

SOUTH AFRICA / JUDGMENT

# Boschenbach (Pty) Ltd and Others v Minister of Transport and Public Works and Others (19123/2012) [2012] ZAWCHC 241 (10 December 2012)

[2012] ZAWCHC 241

## COURT

Western Cape High Court, Cape Town

## BEFORE

Cloete

## CASE / FILE NUMBER

19123/2012

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Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 3754/2012

In the matter between:

BOSCHENBACH (PTY) LTD .....First Applicant

FINCLAN (PTY) LTD .....Second  
Applicant

FRIEDRICH SACHSE BREYTENBACH NO .....Third Applicant

ULRIKE DOHNE BREYTENBACH NO .....Fourth  
Applicant

CAREL JOHANNES BREYTENBACH NO .....Fifth Applicant

NAOMI ERASMUS NO .....Sixth Applicant

And

MINISTER OF TRANSPORT AND PUBLIC WORKS .....First Respondent

WEST COAST DISTRICT MUNICIPALITY .....Second Respondent

WESTERN CAPE NATURE CONSERVATION BOARD .....Third Respondent

## REASONS

FOR ORDER DATED 16 NOVEMBER 2012 IN

*"THE ROADS APPLICATION"*

CLOETE AJ:

### Introduction:

- [1] This is an application in terms of rule 53(1) of the uniform rules of court for the review and setting aside of the decision made on 17 November 2011 by the first respondent ('the Minister) to refuse the deproclamation of Minor Roads 7910 and 7911 where they traverse the Boschenbach private game reserve {the roads).
- [2] Further relief sought by the applicants to compel the third respondent to issue a Certificate of Adequate Enclosure ('CAE) in respect of the Boschenbach private game reserve ('Boschenbach) pending the final outcome of the review was resolved when the third respondent agreed on 7 March 2012 to such an order.
- [3] The applicants also sought costs against those of the respondents who opposed the application. The second and third respondents elected not to oppose and to abide the decision of the court. The Minister has opposed the relief sought.
- [4] The applicants base the relief that they seek on various provisions of the Promotion of Administrative Justice Act No 3 of 2000 ('PAJA).
- [5] In relation to the grounds of review the applicants in essence submit that:
  - 5.1. The Minister misunderstood the servitude initially tendered by the applicants to be a personal servitude in favour of a neighbouring farmer, Mr Laing, as opposed to a praedial or public servitude;
  - 5.2. The Minister miscategorised the application for deproclamation as an application for the closure of the roads, losing sight of the fact that an application for deproclamation does not necessarily imply physical closure of a road;
  - 5.3. The Minister did not properly appreciate that the registration of a praedial servitude would ensure access to the roads to all employees, guests, visitors, family members, tradespeople and medical advisors of the proposed dominant tenement, i.e. Mr Laing's farms; and
  - 5.4. The Minister did not properly appreciate that the registration of a public servitude in respect of Minor Road 7910 would ensure that all members of the public retain access to the road.
- [6] It is the Minister's contention that he at all relevant times understood the nature and effects of servitudes, specifically

personal and praedial servitudes, and that the application on which the Minister made a decision on 17 November 2011 was in effect one for closure of the roads despite the servitude tendered. It is further contended that after due consideration of all relevant

factors and the interests of both the applicants and other persons using the roads the Minister correctly refused the application for deproclamation.

### **Background:**

[7] The salient facts of this matter are mostly undisputed and are as follows.

[8] The applicants in their respective capacities collectively operate Boschenbach, a commercial private game reserve in the Cederberg. The game reserve has been operating since 2000 when the first and second applicants started to transform the erstwhile sheep and rooibos tea farms into a private game reserve and conservation area.

[9] The applicants re-introduced wildlife (including eland, wildebeest, impala, springbok, oryx, kudu, hartebeest, zebra, buffalo, black mane Cape lion and cheetah) to the area. Except for the lions and cheetahs which are kept in enclosed camps all other animals are free roaming. An application for the import and keeping of two white rhino ('the rhino application') was heard simultaneously with this review application. On 16 November 2012 I made an order in that regard, and the reasons for that order are dealt with separately. In short however the applicants were successful in their application subject to certain conditions being adhered to.

