THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1223/2017

In the matter between:

JJPC BRAND ADMINISTRATORS	**FIRST APPELLANT**
BASIE BRAND	**SECOND APPELLANT**

and

P LOMBARD	**FIRST RESPONDENT**
L J ENGELBRECHT	**SECOND RESPONDENT**
EATING HABITS (PTY) LTD	**THIRD RESPONDENT**

Neutral citation: *JJPC Brand Administrators & another v Lombard & others* (1223/2017) [2019] ZASCA 55 (1 April 2019)

Coram: Navsa AP and Tshiqi, Wallis and Van der Merwe JJA and Eksteen AJA

Heard: 4 March 2019

Delivered: 1 April 2019

Summary: Road – portion of public road closed – whether remaining portion a public road depends on circumstances.

Servitude – relocation of defined servitude of right of way at instance of servient owner – not permissible if proposed new route would be less convenient, less practical or more expensive to dominant owner.

ORDER

On appeal from: Limpopo Division of the High Court, Polokwane (Makgoba JP sitting as court of first instance):

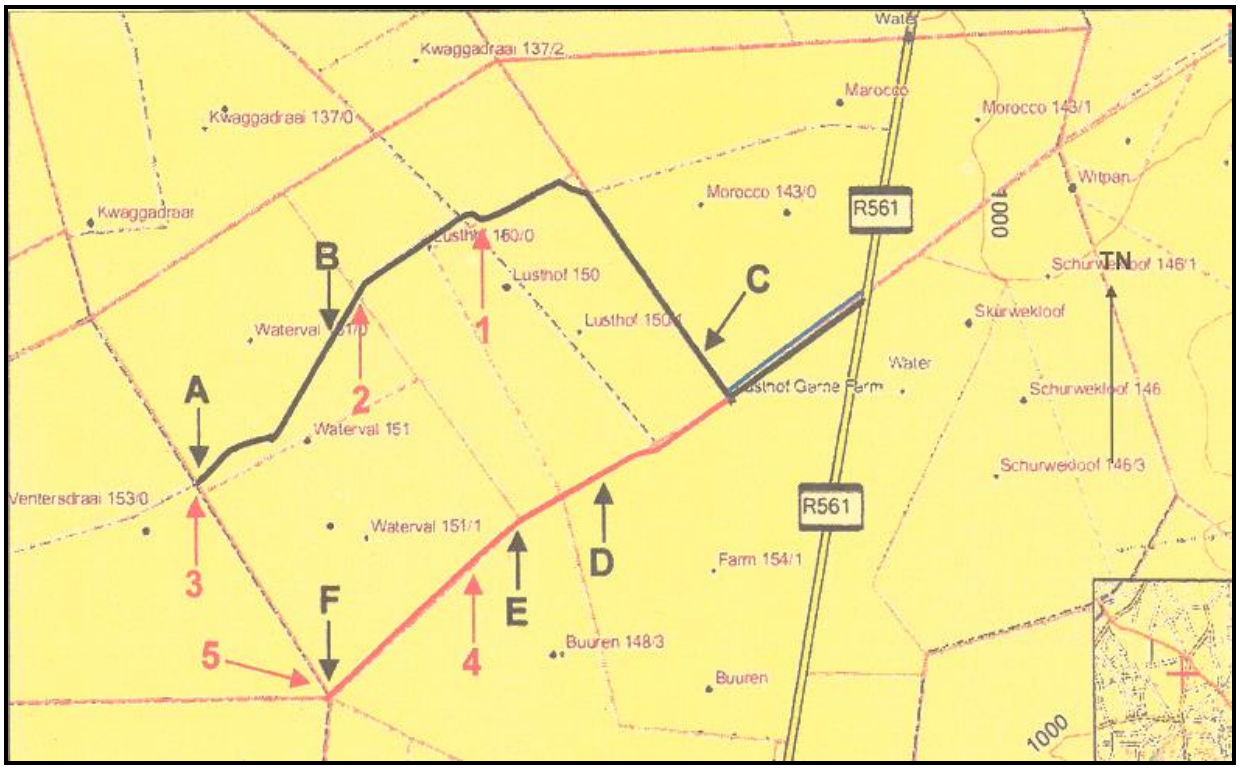
1 The appellants' application to adduce further evidence on appeal is dismissed with costs.
2 The appeal is upheld with costs to be paid by the respondents, jointly and severally.
3 The order of the court a quo is set aside and replaced with the following:
'The application is dismissed with costs to be paid by the respondents, jointly and severally.'

