liability rules servitudes may sometimes be created or transferred or extinguished by operation of law, without the consent of the affected owner, against payment of compensation. The common law right of way of necessity can therefore be seen as a liability rule that replaces a

<sup>83</sup> G Calabresi & AD Melamed "Property rules, liability rules, and inalienability: One view of the cathedral" (1972) 85 *Harvard Law Review* 1089-1128 1092, 1105-1106; L Kaplow & S Shavell "Property rules versus liability rules: An economic analysis" (1996) 109 *Harvard Law Review* 713-790 757; A Bell & G Parchomovsky "Pliability rules" (2002) 101 *Michigan Law Review* 1-79 3.

<sup>84</sup> G Calabresi & AD Melamed "Property rules, liability rules, and inalienability: One view of the cathedral" (1972) 85 *Harvard Law Review* 1089-1128 1092; L Kaplow & S Shavell "Property rules versus liability rules: An economic analysis" (1996) 109 *Harvard Law Review* 713-790 757 fn 143; A Bell & G Parchomovsky "Pliability rules" (2002) 101 *Michigan Law Review* 1-79 3.

<sup>85</sup> SE Sterk "Freedom from freedom of contract: The enduring value of servitude restrictions" (1985) 70 *Iowa Law Review* 615-661 631.

<sup>86</sup> TJ Miceli "Property" in JG Backhaus (ed) *The Elgar companion to law and economics* (2<sup>nd</sup> ed 2005) 246-260 249.

property rule and allows courts to impose a servitude of right way over the servient owner's tenement by court order, without the cooperation of and even against the will of the servient landowner, against payment of compensation.

Calabresi and Melamed argue that property rules should be preferred over liability rules when transaction costs are low, that is, when parties are able to bargain with one another on an amicable basis.<sup>87</sup> On the other hand, liability rules should be preferred when a transfer is desirable for some overriding reason (such as economic policy regarding efficient land use) but difficult to negotiate because transaction costs are high, that is, when parties are unable to engage in voluntary negotiations for some reason.<sup>88</sup> The implication of the distinction between the property rules and liability rules for servitude law is that courts should only be justified to enforce a right of way of necessity against the will of the servient owner where it has been proved that it is unreasonably difficult or impossible for the dominant owner to acquire a negotiated servitude of way by contract. This is the same conclusion that is indicated by the Coase theorem. Both the Coase theorem and the distinction between property rules and liability rules therefore indicate that enforcement of a right of way of necessity by court order is only justified where it is impossible for the dominant owner to negotiate for an ordinary servitude of way. The onus of proof should therefore, according to law and economics theory, rest on the party claiming a right of way of necessity to prove not only that the right of way is necessary for practical

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<sup>87</sup> G Calabresi & AD Melamed "Property rules, liability rules, and inalienability: One view of the cathedral" (1972) 85 *Harvard Law Review* 1089-1128 1106. See also A Bell & G Parchomovsky "Pliability rules" (2002) 101 *Michigan Law Review* 1-79 3; TJ Miceli "Property" in JG Backhaus (ed) *The Elgar companion to law and economics* (2<sup>nd</sup> ed 2005) 246-260 249.

<sup>88</sup> G Calabresi & AD Melamed "Property rules, liability rules, and inalienability: One view of the cathedral" (1972) 85 *Harvard Law Review* 1089-1128 1106. See also A Bell & G Parchomovsky "Pliability rules" (2002) 101 *Michigan Law Review* 1-79 3; TJ Miceli "Property" in JG Backhaus (ed) *The Elgar companion to law and economics* (2<sup>nd</sup> ed 2005) 246-260 249.

and policy reasons related to efficient use of the land, but also that she has tried, unsuccessfully, to secure an ordinary servitude of way by contract.

On the basis of the above law and economics discussion, the following conclusions can be made. The granting of a right of way of necessity by court order is only justified where it is difficult or unreasonably difficult for the dominant owner to acquire a negotiated right of way. Therefore, the dominant owner must satisfy the court that she could not reach an agreement with the servient owner for the creation of an ordinary servitude. Other than that, the granting of the right of way of necessity by court order cannot be justified; even when it has been proved that the right of way is necessary for practical and policy reasons. Insisting on a system of property rules corresponds with the individualistic approach discussed earlier because both advocate strong, absolute protection of individual property rights. By contrast, a system that allows some room for liability rules corresponds with the social approach discussed earlier because, as Calabresi and Melamed argue, society needs to fall back on liability rules in instances where transaction costs are too high to enable the transfer of property rights in the open market.<sup>89</sup> Accordingly, the choice of a liability rule is justified because it facilitates a combination of efficiency and distributive results which would be difficult to reach under a pure property rule.<sup>90</sup> In other words, where the dominant tenement is landlocked; there are sound practical and policy reasons to unlock the land for the sake of efficient use; and the owner is unable to secure a servitude of way by contract then courts should be able to intervene to

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<sup>89</sup> G Calabresi & AD Melamed "Property rules, liability rules, and inalienability: One view of the cathedral" (1972) 85 *Harvard Law Review* 1089-1128 1106.

<sup>90</sup> G Calabresi & AD Melamed "Property rules, liability rules, and inalienability: One view of the cathedral" (1972) 85 *Harvard Law Review* 1089-1128 1110.

assist the landlocked owner to get access to the public road that is reasonably necessary for efficient use of the land in the public interest.

### 3 6 Conclusion

This chapter investigates the justifications for allowing the courts to enforce the common law right of way necessity. As a point of departure, the chapter shows why it is necessary to have a right of way of necessity in certain circumstances for efficient land use.

The chapter shows that the right of way of necessity is based largely on considerations of public policy, which encourages the efficient use of land. However, granting a right of way of necessity by court order is not based on reasonableness; there is a significant difference between necessity and reasonableness. Public policy discourages landlocking of land because valuable land should never be taken out of use merely because of inaccessibility; it must always be possible to put land to efficient use. When promoting the efficient use of land, public policy simultaneously ensures promotion of both the individual's economic interest and the social interest in efficient use of the land. It is argued in the chapter that the right of way of necessity does more than just benefit the individual; instead, it also benefits the public by opening up the potential of land as a means of production and by allowing the efficient use of private property to benefit society through increased productivity; availability of valuable resources and products; creation of jobs; and establishing a tax basis.

The chapter supplements the policy argument by referring to two jurisprudential views or approaches to the right of way of necessity, the individualistic and the social

approach. The individualistic view offers a strict approach to the right of way of necessity and only allows the granting of this servitude under truly exceptional or emergency circumstances. This approach is primarily concerned about the protection of the institution of ownership. By contrast, the social approach offers a more flexible approach to the right of way of necessity. The social approach is primarily concerned about the social interest in the efficient use of land. It is more public-policy oriented and focuses on the efficient use of land that benefits the public. South African case law recognises both these approaches; it is shown in the chapter that the South Africa case law relating to the right of way of necessity has developed from a strict approach to a more flexible approach to allow the granting of a right of way of necessity for purposes of promoting the efficient use of land even in instances where existing access to the public transport systems is merely inadequate for efficient use of the land.

Besides the public policy and the social benefit argument, the chapter goes further to show in terms of law and economics theory under which circumstances the courts are justified in enforcing a right of way of necessity. The chapter considers the Coase theorem and Calabresi and Melamed's distinction between property rules and liability rules. The implication of the Coase theorem is that courts are not justified in enforcing a right of way of necessity where the dominant owner can secure a servitude of way by contract. Accordingly, courts will only be justified in enforcing the right where it is proved that it was impossible for the dominant owner to acquire a negotiated servitude of way. The same implication follows from the distinction between property rules and liability rules. For a system dominated by property rules, the dominant owner who needs a right of way to connect to a public road must negotiate with the servient owner. On the other hand, a system that allows room for

liability rules will also allow a right of way of necessity to be imposed by court order, against payment of compensation. The essence of the distinction between property rules and liability rules is that courts are not justified to impose a right of way of necessity if it is possible for the dominant owner to acquire a servitude of way through negotiation. It is only where it is impossible to acquire such a servitude through a contract that the courts can be justified to enforce it. The chapter shows that there is a link between a system that insists upon property rules and the individualistic approach and also between a system that allows room for liability rules and the social approach. Property rules and the individualistic approach are more concerned about the protection of property rights, whereas liability rules and the social approach are willing to allow the limitation of property rights for purposes of efficient use of land for the public benefit.

In essence, courts are justified to enforce a right of way of necessity in favour of landlocked land if such a servitude will ensure the efficient use of the land for the landowner and also for society in general. However, creating a right of way of necessity by court order will only be justified if the dominant owner can prove that she unsuccessfully tried to negotiate for a right of way with the servient owner. In other words, courts will only be justified in enforcing the right of way of necessity where an ordinary right of way could not be acquired through negotiations. Arguably, in absence of proof that the owner of the landlocked land have tried unsuccessfully to secure a servitude of way by contract, the requirement of necessity has not been satisfied.

## Chapter 4: Section 25 analysis

### 4 1 Introduction

The previous chapter has shown that there are valid policy reasons for having the right of way of necessity and for allowing courts to enforce this right.<sup>1</sup> What remains is to examine the possible constitutional implications of a court awarding a right of way of necessity in view of the justifications discussed in the previous chapter. This chapter considers two constitutional issues; firstly, whether the granting of a right of way of necessity by a court constitutes an arbitrary deprivation of the servient owner's property rights that may be in conflict with section 25(1) of the Constitution. Secondly, the chapter ascertains whether the granting of a right of way of necessity could also constitute expropriation of the servient owner's property rights in line with section 25(2) and 25(3) of the Constitution.

There are a few remarks in case law and academic literature about the enforcement of the right of way of necessity constituting an expropriation.<sup>2</sup> However, some authors argue that the granting of the right of way of necessity does not

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<sup>1</sup> See chapter 3 above.

<sup>2</sup> The Appellate Division in *Van Rensburg v Coetze* 1979 (4) SA 655 (A) 677H remarked that the court process granting a permanent right of way of necessity amounts to an expropriation of rights. In *Nhlabathi and Others v Fick* [2003] 2 All SA 323 (LCC) para 32, the Land Claims Court also remarked that: "A servitude imposed upon a landowner without his consent could well constitute an expropriation." Similar remarks were made by Hurt J in *English v CJM Harmse Investments CC & Another* 2007 (3) SA 415 (N) 421I when he observed that the granting of a permanent right of way of necessity is virtually similar to an expropriation of property. Moreover, A Gildenhuys *Onteieningsreg* (2<sup>nd</sup> ed 2001) 56-57 describes the process of granting a way of necessity against the will of the servient owner as a "forced acquisition of rights", which amounts to expropriation.

amount to expropriation.<sup>3</sup> The reason for the latter argument is that there is no common law authority for expropriation under South African law.<sup>4</sup> The authority to expropriate derives exclusively from statutory authority.<sup>5</sup> Consequently, courts do not have the inherent authority to expropriate property.<sup>6</sup> This in effect means that enforcing the common law regarding the right of way of necessity by a court order does not amount to expropriation under South African law. This chapter proceeds on the basis that the right of way of necessity does not amount to expropriation, and for that reason this chapter ignores the section 25(2) issue and focuses specifically on section 25(1).<sup>7</sup>

Section 25(1) provides that no one may be deprived of property unless the deprivation is in terms of law of general application, and that no law may allow

<sup>3</sup> See in this regard AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 346; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 565 fn 439; J Scott "The difficult process of applying easy principles: Three recent judgments on via ex necessitate" (2008) 41 *De Jure* 164-174 167.