[10] The Boschenbach reserve is comprised of the following properties or farms:

10.1. Portion 9 of the Farm Trekpoort Annex also known as Grootfontein 69 No 9, Division Clanwilliam (hereinafter referred to as 'Trekpoort Annex).

10.2. Portion 4 of the Farm Trekpoort also known as Grootfontein 69 No 69, Division Clanwilliam (hereinafter referred to as 'Trekpoort).

10.3. Trekpoort Annex and Trekpoort are registered in the name of the first applicant under title deed no T49206/2001.

10.4. Portion 1 (Kleinpoort) of the Farm Rietvley Ext No 112, Division Clanwilliam held by the second applicant under title deed no T20930/95 (hereinafter referred to as 'Rietvley).

10.5. Portion 1 of the Farm Holfontein No 72 (the correct description should read Portion of Portion 1 and Portion 2 of the Farm Holfontein No 72) held by the first applicant under title deed no T35049/11.

[11] The first applicant has apparently applied for the consolidation of Portion 9 of the Farm Trekpoort Annex, Portion 4 of the Farm Trekpoort and Portion 1 of the Farm Holfontein No 72 under the same title deed and the application is pending.

### The Minor Roads:

[12] Minor Road 7910 is a connecting road between Roads 2192 and 2190. At the point where Road 7910 intersects Road 2190 the latter continues in an easterly direction where it connects with the N7. Road 2190 is not relevant to the relief sought by the applicants.

[13] Minor Road 7910 traverses the following properties, namely:

13.1. Portion 8 of the Farm Grootfontein 69 - registered in the name of Koelfontein Rooibos CC.

13.2. Trekpoort Annex and Trekpoort - registered in the name of the first applicant and thus part of Boschenbach.

13.3. Krommevalley - registered in the name of Mr Hendrik Barend Laing.

13.4. Langklip - also registered in the name of Mr Laing.

13.5. Portion 25 (Remaining extent) of the Farm Krommevalley 113- registered in the name of Mr Dibert Theron.

[14] When Minor Road 7910 was proclaimed in the 1800's it served as a public road connecting Clanwilliam and Lambert's Bay. However as farming activities in the area increased and the national road network in the area expanded and was improved better alternative routes became available.

[15] Due to the availability of alternative routes and the fact that Minor Road 7910 extends over privately owned farms and rugged, mountainous farmland, this road has for many years mainly been used by the owners of the farms over which it runs, as well as the employees of such owners and visitors to such properties. The Minister has provided details of persons who claim to currently still use the road. The applicants do not deny that the road is still used by vehicles but deny that any pedestrians make use of the road. In an email dated 23 July 2010 Mr Lars Starke, the Department's District Roads Engineer based in Ceres, wrote to an official of the third respondent informing her that 'Minor Road 7910 does not serve many properties and traffic volumes are estimated to be less than 5 vehicles per day. Exposure to game for a person making use of the road would consequently be low.'

[16] The fact that Minor Road 7910 fell into relative disuse contributed to the fact that for the past 15 years this road has seldom been serviced and maintained by the Western Cape Provincial Administration. Insofar as it was maintained this was done by the owners of the farms which it traverses at their own expense. Mr Laing, the owner of the neighbouring farms Krommevalley and Langklip,

maintains Minor Road 7910 where it traverses Boschenbach.

[17] As a result of the diminished use Minor Road 7910 has deteriorated to such an extent that for many years it has been no more than four or five metres wide, whilst some sections thereof can best be described as a 'Jeep track'.

- [18] Over the past 30 years the various owners of the farms over which this road extends erected fences and gates over the road in contravention of the Western Cape Roads Ordinance No 19 of 1976 ('the Roads Ordinance'). Many such gates and fences on Boschenbach land were removed by the applicants. The two existing gates on the Boschenbach properties can be opened by anyone as the keys of the locks are attached to the chains which are used to secure the gates when closed.
- [19] As I have said the relief sought in this application relates only to that portion of Minor Road 7910 which falls within the boundaries of Boschenbach. The portion in question is 4.7 kilometres in length.
- [20] Minor Road 7911 ends on the border between Rietvley and Trekpoort. The Minister accepted that 'It is likely that Minor Road 7911 may have fallen into disuse because of the common ownership of the two farms in question.' There were no objections, public or otherwise, to the closure of Minor Road 7911. Again the relief sought in this application relates only to that portion of Minor Road 7911 which falls within the boundaries of Boschenbach. The portion in question is 1.2 kilometres in length.

