THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Not reportable

CASE NO: 290/05

In the matter between :

AVENTURA LIMITED Appellant

and

JACKSON, HUGH STANLEY First Respondent

JACKSON, MARTIN BRIAN Second Respondent

JACKSON, LYNDA-ANN Third Respondent

Before:	**HARMS, NUGENT, CONRADIE, LEWIS & MAYA JJA**
Heard:	**15 AUGUST 2006**
Delivered:	**15 SEPTEMBER 2006**
Summary:	**Right of way of necessity – granted conditionally upon applicable environmental authorisation being obtained.**
Neutral citation:	**This judgment may be referred to as Aventura Ltd v Jackson N.O. [2006] SCA 102 (RSA)**

J U D G M E N T

NUGENT JA

NUGENT JA:

[1] The respondents in this appeal are the trustees of the Rondeklip Investment Trust. In 1992 the Trust acquired a portion of undeveloped land known as Portion 36 of the farm Hangklip No 305 in the division of Knysna. The land is adjacent to the Keurbooms Forest Reserve on the hills that rise from the Keurbooms River near its estuary and it is covered by pristine indigenous forest and bush. (I will refer to it as the Rondeklip property.)

[2] The Rondeklip property has no direct access to a public road and in that sense it is landlocked. Access to the property is capable of being obtained only by crossing either one or both of two adjoining properties. One is a large, undeveloped portion of land, known as Portion 10 of the farm Hangklip that is owned by Catwalk Investment 341 (Pty) Ltd. (It was described throughout the evidence as the Catwalk property). The other is Farm 509, which is owned by the appellant, and which has been developed as a recreational resort. (I will refer to the appellant as Aventura and to its property as the Aventura property).

[3] The Trust sought, and was granted, an order by the Cape High Court (Zondi AJ) compelling Aventura to register a right of way over its property in favour of the Rondeklip property, subject to 'the plaintiff's compliance with the provisions of the Environment Conservation Act 73 of 1989 and the National Environmental

Management Act 107 of 1998 relating to the construction of the road.' The court below also ordered that 'the question of the reasonable compensation payable by [the Trust] to [Aventura] is to be determined at a later date'. Aventura appeals against those orders with the leave of the court below.

[4] Because the appeal was argued before us on decidedly narrow grounds it is not necessary to delve into the evidence in any detail: the following synopsis of those parts of the evidence that are material will suffice for present purposes.

[5] The Aventura property is situated alongside a national road. From the national road a private road has been constructed to the entrance of the recreational resort that has been established on the property. The resort comprises, amongst other things, a group of chalets. From the entrance to the resort there is a lightly-constructed tarred road leading to the chalets. Beyond the furthermost chalet is a natural watercourse, situated mainly on the adjoining Catwalk property, that extends into the surrounding hills. The right of way that was afforded to the Trust by the court below allows for passage from the national road, along the private road I have described, to a point short of the furthermost chalet. From that point the right of way diverges from the tarred road, by-passes the furthermost chalet, crosses about 30 m of land, and then enters the Catwalk property near the foot of the watercourse. From there it proceeds up the watercourse, along the route of a

servitude of right of way over the Catwalk property, until it enters the Rondeklip property. It is contemplated that the Trust will construct a road over the last 30 m of the Aventura property and along the remainder of the route up to the Rondeklip property.

[6] The construction of the road along the watercourse on the Catwalk property will necessarily disturb the natural flora that exists at present along that route. Moreover, while the relevant town planning regulations permit the Rondeklip property to be used for agriculture, and thus permits one residence to be built on the land, the development of the land for one or more of those purposes will also disturb the natural flora.

[7] All the land that is now in issue falls within an area that is demarcated for environmental protection. It is not disputed that the use of the Rondeklip property for the purposes for which it is zoned, and the construction of an access road, will require prior authorisation from the various authorities contemplated by the Environment Conservation Act 73 of 1989 and the National Environmental Management Act 107 of 1998. The relevant authorisation has not yet been sought.