<sup>4</sup> A Gildenhuys *Onteieningsreg* (2<sup>nd</sup> ed 2001) 93; A Gildenhuys & GL Grobler "Expropriation" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 10 Part 3 (2<sup>nd</sup> ed 2012) para 12. See also AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 346, 453.

<sup>5</sup> See in this regard *Joyce & McGregor Ltd v Cape Provincial Administration* 1946 AD 658 671; *Harvey v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP) para 81; *Pretoria City Council v Modimola* 1966 (3) SA 250 (A) 258H. See also AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 453; AJ Van der Walt "Constitutional property law" (2009) 2 *Juta's Quarterly Review* para 2.4; A Gildenhuys *Onteieningsreg* (2<sup>nd</sup> ed 2001) 10, 49; A Gildenhuys & GL Grobler "Expropriation" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 10 Part 3 (2<sup>nd</sup> ed 2012) para 12.

<sup>6</sup> *Ekurhuleni Metropolitan Municipality v Dada NO and Others* 2009 (4) SA 463 (SCA) para 14. See also AJ van der Walt "Constitutional property law" (2009) 2 *Juta's Quarterly Review* para 2.4, who argues: "[c]ourts can only have the power to order expropriation if that power is granted to them specifically, and that would be by way of exception."

<sup>7</sup> The granting of a right of way of necessity has in few occasions been associated with a section 25(1) deprivation. See in this regard *English v CJM Harmse Investments CC & Another* 2007 (3) SA 415 (N) 422B-D. See also MD Southwood *The compulsory acquisition of rights* (2000) 106.

arbitrary deprivation of property.<sup>8</sup> Using the methodology laid down in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* (“FNB decision”),<sup>9</sup> the chapter evaluates whether the granting and enforcing of a right of way of necessity is constitutionally valid. However, before proceeding with the constitutional analysis, this chapter starts by briefly discussing the implications of the right of way of necessity for the servient owner.

## **4 2 The implications of the right of way of necessity for the servient owner**

The right of way of necessity, including the manner of its establishment, has certain implications for the property rights of the servient owner. This common-law created and court-enforced servitude places restrictions on the property rights of the servient owner. Some authorities would refer to these restrictions as a detachment of entitlements from ownership.<sup>10</sup> It is said that the granting of a servitude detaches some of the entitlements resulting ownership from the ownership of the servient tenement and attaches them to another person’s property as part of his ownership of

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<sup>88</sup> Section 25(1) of the Constitution of the Republic of South Africa, 1996.

<sup>9</sup> 2002 (4) SA 768 (CC) para 60. See also PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* (5<sup>th</sup> ed 2006) 545.

<sup>10</sup> See in this regard *Jackson v Aventura Ltd* [2005] 2 All SA 518 (C) 526; *Maclear Divisional Council v Norton* 1918 CPD 16 23; *Willoughby’s Consolidated Co Ltd v Copthall Stores Ltd* 1913 AD 267 280; *In re Bennett & Green and the Bank of Africa, Limited* (1901) 22 NLR 404 414. For criticism of this view see CG van der Merwe & MJ de Waal “Servitudes” in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 (2<sup>nd</sup> ed 2010) para 540 fn 2; CG van der Merwe *Sakereg* 2 ed (1989) 458; MJ De Waal “Servitudes” in R Zimmermann & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785-817 786-787.

a separately owned dominant tenement (in case of praedial servitudes).<sup>11</sup> However, this argument is disputed by both Van der Merwe<sup>12</sup> and De Waal.<sup>13</sup> Both authors argue that ownership should never be regarded as a bundle of rights capable of being detached from ownership; instead, it should be seen as a single right with different entitlements that could be limited in some way.<sup>14</sup> They further argue that the bundle of right theory undermines the nature of servitude as a limited real right.<sup>15</sup> According to De Waal, the granting of a servitude should rather be described as a restriction being placed on one or more of the entitlements of ownership,<sup>16</sup> and according to Van der Merwe placing a restriction on entitlements does not deprive ownership of its character.<sup>17</sup> On the basis of Van der Merwe and De Waal's argument, one could argue that the granting of the right of way of necessity merely amounts to temporary restriction of some of the servient owner's entitlements, but not a separation of rights from ownership. Of course, restrictions created by the

<sup>11</sup> See in this regard *Dreyer Letterstedt's Executors* (1865) 5 Searle 88 99; *Consistory of Steytlerville v Bosman* (1893) 10 SC 67 69.

<sup>12</sup> CG van der Merwe *Sakereg* 2 ed (1989) 458; CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 (2<sup>nd</sup> ed 2010) para 540 fn 2.

<sup>13</sup> MJ De Waal "Servitudes" in R Zimmermann & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785-817 786-787.

<sup>14</sup> CG van der Merwe *Sakereg* 2 ed (1989) 458; CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 (2<sup>nd</sup> ed 2010) para 540 fn 2; MJ De Waal "Servitudes" in R Zimmermann & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785-817 786-787.

<sup>15</sup> CG van der Merwe *Sakereg* 2 ed (1989) 458; CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 (2<sup>nd</sup> ed 2010) para 540 fn 2; MJ De Waal "Servitudes" in R Zimmermann & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785-817 787.

<sup>16</sup> MJ De Waal "Servitudes" in R Zimmermann & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785-817 787.

<sup>17</sup> CG van der Merwe *Sakereg* (2<sup>nd</sup> ed 1989) 174; MJ De Waal "Servitudes" in R Zimmermann & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785-817 786-787.

granting of a permanent right of way of necessity would remain for as long as the situation of necessity exists.

This section identifies specific entitlements of ownership that are affected by the granting and enforcement of the right of way of necessity. Ownership consists of several entitlements, which amongst others include the entitlement to use and enjoyment, the entitlement to possess, the entitlement to dispose of the property, and the entitlement to exclude others.<sup>18</sup> The imposing of a right of way of necessity by operation of law places restrictions on some of these entitlements, specifically the entitlement of use and enjoyment, the entitlement to possess, the entitlement to dispose, and the entitlement to exclude others. The servient owner can no longer do as he pleases with his property. For instance, he cannot construct a building along the portion where the right of way of necessity is to be exercised.<sup>19</sup> The servient owner is also denied the entitlement to dispose freely over his servient tenement. The entitlement to dispose ordinarily allows the servient owner to have a say in all activities that take place on his land, including having a say as to what he wants or does not want on his land. However, the law restricts this entitlement in a way that it forces him to allow for the establishment of a servitude of way against payment of compensation. Forcing the servient owner to allow the dominant owner to come onto

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<sup>18</sup> Regarding entitlements of ownership see PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 92-93; CG van der Merwe & A Pope "Ownership" in F du Bois (ed) *Wille's Principles of South African law* (2007) 469-556 470; H Mostert, A Pope, PJ Badenhorst, W Freedman, JM Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 93; C Lewis "The modern concept of ownership of land" 1985 *Acta Juridica* 241-267. See also *Chetty v Naidoo* 1974 (3) SA 13 (A) 20B-C; *Pearly Beach Trust v Registrar of Deeds* 1990 (4) SA 614 (C) 617I.

<sup>19</sup> See for instance *Jackson v Aventura Ltd* [2005] 2 All SA 518 (C), where the servient owners raised an argument that the granting of the right of way of necessity over their land will affect their use and enjoyment of the land, on which they intended constructing two hotels, a conference center and restaurant.

and use the servient tenement restricts the servient owner's entitlement to exclude because he no longer has the power to decide who could enter onto his land. In terms of South African common law, the property owner is normally entitled to exclude all other persons from his land unless limited by the law.<sup>20</sup> The creation of the right of way of necessity restricts this entitlement and also affects the servient owner's entitlement to possess, being the entitlement to be in exclusive physical control of the servient tenement.<sup>21</sup>

It is therefore clear that the common law right of way of necessity limits the servient owner's ownership. Ownership is never absolute under South African law; it is subject to legal restrictions<sup>22</sup> imposed by both public and private law.<sup>23</sup> Public law restrictions are imposed in the interests of society as a whole or in the interests of a certain section of the community.<sup>24</sup> On the other hand, private law imposes restrictions in the interest of private individuals with the purpose of harmonising conflicting property interests, in particular between neighbouring owners.<sup>25</sup> Public law

<sup>20</sup> *Consolidated Diamond Mines of South West Africa Ltd v Administrator, SWA & Another* 1958 (4) SA 572 (A) 636D; *Victoria & Alfred Waterfront (Pty) Ltd and Another v Police Commissioner of the Western Cape and Others* 2004 (5) BCLR 538 (C) 542, 543-544.

<sup>21</sup> See C Lewis "The modern concept of ownership of land" 1985 *Acta Juridica* 241-267 254.

<sup>22</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 91, 93; CG van der Merwe & A Pope "Ownership" in F du Bois (ed) *Wille's Principles of South African law* (2007) 469-556 473.

<sup>23</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 91; H Mostert, A Pope, PJ Badenhorst, W Freedman, JM Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 94-95; CG van der Merwe & A Pope "Ownership" in F du Bois (ed) *Wille's Principles of South African law* (2007) 469-556 473.

<sup>24</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 95; H Mostert, A Pope, PJ Badenhorst, W Freedman, JM Pienaar & J van Wyk *The principles of the law of property in South Africa* (2010) 117; CG van der Merwe & A Pope "Ownership" in F du Bois (ed) *Wille's Principles of South African law* (2007) 469-556 473-474.

<sup>25</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 95; H Mostert, A Pope, PJ Badenhorst, W Freedman, JM Pienaar & J van Wyk *The principles*

limitations could include limitations imposed or required by the Constitution,<sup>26</sup> specifically section 25. It is therefore important to establish whether the limitations created by the common law right of way of necessity are valid in terms of section 25 of the Constitution. In other words, it is necessary to establish whether the interference with the servient owner's entitlements that results from the granting of a right of way of necessity over the servient land amounts to a deprivation in terms of section 25(1), and, if so, whether that deprivation is constitutionally valid.

### **4 3 The *FNB* methodology**

#### **4 3 1 Introduction**

The *FNB* decision<sup>27</sup> is currently the leading Constitutional Court judgement as far as the property clause is concerned.<sup>28</sup> This decision authoritatively explains the interpretation and application of the property clause in constitutional property disputes. The Court in *FNB* held that the function of the property clause is to both protect existing private property rights and promote the public interest, and at the same time to strike a proportionate balance between the two functions.<sup>29</sup> This is

*of the law of property in South Africa* (2010) 132; CG van der Merwe & A Pope "Ownership" in F du Bois (ed) *Wille's Principles of South African law* (2007) 469-556 476.

