The Difficult Process of Applying Easy Principles: Three Recent Judgments on *Via ex Necessitate*[*]

1 Introduction

This note will focus on two recent sets of facts which are contained in the newest law reports, namely *English v CJM Harmse Investments CC* (2007 3 SA 415 (N)) and the Supreme Court of Appeal judgment *Aventura Ltd v Jackson NO* (case no 290/05 of 2006-09-15), available on *Legalbrief Judgments*) which brings the matter first raised in *Jackson v Aventura Limited* ([2005] 2 All SA 518 (C)) to an end. (For a brief reference to the judgment of the court *a quo* in the *Aventura* case, see Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* (2006) 328 n 66.) An evaluation of each of these judgments against the principles of our modern law in respect of the granting of a way of necessity will be made, w ith specific emphasis on three aspects: firstly, the application of the principle of "*ter naaster laage ende minster schade*" (Van Leeuwen *Censura Forensis* 2 14 34: the principle that a way of necessity "must go by the

route which is least burdensome and the nearest to the public roads" – *Wilhelm v Norton* 1935 EDL 143 168) which was of cardinal importance in all the aforementioned judgments; secondly, the rule that the creation of one's own position of necessity is normally a bar to one's successfully claiming a *via necessitatis*, a principle which never arose for discussion in the *Aventura* case where its application could have had a major impact; and, thirdly, the principle of *utilitas praedio* which, if considered and applied in the *Aventura* case, could likewise have effected a different outcome than the one reached by the Supreme Court of Appeal.

In the restricted field of law dealing with ways of necessity, the ground-breaking contribution of Van der Merwe and Lubbe ("Noodweg" 1977 *THRHR* 110) in which they sketch the development of our modern rules pertaining to the granting of a way of necessity, received almost immediate recognition when Jansen JA labelled it as an "insiggewende artikel . . . [wat] in die algemeen geraadpleeg [kan] word" in the seminal judgment of *Van Rensburg v Coetzee* (1979 4 SA 655 (A) 670E). Apart from references to this publication in virtually all subsequently reported judgments, it is particularly noteworthy, for our purposes, that Hurt J approvingly referred to it in the *English* case (418G *et seq*). Furthermore, one realises that our old authorities still feature very strongly in this field, probably as a result of the discussion of some of the old European authorities, amongst others some of our own institutional writers like Simon van Leeuwen, Hugo de Groot, Johannes Voet and DG van der Keessel, Van der Merwe and Lubbe. (From a purist point of view it is erroneous to refer, even by implication, to authorities like Christinaeus, Huber and Zypaeus as "Roman-Dutch" authors, as Van der Merwe and Lubbe do. They are European Romanistic writers, which does not imply that one cannot consult them. However, this topic will not be pursued for purposes of this note.)

2 The *English* Case

2 1 *Facts and Judgment*

The plaintiff and defendant owned adjoining properties. The plaintiff proceeded against the defendant in the high court for a defined and registered right of way of necessity over the defendant's property. This *ius viae plenum* – a permanent praedial servitude – would constitute a shortcut for the plaintiff from a public road to part of his property. He did in fact have alternative access by utilising an existing farm road on his own property for ordinary farming purposes, but this route was longer and more arduous. It is noteworthy that the defendant had conceded that the plaintiff was in fact entitled to a *ius viae precario* (*viz* a periodic way of necessity which entitled the

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owner of the dominant tenement far less entitlements than those held by the holder of a permanent *via necessitatis*, in the sense that it can only be utilised in situations of necessity, for which no compensation is payable – Van der Merwe and Lubbe 114–115) to meet any emergency situation which might make it desirable that he reach the public road within a much shorter period of time. The only real issue was thus whether the plaintiff was entitled to a more permanent right of way (for which he would have to pay compensation).

The defendant raised three defences, namely that: (a) the creation of the permanent right of way would defeat the purpose for which it had acquired its property, *viz* the establishment of a private retreat or bush camp; (b) the right of way was not necessary to enable the plaintiff to conduct viable farming operations, seeing that there was an existing road linking him to a public road; and (c) analogous to the first defence, the defendant was in the process of creating a private game reserve, which operation would be seriously jeopardised by the granting of a permanent right of way over its property, as this would materially infringe upon the carefully developed environmental amenities on the property in question. All these defences were successful and the plaintiff thus failed in his action.