JUDGMENT

Van der Merwe JA (Navsa AP and Tshiqi and Wallis JJA and Eksteen AJA concurring)

[1] This appeal concerns a road that links the farm Ventersdraai 153, Registration Division L.R., Limpopo Province (Ventersdraai) to the R561 provincial road between the towns of Baltimore and Marken. The issues for determination are whether the Limpopo Division of the High Court, Polokwane (Makgoba JP) correctly made orders declaring: (a) that this road (the existing road) is not a public road; and (b) that the respondents are entitled to relocate its route.

Background



[2] The existing road runs via points C and B to point A on the map shown above. Point A indicates the entrance to Ventersdraai. The distance between point A and the R561 is approximately 11 kilometres. From the R561 the existing road traverses the remainder of the farm Morocco 143 (Morocco), portion 1 of the farm Lusthof 150 (Lusthof 1), the remaining extent of the farm Lusthof 150 (Lusthof) and the remaining extent of the farm Waterval 151 (Waterval), in that order. Upon exiting the R561 it runs in a south-westerly direction on Morocco along its southern boundary. At the south-western corner of Morocco it turns 90 degrees to the north-west and continues on Morocco alongside its boundary with Lusthof 1. It then turns towards the south-west and follows that general direction, first over Lusthof 1, then over Lusthof and finally over Waterval up to the boundary of Ventersdraai.

[3] The late Mr JJPC Brand (the testator) acquired Ventersdraai during 1968. During 1976 he also acquired the remainder of the farm Kwaggadraai 137 (Kwaggadraai). Kwaggadraai adjoins Ventersdraai at the latter's north-eastern corner. Ventersdraai and Kwaggadraai presently vest in the first appellant, the administrators

of a trust created by the joint will of the testator and his surviving spouse, Mrs Susanna Dorethea Brand (Mrs Brand). There was some confusion at the commencement of the proceedings in the court below as to who the administrators of the testamentary trust were, but it is clear that Mrs Brand was one of them. In terms of a power of attorney filed on behalf of the first appellant shortly before the hearing of the appeal, the administrators are indicated as Mrs Brand and two of her sons, Mr Jacobus Johannes (Basie) Brand and Mr Johannes Hendrik (Tommy) Brand. Mr Basie Brand is the second appellant.

[4] The registered owner of Morocco is Go Lokile Farm (Pty) Ltd. It did not oppose the respondents' application in the court a quo nor participated in the appeal. The first respondent, Mr Philip Lombard, was previously the owner of Lusthof 1. He transferred ownership of Lusthof 1 to a Mr Nicolaas Stephanus Botes on 12 September 2013, but for some unexplained reason remained a party to the proceedings in the court a quo and the appeal. It is not disputed that Mr Botes aligns himself with the respondents. The second respondent is Mrs Louisa Jacoba Engelbrecht. She is the owner of Lusthof. The third respondent, Eating Habits (Pty) Ltd, is the owner of Waterval. It also owns portion 1 of the farm Waterval 151 (Waterval 1). Waterval 1 adjoins the southern boundary of Waterval and both adjoin the eastern boundary of Ventersdraai.

[5] According to the evidence it is well known in the area surrounding the existing road that it originated as a wagon road ('wapad') long before the1950's. The second respondent had resided on Lusthof since 1955 and confirmed that the existing road had been in use since then. Mrs Brand first arrived in the area during 1962 and also confirmed that the existing road had been used since that time. The existing road allows convenient access to the homesteads on Ventersdraai and on the other farms along its route. This probably determined its route in the first place.

