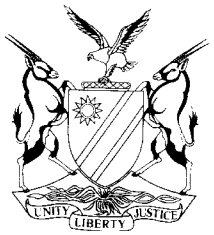

REPORTABLE

IN THE HIGH COURT OF NAMIBIA CASE NO: A 221/2009

In the matter between:

TELECOM NAMIBIA LIMITED **APPLICANT**

and

REGENSTEIN (PTY) LIMITED **1ST RESPONDENT**

HOME OWNERS ASSOCIATION OF REGENSTEIN **2ND RESPONDENT**

CORAM: GEIER, AJ

Heard: 28 March 2011

Delivered: 16 February 2012

JUDGMENT:

GEIER, AJ: [1] Some 10 kilometres to the south of the capital of Windhoek

and on the crescent of the Gross Hertzog Mountain, one can see a telecommunications/microwave tower. This tower is situate on Portion 12 of the farm Regenstein no. 32. A further piece of land, Portion 17 lies adjacent to Portion 12, which it partially surrounds. Both portions, owned by Applicant, are totally surrounded by the farm Regenstein no. 32, owned by the First Respondent.

[2] Both portions are utilised by the Applicant in its telecommunication business. The Applicant also makes these lots available to other players in the telecommunications field in that it lets Portion 17 to the cellphone company Leo, the Namibian Broadcasting Corporation, MTC, Satcom, TransNamib and the Embassy of the United States of America.

[3] In order to gain access to Portions 12 and 17 one will first have to utilise a proclaimed farm road, road FR 1425, which turns off the B1 national road leading to Rehoboth, and which runs for some distance into the farm Regenstein. To reach the said telecommunications installations one has to leave road FR 1425 and turn onto a road which takes one then up to the crown of the of the Gross Hertzog Mountain.

[4] In so doing one utilises a servitude, which was registered against the title deed of the farm Regenstein, as the servient tenement, which servitude was similarly registered against the title deed of Portion 12 of the Applicant's property, as the dominant tenement.

[5] When travelling along this route one will have to pass through three gates.

[6] The first gate has been erected on the proclaimed road, near the entrance to the farm Regenstein. It controls access to a housing estate also situate on the Farm Regenstein. This Housing estate is managed by the Second

Respondent. The second and third gates, both locked, are situate on the servitude road, which in turn is also situate on Farm Regenstein. The third locked gate is at the entrance of portion 12 on which the Applicant's microwave tower is located, which is at the end of the servitude road.

[7] A dispute has now arisen between the Applicant and the Respondents relating to the use of both the farm road and the servitude road. This dispute relates mainly to the subleases, which have been granted by the Applicant, to the above mentioned sub-lessees, and in respect of which the Respondents allege that their permission in respect of the use of the road had to be obtained first and that such subleases would also be contrary to the restriction of the applicable title deeds.

[8] Applicants on the other hand have alleged that, in recent times, the Respondent's have seen fit to unlawfully deny the Applicants' lessees the use of the public road and the servitude road and that in particular the way, in which the gate, which gives access to the farm, is operated, unlawfully impedes its access. Accordingly the Applicants seek to interdict the Respondents from their alleged unlawful conduct together with certain alternative declaratory relief relating to access, by way of a servitude of necessity to Portion 17 of Farm Regenstein.[1]

[9] It appears more particularly from the relevant Notice of Motion that the Applicant initially sought the following orders:

1) Interdicting and restraining the First and Second Respondents from hindering or restricting the access of the Applicant and its lessees to Road FR 1452 in any way whatsoever including but not

[1]Although an indication was given that portions 12 and 17 would soon be consolidated it remains unknown, at present, whether, through such consolidation, the need for the consideration of the alternative relief has since fallen away.

limited to interdicting the Respondents from operating and closing a gate at the commencement of such road located at or near the trunk road between Windhoek and Rehoboth;

2) Directing the Respondents to remove the gate erected and operated by them at the entrance to Road FR 1452 forthwith;

3) Interdicting and restraining the First and Second Respondents from hindering the access of the Applicant and its lessees from making use of the servitude of right of way registered in favour of portion 12 of farm Regenstein no. 32 over the First Respondent's property being portion 9 of farm Regenstein no. 32, which servitude is more fully described in annexure "**B1**" to the Founding Affidavit;

4) In the alternative to paragraph 3 and in so far as may be necessary, declaring that portion 17 of the farm Regenstein no. 32 enjoys a servitude of way of necessity over portion 9 of farm Regenstein no. 32 with the extent and route of such servitude as being set out in the same terms as the right of way registered in favour of portion 12 of farm Regenstein no. 32 over portion 9 of such farm as set out and registered in the Deeds Registry in annexure "**B1**" to the Founding Affidavit, and

5) Directing the Respondents to pay the costs of this application on the scale as between legal practitioner and client, alternatively directing that the Respondents pay the Applicant's costs of this application;

6) Granting to the Applicant such further and/or alternative relief as this Honourable Court deems fit.

[10] It becomes clear that the Applicant, in the main, seeks interdictory relief.

[11] Such relief is then sought firstly in respect of access to Farm Road 1425, and secondly in respect of the 'servitude right of way', 'the servitude road'.

[11] In order to be granted such relief the Applicant will have to establish –

a) a clear right;
b) an injury actually committed or reasonably apprehended, and
c) the absence of similar protection by any other ordinary remedy[2]

in respect 'Farm Road 1425' and the 'servitude road'.

THE INTERDICT SOUGHT iro FARM ROAD 1425

[12] Here the interdict sought relates to the alleged hindering or restricting of access of the Applicant and its lessees to Road FR 1425 in respect of which an order is sought interdicting the Respondents from operating and closing the gate at the commencement of such road located at or near the trunk road between Windhoek and Rehoboth.

[13] Mr. Frank SC, who appeared together with Mr. Maasdorp submitted that it is common cause that this gate, which has been erected in its present form by Respondents to control access to the housing estate, which has been developed on the farm Regenstein, is located on the aforementioned proclaimed farm road.

[14] Reliance was placed on 'the clear prohibition' contained in Section 48 of

[2] See for instance : *Passano v Leissler* 2004 NR 10 HC at 14 H-I, *Congress of Democrats and Others v Electoral Commission* 2005 NR 44 HC at 58 J/H – I, *Bahlsen v Nederlof* and another 2006 (2) NR 416 HC at 424 C-D/E paragraph 30 etc

the Roads Ordinance[3] in respect of which the relevant sub-sections provide as follows:

> "**(1) Without the consent of the Executive Committee no person ... shall close or otherwise bar any swing gate across a proclaimed road against passage.**
>
> **(2) Any person who contravenes or fails to comply with the provisions of this section shall be guilty of an offence.**"

[15] In recognition of these provisions it was submitted that the construction of the gate, per se, did not contravene the Roads Ordinance - provided that it does not hinder the public's freedom of passage - but that it was not permissible for Respondents to control access in the manner that the Respondents do.