<sup>26</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) 95.

<sup>27</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC).

<sup>28</sup> See the remarks by Nkabinde J in *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another* 2009 (6) SA 391 (CC) para 35, where she describes the *FNB* decision as the leading judgement regarding the property clause in the Constitution.

<sup>29</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 50.

supported by Van der Walt, who adds that constitutional protection of property is different from private-law protection of property.<sup>30</sup> According to Van der Walt, the function of the property clause is not to guarantee and insulate existing property rights against any interference, but to establish and maintain the appropriate balance between individuals' vested rights and the public interest through regulatory deprivations (amongst other measures) that promote or protect legitimate public interests.<sup>31</sup> The *FNB* decision also distinguishes between deprivation and expropriation, holding that all expropriations are deprivations, but only some deprivations are expropriations, deprivation being a wider category that includes the narrower category of expropriation.<sup>32</sup> Most importantly for this chapter, the Constitutional Court in the *FNB* decision developed a methodology for the purpose of deciding constitutional property disputes in a form of set questions.<sup>33</sup> Roux outlines the questions that structure the *FNB* methodology as follows:

- "(a) Does that which is taken away from [the property holder] by the operation of [the law in question] amount to property for purpose of s 25?
- (b) Has there been a deprivation of such property by the [organ of state concerned]?
- (c) If there has, is such deprivation consistent with the provisions of s 25(1)?
- (d) If not, is such deprivation justified under s 36 of the Constitution?
- (e) If it is, does it amount to expropriation for purpose of s 25(2)?
- (f) If so, does the [expropriation] comply with the requirements of s 25(2)(a) and (b)?

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<sup>30</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 91.

<sup>31</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 91.

<sup>32</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) paras 57-58.

<sup>33</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46.

(g) If not, is the expropriation justified under s 36?"<sup>34</sup>

This methodology gives interpretative meaning to section 25 of the Constitution, most importantly section 25(1), which sets out two formal requirements for deprivation of property, namely that deprivation must be in terms of law of general application and no law may permit arbitrary deprivation.<sup>35</sup> Until the *FNB* decision, it was not clear what is meant by "arbitrary deprivation".<sup>36</sup> Roux argues that the arbitrariness test dominates the whole of the constitutional property inquiry.<sup>37</sup> In terms of the *FNB* decision, a deprivation of property is regarded as "arbitrary" for purposes of section 25 when the "law of general application" does not provide sufficient reason for the particular deprivation in question or is procedurally unfair.<sup>38</sup>

Using the *FNB* methodology, the next part of the chapter seeks to determine whether the granting of the right of way of way of necessity establishes a deprivation of property and, if so, whether that deprivation satisfies the section 25(1) requirements.

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<sup>34</sup> T Roux "Property" in Woolman S, Bishop M & Brickhill J (eds) *Constitutional law of South Africa* vol 3 (2<sup>nd</sup> ed OS 2003) ch 46 3, footnotes omitted. Roux's formulation of the questions derives from *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46.

<sup>35</sup> For an extensive discussion on the formal requirements, see AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 218-225.

<sup>36</sup> T Roux "Property" in Woolman S, Bishop M & Brickhill J (eds) *Constitutional law of South Africa* vol 3 (2<sup>nd</sup> ed OS 2003) ch 46 2.

<sup>37</sup> T Roux "Property" in Woolman S, Bishop M & Brickhill J (eds) *Constitutional law of South Africa* vol 3 (2<sup>nd</sup> ed OS 2003) ch 46 3.

<sup>38</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

#### 4 3 2 Does the law complained of affect “property” as understood by section 25?

The previous section shows that the granting of a right of way of necessity affects the servient owner’s property interests, specifically some of his entitlements of ownership. The question is whether the property interests in question qualify as property for purposes of section 25(1).<sup>39</sup>

Section 25 does not define “property”, but simply states that no one may be deprived of “property” unless the deprivation is in terms of law of general application<sup>40</sup> and that no law may allow arbitrary deprivation of “property”.<sup>41</sup> According to section 25, “property” is not restricted to land.<sup>42</sup>

The Constitutional Court in *In re Certification of the Constitution of the Republic of South Africa, 1996*<sup>43</sup> was faced with the task of defining “property” for purposes of section 25 of the Constitution. In that case, there was an objection raised against the property clause to the effect that it does not expressly protect the right to acquire, hold and dispose of property.<sup>44</sup> This objection raised the question whether the formulation of the right to property adopted by the Constitutional Assembly complies with the test of “universally accepted fundamental rights”.<sup>45</sup> The Constitutional Court, after considering foreign constitutional jurisdictions, reached the conclusion that there is no universally recognised formulation of the concept “property” and therefore

<sup>39</sup> See in this regard T Roux “Property” in Woolman S, Bishop M & Brickhill J (eds) *Constitutional law of South Africa* vol 3 (2<sup>nd</sup> ed OS 2003) ch 46 10.

<sup>40</sup> Section 25(1) of the Constitution of the Republic of South Africa, 1996.

<sup>41</sup> Section 25(1) of the Constitution of the Republic of South Africa, 1996.

<sup>42</sup> Section 25(4)(b) of the Constitution of the Republic of South Africa, 1996.

<sup>43</sup> 1996 (4) SA 744 (CC).

<sup>44</sup> *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) para 70.

<sup>45</sup> *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) para 71.

dismissed the objection.<sup>46</sup> The Court held that the mere fact that section 25 is formulated in a negative and not a positive form and that it does not contain an express recognition of the right to acquire and dispose of property does not necessarily mean that it does not comply with “universally accepted fundamental rights”.<sup>47</sup>

The Constitutional Court in the *FNB* decision once again had a chance to give a meaning to the section 25 concept of property but avoided this task, holding that it is “practically impossible to furnish – and judicially unwise to attempt – a comprehensive definition of property for purposes of section 25.”<sup>48</sup> However, the Court held that corporeal movables are protected in section 25.<sup>49</sup> This appears from a *dictum* by the Court that ownership of corporeal movables must, just like ownership of land, “lie at the heart of our constitutional concept of property, both as regards the nature of the right involved and the object of the right”.<sup>50</sup> According to Roux this

<sup>46</sup> *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC) para 72. The CC reached this conclusion after finding that some democracies provide no express protection of property in their constitutions or bills of rights whereas others do. At the same time, of those jurisdictions that do have a property clause, some formulate the right to property simply in a negative way, restraining state interference with property rights, whereas others express the right in a positive way, providing for the right to acquire and dispose of property (see para 72).

<sup>47</sup> *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC) para 72.

<sup>48</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 51.

<sup>49</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 51.

<sup>50</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 51.

*dictum*, specifically relating to ownership of land, confirms the importance of the provision in section 25(4)(b) that “property is not limited to land.”<sup>51</sup> Van der Walt argues that for purposes of section 25, “property” can be regarded as a range of objects: both tangible and intangible, various traditional property rights and interests both real and personal, and a wide range of other rights and interests which (in the civil-law tradition) have never been regarded as property.<sup>52</sup> He further argues that section 25 must be interpreted to mean all property rights, and that “property” in the sense of rights must include ownership, limited real rights and some personal rights.<sup>53</sup> The Natal Provisional Division of the High Court held in *Geyser and Another v Msunduzi Municipality and Others*<sup>54</sup> that property for purposes of section 25 includes “property rights such as ownership and the bundle of rights that makes up ownership such as the right to use property or to exclude other people from using it”. This decision is confirmed by Roux, who argues in favour of section 25 protection of the traditional incidents of ownership.<sup>55</sup> Badenhorst, Pienaar and Mostert also argue that incidents of ownership such as “the right to use the thing”, and “the right to dispose of it at will” should be protected in terms of section 25.<sup>56</sup> This argument seems to derive support from the *FNB* arbitrariness test, which amongst other

<sup>51</sup> T Roux “Property” in Woolman S, Bishop M & Brickhill J (eds) *Constitutional law of South Africa* vol 3 (2<sup>nd</sup> ed OS 2003) ch 46 10.

<sup>52</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 107. Since the right of way of necessity only relates to land, it is unnecessary to consider all the property interests as mentioned by Van der Walt. Therefore this discussion will be limited to those property interests pertaining to land.

<sup>53</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 129, 139.

<sup>54</sup> 2003 (5) SA 18 (N) 37A.

<sup>55</sup> T Roux “Property” in Woolman S, Bishop M & Brickhill J (eds) *Constitutional law of South Africa* vol 3 (2<sup>nd</sup> ed OS 2003) ch 46 13.

<sup>56</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* (5<sup>th</sup> ed 2006) 537.

aspects determines whether a deprivation embraces all or only some of the incidents of ownership.<sup>57</sup>

The right of way of necessity restricts certain entitlements of ownership of land, specifically ownership of the servient tenement, and it is clear that ownership of land enjoys section 25 protection. On the basis of the discussion above and the previous section, it can be concluded that property interests are indeed affected by the granting of a right of way of necessity and that these interests are protected by section 25 since they derive from ownership.

#### 4.3.3 Has there been a deprivation of property?

Once it has been concluded that the entitlements of ownership that are affected by the granting of a right of way of necessity are property for section 25 purposes, the next step is to establish whether the placing of restrictions on these entitlements of ownership amounts to “deprivation of property” in terms of section 25(1). The question is what exactly constitutes deprivation for purposes of section 25(1)? It is said that there is currently no comprehensive definition of deprivation recognised in case law.<sup>58</sup> However, deprivation is normally associated with some form of state interference with private property.<sup>59</sup> It is mostly about regulation of the use,

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<sup>57</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100. See also T Roux “Property” in Woolman S, Bishop M & Brickhill J (eds) *Constitutional law of South Africa* vol 3 (2<sup>nd</sup> ed OS 2003) ch 46 13.

<sup>58</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The law of property* (5<sup>th</sup> ed 2006) 544. See also AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 196, who argues that the terminology regarding deprivation is not clear or consistent.

<sup>59</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 196.

enjoyment and exploitation of property and it is usually not compensated.<sup>60</sup> Furthermore, deprivation does not involve the taking away or state acquisition of property but just the regulation of its use.<sup>61</sup> The Court in *FNB*, referring to Van der Walt, acknowledges that the term “deprive” or “deprivation” is sometimes misleading or confusing because it can create the wrong impression that it refers to the taking away of property (expropriation), whereas according to the Court it does not.<sup>62</sup> Despite the confusion, the Court concludes that any interference with the use, enjoyment or exploitation of private property constitutes some form of deprivation in respect of the person having title or right to or in the property concerned.<sup>63</sup> On the basis of this *FNB* definition of deprivation, the restriction imposed on some of the entitlements of ownership caused by the granting of the right of way of necessity constitutes a deprivation of property for purposes of section 25(1). The question is how significant the interference should be for it to be regarded as deprivation for purposes of section 25(1). There seems to be a conflict of views in case law regarding this question. In *Nhlabathi and Others v Fick* (“*Nhlabathi*”),<sup>64</sup> the Land Claims Court held that the appropriation of a grave by an occupier authorised by section 6(2)(dA) of the Extension of Security of Tenure Act (“ESTA”)<sup>65</sup> constituted deprivation for purposes of section 25(1). The court reached this conclusion despite it accepting that the establishment of a grave will in most instances constitute a

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<sup>60</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 196.

