

SOUTH AFRICA / JUDGMENT

Meyer v Trustees for the Time Being of the Aurum Mykel Trust (A345/2018) [2019] ZAWCHC 44; 2020 (2) SA 557 (WCC) (29 April 2019) [2019] ZAWCHC 44

COURT

Western Cape High Court, Cape Town

BEFORE

Francis, Bozalek

CASE / FILE NUMBER

A345/2018

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: A345/2018

In the matter between:

MARCEL MEYER APPELLANT

and

THE TRUSTEES FOR THE TIME BEING OF THE

AURUM MYKEL TRUST RESPONDENT

JUDGEMENT DELIVERED ON 29 APRIL 2019

FRANCIS AJ

INTRODUCTION

1. The appellant, Marcel Meyer, proceeded with an action in the Knysna Magistrate's Court for a final interdict prohibiting the respondent, the Trustees for the Time Being of the Aurum Mykel Trust, from interfering with the appellant's right of way allegedly acquired by implied consent ("Claim A") and a further claim, in the alternative, for the registration of a right of way servitude allegedly acquired by acquisitive prescription ("Claim B").

2. After considering the evidence led at the trial, the learned magistrate dismissed both claims and inter alia ordered the appellant to pay the costs of the respondent on an attorney and client scale based on the Magistrate's Court tariff.
3. Claim A was dismissed on the basis that the appellant had failed to prove an essential element for a final interdict in that an alternative remedy was available because the appellant could have applied for the determination of a right of way.[1] Claim B was dismissed on the basis that the appellant had failed to prove all the requirements for acquisitive prescription, particularly

the requirement relating to the actual use of the servitude concerned for a continuous and uninterrupted period of 30 years.

4. The appellant now appeals against the judgement of the learned magistrate. The appeal is some 8 days out of time. The

appellant made an application to condone the late lodgement of his appeal which was not opposed by the respondent. This court is satisfied that the appellant has made out a case for condonation and, accordingly, grants the application.

BACKGROUND

5. The appellant was represented at the appeal by Advocate Jooste and the respondent by Advocate De Bruyn, both of whom had represented the respective parties at the trial in the court a quo. Both counsel produced comprehensive heads of argument for which the court is indebted. The court has also had regard to the Record of the proceedings in the court a quo, which included the reports of experts, various sketch maps, sub-divisional diagrams indicating the cadastral boundaries of the

properties owned by the appellant and the respondent, as well as the route of the right of way which is in dispute. The boundaries

of the relevant properties and access roads referred to in this judgement are depicted in the sketch annexed to this judgement marked annexure "A".[2]

6 The appellant is the owner of Portion 11 of the Farm No. 293, Plettenberg Bay, Western Cape (hereinafter referred to as "Portion

11" or "the appellant's property") and is marked "293/11" on annexure A. The sub-divisional diagram for Portion 11 was approved during 1951 and this property was first registered through sub-division during 1953. Prior to being sub-divided, the parent property of Portion 11 was "Lot 57" which was later re-numbered "Farm 293" when the sub-division of Lot 57 was approved by the Surveyor-General.

7. The respondent is the owner of Portion 15 of the Farm 290, The Craggs, Plettenberg Bay, Western Cape (hereinafter referred to as “Portion 15” or “the respondent’s property”) and is marked “290/15” on annexure A. The sub-divisional diagram for Portion 15 was approved during 1952 and, prior to the sub-division, the parent property of Portion 15 was Lot 58 which was later re-numbered “the Farm 290, The Craggs” when the sub-division of Lot 58 was approved by the Surveyor General.
8. Prior to being sub-divided, Lot 57 and Lot 58 were adjacent to each other and, it appears, access to Lot 57 was obtained via a “farm road” which traversed Lot 58. Although a detailed description of the devolution of Lots 57 and 58 is not evident from the Record, it does not appear to be in dispute that both properties were in separate ownership at the time the sub-divisional diagrams were approved and at the time when Portion 11 and Portion 15, respectively, were registered as separate sub-divisions. Certainly, the evidence indicates that the land surveyor who attended to the sub-division of Portion 11 had consulted with the adjacent property owners, including the owner of Lot 58, with regard to the access to be provided to inter alia Portion 11 in the event that the sub-division was approved by the Surveyor-General.

