REPORTABLE

CASE NO.: SA 14/2008

IN THE SUPREME COURT OF NAMIBIA

In the matter between

MINISTER OF AGRICULTURE, WATER AND FORESTRY **APPELLANT**

and

BRYAN O'LINN **RESPONDENT**

CORAM: Nugent AJA, Cloete AJA, *et* Maya AJA.

HEARD ON: 2008/11/06

DELIVERED ON: 2008/12/12

APPEAL JUDGMENT

NUGENT, AJA:

[1] The respondent is the owner and occupier of a portion of land known as Erf 2205 Windhoek. The erf was first registered in the deeds registry in 1956. It was

acquired the following year by Mr Smit, who constructed certain buildings on the erf. He sold the developed property to the respondent in 1968.

[2] The property abuts Promenaden Road but the steep gradient makes access from that point impractical. For that reason the respondent, like Mr Smit before him, has habitually accessed the property from Nelson Mandela Avenue, following a route that runs alongside the boundaries of the neighbouring erven on the south-west bank of the Klein Windhoek River (I refer to that route as the access road).

[3] The land that is traversed by the access road is alleged by the respondent to be owned by the state, which is represented in these proceedings by the appellant. Alleging that a servitude of right-of-way has accrued by acquisitive prescription for the benefit of the owner for the time being of Erf 2205 the respondent applied to the High Court for a declaration to that effect and for ancillary relief. The application succeeded before Muller J and the appellant now appeals against his orders.

[4] The applicable principles of law are dealt with comprehensively in the carefully reasoned judgment of the court below and it would be superfluous to repeat them because the appeal is directed at only two issues.

[5] I have pointed out that in his founding affidavit the respondent alleged that the land that is traversed by the access road is owned by the state. The respondent nonetheless joined the Municipal Council of the Municipality of Windhoek in the

proceedings, presumably as a precaution for any interest that it might have in the matter. Neither the Municipal Council nor the Registrar of Deeds, who was also cited, opposed the application and neither has appealed.

[6] Although the appellant opposed the application it did not file an answering affidavit placing in issue the factual averments made by the respondent. Instead it gave notice under Rule 6(5)(d)(iii) that it intended raising what it called questions of law. It expressed those questions as follows:

> "1. Is the Municipal Council of the Municipality of Windhoek the owner of the [access road] taking into account the following legal instruments:
>
> (a) the agreement entered into between the Imperial District Court of Windhoek as the representative of the Treasury of German South-West Africa and the Municipality of Windhoek dated 28 November 1911 annexed hereto as annexure ‘A1’ and ‘A2’.
>
> (b) Title deed No 675/1922 annexed hereto as annexure ‘B’.
>
> (c) ….
>
> 2. Should [the Municipal Council] be the owner of the property referred to in paragraph 1 hereof, is applicant precluded by virtue of section 65 of the Local Authorities Act No. 23 of 1992 from acquiring a servitude by prescription in respect of the above named property?"

[7] It is not disputed that the statutory provision referred to by the appellant precludes the acquisition by prescription of a servitude over municipal property and

the second question is thus not controversial. To the extent that there is any controversy at all in relation to this aspect of the case it is confined to whether the access road is on municipal property.

[8] The manner in which that question was sought to be raised by the appellant was unconventional. Rule 6(5)(d)(iii) is designed to alert an applicant in motion proceedings to the fact that the respondent intends raising a point of law arising from the facts as they are alleged by the applicant, in much the same way as an exception raises points of law in proceedings by way of action. The proper course for a respondent who wishes to introduce new facts, as the appellant sought to do in this case, is to introduce those facts by filing an appropriate affidavit.

[9] In the court below the respondent objected to the documents that are referred to in the appellant's notice (the agreements and the deed of title) being placed before the court in that manner, which prompted the appellant to attempt to rectify the matter by applying shortly before the hearing for leave to file affidavits authenticating the documents. One affidavit was deposed to by an officer of the Municipal Council, attesting to the fact that the agreements were amongst the official records of the Council. The other was deposed to by the Registrar of Deeds, who said that the deed of title that had been tendered by the appellant correctly reflected the records held in the deeds office.