<sup>61</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 196-197.

<sup>62</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 57.

<sup>63</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 57.

<sup>64</sup> *Nhlabathi and Others v Fick* [2003] 2 All SA 323 (LCC) para 29.

<sup>65</sup> Act 62 of 1997.

minor interference with the landowner's property rights.<sup>66</sup> This decision could be interpreted to mean that it does not matter whether the interference is small or material and that any interference will amount to deprivation of property for purposes of section 25(1). However, the Constitutional Court in *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others* ("Mkontwana")<sup>67</sup> took a different approach from that of *FNB and Nhlabathi* by stating that whether a deprivation occurred "depends on the extent of the interference with or limitation of use, enjoyment or exploitation".<sup>68</sup> According to the Court, a deprivation of property occurs when there is "at the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society".<sup>69</sup> Van der Walt criticises this approach, arguing that limiting deprivation to interferences that exceed the normal regulatory functions of a democratic society will effectively defeat

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<sup>66</sup> *Nhlabathi and Others v Fick* [2003] 2 All SA 323 (LCC) para 31.

<sup>67</sup> *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others* 2005 (1) SA 530 (CC). The Constitutional Court had to decide on the constitutional validity of section 118(1) of the Local Government: Municipal Systems Act 32 of 2000, particularly whether the section constituted arbitrary deprivation of property contrary to section 25(1) of the Constitution. The section limits an owner's power to transfer immovable property by providing that the Registrar of Deeds may not effect the transfer of any property without a certificate issued by the municipality to the effect that the consumption charges due during a period of two years before the date of the issue of the certificate have been paid. This section effectively burdens owners of property with consumption charges for water and electricity supplied to people occupying such properties but who were not the owners themselves.

<sup>68</sup> *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others* 2005 (1) SA 530 (CC) para 32.

<sup>69</sup> *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others* 2005 (1) SA 530 (CC) para 32.

the purpose of section 25(1).<sup>70</sup> According to him, limiting the concept of deprivation to “abnormal or excessive regulatory deprivation” will serve no purpose at all because the purpose of section 25(1) is not just to prevent excessive regulation, but also to authorise and control normal regulation.<sup>71</sup> Van der Walt concludes that all normal regulatory restrictions on the use and enjoyment of property should be considered as section 25(1) deprivations.<sup>72</sup>

The deprivation question was further complicated in subsequent Constitutional Court judgements, namely *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another* (“Reflect-All”)<sup>73</sup> and *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* (“Offit”).<sup>74</sup> In *Reflect-All* the Constitutional Court referred to the definition in both *FNB* and *Mkontwana* but refrained from following the narrow *Mkontwana* definition of deprivation, instead opting for the wider *FNB* one, namely that any interference with property amounts to deprivation.<sup>75</sup> On that basis, the Court decided that section 10(1) and 10(3) of the Gauteng Transport Infrastructure Act 8 of 2001 constitutes a deprivation of the applicants’ use,

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<sup>70</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 205.

<sup>71</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 205.

<sup>72</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 205.

<sup>73</sup> 2009 (6) SA 391 (CC). In this case the Constitutional Court had to decide whether subsections 10(1) and 10(3) of the Gauteng Transport Infrastructure Act 8 of 2001 were constitutionally invalid on the grounds that the impugned provisions violated the applicants’ (landowners’) right to property, as protected in section 25(1) of the Constitution.

<sup>74</sup> 2011(1) SA 293 (CC). In this case the Constitutional Court had to decide whether a continuous threat to expropriate by one of the respondents (the state) constituted a deprivation of the appellants’ property in terms of section 25(1) of the Constitution.

<sup>75</sup> *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another* 2009 (6) SA 391 (CC) paras 35, 36, 38.

enjoyment and exploitation of their properties.<sup>76</sup> However, the Constitutional Court in *Offit* also referred to the definition in both *FNB* and *Mkontwana* but opted for the narrower *Mkontwana* definition of deprivation, holding that there must “at least be substantial interference” for such interference to qualify as deprivation for the purposes of section 25(1).<sup>77</sup> The same narrow definition of deprivation was followed in the recent Constitutional Court decision of *Agri South Africa v Minister for Minerals and Energy*,<sup>78</sup> where Mogoeng CJ held that deprivation arises when property or rights in property are “significantly interfered with.” Van der Walt does not agree with the *Mkontwana* definition of deprivation.<sup>79</sup> He argues that the Court in *Offit* did not actually follow the *Mkontwana* definition of deprivation, but in actual fact applied the *FNB* test;<sup>80</sup> although it cannot be denied that the passage cited comes from the *Mkontwana* definition, the passage suggests that the Court in *Offit* “distinguished between insignificant and significant deprivation, rather than between ‘normal’ deprivation and deprivation that exceeds what is normal in an open and democratic society,” which is the main aspect of the *Mkontwana* definition.<sup>81</sup> Finally, Van der Walt argues that the decision in *Offit* might as well have been reached on the basis of the *FNB* definition of deprivation.<sup>82</sup> Despite the uncertainty regarding the meaning of deprivation, Van der Walt seems convinced that deprivation is most likely to be viewed in light of the wider *FNB* definition of deprivation, which includes any

<sup>76</sup> *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another* 2009 (6) SA 391 (CC) para 38.

<sup>77</sup> *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2011(1) SA 293 (CC) paras 38-39.

<sup>78</sup> (51/2012) [2013] ZACC 9 (18 April 2013) para 48.

<sup>79</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011).

<sup>80</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 207.

<sup>81</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 207.

<sup>82</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 208.

limitation on the use and enjoyment of property. He describes the *Mkontwana* definition of deprivation as “confusing and contradictory” and concludes that no matter how small or significant limitations are they should qualify as deprivation for purposes of section 25(1).<sup>83</sup> Van der Walt adds that limitations should only qualify as deprivation if they impose a legally perceptible burden or restriction on the use and enjoyment of property,<sup>84</sup> in other words, when they are not excluded by the *de minimis* rule.<sup>85</sup>

In view of the *FNB* wider definition of deprivation and Van der Walt’s definition, one can conclude that restrictions placed upon the servient owner’s entitlement of use and enjoyment, entitlement to dispose, entitlement to possess and the entitlement to exclude constitute deprivation for purposes of section 25(1).

#### 4 3 4 If there is a deprivation, is the deprivation in line with section 25(1)?

Once it has been concluded that the granting of a right of way of necessity constitutes deprivation of property, the next step in the *FNB* methodology is to establish whether the deprivation complies with the requirements outlined in section 25(1). Deprivation must comply with the requirements of section 25(1) for it to be constitutionally valid. Section 25(1) contains only two formal requirements for deprivation of property.<sup>86</sup> First of all, the deprivation must be authorised by law of general application and secondly, such law may not allow arbitrary deprivation.

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<sup>83</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 213.

<sup>84</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 213.

<sup>85</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 209, 212.

<sup>86</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 218.

The first requirement requires deprivation of property to be in terms of law of general application. This requirement is intended to protect individuals from being deprived of property by laws that single them out for selective treatment in a way that their property rights alone are interfered with.<sup>87</sup> The effect of this requirement is that only law of general application may deprive the servient owner of his entitlements of ownership. Considering the fact that the right of way of necessity is a common law rule, the only question is whether the common law qualifies as law of general application for purposes of section 25(1). It is generally accepted that all legislation qualifies as law of general application for purposes of section 25.<sup>88</sup> In the *FNB* case the court did not interpret what constitutes “law” of general application; instead, it just concluded that the challenged statutory provision constituted law of general application.<sup>89</sup> However, in other decisions outside the ambit of section 25 the common law has been recognised as law of general application.<sup>90</sup> Although there is yet to be a case challenging the constitutional validity of a common law rule in terms of section 25(1), Van der Walt is convinced that common law rules also qualify as law of general application for purposes of section 25(1).<sup>91</sup> He argues that:

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<sup>87</sup> T Roux “Property” in Woolman S, Bishop M & Brickhill J (eds) *Constitutional law of South Africa* vol 3 (2<sup>nd</sup> ed OS 2003) ch 46 21; AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 232.

<sup>88</sup> T Roux “Property” in Woolman S, Bishop M & Brickhill J (eds) *Constitutional law of South Africa* vol 3 (2<sup>nd</sup> ed OS 2003) ch 46 21, relying upon *Park-Ross v The Director, Office for Serious Economic Offences* 1995 (2) SA 148 (C) 167B. See also AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 233.

<sup>89</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 61.

<sup>90</sup> See in this regard *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC) para 44; *S v Thebus* 2003 (6) SA 505 (CC) paras 64-65. The Constitutional Court in both cases recognised the common law as law of general application.

<sup>91</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 234.

“The fact that section 25(1) refers to “law of general application” (as opposed to a law of general application) ensures that regulatory deprivation of property can also be authorised by the rules of common and customary law, and at the same time it subjects the common law to the requirement that it should not authorise arbitrary deprivation of property”.<sup>92</sup>

It can be assumed on the basis of Van der Walt’s argument that the common law rule that regulates the creation of a right of way of necessity constitutes law of general application for purposes of section 25(1).

In terms of the second requirement, law of general application should not allow arbitrary deprivation of property. It is argued that it is hard but not impossible to imagine that a deprivation authorised by rules of common law can constitute an arbitrary deprivation.<sup>93</sup> Still, it is important to subject the common law principles that regulate the creation of a right of way of necessity to the *FNB* non-arbitrariness test.<sup>94</sup> According to Roux, this test is the most crucial part of every property clause challenge.<sup>95</sup>

It was held in *FNB* that deprivation is “arbitrary” in terms of section 25 when the law complained of “does not provide sufficient reason for the particular deprivation in question or is procedurally unfair.”<sup>96</sup> In other words, the deprivation would be arbitrary if it is procedurally unfair or (substantively) if there is insufficient reason for it. Van der Walt describes this non-arbitrariness requirement in two ways. Firstly, he

<sup>92</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 234.

<sup>93</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 234-235.

<sup>94</sup> For a detailed discussion on the non-arbitrariness test, see AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 237-288.

<sup>95</sup> T Roux “Property” in Woolman S, Bishop M & Brickhill J (eds) *Constitutional law of South Africa* vol 3 (2<sup>nd</sup> ed OS 2003) ch 46 2, 4-5, 21-25.