APPELLANT’S CASE

9. The appellant submitted that Portion 11 was land-locked on sub-division and, accordingly, a tacit or implied servitude of right

of way was created over the respondent’s property in favour of the appellant’s property in order to access the public road. The route of the implied servitude of right of way is marked Y to Z to W on annexure A (hereinafter referred to as “the disputed road”). Without this implied servitude, the appellant would not have been able to access the public road from Portion 11; the public road is depicted between the points X and Y on annexure A. In any event, so argued the appellant, the original owner of Lot 57 (the parent property of Portion 11) had even prior to sub-division used the disputed road, which was the original farm road that traversed the respondent’s property, in order to gain access to Lot 57 and is depicted on the sub-divisional diagram for Portion 11.

10. The appellant further avers, in the alternative, that he has acquired the right to use the disputed road by acquisitive prescription in that he and his predecessors in title acted as though they were entitled to exercise this servitudinal right for a combined and

continuous period of more than 30 years (since at least 1953) and that this use was *nec vi*, *nec clam*, *nec precario* and adverse to the respondent.

11. Finally, according to the appellant, the respondent interfered with his right to use the disputed road by digging a trench at the point where the disputed road crosses the boundary between the appellant and respondent’s properties, thereby denying the appellant access from Portion 11 to the public road.

RESPONDENT’S CASE

12. The respondent denied that Portion 11 was land-locked on sub-division or that the disputed road even existed at the time Portion 11 was sub-divided.
13. According to the respondent, even if the Surveyor-General had approved the sub-division of Portion 11 on the basis that the

original farm road over Portion 15 (points X to Z to W on annexure A) would be used to gain access to the public road, this road is different from the route of the disputed road. The appellant tendered no evidence before the court a quo to indicate, or establish, that the disputed road was the route used by the appellant and his predecessors or that it existed at the time of sub-division. This much, according to the respondent, was conceded by Mr Teggin, the appellant's expert witness. Therefore, the appellant had not proved that the disputed road constitutes the basis for the servitude by implied consent.

14. The respondent further averred that the disputed road is not reflected on the sub-divisional diagram of Portion 15 which was

approved after the sub-divisional diagram for Portion 11 was approved. If, as submitted by the appellant, the Surveyor-General had approved the sub-division of the appellant's property subject to access being provided via the disputed road, why was this not reflected on the sub-divisional diagram of Portion 15? Again, Mr Teggin could not offer an explanation for the omission. Finally, the respondent submitted that there was no evidence before the court as to when the road Y to Z, which connects with X to Z to W, was built and when it came into existence. However, what is certain, and conceded by Mr Teggin, was that the road Y to Z did not exist at the time of either the sub-division of Portion 11 or Portion 15. Therefore, the road Y to Z cannot be the basis for asserting a right to an implied servitude.

15. In so far as the alternative claim relating to acquisitive prescription is concerned, the respondent denies that such a real

right was created. It submits that, if anything, the appellant's predecessors acknowledged that the respondent and

his predecessors had prevented use of the disputed road because the appellant's predecessors then built the existing road, marked Y to S to V on annexure A, on the appellant's property which gives the appellant direct access to the public road in question. In any event, so averred the respondent, a portion (Y to Z) of the disputed road did not exist at the time of sub-division and no evidence was led as to when it was created. Accordingly, the appellant could not, and did not, prove that the entire length of the disputed road was used as a matter of fact, and as of right, and openly, for a continuous period of 30 years.

ISSUES

16. In my view, the crisp issues for determination are:

16.1 whether or not the appellant has proved that a right of way servitude by implied consent was acquired over the respondent's property when Portion 11 was sub-divided; and

16.2 whether the nature of the use by the appellant of the disputed road was such that it satisfied the requirements for acquisitive prescription.

APPLICABLE LEGAL PRINCIPLES AND DISCUSSION

17. Claim A: Right of way by implied consent

17.1 The creation of a right of way servitude by implied consent can be traced to van Leeuwen's Commentaries. In *Ridden v Quinn* 1909 E.D.S. 373 at 378, the learned Judge President quoted from a passage in van Leeuwen's Commentaries which reads as follows:

"If a piece of land is divided into two or more portions, the back portion will retain its right of outlet over the front portion, even although nothing was said about this at the time for the partition of the land cannot impose a servitude upon the neighbours...."

