REPUBLIC OF NAMIBIA

REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: A 287/2014

In the matter between:

DESERT WEAR CC	**1ST APPLICANT**
MATHILDA JUDITH LANGENHOVEN	**2ND APPLICANT**
JOHANNES JACOBUS LANGENHOVEN	**3RD APPLICANT**
ADOLF MICHAEL FLORIN	**4TH APPLICANT**

and

THE CHAIRPERSON OF THE COUNCIL OF THE MUNICIPALITY OF SWAKOPMUND	**1ST RESPONDENT**
TANNENHOF PROPERTIES CC	**2ND RESPONDENT**
NAMSPACE CONTRACTORS CC	**3RD RESPONDENT**
RICHTHOFEN CC	**4TH RESPONDENT**
EDLO PROPERTIES CC	**5TH RESPONDENT**
REGISTRAR OF DEEDS	**6TH RESPONDENT**
THE CHAIRPERSON OF THE BOARD OF THE ROADS AUTHORITY OF NAMIBIA	**7TH RESPONDENT**
MINISTER OF ENVIRONMENT AND TOURISM	**8TH RESPONDENT**
THE COUNCIL OF THE MUNICIPALITY OF SWAKOPMUND	**9TH RESPONDENT**
THE ROADS AUTHORITY OF NAMIBIA	**10TH RESPONDENT**

Neutral citation: *Desert Wear CC vs The Chairperson of the Council of the Municipality of Swakopmund* (A 287/2014) [2020] NAHCMD 602 (18 March 2021)

Coram:	**UEITELE J**
Heard:	**2-3 June 2016; 25 April 2017 and 03 August 2017**
Delivered:	**27 October 2020**
Reasons Released	**18 March 2021**

Flynote: *Administrative law* – Legal duty of administrative body to execute its duties where there has been illegal inaction, by neglect of duty, on the part of an administrative body or administrative official, the one remedy available to compel performance is mandamus, a remedy used to prevent breach of duty and injustice.

Servitude — Acquisition — Vetustas (immemorial user) — Requirements — Claimant to show that right to occupation and usage existed for time immemorial — Presumption of legality arising — Immemorial meaning that circumstances in which right arose beyond living memory.

Servitude — Of right of way — via necessitatis — Nature and extent of — When a claim to a way of necessity arises — Without an order of court a claim to a way of necessity does not make registration of such a right possible — Extent of a way of necessity in the case of a farmer

Servitude — Principle that servitude should be taken "*ter naaster lage en minster schade*" — Applicable to a right of way of necessity — What it amounts to — When such principle can be departed from.

Summary: The four applicants who commenced proceedings in this Court by notice of motion seeks various orders including the following; the Court to order the Municipal Council of Swakopmund to immediately take all necessary steps to prevent the second or third respondents or both the second and third respondents from conducting or allowing commercial or industrial activities to be conducted in contravention of the provisions of Swakopmund Town Planning Scheme; the Court to interdict or restrain the second and third respondents from using the "*private road*" traversing the applicants'

properties, for industrial purposes using heavy or commercial vehicles and further by allowing the said respondents' employees to use the road or to create a nuisance by their use of such road; the Court to order that the second and third respondents are restrained from interfering with any structures on the applicants' properties; an order directing the Municipal Council of Swakopmund to take all necessary steps to, within 6 months, construct an alternative route for use by the second and third respondents or other members of the public; and lastly an order reviewing and setting aside a resolution taken by the Municipal Council of Swakopmund to register a "*right of way*" servitude over their properties.

Only the first, second, third and ninth respondents opposed the application and on the basis that the alleged '*private road'* constitutes a public servitudal right of way, constituted by ancient use or immemorial use, in favour of the public.

This case concerns the contest between a person's right to the protection of their privacy and another person's right to use such thoroughfares that passes through another person's private property.

Held that there is no evidence in this matter that the applicants, dishonestly or fraudulently or in bad faith approached the Court, the doctrine of '*dirty hands'* therefore does not find application in this matter.

Held that the obligation or duty which Council has is to observe and enforce the observance of all the provisions of the Town Planning Scheme. If Council fails or neglects to enforce the observance of the Town Planning Scheme, that failure or neglect is unlawful.

Held further that a Court may grant a right of way over the property of a non-consenting owner (subject to the payment of appropriate compensation), but only where it is shown that the right of way is necessary to provide access to a public road.

Held further that in determining the piece of land which the way of necessity must traverse, the Court will be guided *by "ter naaster lage en minster schaden"* rule which means that the way of necessity must traverse the adjoining land which lies between

the landlocked and the nearest public road.

Held further that a right of way of necessity is created by operation of law as soon as land becomes landlocked. It binds the surrounding properties (as of a right) immediately when the dominant tenement becomes landlocked.

ORDER

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1. The Council for the Municipality of Swakopmund must, in insofar as Tannenhof Properties CC and Namspace Contractors CC continue to conduct commercial and light industrial activities in contravention of the Swakopmund Town Planning Scheme on the property described as:

Certain:	Consolidated Farm Tannenhof No. 74
Situate	In the Municipality of Swakopmund Registration Division “G”
Measuring	8, 9517 (Eight comma Nine Five One Seven) hectares
First Registered	By Certificate of Consolidated Title No. T 156/1952 with Diagram No A 433/1951 relating thereto and held by Deed of Transfer No T 3353/2001,

forthwith take all steps that are necessary to prevent Tannenhof Properties CC and Namspace Contractors CC from conducting commercial and light industrial activities in contravention of the Swakopmund Town Planning Scheme on that property.

2. The relief sought by the applicants to interdict Tannenhof Properties CC and Namspace Contractors CC, and their employees from using the road traversing certain Remainder of Farm Richthofen No 156, Farm Richthofen No. 237, and Portion 141 of the Farm No 163 is refused.

3. The relief sought by the applicants to direct the Municipal Council of the Municipality of Swakopmund to construct an alternative road for access to the Consolidated Farm Tannenhof No. 74 in the District of Swakopmund is refused.

4. The Consolidated Farm Tannenhof No. 74 in the District of Swakopmund is entitled to a servitude of right of way over Remainder of Farm Richthofen No 156, Farm Richthofen No. 237, and Portion 141 of the Farm No 163, subject thereto that the owners of the Consolidated Farm Tannenhof No. 74 pay just and fair compensation to the owners of the servient tenements.

5. The applicants' application to Review and set aside the Council's decision taken on 27 May 2014 under Council Resolution C/M 2014/05/27 is refused.

6. Each party must pay its own costs.

7. The matter is regarded as finalised and is removed from the roll.

JUDGMENT

UEITELE, J

Introduction

[1] Article 13(1) of the Namibian Constitution protects the privacy of persons. It, amongst others, provides that *'No person shall be subject to the interference with the privacy of their homes…'* whilst Article 21 promises persons the right to move freely throughout Namibia[1].

[2] This case concerns the contest between a person's right to the protection of their privacy and another person's right to use such thoroughfares that passes through another person's private property. The contest becomes more convoluted when one realises that there is a constitutional flavour to the legitimate exercise of both rights.

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[1] Article 21 (1)(g) of the Namibian Constitution.

[3] In this matter there are four applicants who commenced proceedings in this Court during November 2014, by notice of motion seeking various orders. The first order that the applicants seek is an order directing the Municipal Council of Swakopmund to immediately take all necessary steps to prevent the second or third respondents or both the second and third respondents from conducting or allowing commercial or industrial activities to be conducted, in contravention of the provisions of the Swakopmund Town Planning Scheme, on a property known as the "Tannenhof" property.

[4] The second order that the applicants are seeking is an order interdicting or restraining the second and third respondents and their employees from using the "*private road"* traversing the applicants' properties for industrial purposes using heavy or commercial vehicles or to create a nuisance by their use of such road.

[5] The third order that the applicants seek is an order restraining the second and third respondents from interfering with any structures on the applicants' properties. The fourth order that the applicants are seeking is an order directing the Municipal Council of Swakopmund to take all necessary steps to, within 6 months from the date that this court delivers its judgement, construct an alternative route for use by the second and third respondents or other members of the public.

[6] The final remedy, apart from the costs of their application that the applicants seek, is an order reviewing and setting aside the Municipal Council of Swakopmund's resolution taken on 27 May 2014 to register a "*right of way*" servitude over Farm Richthofen No 156, Farm Richthofen No. 237, and Portion 141 of the Farm No 163.

[7] Initially the applicants only cited seven respondents, but after some preliminary objections of non-joinder were taken by the Municipal Council of Swakopmund and by the second and third respondents, the applicants joined three additional respondents and there are now effectively ten respondents in this matter. The first, second, third and ninth respondents opposed the application (particularly the order seeking to interdict the second and third respondents from using the '*private road'*) on the basis that the alleged '*private road'* constitutes a public servitudal right of way, constituted by ancient use or immemorial use, in favour of the public.