<sup>96</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

views the non-arbitrariness requirement as a provision which ensures formal procedural justice, described as a “thin”, low level of scrutiny, rationality test which ensures that deprivation of property is rationally connected to some legitimate government purpose.<sup>97</sup> Secondly, the non-arbitrariness requirement requires that any law that permits deprivation must establish sufficient reason for the deprivation, what he describes as a “thick”, proportionality-type interpretation.<sup>98</sup> In other words, the deprivation should not only be rationally linked to a legitimate government purpose but must also be justified by the purpose that it serves.<sup>99</sup>

Nothing was said in *FNB* regarding what constitutes procedural fairness for purposes of section 25(1). Procedural arbitrariness would probably not arise in cases concerning the granting of the right of way of necessity because the right of way of necessity is enforced by a court order. In the process, courts take into account all the relevant factors that would exclude procedural arbitrariness before deciding to enforce the right, and that by definition is not procedurally unfair. On this basis, it is safe to conclude that as long as the deprivation of the servient owner’s property rights that results from granting of a right of way of necessity is subject to judicial scrutiny, the problem of procedural arbitrariness would not arise.<sup>100</sup>

The Court in *FNB* focused specifically on the second criterion of the non-arbitrariness requirement, namely substantive arbitrariness. In terms of this requirement, a deprivation is arbitrary when the law in question does not provide

<sup>97</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 237.

<sup>98</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 238.

<sup>99</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 238.

<sup>100</sup> For a similar argument, see ZT Boggenpoel “Compulsory transfer of encroached-upon land: A constitutional analysis” (2013) 47 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* (forthcoming), writing in the context of encroachment cases.

sufficient reason for the deprivation.<sup>101</sup> The Constitutional Court in *FNB* went on to explain how sufficient reason must be established, holding that there must be an evaluation of the relationship between the deprivation in question and the purpose of the law in question.<sup>102</sup> To achieve this, the Constitutional Court stated that “a complexity of relationships” must be considered,<sup>103</sup> which includes the relationship between the purpose for the deprivation and the person whose property is affected by the deprivation;<sup>104</sup> the relationship between the purpose of the deprivation, and the nature of the property; and the extent of the deprivation of the property in question.<sup>105</sup> Regarding the extent of the deprivation, the Constitutional Court held that the purpose of the deprivation must be more compelling when the deprivation in question concerns ownership of immovable property and corporeal movable property rather than when it concerns a less extensive property interest, and also when the deprivation embraces all rather than just some of the entitlements of ownership.<sup>106</sup> The Constitutional Court also held that the substantive arbitrariness test is context-based<sup>107</sup> and that the test can vary from mere rationality to something closer to the

<sup>101</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

<sup>102</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100 (a).

<sup>103</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100 (b).

<sup>104</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100 (c).

<sup>105</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100 (d).

<sup>106</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100 (e), (f).

<sup>107</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100 (h). See

section 36(1) proportionality test of the Constitution.<sup>108</sup> The following paragraphs consider the factors mentioned in *FNB*<sup>109</sup> in the context of the right of way of necessity in order to determine whether there are sufficient reasons for the deprivation of the servient owner's entitlements of ownership to justify the judicial granting of a right of way of necessity.

The end sought by the law relating to the right of way of necessity is to connect a piece of landlocked land to the public transport systems. This purpose is based on public policy aimed at encouraging the efficient use of land, and it also fulfils a social function in that it opens the potential for private landlocked land to be exploited fully for the public benefit.<sup>110</sup> The means employed (the deprivation of certain of the servient owner's entitlements) entails the enforcement of a servitude of right of way over the servient tenement by courts that are authorised to do so by the common law. Furthermore, it seems that the courts are only justified to impose this deprivation in cases where it is unreasonably difficult or impossible for the dominant owner to acquire an ordinary servitude of way by contract.<sup>111</sup> It is difficult to think of any other mechanism to resolve the problem of landlocked land in instances where it is impossible for the dominant owner to acquire an ordinary servitude of way, than the one provided by the common law through the intervention of the courts. Without the judicial possibility to create a right of way of necessity, landlocked land would be

also *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another* 2009 (6) SA 391 (CC) para 49.

<sup>108</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100 (g). See also AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 246.

<sup>109</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

<sup>110</sup> See in this regard chapter 3 above.

<sup>111</sup> See in this regard chapter 3 above.

removed from efficient use and also from providing the public benefit that would result from efficient use. Generally speaking, it can be concluded that there is a legitimate reason for creating the judicial possibility to grant a right of way of necessity that would protect both the individual dominant owner's interests in efficient use of his land and the public interest in efficient use of valuable land.

There also seems to be sufficient reason for imposing the servitude on the affected servient property, thereby establishing the *nexus* between the affected property and the purpose that the *FNB* decision requires. Despite the fact that the affected servient owner is not the cause of the landlocking situation, the servient owner happens to be the person whose property lies between the dominant tenement and the sought public road. This in effect establishes the required connection between the servient owner's land and the purpose which the right of way of necessity serves. The servient tenement happens to be that adjoining property (land) that lies between the dominant tenement and the nearest public road which the dominant tenement seeks connection to.<sup>112</sup>

As far as the nature and extent of the deprivation are concerned, the right of way of necessity also seems to satisfy the *FNB* requirement of proportionality. The right of way of necessity does not affect the entire right of ownership of the servient land, even though quite extensive entitlements of ownership, specifically the entitlements to use and enjoyment, possess, dispose, and exclude, are restricted.<sup>113</sup> Moreover, the extent of the deprivation of these entitlements is not severe in that it does not affect the entire property but just a small portion of the servient tenement,

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<sup>112</sup> In other words, the servient tenement happens to meet the “*ter naaste lage en minster schade*” requirement, which is discussed in chapter 2 section 2 3 5 2 above.

<sup>113</sup> See in this regard section 4 2 above.

which the servient owner is not entirely excluded from using himself either. This aspect is particularly clear provided that the common law requirement, according to which the court must identify the route of the servitude in a location on the servient land that would cause the smallest possible burden, is met. Moreover, the servient owner is compensated for the loss caused by the deprivation.

If one takes into account the above analysis, the deprivation caused by the right of way of necessity should be described as not very severe, and therefore something closer to rationality analysis (as opposed to almost full proportionality) will probably suffice. On that level of analysis, it is reasonably easily concluded that considering the legitimate purpose served by granting a right of way of necessity, together with the clear and direct connection between such purpose, the servient owner, and the servient tenement, it appears that the law relating to right of way of necessity does not permit arbitrary deprivation of property. In other words, there are sufficient reasons to justify the deprivation caused by a right of way of necessity.

The analysis above has to be qualified, though: the deprivation resulting from granting a right of way of necessity and thereby imposing a restriction on the servient landowner's entitlements of use, enjoyment, disposition and exclusion against his will can only be non-arbitrary if the servitude is granted by court order, the court having considered and applied the common law requirements for the right of way of necessity quite strictly. This includes, above all, the requirement of necessity, which means that the potential dominant owner who claims a right of way of necessity must prove that his land has no reasonable access to the public transport systems; that having such access is objectively necessary for the efficient use of the dominant land; and that efficient use of the land will have some public benefit (which could be in the form of creation of jobs, production of food or other valuable produce, and

creating a tax base). Above all, the potential dominant owner must prove that it is unreasonably difficult or impossible (for some valid reason not of his own making) to obtain a servitude of right of way through negotiation with the servient owner; in the absence of proof of this factor there is no real necessity and the court would not be justified to impose a servitude by force.

In terms of the analysis above it can be concluded that judicial granting of a right of way of necessity generally amounts to non-arbitrary deprivation, in other words that it complies with section 25(1) of the Constitution. Where the deprivation is found to be consistent with section 25 (1), section 36(1) analysis does not arise.<sup>114</sup> The next question would have been whether the deprivation amounts to an expropriation. However, there is no need to answer this question because it has already been disposed of earlier on: there is no authority for expropriation in the common law and the South African courts do not have the inherent power to grant expropriation without statutory authority.

#### 4 3 5 Can an arbitrary deprivation be justified in terms of section 36(1)?

Assuming that the granting of a right of way of necessity failed the non-arbitrariness test in a particular instance, the next step of the analysis would have been to determine whether the limitation could be justified under section 36(1) of the Constitution.<sup>115</sup> Section 36(1) provides that rights in the Bill of Rights may be limited

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<sup>114</sup> *First National Bank of SA Ltd t/a Wesbank v Comissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 70.

<sup>115</sup> *First National Bank of SA Ltd t/a Wesbank v Comissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46.

only if such limitation is “reasonable and justifiable in an open and democratic society”.

Roux argues that the application of section 36 in property clause challenges seems to be a repetition of the *FNB* arbitrariness test<sup>116</sup> and therefore it has no meaningful application in section 25(1) challenges.<sup>117</sup> This argument is supported by Van der Walt, who states that the requirement that deprivation should be authorised by law of general application also applies in section 36(1), which provides that rights may only be limited in terms of law of general application.<sup>118</sup> Furthermore, the requirement in section 36(1) that a limitation should be reasonable and justifiable is a proportionality test similar to that of the *FNB* arbitrariness test.<sup>119</sup> Roux is of the view that a deprivation which limits section 25(1) rights without being authorised by law of general application will never be saved by section 36.<sup>120</sup> He further argues that a law which permits deprivation of property which is procedurally or substantively arbitrary is not likely to be reasonable and justifiable in an open and democratic society either.<sup>121</sup> There seems to be very little chance of an arbitrary deprivation being saved by the limitation clause.

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<sup>116</sup> T Roux “Property” in Woolman S, Bishop M & Brickhill J (eds) *Constitutional law of South Africa* vol 3 (2<sup>nd</sup> ed OS 2003) ch 46 26.

<sup>117</sup> T Roux “Property” in Woolman S, Bishop M & Brickhill J (eds) *Constitutional law of South Africa* vol 3 (2<sup>nd</sup> ed OS 2003) ch 46 27.

<sup>118</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 74.

<sup>119</sup> AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 74.

<sup>120</sup> T Roux “Property” in Woolman S, Bishop M & Brickhill J (eds) *Constitutional law of South Africa* vol 3 (2<sup>nd</sup> ed OS 2003) ch 46 26.

<sup>121</sup> T Roux “Property” in Woolman S, Bishop M & Brickhill J (eds) *Constitutional law of South Africa* vol 3 (2<sup>nd</sup> ed OS 2003) ch 46 26.

#### 4.4 Conclusion

The aim of this chapter was to consider two constitutional issues associated with the right of way of necessity. In the first place, the chapter had to ascertain if the granting or enforcement of the right of way of necessity by courts amounts to an arbitrary deprivation of the servient owner's property rights, which may be in conflict with section 25(1) of the Constitution. In the second place, the chapter had to ascertain whether the granting of a right of way of necessity could also lead to an expropriation of such property rights and, if so, whether such expropriation is in line with section 25(2) and 25(3) of the Constitution.

This chapter disposed of the second constitutional issue on expropriation by concluding that the right of way of necessity enforced by a court order is unlikely to constitute expropriation due to lack of legislation that authorises expropriation. The right of way of necessity is regulated by common law, which in terms of South African law does not provide any authority to expropriate,<sup>122</sup> and since the courts do not have an inherent authority to expropriate under South African law either, the judicial granting of a right of way of necessity can probably never amount to expropriation.

