



REPORTABLE

CASE NO: SA 16/2017

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

RAINIER ARANGIES

Appellant

and

JORGE MANUEL BATISTA NEVES

First Respondent

MARIA ALZIRA ALVES BATISTA NEVES

Second Respondent

ATTORNEY GENERAL OF NAMIBIA

Third Respondent

Coram: MAINGA JA, SMUTS JA and ANGULA AJA

Heard: 25 October 2018, 12 April 2019

Delivered: 27 May 2019

Summary: This appeal concerns a decision of the court *a quo* in which the learned judge found that the 1st and 2nd respondents discharged the *onus* upon them, establishing that they acquired a servitude of right of way by acquisitive prescription over the appellant's property in Tsumeb (Erf 646) in terms of section 6 of the Prescription Act 68 of 1969. This court raised *mero motu* a further issue concerning the impact of section 65 of the Local Authorities Act 23 of 1992 to these proceedings. Appellant's property was for the claimed period of prescription

(from 1973 to 2003) owned by the local authority of the Municipal Council of Tsumeb (referred to as Erf 56 until its subdivision and the creation of Erf 646 in about 2004).

The court *a quo* found that it was probable that access was gained to the dwelling on an uninterrupted basis for a period in excess of 30 years. After the court referred to the requisites for acquisitive prescription set out in s 6 of the Prescription Act and to authority, it found that an uninterrupted period of 30 years of possession of the route was established on the part of the 1st and 2nd respondents and their predecessor in title. The fact that Erf 646 was later fenced in and keys of the gate provided to the respondents' tenants, amounted to an inference that respondents' free access over Erf 646 was acknowledged. The court concluded that the requisites for acquisitive prescription were established and found in favour of 1st and 2nd respondents.

The parties were invited by this court to make submissions on whether s 65 precludes the acquisition of a servitude over Erf 646, as municipal property. Appellant argued that the respondents' claim for a servitude of right of way was precluded by s 65 and that acquisitive prescription could not run against the municipality prior to 2004.

First and 2nd respondents argued that appellant had not raised this issue as a defence in the court *a quo*. Nor had the municipality, which had been cited as a party and elected not to oppose the relief sought by the respondents. Respondents submitted that s 65 found no application to the case because at the time the servitude was claimed, the property had long since been acquired from the municipality – originally in 2004 (they argued that the defendant cannot rely on s 65 as a defence because he became owner of erf 646 in 2012) – relying on Silungwe, AJ in *Strauss and another v Witt and another*. Respondents further argued that had s 65 been raised in the court *a quo*, 'a number of factual and additional legal issues would have been investigated at the trial, and in the pleadings'. Respondents argued that the issue could not be 'raised or determined in accordance with their fair trial rights, on appeal' – seeking to rely on *Director of Hospital Services v Mistry*. They contended that, had s 65 been raised, the

plaintiffs may not have abandoned their alternative claim based on a *via necessitate* and that s 65 may be impermissibly overbroad and in conflict with Arts 10 and 16 of the Constitution and that the respondents had insufficient time to consider raising the constitutionality of s 65 on appeal as it could deprive the plaintiffs of rights they had when the Act was put into operation in 1992. Respondents further argued that section 65 essentially offends against Art 10 in that a private person can acquire land or rights in it by prescription against the State but not against local authority.

Held that, reliance upon the *Mistry* matter is entirely misplaced and would create an intolerable position if a court of appeal is precluded from giving the right decision on accepted facts merely because one of the parties had failed to raise a legal point.

Held that, it is open to a court of appeal to raise questions of law of its own motion for the first time on appeal. It is indeed the court's duty to do so if the Constitution or a statutory provision or the common law would preclude reliance upon an illegal contract or a principle of common law in conflict with the Constitution. This court has done so and will continue to do so when circumstances require it to do so.

Held that, s 65 contemplates the term 'become owner' which is preceded by the words 'by prescription'. The concept addressed in the section is one of acquisition of land or rights in land by prescription. The term becoming an owner is thus used to denote acquisition of ownership of land or the acquisition of rights in it by prescription and should be understood in this context. This is what is plainly intended by the section – refer to *Minister of Agriculture and Forestry v O'Linn*.

