



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT**

In the matter between:

Case no: I 3785/2012

JORGE MANUEL BATISDA NEVES

1ST PLAINTIF

MARIA ALZIRA ALVES BATISDA NEVES

2ND PLAINTIFF

And

RAINIER ARANGIES

1ST DEFENDANT

COUNCIL FOR THE MUNICIPALITY OF TSUMEB

2ND DEFENDANT

Neutral citation: *Neves v Arangies* (I 3785-2012] [2016] NAHCMD 271 (05 September 2016)

Coram: **MILLER AJ**

Heard: **05 September 2016**

Delivered: **05 September 2016 (*Ex tempore*)**

ORDER

In the premises I make the following order:

1. The application for absolution from the instance is dismissed with costs.
2. The costs will include the cost of one instructing and two instructed Counsel.

JUDGMENT

MILLER AJ:

[1] In this matter the plaintiff instituted action against the defendant claiming that he had acquired an acquisitive right of way through prescription over a portion of a property belonging to the defendant, (the 1st defendant that is). As an alternative, the plaintiff seeks an order establishing a right of way over the premises.

[2] At the commencement of the trial, an inspection was held where the properties are situated in Tsumeb. These were recorded and handed in as an exhibit during the course of the trial. I am not going to deal in details with that because it is common cause that on the street side of plaintiff's property, a shop had been erected and at a later stage a residential unit had been erected at the back of the shop.

[3] It is also apparent that by nature of the construction of the shop and the adjoining shops, there is no vehicle access to the residential property house via the adjoining street. At the very end of plaintiff's property is a largely vacant piece of land which was at some stage owned by a local mining company and then it was at a later stage acquired by the 1st defendant. It is the plaintiff's evidence that since the year 1973, vehicle access to and from the residential premises on the plaintiff's property was over the piece of that land which presently belongs to the 1st defendant.

[4] After hearing the evidence of the plaintiff, and when the plaintiff closed its case, by Mr Barnard who appeared for the 1st defendant sought absolution from the

instance. In support of the application various points are raised. Firstly and relying on some authorities which I was referred to, Mr Barnard submits that an owner land cannot construct a building on his property in such a way that it blocks access to their adjoining road and then thereafter claim a right of way over his neighbour's property.

[5] That may or may not be good law and I expressed no opinion on it because I find the authorities referred to although they may be a good defence to a claim to establish a right of way does not assist defendant where the plaintiff does not seek to establish a new right but seeks to enforce in this case an existing right which had existed since the year 2003 according to the plaintiff. I do not think that an owner that has allowed a neighbour access over his property for the period of 30 years and thus allow the right to be established to complain that the right can no longer be exercised. On that basis the authorities referred to by Mr Barnard are distinguishable and in my view not applicable to the present case at least as far as the plaintiff's main case is concerned.

[6] Secondly there was evidence that some time before the prescriptive period of 30 years had run out the property of the 1st defendant was fenced that the gates installed were locked. The plaintiff's evidence is that they were handed keys gain and access to and from the premises. Mr Barnard submits in this regard that in fact that the gates were installed and locked has the effect that the plaintiff's rights to become precarious from that point on. That may be one inference, but it is not the only inference.

[5] The handing over of the key to the defendant perhaps may also as an inference be an acknowledgement of and the endorsement of the plaintiff's free access over the property to and from, the residential building on the plaintiff's property. A further submission made was that the plaintiff's evidence does not cover the entire period of 30 years since on his own evidence he was away from the property for a period of time where he lived elsewhere. That is correct as it goes. However the totality of the plaintiff's evidence is that access was gained to the residential building continuously and that in my view is probable.

[6] If one bears in mind that it was the only access to and from the residential building, it is highly probable that access was gained to the residential period on an uninterrupted basis for a period in excess of 30 years. Furthermore it was submitted that the plaintiff's evidence is unworthy to the extent that I should grant absolution from the instance on that basis alone. In view of the conclusion I have come to, I do not find it helpful to engage in a discussion in detail on the merits and demerits of the plaintiff's evidence. It suffice to say that I am unpersuaded that the evidence of the plaintiff is so unworthy that I should grant absolution from the instance on that particular basis.

[7] I will accordingly make the following orders:

1. The application for absolution from the instance is dismissed with costs.
2. The costs will include the cost of one instructing and two instructed Counsel.

Miller, AJ
Acting

Appearance

Plaintiff

F Schultz

Instructed by

Neves Legal Practitioner, Windhoek

Defendant

RDT Mueller

Instructed by

Mueller Legal Practitioners, Windhoek