The Parties

[8] The first applicant is Desert Wear CC, a close corporation duly registered and incorporated in terms of the Namibian laws, having its principal place of business situated at Swakopmund. Mrs. Langenhoven (the second applicant) and her husband Mr. Langenhoven (the third applicant) hold equal (50% each) members interest in Desert Wear CC. I will for ease of reference, in this judgment, refer to the first applicant as Desert Wear and the second and third applicants as the Langenhovens or if I need to refer to one of them individually as Mr or Ms Langenhoven. The fourth applicant is Mr. Adolf Michael Florin, a major male building contractor and guest-house operator.

[9] The first respondent is the Chairperson for the Council of the Municipality of Swakopmund. In my view the first and ninth respondent, which is the Municipal Council for the Municipality of Swakopmund is one and the same entity and I will in this judgment refer to the first and ninth respondents as the Municipal Council of Swakopmund or simply as the Council.

[10] The second respondent is Tannenhof Properties CC, a close corporation duly registered in terms of the laws of the Republic of Namibia. The third respondent is Namespace Contractors CC, also a close corporation duly registered in terms of the laws of the Republic of Namibia.

[11] As indicated earlier on in this judgement only the Municipal Council of Swakopmund and the second and third respondents opposed this application as such I will not make mention of the remaining respondents, particularly in view of the fact that no relief was sought against them and those defendants also did not participate in these proceedings.

Brief background

[12] In the district of Swakopmund there was amongst other farms a farm known as Farm No. 163 which is situated east of the Swakopmund Town and south of the B2 main road. The farm was, since the intrusion and occupation of Namibia by Germany in 1884,

State land. On 14 August 1979 the State donated the farm to the Municipal Council of Swakopmund and the Council accepted the donation on 17 September 1986. The State transferred ownership in Farm 163 on 20 October 1986 by Government Grant No 3401/1986 to the Municipality of Swakopmund. The original size of the farm was 10 222, 0579 (Ten Thousand Two Hundred and Twenty Two comma zero five seven nine) hectares. With the passage of time the Council '*cut off*' or subdivided the farm into small portions of land and sold those portions to private individuals.

[13] The 'cutting off' of portions of land from Farm 163 or the subdivision of Farm 163 resulted in the existence of a number of small holdings or plots that are situated to the eastern side of the Town of Swakopmund. Amongst the many small holdings that came into existence Desert Wear CC owns two plots namely Portion 140 and Portion 141 of the Farm No 163[2]. The Langenhovens acquired, through Desert Wear CC, Portion 141 of the Farm No 163 during October 2009. The Langenhovens conduct agricultural activities on Portion 141 and reside on Portion 140 of the Farm No 163. From the affidavits filed of record I could not establish how long the Langenhovens have resided on Portion 140 of Farm No 163. (I will for ease of reference refer to these two portions as Portion 140 and Portion 141 respectively, in this judgment).

[14] Portion 141 borders and is adjacent to a certain plot or smallholding known as Consolidated Farm Tannenhof No. 74 (farm Tannenhof) which is owned by Tannenhof Properties CC, the second respondent, to the South, a certain Remainder of Farm Richthofen, No 156 which is owned by Richthofen CC, the fourth respondent, to the West, and the Dorob National Park to the North.

[15] All these smallholdings fall within the local authority area (municipal area) of the Municipality of Swakopmund and are under the jurisdiction of the Municipal Council of Swakopmund. As I indicated earlier all the small holdings lie to the South of the B2

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[2] Portion 141 is fully described as:

CERTIAN:	Portion 141(a portion of portion 40) of Farm No. 163
SITUATE	In the Municipality of Swakopmund
	Registration Division "G"
	Erongo Region
MEASURING	11, 7150 (One One comma Seven One Five Zero) Hectares
HELD BY	Deed of Transfer No T 6370/2009.

National Road that connects Swakopmund to inland Namibia (such Usakos, Karibib, Okahandja and Windhoek). The small holdings are thus subject to the Swakopmund Town Planning Amendment Scheme (the Town Planning Scheme).

[16] In terms of the Town Planning Scheme, Consolidated Farm Tannenhof No. 74, certain Remainder of Farm Richthofen, No 156, Farm Richthofen No. 237, and Portion 141 of Farm No 163 are all zoned as agricultural properties. This means that certain restrictions apply to how land that is zoned agricultural land may be used. The Town Planning Scheme expressly provides:

(a) that the purpose for which the Consolidated Farm Tannenhof No. 74, certain Remainder of Farm Richthofen, No 156, Farm Richthofen No. 237, and Portion 141 of the Farm No 163 may be used and buildings may be erected thereon, is “agricultural”; and

(b) In this zone, except with the consent of the Council only one residential dwelling, together with such buildings which are normally used in connection with agriculture may be erected on each farm portion or agricultural holding.; and

(c) that no person may use or cause or allow the land to be used for any other use.

[17] To gain access to some of these smallholdings, particularly the Tannenhof property and also to the Dorob National Park a road connects from the B2 National Road over the small holdings. To be specific in order to ingress and egress Consolidated Farm Tannenhof No. 74 one has to pass through plot 141, certain Remainder of Farm Richthofen, No 156 and Farm Richthofen No. 237.

[18] It appears that during the year 2006 or 2008 the Municipal Council of Swakopmund gave its consent for a company known as Namspace Contractors CC, the third respondent in these proceedings (I will for the sake of convenience refer to the third respondent as Namspace) to commence industrial business (as an industrial manufacturer of modular housing units and containers) on the Tannenhof property.

[19] In order to execute its business Namspace established a factory, a warehouse

and administrative offices on the Tannenhof property. Namspace engages and uses industrial workers and staff of up to 40 employees for its business at the Tannenhof property, who have to be transported on a daily basis (between Monday and Friday), using commercial vehicles and buses to and from Tannenhof and Swakopmund.

[20] Apart from the transporting of its employees, as indicated above it so happens that occasionally Namspace uses or requires heavy duty trucks to travel between Tannenhof and Swakopmund. All these heavy duty trucks use the road that passes through Portion 141 (The applicants have labelled this road as the 'private road'). The use of the road (the 'private road') that passes over Portion 141 created its challenges for the Langenhovens. In the affidavit in support of their claims Ms Langenhoven narrates the events that have aggrieved them. She amongst other matters avers that as a result of the industrial business that is established on the Tannenhof property the applicants continue to, on an ongoing basis, experience;

'41.1 …numerous daily crossings (during the week at least) of all kinds of vehicles (for example, a video recording taken by me [Ms Langenhoven] reveals that in a matter of about 10 hours on 12 June 2013, more than 100 vehicles including some driven by Dorob Park residents and visitors, traversed our private properties along the private route)…

41.2 excessive noise generated by large trucks and buses used by the third respondent [Namspace],

41.3 dust and dirt generated by large vehicles utilised by the third respondent, which impact negatively on crop plantations;

41.4 unauthorised parking of the second [Tannenhof CC] and third respondent's [Namspace] vehicles on the applicants' properties in complete disregard of the applicants' rights;

41.5 vandalism of the applicants' property at the instance of the second [Tannenhof CC] and third respondent's [Namspace] employees and contractors.'

[21] Ms Langenhoven who deposed to the affidavit in support of the applicants' claim avers that between the years 2011 and 2014 they have experienced numerous problems with the Namspace and the occupiers of the Tannenhof property. She states that they

suffered immensely and continued to so suffer. She states that they continued to suffer an invasion of their privacy, they were continuously exposed to the public eye of strangers, drivers and employees of Namspace passing through their property with a result that their right to privacy was being breached. She furthermore avers that since they have been unable to secure their property they had ongoing safety concerns and the security of their properties had been compromised. She also complained about the value of their property depreciating.

[22] Ms Langenhoven furthermore proceed to testify that because of the problems and difficulties that they experienced she and her husband engaged the officials and political office bearers of the Council with a view to find an alternative route to the private road, for use by Namspace its employees and other members of the public. She stated that on July 2014 she received a letter from Council which reads as follows:

'RIGHT OF WAY SERVITUDE –SMALL HOLDING PLOT 141

Your correspondence in the above mentioned regard refers.

We hereby would like to inform you that the Municipal Council of Swakopmund has on 27 May 2014 resolved as follows:

"**RESOLVED**

(a) That the present route of the road over smallholding Plot 141 be retained as is.
(b) That a "Right of Way" servitude, 20m wide and following the centreline of the existing road be registered over the property.
(c) That the costs of the registration of the servitude be to Council's account.
(d) That the owner of Smallholding Plot 141 be informed that no compensation shall be afforded for the registration of the servitude"

[23] The applicants were aggrieved by the letter of 23 July 2014. That grievance and others that I quoted above held by the Langenhovens and Florin led to them, during October 2014 instituting these proceedings. As I indicated in earlier paragraphs of this judgment the applicants seek the following relief:

(a) an Order directing the Council to stop commercial and industrial activities on the Tannenhof property or using Tannenhof property for commercial or industrial activities in

contravention of the provisions of the Swakopmund Town Planning Scheme on the Tannenhof property;

(b) an Order interdicting Tannenhof and Namspace from using the road alleged to be a “private road” for traffic with heavy or commercial vehicles and from interfering with the structures on Portion 141 of the Farm No 163;

(c) an Order directing the Council to take steps to construct an alternative route for the use by the Tannenhof CC, Namspace and the general public; and

(d) an Order setting aside the Council’s decision of 27 May 2014.

