THE REPUBLIC OF SOUTH AFRICA

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

Case No: 8064/2017

Before the Hon. Mr Justice Bozalek

Hearing: 4 September 2017
Judgment Delivered: 15 September 2017

In the matter between:

FREDERICK CHRISTOFFEL ORFFER N.O.	***1st Applicant***
ANÉL ORFFER N.O.	***2nd Applicant***
ARNOLDUS JACOBUS STOFBERG N.O.	***3rd Applicant***
(in their capacities as the trustees of the FC Orffer Trust (IT 21076/2014))	
DROOMLAND LANDGOED (PTY) LTD	***4th Applicant***

and

CHRISTIAAN JOHANNES ORFFER N.O.	***1st Respondent***
ELMIEN ORFFER	***2nd Respondent***
ARNOLDUS JACOBUS STOFBERG N.O.	***3rd Respondent***
(in their capacities as the trustees of the Bloubank Boerdery Trust (IT 1050/2009))	
DIE ORFFER LANDGOED (PTY) LTD	***4th Respondent***

JUDGMENT

BOZALEK J

[1] This application concerns a dispute between two brothers who occupy adjoining farming properties over a servitudinal right of way in favour of the one brother's property over the other's property. More specifically the dispute concerns whether a suspensive

condition in a settlement agreement has now been fulfilled with the result that all disputes relating to the issue must now be referred to arbitration.

[2] Although there are a variety of parties involved in the application as applicants or respondents, in essence the contending parties are the first applicant and the first respondent viz the brothers. All the other cited parties are either themselves or their wives in their capacities as trustees of family trusts or the commercial vehicle through which the first applicant and first respondent conduct their farming ventures. For the sake of simplicity I shall to refer to the brothers simply as applicant and respondent.

Background

[3] The two adjoining properties appeared to have constituted the farm *'Bloubank No 52'* ('the farm') in the district of Tulbagh which was farmed by the brothers jointly until 2013 when they found that they could no longer harmoniously work together. Accordingly they agreed to subdivide the farm into Portions 1 and 2 with Portion 2 being farmed by the applicant and Portion 1 by the respondent. It would appear that fruit is grown on both portions and that at least part of the applicant's business is to dry some of that fruit in a drying yard/s. There is also a need, at least as far as Portion 2 is concerned, for heavy vehicles to travel onto the property to collect fruit or dried fruit.

[4] One of the practical difficulties facing the parties on subdivision was to create access to Portion 2 from the surrounding provincial roads and provision for such access had to be made in the subdivision plan. To this end a servitudinal road passing over Portion 1 and giving access off divisional road 1471 was apparently agreed and planned in the terms of the subdivision and duly registered in the deeds office. I shall refer to this as the *'servitudinal road'*. After the subdivision was approved the respective portions of

land were sold to the applicant and the respondent. The subdivision exercise was carried out by a team of professional persons including an attorney and a land surveyor, a Mr David Hellig, who acted on behalf of both brothers in doing so.

[5] In approximately August 2016, prior to the subdivision being effected, the respondent expressed his dissatisfaction at the location of the servitudinal road which enters his property at the traditional entrance to the farm and goes past the dwelling which he and his family occupy on Portion 1. Discussions ensued between the brothers which led to an agreement that the applicant would rather gain access to his property through a road to be built across respondent's portion but giving access and exit off divisional road 1474. I shall refer to that road as the *'Southern road'*.

[6] It would appear that the parties were anxious for the subdivision to be effected as soon as possible and to avoid delay they agreed that the application for subdivision would not be amended to reflect the servitudinal right of way as constituting the Southern road, as opposed to the (original) servitudinal road. It was agreed rather that the alternative access road i.e. the Southern road would be constructed by the respondent within a year after the subdivision was effected at which point the servitudinal road would simultaneously be cancelled in the title deeds and replaced by the Southern road. It was further agreed that in the meantime and for the purposes of conducting his farming business the applicant would use an existing access road from divisional road 1471 which also provided access to his cold store and pack sheds on Portion 2.