[6] As I have said, the testator acquired Ventersdraai during 1968. At that time the existing road formed part of a public road that continued over Ventersdraai from its boundary with Waterval (point A on the map), in a south-westerly direction and then in the same direction over the adjoining farm Morning Star 156 (Morning Star). This public road then proceeded southward over the farm Eulalie 136 until it joined a public road between Jemima and Marken. This public road thus linked the Baltimore/Marken and Jemima/Marken public roads.

[7] On 14 March 1973, however, the then Administrator of the Transvaal published a notice in the *Provincial Gazette* headed 'CLOSING OF PUBLIC ROAD ON THE FARMS MORNINGSTAR 165 LR (sic) AND VENTERSDRAAI 153 L.R.: DISTRICT OF ELLISRAS.' (The notice). It is clear from the notice and the accompanying sketch plan that only that portion of the public road that traversed Morning Star and Ventersdraai, was closed. The notice stated that the Administrator acted under the provisions of s 31(1) of the Transvaal Road Ordinance 22 of 1957. This meant that the notice constituted approval by the Administrator of an application that had been made under s 28(1) of the Ordinance by 'a person who desires that any public road other than a provincial road be closed'. The notice therefore did not, in its terms, affect the remaining portions of the public road, southward of Morning Star and to the east of Ventersdraai.

[8] During 1978 the testator and Mrs Brand moved their residence to Kwaggadraai. They and their descendants (the Brand family) have resided on Kwaggadraai ever since. When these proceedings were instituted during 2012, Mrs Brand had continuously resided on Kwaggadraai for more than 33 years. At that time her aforesaid two sons and their families also resided on Kwaggadraai. The Brand family have used the existing road via Ventersdraai continuously since at least 1978. This included use by heavy trucks transporting cattle, game and lucerne. The Brand family also maintained the existing road during this period.

[9] The only modification to the route of the existing road took place during 1992. At that time the existing road traversed the middle of Morocco. Because a pan on Morocco rendered a portion of the route difficult to use when it rained, all interested parties agreed to move the route to run along the boundaries of Morocco as detailed above.

[10] The third respondent acquired Waterval 1 only during 2009. It then became interested in also acquiring Waterval, which it intended to use together with its existing farm as a unit, for purposes of a game farm. Its representatives found it objectionable that the existing road would run more or less through the middle of the envisaged combined game farm. Before it acquired Waterval, the representatives of the third respondent met with Mrs Brand and the second appellant, to discuss the possible

relocation of the existing road over Waterval. At that time they proposed that after entering Waterval from Lusthof, the existing road would turn towards the north-west and would from there, run along the eastern, northern and western boundaries of Waterval, in that order, up to the present entrance to Ventersdraai.

[11] The appellants did not agree to this proposal. The second appellant, *inter alia*, said that the existing road had been used for more than 30 years and produced a letter that, according to him, supported the stance that the use of the existing road could not be impeded. It turned out that this was a letter from the regional head of the western region of the Department of Public Works of the Northern Province, dated 12 September 2000 (the letter) and addressed to Mrs Brand. The letter referred to an application by a previous owner of Waterval to close the existing road over Waterval and informed Mrs Brand that the relevant roads board had decided that the existing road 'may not be closed and shall retain its status as a public road'. When the third respondent acquired Waterval during July 2010, it knew that the appellants were opposed to the relocation of the existing road and on what grounds.

[12] As I have said, the respondents launched their application during 2012. For present purposes it suffices to say that the respondents claimed orders declaring that the existing road was not a public road and that they were entitled to relocate it according to their proposal. In their application, however, the respondents proposed a road entirely different from what they had proposed earlier. They proposed a route along points D and E to point F on the map. The proposed new road would continue from the south-western corner of Morocco in the same general direction along the southern boundaries of Lusthof 1, Lusthof and Waterval, until it reached Ventersdraai. It is immediately apparent that the proposed new road would provide entrance to Ventersdraai only at its south-eastern corner (point F). It is common cause that this is approximately three kilometers from where the existing road enters Ventersdraai (point A).

[13] The appellants maintained that it had not been shown that the existing road was no longer a public road. They contended that, in any event, a praedial servitude of right of way along the existing road had by acquisitive prescription been created in favour of the owners of Ventersdraai. As the proposed new road would cause material

prejudice to the owners of the dominant tenement, so they argued, the relocation of the servitude was precluded by law.