[16] In conjunction with this it also needs to be mentioned here that the Applicants abandoned the relief sought in prayer 2 of the Notice of Motion in terms of which they originally sought to procure an order directing the Respondents to remove the gate erected and operated by them at the entrance to Road FR 1425.

[17] As it was further common cause that the Respondents utilised this said gate to control access to the property - and as this was done by way of a register - which would have to be completed prior to be allowed to move onto the premises - the Applicant and its tenants were not afforded unhindered access in the sense that they would not be allowed to open and close the gate themselves and to move freely through such gate. It was thus pointed out that the Applicant and its tenants were in this manner dependent on the Respondents to grant them access.

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[3]Ordinance 17 of 1972

[18] It was also argued that where someone is entitled to free access, one cannot erect a gate across the road for the purpose of preventing unauthorised persons from using it and by keeping it closed at times to prevent the full use of the road by persons and vehicles seeking access via that road who are entitled to use it.

[19] It was thus submitted that should the Respondents wish to keep the gate they would have to allow free access at all times to members of the public wanting to make use of the proclaimed road and that they, at best, would be entitled to write down the registration numbers of all vehicles as they would pass through the gate from time to time. It was submitted in conclusion that no defence had been made out by the Respondents.

[20] Mr. Heathcote SC who appeared together with Mr. Schickerling on behalf of the Respondents on the other hand submitted that the Applicant had failed to establish any clear right - nowhere was it alleged that the road in question was ever intended or for that matter used by the broad public. The Applicant had admitted that access to its personnel had for many years been dealt with in terms of an agreement, which they referred to as an "arrangement". The only issues outstanding as regards that agreement were the aspect of maintenance of the road and some security aspects, which were still the subject of negotiations at the time that the Applicant decided to lodge this application, despite the Respondents' indication to continue negotiations. Applicant had never been refused access and in this regard it was also not alleged that the Respondents have threatened to deny the Applicant any access. The Respondents' alleged insistence that traffic proceed only one-way was abandoned prior to the application having been lodged and that this complaint had thus become moot. The Applicant's sole remaining complaint was the fact that the Respondents failed to recognise the sub-leases in terms whereof the Applicant leases portion 17 to its so-called operators to set up structures contrary to the clear restrictions of the title deed of Portion 17. This was the real

reason on which the applicant approached the court with the actual aim to enforce the lease agreements which run counter to the restrictions imposed in respect of Portion 17 by way of a court order upon the Respondents. Save for the refusal to recognise these lease agreements no case whatsoever is established by the Applicant that the Respondents have infringed the Applicant's right to make use of the road and servitude in the manner as was agreed between them and which have continued for many years. It was therefore submitted that the Applicant also failed to establish an injury actually committed or reasonably apprehended on a balance of probabilities.

THE CLEAR RIGHT RELIED UPON

[21] It was always common cause between the parties that Farm Road 1425 was a proclaimed farm road. Clearly the public's the right of access and the right to traverse into the Farm Regenstein over such road – and thus the Applicant's rights of access, Applicant's tenant's rights of access and for that matter the public's right of access and the right to traverse into the Farm Regenstein over such road - would therefore always be regulated by the Roads Ordinance 17 of 1972.[4] The prohibition to bar or obstruct such a road is, as mentioned above, contained in Section 48(1) of this Ordinance. Clear rights were thus established in these respects.

HAVE THE APPLICANTS SHOWN AN INJURY OR REASONABLE APPREHENSION OF HARM

[22] In this regard Applicant has alleged that it and its predecessors have made consistent use of the road over the years. Also the other operators, such as the Namibian Broadcasting Corporation, Satcom and the Embassy of the United States of America, all lessees of the Applicant, have utilised FR 1425 for some time. It was now contended, that, as 'a practical matter' Applicant and its lessees require immediate access to Portions 12 (and 17), if and when the need

[4]In terms of which the Respondent's have since also applied for the closure of this road.

arises. It was then alleged that the Respondent's in recent times 'have seen fit' to 'impede' the Applicant and its lessees in their use of the public road. The circumstances relating to the establishment and running of a security check point were then sketched and reliance was also placed on an incident where an employee of SatCom, a certain Mr Dos Ramos, was delayed by some 20 minutes to gain access to the road. It was thus contended that the impairment of access and egress to FR 1425 was in conflict with the relied upon provisions of the Roads Ordinance, which acts also constitute a criminal offence.

[23] More particularly the Applicant alleged that the unlawful interference with the applicant's rights arose after the establishment of the Second Respondent. The Second Respondent, the Home Owner's Association of Regenstein was set up as a consequence of a small and exclusive development on the farm comprising luxury homes established for a small group of affluent people. These homes have been and are being set up on some 50 sites on the farm as allocated by the First Respondent. The Association has a lease agreement with the First Respondent in respect of the remainder of the farm, (apparently excluding the individual sites upon which homes have been constructed) but including areas over which the public road and the servitude right of way are located.

[24] After the establishment of the Second Respondent and the commencement of the exclusive residential development on the farm, the First or Second Respondents proceeded to set up a security check point and a gate at the boundary of the farm close to where the proclaimed road no FR 1425 turns off the national road. This check point is usually manned by security personnel who are mostly in attendance there. Access and egress to the road is only afforded to the applicant by these security guards who open the gate in question. This despite the fact that road no FR 1425 is and has at all material times been a public proclaimed road. The impairment of access and egress in this manner is thus in clear conflict with the provisions of the Roads Ordinance.

It is not only unlawful but constitutes a criminal offence. In this regard reference was made to s 48 of the Roads Ordinance, 17 of 1972 as amended.

[25] After the establishment of the development on the farm and the Second Respondent, several meetings were held between the Applicant and the Second Respondent spanning some years concerning the applicant's technicians requiring access to the facilities on Portion 12. Applicant’s technicians initially made use of access cards which would be shown to the security personnel at the gate at the commencement of Road FR 1425. As the vehicles used by the technicians bore the applicant's logo entrance to the premises was usually granted without much delay. Even a remote control for the entrance gate at the commencement of Road FR 1425 was initially provided, but this was taken back during 2007. After this point in time, the applicant's employees no longer enjoyed unrestricted and unhindered access to its properties.