Held that, s 65 provides that the prohibition upon acquisition of municipal land or rights in it operates 'notwithstanding the provisions of the Prescription Act.' Section 18 of the Prescription Act itself envisages that laws may prohibit the 'acquisition of land or rights in land by prescription'.

Held that, the *O'Linn* matter made it clear when it decided that, s 65 properly construed precludes the acquisition by prescription of a servitude over municipal

property. That has been the position in Namibia since 1977. Courts are to give effect to the unambiguous meaning of s 65, despite the hardship which may arise.

Held that, the meaning of s 65 is clear – it precludes the acquisition of municipal land or rights in it by acquisitive prescription. It does not merely preclude the assertion of a claim of acquisitive prescription at the time the land is owned by a local authority. It precludes acquisitive prescription running against a local authority. To that extent, the statement by Silungwe, AJ is not to be followed.

It is held that, s 65 precluded the 1st and 2nd respondents in this case from acquiring that right over that property.

It is further held that, the fact that the State does not enjoy the benefit of similar protection does not mean that s 65 is in conflict with Art 10 by preventing the acquisition by prescription in respect of municipal land or rights in it. The legislature may not as yet have provided for similar protection to the State because much of the land and public spaces in urban areas vest in local authorities. Although this may give rise to anomalies as is demonstrated by the facts in the *O'Linn* case, the protection of municipal property and rights in it by s 65 is however rationally connected to a legitimate purpose of preserving municipally owned land which a local authority would be at pains to protect against acquisitive prescription in the public interest. The 1st and 2nd respondents have not established that the differentiation contemplated by s 65 infringes Art 10.

It is further held that, the constitutional challenge to s 65 is without merit and must fail.

It is held that, the appeal is upheld with no order as to the costs of appeal.

APPEAL JUDGMENT

SMUTS JA (MAINGA JA and ANGULA AJA concurring):

[1] The appellant in this appeal takes issue whether the respondents discharged the *onus* upon them to establish a right of way by acquisitive prescription in terms of s 6 of the Prescription Act, 68 of 1969 (the Act).

[2] The respondents as plaintiffs succeeded in their claim for a right of way over the appellant's property in Tsumeb. The appellant appeals against the High Court decision to that effect. For the sake of convenience, the parties are referred to as plaintiffs and defendant. There is however a further issue – not raised by the appellant but by this court – which also arises in this appeal. It concerns the impact of s 65 of the Local Authorities Act, 23 of 1992 upon these proceedings. It provides:

'Notwithstanding the provisions of the Prescription Act, 1969 (Act 68 of 1969) or any other law, no person shall by prescription become the owner of any immovable property of a local authority council or of any right in such property.'

[3] The appellant's (defendant's) property was for the claimed period of prescription owned by the local authority of the Municipal Council of Tsumeb.

The pleadings

[4] The plaintiffs sought an order declaring that they acquired a servitude of right of way over the defendant's property, erf 646 Tsumeb.

[5] In 1972 Mr Neves senior (the first plaintiff's father and the second plaintiff's husband) acquired Erf 71A, Tsumeb. It is located on President's Avenue with a structure comprising a shop building with two shop fronts on that street. During 1980, Mr Neves senior erected a dwelling and lean-to behind the shop building to

the rear of the property. The lean-to was used as a car port/garage. Mr Neves senior died in 1997 whereupon the plaintiffs succeeded him in title to Erf 71A and are the current owners of that property.

[6] The defendant (appellant), cited as first defendant in the action, is the owner of Erf 646, Tsumeb in Susan Nghidinwa Street, 71A. This property abuts Erf 71A at one corner.

[7] The Council for the Municipality of Tsumeb was cited as second defendant in the action. It is the owner of Erf 56 which is adjacent to the rear of Erf 71A. The defendant's Erf 646 previously formed part of Erf 56. After subdivision, Erf 646 was created and in 2004 was sold to the appellant's predecessors in title.