17.2 In essence, the van Leeuwen principle is to the effect that when a land-locked tenement (blockland) is created by the sub-division of land, a servitude of right of way is established by implied consent, in favour of any sub-division that remains without access to the public road, over any sub-divisions with access. The van Leeuwen principle was followed in a number of decisions such as *Wilhelm Norton* 1935 EDL 143 at 169 and *Beukes v Crous en 'n Ander* 1975 (4) SA 215 (NC) 220A-H. In *Van Rensburg v Coetzee* 1979 (4) SA 655 (AD) at 675 B-C, the then appellate division of the Supreme Court confirmed that the van Leeuwen principle forms part of South African Law.

17.3 The court concluded in *Van Rensburg v Coetzee*, supra, at 673D – 674B, that the van Leeuwen principle would only apply to create a right of way based on implied consent in sub-division cases where such an implied consent ruling makes sense, notably because the sub-dividing previous owner still owns a portion over which access is possible for those portions that are land-locked. Jansen JA made this comment in light of the cautionary noted sounded by Kennedy R in *Matthews v Road Board for the District of Richmond and Others* 1967 (3) SA 244 (N) at 247 F-H where the court stated as follows:

"Secondly, it would seem to me, with respect to the decision in Riddin's case, supra, that what van Leeuwen there had to say is but of small practical value in a country like South Africa, where vast tracts of land, as we know, exist for farming purposes, it would be impractical, from the distance point of view alone, if any such an owner sub-divided his land, to compel the owner of the sub-division to use the right of way enjoyed by the seller, and none other, when a closer and more reasonable means of access is available by the grant of a way of necessity over a neighbour's property."

17.4 The van Leeuwen principle is a method of establishing a right of way to gain access to the public road in sub-division cases and must be distinguished from the right of way of necessity. The van Leeuwen principle rests on implied consent whereas the normal right of way of necessity derives from the operation of law and has to be confirmed by court order, if necessary

(see, *Van Rensburg v Coetzee*, supra, and the various authorities cited in that judgment). The significant difference in the creation of a right of way by necessity and a right of way by implied consent is that the former can be established over any servient tenement that gives the required access to the public road and such access is simply based on necessity (see, *Van Rhyn, NNO v Fleurbaix Farm (Pty) Ltd* 2013 (5) SA 521(WCC)), whereas the right of way by implied consent is restricted to a sub-division that is cut off from access to a public road whilst other portions still have access to the public road and all the sub-divisions still belong to the original sub-dividing owner (for a useful summary of the cases and a simplified exposition of the principles underlying the right of way by implied consent see, AJ Van Der Walt, *The Law of Servitudes* (2016), pages 341-343, and 354-355).

17.5 It appears to me that the parties may have misconceived the true nature of the remedy sought to be relied on by the appellant; they appear to have misconstrued a right of way of necessity with the right of way by implied consent as postulated by van Leeuwen. The key features underpinning the van Leeuwen principle is that the sub-divided portions of the property must be in common ownership and that the sub-division of land cannot impose a servitudal burden upon neighbouring properties. In the matter at hand, the appellant certainly did not plead, or by way of evidence demonstrate, that the requirements for the acquisition of a right of way by implied consent were met. For instance, there is no averment whatsoever that the appellant's property and the respondent's property were in common ownership at sub-division. On the contrary, it appears to be common cause that the properties were in fact in separate ownership and were sub-divided at different times from different parent properties. In addition, the disputed road undoubtedly imposes a burden on Portion 15. Accordingly, the claim for a right of way by implied consent, and the consequential relief sought for a final interdict to protect this alleged right, must fail. If the Appellant was of the view that the disputed road was the only viable access to the public road, he ought to have pursued an action for the determination of a right of way.

17.6 The learned magistrate's decision in this regard was thus correct even though it may have been based on a misconception of the applicable legal principles relating to the acquisition of a servitude by implied consent.