2 2 *Evaluation*

In his judgment Hurt J referred (418J) to the evolution of the common-law rules from the Roman "individualistic-amoral" approach to a more "social-ethical" approach adhered to by many of our institutional writers (as described in *Van Rensburg v Coetzee* 670G–H on the basis of the work of Van der Merwe and Lubbe), to explain that the requirement that the plaintiff's land must be totally inaccessible (ie "*blokland*") has given way to a more flexible test according to which a *ius viae plenum* could be granted to the owner of property over his neighbour's land, in spite of an existing link over the former's own property to a public road (see also 420F–I). The circumstances under which such a claim to a permanent way of necessity by the owner of an active farm can originate, has been formulated admirably in *Lentz v Mullan* (1921 EDL 268) (and expressly approved by Jansen JA in his ground-breaking judgment in *Van Rensburg v Coetzee* (671B)), where Graham JP expressed himself as follows (270): "[T]he claimant, to succeed, must show that he has no reasonable 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".

In addition to his later reference to the *Lentz* case (420H–I), Hurt J also referred to the well-known judgment of Steyn J in *Trautman v Poole* (1951 3 SA 200 (C)) where that judge paraphrased the opinions of the relevant Roman-Dutch authorities and older case law (Van Leeuwen *Censura Forensis* 2 14 34, De Groot *Inleidinge tot de Hollandse Rechtsgeleerdheid* 2 35 7–11; Schorer *ad Grot* note 216, *Van Schalkwijk v Du Plessis* 1900 17 SC 454) as follows (207E 208E–F):

> "A *via necessitatis* is awarded on the basis of what is necessary and not merely because it is reasonably required . . . 'unreasonableness' is not the test and, in the absence of any proof that the cost of linking up with this road from [such owner's] home would be immoderate or disproportionate, the grant of a *via necessitatis* was not justified."

One can assume that Hurt J had not been referred to *Lentz v Mullan supra*, because that judgment (270) contains a *dictum* which is particularly apposite to the facts of the instant case:

> "If he [the plaintiff] has an alternative route to the one claimed, although such route may be less convenient and involve a *longer* or *more arduous* journey, so long as the existing road gives him *reasonable access* to a public road he must be content, and cannot insist upon a more direct approach over his neighbour's property" (italics supplied).

It is clear that in a case like the present this "reasonable access" criterion to be used to determine whether a *ius viae plenum* should be granted over a defendant's property is the "economic viability of the required farming operation and what may loosely be described as 'an appropriate balance of convenience'" (421I; this formulation follows Hurt J's interpretation of the trend set by the fairly recent judgments in *Naudé v Ecoman Investments* 1994 2 SA 95 (T)) and *Sanders v Edwards* 2003 5 SA 8 (C)). A consideration which played an important part in leading the court to a decision on this point, is the fact that the plaintiff placed no evidence before the court that would have established that the absence of a permanent way of necessity would lead to the plaintiff's inability to conduct viable farming operations. It is to be welcomed that the judge pointedly reminds us that a necessary corollary of the economic viability of the plaintiff's property, is the defendant's peaceful occupation of his property, to which he has a right *qua* owner (see 421J). This interest of the defendant has always been recognised in the case law.

Although Hurt J nowhere refers in so many words to the common-law rule of "*ter naaster laage ende ter minster schade*", those parts of his judgment that weigh up the interests of the parties, are

in fact an embodiment of the application of that old rule: In my view the "*ter naaster laage*" part of the rule has the interest of the plaintiff as object, whilst the remainder thereof has a bearing on the interests of the defendant. In essence that old rule is an early embodiment of what Hurt J refers to as "an appropriate balance of convenience" (421I) in this context.

