



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 3785/2012

In the matter between:

JORGE MANUEL BATISTA NEVES

FIRST PLAINTIFF

MARIA ALZIRA ALVES BATISTA NEVES

SECOND PLAINTIFF

and

RAINIER ARANGIES

FIRST RESPONDENT

COUNCIL FOR THE MUNICIPALITY OF TSUMEB **SECOND RESPONDENT**

Neutral citation: *Neves & Another v Arangies & Another (I 3785/2012) [2017]*
NAHCMD 57 (03 March 2017)

Coram: MILLER AJ

Heard: 15, 16 and 18 November 2016.

Delivered: 03 March 2017

ORDER

1. I grant judgment in favour of the plaintiff, on the principal claim.
 2. The first defendant is ordered to pay the costs of the plaintiff on the basis of one instructing and 2 instructed counsel.
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JUDGMENT

Miller, AJ:

[1] The plaintiff in this matter seeks an order declaring that they have acquired a servitude of right of way over the first defendant's property in terms of section 6 of the Prescription Act, Act 68 of 1969 and other relief as stated in their Particulars of Claim dated 29 November 2012. The law relating to acquisitive prescription is well settled. It requires the plaintiff to prove that it had possession of the property or any portion thereof for an interrupted period of 30 years and that such possession was *nec vi, nec clam* and *nec precario*.

[2] During 1972, Mr. Manuel da Silva Neves (first plaintiff's father and second plaintiff's husband) (hereinafter referred to as Mr. Neves), purchased and became the owner of Erf 71A, Presidents Avenue, Tsumeb, Namibia, which is the Erf in issue.

[3] The aforesaid Erf 71A, had and still has shop-fronts on the front of the property which faces Presidents Avenue and during 1980, Mr. Neves erected dwelling and a lean-to at the rear of the property. The lean-to was used as a carport/garage.

[4] Mr. Neves passed away on the 24th of February 1997, and subsequent to the demise of Mr. Neves, plaintiffs became the owners of the aforesaid property, Erf 71A together with all its improvements.

[5] The first defendant is the owner of Erf 646 (formerly open space, a portion of Erf 56 open space), Susan Nghidinwa Street, Tsumeb, Namibia. The first defendant's property borders that of the plaintiff's.

[6] The second defendant is the owner of Erf 56, Tsumeb and the aforesaid property of the first defendant formed part of Erf 56, Tsumeb prior to it being created as Erf 646, Tsumeb. Second defendant's property is adjacent to that of the plaintiffs. No costs order is sought against the second defendant, save in the event of it opposing the relief sought.

[7] It is stated in the particulars of claim that the only ingress and egress from the plaintiff's property, by motor and delivery vehicles, is via the public road known as Susan Nghidinwa Street and the only way to reach it is by traversing the defendant's properties as follows:

1. From Susan Nghidinwa Street across the total length of the first defendant's property along its boundary with erven 69 and 70 up to the boundary with the second defendant's property where the property of the first defendant borders that of the plaintiffs; and

2. From the second defendant's property at the point mentioned in paragraph 11.1 above into the plaintiff's property in the one corner abutting first defendant's property and adjacent to erf 70 and second defendant's property.

[8] Since 1972, the late Mr. Neves, plaintiffs, their customers, tenants, employees, and guests have traversed the defendants' properties as set out above in paragraph xx, openly, continuously, and as though they were entitled to do so, in order to obtain motor vehicles and other access and from the property. It is alleged that at no time have the plaintiff's acknowledged defendant's right to prevent them from using the said right of way.

[9] It is for these reasons that the plaintiffs claim that they have acquired a servitude of right of way, with a width of 4 meters over the defendants' properties in terms of Section 6 of the Prescription Act, Act 68 of 1969.

[10] Section 6 of the Prescription Act of 1969 reads as follows –

'6 Acquisition of servitudes by prescription

Subject to the provisions of this Chapter and of Chapter IV, a person shall acquire a servitude by prescription if he has openly and as though he were entitled to do so, exercised the rights and powers which a person who has a right to such servitude is entitled to exercise, for an uninterrupted period of thirty years or, in the case of a praedial servitude, for a period which, together with any periods for which such rights and powers were so exercised by his predecessors in title, constitutes an uninterrupted period of thirty years.'