[7] According to the applicant, however, the respondent reneged on his obligation to construct the Southern road within the stipulated time period and, when he did commence doing so, it was not in accordance with the agreed dimensions. Whatever the case, it

would appear that the relationship between the parties deteriorated to the extent that on 10 November 2016 the applicant launched an urgent application in this Court in which he sought a reversion in his access arrangements to the enforcement of the servitudinal road in order to protect his interests. That application was settled in a written agreement on 21 November 2016 which was incorporated into a court order.

[8] At this stage it needs be recorded that the respondent had a different version of events leading up to the interdict proceedings. In essence he states that he only became aware of the location of the servitudinal road around the time that he was required to sign the sale agreement and was immediately dissatisfied therewith. Accordingly he raised it with the applicant with the eventual result that the agreement relating to the Southern road was reached. When, in due course he began to build the Southern road an inspector from the Breede Valley District Municipality inspected it and asked why the applicant could not gain access to his portion over his own property, to the north i.e. off divisional road 1477. In this way the need for a servitude would be avoided. The respondent alleges he told the official that the applicant had told him that his application for access from divisional road 1477 had been rejected and he was thus unable to gain such access. The official then advised the respondent that he was aware of no such application. In due course, the respondent's case continues, he confronted the applicant who ultimately conceded that there had never been any such application.

[9] The respondent's case is further that he only agreed to the servitudinal road because of the applicant's misrepresentation relating to access from divisional road 1477 aforesaid which was false and therefore the respondent took the view that the applicant was not entitled to gain access to his portion (Portion 2) using the servitudinal road but

must instead obtain access through a road over his own property i.e. Portion 2 at a certain point off divisional road 1477. I shall refer to this as the *'Northern road'*.

[10] These were the issues which came before this Court in the interdict proceedings but which were resolved, at least partially, by the settlement agreement.

The Settlement Agreement

[11] In terms of the settlement agreement the interdict proceedings were postponed sine die and it was recorded that the applicant had already given instructions to land surveyors to apply to the relevant government authorities for the approval of the construction of an access road to Portion 2 off divisional road 1477 i.e. the Northern road, so that no servitude right of way would be necessary; further that in the event that the Northern road was approved the applicant would take all steps to ensure it was constructed within a reasonable time but no later than 30 June 2017; that the parties would make financial contributions to the construction costs of the Northern road and, should the applicant have to forfeit any part of his drying yard for the construction of the road, the respondent would pay compensation to him. The agreement further provided that in the event of it being legally impossible – '*wetlik onmoontlik'* – to construct the intended Northern road, all disputes would be referred to arbitration to be commenced as soon as possible and to be completed by the end of June 2017.

[12] Certain provisions in the settlement agreement are particularly important and I therefore quote them in full.

> '*DIE SKIKKINGOOREENKOMS*
>
> *7. Dit word genotuleer dat die Applikante alreeds opdrag gegee het aan professionele landmeters om aansoek te doen by die nodige owerhede (namens die Applikante) vir die bou van 'n toegangspad 6 meter wyd vanaf die bestaande*

ingang op Afdelingspad 1477 na die Applikante se koelstoor oor die Applikante se grond ('die Noordelike Pad').

8. Indien sodanige aansoek goedgekeur word sal die Applikante alle nodige stappe neem ten einde te verseker dat die Noordelike Pad so gou redelikerwys moontlik voltooi en in gebruik geneem word, maar in elk geval teen nie later as 30 Junie 2017 nie.

...

15. Met ingebruikneming van die Noordelike Pad sal die terme van hierdie skikking alle regte en verbintenisse deur enige ooreenkoms van watter aard ookal tussen die partye wat handel met enige reg van weg waarop die Applikante oor die grondgebied van die Respondente aanspraak maak, vervang.

ARBITRASIE

16. Indien dit wetlik onmoontlik is vir die Applikante om die Noordelike Pad te bou, sal alle bestaande dispute tussen die partye na arbitrasie verwys word ('die Arbitrasieverrigtinge'), soos volg:

16.1 Die Applikante sal Arbitrasieverrigtinge ... van die stapel te stuur ten einde gepaste regshulp te eis. Die Respondente sal geregtig wees om enige teeneise wat hul moontlik sou wou instel, as Verweerders, tydens genoemde verrigtinge in te stel.

17. Die Arbitrasieverrigtinge sal so gou moontlik ingestel moet word nadat daar vasgestel word dat die Noordelike Pad nie wettiglik toelaatbaar is nie en daarna afgehandel moet word indien dit enigsins prakties moontlik is teen einde Junie 2017.'

