FORM A

FILING SHEET FOR EASTERN CAPE JUDGMENT

ECJ : **163**

PARTIES**:** **CARL WYNAND RAUTENBACH**

AND

ONGEGUNDE VRYHEID CC

- Registrar: **CA 186/06**
- Magistrate:
- High Court: **EASTERN CAPE DIVISION**

DATE HEARD: **01/06/07**

DATE DELIVERED: **18/06/07**

JUDGE(S): **Jones J, Dambuza J.**

LEGAL REPRESENTATIVES –

Appearances:

- for the Appellant(s): **ADV: Jooste**
- for the Respondent(s): **ADV: Quinn SC and ADV: Taljaard**

Instructing attorneys:

- Appellant (s): **NETTELTONS**
- Respondent(s): **BORMAN & BOTHA**

CASE INFORMATION -

- *Nature of proceedings* : **APPEAL**

FORM A

Not reportable
In the High Court of South Africa
(Eastern Cape Division)

Case No CA 186/2006
Delivered:

In the matter between

CARL WYNAND RAUTENBACH **Appellant**

and

ONGEGUNDE VRYHEID CC **Respondent**

SUMMARY: *Via ex necessitate* – access to fisherman's cottage on coastal land – application for a registered servitude giving access – there was only one existing road to the applicant's cottage which traversed the proposed servient tenement – this road followed the most convenient route – the applicant's land was not landlocked – there were other alternative routes over the applicant's own land between his cottage and the nearest public road where an access road could be constructed – the proposed servitude was not the only reasonably sufficient means of gaining access to the cottage – the dismissal of the application was upheld on appeal.

JUDGMENT

JONES J:

[1] The appellant, as plaintiff, sued for the registration of a servitutal right of way over the defendant's property. On 6 March 2006 the magistrate of Humansdorp dismissed his claim. This is an appeal against the magistrate's order.

[2] The dispute between the parties relates to two neighbouring seaside

cottages on the farm Ongegunde Vryheid near St Francis Bay. One is on portion 70. It belongs to the appellant. He makes regular use of it as a fisherman's cottage about twice a month over weekends. The other is on portion 71. It is owned by the respondent and is permanently occupied as a residence by a member of the respondent, Ms Enzer. The properties upon which they are situated adjoin each other. The respondent's property is completely landlocked. Access to it is gained by a registered right of way over the appellant's property. Presently, access to both cottages is by way of that road. It runs from the public road through the appellant's property, across on to the respondent's property to Ms Enzer's home, and then back on to the appellant's property to his cottage which is to the east and out of sight of the other cottage. For the most part this road is a rough track, rather than a road.

[3] The appellant acquired portion 70 in 1988. He has been using the present access road since then. Difficulties about his use of it arose after Ms Enzer acquired a member's interest in the respondent and took up permanent residence, which was during 2001. The road runs directly in front of her home, 5 to 10 metres from her front veranda, between it and the sea. Ms Enzer found the appellant driving in front of her house irksome. She called upon him to provide an alternative access road, and ultimately put him on terms to do so. When he refused she closed off the road. This led to litigation, and a spoliation order at the appellant's instance restoring the *status quo ante.* The present action by him, claiming a servitude *ex necessitate*, was the next predictable step.

[4] The legal principles which apply to this kind of situation are easily stated. The court may, without the consent of the owner of property, order a right of way over the property in favour of neighbouring property where the right of way is necessary to provide access to a public road. This is, of course, subject to the

payment of appropriate compensation. See *Van Rensburg* v *Coetzee* 1979 (4) SA 655 (A), and the authorities collected and discussed in that judgment. This is a serious incursion into the rights of the owner of the servient tenement, and such a right will only be granted in cases of necessity. The courts have declined to lay down hard and fast rules for when a right of way is considered to be necessary, but in general terms 'necessity' means that the right of way must be the only reasonably sufficient means of gaining access to landlocked property, and not merely the most convenient access to that property (*Trautman NO* v *Poole* 1951 (3) SA 200 (A) 207D-208A; *Aventura* v *Jackson and others* 15 August 2006 SCA Case No 290/05 para 8 per Nugent JA).