The application for deproclamation:

- [21] The applicants state that by the beginning of 2009 they had invested more than R10 million in the development of the private game reserve, including the renovation of existing buildings and housing facilities, the erection of new buildings and facilities, the construction of fences in accordance with the requirements and prescriptions of the third respondent, the appointment of experts to conduct environmental and impact studies, the purchase and import of various wildlife species, compliance with legislation relating to the issue of permits and firearm licences as well as marketing and advertising expenses.
- [22] Associated with the permits to import and keep wildlife was an application for the issuing (and thereafter the renewal thereof every three years) of a CAE by the third respondent in terms of the Nature and Environmental Conservation Ordinance No 19 of 1974 ('the Environmental Ordinance').
- [23] The applicants applied for and were duly issued with CAE's in 2002, 2005 and 2007. As I have already indicated a further CAE was issued on 9 March 2012 as a result of the order of this court dated 7 March 2012 after the third respondent agreed to the issue of such a certificate pending the final outcome of these review proceedings.
- [24] During April 2009 Boschenbach applied for permits to import and keep disease- free buffalo. The third respondent conducted the required inspection of the property, in May 2009 the third respondent became aware, ostensibly for the first time, that two public roads, i.e. Minor Roads 7910 and 7911, traverse the Boschenbach reserve.

[25] Pursuant to the third respondent's discovery as to the status of the roads it informed the applicants that it could no longer issue a CAE for land traversed by a public road. This position was later confirmed in a letter from the third respondent to the applicants dated 28 June 2010 as follows:

'During an inspection in May 2009 it came to CapeNature's attention that a public road/minor road traverses a portion of Boschenbach to the adjacent properties. In the light of this discovery you were duly advised to obtain authorisation from the Provincial Roads Department in order to have the public road de-proclaimed or no-objection [sic] to have a fence erected over the public/minor road to ensure the validity and renewal of your certificate of adequate enclosure. This request was made after the Provincial Roads Department approached CapeNature requesting that we not renew any certificates of adequate enclosure if it is brought to our attention that any proclaimed provincial road is being freely traversed by encamped game and the game farm operator does not have the necessary authorisation.

The validity of the certificate of adequate enclosure and renewal thereof is unfortunately therefore pending until the matter has been resolved with the Provincial Roads Department. The reason for this is that the ownership of a proclaimed road resorts with the State. This means that a private property dissected by a proclaimed road cannot be deemed to be adequately enclosed because a section of the enclosed property belongs to another party, i.e. the State. CapeNature can thus only renew the relevant certificate of adequate enclosure if the other land owner, the Provincial Roads Department, supplies written authorisation that the road be de-proclaimed or that a fence be erected over the public/minor road. '

[emphasis supplied]

[26] On 25 May 2009 (just over a year before the third respondent's letter) the applicants had approached the Minister's Department for a certificate of no-objection. Having conducted a risk analysis the Department agreed to the issue of such a certificate provided that the applicants complied with certain requirements which included the erection of warning signs. It appeared however that the risk analysis did not address the issue of potential liability for damages suffered by a road user if attacked by a wild animal (i.e. whether this risk vested in the owner of the road being the Department or the owner of the farms being the first and second applicants).

[27] The applicants state that having obtained the aforementioned permission from the Department and after the third respondent had agreed to issue the 2010 CAE, it was the applicants who were concerned about the practical implications thereof if members of the public were allowed to travel on Minor Road 7910. The legal uncertainty which could exist due to the ownership of the roads

foreshadowed potential future disputes regarding liability for damages caused by wild animals to users of the road. On 16 February

2011 Mr Breytenbach of the applicants sent a letter to the Minister recording his concerns. It was at that point that the Minister

withdrew permission for the certificate of no-objection.