The part of this judgment dealt with up to now, in essence, concerns the defendant's second defence referred to at the outset of the discussion of this particular case – one can describe it as the defence which embodies the "*ter naaster laage*" requirement. In respect of the first and third defences (those based essentially on the "*ter minster schade*" requirement) Hurt J expended a very limited amount of ink: Initially he made the rather startling observation that "the practical effect of the grant of a *jus viae plenum* is virtually identical to an expropriation of property" (421I). The analogy is unfortunately not a happy one – it is rather misplaced: although compensation is payable in the event of expropriation, as in the case of the grant of a *ius viae plenum*, expropriation entails that the expropriated person loses the property or the use thereof, which is most definitely not the case when a way of necessity is granted. The analogy becomes more unfortunate when Hurt J endeavours to invoke section 25(1) of the Constitution of the Republic of South Africa (Act 108 of 1996) as authority for this proposition, apparently losing sight of the fact that this subsection deals with deprivation (as opposed to expropriation), where no provision is made in the measure itself for compensation (see Currie and De Waal *The Bill of Rights Handbook* (2005) 541). This, in turn, is not to be reconciled with the common-law requirement that the grant of a *ius viae plenum* must be accompanied by reasonable compensation by the successful plaintiff. In conclusion, after having rendered a synoptic description of the defendant's present and future activities on his property, the court simply concluded that "[i]n these circumstances it is clear that the prejudice which the defendant would have to put up with if a right of way were registered in favour of the plaintiff is significant" (425A).

It is suggested that the rejection by the court of the plaintiff's action was correct: basically the plaintiff failed to discharge the *onus* of proving necessity, as required by the well-established rule in this regard.

3 The *Aventura* Cases

3 1 *Facts*

The plaintiffs (respondents) are the trustees of a trust which acquired a portion of undeveloped, landlocked land near picturesque Knysna. Access to this property can be obtained only by crossing either one, or both of two adjoining properties. The first of these, the so-called "Catwalk" property, is a large, undeveloped portion of land; the other, much smaller, property of which Aventura, the defendant (appellant) is the registered owner, has been developed as a recreational resort. The facts show that the only true adjacent property to that of the plaintiffs is the so-called "Catwalk" property. Although the plaintiffs' property and the Aventura property share a common border for a short distance, the terrain at that point is so rugged that no access over the common border by means of a road is possible: the properties are thus adjacent only for geographical, and not for practical purposes. Although it was possible for the plaintiffs to gain access to their property from a public road via a rather long, arduous route over the Catwalk property, which would entail the construction of extensive road works at high cost – in view of the rugged nature of the terrain - they preferred to claim a *ius viae plenum* along a much shorter route to a national road. This route would first have to traverse a stretch of the Catwalk estate (the owner of which had granted the plaintiffs a right of way over the property, which servitude had in the meantime been registered) and then follow a course over the Aventura property, where an existing tar road providing direct access to the national road, bordering on the Aventura property, was available. This option would require plaintiffs having to spend much less on the construction of new road works. However, an obstructing factor for the plaintiffs in the choice of their preferred route was the fact that a new road would have to be built along an existing river-bed, which would have a definite detrimental impact upon the sensitive environment. Consent for the building of the preferred road and other building projects on the plaintiffs' property would have to be obtained from the relevant authorities in terms of the Environmental Conservation Act (73 of 1989) and the National Environmental Management Act (107 of 1998). It is clear from the facts, although the point was not raised at all, that the plaintiffs' dilemma could largely be ascribed to their choice of locality for the buildings they had intended to erect, *viz* on the portion of their land near the Aventura camp. This choice had been influenced by the fact that the preferred site is situated on terrain which is "less steep and provides the best view" (530*j* of the trial court report).

3 2 *Judgments*

The trust was granted an order in the Cape High Court by Zondi AJ, compelling Aventura to register a right of way over its property in favour of the plaintiffs' property, ". . . subject to the plaintiffs' compliance with the provisions of the Environmental Conservation Act 73 of 1989 and National Environmental Management Act 107 of 1998 relating to the construction of the road" (533*i*). The trial court also ordered that the question concerning reasonable compensation should be determined at a later date (534*a*). The defendant was granted leave to appeal against these orders to the Supreme Court of Appeal.

Nugent JA rejected the appeal, with the effect that the appellant was obliged to grant the permanent way of necessity to the respondents. (The court's remark that "[t]he appellant has been successful in sustaining its claim to a right of way . . ." (para [11]) is clearly a *lapsus calami* in two respects: it refers to the wrong party, and is couched in the singular.) The following order substituted that of the court *a quo* (para [12]):

> "1. Subject to the owner of Portion 36 of the farm Hangklip No 305 in the division of Knysna ('the dominant tenement') [*viz* the plaintiffs/respondents]:
>
> (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') [viz the Aventura property]; [and]
>
> (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." (For our purposes the content of the two additional orders is irrelevant.)