[14] The court a quo held that the existing road was not a public road and in para 1 of its order issued a declaratory order to that effect (the first declaratory order). Despite accepting that the appellants had established a right of way along the existing road, in para 2 of its order, it declared that the respondents are entitled to relocate it as latterly proposed by them (the second declaratory order) and made further orders aimed at giving effect thereto (paras 3-7 of the order). Paragraph 8 of the order directed the appellants, jointly and severally, to pay the costs of the application. The court a quo refused leave to appeal but this court, subsequently, granted leave to the appellants to appeal to it.

Public Road

[15] The definition of 'public road' in s 2 of the Transvaal Road Ordinance 5 of 1912, provided for essentially two categories of public roads. They were:

'*(a)* any road proclaimed as such under this Ordinance or which has been established or become a public road under this or any other Ordinance;

(b) any road or path however created . . . which at the commencement of this Ordinance has been in the undisturbed use of the public or which the public has had the right to use during a period of not less than fifteen years.'

Section 7(1)*(a)* of this Ordinance provided that the Administrator of the Transvaal may 'from time to time as occasion requires' by proclamation declare any road to be a public road.

[16] The whole of Ordinance 5 of 1912 was repealed by the Roads Ordinance 9 of 1933. Its definition of 'public road' included paras *(a)* and *(b)* above, in identical terms. The provisions of s 7(1)*(a)* of Ordinance 9 of 1933 were also virtually identical to those of its predecessor. It provided, however, that a proclamation under s 7(1)*(a)* had to be published in the '*Official Gazette of the Province of Transvaal*'.

[17] The Roads Ordinance 22 of 1957, in turn, repealed the whole of Ordinance 9 of 1933. It retained the two categories of public roads, in the following terms:

'(1) any road declared as such under this Ordinance, or designated as a public road under this Ordinance or any other law, and includes any temporary deviation thereof;

(2) any road, however created . . . which has been in the undisturbed use of the public during a continuous period of not less than fifteen years'.

Section 5(1)*(a)* of Ordinance 22 of 1957 provided that the Administrator may by notice in the Provincial Gazette declare any road to be a public road after investigation and report 'by the board concerned'. This referred to the road board for the particular area that had been constituted under Ordinance 5 of 1912 that remained in place under Ordinances 9 of 1933 and 22 of 1957.

[18] Ordinance 22 of 1957 was repealed by the Limpopo Roads Agency Limited and Provincial Roads Act 7 of 1998. That Act established the Limpopo Roads Agency and made it responsible for provincial roads of the Limpopo Province. Section 71(1) of this Act, in essence, provides that any action or decision taken under or recognised by Ordinance 22 of 1957, remained of full force and effect and s 55(6) thereof provides specifically for the continued existence of the aforesaid road boards.

[19] It follows that the public road that the existing road formed part of, referred to in the notice, could either have been established by proclamation or by public use. A proclaimed public road will generally only cease to be a public road if it is closed by proclamation. The same must in my view apply when only a portion of a proclaimed public road is de-proclaimed. The remainder of the proclaimed public road would in these circumstances retain that status.

[20] The position may be different when a portion of a public road that had been established by public use, is closed, albeit by proclamation. The remaining portion of such a road would not necessarily cease to be a public road. See *Botha v Bukes & another* 1955 (1) SA 581 (O) at 586G-H. Whether it retains that status, would depend on the circumstances of each case. One question would be whether the remaining portion continues to be in the undisturbed use of the public and the answer to this question depends on whether the remaining portion leads from one public place to another and/or is used by the public at large as a matter of general right. See *Rex v Erasmus* 1947 (3) SA 568 (T) at 570-571 and *Roos v Mossop* 1952 (1) SA 8 (T) at 11D-F and 12F-13B. (In both these cases the court had to determine whether the road in question was a public road under Ordinance 9 of 1933).