[8] In the plaintiff's particulars of claim, it is averred that the only ingress and egress for motor vehicles and delivery vehicles to and from the plaintiffs' property is via Susan Nghidinwa Street and the only way to reach Erf 71A is by traversing Erf 646 and where that ends, across a small section of Erf 56 at the access point to Erf 71A. The route claimed as a right of way is thus across the total length of Erf 646 from Susan Nghidinwa Street up to the boundary of Erf 56 and then over Erf 56 up to the access point on Erf 71A.

[9] It was further alleged that since 1972, Mr Neves senior, the plaintiffs, their customers, tenants, employees and guests traversed Erf 646 and Erf 56 openly, continuously and as though they were entitled to do so and used this route in order to obtain access to and from Erf 71A. It is also alleged that at no time had the

plaintiffs acknowledged the cited defendants' right to prevent them from using the claimed right of way.

[10] The plaintiffs accordingly claimed a right of way with a width of 4 meters over the defendant's property and the municipal erf (Erf 56) to Erf 71A under s 6 of the Act.

[11] An alternative claim was set out but is no longer relevant as it was not pursued in the court below.

[12] In his defence to the action, the defendant put in issue the use of the route claimed as a right of way and denied that the requisites acquisitive prescription were met and put the plaintiffs to the proof thereof.

[13] The municipality initially defended the action but withdrew its notice to defend prior to filing a plea.

Evidence before the High Court

[14] Three witnesses testified for the plaintiffs, the first plaintiff, Mr Martiens and Mr Jamal. The defendant also called three witnesses, including himself and Mr De Beer and Ms Rust. The court also conducted an inspection *in loco* at Erf 71A, Tsumeb. The record of the proceedings inexplicably did not include the joint report of that inspection. (This is one of several breaches of the rules of this court on behalf of the appellant/defendant. The others are referred to below, when dealing

with the question of costs.) That inspection report in detail describes Erf 71A and its environs.

[15] The shop building of Erf 71A has two shop fronts facing President's Avenue. There is no access to the dwelling on Erf 71A from President's Avenue except by going through either of the two shops in the shop building. To the rear of Erf 71A, there is a steel sliding gate in the boundary wall (bordering on Erf 56) which is about 3 meters wide. There is another pedestrian gate from Erf 71A to Erf 56. The sliding gate is very close to the corner of Erf 71A and Erf 646. The larger steel gate provides access to the lean-to. It was pointed that Erf 71A is the only property on President's Avenue on that side of the road which did not have vehicular access from a public road. The defendant conceded that there is no access to the dwelling save via the route or through either shop.

[16] The route across Erf 646 has two access gates with security wire. The route runs along the length of Erf 646. It was common cause that Tsumeb Corporation Limited (TCL) was originally owner of Erf 56 before its subdivision and used it as a parking area for its employees. In 1970 it donated Erf 56 to the municipality but continued to use Erf 56 as a parking facility for employees. It later fenced in the area for the security of the parked vehicles of employees. In 2006 Erf 56 was subdivided into the remainder of Erf 56 and Erf 646. Erf 646 was donated to Ongopolo Mining Limited, TCL's successor. On 24 November 2006 it was sold to Ohoronggo Cement and within a year was acquired by Mr and Mrs Neetling who sold it to the defendant in 2012.

[17] The first plaintiff was born in 1966 and grew up in Otjiwarongo until 1980. From 1980 to 1982 he travelled intermittently to Tsumeb after his father had erected the dwelling and lean-to on Erf 71A. From 1982 to 1985 he was abroad to avoid military conscription and thereafter from 1986 to 1994 attended at the University in Bloemfontein, where he studied law. From 1996 he has stayed in Windhoek where he practises as a legal practitioner after completing his articles in Windhoek.