3 3 *Evaluation of the Judgment of the Court* a Quo

In his judgment Zondi AJ relied on the method described by Jansen JA in *Van Rensburg v Coetzee* (678; see the useful systematic exposition of this part of the judgment by Badenhorst, Pienaar and Mostert 330) and proceeded on the strength of the basic tenet of "*ter naaster laage ende mister schade*" (529*i*). One cannot find fault with his point of departure, expressed as follows: "In my view impassibility of land must be looked at in relation to the topographical and geographical features of both the servient tenement and the dominant tenement . . ." (*ibid*). *In casu* the impassibility of the shortest route via the common boundary between the plaintiffs' property and the Aventura estate renders the first part of this maxim inapplicable (*ibid*). Unfortunately, the "*ter minster schade*" requirement was formulated as follows: "[It] will not apply where a piece of land to be traversed by a right of way of necessity will be *so* detrimentally affected" (italics supplied). The insertion of the adverb "*so*" definitely shows that the judge omitted certain words at the end of his sentence. Retaining the sentence as it stands yields an expression of an incomplete, if not meaningless idea. On the other hand, omitting the "*so*" would make the sentence express a rule which, in context, is clearly erroneous in view of the existing law - surely, the granting of *any* servitude detracts from the value of the servient tenement.

The court's declining to consider the longer, more arduous route over the Catwalk property as a sufficient alternative, would at first glance seem to be incompatible with the *locus classicus, Lentz v Mullan supra*, where it was emphatically pointed out that the fact that an existing route is longer and more arduous is not an absolute bar to the court granting the right of way over such less convenient route. There is no right to insist on a more direct route over another's property. On the other hand – and this does not appear absolutely clearly from the judgment – it is possible that the cost of utilising the longer route could have scuppered any advantage that the plaintiffs could have derived from their property. This is at most implied as the reason for the court's decision on this point is stated in the following words of Zondi AJ (531*b*):

> "These [alternative] routes would further require the construction and use of a road from the existing road on Catwalk property to the boundary of the plaintiffs' property and that construction would be over steep and extremely difficult terrain."

By implication the cost of construction of such a carriageway would be extremely high. One can also point out that there is a significant similarity in facts between this case and that of the leading old case of *Van Schalkwijk v Du Plessis supra*, where Villiers CJ held, *inter alia*, that an important

consideration to be taken into account was that the defendant's property was much smaller and more cultivated than the property over which an alternative route was possible. The Aventura property is indeed much smaller and more developed than the Catwalk property, and it is logical that the effect of an additional roadway with a higher frequency of use over the existing road would have a relatively more detrimental effect on it than a longer roadway would have in respect of the Catwalk property.

It is noteworthy that Zondi AJ declined to extend the application of the "*ter minster schade*" requirement to an assessment of the impact of the desired route on the broader environment. He justified his stance by asserting that he was only authorised to apply the common-law principles in this regard, for "[i]f this Court . . . were to apply both the common-law principles and environmental considerations in considering the claim, the whole environmental legislative framework would be rendered nugatory" (532*d*). On the one hand it can be argued from a position of principle that this is too cautious an approach, as the court effectively "surrenders" its inherent authority to adjudicate matters between parties before it, although the policy reason proffered does make good practical sense.

An argument which was never raised on behalf of the defendant, was that the dilemma in which the plaintiffs had found themselves had been mainly of their own making. It should be kept in mind that the access road for which they had petitioned the court was to follow the shortest route to the spot *which they had chosen for reasons of their own convenience – the less steep terrain and the location with the best view* (530*j*). It is abundantly clear that they could have chosen a spot on the other side of the property, which would provide a shorter exit route to the public road over the Catwalk land, than the existing one, were they to exit over the Catwalk property alone. There is ample authority that an owner who has only himself to blame for his dilemma is not, as a rule, entitled to a way of necessity (*cf* Van Leeuwen *Het Roomsch Hollandsch Recht* 2 21 12; see *Ross' Executors v Ritchie* (1898) 19 NLR 103 110; *Bekker v Van Wyk* 1956 3 SA 13 (T) 144E–G), for instance, and similar to the case under discussion, where the owner builds a dwelling in an inaccessible spot, thus depriving himself of an existing right of way to a public road (*Carter v Driemeyer* 1913 NPD 1 6; *cf*, however, Van der Merwe and Lubbe 120–121), or where an owner had, for his own convenience, effected the closure of a public road which rendered his property landlocked (*Bekker v Van Wyk supra*), or where a subdivision of property results in one of the portions becoming landlocked (*Riddin v Quinn* 1909 EDC 373). (For further authority, see Badenhorst, Pienaar and Mostert 329 n 80.) It is suggested that the free choice by the plaintiffs of the location of their development had been the main, if not the exclusive cause of their predicament. The analogy with the previous three examples certainly need not be explained in any detail to substantiate its applicability. In layman's parlance one could rightly declare: "They wanted to have their cake and eat it" (Which they succeeded in doing eventually!) One can only wonder why this point was never raised on the defendant's behalf.