[28] Mr C J Fourie, the head of the Minister's Department, states that the officials of that Department at all times made it clear that the Department would not object to a CAE being issued provided that two conditions were met: that the road was not closed to the public, and that the risk to the public could be adequately mitigated. He also states that once it became clear that Mr Breytenbach himself was concerned about the risk involved in travelling on the road at night the Department withdrew its support for the issue of a CAE. The effect of the withdrawal was that the CAE could not be issued by the third respondent.

[29] Over the same period all parties concerned were ad idem that it was not a viable option to fence off the roads and after many meetings were held and much correspondence exchanged it became apparent that the only option left to the applicants was to pursue the application for deproclamation of the roads.

[30] The applicants had also lodged an application for the deproclamation of the roads with the second respondent on 9 July 2009. Mr Fourie states that the application should have been addressed to the Minister via the second respondent and not to the second respondent itself. However the parties agree that nothing turns on this since the second respondent passed it on to the Minister's

Department, which dealt with it in accordance with the Roads Ordinance.

[31] From the outset the applicants tendered continued use of Minor Road 7910 to Mr Laing and later, but before the Minister made his decision,, the registration of a servitude to ensure a continued future right of way to all present road users. This is consistent

with the resolutions of the first and second applicants annexed to their founding papers where it was recorded inter alia that the first and second applicants had resolved to \. .take all legal steps necessary to register a servitude in favour of those third parties as the company may be advised for the use of Secondary Road number 7910'.

[32] On 24 September 2010 the application for 'closure' of the roads was advertised by the Minister's Department in a local newspaper and all interested parties were called upon to lodge complaints, if any, within the prescribed time period. Cederberg Municipality supported the application. Importantly, the tender for the registration of a servitude was not mentioned in the advertisement.

[33] Objections to the closure of Minor Road 7910 were received by the second respondent during September and October 2010 from certain parties, including Mr Laing,

some of his employees, certain of their family members and other farmers and neighbours. There were nine main objectors in all.

[34] The reasons supplied by these objectors show that the primary objection was to closure of the road. Six objected only to the

closure of the road while three objected not only to the closure but also raised concerns about the safety of road users, in particular

pedestrians and cyclists. Some months later, on 2 March 2011, a Mr Deon Kotze complained through his attorneys directly to the

applicants about the safety of road users.

[35] Subsequent to the lodging of formal objections in response to the Department's advertisement there were further communications

between the applicants, the Department and other relevant role players. On 11 April 2011 the Minister met with the applicants'

representatives. The Minister states that 'We met at Graafwater on Monday, 11 April 2011, and they discussed the problem with me and explained their needs and what they proposed. I undertook to give the matter my attention. '

[36] On 15 April 2011, i.e. four days after his meeting with the applicants' representatives, the Minister wrote to Dr Ulrike

Breytenbach (one of the aforementioned representatives) as well as to 'Len [Fourie];, the Chief Director: Provincial Roads, Network Roads Management in the Department. That email reads as follows:

'Hi Ulrike,

You will understand that this is a fairly long process to be handled by our Roads Branch. Len, will your people look at this proposal noting that the applicants will grant a servitude to all present users.

If found favourable, can you initiate the process.'

[37] It is accordingly clear that on 15 April 2011, some seven months prior to making a decision, the Minister was aware that the

applicants tendered a servitude 'to all present users' of the road, irrespective of the language in which the servitude tendered might have been couched.

[38] The Minister states that thereafter 'The Department dealt with the matter in accordance with the legislation. In due course, a report was made to me summarising the issues and requesting my decision. On 17 November 2011, I made my decision. '

[39] The report to which the Minister refers is an inter-departmental memorandum dated 31 October 2011 prepared by the Executive Manager: Roads and Transport Management, in the Department.

[40] The memorandum highlighted ‘the most important viewpoints expressed by the objectors’. Three ‘viewpoints’ were listed, all of which were directed at the objection to closure of the road, although mention was made of Mr Laing’s concern about the safety of road users. All that was stated regarding the registration of a servitude was that the applicants had tendered to register a personal servitude in favour of Mr Laing. This tender, to the extent that it had ever existed, had been superseded by what was conveyed to the Minister at the meeting of 11 April 2011 and recorded in his subsequent email of 15 April

2011. However the memorandum recorded that it had been considered by the District Roads Engineer, Ceres and commented on by him as follows:

‘Mr Laing has the convenience of the public road and would be deprived of an existing right should the road be closed. If the road is closed and a servitude right of way is registered, he would also not enjoy the same level of protection when using the road as before. His travel distance would also increase drastically if the road is closed as his property is situated halfway between Clanwilliam and Graafwater and it would appear that he needs to make regular trips in both directions.’