[18] During the period of the claimed prescription – from 1973 to 2003, he was only occasionally in Tsumeb. He testified that the area behind Erf 71A was from 1973 onwards an open space and that the only vehicular access to Erf 71A was over that open area claimed as a right of way (the route) in the proceedings. This was also the access to the dwelling and lean-to after their construction in 1980. He testified that prior to 1980 (and from 1973) his parents, guests and their employees enjoyed access to Erf 71A across Erf 646 (then part of Erf 56) over the claimed route. Before the erection of the dwelling and lean-to, the route was utilised to access the property, to remove rubbish and for parking. During 1973 to 1980, Mr Neves senior regularly travelled to Tsumeb to ‘go and do the accounts’, and entered the premises across the route and park inside the premises.

[19] It came to the attention of the first plaintiff that the defendant gave notice to owners of the adjacent property which also used that route that access would be terminated from 1 March 2012.

[20] Locks had been put on gates providing access to that route (and Erf 646) by Tsumeb Corporation Limited (later Ongopolo Mining Company Limited) which

used Erf 646 as a parking area for employees. This had been done for the security of employees' vehicles parked there.

[21] The first plaintiff testified that the dwelling and lean-to had been erected on Erf 71A with municipal approval - although in the pleadings exchanged on his behalf it had been alleged that only the dwelling had municipal approval and not the lean-to. He testified that the shop was shortly after its acquisition in 1973 operated as a supermarket which he occasionally visited until he moved there with his family in 1980 after the dwelling was built. Both shops on Erf 71A were from the outset used as shops.

[22] The first plaintiff also stated that when plans for the dwelling were approved, permission was also sought from and granted by TCL to build against its wall and to 'go into their yard to plaster that wall'.

[23] The plaintiff also called Mr A S Martiens who worked for Mr Neves senior, running the supermarket at Erf 71A from 1974 to 1980. During that time he used the route for access to the rear of Erf 71A every day since starting his employment. He also testified that Mr Neves senior during that time made use of the route to access Erf 71A with a small truck to remove rubbish and to off load fruit and vegetables.

The approach of the High Court

[24] The High Court found that it was probable that access was gained to the dwelling on an uninterrupted basis for a period in excess of 30 years.

[25] After referring to the requisites for acquisitive prescription set out in s 6 of the Act and to authority, the court found that an uninterrupted period of 30 years of possession of the route was established on the part of the plaintiffs and their predecessor in title (Mr Neves senior). The fact that Erf 646 was later fenced in and keys of the gate provided to the plaintiffs' tenants, amounted to an inference that plaintiffs' free access over Erf 646 was acknowledged. The court concluded that the requisites for acquisitive prescription were established and found in the plaintiff's favour.

Impact of s 65 on the proceedings

[26] It is common cause that Erf 646 until 2004 formed part of Erf 56 which from 1970 was owned by the municipality – thus for the entire prescriptive period asserted in these proceedings. The question arises as to whether s 65 precludes the acquisition by prescription of a servitude over Erf 646, as municipal property.

[27] The defendant did not raise this provision in the proceedings in the court below. Nor was it raised by the court. Shortly before the appeal was initially due to be heard on 25 October 2018, this court however on 19 October 2018 invited the parties to provide supplementary written argument on that issue.

Submissions on appeal

[28] Both sides in this appeal availed themselves of that opportunity and provided written argument on s 65 and the issue was addressed in some detail in oral submissions on behalf of the defendant on 25 October 2018.

[29] The defendant's supplementary heads of argument quoted the plaintiff's written argument which accepted that 'at all relevant times (since the commencement of the 30 year prescription period in 1973) the appellant's property constituted public open space (Erf 56) which belonged to the Tsumeb municipality'. It was also accepted by the first plaintiff that in about 1970 TCL donated Erf 56 to the Municipality of Tsumeb subject to the understanding that it be utilised as a parking facility for TLC employees. Mr T Barnard, who appeared for the defendant, argued that the plaintiffs' claim for a servitude of right of way was precluded by s 65 and that acquisitive prescription could not run against the municipality prior to 2004. Mr Barnard contended that the appeal should succeed with costs on this ground alone.

