THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NO: 19032/2011

In the matter between:

HEIKO VAN WYNGAARDEN First Applicant

NICOLA EVELYN VAN WYNGAARDEN Second Applicant

and

FERNBOSCH TRADING CC Respondent

JUDGMENT: 2 FEBRUARY 2012

VELDHUIZEN J:

[1] This application is brought as a matter of urgency. The applicants apply for an order, pending the finalisation of an action to be brought for the registration of a servitude over the respondent's property, that they be permitted to utilise such servitude.

[2] The applicants own erf 164739 ('the property'), in equal undivided shares. They also own the adjoining erf 170716. The property abuts Shamrock Road which becomes Prospect Road. The respondent's property is farm 872 ('the farm') which abuts the applicants' property on the northern-western side thereof.

[3] The applicants are about to commence building a dwelling on the property. They state that they have a clear (alternatively *prima facie*) right to the registration of a servitude over the farm for the following reasons:

- The right of way is necessary to provide access from the property to a public road . . .;
- The property is landlocked and the servitude is the only reasonably efficient means of gaining access to a public road. But for the farm, the property is surrounded by built-up urban properties. The fall from the north eastern side of the property onto Prospect and Shamrock Roads is too steep for vehicular access. The only effective solution is the servitude indicated on the surveyor's diagram;
- The servitude is set out so as to minimise the impact on the use of the farm. It is situated on the south-eastern boundary which, in my view is far away from where a dwelling would be located on the farm.'

[4] The only relief which the applicants now seek is the interim right to use the farm so that motor vehicles (presumably heavy duty lorries) can convey building material over it and deliver the material to the property. The route over the farm envisaged by the applicants will extend over approximately 340 square metres.

[5] I accept that a way of necessity can be granted because alternative routes will be disproportionately expensive. In *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) het Jansen AR op bl. 671 beslis: 'Dit is genoeg om te aanvaar dat 'n aanspraak op 'n noodweg ontstaan as 'n grondstuk geografies ingesluit is en geen uitweg het nie, of, as 'n uitweg wel beskikbaar is, dit egter ontoereikend is en die posisie daarop neerkom dat die eienaar

> "has no reasonably sufficient access to the public road for himself and his servants to enable him, if he is a farmer, to carry on his farming operations"

(*Lentz v Mullin* 1921 EDC 268 te 270 . . .)

Such a situation, however, presupposes that sufficient facts are placed before the court to enable it to weigh up the financial implications for both parties.

[6] The respondent's expert, Mr ED Kelly, who is a civil and structural engineer, opined that '. . . construction works can be carried out by using a tower crane positioned on the erf or a hoist or conveyor from street level on Shamrock Road. This is standard building practice when works are to be carried out on a

steep slope. The suggestion that access is required over the farm for the works is, in my professional opinion, extraordinary.' This opinion is not disputed. The applicants' only answer is that such a course would entail unnecessary expense. The applicants make the bald statement that it would cost in excess of R100 000 to erect a crane as suggested by Mr Kelly.

[7] The applicants placed no facts before me from which I am able to determine what the cost implications for the respondent will be should I grant an order allowing them to use the proposed route over the farm. The fact that they undertake to restore the farm to its original state once their dwelling is completed does not assist them. The order they ask is one that makes serious inroads on the real property rights of the respondent and, in the light thereof, I need to be able to make a comparative judgment of the financial implications which such an order will entail for both parties. I am, due to the paucity of information, not able to do this. For this reason alone the application cannot succeed.

[8] There is, however, another reason why the applicants' application cannot be upheld. The applicants must at all times have been aware of the steep slope of their property. Despite this knowledge the plans for their proposed dwelling make no provision for vehicular access to it from the existing public road.

[9] CG Van der Merwe writes in LAWSA Vol 24, 2nd Ed. at p. 474:

> 'A landowner is not allowed to claim a way of necessity if he or she has created the situation of necessity him- or herself. The rationale is that a person should not by his or her own design place him- or herself in a position where he or she could virtually expropriate some of his or her neighbour's real rights.'

This view is not only supported by authority but also accords with common sense. If the applicants have to employ costly measures to provide building material from Shamrock Road to the property then they have only themselves to blame and cannot expect this court to burden the respondent with a temporary servitude of right of way.

[10] For these reasons the application is dismissed with costs. The preparation fees of the respondent's experts Mr ED Kelly shall be allowed on taxation.

A H. VELDHUIZEN, J
JUDGE OF THE HIGH COURT