Republic of South Africa

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

Case No: **11859/2011**

In the matter between:

THE LANGEBAAN RATEPAYERS' AND RESIDENTS' ASSSOCIATION Plaintiff

and

DORMELL PROPERTIES 391 (PTY) LTD First Respondent

THE SHERIFF OF THE HIGH COURT, LANGEBAAN Second Respondent

THE PREMIER OF THE WESTERN CAPE Third Respondent

THE SALDANHA BAY MUNICIPALITY Fourth Respondent

JUDGMENT DELIVERED: 08 MAY 2012

SABA, AJ

Introduction

[1] The applicant seeks an interdict against the first respondent, together with certain declaratory relief pertaining to a section of the "White Road" in Langebaan. The applicant further seeks a declaratory relief that a public servitudal right of way, constituted by ancient use or immemorial use, exists in favour of the public along the route followed by the White Road, Langebaan.

[2] The first respondent opposes the application on the basis that the section of the White Road constitutes private property and the public is not entitled to its use. The applicant is represented by Mr Irish *SC* and the respondent is represented by Mr MacWilliam *SC*

[3] For the sake of convenience, I will refer to the section of the White road which is the subject-matter of this application as the gravel road.

The Parties

[4] The applicant is a voluntary association having legal personality and duly constituted in terms of a constitution. The first respondent is a company with limited liability duly incorporated in terms of the Company Laws of the Republic of South Africa. The second respondent is the Sheriff of the High Court. The third respondent is the Premier of the Western Cape N.O. Fourth respondent is a local Municipality as defined in section 2 of the Local Government: Municipal Systems Act, 32 of 2000. No substantive relief is sought against second, third and fourth respondents.

[5] The relief sought in the notice of motion is formulated as follows:

> *"5.1 That this matter be heard as one of urgency and that Applicant's failure to adhere to the normal time-frames and forms of service in terms of the rules of this Honourable Court, be condoned;*
>
> *5.2 That a rule nisi do hereby issue, returnable on a date to be determined by the above Honourable Court, calling upon First Respondent and all other persons who may have an interest in this matter, to show cause why a final order should not be granted in the following terms:*
>
> *5.2.1 That First Respondent be interdicted and restrained from closing the public servitutal right of right of way known as the White Road at Langebaan ("the White Road"), which was unilaterally closed by such Respondent on or about 15 May 2011;*

5.2.2 That First Respondent be ordered to reopen the White Road for use by members of the public and should First Respondent fail to do so, that Second Respondent do so;

5.2.3 That it be declared that a public servitutal right of way, constituted by ancient use, exists in favour of the public along the route followed by the White Road;

5.2.4 That the public be allowed to use the White Road as they did before it was closed by First Respondent on or about 15 May 2011;

5.2.5 That First Respondent be ordered to pay the costs of this application on a scale as between attorney and client and that any other Respondent/s who oppose this application be ordered to pay the costs of this application on the scale as between party and party, jointly and severally with First Respondent, the one paying, the other to be absolved;

5.2.6 Further and / or alternative relief.

5.3 That, pending the return date of the aforesaid rule nisi, paragraphs 5.2.1, 5.2.2, and 5.2.4 thereof shall operate as an interim interdict and, unless otherwise ordered, shall continue so to operate pending the final determination of this matter".

[6] The application was brought as a matter of urgency and set down for hearing on Monday, 20 June 2011. On 20 June 2011 no opposing papers were filed, but the first respondent was represented at Court to oppose the granting of any relief. It sought the postponement of the matter, together with leave to file opposing papers. On 24 June 2011 Baartman J, made an order governing the further conduct of the proceedings. On 7 September 2011, the first respondent had not filed an answering affidavit and the Judge President by agreement between the parties granted an order setting the matter down for hearing on 22 November 2011.

Brief history of the White Road

[7] In approximately 1968, the then Divisional Council of Mamelsbury proclaimed a portion of the White Road (including the gravel road) to be a provincial road until 1991. In 1991 the Divisional Council then constructed a tarred link road (called Park Road) from the White Road over the hill behind the town to connect Sunbird Avenue, which runs in an east-west direction in the town. In other words, the link road served as a bypass for through traffic. This resulted in deproclamation of the gravel road as a provincial road and it no longer served as the principal through route to and from the south.

[8] It is common cause that on or about 15 May 2011 the first respondent closed the gravel road with a boom at the southern entrance and a gate at the northern entrance and refused to allow the public to have access thereto.