[24] I indicated earlier that Council, Tannenhof and Namspace opposed the applicants’ claims. In addition to opposing the applicants’ claim Tannenhof instituted a counter application in terms of which it seeks an order to declare that servitudes or right of way have vested over plot 141, certain Remainder of Farm Richthofen, No 156, and Farm Richthofen No. 237 in favour of the Tannenhof property.

[25] Before I proceed to consider the claims of the applicants, I find it appropriate to indicate that during the course of case managing this matter, the Court was informed that Namspace was place under provisional liquidation which was later confirmed (though no court order to that effect was provided to me), necessitating a lengthy postponement of hearing the application. When the matter was ultimately heard on 03 August 2017 the Court was informed that, the second respondent, Tannenhof CC has withdrawn its opposition to the applicants’ claims, but nothing was mentioned with respect to the second respondent’s counter application.

[26] I furthermore find it appropriate to, before I consider the claims of the applicants, briefly outline the approach adopted by Courts when they consider competing claims in motion proceedings.

Approach to potential disputes of facts in motion proceedings.

[27] The legal principles to be applied in the adjudication of a dispute of fact on

affidavit, were set out in the matter *Kauesa v Minister of Home Affairs and Others*[3] This approach was endorsed by the Supreme Court in the matter of *Doeseb and Others v Kheibeb and Others*[4]. In the *Kauesa* matter the High Court said:

'It is trite law that any dispute of fact in application proceedings should be adjudicated on the basis of the facts averred in the applicant's founding affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, whether or not the latter has been admitted by the applicant, unless a denial by the respondent is not such as to raise a real, genuine or *bona fide* dispute of fact or a statement in the respondent's affidavits is so far-fetched or clearly untenable that the Court is justified in rejecting it merely on the papers … This approach remains the same irrespective of the question which party bears the *onus* of proof in any particular case.'

[28] In the South African then Appellate Division, the Botha JA, in the case of Administrator*, Transvaal & Others v Theletsane & Others*[5] said:

'For my purpose it is enough to say that in motion proceedings, as a general rule, decisions of fact cannot properly be founded on a consideration of the probabilities, unless the Court is satisfied that there is no real and genuine dispute on the facts in question, or that the one party's allegations are so far-fetched or clearly untenable as to warrant their rejection merely on the papers, or that *viva voce* evidence would not disturb the balance of probabilities appearing from the affidavits.'

[29] With the above approach I now proceed to consider the issues that I am expected to resolve in this matter.

<u>Can the Court order or direct the Council to stop the commercial and industrial activities on the Tannenhof Properties?</u>

[30] Strictly speaking the order, namely directing the Council to stop the commercial and industrial activities on the Tannenhof property or for Council to stop the Tannenhof property from being used for commercial or industrial activities in contravention of the Swakopmund Town Planning Scheme, sought by the applicants is, in light of the

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3 *Kauesa v Minister of Home Affairs and Others*[7]1994 NR 102 (HC) (1995 (1) SA 51) at p108G – J.

4 *Doeseb and Others v Kheibeb and Others*[7] 2006 (2) NR 702 (SC).

5 *Administrator, Transvaal & Others v Theletsane & Others*[7] 1991 (2) SA 192 (A) at 197 A – E

withdrawal of the opposition by Tannenhof and the liquidation of Namspace, moot. But because Council has not withdrawn its opposition to that part of the relief as sought by the applicants I consider the matter as live.

[31] I indicated above the applicants complain that Tannenhof CC and Namspace are using the Tannenhof properties in contravention of both the Swakopmund Town Planning Scheme and the conditions registered against the Title Deed of the Tannenhof property. It is for these reasons that the applicants seek an order directing the Council to take steps to prevent the illegal use of Tannenhof property and an order interdicting Tannenhof CC and Namspace from using the Tannenhof property in contravention of both the Swakopmund Town Planning Scheme and the Title Deed conditions.

[32] The Council admitted that it is aware of the business conducted by Namspace on the Tannenhof property, but questioned the basis in law on which the applicants seek this relief against Council. Mr Demasius the erstwhile Chief Executive Officer of Council, in his answering affidavit said:

> 'With reference to paragraph 31.1, [that is, the order directing the Council to take steps to stop the contravention of the Town Planning Scheme by Namspace and Tannenhof CC] it is unclear on what basis in law the applicants seek this relief against the first respondent…
>
> The Council is aware of the business conducted by the third respondent on the Tannenhof property. The Council has already taken steps to enforce the applicable provisions of the Swakopmund Town Planning Scheme and the third respondent [Namspace] has indicated that it will cease the conducting of the business on the property in May 2015…'

[33] Despite admitting the industrial business activities that Tannenhof CC and Namspace conduct on the Tannenhof property, Mr Demasius in the answering affidavit on behalf of Council alleges that Desert Wear CC and the Langenhovens have also erected illegal permanent structures on Portion 140, and which were not approved by Council. He further alleges that no building plans were ever submitted to Council's engineering department for approval. Mr Demasius thus contends that the first, second and third applicants are thus also in breach of the Swakopmund Town Planning Scheme and that instructions were given to the Langenhovens to demolish the illegal structures on Portion 140 by 29 November 2014.

[34] Mr Demasius, in the answering affidavit furthermore avers that Mr. Florin (the fourth applicant) is also contravening the Swakopmund Town Planning Scheme on his immovable property concerned [certain Remainder of Farm Richthofen, No 156]. He says a company known as Powerline Africa is operating from Richthofen, No 156. Council was also in the process of taking steps against him, say Mr Demasius. Mr Demasius thus invoked the doctrine of '*dirty hands'* and says the applicants are seeking to enforce the Swakopmund Town Planning Scheme which they themselves flout. This is '*male fide'* and the applicants must be prevented from obtaining relief from this court under such circumstances, contended Mr Demasius.

[35] Tannenhof CC, the second respondent, also admitted the nature of Namspace's business and that Namspace was utilising a warehouse on the Tannenhof property. Mr Hansen who deposed to the answering affidavit on behalf of Tannenhof CC states in that affidavit that the Langenhovens have from the time that they bought Portion 141 been aware of Namspace's operations on the Tannenhof property. He continues and states that by the time that the Langenhovens bought Portion 141 the general use of the entire area had evolved to light industrial. He, amongst other statements, states that:

'The respondents' [that is Tannenhof CC and Namspace] use of the Tannenhof property was in the *bona fide* belief that it was entitled to do so and with the apparent consent of the first respondent [Council]. The building plans for the warehouse used by the respondents for its business operations was also approved by the first respondent.'

[36] The second and third respondents apart from admitting that they use the Tannenhof property for light industrial business deny that they have caused "excessive noise", "dust and dirt", "unauthorised parking", and "vandalism" or other detrimental "effects" allegedly occasioned by the "actions by the third respondent and the staff employed by it". In his affidavit in support of Tannenhof's counter application, Hanssen stated that "…the third respondent's operations [on Tannenhof] will move to the Swakopmund Industrial area by the end of May 2015 and in his affidavit dated 2 September 2015 Hanssen stated that Namspace had finally vacated its operations on Tannenhof on 12 June 2015.

Did the applicants approach the Court with dirty hands?

[37] The legal principles relating to the doctrine of 'unclean hands' were not so long ago considered in two Supreme Court judgements[6]. In the matter of *Shaanika and Others v The Windhoek City Police and Others*[7] O'Regan AJA who authored the judgment on behalf of the Court said:

'[27] The doctrine of 'unclean hands' appears to have originated as an equitable doctrine in England. As noted in a recent decision of this court, *Minister of Mines and Energy and Another v Black Range Mining (Pty) Ltd*, the doctrine has largely found application in the area of unlawful competition law where its effect is that an applicant is prevented from obtaining relief where he or she has behaved dishonestly. Accordingly, in *Black Range Mining*, this court refused to uphold a challenge based on the doctrine of *'unclean hands'* in the absence of any evidence showing that the appellant had acted dishonestly or fraudulently. Although the court in *Black Range Mining* did not expressly say so, I have no doubt that in using the words '*dishonestly or fraudulently*', it would have considered bad faith or mala fides in the conduct of litigation to be included within its formulation.

