

Relief for Owners of Landlocked Land

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INTRODUCTION

This article serves as an update to our original publication dated 05 July 2017, titled *“Relief for Owners of Landlocked Land”* authored by Chantelle Gladwin-Wood (Partner) and Gary Boruchowitz. In that article, we explored the legal remedies available to property owners who cannot access their land from a public road without crossing the land of another. The original article introduced the concept of “landlocked” properties and discussed the various legal mechanisms, particularly servitudes, through which access rights can be acquired.

In this updated version, we revisit and expand upon those principles, offering greater clarity on the practical application of the law, developments in case law, and the evolving interpretation of servitutory rights of way of necessity. This topic is particularly relevant in the context of farmland that has been subdivided over time often without the registration of the necessary servitudes providing vehicular and pedestrian access to the landlocked portions, resulting in portions of land becoming inaccessible from the nearest public road unless adjacent private land parcels are traversed.

WHAT IS LANDLOCKED PROPERTY?

A landlocked property is one that cannot be reached from a public road without traversing the privately owned land of another person. In some instances, the route from a public road to the property may be so difficult or hazardous that access is virtually impossible. Owners of such properties may have legal remedies available to them, including the right to cross neighbouring land to reach their own. This right can arise in several ways:

1. The landlocked owner might have acquired a right to traverse another’s land in order to reach the landlocked property when he purchased the landlocked land. This right would most commonly have been registered as a servitude in favour of the landlocked land;
2. The landlocked owner might have negotiated with the surrounding land owners in order to arrange for a right of way servitude to be registered over

someone else’s land, allowing the landlocked owner to reach his or her property from a public road (and this right would most commonly have been registered as a servitude in favour of the landlocked land);

3. The landlocked owner might have acquired a servitutory right of way over another’s land by way of acquisitive prescription; or
4. In the situation where the landlocked owner does not have any servitutory right to traverse another’s land to reach his own, he will have a right in terms of the common law to do so (known as a ‘right of way of necessity’) which arises automatically, by operation of law, when certain factual situations exist.

Affected parties can agree to register a servitude giving the landlocked land (and/or its owners) the right to traverse the ‘servient’ land (the land affected or burdened by the right of way servitude). Because this article focuses on how a landlocked owner can acquire rights to traverse the land of another other than by way of agreement, the requirements for concluding such an agreement will not be dealt with any further.

ACQUISITION OF SERVITUDE VIA PRESCRIPTION

It is possible for a person to acquire ownership of land through acquisitive prescription (which is a legal process in terms of which an owner that uses someone else’s land openly as if he was the owner thereof for a period of 30 years or more becomes the owner of that land). It is also possible to acquire a right of way servitude over someone else’s land in the same manner. When calculating the 30 year period, the time period during which even prior owners of the landlocked land openly and without force utilized the road/path/track, is taken into account.

Once the landlocked owner has acquired such a right, he can force the owner of the affected land to recognise the servitude by approaching a court for an order authorising the registration of the servitude against the title deeds of the affected properties.

RIGHT OF WAY OF NECESSITY

Where a landlocked owner does not or cannot acquire a right of way over another's land by agreement or prescription, he will automatically have a 'right of way of necessity' over another's land in terms of common law. This arises by operation of law and the owner of the affected land does not need to consent.

However, it is not open for the landlocked owner to simply choose and plot out whatever he or she thinks the most convenient path over his neighbour's land is. His right to traverse his neighbour's land to reach his own is limited to the shortest route between the landlocked property and the nearest public road, and the route that causes the least damage/inconvenience to the land. What the "most convenient route" is, is often the subject of debate as there are many factors that a court could consider when making this determination.

A landlocked owner cannot demand the right to drive over a portion of his neighbour's property in a manner that will unreasonably negatively effect on the neighbour's privacy, property value or business interests.

As a result, the route that the landlocked owner must take is often the subject of dispute between the parties and there are several reported cases dealing with the principles that have evolved in our common law to determine where the shortest and least damaging route lies.

REGISTRATION AT THE DEEDS OFFICE AGAINST THE TITLE DEEDS OF THE LAND

Although a right of way of necessity is a limited real right in another's property, and it is a servitude (which is capable of being registered against the affected land in the Deeds Office), one will not usually find a right of way of necessity registered at the Deeds Office. This is because this right only comes into existence in situations where the landlocked owner cannot reach his own land from a public road and does not have any right to traverse another's property to reach his own land. If the landowner in question already had a servituted right to traverse another's property to reach his own land, then he would not need the right of way of necessity and it would not come into existence in terms of the common law.

Once the right of way of necessity comes into existence, however, it can be registered against the title deeds of the affected property in the Deeds Office. If the owner of the affected land is not co-operating and refuses to recognise the right of the landlocked owner to traverse the affected land, a court order can be obtained forcing the affected owner to co-operate and respect the rights of the landlocked owner.

After registration, the property will no longer be landlocked because the landlocked owner and his successors in title (ie people who buy or receive transfer of the property from the landlocked owner) will also be entitled to make use of the right of way of necessity servitude.

REASONABLE USE

All servitudes must be used reasonably. This requirement protects the owner of the land burdened by the servitude, to ensure that he is not unreasonably affected by the manner in which the servitude holder exercises his right in terms of that servitude. If a servitude holder is acting unreasonably and abusing the use of the servitude, the affected landowner can apply to court for relief. A right of way of necessity will operate over any land (including state owned land). The principles set out in this article apply equally to the state as the owner of land affected by right of way of necessity servitudes.