[21] The aim of the respondents' application was the relocation of the existing road. In order to achieve that aim, they had to show that the existing road was not a public

road. Thus, the onus rested on the respondents to prove on a balance of probabilities, in the first place, that the existing road was not a proclaimed public road or a part thereof. In the replying affidavits, the respondents produced evidence that some searches of official records did not provide any indication that the existing road had been part of a proclaimed public road. There is, however, such a lack of particularity in respect of the nature, sources and extent of these searches that the court a quo should not have been satisfied that a proper case had been made for the grant of the first declaratory order.

[22] In the result, the first declaratory order must be set aside. As it follows that the existing road may have to be regarded as a public road, the second declaratory order was incompetent. But assuming that the respondents established that the existing road was not a public road, it would, for the reasons that follow, in any event not have been entitled to the second declaratory order.

Relocation of right of way

[23] By the end of 2011, the owners of Ventersdraai had used the existing road openly and as though they were entitled to do so for an uninterrupted period of more than 30 years, since at least 1978. The appellants would, on acceptance of the case of the respondents that the existing road was not a public road, therefore have established that a praedial servitude of right of way along the existing road had been acquired in terms of s 6 of the Prescription Act 68 of 1969 in favour of Ventersdraai as the dominant tenement. This was never disputed by the respondents and correctly accepted by the court a quo. When a servitude is acquired by prescription, an original real right is created which is enforceable against the 'whole world' without the need for registration. See *Cillie v Geldenhuys* [2008] ZASCA 54; 2009 (2) SA 325 (SCA) para 13 and AJ van der Walt *The Law of Servitudes* 1 ed (2016) at 322.

[24] I therefore turn to the issue of relocation of such right of way. The starting point is the fundamental principle of the law of servitudes, namely that the servient owner may not do anything that impedes the use of the servitude. A servitude of right of way may be constituted either along a specific route (a definite or defined servitude) or generally (*simpliciter*), in which case the entire servient tenement is subject to the servitude and the owner of the dominant tenement may select a route provided only that he does so *civiliter modo*. See *Nach Investments (Pty) Ltd v Yaldai Investments*

(Pty) Ltd & another 1987 (2) SA 820 (A) at 831C-E. The right of way in question was created in respect of the specific route and is a definite servitude.

[25] In *Gardens Estate, Ltd v Lewis* 1920 AD 144 at 150 this court said:

'A definite servitude having originally been constituted, it could only be altered by mutual consent. In this respect a servitude as constituted differs from a servitude created *simpliciter* (D. 8.1.9). In the latter case, according to *Voet* 8.3.8, the owner of the dominant tenement has the election where to lay the line, which he must however exercise *civiliter*. If he has once exercised his election, he cannot afterwards change. But the owner of the servient tenement would have the right to do so provided the new route is as convenient as the old one (*cf. McCabe v. Rubidge,* 1913 A.D. 441). When *Voet*, 1.50, says that the owner of the servient tenement has the right to point out another route to that which has been agreed upon (*vel conventione designatum fuerat*) he speaks of servitudes created *simpliciter*.'

[26] This was the position in our law until the decision in *Linvestment CC v Hammersley & another* [2008] ZASCA 1; 2008 (3) SA 283 (SCA). After having had regard to comparative law (paras 27-30) the court developed the law to also permit relocation of definite servitudes at the instance of the owner of the servient tenement in the following terms:

"'It is declared that if the owner of a servient tenement offers a relocation of an existing defined servitude of right of way the dominant owner is obliged to accept such relocation provided that:

(a) the servient owner is or will be materially inconvenienced in the use of his property by the maintenance of the *status quo ante*;

(b) the relocation occurs on the servient tenement;

(c) the relocation will not prejudice the owner of the dominant tenement;

(d) the servient owner pays the costs attendant upon such relocation including those costs involved in amending the registration of the title deeds of the servient tenement (and, if applicable, the dominant tenement).'"

[27] In the result, the law in respect of the relocation of a definite servitude was broadly equated to that pertaining to the relocation of servitudes created generally. However, two observations need to be made in the light of the aforesaid passage from *Gardens Estate* and of what was said in *Rubidge v McCabe & Sons and Others* 1913 AD 433. There Lord De Villiers CJ said at 441:

'As owners of the dominant tenements the owners must exercise their rights in a manner least oppressive to the defendant and as owner of the servient tenement the defendant has the

right, after due notice to the plaintiffs, to divert the course of the road provided – and this is the most important proviso – it does not by such diversion make the use of the road less convenient or more expensive to the plaintiffs.'