[41] The memorandum does not explain how Mr Laing would not enjoy the ‘same level of protection’ when using the road as before if a servitude was registered. In any event the Minister’s own email of 15 April 2011 makes it clear that the registration of a personal servitude in favour only of Mr Laing was not in fact what had been tendered by the applicants and conveyed to the Minister.

[42] The memorandum concluded by supporting the opinion of the District Roads Engineer that the application for deproclamation be rejected. Included in the memorandum was a handwritten comment dated 11 November 2011 by the Minister’s Head of Department, Mr C J Fourie in support of the recommendation to reject the application. That comment reads as follows:

‘We cannot lock owners out from [sic] their properties. There are other alternatives for the applicant.’

[43] In his answering affidavit the Minister defends his decision to refuse the application, stating the following:

‘It was clear to me from the application that what the applicants actually sought was my approval for the closing of these roads - not in the sense of physical closing, but in the sense of terminating the public right to use the roads, by removing their status as public roads...

It was clear to me that what the applicants sought to achieve was the right to exclude members of the public from using the road which traverses their property...

In considering the matter, I had to balance the interests on the one hand of the applicants in having the roads closed so that they could obtain a CAE and conduct their game farm and nature reserve in a manner which they desire; and on the other hand the interests of other persons who might be prejudiced if they lost their right of access to and use of the roads...

At the time when I made the decision, I was well aware of what the applicants sought. They sought to have the right to exclude the

public from the use of these roads... ’

and in respect of Minor Road 7911

At the time when the application came before me the farms Trekpoort, Trekpoort Annex and Rietvley had not been consolidated, and there was no servitude registered over the farms Trekpoort and Trekpoort Annex in favour of the farm Rietvley. I had to make my decision on the basis of the circumstances which existed at the time. If a fresh application were made for the closure of Minor Road 7911, and the facts at that time were either that those three farms had been consolidated, or that a servitude had been registered, I would obviously have to consider the matter afresh in the light of those changed circumstances. I do not believe that it would be appropriate for me to pre-judge the matter, but plainly those changed factual circumstances would be very material to the decision which I would have to make. ’

Public, praedial and personal servitudes:

[44] The notice of motion reflects that the applicants tendered to register (against the relevant title deeds) a servitudal right of way over Minor Road 7910 in favour of the farms Krommevalley and Langklip registered in the name of Mr Laing as well as Portion 25 (Remaining Extent) of the Farm Krommevalley 113 registered in the name of Mr Dibert Theron.

[45] In the applicants’ replying affidavit dated 3 July 2012 they went even further and tendered the registration (against the title deeds) of a public servitude over that road.

[46] It must be so that on the Minister’s own version the servitude tendered by the applicants was never a personal servitude. Not only does a praedial servitude bind successors in title, it also grants access to the dominant tenement to employees, guests, visitors, family members, tradespeople and medical advisors of the dominant owner: Hall and Kellaway ‘Servitudes’ Juta 1973 at p75 and p83, referring to Voet 8.3.1. Having regard to the Ministers email of 15 April 2011 in which he informed Mr Len Fourie that The applicants will grant a servitude to all present users’ he must, at the very least, have understood that as a minimum a praedial servitude was tendered.