18. Claim B: Acquisitive prescription

18.1 Acquisitive prescription in South African law is governed, in the main, by the Prescription Act 68 of 1969 ("the 1969 Act"), the Prescription Act 18 of 1943 ("the 1943 Act"), where applicable, and any rules of the common law consistent therewith. The 1969 Act came into operation on 1 December 1970 and replaced the 1943 Act but the requirements of the latter Act applies to prescription periods running until 30 November 1970. Despite the differences in definition of acquisitive prescription in each statute, the provisions of the two prescription Acts are very similar. Certainly, the basis for acquisitive prescription appears to have been accepted by the courts as being essentially the same in each enactment[3]. The appellant claims that he has a servitude of right of way over the respondent's property by virtue of the utilisation of the disputed road from at least 1953, i.e. on subdivision of the appellant's property. Thus, both the

1943 and 1969 Acts are applicable.

18.2 I do not intend traversing all the intricate provisions of the law relating to the acquisition of servitudes by prescription. Suffice to say, a servitude can be acquired by prescription if the use of the servient property was *nec vi* (peacefully), *nec clam* (openly), *nec precario* (the absence of a grant on request), and adverse to the owner for a period of 30 years (see, section 6 of the 1969 Act, *Bisschop v Stafford* 1974 (3) SA (AD) at 10C, and *Ploughman v Pauw* 2006 (6) SA 334 (C)).

Furthermore, the alleged acquirer of a servitude of right of way must prove actual use or exercise of the right of way, with the necessary intention, over the duration of the whole prescription period (see, *Forellendam Bpk v Jaconsbaai Coastal Farms (Pty) Ltd* 1993 (4) SA 138, and *Cillie v Geldenhuys*, *supra*, at para 15). The use must be such that the alleged acquirer acted as if he/she was entitled to exercise the servitudal right (*Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd* 1972

(2) SA 464 (W) at 474C).

18.3 With regard to the *nec precario* requirement, the learned judge Theron JA in *Phezulu Private Estate v Metelerkamp* 2014 (5) SA 37 (AD), at para 10, commented as follows:

“Nec precario, the absence of a grant on request, has been subsumed into ss 1 and 6 of the current Prescription Act by the requirement that the potential acquirer of the servitude must act as though he or she was entitled to exercise the servitudal right. It follows that either express or tacit consent would mean that the alleged acquirer did not act as if he or she was entitled to exercise the servitudal right. The notion of a precarium is based upon the application by one party for a concession which is granted by the other party; that other party reserving at all times the right to revoke that concession as against the grantee in terms of the particular conditions to which the grant is subject. Put differently, a precarium is a legal relationship which exists between parties when one party has the use of the property belonging to the other on sufferance, by leave and license of the other. Precarium has its origin in the fact of the permission usually being obtained by a prayer (footnotes omitted)”

18.4 The corollary of the requirement that the use must be *nec precario* is that the use must be adverse to the owner. In this regard, Colman J in *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd*, *supra*, at para 479A, explained:

“Without myself attempting a full definition (which is not necessary for the purposes of this case), I go so far as to say that no use, occupation or possession is adverse, for the purposes of the law of acquisitive prescription, unless the owner has a legal right to prevent it.”

18.5 The onus of proving that acquisitive prescription has taken place is clearly on the appellant. In his judgement, the learned magistrate summarised the appellant’s evidence in support of his claim for acquisitive prescription as follows[4]:

18.5.1 The only contribution towards the aspect relating to acquisitive prescription by the Appellant’s expert witness, Mr Teggin, was that the disputed road probably existed even before sub-division took place in 1953.

18.5.2 The appellant's second witness, Mr Cronje, stated that he bought Portion 11 from Dr Enslin and he sold it again during 2014 or 2015 to the appellant. He further stated that the disputed road was pointed out to him by Dr Enslin. Mr Cronje testified that he and his partner, Mr Mostert, were present when the previous owner of Portion 15 told them "that is the road to use".

18.5.3 Mr Cronje was the owner of Portion 11 for approximately 22 to 23 years and he used the disputed road without interference.

18.5.4 Mr Cronje did not know how long Dr Enslin owned the property before him and could only state that it was "for a long time". He also testified that the gate on the disputed road was sometimes locked with a piece of rope, but they could get through at all times.