[9] It is not in dispute that for a long time the gravel road was previously allowed as a thoroughfare to the general public driving, cycling or walking. It is however in dispute that the general public has a servitudal right of way. First respondent contends that such right was terminated in 1991 by the diversion and deproclamation of the gravel road under section 3 of the Ordinance, 1976.

[10] It is the applicant's case that a public servitudal right of way over the gravel road existed because the public in general had a right of access to the gravel road from the time immemorial, which it enjoyed historically on an unencumbered basis. The applicant contends that despite the realignment of the provincial road and the deproclamation of the gravel road, the public did not lose its ancient right to use the gravel road. That the closure of this road by the first respondent prevented and hindered the ability of the members of the applicant as well as members of the wider public from accessing the beaches. It is also averred that the gravel road was previously used and is still used for recreational purposes which include walking and cycling.

[11] In support of the applicant's claim, Jocabus Albertus Jesse Kotze ("**Kotze**")), the chairman of the applicant relied on maps sourced from pages 32 and 33 of a book titled "The Saldanha Bay Story", authored by Jose Burman and Stephen Levin. Copies of the maps form part of the record and are marked LRRA.3.1 - 3.4. The significance of the evidence relating to these maps is reflected in paragraphs 20, 21 of Kotze's founding affidavit, the contents of which are as follows:

> "20. The earliest of these (LRRA.3.1) dating from 1795, shows the principal route from the South (i.e., from the military garrison and Groote Pos and hence Cape Town) as a dotted line. The route approaches the shore of the lagoon at the southern end then follows the shoreline, rounding the promontory to reach the site of the present village of Langebaan and, in so doing traversing the section of the White Road now dosed by First respondent. It also shows at the bottom thereof its reference from the Cape Archives.
>
> 21. ....On "LRRA.3.4" it is indicated that the route was a thouroughfare and was surveyed as such as early as 1881,".

At paragraph 24 he says:

> "I was able to source a manuscript detailing the local history of Saldanha Bay and the farm Geytenbergsfontein, now known as Oostewal and in which references are made to a route, of which the White Road forms part and which now forms the basis of this application. The history was never published, but I was able to source it from one Graham Bull, who still resides on one of the portions of the original farm Oostewal. I annex a complete copy thereof, marked "LRRA.4." From a reading thereof, the following appears:
>
> 24.1 In the third paragraph on page 5 thereof. There is a reference to an anonymous writer who stayed at the farm Theefontein during the first British occupation of the Cape (1795-1803). Theefontein is a farm to the west. The manuscript indicates that this writer travelled from Theefontein to Saldahna Bay, which means that he must have used the route of the White Road to do so;
>
> 24.2 The fact that this road led to Cape Town from the area presently known as Saldahna Bay, is continued in the last paragraph on page 5 of this same manuscript, and follows onto the top of page six;
>
> 24.3 As appears from page 6 of the same document, the farm Oostewal (then known as Gietenborgsfontein) served as a delivery point for grain and a grain magazine was erected. This means farmers must have travelled on

the same road, to deliver their grain".

[12] The applicant further relied on two affidavits deposed to by two elderly people, Sophia Makka (Sophie) a 72 year old female and Freddie Makka (Freddie) a 78 year old male. In her affidavit Sophia states that, as a child, she and her six brothers used to freely walk through the gravel road when going to school, to church and when going to buy groceries and had never required permission from anyone for doing so. Freddie on the other hand states that he has been a fisherman all his life. Since his childhood days, he and other fishermen used the gravel road to collect bags of seagrass from the beach and sell them to a local general store. They also used the road when going to the beach without any hindrance.

[13] In opposing the application Ricardo Scapellini ("**Scapellini**"), on behalf of the first respondent averred that subsequent to the diversion of the road, the developer instituted a permit system in terms of which members of the public were required to obtain permits from the site office at Myburgh Park for access, by foot, to the shore. He also relied on letters from the Surveyor – General Cape Town and the Department of Public Works (RS9 and RS10 respectively) which according him, confirm that the gravel road is a private road, on private land.

The relevant part of RS9 reads as follows:

> "STATUS REPORT: ROADS ON REMAINDER OF FARM NO 292, MAMESBURY
> ...(Divisional Road No. 1162), thus is not a public road in our records (it does not vest with the municipality). The road shown in yellow is a private road as vesting has reverted back to the owner of the land of which such land was originally part of. It was the old proclaimed road.
> Although these properties are not shown as public road in my records, according to the definition of public street in the Municipal Ordinance 20 of 1974 or the Divisional Council Ordinance no. 18 of 1976, they may well be defined as such...."