[28] There are good reasons for this narrower approach to the doctrine. In the area of constitutional rights, in particular, courts should be slow to place barriers before the doors of the court. Fundamental to the functioning of a constitutional democracy is the right of citizens to approach courts to assert their constitutional rights and to have legal disputes determined, a right protected in Namibia by art 12 of the Constitution. It is not necessary to determine in this case whether the doctrine of 'unclean hands' has no place in the field of constitutional law at all, for here, as in *Black Range Mining*, the doctrine finds no application as there is no evidence of *dishonesty, fraud or mala fides* in the conduct of litigation on the part of the appellants. Although the appellants admit they have been occupying the land in question without the consent of the owners, and therefore unlawfully, they have asserted that they are occupying the land because they have no other place to reside. The conduct of the appellants, while unlawful, cannot be said to be dishonest or fraudulent.'

[38] In my view both in the *Black Range* and *Shaanika* matters the Supreme Court has expressed itself that the application of the doctrine of *'dirty hands'* is limited to cases

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6 In the matter of *Black Range Mining (Pty) Ltd v Minister of Mines and Energy and Another* 2011 (1) NR 31 (SC) and *Shaanika and Others v The Windhoek City Police and Others* 2013 (4) NR 1106 (SC)

7 *Ibid.*

where a party who approaches a Court does so in a fraudulent, dishonest *or mala fide* manner. There is no evidence in this matter that the applicants, dishonestly or fraudulently or in bad faith approached the Court. I therefore find that the doctrine of '*dirty hands'* does not find application in this matter.

The legal basis for the applicants' claim.

[39] Mr Corbett who appeared for the Council argued that whilst the applicants submit that they have a "clear right firstly to require the Council to enforce its own Town Planning Scheme and secondly, to require Tannenhof CC and Namspace to comply with the Swakopmund Town Planning Scheme and the Town Planning Ordinance and the relevant Title Deeds", the interdictory relief and the relief relevant to the enforcement of the Swakopmund Town Planning Scheme, has become academic, because Namspace has moved its operations from the Tannenhof property, and in any event, no case is made out on the papers for such relief to be granted. This moreover in light of the absence of prejudice to the applicants. In fact, the applicants presently have no *locus standi* to seek such relief as and against Council, argued Mr Corbett.

[40] The institutions that are necessary for the existence and operation of the public administration are created by law, the 'powers' of the administration depend upon the law. Pubic bodies or administrative bodies, to use the words of art 18 of the Namibian Constitution, derive their authority from the law[8]. The law not only empowers administrative bodies, it also places them under a duty/obligation to act.

[41] Professor Baxter[9] argues that no matter what powers are conferred upon the administration this powers are always coupled with at least one duty namely the duty to act, though the extent of the duty may vary. The learned authored proceeds and argue that where the power to act is discretionary the duty may be a weak one requiring only that the person vested with the power must consider whether to exercise it or not[10]. On the other hand a discretionary power may be coupled with a strong duty to decide in a certain way. Where the discretionary power is coupled with a duty to decide or act in a

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8 *Rally for Democracy and Progress and Others v Electoral Commission for Namibia and Others* 2013 (3) NR 664 (SC).

9 Baxter Lawrence. *Administrative Law,* Juta, 1984 at pp76-77.

10 *Ibid*.

certain way then the administrative body has no discretion but must decide or act as contemplated by the law.

[42] In the matter of *Municipal Council of Gobabis v Smith t/a Bertie Smith Contractor Services*[11] Parker AJ quoting from the work of Prof HWR Wade[12]: said:

'As well as illegal action, by excess or abuse of power, there may be illegal inaction, by neglect of duty. Public authorities have a great many legal duties, under which they have an obligation to act, as opposed to their legal powers, which give them discretion whether to act or not.'

[43] In the present matter a local authority such as the Council derives its power to prepare a Town Planning Scheme from either sections 4, 5, 6 or 7 of the Town Planning Ordinance, 1954 (Ordinance No. 18 of 1954). Section 28 of the Town Plaining Ordinance, 1954 places a duty on a local authority (in this instance on Council) to observe and enforce the observance of all the provisions of the Town Planning Scheme. Section 28 (1) reads as follows:

'Upon the coming into operation of an approved scheme the responsible authority shall observe and enforce the observance of all the provisions of the scheme.'

[44] It thus follows that in the present matter Council has the legal power or discretionary power whether to act or not (that is, whether to develop or not to develop a Town Planning Scheme) in terms of s 5, 6 or 7 of the Ordinance, but once Council has developed a Town Plaining Scheme it has an obligation, a duty to act in terms of s 28(1) of the Ordinance. The obligation or duty which Council has is to observe and enforce the observance of all the provisions of the Town Planning Scheme. If Council fails or neglects to enforce the observance of the Town Planning Scheme, that failure or neglect is unlawful.

[45] The question that then follows is who can challenge Council's administrative unlawfulness. Professor Baxter[13] argues that although public powers are always

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11 *Municipal Council of Gobabis v Smith t/a Bertie Smith Contractor Services* 2015 (1) NR 299 (HC)

12 Wade HWR: *Administrative Law* 5th Ed (1984)

13 Baxter Lawrence. *Administrative Law,* Juta, 1984 at pp 411.

coupled with some duty, this does not necessarily imply that it is a duty owed to specific individuals, it might only be owed to the legislature or to the public in general. The learned professor continues and argue that the question whether a breach of a duty imposed by statute confers a right of action on an individual depends upon the scope and language of the Act which creates the obligation and on considerations of policy and convenience.

[46] In the matter of *Ellis v Vickerman*[14] the Court reasoned that:

'If there is no penalty and no other special means of enforcement provided by the statute, it may be presumed that those who have an interest to enforce one of the statutory duties, have an individual right of action, otherwise the duty might never be performed. But if there is a penalty clause, the right to a civil action must be established by a construction of the scope and purpose of the statute as a whole.'

[47] The general rule is that a person who approaches a Court to challenge an administrative unlawfulness must be a person having *locus standi*, in that he or she is having an interest in the subject matter. In the case of *Cabinet of the Transitional Government of SWA v Eins*[15] the court said the following:

'A person who claims relief from a court in respect of any matter must, as a general rule, establish that he has direct interest in that matter in order to acquire the necessary *locus standi* to seek the relief.'

[48] Baxter[16] is also of the view that in order to have a standing to challenge administrative unlawfulness an individual must show that he or she has some degree of personal interest in the administrative action or inaction that is being challenged. In the matter *Dalrymple v Colonial Treasurer*[17], a case that was decided some one hundred and ten years ago, some members of the then last Legislative Council of the Transvaal Colony attempted to interdict the colonial treasurer from paying excessive amounts by way of remuneration to members of the Transvaal Parliament. Although the majority of

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14 *Ellis v Vickerman* 1954 (3) SA 1001 (C).at 1005.

15 *Cabinet of the Transitional Government of SWA v Eins* 1988 (3) SA 369 AD at page 388 A-E

16 *Supra* footnote No. 9

17 *Dalrymple v Colonial Treasurer* 1910 TS 372 at 379

the Court found that the payments were clearly illegal, the three judges of the Court were agreed that the applicants had insufficient interest to seek the interdict and the therefore lacked standing. That they were both taxpayers and legislative councillors was held to be insufficient. Innes CJ observed that:

'The general rule of our law is that no man can sue in respect of a wrongful act unless it constitutes the breach of a duty owed to him by the wrongdoer or unless it causes him some damage in law. This principle runs through the whole of our jurisprudence. It is not confined merely to the civil side... And the rule applied to wrongful acts which affect the public as well as to torts committed against private individuals.'

[49] Wessels J stated that:

'The person who sues must have an interest in the subject matter of the suit and that interest must be a direct interest … Courts of law… are not constituted for the discussion of academic questions, and they require the litigant to have only an interest, but also an interest that is not too remote… Courts of law have required the applicant to show direct interest in the subject matter of the litigation or some grievance special to himself'.

[50] In the matter of *Trustco Ltd t/a Legal Shield Namibia and Another v Deeds Registries Regulation Board and Others*[18] the Supreme Court held that in a constitutional State, citizens are entitled to exercise their rights and they are entitled to approach courts, where there is uncertainty as to the law, to determine their rights.

[51] From the papers filed it is clear that the applicants are the owners of immovable property which is adjacent to the Tannenhof property, it is also clear that the Tannenhof property was at the time that the applicants instituted their claim being utilised for purposes that are in contravention of the Swakopmund Town Planning Scheme. The use of the Tannenhof property interferes with their rights in that it partly causes them some nuisance and inconvenience. I therefore have no doubt in my mind that that the applicants have some grievance special to themselves and thus have a legal interest to see to it that the provisions of the Swakopmund Town Planning Scheme are adhered to. They are the owners of land in the municipal area of

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[18] *Trustco Ltd t/a Legal Shield Namibia and Another v Deeds Registries Regulation Board and Others* 2011 (2) NR 726 (SC)

Swakopmund and their interest is that the land neighbouring them must be utilise in the manner set out in the Swakopmund Town Planning Scheme.