- [47] Public servitudes differ from praedial servitudes in that they are not constituted for a specific dominant tenement or tenements and from personal servitudes in that they are not constituted in favour of a specific person or persons: Van der Merwe and De Waal *The Law of Things and Servitudes* 1993 para 286, *The Law of South Africa* (LAWSA), 2nd Edition, Vol 24, para 624 and the authorities cited therein.
- [48] A personal servitude only extends to the particular person holding the right. The authors explain in *Silberberg and Schoeman's Law of Property* 3rd Edition, Butterworths at p 368 fn 10:
- ‘When [a personal servitude] is constituted over land it may, and often does, have the same contents as a praedial servitude. Eg A is the owner of a farm. He grants a right of way to B who owns an adjacent farm. This is a praedial servitude if it is granted to B qua owner of his farm; it is a personal servitude if it is granted to B as an individual on the basis that only he and no other person may exercise it.’
- [49] To my mind either the Minister had forgotten what he had recorded in his email of 15 April 2011 or he must have acted on an incorrect understanding of both the nature and effects of the tendered servitude. He could not otherwise have concluded that it was the applicants’ wish to close the roads and simultaneously prevent their use by others.
- [50] Even if a praedial servitude was still tendered all those parties who expressed their wish to continue to use the road to access the properties of Mr Laing and Mr Theron would be entitled to do so. Since July 2012 however a public servitude has been tendered in respect of Minor Road 7910 which will result in all members of the public being entitled to use the road whether they wish to access the dominant tenements or not. This is in line with what the Minister understood had been conveyed to him when in his email of 15 April 2011 he wrote that the servitude was tendered in favour of ‘all present users’.
- [51] As to the Minister’s view expressed in his answering affidavit that he would ‘obviously have to consider the matter afresh’ if a servitude was registered over Minor Road 7911, the applicants found themselves in a catch-22 situation. In order for them to register a servitude the roads had to be deproclaimed. They could not register any type of servitude over the roads while they were still proclaimed as public roads. It would accordingly have been impossible for the applicants to register a servitude over a public road in order to enable the Minister to consider whether that public road or roads should be deproclaimed. In any event a servitude may only be imposed on a property by the owner thereof. In other words, in order for the applicants to register a servitude of right of way over the relevant roads, they have to be the owners thereof. Until the roads are deproclaimed ownership thereof vests in the second respondent.
- [52] The Minister does not take issue with the applicants’ contention that the Western Cape Divisional Councils Ordinance No 18 of 1976 specifically provides for the ownership of a public road to vest in a private property owner under certain circumstances.

Whether the Minister's decision should be set aside:

[53] It is trite that in motion proceedings where a court is confronted by disputes of fact, a final order may only be granted if those facts averred in the applicant's affidavits that have been admitted by the respondent, together with the facts alleged by the respondent justify such an order. A respondent's version in motion proceedings can only be rejected where the allegations made ...fa/7 to raise a real, genuine or bona fide dispute of fact... [or] 'are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers...' : Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd [1984] ZASCA 51; 1984

(3) SA 623 (A) at 634E-635C.

[54] Applying this test it is my view that the Minister failed to raise a real, genuine or bona fide dispute of fact in his opposition to the relief sought by the applicants. His decision of 17 November 2011 was influenced by errors relating to the nature of the application and the effect of the tendered servitude. The conclusion that he reached cannot be said to have been rationally connected to the information before him or the reasons given by him for the decision. It follows that the Minister's decision must be set aside.

Substitution of decision:

[55] in citing Johannesburg City Council v Administrator Transvaal 1969 (2) SA 72 (T) at 76D-G, Baxter 'Administrative Law' Juta 1984 at pp 682-685 identifies four separate and distinct instances in which courts recognise that they are justified in correcting a reviewed decision by substituting their own:

55.1. where the end result is in any event a foregone conclusion and it would merely be a waste of time to order the functionary to reconsider the matter;

55.2. where further delay would cause unjustifiable prejudice to the applicant;

55.3. where the functionary has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again; and

55.4. where the court is in as good a position to make the decision itself.

[56] In Commissioner, Competition Commission v General Council of the Bar of South Africa and Others 2002

(6) SA 606 (SCA) at para 15 the Court stated the following:

. .Baxter lists a case where the Court is in as good a position to make the decision as the administrator among those in which it will be justified in correcting the decision by substituting its own. However the author also says:

*"The mere fact that a court considers itself as qualified to take the decision as the administrator does not of itself justify usurping that administrator's powers ...; sometimes, however, fairness to the applicant may demand that the Court should take such a view. "*

This, in my view, states the position accurately. All that can be said is that considerations of fairness may in a given case require the Court to make the decision itself provided it is able to do so. '

[57] Section 8(1)(c)(ii)(aa) of PAJA explicitly recognises this Court's power to grant substitution relief although this relief only arises in 'exceptional' cases. No guidelines are given as to when this is appropriate.