The relevant part of RS10 is as follows:

" 3. Background –

3.1 Division 1162 (previously known as no 36) was originally by Proclamation No 40 dated 31 January 1969 proclaimed to be a provincial road. At that stage, the portion of this road followed the alignment of the gravel road across your client's said

property. However in 1991, this portion of road was at the request of the previous developers and in collaboration with the Parks Board, diverted (within a 1000 meters of the centreline of the original route) to the location and route where the tarred road is now situated. One of the conditions that were imposed was that the new road should be built by the developers (at their costs) to the specifications and requirements of this Department. In terms of the provisions of section 19 of the Roads Ordinance, 1976 (Ordinance No 19 of 1976), it was therefore not necessary to amend the original description of the route as described in the original proclamation. All the interested parties at that time were informed of the diversion and supported the proposal.

3.2 In terms of section 22 of the Roads Ordinance, 1976 (Ordinance No 19 of 1976), the ownership of land (together with all works and things attached thereto) which ceased to form part of any public road diverted or closed, automatically passes and vests in the owner of the land of which such land originally formed part. Taking the aforementioned into consideration and the provisions of section 21 of the said Ordinance, the ownership of the gravel road has therefore passed over and vested with your client since date that the new road was opened to public traffic..."

[14] At paragraph 21.2 of his opposing affidavit, Scapellini deals with the maps relied upon by the applicant and say:

> "It is clear from all these maps that use of the gravel road was at all relevant times allowed, merely as a thoroughfare from the south-eastern side of the lagoon to the town of Langebaan."

He further states the following at paragraph 22.2:

> "It is clear from the map (referring to the map dating from 1795 "LRRA 3.1") that a section of the gravel road runs, at a certain point, relatively close to the shore, but that there remains a significant stretch of land between the gravel road and the shore itself".

[15] Regarding the manuscript relied upon by the applicant (detailing the history of Saldahna including the gravel road), I consider it necessary to quote from paragraph 24 of Scapellini's opposing affidavit where he states the following:

> "...24.3 As far as the manuscript annexure to the papers is concerned, consisting of superfluous matter, there is nothing to suggest that the gravel road was at any time used as an access road to the shore, or

that the public could freely trespass and trample over all of the private land laying adjacent to the shore;

24.4 ...it is clear from the manuscript that the lagoon was from times immemorial, well-managed, with designated harbours, outposts, forts, the appointment of "caretakers for the bay", and stones bearing VOC insignia as proof of ownership. Permission had to be obtained to build huts for storing fishing nets, to work saltpans or to graze cattle, and specific areas were designated cattle posts or whaling stations. By notice in the Government Gazette farmers were instructed to deliver grain at specific points, where grain magazines were erected by the "Postholder". Applications to gather eggs were sifted by the "Overseer". Boats landed on designated "landing strips". All of these activities could not take place anywhere by anyone along the lagoon coast, but access was clearly controlled and limited to designated areas;

24.5 Today the lagoon is even more carefully managed by inter alia SANPARKS, having been declared a protected area in terms of the Protected Areas Act, 57 of 2003 ("the PAA"). Designated access roads to the shore have been established along the lagoon coast, where members of the public can launch their boats, park their motor vehicles, use ablution facilities, etc. These areas, where access to the shore is allowed, invariably become hives of activity in the summer months and are carefully policed, in order to maintain law and order, and in order to ensure that the public abides by the environmental laws and regulations applicable to their activities in and around the lagoon.

24.6 These designated areas are clearly marked along the roads circling the lagoon, with boards indicating which activities are allowed and which activities are prohibited, at each of the designated areas.

24.7 In support of the above, I annex hereto, marked **"RS5"**, a map of the lagoon which can be obtained from the website of SANPARKS. The map clearly shows the different zones of control in the lagoon.

24.8 The gravel road does not lead to such an area, and it cannot be used to gain access to the shore at all".

[16] It is my view that the above excerpt does not deal with the averment about the anonymous writer who stayed at the Farm Theefontein (between 1795 and 1803) and used the route of the White Road to travel to Saldahna, nor does it deal with the averment that the farmers used the same route when going to deliver the grain. Scapellini refers to access that was controlled and limited to designated areas without stating that the gravel road was one of those areas. What Scapellini further avers that the gravel road does not lead to the lagoon is not correct because, attached to annexure 'RS15' (relied upon by the respondent), are a number of photographs showing the gravel road closed with a gate on one side and with a boom on the other side. Importantly, in my view, these photographs also show that the gravel road leads straight to the beach. The fact that the manuscript does not suggest that the gravel road was used as an access road to the shore is therefore without any merit.