[52] Having come to the conclusion that the Council has an obligation or duty to observe and enforce the observance of all the provisions of the Swakopmund Town Planning Scheme and that the applicants have a legal interest to ensure that land neighbouring them is utilised in accordance with Swakopmund Town Planning Scheme the most effective remedy available to them to compel the Council's performance of its obligations is *mandamus.*

[53] For the reasons and conclusion outlined in the preceding paragraphs concerning the Council's exercise of discretionary power under ss 5, 6 & 7 read with s 28 of the Ordinance I have come to the conclusion that the applicants established the basis upon which, in my judgment, the relief (modified though) sought in para 1 of the notice of motion must be granted.

Can the Court interdict Tannenhof CC and Namspace or the general public from using the road traversing Portion 141 of Farm No 163?

[54] Ms Langenhoven in her affidavit in support of the applicants' claims, (particularly the claim that the road that passes over certain Remainder of Farm Richthofen No 156, Farm Richthofen No. 237, and Portion 141 of the Farm No 163 is a private road and that the second and third respondents must be interdicted from using that road), avers that Deed of Transfer No T 6370/2009 in respect of Portion 141 does not contain any servitude in favour of the Tannenhof property or any other party to exercise a right of way to traverse Portion 141 of the Farm No 163.

[55] Ms Langenhoven further contends that no rights have been specifically registered in favour of Tannenhof CC or Namspace or their predecessors in title over Portion 141. She furthermore disputes that Tannenhof CC or Namspace acquired any rights of way over Portion 141 by acquisitive prescription and thus concluded that Tannenhof CC or Namspace enjoy no rights of access or traversing over Portion 141.

[56] Mr Demasius, in his answering affidavit, on the other hand avers that the road in question has been in us by members of the public since the early parts of the 1800s. He

furthermore avers that the road formed part of the "Bay Route", which route was used by traders including Jonker Afrikaner for trade with settlers at the coast. He continued and stated that:

'The proximity of the route to the Swakop River allowed travellers access to water. The route including the road has thus been in use by the general public for over 200 years.

I am aware that he road has been used for well in excess of thirty years by tour operators and other members of the public wishing to gain access to the Swakop River. It has, for the same period constituted a popular tourist, tour operator and visitor access point to the river and certain areas of the Namib Desert for tourism and recreational activities. The road has similarly been used by members of the public to gain access to farms stream–up (east) of Tannenhof No. 74….These uses continue up to the present time.'

[57] Mr Demasius thus concluded by stating that in the circumstances a public servitudal right of way existed in favour of the public over the road, created by immemorial use on an unencumbered basis or *vetustas*.

[58] The averments by Demasius accord with the averments made by Hansen who deposed to the affidavit on behalf of Tannenhof CC. Hansen avers that since, at least, the late 1800's to date [i.e. 2017] and for an uninterrupted period of more than 114 years, the road, which crosses certain Remainder of Farm Richthofen No 156, Farm Richthofen No. 237, and Portion 141 of the Farm No 163, had already been established and used by the public.

[59] In support of the contention that for an uninterrupted period of more than 114 years, the road, which crosses certain Remainder of Farm Richthofen No 156, Farm Richthofen No. 237, and Portion 141 of the Farm No 163, had already been established and used by the public Hansen cites the versions of a certain Ms Gabrielle Mariane Tirronen and Mr Peter von Garnier. He states that Ms Tirronen who was born during 1947, in Swakopmund and lived most of her life in Swakopmund informed him that her grandfather one, Emile Henrichsen, moved to Swakopmund in 1897. He worked for the "*Damara and Namaqua Gesellschaft*[19]*".* Her father, Mr Emile Herman Henrichsen, was

[19] The "*Damara & Namaqua Gesellschaft*" was a Company established on 1 October 1894 in Hamburg to carry on trade in the German colony South West Africa. From 1900 until the beginning of

born in Swakopmund during 1904.

[60] She further informed him that her father narrated to her how during the late 1800 and early 1900, fresh food and supplies were not readily available in Swakopmund as a result of which those in search of fresh milk, fresh vegetables and other food, had to travel with ox wagons to a place known as Goanikontes, an oasis about 38 km east of Swakopmund in what is today known as the Dorob National Park, across the Swakop river. Travellers making their way to Goanikontes to pick up fresh supplies, did so by travelling along the road.

[61] Ms Tirronen further informed Hansen that her father and his father (i.e. her grandfather) both travelled that road extensively. Ms Tirronen stated that her father told her that if it had not been for his father having travelled on that road to Goanikontes with his ox wagons for fresh supplies, he (her father) may have succumbed to malnutrition. The road, which is still in exactly the same place, has been opened to the public since, at least, the late 1800's. Later years when cars and trucks became available, the public used the road with the trucks and cars.

[62] Mrs Tirronen herself recalls having used the road with her parents from her young childhood days in the 1950's. She recalls her family, as well as the greater community, frequenting a place at the time called "Grosse Baum" on what was then called Farm Birkenfells, which was a popular picnic spot for Swakopmund residents who wanted to go out for the day and it was situated just past Tannenhof. In order to go there, Mrs Tirronen and her family, as well as other visitors of Grosse Baum, travelled along the road since she could remember. She confirms that the road is still in exactly the same place today, – i.e. across certain Remainder of Farm Richthofen No 156, Farm Richthofen No. 237, and Portion 141 of the Farm No 163, as clearly indicate in annexure B to Ms Langenhoven's founding affidavit as it was then.

[63] Ms Tirronen also recalls that as she was growing up Tannenhof, belonged to the Pruter family. She states that Tannenhof was like a paradise to the Swakopmund

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W War 1, at times up to 32 branches of this company existed in places such as Lüderitz, Rehoboth, Outjo, Tsumeb, Grootfontein, Keetmanshoop etc. Goods offered ranged from maize to water pumping equipment.

community at the time with lush gardens of roses, grass lawns and palms. Ms Tirronen further recalls that one had to drive past Tannenhof to get to Grosse Baum. Tannenhof was a popular destination and the Pruter family often entertained guests there and hosted parties. Mrs Tirronen also recalls how, as a young child and adolescent she had attended a number of picnics and parties, hosted by the Pruter family at Tannenhof. In order to access Tannenhof, the Pruter family as well as the public used the road, which is in exactly the same place as it was then.

[64] Hansen furthermore narrated the version told to him by a certain Peter von Garnier. Mr von Garnier says he was, since the late 1980's until 2014 when he retired, employed as a tour guide by a company known as Charly's Desert Tours a tour operator company that takes tourists into the desert near Swakopmund on day excursions since the mid 1980's, von Garnier avers that, during the period of late 1980 to 2014, with the exception of the time when he was on leave for whatever reason, he took tourist into the desert along the road virtually every single day. This was done with large tourist vehicles and buses and trucks as well as light vehicles. Part of his tour was to firstly stop at Gut Richthoven and then to stop over at the old Richthoven station building on Farm Richthofen No. 237 in order to explain the history of the farm. From there he would stop at Tannenhof and then access the Swakop River and the desert further along the road.

[65] Mr von Garnier confirms that the road is still in exactly the same place as it has been since he first started using the road during the late 1980's – i.e. across certain Remainder of Farm Richthofen No 156, Farm Richthofen No. 237, and Portion 141 of the Farm No 163 and that the public used the road freely. He also recalls Tannenhof's lush gardens and also describes it as a paradise, until the Steinhausen family, through a company named Olympia Reisen Namibia (Pty) Ltd purchased the property in the early 1990's. Mr von Garnier further confirms that those who wished to access Tannenhof, the Swakop River, the desert and surrounding areas did so freely with the use of the road.

[66] What both Mrs Tirronen Mr von Garnier could however not confirmed to him [i.e. Mr Hansen] is the origin of the use of the road. Mr Hansen states that the origin of the use of the road is unknown and that he could not, despite a diligent search, find any record relating the origin of the use of the road.

[67] Mr Hansen furthermore states that, since time immemorial, the road has been open to the public and was freely used as such and in addition:

(a) Tannenhof is landlocked and there is no other alternative route in existence in order for Tannenhof, its owner, agents and assignees to access the Tannenhof property; and

(b) Since 1952, when Tannenhof was first registered, and for an uninterrupted period of more than 30 years Tannenhof, its owners, agents and assignees have had possession of the road, have been using the road openly and freely as if they were entitled to do so and adverse to the rights of the owners of the properties over which the road is situated. This was also necessitated by virtue of the fact that Tannenhof, as well as some of its neighbouring properties, are landlocked and cannot be reached but *via* the road.

[68] In reply Ms Langenhoven denies that the road has been in use by the general public for a period of over 200 years. She based her denial on the ground that the road was allegedly established as a pubic road during the year 1953 and the road was proclaimed as a public road during 1958 and deproclaimed as a public road during the year 2011.