TYPES OF RIGHTS OF WAY OF NECESSITY

According to *Van Rensburg v Coetzee*¹ there are two recognised kinds of ways of necessity, which differ in specific respects.

1. *Jus viae precario* (Precarious Way)

This type of right of way confers less rights of enjoyment on the claimant, and is generally claimed only in situations of emergency. The owner of the servient land may close and cultivate the way but must open it and make it serviceable upon request in an emergency. Normally, there is no suggestion of compensation to the owner burdened. An example would be where a river floods and makes a road impassable only for a month of the year, during which time a property becomes landlocked. In such a case, a right of way of necessity *jus viae precario* would arise, but only for the period of time that the road is impassable because the river is in flood.

2. *Jus viae plenum* (Full Right of Way)

This type of right of way of necessity confers a fuller right of way. The owner of the landlocked property can insist on this full right against payment of a *justum pretium* (just price). The conferring of this right is treated as a kind of expropriation of a right, and operates permanently.

The determination of the Way of Necessity, including which piece of land it must traverse, its route, and its width, is governed by the principle: "***ter naaster lage en minster schade***" (at the nearest location and with the least harm/damage.²)

MOTION OR ACTION PROCEEDINGS?

In the recent Supreme Court of Appeal judgment in *Wulffers v Boxer Dale Holdings (Pty) Ltd and Others*³, an application concerning a servitude and way of necessity over immovable property was dismissed, not due to the inherent lack of a right, but primarily because of an important procedural missteps. This outcome provides a reminder of the critical importance of selecting the correct legal procedure and thoroughly pleading one's case.

The case involved a dispute between Ms Wulffers, the owner of Portion 233, and the respondents Boxer Dale Holdings (Pty) Ltd, Henry Anthony Klitsie, and Anton Heinrich Genade who sought a right of way over her land. While the Klitsies' portion of land (Part C) was landlocked, and they might have been entitled to a "way of necessity" (*via ex necessitate*) over Ms Wulffers' property to access it, this specific claim was "not advanced in the respondents' founding papers". This meant that even if a valid right existed, it was not properly put before the court for consideration.

Furthermore, Boxer Dale and Mr Genade relied on a general reciprocal praedial road servitude, registered in 1993, which stipulated that its route "is to be agreed upon by the registered owners". Crucially, there was no evidence that the route had ever been agreed upon by all relevant registered owners, including the owner of 'Property One', who had a direct and substantial interest in the proceedings and whose consultation was not evidenced. As a result, Boxer Dale and Mr Genade failed to establish their entitlement to any relief under this servitude.

Beyond the issues with how the claims were pleaded, the application was also dismissed because the respondents elected to utilize the incorrect procedural avenue to pursue their claims. The court highlighted that there was a "clear dispute of fact" regarding which route for the servitude would be "most appropriate and least onerous" for Ms Wulffers, the servient owner. There was also a dispute concerning the required width of the road. The parties were simply "unable to agree on a route".

The Supreme Court of Appeal firmly stated that "motion proceedings are not suited to resolving the kinds of disputes of fact that we have here. They cannot be resolved on paper". By electing to proceed by way of application when such foreseeable disputes existed, the respondents "did so at their own peril".

WHY EXPERIENCED LAWYERS ARE ESSENTIAL IN PROPERTY AND LITIGATION MATTERS

This case clearly illustrates why it is crucial to engage experienced lawyers in property law and litigation to assist with such disputes:

- **Pleading the Correct Claim:**
Experienced lawyers understand the nuances of property law, such as the specific requirements for claiming a "way of necessity." They would ensure that any potentially valid claim is properly advanced and articulated in the founding papers in the strongest and most convincing legal terms, presenting all necessary actual and legal arguments. Experienced lawyers will also know how to attempt to avoid court, by negotiation or other dispute resolution mechanism available. Court should always be a last resort as the best interests of the client (and not the amount of fees the lawyer can bill the client) should always be a consideration in the lawyer's mind when advising the client.
- **Choosing the Right Legal Procedure:**
A skilled litigator can assess whether a dispute involves significant factual disagreements which will preclude the matter from being heard in application proceedings. If clear "disputes of fact" are apparent or foreseeable, they would advise against motion proceedings (applications), which are designed for cases with undisputed facts. Instead, they would recommend action proceedings (summons), which allow for oral evidence, cross-examination, and a more thorough ventilation of facts, making them suitable for complex factual disputes. Proceeding incorrectly, as seen in this case, can lead to the dismissal of an otherwise potentially valid claim.

CONCLUSION

Access issues on landlocked properties involve complex legal and procedural considerations. While rights of way by agreement, prescription, or necessity can offer relief, they must be correctly identified, pleaded, and enforced. As seen in recent case law, even valid claims can fail due to procedural missteps. To protect your rights and avoid costly errors, it's essential to seek expert legal advice when dealing with servitudes and access disputes.

¹*Van Rensburg v Coetzee (Appellate Division)* [1979] ZAENGTR 29 (24 August 1979)

²*Van Rensburg v Coetzee Para 675A*

³*Wulffers v Boxer Dale Holdings (Pty) Ltd and Others (1224/2021)* [2022] ZASCA 172 (1 December 2022)



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