[17] The pertinent issue for determination is whether a public servitudal right of way existed in favour of the public over the section of the White Road ("the gravel road").

[18] When asked to decide an opposed application on the affidavits, the approach to adopt is set out as follows in **Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Limited** 1984 (3) SA 623 (A) at 634E-635C.

> *"... where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent together with the facts alleged by the respondent, justify such an order .... In certain instances the denial by the respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact ... Moreover there may be exceptions to this general rule, as for example, where the allegations or denials of the respondent are so far-fetched or clearly*

untenable that the Court is justified in rejecting them merely on the papers..."

Legal Position

[19] In **LAWSA** at paragraph 624 the following is stated about the existence of a public servitude.

> "The existence of a public servitude can be asserted by proving *vestus* or immemorial user. In terms of this doctrine there is a rebuttable presumption that where a so-called public servitude has been exercised by members of the public from time immemorial, such servitude arose by virtue of a valid title even though there is no written proof of the validity of the rule".

At paragraph 627 it is stated that '*public servitudes are not extinguished by non-user or any form of extinctive prescription'.*

[20] In **De Beer v Van der Merwe** 1923 AD 378 at 383, JUTA, J.A., dealing with the doctrine of *vestustas,* the following is stated:

> "According to the *Digest* (39.3.1, 23: et 23.2.1.3.5.7, the doctrine of vetustas was applicable to the case of an artificial channel or ditch to drain fields or carry off water made so anciently that no one could remember when. The doctrine is thus defined by *Goudsmit* (id., sec. 81): "When any state of things had endured so long a time that its origin dated back to a period to which the memory of man did not extend there was a legal presumption that such origin had been legitimate and the parties were dispensed from furnishing proof that it was so....The nature and quality of proof to be adduced by the parties, it is unnecessary to consider".

[21] Section 21 of Provincial Ordinance 19 of 1976 ("**the Ordinance**") provides:

> "Notwithstanding the closing or *diversion of a public road or public path or any portion thereof under this ordinance, the right of the public to use such road, path or portion shall continue until the road authority concerned has,* by visible means on or attached to the land comprised in such road, path or portion, *indicated that*, in the case of a closure, such road, path or portion is closed to public traffic and, ***in the case of a diversion, the diversion is open to public traffic".*** (my emphasis)

[22] Section 22 of the Ordinance provides:

"(2) If –

(a) Any public road or public path is diverted .....

the ownership of the land thereby ceasing to form part of such public road, public path,....as the case may be, together with all works and things attached thereto, shall, unless the Administrator, by notice in the Provincial Gazette, otherwise directs **pass to and vest in the owner of the land of which such firstmentioned land originally formed part..."**(my emphasis)

Submissions

[23] Mr Irish *SC* submitted that the fundamental basis of this application is found on the principle *via vicinalis* and not on dominant and tentement servients. He referred to the case of **Peacock v Hodges** (Buch., 1876, p.65) at 70 where the following is stated:

"...there is another kind of road recognised by the Roman and the Roman-Dutch laws, and that is a neighbour's road, a *via vicinalis*. It is either a road in a village or a road leading to a town or village, which has been used by the public from time immemorial without any objection or hindrance from the neighbours over whose land it runs, I think that clear proof of uninterrupted use for thirty years and upwards is sufficient, by the law and practice of this Colony, to establish an user from time to time immemorial".

[24] Mr Irish submitted further that evidence substantiating the applicant's claim of immemorial use of the gravel road is contained in the affidavits deposed to by Mr and Mrs Makka (mentioned in paragraph 11 above), in the maps and the manuscript also referred to in paragraphs 10 an 11 of this judgment. He placed reliance on **Ludorf and another vs Wegner and Others** 6 Juta, 193 where the principle in Peacock supra was employed. At 198-199 of the case the following was said:

"...the so-called "neighbour's roads" may be acquired for the benefit of the public if the custom of using them had existed from time immemorial. Accordingly, in the case of Peacock vs Hodges (Buch., 1876, p.65), this Court, upon proof that the villagers of Malmesbury had been accustomed to use such a neighbour's road without let or hindrance for thirty years upwards, held that the public, and not those only who had used the road, had acquired a right to avail themselves of the custom. I may here

remark that the Court did not intend to decide, as stated in the headnote to the report, that "time immemorial" may be defined as "the period required for prescription," but rather that on proof of the custom for thirty years and upwards, the absence of any evidence as to when the custom originated justified the Court in holding that it had existed immemorially".