[26] This averment was qualified in the following respects. The applicant's technicians were still mostly able to enter the premises without much delay as the security personnel who are almost always in attendance have been briefed by the Second Respondent to afford the applicant's technicians access to the site. It was pointed out however that the Applicant is entirely dependent upon the presence of these security officials. This arrangement is unsatisfactory in the view of the Applicant if an emergency were to arise and were no security officials would be present as the circumstances relating to the delay experienced by one of the applicant's lessees on Portion 17, Satcom, illustrated when security guards did not have the means to open the electronically controlled gates over a particular Easter weekend. These restrictions, so the Applicant contended, were in clear conflict with the Applicant’s rights as a user of a public road and under the servitude.

[27] Such position was also untenable in respect of the Applicant lessees - including TransNamib, MTC, Cell One and the NBC. The Applicant and its

tenants, and for that matter, any member of the public as well, should not be dependent upon the whim of the Respondents and their guards acting on the Respondents' instructions for access as this was clearly in conflict with the rights conferred by the Roads Ordinance. The Respondents' insistence on the other hand, on such control was in clear conflict with the Ordinance and the servitude.

[28] In addition, and as a matter of practical importance, the Applicant and its lessees require immediate access to Portions 12 (and 17), if and when the need arises such as in the event of faults when the equipment needs to be repaired as a matter of urgency to prevent undue and entirely avoidable interruptions of services. The need for such immediate action was graphically illustrated with reference to the case of TransNamib, Namibia's national rail operator, which has a radio transmitter on the site. This transmitter controls rail movements on the entire rail network in southern and central Namibia. It is critical that TransNamib should have unimpeded immediate access to the transmitter in the event of a fault occurring with that transmitter. Such a fault has fortunately not occurred since the respondents have regulated access and egress over the farm in the manner described. The Applicant's strongly felt that is something which should no longer be left to chance as a disaster could unfold in the event of delays to fix a fault on that transmitter. It was pointed out that the Applicant's tenant's rights to occupy the portions are derived from the Applicant's.

[29] The Second Respondents' Chairperson, Mr PF Koep and representatives of the applicant had met with a view to enter into agreements concerning the maintenance of and easy access to the access road and to take into account security and safety concerns of the residents of the development. The applicant has stated that it would have no difficulty with regard to its personnel properly identifying themselves, not making noise or speeding on the road and generally seeking to accommodate the security concerns of the residents where this would not compromise its rights of access.

[30] The Second Respondent on the other hand continued to fail to recognise the right of the applicant to proper and unhindered access, the applicant's rights, as owner, to lease portions of these sites to other operators or those institutions, such as the US Embassy, who would require access to the area in order to put up receivers or antennas and thereafter maintain and repair them as and when the need would arise. The Second Respondent took the position that the applicant is not entitled to lease its premises without such parties first entering into a separate agreement with the First or Second Respondents. The Respondents' approach was articulated in a letter written by the Second Respondent's Chairperson, Mr Koep, dated 14 July 2008 concerning access to one of Applicant's lessees, Satcom, in which he stated that he has advised Satcom not to pay its rental to the applicant 'until such time as an agreement between Telecom and Regenstein has, in fact, been signed'. This advice, in turn, was regarded by the Applicant as constituting the delict of unlawful interference with its contractual rights, and advice given in blatant conflict with the public nature of a portion of the road.

[31] It should be mentioned that Mr Koep had also advised Mr Stanley Shanapinda, the Applicant's Head of Legal Services, that the First and Second Respondents would apply for the closure of the public road FR 1425. It was indicated at the time that the position of the Applicant would be reserved and that the Applicant would in all likelihood oppose such an application.

[32] On the occasion of advising the Respondents of the NBC's need to construct a replacement tower a draft agreement relating to the maintenance of the road was also presented. The parties however could not reach agreement in this regard as mentioned above.

[33] Given the increasing difficulties and the stance adopted on the part of the Second Respondent, Applicant's resolved to refer the matter to it's legal

practitioners of record. This was particularly so after it had been alleged in a letter of the Second Respondent, dated of 4 October 2008, that the applicant's presence and that of [its] employees and/or service providers constitutes a threat to the security of the estate", and as a result of which 'a list of names of people who would be entering the premises was demanded, requiring further that such employees should be identifiable by wearing uniforms and that the Applicant should accept liability for the conduct of its employees.

[34] A string of correspondence followed. Respondents in essence, and as appears from the selected passages below, persisted with the stance that the Applicant was not entitled to sublet their land and in this regard Respondents demanded further that the Applicant conclude an agreement with regard to the use of the access road by its lessees.

[35] Relevant to this leg of the enquiry are then the following passages emanating from the pen of Mr Koep in his capacity as the Chairperson of the Second Respondent :

a) In the letter of 1st August 2008 addressed to Applicant's Assistant Legal Advisor he wrote :

> *" … It is recognised that whatever rights Telecom Namibia may have with regard to access to the Gross Herzog Mountain, Telecom Namibia is not legally entitled, without permission of the landowner, being Regenstein Pty Ltd, to allow access to that sight." (site) …*

b) In the letter of 17 October 2008 addressed to Applicant's legal practitioners of record it was placed on record :

> *" Yesterday one of our members was approached to allow Cell*

One, a mobile telephone operator, onto the farm, as apparently your client has entered into an agreement with Cell One, in terms of which that company may establish itself on the top of the Gross Herzog Mountain on the property belonging to our client.

We have attempted to point out to you why we are of the opinion that your client is not empowered to do so and we are quite frankly amazed that this should happen.

We would therefore request you to in turn request your client not to engage in behaviour which may exasperate an already illegal situation and conduct … ".

[35] Ultimately the battle lines were drawn as follows when Mr Ruppel, the Applicant's legal practitioner of record addressed a letter in the following terms to the Chairman of the Second Respondent :

" We refer to earlier correspondence herein, and more specifically our letter to you of 10 October 2008. In that letter we asked you to clarify on exactly what authority access to what is both a proclaimed road and a right of way our client is entitled to under the servitude registered against the title of Farm Regenstein is denied or sought to be restricted.

You recorded your understanding of the nature of the servitude rights our client and those occupying the Grosshertzog site or having to enter that site under the authority of our client. We disagree with your assertion that Telecom is not entitled to access the Grossherzog site along the servitude road registered against the title of the servient property, and more particularly also your claim that such third person's 'use the road to the tower illegally … '.

As regards the restrictions which are imposed and enforced over what is a proclaimed public road, you have not reverted to us, save to indicate that you intend to apply for the deproclamation of the road. Until the access road has been so deproclaimed (our client's rights in this regard are reserved), there is, as far as we can establish, no basis in our law under which the owner of Regenstein or its shareholders or the members of your Association would have any right to control, restrict or deny the public the right to travel on that road.

The current controls and regiment at the gate to the farm constitute a serious infringement on persons who have every right to enter Regenstein on that public road and to access to the Grosshertzog site. In this regard, two recent incidents have been brought to our clients' notice. …

… This then serves to request you to provide us, by return of fax, with an undertaking that all restrictions at the entry gate will be lifted immediately and that our client and those required or entitled to have access to the Grosshertzog site shall have the right to travel on the proclaimed road leading to and on the stretch of road which is the subject of the servitude registered against the servient property without further constraints or interference.