[30] Mr Heathcote, who together with Ms Campbell appeared for the plaintiffs, pointed out in their written argument that the defendant had not raised this issue as a defence in the court *a quo*. Nor had the municipality, which had been cited as a party and elected not to oppose the relief sought by the plaintiffs, raised this provision. It was submitted that s 65 found no application to the case because at the time the servitude was claimed, the property had long since been acquired from the municipality – originally in 2004 - relying on a statement by Silungwe AJ in the High Court in *Strauss and another v Witt and another*¹ to the effect:

'... s 65 merely precludes a person from asserting, by prescription, any right in respect of the immovable property that is at the time owned by a local authority council in which it has a right.'²

¹ 2014 (1) NR 213 (HC)

² At 216 C.

[31] It was further contended in their written argument that, had s 65 been raised, 'a number of factual and additional legal issues would have been investigated at the trial, and in the pleadings'. These were said to include:

- '(1) When was the area known as Tsumeb approved as a township?
- (2) When was the third respondent established in that area?
- (3) When was the area known as Tsumeb declared to be municipality?
- (4) When did the subject immovable property vest in the municipal council?
- (5) When did the third respondent take transfer of the subject immovable property?
- (6) What is the nature of the right of way immediately before a servitude exists by prescription? Is it a personal or praedial right?'

[32] It was submitted that the issue could not be 'raised or determined in accordance with (the plaintiffs') fair trial rights, on appeal'. In support of this contention, Mr Heathcote referred to *Director of Hospital Services v Mistry*³ where it was held that courts should refrain from deciding issues not raised on the papers before it and which related to facts which occurred subsequent to the exchanging of affidavits.

[33] Mr Heathcote also contended that, had s 65 been raised, the plaintiffs may not have abandoned their alternative claim based on a *via necessitate*. When Mr Heathcote commenced oral argument (after Mr Barnard had concluded his oral submissions) on 25 October 2018, he also contended that s 65 may be impermissibly overbroad and in conflict with Arts 10 and 16 of the Constitution and that the plaintiffs had insufficient time to consider raising the constitutionality of s 65 on appeal as it could deprive the plaintiff of rights they had when the Act was put into operation in 1992.

³ 1979 (1) SA 626 (A).

[34] The court referred Mr Heathcote to s 174A of the Municipal Ordinance⁴ which applied until the repeal of that Ordinance when the Act was put into operation in 1992. It provided:

‘Notwithstanding anything to the contrary contained in any law, no person shall acquire by prescription any land or any rights in respect of the land, the dominium of which vests in a municipality or is held in trust for a municipality which may possibly be constituted.’

[35] The court enquired from Mr Heathcote whether the plaintiffs wished to challenge the constitutionality of s 65 and if so, whether his clients sought a postponement of the appeal. After taking instructions, Mr Heathcote sought and was granted a postponement of the appeal with the defendant not opposing the postponement. This court made the following order:

- ‘1. The appeal is postponed to a date to be arranged in the first term of 2019 for argument including whether the provision of s 65 of Act 23 of 1992 are in conflict with Articles 10 and 16 of the constitution.
2. Given the fact that the respondents intend to raise the constitutionality of s 65 of Act 23 of 1992, the Attorney General is hereby joined to the proceedings.
3. The respondents are to file their heads of argument (20) days before the date of hearing and the appellant and Attorney General (10) days before the hearing.
4. The appellant is to serve the record and written arguments to date upon the Attorney General.
5. The costs of today to stand over.’

⁴ 13 of 1963. Section 174A was incorporated in 1977.

[36] On 16 November 2018, the Registrar of this court directed a letter to the Association for Local Authorities in Namibia (ALAN), drawing its attention to the fact that s 65 was the subject of a constitutional challenge, attaching a copy of the court order of 25 October 2018. It was pointed out that the local authority in question had been cited in the proceedings but did not defend the action although that issue had not been raised at that stage. ALAN was informed that should it apply to intervene, such an application should be brought expeditiously so as not to jeopardise the date of hearing (12 April 2019). Although ALAN acknowledged receipt of the Registrar's letter, no such application for intervention was made.