[69] In view of the parties' contentions I will proceed to assess whether a servitude of right of way has been proven.

Servitude

[70] A servitude is defined as a limited real right in terms of which a burden is imposed on a movable object or an immovable tenement restricting the rights, powers or liberties of its owner, to a greater or lesser extent in favour of either another person or the owner of another tenement[20]. *Silberberg & Schoeman*[21], states that Roman Dutch Law distinguishes between praedial and personal servitude.

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[20] Van der Merwe C G & de Waal M J: *The Law of Things and Servitudes*. 1993, Butterworth at para 230.

[21] PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006)*, page 321.*

[71] The praedial servitude relates to at least two pieces of land. It is said to be constituted in favour of one piece of land *"which is called dominant tenement or land"* over another piece of land *"which is called the servient tenement or land"* in other words, a praedial servitude confers a benefit on the dominant *tenement* and imposes a corresponding burden on the servient *tenement*: *"one piece of land serve the other"* by contrast, a personal servitude is always constituted in favour of a particular individual on whom it confers the right to use and enjoy another's property. Prima facie, therefore, it is not transferable by its holder. On the other hand, a personal servitude is*, "in the same way as the praedial servitude"* always enforceable against the owner of the property that is bearant with it, whoever he or she maybe.

[72] A praedial servitude may be created in any one of the following ways:

(a) A servitude may be constituted by a state grant when the state grants a servitude over state land or grants land with a reservation of servitude over the land granted or in favour of the land granted; or
(b) A servitude usually originates from an agreement between the owner of the dominant tenement and the owner of a servient tenement.
(c) A servitude may be created by statute;
(d) A further method of acquiring a servitude is by prescription.

[73] Council and Tannenhof CC advances three legal grounds in support of the opposition to the interdictory relief sought by the applicants and the right of Tannenhof and the general public to use of the disputed road (*'the private road'*). The first ground on which Council and Tannenhof CC rely is that a public servitude of right of way in favour of the Tannenhof property and the public at large had been created by prescription in terms of the Prescription Act, 1969[22]*.* The second was that a servitude of right of way in favour of the Tannenhof property and the public at large existed and that its lawful existence was confirmed by the principles of *vetustas*. The third was that the Tannenhof property is landlocked and there is no other alternative route in existence in order for Tannenhof, its owner, agents and assignees to access the Tannenhof property. I now proceed to consider those three grounds.

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[22] Prescription Act, 1969 (Act No. 68 of 1969).

The Prescription Act, 1969

[74] I will start with the first basis namely the claim based on the Prescription Act, 1969. Chapter II of the 1969 Prescription Act, 1969 deals with the acquisition and extinction of servitudes by prescription. Section 6 of the Prescription Act, 1969 provides that:

‘ 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.’

[75] Section 9 of the Act, however, provides that chapter II of that Act does not apply to public servitudes[23]. In my view section 9 of the Prescription Act, 1963 is an insuperable bar to the argument based on prescription.

Vetustas

[76] The second ground on which a right of way is asserted is on the *vetustas* principle. *Vetustas* is not a subject that frequently engages the attention of our Courts. In the matter of *De Beer v Van der Merwe*[24] Juta JA explained that the doctrine of *vetustas* relates to a right that has been exercised against another person and has been in existence for so long since time immemorial that no one can tell when, and therefore how, it arose. It is then assumed that the right arose lawfully. The learned judge quoted with approval *Goudsmit's* definition of the doctrine of *vetustas* as follows:

'When any state of things had endured so long a time that its origin dated back to a period to which the memory of man did not extend there was a legal presumption that such origin had been legitimate and the parties were dispensed from furnishing proof that it was so.'

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[23] Also see the case of *Ludolph and Others v Wegner and Others* 1888 (6) SC 193 at p 199, *Nesbitt v Clayton* 1957 (1) SA 382 (SR).

[24] *De Beer v Van der Merwe*, 1923 AD 378 at p. 383

[77] Judge Juta[25] further argued that *vetustas* may appear similar to prescription, but the two operate in different ways. The learned judge stated that prescription takes place when it is proved that the right was exercised*, nec vi*, *nec clam* and *nec precario*[26] creates a legal situation: It is complete when proved. It does not merely raise a rebuttable presumption. But *vetustas*, did not create a legal situation: it merely dispense with proof of its origin. The party relying on it has to prove the immemorial existence of the state of affairs which he desires to maintain. A presumption then arises that such state of things had been originally lawfully created. The *onus* then shifts to the other party to prove that it lacked a lawful origin.

[78] The learned judge said that the basic idea underlying the doctrine of *vetustas* is that the right claimed was exercised as against some other person. He said:

'If a water cause has drained the field of one owner on to the fields of another owner, and it has been in existence so long that no one can tell when it was constructed, then such immemorial existence is considered to be *pro leg*-that the watercourse had been originally lawfully created. There is no question in such case of proof as is in the case of prescription that the right had been acquired by user as of right, *nec vi, clam or precarious*, by the person claiming it and his predecessors in title: but the presumption arises that it had a lawful origin *pro-lege.* The presumption can be rebutted by showing that it has an unlawful origin. Prescription is based on the exercise of an unlawful act: *Vetustas* on a lawful origin, *pro lege*. But both require that there shall be two owners. Where both pieces of land are owned by one person and he drains his upper land into his lower land no matter of how long such watercourse exists, there is no room for the application of the doctrine. There can be no question of lawful or unlawful origin, nor could the obligation on the one hand land to receive the water from the other land be deemed to be *pro lege*.'

[79] Kotzé JA, in the same judgment dealt with the principle of *vetustas* in slightly more detail, saying:

'By *vetustas* is understood a condition of things beyond living memory, immemorial usage. If it can be shown, or does appear how and when a particular work or construction was

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[25] *Ibid.*

[26] *nec vi* meaning without force and *nec clam* meaning openly for an uninterrupted period of thirty (30) years, and *nec-precario* meaning that the right must have been exercised adversely and as of right.

originally made, the doctrine of *vetustas* does not apply … If, therefore, the facts of a given case show that the state of things in question is within living memory, that is to say, if there be *probatio* or *memoria* in *contrarium*, the doctrine of *vetustas* does not apply.'

In other words, the origin of the right being claimed must be beyond proof *(probatio*) or contrary memory or recollection (*memoria in contrarium*).

[80] In the matter of *Divisional Council of Fraserburg v Van Wyk*[27] Watermeyer J illuminatingly discusses the meaning of immemorial usage. He pointed out that passages in some judgments to the effect that once it can be shown when the exercise of rights began there could not be an immemorial usage of such rights, were not entirely consistent with the decisions in those cases.

[81] Watermeyer J concluded by stating that:

'Goudsmit suggest that all the proof required from the person claiming rights by immemorial custom is proof of the existence of these rights during the memory of man, "which was not restricted to that which persons themselves remembered but extended to things stated to the existing generation by that which had preceded it". And when such proof has been given then the *onus* of proving, not the date when the custom originated but its unlawful origin lies on the defendant and if he fails to prove unlawful origin then the fictitious presumption of immemorial existence prevails'.

[82] Differently expressed, there must be proof that the right has existed for a very long time and that there is no certain knowledge or information of a different condition or practice having existed. The witnesses should state that in their own time and that of their forebears the practice existed and nothing was heard or reported to the contrary. In homely language they would say it was ever thus[28].

[83] In the present matter the road in dispute traverse over land that was originally Crown or State Land. All the portions of that Land that is, certain Remainder of Farm Richthofen No 156, Farm Richthofen No. 23, Portion 141 of the Farm No 163 and the

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[27] *Divisional Council of Fraserburg v Van Wyk* 1927 CPD 285 at 306.

[28] Per Wallis JA in the matter of *Grootkraal Community and Others v Botha NO and Other* 2019 (2) SA 128 (SCA), at p 135 para [14].

Remainder of Consolidated Farm Tannenhof No 74 were since German Colonial occupation of Namibia in 1884 until at least 1924 land Crown or State Land. Mr Danna Beukes the Registrar of Deeds in Namibia deposed to an affidavit in which he states that:

(a) The farm described as Portion 1 of Richthofen No. 32 was at least until 1924 part of Crown Land. During November 1924 this farm was transferred to Gustav Fiedler by Certificate of Substituted Tile No. 396 of 1924 and transferred, during August 1934 from Gustav Fiedler to Ilse Hermine Margarete Schroeder who in turn transferred it to Hermann Karl Pruter 16 May 1944 by Deed of Transfer No. T 209 /1944;

(b) The portion of the Farm described as Tannenhof No. 74 was until 1949 part of Crown/State Land. During February 1949 this farm was for the first time, by Government Grant No. 16/1949 transferred into private ownership into the name of Hermann Karl Pruter.