Failing your undertaking, our instructions are to institute legal proceedings for such relief as is necessary to secure our client's rights and the rights of third persons affected by the restrictions you impose and enforce…".

[36] Mr Koep, now in the capacity as legal practitioner for the First and Second Respondents, in the letter of 29 April 2009, responded by setting out his client's stance in the following terms :

" … Our Instructions therefore are to inform you that the situation, as we understand (it) is the following;

1. *Our clients recognise that your client, Telecom Namibia Limited, has a right to access its installation situated on the property with Title Deed1646/74. We say this without prejudice, as it is not clear in terms of the law whether Telecom Namibia is, in fact, the equivalent of the Government of the Territory of South West Africa or its successor in title, being the Government of the Republic of Namibia.*

2. *The servitude is registered in favour of the Government and no one else. Under the circumstances your client is not entitled to sublet, as it were, its servitude to the Namiblan Broadcasting Corporation.*

3. *Your client, Telecom Namibia Limited, has apparently entered into agreements with those parties who have erected installations on the property with Title Deed 1613/86 and has allowed them access over our clients' property without our clients' consent. Furthermore, your client has allowed them to erect installations contrary to the terms imposed by the Title Deed. Again, we point out that there is no servitude registered In favour of Title Deed 1613/86.*

4. *All the parties that have erected installations on the property with Title Deed 1613/86*

   4.1 *access that property illegally; and*
   4.2 *have erected installations Illegally.*

5. *Under the circumstances we do not agree with the assertions made by you in your letter under reply and should you wish to bring an application to Court, this will be opposed and our clients then reserve*

the right to apply for the appropriate Order against your client, as well as all the other parties mentioned above and for the reasons stated therein…".

[37] As the sought undertaking was not forthcoming, Applicant then instructed the preparation of this application.

[38] Against this background the Respondents denied that any infringement occurred, or is or was threatened or that they unlawfully closed or barred or prohibited access of the public to farm Road FR 1425. They state that Applicants have failed to allege that the road in question was ever intended or used by the broader public and that the Applicant has been admitted to access in terms of an arrangement in respect of which a settlement of all outstanding issues was unfortunately not reached.

[39] Counsel for Respondent's ultimately submitted that the Applicant's case boiled down to the sole complaint 'that the Respondents fail to recognise the subleases in terms whereof the Applicants leases portion 17 to its so called operators to set up structures contrary to the clear restrictions of the title deed of portion 17'. They state that, save for the refusal to recognise these lease agreements, no case whatsoever has been established by the Applicant that the Respondents have infringed the Applicant's rights to make use of the road in question.

[40] It must be clear that the determination – whether or not the above sketched events amount to 'an injury was actually committed or reasonably apprehended' – must be made against the applicable provisions of the Roads Ordinance.

[41] The Ordinance affords the Applicant, its tenants and the public an unlimited right of access to FR 1425. Section 48(1) of the ordinance expressly prohibits the 'closing or otherwise barring' of a proclaimed public road against

passage without the consent of the ‘Executive Committee’.

[42] No such consent has been given in respect of proclaimed road FR 1425.

[43] It is common cause that a security gate has been erected across FR 1425 to control access to the Farm Regenstein and the housing estate located on it.

[44] This gate is closed at all times.

[45] The gate is manned by security personnel. Access is only granted by such security personnel once a register has been completed and the security personnel consent thereto. Access can apparently also be granted on the express instructions of a particular resident to the security personnel.

[46] Employees of the Applicant, its tenants and members of the public thus do not have unhindered access – they are not allowed to open and close the gate themselves.

[46] It becomes clear that the closing of the gate in order to control access and the conditional opening thereof at the pleasure of security personnel or residents most certainly obstructs/bars FR 1425 against free and unhindered passage.

[47] Free passage to FR 1425 is barred/obstructed at least in the sense that of members of the public are not granted free and unhindered access and freedom of passage; as members of the public are dependant on the security personnel or residents to grant them access through such gate.

[48] In these respects at least the Respondents have ‘closed or barred’ the proclaimed public road FR 1425 in contravention of Section 48(1) of the Roads

Ordinance.

[49] The Applicant has thus established the requirement of ‘an injury actually committed’.

[48] In addition, and even if I am wrong in coming to this conclusion, it becomes more than abundantly clear through the correspondence emanating from the pen of the Chairman of First Respondent and legal practitioner of both Respondents’, as quoted above, that Respondents most certainly have an issue with the Applicants’ tenants from making use of the proclaimed road, in that they - for instance viewed – ‘*the applicant’s presence and that of [its] employees and/or service providers as a threat to the security of the estate’* – in that they regarded the seeking of access, by one of the Applicant’s tenants, as engaging in behaviour *‘which may exasperate an already illegal situation and conduct’* – and by adopting the stance that the Applicant was not entitled to lease out the property it owns and thus by stating that ‘*all the parties that have erected installations on the property with Title Deed 1613/86 access that property illegally’* – as a result of which the threat is made that *‘should you (applicant) wish to bring an application to Court, this will be opposed and our clients then reserve the right to apply for the appropriate Order against your client, as well as all the other parties mentioned above and for the reasons stated therein’.*

[49] Most importantly Respondent’s failed to give the undertaking that all restrictions at the entry gate (on FR 1425) would be lifted immediately granting the Applicant and its tenants access to the Grosshertzog site and by allowing them ‘ … the right to travel on the proclaimed road leading to and on the stretch of road which is the subject of the servitude registered against the servient property without further constraints or interference’.

[50 In this regard I find that the Applicant has also, at the very least, established the requirement of ‘a reasonable apprehension of injury’.

[51] I therefore conclude that the Applicant has also satisfied the second requirement for the granting of the sought interdict.

NO ALTERNATIVE REMEDY

[52] In this regard the Applicants allege simply that they have no adequate alternative remedy.

[53] The Respondents on the other hand state that the criminal sanction imposed by Section 48 (2) of the Roads Ordinance constitutes an alternative adequate remedy and it was submitted further that Section 50, in addition, provides for clear alternative relief.

[54] Section 48(2) clearly amounts to a criminal sanction. I don not think that such a criminal sanction amounts to an adequate legal remedy in the circumstances of this matter as it does not afford the Applicant similar protection as the civil relief, sought herein, would do.