[58] However, in *Gauteng Gambling Board v Silverstar Development Ltd and Others* 2005

(4) SA 67 (SCA) the Court at para 28 explained 'exceptional circumstances' to mean the following:

'Since the normal rule of common law is that an administrative organ on which a power is conferred is the appropriate entity to exercise that power, a case is exceptional when, upon a proper consideration of all the relevant facts, a court is persuaded that a decision to exercise a power should not be left to the designated functionary. How that conclusion is to be reached is not statutorily ordained and will depend on established principles informed by the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair. '

[59] Hoexter 'Administrative Law' 2nd Ed, 2012 at p 553 writes that Courts will continue to be guided by the established principles and that 'fairness to both sides has always been and will certainly remain an important consideration'.

[60] During the course of argument I raised the issue of safety for users of the road, notwithstanding that when the Minister made his decision this did not appear to be of any significant concern to him. I did so in light of the comments made by certain of the objectors to the application for deproclamation and an incident that had occurred on 21 November 2011 (i.e. after the Minister on his version had made his decision) when certain buffalo escaped through a gate on Boschenbach that had been left open by an outsider. I was informed by the applicants' counsel that they would take all reasonable steps necessary to put adequate measures in place. This was followed by a tender in which the applicants consented to a number of safety conditions being registered simultaneously with the tendered servitudes, namely a public servitude in respect of Minor Road 7910 and a praedial servitude in respect of Minor Road 7911.

[61] These tenders persuaded me that even if the matter were to be referred back to the Minister the end result would to all intents and purposes be a foregone conclusion. Not only would the tenders address all of the objectors' concerns but there would be no point in the applicants having to start afresh with their application since there is no realistic alternative decision which the Minister could make. Furthermore the tenders met the two conditions stipulated by the Department, namely that the roads are not closed to the public and the risk to the public is adequately mitigated.

[62] In addition any further delay would cause unjustifiable prejudice to the applicants who would effectively be hamstrung and potentially locked into another administrative process, the last of which took two and a half years plus another year before the matter was even argued in court.

[63] It is thus my view that factors fall within the meaning of 'exceptional circumstances' referred to in the Silverstar case.

Costs:

[64] It is clear from the Minister's own communication of 15 April 2011 that he was at the very least aware that the applicants had tendered a praedial servitude. That was also the position initially adopted by the applicants in their notice of motion. The applicants themselves had at an early stage raised safety concerns and evidenced willingness to address these concerns by way of a process of consultation long before the Minister made his decision. Even in his answering affidavit the Minister adopted the stance that the applicants were seeking to close the roads and thus prevent members of the public from using them. There was no necessity for the applicants to have had to approach court in relation to Minor Road 7911 and there would have been no necessity for them to have done so in respect of Minor Road 7910 if the Minister had not mistakenly relied on incorrect facts. The fact that a public servitude was tendered by the applicants in reply did not deter the Minister from persisting with his opposition to the relief sought by them and they were thus obliged to expend what to my mind were unnecessary costs in achieving their result. It is thus my view that there is no reason why the applicants should be mulcted with costs.

### Conclusion:

[65] It was for these reasons that I made the order of 16 November 2012.

J I CLOETE

[10 December 2012]

### ORDER IN "THE ROADS APPLICATION"

Having heard counsel for the applicants and the first respondent and having read the papers filed of record IT IS ORDERED THAT:

1. The decision of the Minister of Transport and Public Works of 24 November 2011, conveyed to the applicants on 2 February 2012, to refuse closure of Roads 7911 and 7S10 where they traverse the Boschenbach Private Game Reserve, is set aside.
2. Subject to the fulfilment of the conditions set out in paragraphs 4 and 5 below, Roads 7911 and 7910 are hereby closed.

3. Pending closure of Roads 7911 and 7910 in accordance with paragraph 2 above third respondent shall not be permitted to withdraw the Certificate of Adequate Enclosure issued in terms of paragraph 1 of the Order of this Court of 7 March 2012. Such certificate shall further, and to the extent necessary, be amended to include all animals currently on Boschenbach, and more specifically the zebra and the buffalo, as well as the two rhinos referred to in case no. 19123/2012.