[13] It was common cause between the parties that the reference to the application relating to the *'Northern road'* referred to one which would have as its point of access to divisional Road 1477 at point 1 marked on a diagram marked FC 2 at page 40 in the papers and which is also reflected as point B on page 108 of the papers. On 23 November 2016 i.e. two days after the settlement agreement was concluded the land surveyor, Mr

Hellig, duly submitted an application to the Department of Transport and Public Works in the Western Cape Government (*'the Department'*) for a proposed new access road from divisional Road 1477 to Portion 2 of farm 52 in Tulbagh. This was a reference to the so-called Northern road and the application explains that the parties had agreed to cancel the existing registered servitude road and the registration of a new servitude road (i.e. the Southern road) but that the respondent was reluctant to proceed with the registration of a servitude road in favour of Portion 2 for various reasons with the result that Hellig had been instructed by the applicant to submit an application for the cancellation of the two previously approved servitude roads *'and for a full access point at B for access to farm 52/2 Tulbagh from divisional road 1477'*.

[14] The response to that application was forthcoming on 1 February 2017 when Mr ML Watters, Chief Director: Road Networks Management in the Department of Transport and Public Works in the Western Cape Government advised, that *'owing to the geometry of Divisional Road 1477'* his branch would *'not approve a new access onto Farm 52/2 from Divisional Road 1477'*. The principal reason for this decision appeared to be that access to divisional road 1477 at the stipulated point did not comply with the legal requirements (apparently in terms of the Roads Ordinance 19 of 1976) for minimum road *'shoulder sight distances' ('SSD')* for safe access. It was common cause that this was or is a reference to the distance which someone accessing the road from Portion 2 at that particular point must be able to see down the road and thereby be apprised of oncoming vehicles.

[15] Upon receipt of this response from the Department the applicant took up the position that the suspensive condition contained in clause 16 of the settlement agreement

had been fulfilled and that all disputes between the parties could then be referred to arbitration in terms of clause 17. The respondent did not agree with this interpretation or contention however. Instead he adopted the position that the applicant was obliged in terms of the agreement to renew his efforts to obtain the approval of the Department to the establishment of an access road off divisional road 1477 even if it entailed moving the point of access from point 1 further down the road in order to comply with the necessary SSD requirements To this end the respondent even undertook to forfeit part of an orchard belonging to him running alongside divisional road 1477 and to allow the road reserve to be enlarged in order that the SSD requirements could be met. The respondent envisages a further application or application on behalf of the applicant, if needs be utilising these concessions for the approval of an access road which would eventually be a variation of the Northern road. He ultimately sought a power of attorney from the applicant to make such an application on his behalf. Much was also made by the respondent of the need to use to a road engineer. On the papers it was established that a further application could be made using as an access point to divisional road 1477 a point numbered 3 on page 108 of the record. It further emerges that having been apprised of a possible further application Mr Watters, on behalf of the Department stated that it would consider same. According to him if it satisfied the criteria for approval for a safe access *'then there is a chance of approval being granted'* but *'approval must not be taken as a given if application is made'*.

[16] In these proceedings the applicant seeks a declaratory order to the effect that the suspensive condition contained in para 16 of the court order on 21 November 2016 has been fulfilled and that the applicants are entitled to refer the dispute/s as referred to in para 16 to arbitration in terms of para 16.1, 17 and 18 of the court order.

[17] For his part the respondent contends that the application is premature in that the suspensive condition has not been fulfilled since the applicant has not exhausted all attempts to gain approval for an access road onto/off divisional road 1477. The respondent contends further that the Northern road route has not become legally impossible and it remains possible for the applicants to obtain such approval. It contends that the impediment is the applicant's refusal to cooperate by appointing consulting engineers to do a full and proper motivation/application or to authorise and mandate the respondent to submit a proper and fully motivated application on his behalf which the respondent is fully prepared to do. The respondent also relies on clause 27 of the agreement which provides *'(b)eide partye sal met die hoogste goeie trou optree in die uitoefening van hulle regte, asook in die nakoming van hulle verpligtinge, in terme van hierdie bevel'*. The respondent contends that the applicant had breached this clause and had acted unreasonably and in bad faith; further that whatever problems there may had been in obtaining approval for the Northern road access route have been of the applicant's own making.