[55] Section 50 of the Road Ordinance 17 of 1972 provides as follows:

> "**(1) The Executive Committee may direct the owner or erector thereof, within 7 (seven) days thereof, within 7 (seven) days thereafter to remove –**
>
> **(a) any fences, swing gates, motor grid gates and other obstructions erected on, across or along a proclaimed road contrary to the Provisions Ordinance ...; or**
>
> **(b) any swing gate which, in opinion which and if the opinion have been erected on/or across a proclaimed**

road at an unsuitable place."

[56] The first relevant aspect to be taken into account in this regard is that the Applicant no longer seeks an order for the removal of the gate erected at the entrance to FR 1425.

[57] At the centre of the Applicants complaint is the Respondents unlawful use of the gate, in respect of which the Applicant now seeks to interdict the Respondents from deploying such gate in an unlawful manner.

[58] Secondly it would appear that the Applicants complaint is also not that the Respondents gate has been erected contrary to the provisions of the Road Ordinance, or that such gate has been erected on or across a proclaimed road on an unsuitable place.

[59] The provisions of Section 50 of the Roads Ordinance can thus not be of application in the present instance and thus cannot be of assistance to the Applicant herein and thus cannot sustain Respondents submission that Section 50 of the Roads Ordinance constitutes an alternative adequate remedy for the Applicants herein.

[60] As also the third requirement for an interdict has thus been met it must be concluded that the Applicant has made out a case in so far as the relief sought in prayer 1 of its Notice of Motion is concerned.

THE INTERDICT SOUGHT IRO THE SERVITUDE ROAD

[61] Here the Applicant seeks an order "interdicting and restraining First and Second Respondents from hindering the access of the Applicant and its lessees from making use of the servitude route registered in favour of portion 12 of the farm Regenstein no. 32 over the First Respondents property portion 9 of farm Regenstein No 32 … ".

THE CLEAR RIGHT RELIED UPON

[62] Here it is firstly of relevance that it is common cause that the Respondents do not obstruct the Applicant's use of the servitude road.

[63] The Respondents however admittedly, in the absence of their consent, impede access of the Applicant's tenant's to the servitude road.

[64] Accordingly - and at the centre of the determination of whether or not the Applcant is entitled to the interdictory relief sought in prayer 3 of the Notice of Motion - is the question whether or not the Respondent's admitted obstructive conduct is lawful or unlawful.

[65] The answer to this question lies in the rights conferred by the servitude in question

[66] The servitude which is endorsed on the title deeds of both the dominant and the servient tenements herein is described in the title deed of the dominant tenement as being:

> "**A servitude of right of way 18.29 metres wide over the remaining extent of portion 9 of the farm Regenstein no. 32.:**

[67] In the title deed of the servient tenement it is described as being:

> **'further subject to a servitude of right of way of 18.29 (...) metres wide ... in favour of portion 12 (a portion of portion 9) of the farm Regenstein no. 32, ... which servitude is endorsed against deed of transfer no. 2896/1965.'**"

[68] It is apposite to mention here that – initially - a substantial portion of the dispute between the parties also focussed on the question of whether or not the referred to servitude had been extinguished by merger. However - and at the hearing of this matter - Mr. Heathcote indicated that the Respondents abandoned this leg of their defence.

[69] It is further important to note that - although it was initially disputed - it soon became apparent that the parties were actually also ad idem that the servitude in question is a praedial servitude.

[70] Whether or not any infringement of the rights granted in favour of the Applicant and its tenants has occurred must therefore be determined with reference to the rights conferred by the praedial servitude in question.

[71] Mr Frank submitted on behalf of the Applicant that the Respondents' stance is not permissible. In this regard the argument ran that

a) "... a servitude, on the one hand, means a reduction or diminution of the rights of ownership pertaining to the servient tenement but that on the other, this was not to be regarded as a diminution of the rights of ownership in respect of the dominant tenement. One of the incidents of ownership of Applicant's portions 12 and 17, was the right to utilise these properties as owners and one of the things that an owner may do in regard to his property is to enter into lease agreements in respect of such property. Such lessees should then, as a matter of course, have access in similar fashion as Applicant to the properties in question, as such tenants rights derive from those of the Applicant.

b) Had the servitude been a personal one, so the argument ran further, that position might have been different, however being a praedial servitude, it attaches to the property, and anyone, that has the right to

be on such property, can thus use the servitude road to gain access to such property.

[71] Reliance was placed on a passage from *Wille's Landlord and Tenant of South Africa,* 5th Edition, at page 17 where the learned author states:

> *"Where property is subject to a servitude, the owner of the property, it is submitted, has sufficient title to grant a lease of it if the servitude is of such a nature that its use and enjoyment will not be interfered with by the existence of the lease or by the exercise of the rights under the lease. This would, as a rule, be the case where the servitude is a preadial one, but not where it is personal, such as a usufruct, in which case, as will be seen directly, it is the usufructuary who is entitled to grant a lease."*

[72] It was on the strength of this submitted that the Respondents' stance - that the Applicant was allowed to lease out its property - but was not allowed to give someone access to that property – was clearly incorrect. It was thus argued further that' … just like owners – a lessee would be entitled to obtain access for – *' … the members of his household, his guests, his table companions, hirelings and medical attendants along with him'*.[5]

[73] On behalf of the Respondents on the other hand it was in the first instance disputed that the evidence properly established that the Applicant, by operation of statute, as alleged, had become the owner of portions 12 and 17 of the farm Regenstein. This line of argument was based on the title deeds annexed to the founding papers.

[74] In such founding papers the Applicant had however already indicated that the requisite endorsement in respect of Portion 17 - at the time - was still in the

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[5]The Court was referred in this regard to *Penny v Brentwood Gardens Body Corporate* 1983 (1) SA 487 (C) at 490 F-G, *Roeloffze NO & Another v Bothma NO & Others* 2007 (2) SA 257 (C) at 262B and 267 par [35], *Maasdorp: 'The Law of Things'* at 205 - See also *Voet* 8.3.1

progress of registration.. That such endorsement was subsequently effected on 13 July 2009 was proved by the requisite title deed annexed to the replying affidavits. It was also explained in such replying papers that the page reflecting the requisite endorsements to the title deed of Portion 12 had inadvertently not been copied and was therefore now annexed in reply. It appeared from that annexure that the endorsement and thus transfer of ownership of portion 12 of the farm Regenstein to Applicant was effected on 8 May 2009 - that was prior to the launching of this application.

[75] Although I am alive to the fundamental rule that 'an Applicant must stand and fall with the allegations made in the founding papers'[6] I am prepared to exercise my discretion[7] – in so far as this may be necessary – in favour of the Applicant – by taking into account the relied upon annexures to the replying papers - and thus by accepting and finding that the Applicant was able to prove its ownership of Portions 12 and 17 of the farm Regenstein – after all it has appeared that the founding papers did already lay the basis for this essential facet of the Applicant's case.