4. Re Road 7911

4.1. A praedial servitude of right of way shall be registered at the sole cost and expense of the applicants in favour of Portion 1 of the farm Rietvley 112 against the title deeds of Portion 9 of the farm Grootfontein 69 and Portion 4 of the farm Grootfontein 69, the extent and description of which have to be identical to the existing Road 7911 as depicted on the maps and diagrams which appear in the record of proceedings. Such servitude shall be registered by not later than 30 April 2013 unless the parties agree in writing to extend the aforementioned date, or failing which the Court orders that the date shall be extended on good cause shown.

4.2. The following condition shall be registered simultaneously with the servitude right of way, namely that the road shall be maintained by the applicants (or any subsequent owner of the property which the road traverses) in a usable condition; provided that it shall not be encumbent upon the applicant (or any subsequent owner) to improve the road beyond its current condition.

5. Re Road 7910

5.1. A public servitude of right of way shall be registered at the sole cost and expense of the applicants against the title deeds of the farms Portion 9 of the farm Grootfontein 69 and Portion 4 of the farm Grootfontein 69, the extent and description of which have to be identical to the existing Road 7910 as depicted on the maps and diagrams which appear in the record of proceedings. Such servitude shall be registered by not later than 30 April 2013 unless the parties agree in writing to extend the aforementioned date, or failing which the Court orders that the date shall be extended on good cause shown.

5.2. The following conditions shall be registered simultaneously with the servitude of right of way:

5.2.1 As long as the farms Portion 9 of the farm Grootfontein 69 and Portion 4 of the farm Grootfontein 69 form part of the Boschenbach

game reserve, the following conditions will apply:

5.2.1.1. No pedestrian, bicycle, motorcycle or quadbike traffic shall be allowed to travel on Road 7910 through the farms Portion 9 of the farm Grootfontein 69 and Portion 4 of the farm Grootfontein 69, but only other vehicular traffic.

5.2.1.2. Between the hours of 08h00 and 16h30 on all days of the week, gate guards shall monitor all traffic on Road 7910 at both entrances to the farms Portion 9 of the farm Grootfontein 69 and Portion 4 of the farm Grootfontein 69.

5.2.1.3. Both gates shall be kept locked with a chain and lock and the owner of the farms Portion 9 of the farm Grootfontein 69 and Portion 4 of the farm Grootfontein 69 shall ensure that at least four spare keys are provided to the registered owner of the farm Krommevalley.

5.2.1.4. At both entrances to Road 7910 a signboard shall be erected clearly stating that, should any member of the public wish to use Road 7910 to traverse the farms Portion 9 of the farm Grootfontein 69 and Portion 4 of the farm Grootfontein 69, at any time when there is no gate guard present at either gate, a telephone number which will appear on the signboard can be dialled in order to request that the gate(s) be unlocked to enable such member of the public to travel through.

5.2.1.5. At both entrances to Minor Road 7910 a signboard shall be erected clearly warning any member of the public wanting to utilise the road that they may encounter dangerous wild animals when utilising the road.

5.2.1.6. Applicants shall construct grid gates at both entrances to Road 7910.

6. The first respondent shall pay the costs of this application, including costs of two counsel, and further including the costs of preparation and drafting, on the scale as between party and party as taxed or agreed. 7. Reasons for this Order shall be furnished on the application of the applicants and/or the first respondent in accordance with rule 49(1)(c). BY ORDER OF COURT THE REGISTRAR Mostert & Bosman 3rd Floor, MSP Chambers Cnr Carl Cronje and Tygerfalls Boulevard Tygervaiiey
6. The first respondent shall pay the costs of this application, including costs of two counsel, and further including the costs of preparation and drafting, on the scale as between party and party as taxed or agreed.
7. Reasons for this Order shall be furnished on the application of the applicants and/or the first respondent in accordance with rule 49(1)(c).

BY ORDER OF COURT

THE REGISTRAR

Mostert & Bosman

3rd Floor, MSP Chambers

Cnr Carl Cronje and Tygerfalls Boulevard

Tygervaiiey

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Prepared on 14 October 2026 · Esheria