Following the above conclusion, the chapter focussed on the first constitutional issue, namely section 25(1) deprivation. The chapter started by identifying the property interests involved when the courts enforce the right of way of necessity.<sup>123</sup> It is argued in section 4.2 that the property interest affected by the granting or enforcement of the right of way of necessity is the right of ownership, specifically

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<sup>122</sup> A Gildenhuys *Onteieningsreg* (2<sup>nd</sup> ed 2001) 93; A Gildenhuys & GL Grobler "Expropriation" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 10 Part 3 (2<sup>nd</sup> ed 2012) para 12. See also AJ van der Walt *Constitutional property law* (3<sup>rd</sup> ed 2011) 346, 453.

<sup>123</sup> See in this regard section 4.2 above.

certain entitlements of ownership. This section argues that the enforcement of the right of way of necessity places restrictions on the servient owner's entitlement of use and enjoyment, entitlement to possess, entitlement to dispose, and the entitlement to exclude.

This chapter proceeded to discuss the first constitutional question regarding the right of way of necessity at section 4(3). The methodology developed in the *FNB* case was used to address the question whether the granting of the right of way of necessity constitutes an arbitrary deprivation in conflict with section 25(1) of the Constitution.

The first question in terms of this methodology was to ask if the law or conduct complained of affected "property" as understood by section 25. Section 4(3)(2) concluded that the granting of the right of way of necessity affects ownership of land, which is the servient owner's ownership of the servient tenement. The servient owner is restricted from exercising some of his entitlements of ownership. Therefore the property affected for the purposes of section 25 is ownership, particularly certain entitlements thereof.

Secondly, it had to be determined if there was a deprivation of property. It was argued that deprivation takes place when courts enforce the right of way of necessity because by doing so courts place restrictions on some of the servient owner's entitlements of ownership. For this purpose the wider definition of deprivation that was followed in *FNB* was preferred in this chapter.

Following the conclusion that the right of way constitutes a deprivation of property, the third step in terms of the *FNB* methodology was to establish if the deprivation is in line with section 25(1) of the Constitution. Section 25(1) provides

that no one may be deprived of property except in terms of law of general application and that no law may permit arbitrary deprivation of property. It was assumed that the common law principles that regulate the right of way of necessity constitute law of general application for purposes of section 25(1). For a deprivation to be non-arbitrary such deprivation had to be substantively and procedurally fair.

Regarding arbitrary deprivation, a deprivation is regarded as arbitrary if there is insufficient reason for the deprivation or if the deprivation is procedurally unfair.<sup>124</sup> It was concluded in this chapter that the question of procedural arbitrariness is unlikely to arise in cases regarding the right of way of necessity because the deprivation takes place under judicial scrutiny. Accordingly, when courts decide on cases concerning the right of way of necessity, they take into account all the relevant factors that exclude arbitrariness.

Regarding substantive arbitrariness, it is argued that there are sufficient reasons justifying the right of way of necessity and its enforcement by court order. This conclusion is strengthened by the policy arguments, jurisprudential arguments, and law and economics theory, which are discussed in chapter three.<sup>125</sup> Public policy justifies having the right of way of necessity in that it promotes the efficient use of land. In terms of the social approach, the right of way of necessity is also justified by the possibility to promote efficient use of land, particularly economic efficiency, and also for the reason that it fulfils a social function in that the efficient use of land also benefits the public in general. The social approach is followed in South African case law, particularly in cases where lack of reasonable sufficient access affects the

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<sup>124</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

<sup>125</sup> See in general chapter 3 above.

dominant owner's efficient use of land.<sup>126</sup> The law and economic theory shows that the enforcement of the right of way of necessity by courts is justified in instances where it is impossible for the dominant owner to acquire a contract based servitude of way. It was therefore concluded that the granting of a servitude of right of way by court order is justified and therefore not arbitrary if the courts apply the common law requirements, especially the requirement of necessity, quite strictly.

Because the granting of the right of way of necessity was found to be substantively and procedurally fair, the deprivation of the servient owner's entitlements caused by the granting of the servitude is in line with section 25(1) and, thus, constitutionally compliant.

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<sup>126</sup> See chapter 3 section 3 4 above.

## Chapter 5: Conclusion

### 5 1 Introduction

In South African law, the right of way of necessity is a special type of praedial servitude created by operation of law in favour of landlocked land (the dominant tenement) without access to a public road. The right of way of necessity binds surrounding properties immediately when the dominant tenement becomes landlocked.<sup>1</sup> However, this servitude can only be imposed against one of those neighbouring properties (the servient tenement), if such property is deemed suitable to give the dominant tenement access to the public road, once the right is enforced by court order.<sup>2</sup>

The right of way of necessity raises significant constitutional issues for South African law, particularly because of its manner of creation. The manner in which this servitude is created results in a servitude being imposed upon the property of the servient owner by court order, in other words by operation of law, instead of by negotiation and agreement between the relevant landowners, which is the normal way in which servitudes are created. It is imposed on the servient owner's tenement without his co-operation or consent and even against his will. In this sense, the right of way of necessity is a servitude that is created by way of the state enforcing a transfer of rights.

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<sup>1</sup> CG van der Merwe "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1373.

<sup>2</sup> In other words, if it complies with the principle of "*ter naaste lage en minster schade*" discussed in chapter 2 above.

Having said this, the main purpose of this study is to ascertain whether this servitude causes an arbitrary deprivation or even an expropriation of the servient owner's property which does not comply with section 25 of the South African Constitution.<sup>3</sup> The assumption is that the granting of a right of way of necessity by court order could possibly amount to a section 25(1) arbitrary deprivation or perhaps a section 25(2) expropriation. In order to answer these questions, this study establishes whether there are valid reasons to justify the right of way of necessity in general and also to justify its imposition by the courts instead of by agreement.

To achieve the purpose of this study it was necessary in Chapter two to first set out the background to the right of way of necessity by discussing the general principles regulating this servitude. After the discussion on the law pertaining to the right of way of necessity, Chapter three discusses the justifications for the right of way of necessity. This chapter advances three justifications in favour of the right of way of necessity, namely public policy, the social approach, and law and economics theory.

Chapter four refers back to these justifications to ascertain whether the creation of a right of way of necessity constitutes an arbitrary deprivation or even an expropriation of the affected landowner's property. In this regard Chapter four relies on the methodology set out in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* ("FNB decision")<sup>4</sup> for resolving constitutional property disputes. In terms of this methodology, the first question is whether the creation of a right of way of necessity by court order is in line with

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<sup>3</sup> Constitution of the Republic of South Africa, 1996.

<sup>4</sup> 2002 (4) SA 768 (CC).

section 25(1), that is, whether it constitutes a deprivation of property that satisfies the requirements of that section. With reference to case law, it is concluded in Chapter four that the creation of a right of way of necessity imposes restrictions on the servient landowner's entitlements of use and enjoyment, disposition and exclusion and that the imposition of these restrictions qualifies as a deprivation of the servient landowner's property for purposes of section 25(1).

Relying on the justifications provided in Chapter three, Chapter four argues that the creation of a right of way of necessity by court order does not constitute an arbitrary deprivation of property, provided the common law requirements for the servitude are applied quite strictly. In this regard it is particularly important that the requirement of necessity is proved by the owner of the dominant land. Chapter four furthermore rules out the possibility that the creation of a right of way of necessity could cause an expropriation because there is no common law authority for expropriation in South African law.<sup>5</sup> Consequently, Chapter four concludes that the right of way of necessity does not constitute either arbitrary deprivation or expropriation of property, which means that this servitude is constitutionally compliant.

## **5 2 Conclusions**

### **5 2 1 The law relating to the right of way of necessity**

Chapter two provides an overview of the law relating to the right of way of necessity, specifically focussing on the general principles. The chapter briefly traces the origin

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<sup>5</sup> A Gildenhuys *Onteieningsreg* (2<sup>nd</sup> ed 2001) 93; A Gildenhuys & GL Grobler "Expropriation" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 10 Part 3 (2<sup>nd</sup> ed 2012) para 12.

of the South African law regarding the right of way of necessity back to Roman law, which recognised the right of way to a family grave, and also to Germanic law, which recognised the road of egress. Roman-Dutch law adopted both the Roman law right of way to a family grave and the Germanic road of egress and developed them into a general right of way that includes all land that has no way out or does not abut onto a high road. This version of the servitude was received into South African law from Roman-Dutch law. South African law has since used it for the purpose of giving an owner of an inaccessible piece of land access over neighbouring land in order to connect to a public road. This rule was codified under the old Natal government but it is now exclusively regulated by the common law. Chapter two shows that the right of way of necessity is part of servitude law and belongs under praedial servitudes. In that regard the servitude can only be created in respect to immovable property, either rural or urban.

Chapter two identifies two kinds of right of way of necessity, namely the temporary (periodic) right of way and the permanent right of way.<sup>6</sup> It is shown that the two differ in that the temporary right of way is established only in emergency situations or occasionally, when necessity demands, whereas the permanent right of way of necessity is a permanent and regular means of access. Furthermore, a permanent right of way of necessity demands payment of compensation by the dominant owner to the servient owner. The chapter limits the main part of its discussion to the permanent right of way of necessity.<sup>7</sup>

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<sup>6</sup> See the discussion in section 2.3.2 of chapter 2 above.

<sup>7</sup> For the reason why this study is limited to the discussion on permanent rights of way of necessity see section 2.3.2 chapter 2 above.

Chapter two highlights the most important and problematic aspect of the right of way of necessity, namely the manner of creation of this servitude.<sup>8</sup> It is shown that the right of way of necessity differs from ordinary servitudes in its mode of creation. Unlike other rights of way that are created by negotiation and agreement, followed by registration, the right of way of necessity is established without the consent of the servient owner and even against his will. It is created by operation of law<sup>9</sup> and enforced by a court order. The right of way of necessity can only be enforced against a specific servient tenement. The role of the court is to enforce this servitude by confirming the existence of the right and allocating and defining a route over the affected servient land for the servitude. It is argued in Chapter two that the dominant owner may only approach the court for the enforcement of this servitude after an unsuccessful attempt to obtain a negotiated right of way from the servient owner.<sup>10</sup>

Chapter two further discusses the requirements for establishing the right of way of necessity.<sup>11</sup> This chapter identifies two requirements that must be met for a court to enforce the right of way of necessity, namely landlocking and necessity.<sup>12</sup> Regarding landlocking, the dominant owner must allege and prove to the court that her property is enclosed in such a way that she has no way out to a public road at all or that an alternative way is available but is inadequate to enable her reasonable access to the public road. As for the requirement of necessity, the dominant owner must allege necessity and prove to the court why it is necessary for her to get access

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<sup>8</sup> Regarding the creation of the right of the right of way of necessity, see chapter 2 section 2 3 3 above.

<sup>9</sup> JE Scholtens “Law of property (including mortgage and pledge)” 1960 *Annual Survey of South African Law* 190-226 208-209.