A final observation concerns the fact that, for all *practical* purposes, the plaintiffs' property and that of Aventura are not adjacent. All the judgments consulted for purposes of this note concern the application for a *via ex necessitate* over adjacent property. The question may arise whether a specific common-law rule exists to the effect that the plaintiff in an action for the granting of a *ius viae plenum* is restricted to a claim in respect of adjacent property. The present writer could not locate such a rule and it is indeed to be doubted whether such a rule exists at all. An application of the rules pertaining to the general characteristics of praedial servitudes, in particular the principle of *utilitas praedio* which entails that "it is of the essence of a praedial servitude that it must be of some benefit to the dominant tenement" (*Bisschop v Stafford* 1974 3 SA 1 (A) 11F; recently *Bowring v Vrededorp Properties CC* 2007 3 SA 391 (SCA) 395E; see Voet *Commentarius ad Pandectas* 8 4 13; see further Van der Merwe "Die nutsvereiste by erfdiensbaarhede" *Petere Fontes – LC Steyn Gedenkbundel* (1980) 163 164 n 4; Van der Merwe *Sakereg* (1989) 470; Sonnekus and Neels *Sakereg Vonnisbundel* (1994) 585) may afford more clarity.

Closely connected to the *utilitas* characteristic is that of *vicinitas* or proximity (the tenements must be situated, in relation to another, in such a way that the effective exercise of the servitude to the dominant tenement is possible, which does not imply that the tenements need to be adjacent; see, in particular, Sonnekus and Neels 605 and authorities quoted therein). Van der Merwe (470) makes an important observation in this context:

> "In die geval van 'n velddiensbaarheid word in die algemeen vereis dat die erwe aangrensend moet wees, behalwe in gevalle waar 'n tussengeleë erf ook met 'n velddiensbaarheid ten gunste van die heersende erf beswaar is of waar daar 'n openbare weg tussen die heersende en dienende erf is"

(referring to *Bisschop v Stratford supra* and *Briers v Wilson* 1952 3 SA 423 (C) 439; see further Sonnekus and Neels *loc cit*).

The *vicinitas* principle would seem to be applicable here, as it has been pointed out that the plaintiffs had already obtained and registered a servitude of right of way over the Catwalk property (522*e*). It was not mentioned whether that right of way had been granted over the specific route which was to connect to the road over the Aventura property, or whether the grant thereof had been *simpliciter*. Had it been the former, one must bear in mind that a right of way had thus been granted over the servient tenement (Catwalk property) to a point situated on the boundary between the Catwalk property and the Aventura property – a "dead end", if one bears in mind that the plaintiffs at that stage had not acquired a right of way over the Aventura property. Such a *cul de sac* could certainly not have served the owners of the dominant tenement (the plaintiffs in the present proceedings) in any useful way on a permanent basis. The conclusion is unavoidable that the *utilitas praedio* principle had thus not been adhered to in the process of granting the right of way in favour of the plaintiffs' property over the Catwalk estate. Had it been the latter (*viz* a right of way *simpliciter*), adherence to the *utilitas* principle would entail that the road would have to lead to the public road skirting the Catwalk property. This, in turn would entail that the plaintiffs already had an outlet to a public road, depriving them of the element of necessity which had been crucial – in terms of general principle – for their success in applying for the granting of a *ius viae plenum* over the Aventura property. The startling effect of our application of this principle of *utilitas praedio* to the situation at hand is that the focus on its *vicinitas* component, which apparently makes it compatible with the granting of the way of necessity over the defendant's property, diverts our attention from its main thrust, namely to ensure that the practical possibility exists that the servient tenement can be utilised meaningfully on a permanent basis by the dominant tenement, which possibility would seem to be lacking in respect of the right of way which had previously been registered over the interjacent (Catwalk) property. It is suggested that the correct application of the *utilitas praedio* principle could have seriously jeopardised the plaintiffs' case, had it been pleaded as explained above.