[10] The application for leave to introduce those affidavits was opposed by the respondent who in turn filed procedural objections to the course that had been adopted by the appellant. The details of the interlocutory applications are not important. It is sufficient to say that the court below, exercising the discretion that it had, declined to allow the affidavits to be filed, with the effect that the documents referred to in the appellant's notice were precluded from consideration. The appellant contends that the court below erred by refusing leave to file the affidavits and it asks for that decision to be set aside.

[11] When a court is called upon to exercise its discretion to permit a departure from the rules an important consideration is the extent to which the indulgence will prejudice the opposing party. It is difficult to see how the introduction of the affidavits could have had that effect in this case. The contents of both affidavits were purely formal and the respondent had been aware for a considerable time that the documents to which they referred would be sought to be relied upon at the hearing. But I do not find it necessary to decide whether the court below ought to have allowed the affidavits because its failure to do so was in any event not material to the outcome.

[12] The Municipal Council has made no claim to ownership of the property that is now in issue. There was also no direct challenge by the appellant to the allegation by the respondent that the property is owned by the state. The appellant went no further

than to raise as a possibility that the documents which were referred to in its notice might indicate that the property was transferred to the Municipal Council.

[13] The documents reflect that in 1922, by agreement between them, the state transferred to the Municipal Council numerous specified portions of land that are located within the boundaries of a portion of land that is registered in the deeds office as Portion A of the Farm Windhoek, Town and Townlands, No 31, district of Windhoek. According to the affidavit of the Registrar of Deeds the Klein Windhoek River (and presumably its banks as well) is situated on Portion A. Certificate of Registered Title No. 675/1922 records the various portions of land within Portion A that were transferred to the Municipal Council. Counsel for the appellant was not able to submit that the portions of land described in that deed include the land that is traversed by the access road. In those circumstances it seems to me that the affidavits and accompanying documents take the matter no further and on that ground alone there is no proper reason to interfere with the decision of the court below.

[14] Counsel for the appellant also submitted, with reference to various authorities – the decision of the Appellate Division of the South African Supreme Court in *Malan v Nabygelegen Estates* 1946 AD 562 is a prominent example – that a servitude might be acquired by prescription only by use that is adverse to the owner. Yet at common law, so the submission continued, every member of the public may make use of a river bank until such time as that right is revoked by the owner. The use by the respondent and his predecessor-in-title of the bank of the Klein Windhoek River as an

access-route to Erf 2205 was accordingly not adverse to the rights of the state and could not found the creation of a servitude.

[15] What constitutes use that is adverse to the owner of fixed property, and is thus capable of giving rise to acquisitive rights, does not call for elaboration in this case because the appellant's submission founders on other grounds. I think it is clear from the review of the position at common law in *Butgereit v Transvaal Canoe Union* 1988 (1) SA 759 (A) that such rights as the public might have to the use of rivers (and in consequence the banks of the rivers) is confined to rivers that are perennial (and then to only certain such rivers), which the Klein Windhoek River is not. In any event the submission fails on a further ground. I think it is equally clear from the review of the common law in *Transvaal Canoe Union v Garbett* 1993 (4) SA 829 (A) that to the extent that the public has a right to use a river bank it is a right that flows from the right to use the river and is confined to certain uses that are incidental to the use of the river. In this case the use to which the respondent and his predecessor-in-title have put the bank of the Klein Windhoek river is altogether unrelated to the use of the river.

[16] A further point was raised in the appellant's heads of argument but it has no merit. It was rightly not pressed before us and for that reason I need not deal with it.

[17] No grounds have been shown for interfering with the orders made by the court below and the appeal is accordingly dismissed with costs.

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