<sup>10</sup> See chapter 2 section 2 3 3 above. This argument is further justified in chapter 3 section 3 5 above.

<sup>11</sup> See in this regard chapter 2 section 2 3 4 above.

<sup>12</sup> These requirements emanate from the decision in *Van Rensburg v Coetze* 1979 (4) SA 655 (A) 678A.

to a public road over the servient tenement. The dominant owner could for instance show that such access is necessary for purposes of conducting viable farming operations. It is, however, indicated that the dominant owner who has only herself to blame for the landlocking, through her own fault, design or negligence, does not qualify for a right of way of necessity.<sup>13</sup> Secondly, the dominant owner who asks for the right of way of necessity must, to prove necessity, probably also show that she has unsuccessfully attempted to negotiate a servitude by agreement with the servient landowner. To date the courts have not been clear on this point, but the thesis argues that the granting of a right of way of necessity by court order is not justified unless the dominant owner can prove necessity in the sense of not being able, for some valid reason, to obtain a servitude by agreement.

Following a discussion of the requirements for the right of way of necessity, Chapter two discusses the conditions that accompany an award of a right of way of necessity.<sup>14</sup> This includes the route for the right of way; definition of a public road; the relevance of the use of the dominant tenement; and compensation. For the dominant owner to exercise the right of way of necessity a route must be established over a suitable servient tenement. The route must be the shortest route that causes the lightest possible burden for the servient owner. To achieve this, courts are guided by the principle "*ter naaste lage en minster schade*," which requires the right of way of necessity to traverse the neighbouring land that lies between the landlocked land and the nearest public road. In the event that the identified servient tenement does not satisfy the above principle, either because it is impassable or because the servient owner will be materially inconvenienced in the use and

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<sup>13</sup> See in this regard chapter 2 section 2 3 4 3 above.

<sup>14</sup> See in this regard chapter 2 section 2 3 5 above.

enjoyment of her land, the court may refuse to declare the right of way of necessity enforceable and consequently refer the dominant owner to seek access elsewhere. The route for the right of way must connect the dominant tenement to a public road. The alleged public road must satisfy the requirement of a public road in terms of South African law.<sup>15</sup> Chapter two argues that in the modern world it should be possible for a right of way of necessity to be granted for purposes of connecting the dominant tenement to public traffic systems other than a public road.<sup>16</sup> This chapter argues that it should also be possible, as shown by case law,<sup>17</sup> to grant a right of way of necessity for purposes other than just connecting the dominant tenement to public transport systems. Concerning the relevance of the use of the dominant tenement, Chapter two asks whether a right of way of necessity could be granted in favour of a dominant tenement that is used for purposes other than farming.<sup>18</sup> In response to this question, the chapter concludes that the right of way of necessity may be granted for the benefit of land used for purposes other than agricultural purposes. Regarding compensation, the chapter shows that a permanent right of way of necessity can only be granted upon payment of compensation by the dominant owner to the servient owner.<sup>19</sup> The amount of compensation could either be determined by the court or agreed between the parties themselves.

Chapter two further considers the question whether the right of way of necessity should be registered for it to be binding upon the world. The chapter shows

<sup>15</sup> For a detailed discussion on public roads, see chapter 2 section 2 3 5 3 above.

<sup>16</sup> See in this regard chapter 2 section 2 3 5 3 above.

<sup>17</sup> See in this regard *Trautman NO v Poole* 1951 (3) SA 200 (C) 208B; *Natal Parks, Game and Fish Preservation Board v Maritz* 1958 (4) SA 545 (N) 550D-E. See also chapter 2 section 2 3 5 3 for other authorities.

<sup>18</sup> See in this regard chapter 2 section 2 3 5 4 above.

<sup>19</sup> Regarding compensation see chapter 2 section 2 3 5 5 above.

that a right of way of necessity, like all other praedial servitudes, is a limited real right in land, which in principle must be registered in the deeds office.<sup>20</sup> Nevertheless, the chapter shows that a right of way of necessity is an exception to this rule. The right of way of necessity differs from other praedial servitudes in that it does not necessarily have to be registered to have third-party effect. In fact, non-registration of this servitude does not affect its nature as a limited real right. Nevertheless, most courts still recommend that this servitude be registered.<sup>21</sup>

Finally, Chapter two discusses the methods of terminating a right of way of necessity. Besides the ordinary methods of terminating servitudes, the right of way of necessity can be terminated when the situation of necessity ceases to exist. The chapter gives as an example a situation where a new public road is built adjacent the dominant tenement. It is argued that in such a situation the servient owner may ask the dominant owner to cancel the servitude and to stop using it regardless of whether it is registered or not. Alternatively, the servient owner may approach the court for a declaratory order lifting the right of way of necessity.

## 5 2 2 Justification of the right of way of necessity

Chapter three identifies three justifications for creating a servitude of right of way of necessity by operation of law instead of the usual agreement. The main justification is public policy<sup>22</sup> and the other two justifications are the social approach<sup>23</sup> and law

<sup>20</sup> Section 63(1) of the Deeds Registry Act 47 of 1937.

<sup>21</sup> See in this regard *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) 676E; *Aventura Ltd v Jackson NO and Others* 2007 (5) SA 497 (SCA) 500D.

<sup>22</sup> On public policy, see chapter 3 section 3 3 above.

<sup>23</sup> On jurisprudential views, see chapter 3 section 3 4 above.

and economics theory.<sup>24</sup> These justifications show why it is necessary to have a right of way of necessity and also why the courts, particularly, are justified to enforce this servitude without the cooperation of the servient owner.

The chapter shows that the main justification for the right of way of necessity is based on public policy. This possibility to create this servitude by operation of law exists for the reason that public policy does not allow for valuable land situated in desirable and strategic areas to be taken out of use and commerce due to landlocking of land. Public policy prefers to promote the efficient use of land. In this sense it favours the efficient utilisation of the land and discourages the possible loss of land use as a result of landlocking. On this basis, Chapter three argues that the right of way of necessity in view of public policy safeguards the economic interests of the landowner as well as the social interest. The landowner benefits in the sense that when her land gets unlocked she can use it for any purpose that she deems fit, but most importantly she can put it to efficient economic use, from which she can derive some form of income. At the same time, unlocking the land could also benefit the public in the sense that efficient use of land could for instance serve as a source of food production; it could also provide employment; and it could also be a source of taxation. This in effect means that a right of way of necessity opens the potential of land as a means of production and allows the efficient use of private property to benefit society. For these reasons, the interests of society do not allow for a person to hold land in perpetual idleness resulting from landlocking, and therefore the state in the form of courts should be allowed to unlock land where that could not be done on the basis of private negotiations.

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<sup>24</sup> On law and economics justifications, see chapter 3 section 3 5 above.

The public policy argument is complemented by the social approach discussed by Van Apeldoorn<sup>25</sup> in his analysis of the Dutch jurisprudential approaches to the right of way of necessity.<sup>26</sup> Van Apeldoorn distinguishes between an individualistic approach and a social approach. The individualistic approach is more concerned with the protection of ownership and only allows the granting of a right of way of necessity where the dominant tenement is totally landlocked. Other than that, the dominant owner should negotiate with the servient owner for a right of way. The social approach is more flexible and allows for the limitation of ownership where such limitation benefits the public. Van Apeldoorn argues that the right of way of necessity should be seen from a social point of view rather than from an individualistic point of view.<sup>27</sup> The social approach is similar to the public policy argument regarding the efficient use of land. In terms of the social approach, a right of way of necessity should be imposed over the servient tenement, even in the absence of agreement, if the public interest demands it. The essence is that landlocked land should be unlocked to enable the landowner to put it into efficient use, and the owner should in turn fulfil a social function by using the land for the benefit of the society.<sup>28</sup> The same examples discussed above regarding the public policy approach apply here. For instance, if the landowner uses the land for agricultural purposes, such land could be used to produce food in the public interest; the very same use of the land could create employment for the surrounding

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<sup>25</sup> LJ van Apeldoorn “De nood-of uitweg” (1937) 3512 *Weekblad Voor Privaatrecht Notaris-Ambt en Registratie* 185-187.

<sup>26</sup> See in this regard chapter 3 section 3 4 above.

<sup>27</sup> For a discussion on the individualistic approach, see chapter 3 section 3 4 above.

<sup>28</sup> LJ van Apeldoorn “De nood- of uitweg” (1937) 3512 *Weekblad Voor Privaatrecht Notaris-Ambt en Registratie* 185-187 187.

community; and beneficial use of the land could serve as a source of taxation for the state.

The individualistic approach and the social approach also feature in South African law relating to the right of way of necessity, as is evident from the influential Van der Merwe and Lubbe article on the right of way of necessity.<sup>29</sup> The authors show how the South African law on the right of way of necessity has developed from a strict individualistic approach to a more flexible social approach. In terms of the strict approach, a right of way of necessity can only be granted in cases of absolute or total landlocking. This approach is said to be based on the Roman individualistic, absolute, and exclusive nature of ownership. The flexible approach, which allows for the granting of a right of way of necessity not only in cases of absolute landlocking but also where the existing route does not provide a reasonably sufficient access to the public transport system for the dominant owner to enable her, if she is a farmer, to conduct viable farming operations, is said to be based on the Germanic community-based approach. This more flexible, social approach is based on public policy that promotes the efficient use of land even when that requires the imposition of some limitations on private ownership. The right of way of necessity in this regard is granted for the economic viability of the required commercial operation or to satisfy the operational needs of the dominant tenement. South African case law has now formulated and approved the circumstances under which a move from an individualistic approach to a social approach can be justified.<sup>30</sup> The move will be justified where the dominant owner satisfies the court that she has no reasonably sufficient access to the public transport system to enable her, if she is a farmer, to

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<sup>29</sup> CG van der Merwe & GF Lubbe "Noodweg" (1977) 40 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 111-125.

<sup>30</sup> See in this regard chapter 3 section 3 4 above.

conduct viable farming operations.<sup>31</sup> This approach involves evaluating the prejudicial effects of the existing lack of access for the continuing viable farming operations, compared to the prejudicial effects that would follow for the servient owner's property rights if the proposed right of way of necessity were granted. If the prejudicial effect of not having access for the dominant owner outweighs those of the servient owner if a servitude is imposed, the social approach will justify the granting of a right of way of necessity. This ensures that the servient owner's property rights are safeguarded. In this respect, the conflicting interests of the affected landowners are balanced. However, Chapter three indicates that the justification of the right of way of necessity is not justified merely by a balance of inconvenience but by necessity; the balance of inconvenience could at most indicate which neighbouring landowner's land could be identified as the servient land and where the route of the servitude should be located so as to impose the smallest possible burden on the servient land.

Law and economics theory provides a third ground justifying the right of way of necessity, particularly insofar as the enforcement of the right of the way of necessity by courts is concerned.<sup>32</sup> To this end Chapter three refers to the Coase theorem,<sup>33</sup> together with Calabresi and Melamed's distinction between property rules and liability rules.<sup>34</sup> One implication of the Coase theorem is that courts are only justified in enforcing a right of way of necessity where it is impossible for the dominant owner to obtain a negotiated right of way. Normally, the dominant owner should acquire a

<sup>31</sup> See in this regard chapter 3 section 3 4 above.