3 4 *Evaluation of the Judgment of the Supreme Court of Appeal*

Commencing his very brief judgment from the angle of the general proposition that a court may grant a right of way over the property of a non-consenting owner, subject to payment of compensation, where such right of way is necessary to provide access to a public road (*viz* a *ius viae*
plenum) on the strength of *Van Rensburg v Coetzee supra* (par [8]), Nugent JA referred to the only submission made to the court on behalf of the appellant/defendant, namely ". . . that until such time as the Trust (plaintiffs/respondents) has obtained authorisation from the relevant environmental authorities to put the Rondeklip property [the trust property – proposed dominant tenement] 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". The judge summarily rejected this contention as stretching the meaning of "necessity" (as authoritatively described in the judgment of *Trautman v Poole* 207D–208A) beyond its traditional boundaries. This decision is to be welcomed as being in conformity with the more flexible necessity requirement as it has developed in South African case law (see Van der Merwe and Lubbe 115 *et seq*).

On the face of it, the relevant orders of the court *a quo* and of the Supreme Court of Appeal would seem to be identical. In fact, this is what Nugent JA declared in so many words (pars [9]–[11]):

> "It seems to me that the submission that was made on behalf of Aventura raises questions of practicality rather than of legal principle . . . 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."

It is suggested, however, that there is a more fundamental difference than one pertaining merely to form, between the two orders: The Cape High Court ordered the defendant to proceed forthwith with the process of cooperating with the plaintiffs to have the right of way registered. This process could conceivably have been completed before the necessary consent had been obtained from the relevant authorities. Should this consent be refused at a future stage, it would have the unavoidable effect that the servitude must be cancelled. One is thus justified in stating that the granting of the servitude was subject to a *resolutive condition* (the relevant uncertain future event being the refusal by the relevant authorities of the required permission to the owner of the dominant tenement). However, the order of the Supreme Court of Appeal made it abundantly clear that the servitude

could not be registered, unless two conditions were met, *viz* the necessary consent obtained from the relevant authorities and the compensation paid by the owner of the future dominant tenement – it is evident that *suspensive conditions* come into play here. The bottom line of the matter is, however, that in the event of a positive response from the authorities, the plaintiffs/respondents would, under the orders of both courts, obtain their desired permanent way of necessity.

The order granted by the Supreme Court of Appeal is definitely more appealing than that of the Cape High Court: The suspensive-condition approach appeals more to one's sense of equity, than an approach which grants a servitude, which right could be rendered useless by the rejection of the environmental authorities of the application of the owner of the dominant tenement in terms of the relevant legislation. The latter approach rather resembles a "shot in the dark" ("*mog ek troffe*") attitude on the part of the court granting such order.

One last consideration, of a more practical nature, also supports the form in which the Supreme Court of Appeal couched its order: Making the granting of the necessary permission as well as the payment of compensation conditions precedent to the establishment of the right of way avoids the situation where a right of way is first granted (and duly registered) – which essentially amounts to the granting in favour of the owner of the dominant tenement a proprietary interest – and then taken away in the event of the refusal by the authorities of the necessary permission (ie on subsequent realisation of the condition). This could conceivably bring the expropriation measure contained in section 25(2) of the Constitution into play, thus entitling the owner of the dominant tenement, who has now irretrievably lost his real right, to compensation. (See, generally, Currie and De Waal 551 *et seq*; a closer analysis of this aspect falls outside the scope of this note).

4 Conclusion

It has once again become clear that although the basic principles pertaining to the granting of ways of necessity appear to be relatively simple, their correct application can sometimes be a tough nut to crack. It is suggested that litigants and their counsel in cases of this kind should be aware of the fact that the difficulties attached to the process of arriving at the correct solution(s) are more often than not more numerous and multi-faceted than would at first meet the eye.

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