[76] It was more importantly contended on behalf of Respondent's that the only structure erected on Portion 12 was a microwave tower to which the Applicant and its predecessor had always enjoyed access via the servitude road. No such servitude – and thus no rights conferred by any servitude exist in respect of Portion 17. Yet is was in respect of portion 17 that the Applicant had granted certain leases to 'other players in the telecommunications industry' who

- the Applicant now claims - are unlawfully barred from making use of the servitude road to allow them to gain access – via Portion 12 - to Portion 17.

[77] It was thus submitted further that no right of way ever existed in respect

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[6]See for instance :*Stipp & Another v Shade Centre & Others* 2007 (2) NR 627 (SC)

[7]See for instance :*COIN Security Namibia (Pty) Ltd v Jacobs & Another* 1996 NR 279 (HC) at 287 *Shephard v Tuckers Land and Development Corporation (Pty) Ltd* 1978 (1) SA 173 (W) at 178A

of portion 17 and when the Applicant allowed its tenant's to make use of the servitude road it was also exercising its rights *'inciviliter modo'* as the Applicant had thus unduly thereby increased the burden on the servient tenement in this regard..

[78] In addition it was pointed out that the Applicant was in breach of the title deed condition in terms of which it was : *' ... restricted from erecting further buildings on the withinmentioned property except for farming purposes ... '*.

[79] It can immediately be said that it does not appear from the affidavits filed of record that the Applicant or its tenants have 'erected any buildings[8]' on Portion 17. What seems to have been erected are certain *' ... apparatus and installations - such as towers/masts and receivers for the purpose of transmitting and receiving signals ... '*. I am thus not persuaded that Applicant has acted contrary, and thus is in breach of its title deed restrictions/conditions.

[80] What remains to be determined is whether of not the Applicant is entitled to afford its tenants access to Portion 17 via the servitude road granted in favour of Portion 12.

[81] Relevant also to this enquiry is the Applicant's entitlement to seek the enforcement of any rights it might have *vis a vis* its tenants.

[82] The court was referred in this regard to the leading decision – also in Namibia[9] on this point of *United Watch and Diamond Co (Ptv) Ltd and Others v Disa Hotels Ltd & Another* 1972 (4) SA 409 (C) at 417 A to C. Were Corbett J (as he then was) stated :

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[8]See for instance : *'The Concise Oxford Dictionary'* 6th Ed at p 129 –" *…'building' ' … house school, factory, stable …"*.

[9]See for instance :*Ex Parte Sudurhavid (Pty) Ltd: In Re : Namibia Marine Resources (Pty) Ltd v Ferina (Pty) Ltd* 1992 NR 316 (HC) at 321; *Yam Diamond Recovery (Pty) Ltd In Re : Hofmeister v Basson & Others* 1999 NR 206 (HC) at 211-212; *Clear Channel Independent Advertising Namibia (Pty) Ltd & Another v TRANSNAMIB Holdings Ltd & Others* 2006 (1) NR 121 (HC) at p138 at [45]; see also : *August Maletzky & Another v Standard Bank Namibia Ltd & Four Others* - High Court Case A196/2009 at para's [1] – [6] reported at http://www.saflii.org/na/cases/NAHC/2011/35.html

“”The Interest of a sub-tenant in regard to actions for ejectment against the tenant at the suit of the landlord (owner) has been discussed in several cases and the generally accepted view is that the sub-tenant has no legal Interest in the contract between the landlord and the tenant –

> *‘ ... although he may have a very substantial financial or commercial interest therein which may be prejudicially affected by the judgment’.*

(See Henri Viljoen (Pty.) Ltd. v Awerbuch Brothers, supra at p. 167). This , with respect, would seem to be the correct approach. The subtenants’ right to, or interest in, the continued occupancy of the premises sub-leased is inherently a derivative one depending vitally upon the validity and continued existence of the right of the tenant to such occupation. The sub-tenant, in effect, hires a defeasible interest. (See Ntai & Others v Vereeniging Town Council and Another, 1953 (4) SA 579 (AD) at p. 591). He can consequently have no direct legal interest in proceedings in which the tenant’s continued right of occupation is in issue, however much the termination of that right may affect him commercially and financially.’”

[83] It appears thus that the dispute regarding the entitlement of the use of the servitude road is a dispute which correctly lies between Applicant and the Respondents and that any rights which Applicant’s tenants might have acquired are merely derivative in nature which will stand or fall with the determination of the Applicant’s entitlement in this regard.

[84] Regarding the question of whether or not the Applicant’s right of way to Portion 12 could be extended to Portion 17 a useful point of departure is the recent South African Court of Appeal judgement of *Ethekwini Municipality v*

Brooks & Others 2010 (4) SA 586 (SCA) in which Griessel AJA stated[10] – the other members of the Court concurring - :

> *"When it comes to a servitude of right of way it is important to bear in mind that it enures not only to the servitude holder, but, as it was put by Voet, 5 also to 'the members of his household, his guests, his table companions, hirelings and medical attendants along with him'. This passage in Voet does not purport to create a watertight numerus clausus of parties entitled to make use of a servitude road. Thus, Maasdorp 6 paraphrased the above passage as follows:*
>
> > *(S)ervitudes . . . may be made use of, not only by the owner of the dominant tenement, but by anyone who has a legal right to be upon the dominant tenement, such as servants, guests, visitors, labourers, etc.' ... ".*

[85] This seems to be the generally applicable position.[11]

[86] As there is no *numerus clausus* of parties entitled to make use of a servitude road for as long as there is a nexus to the servitude holder – it must be concluded - pre-supposing the Applicant's consent, given the Applicant's contractual obligation to afford its tenants access to the leased premises - that the Applicant's tenants here – would – at least in principle - be entitled to lawfully access- and lawfully traverse to Portion 12. It follows that Applicant's tenants, generally would be able to make use of the servitude road to that extent – but to that extent only.

[87] It would appear however that this entitlement has its 'boundaries'.

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[10]. at 591 I – 592 B para [18]

[11]See also *:Penny v Brentwood Gardens Body Corporate* 1983(1) SA 487 (C) at 490 F-G. *Roeioffze NO and Another v Bothma NO and Others* 2007(2) SA 257 ©; 262 B and 267 par [35]. *Maasdorp: The Law of Things* at 205.