<sup>32</sup> See in this regard chapter 3 section 3 5 above.

<sup>33</sup> RH Coase "The problem of social cost" (1960) 3 *Journal of Law & Economics* 1-44.

<sup>34</sup> G Calabresi & AD Melamed "Property rules, liability rules, and inalienability: One view of the cathedral" (1972) 85 *Harvard Law Review* 1089-1128.

servitude of way by contract without court interference. In terms of the Coase theorem, the state is only justified in forcibly transferring private rights from one person to another if there is a market failure, for instance because of a holdout situation that prevents the creation of a servitude by agreement. The same argument is supported by the distinction between property and liability rules. Property rules protect property rights to the extent that the owner can insist on keeping his property rights and refuse to transfer them to anyone else. On the other hand, liability rules can in certain instances justify forcible transfer of an unwilling owner's property rights against payment of compensation. The difference between property rules and liability rules is consent. Under a system of property rules, consent is required for transfer of property rights to take place, whereas under a system of liability rules a transfer is sometimes enforced without the consent of the property owner. Calabresi and Melamed argues that property rules should be preferred over liability rules when transaction costs are low, that is when parties are able to negotiate for a voluntary transfer, and liability rules should only be preferred when a transfer is desirable for some overriding reason (such as economic policy) but difficult to negotiate because transaction costs are high, that is when parties are unable to engage in or successfully conclude voluntary negotiations.<sup>35</sup> The implication of law and economics theory is that the right of way of necessity should not be enforced against the servient tenement where the dominant may acquire a servitude of way by contract. The enforcement of this servitude by court order symbolises a move from the strict property rule approach to a liability rule approach because the law allows courts to create a right of way for the dominant owner against her will, albeit against compensation. This in essence means that courts are justified to enforce a right of

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<sup>35</sup> G Calabresi & AD Melamed "Property rules, liability rules, and inalienability: One view of the cathedral" (1972) 85 *Harvard Law Review* 1089-1128 1106.

way of necessity against the servient tenement where it is impossible for the dominant owner to obtain a negotiated right of way.

In sum, public policy and the social approach justify the necessity to have a right of way of necessity to encourage the efficient use of land for the benefit of the public (although it might also benefit the individual owner). On the other hand, law and economics theory implies that courts are only justified to enforce this servitude, even where it is necessary for some public interest, when it is impossible or difficult for the dominant owner to acquire a negotiated servitude of way by contract.

### 5 2 3 Section 25 analysis

Chapter four considers two constitutional issues relating to the right of way of necessity.<sup>36</sup> Firstly, the chapter ascertains whether the granting or enforcement of a right of way of necessity by courts amounts to a deprivation of the servient owner's property rights, which might be in conflict with section 25(1) of the Constitution. The second question is whether the granting of a right of way of necessity could also amount to an expropriation of the servient owner's property rights and, if so, whether such expropriation is in line with section 25(2) and 25(3) of the Constitution.

Chapter four concludes that the granting of a right of way of necessity does not constitute expropriation for lack of legislative authority. It is argued that the granting of a right of way of necessity by court order is regulated by the common law, which in South African law does not have the authority to order, grant or justify expropriation.<sup>37</sup> Furthermore, the courts do not have the inherent authority to

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<sup>36</sup> See in this regard chapter 4 above.

<sup>37</sup> A Gildenhuys *Onteieningsreg* (2<sup>nd</sup> ed 2001) 93; A Gildenhuys & GL Grobler "Expropriation" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 10 Part 3 (2<sup>nd</sup> ed 2012) para 12.

expropriate under South African law either. A court order that grants a right of way of necessity in terms of the common law can therefore not amount to or establish an expropriation in South African law.

The rest of Chapter four focuses on the section 25(1) question. It is argued in this chapter that when the courts enforce the right of way of necessity, the servient owner is deprived of certain entitlements of her ownership of the servient tenement. The servient owner is particularly deprived of her entitlement to use and enjoyment of a certain portion of her land, the entitlement to possess her land, the entitlement to dispose of her land, and the entitlement to exclude others from her land.<sup>38</sup> Chapter four undertakes the section 25(1) analysis of the right of way of necessity on the basis of the methodology developed in the *FNB* case to address the question whether the granting of a right of way of necessity constitutes a deprivation that might be in conflict with section 25(1) of the Constitution. The first question in terms of this methodology is to ask whether the law or conduct complained of affects “property” as understood by section 25. It is concluded that the granting of the right of way of necessity affects ownership of land, which is the servient owner’s ownership of the servient tenement. The servient owner is restricted in exercising some of her entitlements of ownership of land. Therefore the property affected for the purposes of section 25 is certain entitlements of ownership of land.<sup>39</sup>

Regarding the second question, namely whether the granting of a right of way of necessity amounts to deprivation of property, Chapter four argues that restrictions placed on the servient owner’s entitlements of ownership by courts qualify as a

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<sup>38</sup> See in this regard chapter 4 section 4 2 above.

<sup>39</sup> See in this regard chapter 4 section 4 3 2 above.

deprivation of property for purposes of section 25(1).<sup>40</sup> Enforcing the creation of a servitude by operation of law involves a state-enforced transfer of the relevant property entitlements, which must qualify as a deprivation of property. Taking into account that the right of way of necessity comes into existence by operation of law, it is concluded that a deprivation takes place the moment the court enforces this right against a particular property.

The third question in terms of the *FNB* methodology is to establish whether the deprivation complies with the requirements set out in section 25(1). Section 25(1) provides that no one may be deprived of property except in terms of law of general application and that no law may permit arbitrary deprivation of property. It is argued in Chapter four that the common law rule regarding the right of way of necessity constitutes law of general application for purposes of section 25(1). The remaining issue is whether the right of way of necessity constitutes arbitrary deprivation. To this end, the chapter determines whether sufficient reasons exist for the deprivation and whether the deprivation is procedurally fair.<sup>41</sup> For a deprivation to be non-arbitrary it has to be substantively and procedurally fair. In terms of the procedural fairness requirement, the right of way of necessity will be procedurally unfair if there are insufficient procedural mechanisms that protect the servient owner's rights. This chapter concludes that granting of a right of way of necessity is probably always procedurally fair by definition, since the deprivation takes place under judicial scrutiny. Accordingly, when courts decide cases concerning the right of way of necessity, they take into account all relevant factors and the court order should therefore preclude procedural arbitrariness.

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<sup>40</sup> See in this regard chapter 4 section 4 3 3 above.

<sup>41</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

The substantive arbitrariness test entails ascertaining whether the law pertaining to the right of way of necessity provides sufficient reason for the deprivation in question.<sup>42</sup> The Constitutional Court held that the substantive arbitrariness test is context-based and will depend on the facts of a particular case.<sup>43</sup> Furthermore, the scope of the deprivation determines whether the test will be a mere rationality test or something closer to the section 36(1) proportionality test. It is argued in Chapter four that something closer to rationality analysis will suffice for the right of way of necessity to pass section 25(1) scrutiny, because the deprivation does not affect the entire right of ownership, but just a few entitlements of ownership. Furthermore, the extent of the deprivation does not apply to the entire servient land but only to a small portion of the servient tenement. For these reasons, the justification for the right of way of necessity does not have to be convincing on the level of full proportionality. Chapter four refers to the justifications for the right of way of necessity identified in Chapter three, namely public policy, the social approach, and law and economics theory to determine whether these justifications are sufficient to render the granting of a right of way of necessity non-arbitrary.

The right of way of necessity is usually justified in terms of public policy in that it promotes the efficient use of land, which efficient use benefits both the dominant owner and society in general. In terms of the social approach, the right of way of necessity is also justified in terms of efficient use of land, particularly economic efficiency, which means that the servitude fulfils a social function in that efficient use of the land benefits the public in general. The public benefits in the sense that

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<sup>42</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

<sup>43</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100 (h).

members of the public are mostly the end users of the land's produce; from employment opportunities created by efficient use of the land; and also indirectly when efficient use of the land serves as a source of taxation. South African case law apparently recognises the social approach for the same reasons. Law and economics theory shows that enforcement of the right of way of necessity by courts is justified in instances where it is important to have a right of way but impossible for the dominant owner to acquire a negotiated right of way. Both the policy and social reasons justify having a right of way of necessity in a particular case, whereas law and economics theory justifies allowing the courts to enforce this servitude against the servient owner's will. Applying these justifications in the substantive arbitrariness test, Chapter four concludes that sufficient reasons exist for the granting of a right of way of necessity by court order to be in line with section 25(1) and thus constitutionally compliant.

### 5.3 Conclusions

The right of way of necessity is a special type of praedial servitude that assists a landowner (dominant owner) whose land is landlocked to gain access to a public road over neighbouring land (servient tenement), which would allow the dominant owner to make efficient use of the dominant land.

The servitude is created by operation of law as soon as the land becomes landlocked, thereby lacking access to a public road. It binds the surrounding properties as of right immediately when the dominant tenement becomes landlocked, but only one of the surrounding properties can be forced to carry this servitude.

The courts enforce this right of way over a specific servient tenement against the will of the servient owner, taking into account the capacity of the servient land to carry the servitude and the principle that the servitude must be established in the place where it will impose the smallest possible burden on the servient owner. A right of way of necessity can only be imposed on the understanding that the dominant owner pays compensation to the servient owner. The parties can agree on the compensation or the court can determine the amount.

Courts should only be approached to enforce this servitude against the servient tenement where it is really necessary to do so, which includes the requirement that the dominant owner must have been unable to acquire a negotiated servitude of way by contract with the servient owner. The right of way of necessity cannot be enforced if the dominant owner caused the landlocking situation herself, through her own fault, design or negligence. Furthermore, this servitude cannot be enforced against a specific servient tenement if the land is unsuitable for exercise of this servitude, either because it is impassable or it will materially and unreasonably affect the servient owner's use and enjoyment of the land.

Despite the implications that creation of a right of way of necessity has for the servient owner's property rights, imposing this servitude by operation of law is justified on the basis of policy and social reasons and by law and economics policy, provided that there are important public interest reasons to have the servitude in a particular case and that it is reasonably impossible to acquire the servitude by agreement. The right of way of necessity is based on public policy that promotes the efficient use of land and discourages landlocking of land. The social reason that justifies this servitude is that efficiently used land benefits not only the landowner, but

also society in general. In this sense the public interest does not allow land to be left unused simply because it is landlocked.

Essence the justifications for the judicial enforcement of a right of way of necessity are sufficient to prevent the common law that regulates the judicial creation of a right of way of necessity from constituting an arbitrary deprivation of the servient owner's property rights in conflict with section 25(1) of the Constitution. In terms of South African law, a right of way of necessity cannot constitute an expropriation of the servient owner's property because it is regulated by common law, which does not have the authority to allow or justify expropriation in South African law.

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