(c) The portion of the Farm described as Tannenhof Ost No. 100 was until 1951 part of Crown/State Land. During October 1951 this farm was for the first time, by Government Grant No. 89/1951 transferred into private ownership into the name of Hermann Karl Pruter.

(d) These three pieces of land that is, Portion 1 of Richthofen No. 32, Tannenhof No. 74 and portion of the Farm described as Tannenhof Ost No. 100 were, by Certificate of Consolidated Title No. 156/1952 consolidated into Tannenhof No 74.

[84] Mr Beukes furthermore deposed that Farm 163 was until 1986 part of State Land. Government during 1979 donated the Farm (i.e. Farm 1963) to the Municipality of Swakopmund but the transfer of the farm in to the name of the Municipality of Swakopmund was only effect during 1986 by Government Grant No. 3401/1986.

[85] In the face of evidence to that effect the road which is in dispute traversed over State Land until at least 1924 I find it difficult to accept that an immemorial custom or practice came in to existence, because the use of the road was simple over State Land and those who used the road could not acquire a right over State Land nor

against anyone else as the State was the owner of that Land.

[86] *Vestustas* could in my view furthermore not apply to the road because of the principle that for *vetustas* to operate, the right claimed was exercised as against some other person or put otherwise the adjacent pieces of land should have been owned by at least two different persons. In this matter the pieces of land belonged, at least until 1949, to one person, the State. It thus follows that Council, the second and third respondents' claim to use the road based on the principle of *vetustas* fail.

[87] It is furthermore sufficiently clear when and how the condition of things on which Tannenhof CC or the Council relies originated. It must have been after 1924 or 1949 when the original grantee (i.e. Gustav Fiedler, or Hermann Karl Pruter) first became the *dominus* of Farm Tannenhof No. 74. There could under the circumstances not have been acquisition of any right by *vetustas*. The Council and Tannenhof claim of right of way by *vetustas* therefore fails.

Via ex necessitate

[88] The third legal ground on which, the second and third respondents oppose the granting of the interdict sought by the applicants is the contention that Tannenhof is landlocked and the owners of the Tannenhof property thus claim a right of way by necessity. A way of necessity (*via ex necessitate*) is a peculiar Roman –Dutch servitude.

[89] It is important to realise that the right of way of necessity differs from all other servitudes in its mode of creation[29]. Unlike other servitudes, the right of way of necessity is created by operation of law[30] as soon as land becomes landlocked. It binds the surrounding properties (as of a right)[31] immediately when the dominant tenement becomes landlocked,[32] but only a specific property, amongst the

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29 PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 328; CG van der Merwe *"The Louisiana right to forced passage compared with the South African way of necessity"* (1999) 73 *Tulane Law Review* 1363-1413 at p1373.

30 J E Scholtens "*Law of property (including mortgage and pledge)"* 1960 *Annual Survey of South African Law* 190-226 209.

31 *Wilhelm v Norton* 1935 EDL 143.

32 CG van der Merwe "*The Louisiana right to forced passage compared with the South African way of*

surrounding properties, can effectively be burdened with this servitude. Therefore, the establishment of a right of way of necessity does not depend on or require the consent of the servient owner whose land is effectively burdened by the servitude[33]. The servitude is imposed against his will[34]. In this sense, the servient owner is forced by law to allow the dominant owner to have a right of way over the servient tenement, which gives the dominant owner access to the public road. This servitude can, however, only be effectively assigned to the dominant owner by a court order[35]. In other words, the right of way of necessity may not be exercised without a court order.

[90] Van der Merwe summarises what I have stated in the preceding paragraphs by stating that a way of necessity is granted either by way of agreement or by order of Court if a piece of land is landlocked without any access to a public road or, if an alternative route is indeed available, such alternative route is so difficult and inconvenient as to be almost impassable. A way of necessity takes the form of the shortest route to the nearest public route and the route which causes the least damage to the servient tenement[36].

[91] In the matter of *Wynne v Pope*[37] Van Winsen J said:

'As I understand the law, a *via ex necessitate* can be claimed by an owner where it is necessary for him to have ingress or egress from his property by such a way in order to reach a public road. *Such a servitude is created simpliciter, and could be altered by the owner of the servient tenement if he can afford to the owner of the dominant tenement another route as convenient as the old route.* For the owner of a dominant tenement to be able to claim the right of *via ex necessitate* along a specific or defined route it would be necessary for such servitude to

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necessity" (1999) 73 *Tulane Law Review* 1363-1413 1373.

33 *Ibid.*

34 *Wilhelm v Norton* 1935 EDL 143; *Van Rhyn NO and Others v Fleurbaix Farm (Pty) Ltd* (A 488/2012) [2013] ZAWCHC 106 (8 August 2013) paras 15-16.

35 PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 334, 328 fn 61. See also the judgement of *Van Rhyn NO and Otherrs v Fleurbaix Farm (Pty) Ltd* (A 488/2012) [2013] ZAWCHC 106 (8 August 2013) paras15-16, where this point was argued and accepted by the court.

36 See Van der Merwe C G & de Waal M J: *The Law of Things and Servitudes*. 1993, Butterworth at para 230.

37 *Wynne v Pope* 1960 (3) SA 37 (CPD) at 39F-G).

have been duly constituted, for example, by an order of Court, or by prescription, or by any form recognised by the law.'

[92] When a right of way of necessity is claimed the Court must determine whether the claimant is entitled to it. In *Van Rensburg v Coetzee*[38] the Court considered and set out extensively the circumstances in which a right of way of necessity will be granted and the following was said:

'It is sufficient to accept that a claim to a way of necessity arises if a piece of land is geographically landlocked and has no way out, or if a way out is in fact available it is, however, inadequate and the position amounts to this that the owner has no reasonably sufficient access to the public road for himself and his servants to enable him if he is a farmer, to carry out his farming operations.'

[93] A court may grant a right of way over the property of a non-consenting owner (subject to the payment of appropriate compensation), but only where it is shown that the right of way is necessary to provide access to a public road. In the matter of *van Schalkwyk v Du Plessis and Others*[39], De Villiers, C.J., had occasion to consider the circumstances which would justify the grant of a *via necessitatis*, and said:

'As to the road being one of necessity to the plaintiff, the Court has never laid down any definite rule as to what circumstances would constitute such a necessity, nor is it advisable that such a rule should now be laid down. It is not necessary for the purpose of the present case to go so far as to hold that there can be no road of necessity over a neighbour's land, unless the only possible approach to a public road is over such land. There may perhaps be cases in which the alternative route would be so difficult and inconvenient as to be practically impossible, and in such cases the Court might be justified in affording relief subject to compensation, and the other restrictions mentioned by Voet (8.3.4). The present case is not, however, of such a nature. It is an inconvenience - I must say, a great inconvenience - for the plaintiff not to be able to use the road in question in order to bring his cattle from his mountain farm on to the nearest public road or to his other farms. But the inconvenience to the plaintiff is not so great as to justify the Court in putting the defendants out to the still greater inconvenience of having a cattle-track through their narrow and cultivated strip of land. The plaintiff can reach the public road by a track over the farms *'Lous Legplek'* and

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38 *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) at 671 (translated version)

39 *Van Schalkwyk v Du Plessis and Others* 17 S.C. 454 at p. 464

'Pampoenfontein', and although that track is more circuitous and less convenient than the one claimed, it is certainly not impracticable as a means of access to and egress from his farm'

[94] From authorities discussed in the preceding paragraphs it is clear that for a party to successfully claim a right of way of necessity the dominant owner must establish that his property is landlocked. Furthermore, it must be landlocked in such a manner that it is "necessary" for him to obtain a right of way of necessity over a particular servient tenement.

[95] What I have discerned from the authorities is that in principle, the dominant tenement must be landlocked for the dominant owner to be entitled to a claim for a right of way of necessity. Landlocking includes complete landlocking without access to public transport systems and also landlocking in the sense that the dominant tenement does have an access to public transport systems but such access is not sufficient for the proper exploitation and economic development of the landlocked dominant tenement[40].

[96] In the matter of *Sanders NO and Another v Edwards NO and Others*[41] also held that the dominant tenement does not have to be literally landlocked from the public road, but it should "constructively" constitute a "*blokland*".

[97] The Courts have, in my view rightly so, refrained from a comprehensive definition of what constitute necessity in all circumstances, but as a general rule what is meant by 'necessity' is that the right of way must be the only reasonably sufficient means of gaining access to the landlocked property and not merely a convenient means of doing so. In determining the piece of land which the way of necessity must traverse, the Court will be guided *by "ter naaster lage en minster schaden"* rule which means that the way of necessity must traverse the adjoining land which lies between the landlocked and the nearest public road. However according to the Court in *Van Rensburg v Coetzee*[42] the rule is not inflexible as it is

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40 *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) 670H-671A. See also J *Scott "The difficult process of applying easy principles: Three recent judgments on via ex necessitate''* (2008) 41 *De Jure* 164-174 166; CG van der Merwe "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1385.