In the same case Solomon JA said at 445:

'The evidence, in my opinion, does not establish that there was a public road over the farm, but rather that a servitude of right of way existed, the plaintiffs' farms being the dominant and the defendant's farm the servient tenements. And if that be the legal position it was competent to the defendant upon giving due notice to the plaintiffs to divert the course of such road, provided that the new road was equally practicable and convenient to them.'

[28] The first observation is that the owner of a servient tenement in respect of a servitude created generally, has the right to change its route, provided that he or she does not cause inconvenience to the owner of the dominant tenement. The first requirement for the relocation of a defined servitude in *Linvestment* is that the owner of the servient tenement must show that he or she will be materially inconvenienced if the route is not changed. I agree with Van der Walt p 423 that this burden is justifiable:

'Since the switch to a flexible rule that allows for unilateral relocation involves a serious infringement of the dominant owner's right to be consulted if a right originally created by contract is subsequently amended, it is reasonable to expect that the servient owner who wants the route changed should start off by proving clearly that the reasonable use of her land would be significantly impaired if the right of way is not relocated.'

This is equally applicable to a right of way originally created by acquisitive prescription.

[29] The second observation is that under our law a right of way *simpliciter* could not be relocated if the proposed new route would be less convenient, less practical or more expensive to the owner of the dominant tenement. I do not think that Heher JA intended the third requirement in *Linvestment* to depart from this formulation. The draft indigenous code of law that he regarded as 'a distillation of pure Roman-Dutch law in its final stage of development' (para 23), stated in this regard that the dominant owner may not refuse an offer by the servient owner, at his cost, of an equally good and convenient ('*even goede en even gemakkelijke*') route. A wide meaning must be ascribed to the prejudice referred to in the third requirement in *Linvestment.*

[30] The first and second respondents did not even attempt to show the first requirement in *Linvestment*. I am by no means convinced that the third respondent established this requirement, but as this was not argued, I confine myself to the issue of prejudice. It will be recalled that the proposed new route would provide access to Ventersdraai at its south-eastern corner. This is approximately three kilometres from where the existing road enters Ventersdraai and gives access to the homestead and the network of farm roads on Ventersdraai. Thus, the proposed new route would result in the first appellant having to construct a new road over about three kilometres at its own expense. There was some debate on the papers as to the geophysical nature of such new road and as to the precise cost thereof, but that is not necessary to determine. It suffices to say that the need to construct such road would *per se* cause material prejudice to the first appellant. The court a quo failed to recognise this and ought to have refused the second declaratory order for this reason too.

Conclusion

[31] It follows that the appeal must be upheld. The appellants are entitled to their costs in the court a quo and on appeal, which should be borne by the respondents, jointly and severally.

[32] The appellants brought an application to adduce further evidence on appeal. The application was opposed and replying affidavits were filed. The application was rightly not pressed before us. It is trite that further evidence should only in exceptional circumstances be admitted on appeal. Nothing exceptional was shown. On the contrary, the proposed further evidence dealt with subsequent events and sought to amplify evidence already before the court. The costs of this application should be borne by the appellants.

[34] For these reasons it is ordered:

1 The appellants' application to adduce further evidence on appeal is dismissed with costs.

2 The appeal is upheld with costs to be paid by the respondents, jointly and severally.

3 The order of the court a quo is set aside and replaced with the following:

'The application is dismissed with costs to be paid by the respondents, jointly and severally.'

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C H G van der Merwe

Judge of Appeal

APPEARANCES

For Appellants:	S W Davies Instructed by: JW Wessels & Partners Inc, Pretoria C/O Kampherbeek & Pogrund Attorneys, Polokwane Honey Attorneys, Bloemfontein
For Respondents:	M P van der Merwe SC Instructed by: Jarvis Jacobs Raubenheimer Inc, Hillcrest C/O Davel De Klerk Kgatla Inc, Polokwane Rossouws Attorneys, Bloemfontein