[18] The two issues before the court are firstly, the proper interpretation of the clause 16 of the settlement agreement i.e. the suspensive condition and, secondly, whether this suspensive condition has been fulfilled or not.

[19] Inasmuch as the applicant contends that the suspensive condition has been fulfilled, clearly it bears the onus of proving this on a balance of probabilities.

[20] There are certain principles which must be observed in interpreting the relevant provisions of the agreement not least that such interpretation is a matter of law and fact

and accordingly a matter for the court to decide.[1] Divining the proper interpretation involves attributing meaning to the words used, having regard to the context provided by reading the particular provisions in the light of the document as a whole as well as the circumstances attendant upon its coming into existence. In determining the context (also referred to as the factual matrix) all relevant facts and circumstances may be considered as part thereof. The interpretation process is objective and a sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.

[21] Against the background of these principles the core issue is what do the words *'wetlik onmoontlik'* in the context of clause 16 of the agreement mean. Is it, broadly speaking, as the applicant would have it, that once the specific application referred to in the settlement agreement failed for the reasons advanced by the Department the suspensive condition was fulfilled or was it, as the respondent contends, only when all reasonable efforts by the applicant to secure that or another point of access off divisional road 1477 had been exhausted, a stage which the respondent states has not been reached.

[22] Of cardinal importance in my view is that the agreement throughout refers to a specific application in respect of a specific road, (*'die Noordelike Pad')*, which is defined and in respect of which an instruction had already been given to a surveyor to lodge with the relevant authorities (see clause 7). Clause 8 underlines this specificity with its reference to the consequences if <u>that</u> application was approved in which event the applicant must proceed to build the road and commence use thereof as soon as possible,

[1] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 SCA para 18 at page 603.

and in any event no later than 30 June 2017. This was a mere seven months into the future.

[23] The specificity of that application is underlined furthermore by the provisions of clause 9 of the agreement which provides for a specified contribution by the respondent to the costs of the road. It goes without saying that without knowing the dimensions and location of the road for which approval was sought it would be difficult or haphazard to specify what an appropriate contribution would be.

[24] The specificity to which I refer is also evident in the clause containing the suspensive condition, namely, clause 16 which refers to the eventuality of it being legally impossible for the applicant to build *'die Noordelike Pad'* (which is defined) in which event all disputes would be referred to arbitration. Mr Stelzner sought to give weight to the fact that clause 16 refers to the legal impossibility of building the road *'te bou'*, in effect contending that this was a different concept to that of the specific application being refused. In my view this is not a persuasive consideration since para 17 makes it clear that the concept of the proposed road not being legally permissible is equated with the concept and wording in para 16, namely, *'indien dit wetlik onmoontlik is ... om die Noordlike Pad te bou'*.

[25] A further important consideration is the fact that nowhere in the settlement agreement is there any suggestion of an obligation on the part of the applicant to exhaust all possibility of securing approval for an access road onto divisional road 1477. Had this been what the parties intended one would have expected such wording to have been used. The significance of the absence of such wording is heightened (and rendered more improbable) by the respondent's case that even when he concluded the agreement he was

suspicious of the applicant's motives and good faith because of the alleged misrepresentation by which he had been misled earlier. It was in these circumstances, the respondent testified, that he had insisted upon the clause requiring the greatest good faith. But this suggests all the more reason to have expected that the wording drafted or approved by the respondent's legal representatives would have made it clear that the application for the approval of the envisaged Northern road was but the starting point of a process in which the end point would be the exhaustion of all possible attempts to gain approval for an access road onto/off divisional road 1477.

[26] What is also noteworthy is the fact that time clearly was of the essence in that a strict time limit was set within which approval was to be gained and the road built and brought into use. This militates strongly against the notion that within a seven month period possible repeat applications with differing circumstances and points of access of divisional road 1477 might be placed before the Department if an earlier application/s were unsuccessful and before it could be said that a state of legal impossibility had been reached.