41 *Sanders NO and Another v Edwards NO and Others* 2003 (5) SA 8 (C) 11E.

42 *Supra* at *672H-673A.*

'…conceivable that the piece of land thereby indicated as that which the way of necessity must traverse is so impassable that it provides no practical way out; or on the other hand it is also conceivable that that piece of land would be so detrimentally affected as a result of particular circumstances that another plan would rather have to be made. In these cases, the basic rule could probably be departed from and the way of necessity located over another piece of land. But that does not detract from the maxim which lays down the manner in which one should proceed in normal cases.'

[98] With this legal background I must now proceed to deal with the parties' contentions.

[99] In her founding affidavit Ms Langenhoven contended that Deed of Transfer No. T 6370/2009 in respect of Portion 141 of Farm 163 does not contain any servitude in favour of the owner of Consolidated Farm Tannenhof No. 74 or to exercise a right of way or to traverse Portion 141 of Farm 163. She accordingly concluded that the owners or the predecessors in title of Consolidated Farm Tannenhof No. 74, do not have or enjoy any right of access or to traverse Portion 141 of Farm 163. Ms Langenhoven furthermore contended that Part V of the Local Authorities Act, 1992 which deals with the powers, functions, rights and duties of Local Authority Councils amongst other things provides that a local authority council shall have the power to construct and maintain streets and public places. She thus conclude that by virtue of s 30(1)(e) and s 48(1)(i) of the Local Authorities Act, 1992 Council is obliged to supply adequate access and streets to property owners within its local authority area.

[100] Mr Marais who appeared for the applicants argued that the respondents claim a *via necessitatis* on the simple basis that they are landlocked. He continued and said, a person claiming a right of way by necessity bears the *onus* to prove firstly, that there is no reasonable access from the dominant property to the nearest public road but across the servient property; secondly, that the route of the proposed right of way of necessity is the least onerous to the servient property; thirdly, that the compensation offered to the servient property is just. He concluded by stating that Tannenhof does not even attempt to discharge the second or third onus and they must thus be interdicted to use the disputed road.

[101] I have earlier pointed out that a right of way of necessity is created by operation of

law[43] as soon as land becomes landlocked. It binds the surrounding properties (as of a right) immediately when the dominant tenement becomes landlocked.[44] In this matter the second and third respondents simply needed to prove that Consolidated Farm Tannenhof No. 74 is landlocked and that the owners of Consolidated Farm Tannenhof No. 74 of necessity have to use the road that traverse over Portion 141 of Farm 163.

[102] In this matter it cannot be doubted that Consolidated Farm Tannenhof No. 74 has since 1952 been landlocked and that that Farm does not have access to public transport systems, except through the road in dispute which traverses over Portion 141 of Farm 163. There is furthermore no dispute that the road in dispute which traverses over Portion 141 of Farm 163 is the only reasonably sufficient means of gaining access to Consolidated Farm Tannenhof No. 74 and not merely a convenient means of doing so.

[103] It therefore follows that the contentions by Ms Langenhoven that Deed of Transfer No. T 6370/2009 in respect of Portion 141 of Farm 163 does not contain any servitude in favour of the owner of Consolidated Farm Tannenhof No. 74 or to exercise a right of way or to traverse Portion 141 of Farm 163 are irrelevant, because the right of way of necessity is created by operation of law as soon as land becomes landlocked. The contention that Council is obliged to supply adequate access and streets to property owners within its local authority area, is as regards Consolidated Farm Tannenhof No. 74 misplaced.

[104] I say so because, in the matter of in the matter of *Wynne v Pope* which I quoted earlier it was held that a *via ex necessitate* can be claimed by an owner where it is necessary for him to have ingress or egress from his property by such a way in order to reach a public road. Such a servitude is created simpliciter, and could be altered by the owner of the servient tenement if he can afford to the owner of the dominant tenement another route as convenient as the old route. The duty to create an alternative route is therefore not on Council but on the owners of the pieces of land which are traversed by the disputed road, who in this case are the applicants.

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43 See footnote 30.

44 CG van der Merwe "*The Louisiana right to forced passage compared with the South African way of necessity*" (1999) 73 *Tulane Law Review* 1363-1413 1373.

[105] In my view the second and third respondents have satisfied the requirements to claim a *via ex necessitate,* over Portion 141 of Farm 163 *subject* thereto that they pay to the owners of that Portion fair and just compensation. It therefore also follows that the prayer by the applicants to interdict Tannenhof CC and Namspace or the general public from using the road traversing Portion 141 of Farm No 163 must, as it does, fail.

Review of Council's decision of 27 May 2014

[106] I indicated above that Ms Langenhoven indicated that during July 2014 she received a letter from Council which informed her that Council resolved per Council Resolution C/M 2014/05/27 that the present route of the road over smallholding Plot 141 [Portion 141 of Farm 163] be retained as is and that a "Right of Way" servitude, 20m wide and following the centreline of the existing road be registered over the property [Portion 141 of Farm 163]. I also indicated that the applicants are on various grounds aggrieved by that decision and seek this Court to review it and set it aside.

[107] What is apparent from the record that was placed before me is that the applicants through a planning Company known as Dunamis Consulting appealed, in terms of the Town Plaining Ordinance, 1954 (Ordinance 18 of 1954) against that resolution to the Minister Responsible for Rural and Urban Development. The Minister upheld the appeal and set aside the Council Resolution. The Minister's decision to set aside Council Resolution C/M 2014/05/27 was communicated to Council during May 2015. On this basis, I have no decision to review and similarly, Council has none to implement. For that reason, the prayer seeking an order to review and setting the Council resolution of 27 May 2014 cannot be granted.

[108] What remains is the question of costs. The basic rule is that, except in certain instance where legislation otherwise provides, all awards of costs are in the discretion of the court.[45] It is trite that the discretion must be exercised judiciously with due regard to all relevant considerations. The court's discretion is a wide, unfettered and an equitable

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[45] *Hailulu v Anti-Corruption Commission and Others* 2011 (1) NR 363 (HC) and *China State Construction Engineering Corporation (Southern Africa) (Pty) Ltd v Pro Joinery CC* 2007 (2) NR 674.

one.[46] There is also, of course, the general rule, namely that costs follow the event, that is, the successful party should be awarded his or her costs. This general rule applies unless there are special circumstances present. Costs are ordinarily ordered on the party and party scale.

[109] In my view each of the parties achieved partial success, it will therefore be just and fair that each party carries his or its costs. In the result I make the following Order:

109.1 The Council for the Municipality of Swakopmund must, in insofar as Tannenhof Properties CC and Namspace Contractors CC continue to conduct commercial and light industrial activities in contravention of the Swakopmund Town Planning Scheme on the property described as:

Certain:	Consolidated Farm Tannenhof No. 74
Situate	In the Municipality of Swakopmund Registration Division "G" Erongo Region
Measuring	8, 9517 (Eight comma Nine Five One Seven) hectares
First Registered	By Certificate of Consolidated Title No. T 156/1952 with Diagram No A 433/1951 relating thereto and held by Deed of Transfer No T 3353/2001,

forthwith take all steps that are necessary to prevent Tannenhof Properties CC and Namspace Contractors CC from conducting commercial and light industrial activities in contravention of the Swakopmund Town Planning Scheme on that property.

109.2 The relief sought by the applicants to interdict Tannenhof Properties CC and Namspace Contractors CC and their employees from using the road traversing certain Remainder of Farm Richthofen No 156, Farm Richthofen No. 237, and Portion 141 of the Farm No 163 is refused.

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[46] See *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045.

109.3 The relief sought by the applicants to direct the Municipal Council of the Municipality of Swakopmund to construct an alternative road for access to the Consolidated Farm Tannenhof No. 74 in the District of Swakopmund is refused.

109.4 The Consolidated Farm Tannenhof No. 74 in the District of Swakopmund is entitled to a servitude of right of way over Remainder of Farm Richthofen No 156, Farm Richthofen No. 237, and Portion 141 of the Farm No 163, subject thereto that the owners of the Consolidated Farm Tannenhof No. 74 pay just and fair compensation to the owners of the servient tenements.

109.5 The applicants' application to Review and set aside the Council's decision taken on 27 May 2014 under Council Resolution C/M 2014/05/27 is refused.

109.6 Each party must pay its own costs.

109.7 The matter is regarded as finalised and is removed from the Roll.

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S F I UEITELE
Judge

APPEARANCES

FIRST TO FOURTH APPLICANTS: JEAN MARAIS
Instructed by
DR WEDER, KAUTA & HOVEKA INC.

FIRST & NINTH RESPONDENTS: ANDREW CORBET
Instructed by
ENS AFRICA / NAMIBIA (Inc. LORENTZ ANGULA INC.