[11] Acquisitive prescription refers to the acquisition of ownership by the possession of another. The following requirements must be alleged and proved by any person claiming acquisitive prescription:¹

- a) There must have been a civil possession (*possession civilis*), which is possession with the intention to possess and control the thing or property. There must also be an intention of acquiring ownership and there must have been physical control exercise.
- b) There must be possession for an uninterrupted period of thirty (30) years, which together with any period for which the thing was possessed by any predecessor in title constituted an uninterrupted period of 30 years.
- c) The possession must have been *nec vic* meaning without force and *nec clam* meaning openly for an uninterrupted period of thirty (30) years.
- d) The possession must be non-precarious. In the case of *De Beer v Van Der Merwe supra*, the court stated that in order to establish prescription, the exercise of the right must have been *non-precario* meaning that the right must have been exercised adversely and as of right.

[12] In the case of ***Bryan O'Linn v Minister of Agricultural, Water & Forestry and Others***,² the court stated that for this requirement to be active, both possession as well as the intention to keep the property must be necessary. Meaning that the requirement of possession must be contemporaneous simultaneously with the requirement of intention in order for the any person to keep the land as the owner.

¹ De Beer v Van Der Merwe 1923 AD 378.

² A 79/2007.

[13] In the case of ***Albert Falls Power Co (Pty) Ltd v Goge***,³ the court held that possession for the purposes of acquisitive prescription is always possession civilis. The court held further that the necessity of its being adverse to the owner is always emphasized as an additional nature of the grounds for claiming title.

[14] At all relevant times (since the commencement of the 30 year prescription period in 1973), the first defendant's property constituted public open space. It is undisputed that Mr. Neethling, the first defendant's predecessor in title purchased the property at some stage during 2004. By then the period of 30 years (1972 – 2003) had already expired and the right of way came into existence.

[15] Mr. Barnard who appeared for the defendant submits that the plaintiffs nor their family made use of Erf 646 from the period of 1973 to 1980, as the first plaintiff with his mother and father lived in Otjiwarongo from 1966 to 1980. I dealt with that aspect during the absolution from the instance application, where I raised as follows:

[5] . . . 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.'

³ 1960 (2) SA 46 N 486.

[16] It is my considered view that whichever way the period is calculated, either from 1973 when the property was registered in the Late Mr. Neves' name or in 1980 when the property was purchased by Mr. Neethling, the fact of the matter is that a period of uninterrupted possession of 30 years has elapsed.

[17] It is common cause that the section of the property over which the plaintiff seeks to establish the principal claim is partly owned by the first defendant and the second defendant respectively.

[18] The second defendant however entered no appearance to defend which leaves the Court only to consider the acquisitive prescription claimed in the principal claim in so far as it relates to that portion of the property owned by the first defendant.

[19] During the course of the argument on the application for absolution from the instance, an argument was advanced that before the prescriptive period of 30 years has run out, the property of the first defendant was fenced and the gates were installed and locked. In this regard I dealt with that argument as follows:

[6] . . . 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 property. . . '

[20] Having heard the evidence tendered by the first defendant subsequent to the dismissal of the application for absolution from the instance, I am of the view that the

only inference to be drawn from the totality of the evidence is that the handing over of the keys to the plaintiff constitutes an acknowledgment of the plaintiff's free access of the property to and from the residential building on the plaintiff's property, and that it's not one of rendering the plaintiff's right precarious.

[21] Although the plaintiff was at times during the course of this evidence emotional and behest for the defendant insulting towards the first defendant's legal representative, I remain of the view that this evidence in its totality he was not an unreliable witness, in fact I accept his evidence despite the shortcomings during that, which I have already mentioned. As far as the evidence of Mr. Arangies is concerned, the only relevant portion thereof is that it is the intention to develop the property by the creation of dwelling units and a shop. That does not advance the case of the defendant because his right to do so is subject to the rights of the plaintiff, acquired by way of prescription.

[22] At the conclusion of the evidence, Mr. Frank abandoned the alternative claim and it is therefore not necessary to deal with that aspect any further.

[23] In conclusion, I find that the plaintiff has established the required elements which will entitle him to the relief claimed in the principle claim.

[24] I therefore make the following orders:

3. I grant judgment in favour of the plaintiff, on the principal claim.
4. The first defendant is ordered to pay the costs of the plaintiff on the basis of one instructing and 2 instructed counsel.

PJ Miller

APPEARANCES:

FOR THE PLAINTIFF:

TJ Frank SC (with him Y Campbell)

INSTRUCTED BY:

Neves Legal Practitioners, Windhoek

FOR THE FIRST DEFENDANT:

TA Barnard

INSTRUCTED BY:

Mueller Legal Practitioners, Windhoek