[25] Mr MacWilliam argued that no facts relating to the immemorial use of the White road were adduced. He argued further that the affidavit of Freddie Makka fails to meet the requirements of immemorial use because it does not show that the rights were exercised from the time immemorial. He further submitted that in order to succeed with a claim based on immemorial use, not only has the applicant to prove the exact route from the road to the shore, which he has failed to prove in this case, but must satisfy the following test, based on Bergh v Gossyn (2) 1965 (3) SA 707 (O) at 708C-D:

"In order to prove an immemorial user it is not sufficient merely to show that no one can remember the exact date or even the exact year when the right was first exercised, nor to show that there are no people living who can remember it; it must be proved that those people who might be expected to know of the origin of the right, if it had been within the memory of living man, had themselves no knowledge of its origin and did not hear from the generation preceding them that it had previously existed".

[26] In response, Mr Irish argued that the existence of a public servitude asserted by *vetustus* or 'immemmorial user' employs the evidential mechanism of a 'rebuttable presumption'. To establish this rebuttable presumption, he said, the following has to be proved:

26.1 That there has been a continuous and uninterrupted activity giving rise to the right by members of the public, whether in general or of a particular locality;

26.2 That the owner or successive owners of affected land have not interfered with members of the public carrying out or performing such activity;

26.3 That the activity in question existed so long that its origin cannot now be established

[27] I find Mr MacWilliam's submission to be misplaced because: firstly it is common cause that the only route which forms the basis of this application is the gravel road; secondly, the principle in Bergh supra is that '*a specific right of way along a specific route, based upon immemorial user, can only be obtained if the immemorial user has been exercised along a specific route*'. This is exactly the argument of Mr Irish; thirdly, Mr MacWilliams has not dealt with the applicant's averments relating to the maps and the manuscript containing the history of the use of the White Road. The said averments therefore remain unchallenged; fourthly, both Mr and Mrs Makka in their affidavits state clearly that they used the gravel road regularly since they were children. They did not require any permission to use it from anyone and had used it without any hindrance. They are now 72 and 78 years respectively. In my view, their evidence meets the requirements of *'immemmorial use'*. I am also persuaded by Mr Irish's submissions in the preceding paragraph, as they are in line with the authorities dealing with instances where public servitutal rights were acquired by virtue of immemorial use.
From the evidence placed on record, I am satisfied that the applicant has succeeded in proving on a balance of probabilities that a public servitude of right of way existed.

[28] Mr MacWilliams submitted further that the public's use of the White Road from at least 1968 and probably before that arose by virtue of the fact that the road was proclaimed and not because of the immemorial use. He contended that because of the diversion of the gravel road to a tarred road which is 1000 metres away, the right of the public to use the gravel road terminated and it can only exercise its right of way on the tarred road.

[29] Mr Irish argued that if a road is deproclaimed and no longer needed as a public road, the servitudal right of way is not affected. He relied for this proposition on **Malherbe v Van Rensberg en 'n Andere** 1970 (4) SA 78 at 82C – E where the following was stated:

> "Die beleid en oogmerke van die wetgewing noop myns insiens sekerlik nie tot die gevolgtrekking dat die wetgewer noodwengig moes bedoel het dat die servituurtregte wat 'n ander oor die grond waaroor die pad loop verwerf het, deur

> die proklamasie van sodanige pad as publieke pad, to niet gaan nie. Dit is 'n aanvaarde regsbeginsel dat waar eiendomsreg in grond, met 'n saaklike servituut beswaar na 'n ander persoon oorgedra word, die grond aan die beswaring onderhewig bly. Ek kan geen rede sien waarom die wetgewing so **uitgele** moet word dat daar van hierdie **reel** afgewyk moet word nie. In die eerste instansie waar die wetgewer bedoel het om, onder andere, servituutregte tot niet te laat gaan word dit uitdruklik bepaa..."

[30] I find Mr Irish's argument to have merit for the following reasons. The first respondent's argument that the public obtained their rights due to the proclamation of the gravel road in 1968 is not substantiated by any facts. Nowhere in the Ordinance is it stated that upon deproclamation or diversion of a public road, the rights of the general public to the use of that road terminate. Section 21 of the Ordinance (dealing with the right of public to use a diverted public road) and Section 22 (dealing with ownership of public roads after diversion) are silent about the rights that were exercised before the gravel road was proclaimed to be a public road. The letters from the Surveyor-General ("RS9 and RS10") relied upon by the first respondent do not say anything about the rights that existed before the White Road was proclaimed a provincial road. Moreover, when the White Road was proclaimed a public road in 1968, the first respondent was not the owner of the land where the gravel road is. Without any evidence to the contrary, he is in my view, not in a position to argue that there was never a public servitutal right of way created by immemmorial use over the gravel road.