[88] The applicable legal position was considered by the Durban and Coast Local Division in *Berdur Properties (Pty) Ltd v 76 Commercial Road (Pty) Ltd* 1998 (4) SA 62 (D) in which Alexander J, with reference to the Cape Provincial Division decision of *Rabie v De Wit* [12] per De Villiers J and Duncan AJ had this to say :

> *"The point before De Villiers J was a novel one, but he found guidance in Louw v De Villiers (1893) 10 SC 324, where it had been held that the owner of the dominant tenement cannot transfer the benefit of that servitude to H another tenement belonging to him without the consent of the owner of the servient tenement. There was support for this proposition in Voet 8.4.13 - 'when a man has the right of waterleading he cannot by nature of this right grant the water to another estate unless by the agreement he was expressly allowed to do so . . .'. Although Voet was dealing with aquaeductus, De Villiers J found the restriction equally applicable to servitus viae and in the result upheld the plaintiff.*
>
> *It is urged on respondent's behalf that the facts in this case are distinguishable. In Rabie's case the servitude was entirely over the property of the plaintiff, the servient tenement, and the increased use by the defendant as owner of the dominant tenement 'increased the burden on the servient tenement entirely owned by the plaintiff'. In this case, so the submission goes, the right of way is reciprocal to both applicant and respondent, and therein lies the difference.*
>
> *With due respect to the argument, I find the distinction unpersuasive. It matters not, in my view, that the servitude B extended only over the property at A. It was designed to serve the interests of B. The ratio of the decision was that the owner of B could not add to the extent of the rights*

[12] 1946 CPD 346

so conferred on his property by allowing another property not so entitled, to utilise them. As Silberberg and Schoeman comment in The Law of Property 3rd ed at 377, '. . . the benefit of a servitude cannot be severed from the land to which it is attached'.

The fact that the servitude under discussion is said to be for the use of the adjacent owners lends added weight, in my opinion, to the observations of De Villiers J in Rabie. It is their use which the servitude is intended to serve - not somebody else's."[13]

[89] In my respectful view these decisions set out the applicable law correctly. I come to this conclusion not only because the referred to decisions are in line with the characteristics peculiar to *praedial* servitudes but also as – in this instance – this would also accord with the canons of construction applicable to this type of agreement.[14]

[90] Portion 12 was acquired by Applicant's predecessor in title during 1974 and with it, the servitude in question. Portion 17 – not subject to any servitude of right of way - was acquired only during 1986...

[91] Not only on application of the principle that – in the absence of any agreement to that effect - the owner of a dominant tenement (B) cannot use a servitude over (A) in respect of a property (C) subsequently acquired by him, but also on the interpretation of the agreement conferring a servitude of right of way expressly in respect of Portion 12 only – Portion 17 not yet being within the contemplation of the parties, it must follow that the Applicant cannot show the

[13] At p 69 -70

[14] In *Silberberg & Schoemans 'The Law of Property'* 5th Ed the learned authors Badenhorst, Pienaar & Moster at pages 330 -331 write : *"The respective rights of the dominant and servient land holders depend, in the first instance, on the terms of the agreement constituting the servitude and must be interpreted according to the general canons of construction."" In addition, certain well-established principles relating specifically to servitudes will govern the construction of the agreement. As such an agreement conflicts with the freedom of the owner of the servient tenement to use his or her property as he or she deems fit, it will be interpreted strictly and its terms construed in a manner which is least burdensome for him or her…"*,

clear right required for the granting of the relief sought in prayer 3 of the Notice of Motion. This leg of the application must therefore fail.

[92] In view of this finding it becomes unnecessary to consider the other pre-requisites for the granting of a final interdict or whether or not the Applicant exercised its rights of use of the servitude road *inciviliter modo*.

THE CLAIMED VIA EX NECESSITATE

[93] The applicant also indicated in its application that insofar as there is no servitude in existence, it would apply for a *via ex necessitate* in respect of access to its property. It was submitted that applicant is entitled to such *via ex necessite* based on the conditions imposed by the initial Government Grant of the property No 79/1930 which has been kept in the title deed and is still part of the title deed of the property of the first respondent which reads :

> *" That all roads, thoroughfares and rights of outspan being or existing on the land hereby granted shall remain free and unencumbent unless the same be cancelled, closed or altered by a competent authority.*
>
> *That the grantee shall be required to grant any adjacent or neighbouring proprietor a way of road of necessity over the land hereby granted to or from the land of such adjacent or neighbouring proprietor."*

[94] In any event it was submitted with reference to the leading decision of *Van Rensburg v Coetzee*[15] that the applicant had also made out a case based on the common law as it was clear that both these properties are landlocked with no other access to the main road and that the applicant was obviously entitled to have access to a main road.

[95] Reliance was placed upon the Headnote which reads :

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[15]1979 (4) SA 656 AD

> *"A claim to a way of necessity arises when a piece of land is geographically enclosed and has no way out, or, if a way out is available, it is however inadequate and the position amounts to this that the owner "has no reasonably sufficient access to the public road for himself and his servants to enable him, if he is a farmer, to carry on his farming operations". Without an order of court this claim does not make the registration of a right of way of necessity in respect of another person's land possible; and, further, before such order is obtained, entry on the other person's land will apparently be unlawful.*[16]

[96] The Respondent's did not seriously dispute the Applicant's claim to a *via ex necessitate*. This is not surprising as all the pre-requisites for a right of way of necessity in respect of Portion 17 are factually given.

[97] It follows that the Applicant's alternative claim for a *via ex necessitate* in respect of Portion 17 of the Farm Regenstein must succeed.

[98] It was rather submitted that the proposed N$500.00 per month was hopelessly inadequate to maintain the road and to adequately compensate the Respondents for its use.

[99] On behalf of Applicant on the other hand it was submitted that a case had been made out that the compensation offered was reasonable. In any event the Respondents had failed to effectively dispute the Applicant's case in this regard.

[100] It does indeed, in the first instance, appear from the affidavits exchanged that there is substance in this submission, as the parties delineated their respective positions as follows :

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[16] See also *Van Rensburg v Coetzee* at p 671 A -D

- THE RESPONDENTS

"I deny that the Applicant is entitled to a servitude by way of necessity because of its ownership of Portions 12 and 17. This cannot, with respect, happen at the cost of the Respondents and without their consent. The so called N$500.00 per month tendered in the additional affidavit smacks of brutal bureaucracy. No evidence as to the reasonableness of such an amount is even remotely established. Applicant is in fact, highly secretive of the number of lessees it has, or what the financial arrangements with such lessees are. N$500.00 per month is hopelessly inadequate to maintain the road, and to adequately compensate Respondents for the servitude by numerous users."