[5] The magistrate found that the appellant did not discharge the onus of proving a right of way *ex necessitate* as described in cases cited above. In my view his conclusion is unassailable. In the first place, it is common cause that the appellant's property is not landlocked. It has direct access to a public road without having to traverse the respondent's property. This access is not in any way limited or confined by geographical features on his property, such as a river or a krantz, which might create practical difficulties of access. This is not a case of incomplete access which for all practical purposes makes it necessary to find another way round. On his own evidence and the evidence of Van den Heever, his road building expert, the appellant enjoys unrestricted access to all parts of his property. All he must do is create his own track through his own bush. Mr

Jooste argued before us that because the present road is the only existing road to his property, this brings it within the definition of *Trautman*'s case as the only reasonably means of access. That is not, however, how the principle in *Trautman's* case works. A landowner cannot claim a *via ex necessitate* because there is an existing road through his neighbour's property, when his property is not landlocked and he can readily provide himself with direct access over his own property. On the facts of this case, this is, in my view, an insurmountable impediment to a finding that the appellant is entitled to the proposed *via necessitatis.*

[6] This is not the only impediment. The only existing road is the one presently used by both parties. It goes right up to the appellant's cottage. It is not possible to build an alternative road along another route that will also go right up to the appellant's cottage. But the appellant's expert witness, Van den Heever, testified that it is possible for the appellant to construct a road which gives him access from his boundary almost right up to the cottage without having to cross over on to the respondent's property. One of the roads envisaged by Van den Heever approaches the cottage from the rear, where a parking area can be constructed about 40 paces from the cottage. The appellant explained that he would prefer to drive right up to the cottage because he has to carry wood, gas bottles, ice, groceries, fishing tackle, and the like from the vehicle to the cottage. He has not installed electricity at the cottage, although this can readily be done, because he prefers to live as closely to nature as possible when he visits it. This is understandable. The photographs show that the area is beautiful, remote, and completely unspoilt. But he cannot claim a way of necessity because he chooses to cart wood and gas instead of installing electricity. Indeed, he conceded in the course of his evidence that being able to drive up to the cottage was a matter of convenience and not necessity. The concession was properly made. It will be no more than an inconvenience to carry wood and gas the 40 paces or so from his vehicle to the cottage, if that is what he chooses to do.

[7] It is beyond question, on the appellant's own evidence and the evidence of

his expert Van den Heever, that the alternative access proposed by Van den Heever, once built, would give 'reasonably sufficient access' to the appellant's cottage as envisaged in *Van Rensburg* v *Coetzee* and *Trautman's case supra.* The alternative road can be traversed by the kind of vehicle which the appellant currently drives to get to the cottage. The expense of building the road is not great in relation to the value of the property and the pleasure to be derived from it. It will not take long to build. From a proportionality point of view[1] it is a better solution to build a new road than to allow the appellant to continue to use the present road. According to the unchallenged evidence of Summerton, the expert property valuer called by the respondent, if the present road is declared to be a right of way the value of the servient tenement will decrease by some R500 000-00, which is considerably more than the costs of constructing the most expensive and luxurious of the roads envisaged by Van den Heever. In addition, the pleasure and enjoyment of the use of the respondent's cottage will be diminished considerably by a through road running within metres of the front door. It bears repeating that a permanent right of way is an onerous burden on the owner of the servient tenement. The requirement of necessity, not in an absolute sense but in the sense of the only reasonably sufficient means of access to landlocked property, is there to prevent that burden from being

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1 I have been referred to the judgment of Hurt J in *English* v *CJH Harmse Investments CC* (Case No 4028/02 NPD 14 March 2006) which counsel made available to me during argument, citing it as 2006 JDR 0792 (N) page 1. This judgment gives a thorough review of the important authorities in the light of constitutional issues relating to diminution of rights, and it provides an illustration of how the courts should understand and apply the principles.

imposed except in proper cases. This is not a proper case. The right of way claimed by the appellant is not *ex necessitate.*

[8] In my opinion, the amount of compensation tendered by the appellant, R5000-00, is shown on the evidence to be entirely inadequate. But it is not necessary to consider the matter of compensation further because of the conclusion reached on the other issues. Furthermore, the appellant did not make a case that he is entitled to the right of way he seeks by reason of an implied agreement, and, in any event, the evidence is overwhelming that there never was such an agreement. The magistrate correctly held that the appellant's use of the road up to now has been on sufferance.

[9] My conclusion is that the appeal must fail. Mr *Quinn* argued for the respondent that because the matter involved a substantial amount of money and was of importance to both parties, and because at issue was a serious inroad into the respondent's rights of ownership, we should permit the costs of two counsel on appeal. It is indeed so that success in this litigation was of particular importance to the respondent. It would prevent a reduction in the value of the property by R500 000-00, and, perhaps even more important, it would prevent enjoyment of the property being significantly impaired by the recognition of a permanent, intrusive right of way. In the circumstances it was, in my opinion, a reasonable and prudent precaution for the respondent to protect its rights by engaging two counsel.

[10] The appeal is dismissed with costs, which shall include the costs of two counsel.

RJW JONES

Judge of the High Court
2 June 2007

DAMBUZA J: I agree.

NC DAMBUZA
Judge of the High Court