[31] Mr Irish further argued that the closing of the gravel road, subjected the general members of the public who do not own cars to a longer walk (caused by the 1000 metre diversion) in the extreme heat (normally experienced in Langebaan) if they want to access the beaches. That the longer walk is caused by their having to go through the town of Langebaan instead of using a shorter and practical route to the beaches, which is the gravel road. There was no counter argument from Mr MacWilliam regarding this issue. This is without any doubt against the idealistic

notions of 'ubuntu' translated as 'humaneness' by Mokgoro J in **S v Makwanyane and another** 1995 (3) SA 391 (CC) at 501.

[32] On the contention relating to permits that were used to control the access of general members of the public from using the gravel road to the shore, it was contended by Mr Irish that the system was never applied on anybody. Scapellini, confirmed this version at paragraph 28.2.16 of his opposing affidavit by stating that when the transfer of ownership of property took place, the permit system, although in place, could not be enforced.

Evaluation

[33] I am of view that the evidence relating to the maps, the affidavits of Mr Kotze, Mr and Mrs Makka who have lived in Langebaan since they were young as well as the manuscript, establishes on a balance of probabilities that the public had access to the gravel road long before it was proclaimed as a provincial road in 1968. It also establishes that the access to the gravel road was without any hindrance. Uncontested evidence contained in these papers reveal that this state of affairs continued until the developers came and made an offer to the Department of Transport and Public Works to divert the White Road at their cost (as stated in RS10). This is what led to the introduction of the permits.

[34] For the reasons stated in paragraph 32 above, I find the issue of the introduction of permits for access to the gravel road to be only relevant:

34.1 in showing that the first respondent's averment that the public was not permitted to use the gravel road after the gravel road was diverted, was not true.

34.2 that there was an attempt to curtail the right previously enjoyed by the public to the use of the gravel road.

[35] In applying the principle in ***Peacock***, (also applied in ***Malherbe***, ***Ludorf*** and ***De Beer***) supra to the facts of this particular matter, I find that the first respondent has failed to rebut the presumption that the origin of the use of the gravel road was

lawful. In the circumstances, I find that a public servitutal right of way existed in favour of the public over the gravel road.

[36] This brings me to a summary of dispute of facts raised on behalf of the first respondent which are as follows:

36.1 Whether the public had access from the White Road to the shore;

36.2 the use of the White Road subsequent to 1991 when it was diverted, more particularly the manner in which it was used by the public, if at all;

36.3 Whether or not the so-called permit system admitted by applicant was effectively operational or properly implemented.

Having regard to what I have stated in paragraphs 33 to 34 above, it is my judgment that the allegations and denials of facts alleged by the respondent above are so far fetched that this court is justified in rejecting them merely on the papers, on the authority of ***Plascon Evans*** case supra.

[37] I now turn to consider briefly the requirements for a final interdict which are as follows:

37.1 **a clear right**

In the light of my decision that the general public had a public servitutal right of way over the gravel road, it is my judgment that the applicant has succeeded in establishing a clear right.

37.2 **a reasonable apprehension of harm**

The applicant has succeeded in establishing that as a result of the closure of the gravel road, the general members of the public have been placed at a great disadvantage and inconvenience that is still ongoing.

37.3 **no alternative remedy**

There is no other remedy to deal with the ongoing violation of the established rights of the general members of the public.

Conclusion

[38] I therefore conclude and find that the general members of the public are entitled to use the gravel road which was closed by the first respondent on 15 May 2011.

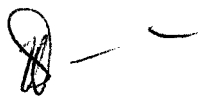
[39] In the result, the following order is made:

39.1 The first respondent is interdicted and restrained from closing the section of the White Road (the gravel road) at Langebaan;

39.2 The first respondent is ordered to re-open the gravel road for use by members of the public and should first respondent fail to do so, that the second respondent do so;

39.3 It is declared that a public servitutal right of way, constituted by ancient use, exists in favour of the public along the route followed by the White Road (the gravel road);

39.4 The first respondent is ordered to pay the costs of this application on a scale as between attorney and client.



N SABA

(Acting Judge of the High Court)