THE APPLICANT IN REPLY

"The reference to the offer of N$500.00 per month as smacking of "brutal bureaucracy" is as inexplicable as it is baseless. The attempt to justify the extravagant language in the last sentence of this paragraph by stating that it is hopelessly inadequate to maintain the road and to compensate for the servitude by numerous users is misleading and negates the context and terms of the offer. I refer to paragraphs 3 and 4 Ms Aspara's supplementary affidavit where this aspect is dealt with. The offer of compensation relates to the use of the portion of the route from the point of (deviation from) the proclaimed road to Portion 17. As is stated by her, this portion is not used by the respondents or their members. It is the route from the proclaimed road to Portions 12 and 17. Furthermore, she stated that the applicant undertakes to maintain this segment of the road. There is thus no question of any cost of its maintenance by the respondents. The reference to the sum being hopelessly inadequate to maintain the road is thus a gross distortion. (The applicant constructed the cement road and has always maintained it). The sum was thus tendered for the use of the non-proclaimed portion

of the route to the tower which the applicant would maintain. The respondents' cavil about the amount is thus exposed for what it is – baseless and misplaced."

[101] This exchange must then also be viewed against the general principles applicable to the quantification of such compensation as set out in the Headnote of *Van Rensburg v Coetzee*[17] from which it appears that this aspect is determined as follows:

"Normally, there is no suggestion of compensation for the way of necessity precario, but there is for the way of necessity which is acquired as a full right of way (jus viae plenum). Apparently the conferring by the court of a jus viae plenum should be regarded as a kind of expropriation of a right and the measure laid down by Glück, namely "the compensation must be in proportion to the advantage gained by the plaintiff and the disadvantages suffered by the defendant", should be viewed in the light thereof. Special damages which the owner suffers as a result his being partly "expropriated" will also be taken into account.[18]

[102] It appears further from the judgment and with reference to *Voet* that the compensation should be *'justum'* and that the aim of the compensation should ultimately be to achieve a *'justum pretium'*.[19]

[103] It must be kept in mind and it goes almost without saying that the Applicant is correct in stating that any *via ex necessitate* would follow the route of the existing servitude road and that '*the offer of compensation relates to the use of the portion of the existing route from the point of (deviation from) the proclaimed road FR 1425 to Portion 17'.* In the premises of this matter it seems almost superfluous to state that this would also obviously be the route *"ter*

[17] At 658H -659A
[18] See also *Van Rensburg v Coetzee* at 676 C-D
[19] See *Van Rensburg v Coetzee* at 676A

naaster lage en minster schade"

[104] It must be accepted that the servitude road to Portion 12 - over which any via ex necessitate to Portion 17 should lie - is in existence and has been so for many years. It is a concrete road which will be used almost exclusively by the Applicant and its tenants. It is also a road which has been maintained at no cost to the Respondents for all these years. The Applicant has undertaken to continue to maintain this road. So what compensation should attach thereto?

[105] Again the Headnote to *Van Rensburg v Coetzee*[20] is instructive. It states :

> *"If the plaintiff offers an amount and the defendant is not satisfied therewith, the defendant will certainly have to submit information which shows that the amount is not justum - unless he wants to run the risk of the court awarding the amount offered - and, if he has suffered any special damages, he will have to prove it. Basically, the rule will in general amount to this that each party must prove those facts upon which he relies for the determination of the value, and the usual civil onus will apply in this connection. But at the end of the case the court will, as best it can, determine a value on the available information.*

[106] It is clear in this instance that the Respondents are not satisfied with the amount offered. They also have not adduced any facts in the answering affidavits against which a determination of any value can be made, nor have they proved that they have suffered any special damages.

[107] In the Heads of Argument filed on behalf of Respondents it is submitted that :

> *"The proposed N$500.00 per month for the right of necessity is, apart from being misplaced in law, (is) hopelessly inadequate to maintain the*

[20] At p 660G

road in question. Respondents' requirement of N$3,500.00 per month is minimal compared to what the Applicant charges its lessees. The Respondent's offer of N$500.00 per month is plainly unfounded in law."

[108] Counsel for the Respondents rely in this regard on a draft agreement - annexed to the answering papers - which apparently was to be concluded between Mobile Telecommunications Limited and First Respondent - from which – upon closer scrutiny - it becomes apparent that the relied upon amount of N$ 3500.00 per month is actually the rental that would have been charged for the entire 'site' – the 'site' having been defined as the *'mobile transmission site situated on the farm Regenstein and includes, where the context so allows, all permanent improvements on the site'* .By that same token it becomes apparent from the referred to draft rental agreement that the concept *'rentable area'* is defined to mean - *' in relation to the site or any part of the site means the allocated area on Gross Herzog Mountain'*. Not surprisingly it is then recorded further in the draft lease that - *'the Lessor lets and the Lessee hires the Site on the terms of the lease'* and the Lessee - in respect of which – *'the rent shall be N$3500.00 for each month'*.

[109] Although the lease agreement - not surprisingly - also regulates the

'Lessees right of Entry and Carrying out of Works' – a basic requirement to any lease – it becomes apparent that the amount of N$ 3500.00 was never intended - does not - and cannot constitute a yardstick against which - a '*justum pretium',* for the use of a *via ex necessitate,* can be determined.

[110] Even if counsels' submissions were to be accepted, and if the rental value, attached by the Respondent's to the renting out of the entire 'site' is anything to go by, it almost follows that any value to be attached to the use of a short stretch of the existing road - ie. the value of the route from the point of (deviation from) the proclaimed road FR 1425 to Portion 17 – must be far less.

[111] It is clear that the Respondents – by failing to submit information which would have shown that the amount of N$ 500.00 is not *justum* - have taken the risk of the court awarding the amount offered. This amount is therefore awarded.

[112] Lastly and given my findings in this matter I deem it proper to award the costs of suit to the Applicant on the basis that it was the Applicant that has been 'substantially successful' in its claims against the Respondents

[113] In the result the following relief is granted :

a) The First and Second Respondents are interdicted and restrained from hindering or restricting the access of the Applicant, its employees and its lessees to Road FR 1425 in any way whatsoever, included in, but not limiting such interdict, the Respondents are also specifically interdicted from operating and closing a gate at the commencement of such road located at or near the trunk road between Windhoek and Rehoboth;

b) A servitude of way of necessity - in favour of Portion 17 of farm Regenstein No 32 - over Portion 9 of farm Regenstein No 32 – with the same extent and route of the servitude and set out in the same terms as the right of way already registered in favour of Portion 12 of farm Regenstein No 32 over Portion 9 of such farm as set out and registered in the Deeds Registry in annexure "B1" to the founding affidavit - is hereby granted;

c) The Applicant is directed to compensate the First Respondent in the amount of N$ 500.00 per month for the use of the servitude of way of necessity granted in paragraph b) above;

d) The First and Second Respondent's are ordered to pay the Applicant's costs of suit, jointly and severally, the one paying the other to be absolved, such costs to include the costs of two instructed and one instructing counsel.

_____

GEIER, AJ

Counsel for Applicant: Adv TJ Frank SC
Adv R Maasdorp
Instructed by: LorentzAngula Inc

Counsel for Respondent : Adv R Heathcote SC
Adv J Schickerling

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