18.5.5 No further witnesses were called by the appellant.

18.5.6 No witnesses were called by the respondent.

19. Based on the evidence proffered by the appellant, the learned magistrate concluded that apart from the fact that the disputed road probably existed prior to 1953, no evidence was presented by the appellant that there was factual use of the disputed road, and that it was used peacefully, openly, and in a manner that was non-precarious or adverse to the owner of Portion 15 for an uninterrupted period of 30 years.
20. It is difficult not to agree with the conclusion reached by the learned magistrate. It is indeed apparent from the record that the appellant offered no evidence to support his assertion that he and his predecessors collectively used the disputed road uninterrupted

for a period of 30 years. The fact that the disputed road may have existed for 30 years is not proof of actual use and, even if the disputed road was depicted on the sub-divisional diagram for Portion 11, this does not automatically convert this road into a servitude of right of way (cf. *Werner v Florauna Kwekery BK and Other* 2016

- (2) SA 282 (SCA) at 291E-F). What was clearly absent from the appellant's evidence were details of all the appellant's predecessors in title, whether they had actual or constructive knowledge of the rights alleged and, if so, how such knowledge was acquired. In other words, it was essential for the appellant to show the historical devolution of the ownership of Portion 11 and that each of the persons who acquired it did so with full knowledge of the appellant's rights.
21. It is also not disputed that there was an alternative route from at least 1974 (Y to S to V on annexure A) that was used in order to access the public road from Portion 11. It seems likely, as argued by the respondent, that the alternative road was constructed because of the respondent's difficulty with the appellant's use of the disputed road. This possibility is underscored by the fact that the respondent erected a gate through which the disputed road had to be accessed. This certainly militates against the *nec precario* requirement for acquisitive prescription.

22. There is also an additional reason why the appellant's claim for acquisitive prescription must fail. According to the appellant, the disputed road was always used on the basis of the implied consent, albeit ascribed, of the owner of Portion 15 given that Portion 11 was land-locked on sub-division. In my view, the claimed use of a servitude route by way of implied consent is inimical to the requirements of *nec precario* and adverse user. In *Phezulu Private Estate v Metelerkamp*, supra, at para 11, Theron JA stated as follows in this regard, "it follows that either express or tacit consent would mean that the alleged acquirer did not act as if he/she was entitled to exercise

the servitudinal right" (see also, *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd*, supra, at 474A).

23. For the foregoing reasons, I am satisfied that the learned magistrate was correct in his conclusion that the appellant failed to discharge the onus of proving that the servitude in question was acquired by acquisitive prescription.

COSTS

24. In so far as the issue of costs is concerned, the court awarded costs on an attorney and client scale, which included the costs of counsel but as prescribed in the Magistrates Court Rules. The learned magistrate also excluded the costs of the respondent's expert witness on the basis that this witness was not called and did not contribute in any meaningful way towards the decision reached by the learned magistrate.
25. The learned magistrate has not indicated why he granted costs on a punitive scale. Certainly, none of the parties prayed for costs on the punitive scale and there was nothing on the papers which indicated that the appellant's claim was vexatious or frivolous as envisaged in Magistrates Court Rule 33(8)(c). Generally speaking, an order for attorney and client costs will not be granted in the absence of a special prayer or notice of an application for such an order (see, *Four Wheel Drive Accessory Distribution CC v Rattan NO 2018 (3) SA 204 (KZD)* at para 69).
26. Counsel for both the appellant and respondent were *ad idem* that costs should follow the cause and that costs should not be confined to the tariff as per the Magistrates Court Rules. I

have no reason to disagree. Matters of this sort are not without difficulty, both at the factual level and as far as the applicable

principles of law are concerned. That the matter was heard before the magistrate's court does not necessarily alter the position.

However, I do not see any reason to interfere with the learned magistrate's decision with regard to the costs associated with the respondent's expert witness since the latter appears to have played no active part in the hearing of this matter.

ORDER

27. In the circumstances, the following order is made:

27.1 The appeal is dismissed with costs, subject to para 27.2 below:

27.2 The costs of the action in the court a quo will be as between party and party and will include the costs of counsel.

FRANCIS, AJ

I agree and it is so ordered.

BOZALEK, J

- [1] Incidentally, the appellant did indeed seek an order for the registration of a right of way (via ex necessitate) but this claim was separated earlier on during the proceedings in the court a quo and only Claims A and B were adjudicated.
- [2] The sketch is a smaller scale version of Appendix SM7 on page 206 of the Record.
- [3] Cillie v Geldenhuys [2008] ZASCA 54; 2009
- (2) SA 325 (SCA) at para 8.
- [4] Pages 253 and 254 of the Record.

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