[27] It must also be borne in mind that the suspensive condition is just that, a reference to a future uncertain event and not a term or condition of the agreement which expressly or impliedly imposes obligations on the applicant to make repeated applications until such time as all possible variations are exhausted. In my view it is the respondent who is seeking to import into the agreement conditions or obligations which were neither intended nor agreed between the parties. In this case it would be an obligation on the part of the applicant to make repeated applications until such time as all possibility of gaining an access road off divisional road 1477 had been exhausted.

[28] Mr Stelzner argued that to give the latter interpretation to the suspensive condition would be to give it a sensible interpretation since the whole point of the agreement was to find a way whereby the applicant could gain access to his own property using a right of way which did not pass over the respondent's property. Not only is this purpose not reflected in the settlement agreement but the argument puts the cart before the horse. The purpose of the settlement agreement was to resolve the immediate interdict application and in such a way that satisfied the respondent's desire for an alternative access road for the applicant, not passing over the respondent's property, to be explored with the Department.

[29] The very structure of the settlement agreement made it clear that the parties envisaged that the application for permission for the Northern road might be unsuccessful in which event arbitration was to be commenced as soon as possible. Given, amongst other factors, the time pressures and constraints which the parties imposed upon themselves it would, in my view, be an insensible or uncommercial interpretation of clause 16 to hold that it envisaged the possibility of multiple applications for an access road off divisional road 1477 with potentially several new variables such as the point of access, the removal of orchards or parts of orchards, the changing of road reserves and the like. Clearly such a process could involve years of delay.

[30] It must also be borne in mind that from the point of view of the applicant he already had a right of access to his property through the servitudinal road, duly registered over the property, and on his version he had lawfully acquired this right with the respondent's knowledge and consent. In this regard, without going into detail, the allegation by the respondent that he had been unaware until a late stage where the

servitudinal road ran is cast into serious doubt by various communications in the papers which appear to indicate that well before the agreements were signed the respondent must have been aware or, at the least, that it had been drawn to his attention, precisely where the servitudinal road ran.

[31] Mr Stelzner also sought to argue that the application submitted on 23 November 2016 to the Department was not properly motivated and really did no more than invite a negative response. I cannot agree with this submission. The application was made by Mr Hellig who appears to have been a trusted professional and who had, earlier on, acted on behalf of both brothers in the subdivision application. On the face of it the application was more than adequate.

[32] It appears to be common cause that the application for the approval of the Northern road as an access road (with the point of access established as point B) is not permissible in terms of the relevant law or regulations by reason of non-compliance with SSD requirements. At best for the respondent the point of access will have to be moved. In these circumstances it is clear that the application, in its original and specific form, became or proved to be, legally impossible i.e. *'wetlik onmoontlik'*. There has been no suggestion that the Department could or might waive the SSD requirements. Inasmuch as the SSD requirements were a legal requirement and were not (and cannot be) met in the application for the approval of the Northern road, that road has proved to be *'legally impossible'* to build.

[33] There is no room for the argument that it is mere personal incapacity or unwillingness on the part of the applicant to pursue further applications for access onto divisional road 1477 rather than legal impossibility which has frustrated the approval and

building of the Northern road. As I have indicated the agreement makes reference to a specific application and a specific point of access. That application was made and was refused for reasons which it seems to me are legally unchallengeable, namely the SSD requirements. No one has suggested that the Department's decision stands any prospect of being successfully challenged.

Conclusion and Order

[34] In the circumstances I am satisfied that the applicant has made out his case and that the applicants are entitled to the declaratory order which they seek and the costs of this application.

[35] The following order is made:

1. The suspensive condition contained in paragraph 16 of the court order that was granted in case number 21972/2016 on 21 November 2016 (annexure "FC3" to the Applicants' founding affidavit), has been fulfilled;

2. The applicants are entitled to refer the disputes, as referred to in paragraph 16 of the court order, to arbitration in terms of paragraphs 16.1, 17 and 18 of the court order;

3. The respondents are ordered to pay the costs of the application.

BOZALEK J

For the Applicants	*:*	*Adv P de B Vivier*
As Instructed by	*:*	*Joubert Van Vuuren Inc* *c/o De Klerk & Van Gend*
For the Respondents	*:*	*Adv R Stelzner*
As Instructed by	*:*	*Muller Terblance & Beyers* *c/o VanDerSpuy Cape Town*