[8] A court may grant a right of way over the property of a non-consenting owner (subject to the payment of appropriate compensation), but only where it is

shown that the right of way is necessary to provide access to a public road (see, for example, *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) and the authorities collected in that judgment). It was not disputed before us by Aventura that the Trust would ordinarily be entitled to the right of way that is now in issue in accordance with that principle. But it submitted (and that was the only submission that was made before us) that until such time as the Trust has obtained authorisation from the relevant environmental authorities to put the Rondeklip property to the use for which it is zoned, and to construct a road along the proposed access route, the necessity for a right of way has not been established. I do not think that is what is meant by 'necessity' as a requirement for the grant of a right of way against the will of an owner. What is meant by 'necessity' is that the right of way must be the only reasonably sufficient means of gaining access to the landlocked property and not merely a convenient means of doing so (*Trautman N.O. v Poole* 1951 (3) SA 207 (C) 207D-208A). That there are restrictions to be overcome before the land may be used for its intended purpose does not seem to me to be relevant to whether a right of way is necessary.

[9] It seems to me that the submission that was made on behalf of Aventura raises questions of practicality rather than of legal principle. For without first establishing a right to the access route the Trust can hardly be expected to be in a position to approach the relevant environmental authorities. But that practical

conundrum is capable of being overcome by making the grant of a right of way conditional upon the appropriate authorisation being obtained. While a way of necessity ordinarily comes into being upon the order of a court to that effect, it is usually desirable for this to be followed by the registration of a servitude to ensure that third parties have notice of the right of way, and in the circumstances of the present case it would be convenient for the right of way to come into effect only if and when a servitude is registered.

[10] There are certain other matters that the order ought to take account of for convenience in the present case. The route that the right of way should take has yet to be precisely defined and reduced to a servitudinal diagram. It would be as well not to attempt at this stage to define the route that the right of way is to follow, but instead to leave that to be agreed upon by the parties, but bearing in mind that the Trust is entitled to reasonable access, and that Aventura is entitled not to be unreasonably disturbed in its use of its property. Neither party was opposed to the order being framed in those terms. Furthermore, the Trust is entitled to its right of way only upon payment of appropriate compensation to Aventura, the amount of which has yet to be determined, and that ought also to be provided for in the order.

[11] In order to take account of the matters that I have referred to the order of the court below ought to be altered but that is a matter of form. The appellant has been

successful in sustaining its claim to a right of way and is entitled to the costs of the appeal.

[12] Accordingly the orders of the court below are set aside and the following orders are substituted:

'1. Subject to the owner of Portion 36 of the farm Hangklip No 305 in the division of Knysna ('the dominant tenement')

(a) obtaining all necessary permissions and authorisations to develop the dominant tenement in accordance with its permitted use as provided for in the applicable town planning regulations, and to construct an access road to the dominant tenement from Farm 509 in the district of Knysna ('the servient tenement');

(b) paying to the owner of the servient tenement such compensation for the grant of the right of way as may be agreed upon by the owners of the two properties or otherwise established by a court

the owner of the servient tenement is ordered to take all reasonable steps to register a servitude of right of way over the servient tenement in favour of the dominant tenement, at the cost of the owner of the dominant tenement, substantially in accordance with the terms set out in paragraph 2 below.

2. (a) The servitude is to follow a route to be agreed upon by the owners of the two properties, or in the absence of agreement, to

be determined by a court, which route is to provide reasonably direct and convenient access from the national road to the dominant tenement via Portion 10 of the farm Hangklip.

(b) The right of way may be used only to obtain access to the dominant tenement for its use for the purposes that are permitted by the applicable town planning regulations at the time of this order.

3. The costs of the proceedings are to be paid by the first defendant.'

Save as set out above the appeal is dismissed with costs.

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R W NUGENT
JUDGE OF APPEAL

HARMS JA)
CONRADIE JA) CONCUR
LEWIS JA)
MAYA JA)