[37] On 1 April 2019, the Attorney General filed a condonation application for the late filing of heads of argument on his behalf. Both the plaintiffs and defendant also filed further written argument.

[38] Mr S Akweenda, assisted by Mr R Kadhila, appeared for the Attorney-General. He argued that the plaintiffs had in their argument failed to establish that s 65 infringed their rights to property and equality protected under Arts 16 and 10 respectively. He argued that on an application of the approach set out in *Müller v President of the Republic of Namibia*⁵ that there was a legitimate purpose of protecting local authorities against acquisitive prescription when it came to parks and open spaces and that no constitutional infringement was established. He also contended that the issue should have been raised by the defendant at a time when the Tsumeb Municipality was party to the proceedings and would have been apprised of the issue. He indicated that the Minister of Urban and Rural

⁵ 1999 NR 190 (SC) at 199-200.

Development may also have an interest in that relief. He argued that the appellant's failure to raise the issue in the High Court should inhibit his ability to raise it in the Supreme Court.

[39] Mr Barnard for the plaintiff similarly relied on *Müller* in arguing that no constitutional violation of Art 10 was established. He also argued that municipal land was owned and managed for the public benefit and that the statutory purpose behind s 65 was that if there were to be neglect in exercising ownership, then this should not be visited upon the public. He also referred to the highly regulated manner governing alienation and disposal of municipal land, requiring transparency and accountability.

[40] In the supplementary written (as well as oral argument), it was contended on behalf of the plaintiffs that s 65 only applies to immovable property *extra commercium* and not property which is *in commercium*. As the erf in question was donated by TCL to the Tsumeb Municipality, it was contended that it was *in commercium* and had not been virgin land.

[41] It was also argued that s 65 did not apply to the acquisition of a servitude of right of way because the use of the 'way' was not exclusive for use by the servient owner. Mr Heathcote argued that one did not use the term 'owner' in usual parlance when it came to rights such as servitudes and that servitudes of right of way were not hit by s 65 which speaks of becoming an owner of land or a right.

[42] In addition to continuing to rely upon *Strauss*, Mr Heathcote also argued that the Tsumeb Municipality had waived the right to rely upon s 65.

[43] The plaintiffs confined their constitutional challenge to Art 10. It was submitted that local authorities and the State were similarly situated and could be differentiated from individual private owners of property. Mr Heathcote argued that it was irrational that the State was not similarly protected and that s 65 thus offended against the right to equality enshrined in Art 10.

[44] These question are addressed in turn.

Raising s 65 on appeal

[45] As for Mr Heathcote's reliance upon *Mistry*, that matter, which sets out a very well established principle dating back to the writings of Voet, is entirely inapplicable. The court of first instance in that matter had made findings and drew conclusions concerning a delay in proceeding with disciplinary proceedings and did so with reference to factual matter not before court and thus where there were no facts on record to support findings made.⁶ The court of appeal concluded:

' . . . (A) judicial officer in civil proceedings must resolve the dispute on the issues raised by the parties and confine the enquiry to the facts placed before the court.'
(Emphasis supplied).

Judicial officers are plainly required to confine an enquiry to the facts placed before them, as is amply demonstrated by the facts of that matter.

⁶ At p 635A-C.

[46] This court has permitted parties to raise issues of statutory non-compliance or illegalities for the first time on appeal.⁷ The dictum by Innes, J in *Cole v Government of the Union South Africa*⁸ is instructive in this regard:

‘(I)t has been suggested that the appellant should not be allowed to take advantage of the point on appeal. But there seems no reason, either on principle or on authority, to prevent him. The duty of an appellate tribunal is to ascertain whether the Court below came to a correct conclusion on the case submitted to it. And the mere fact that a point of law brought to its notice was not taken at an earlier stage is not in itself a sufficient reason for refusing to give effect to it. If the point is covered by the pleadings, and if its consideration on appeal involves no unfairness to the party against whom it is directed, the Court is bound to deal with it. And no such unfairness can exist if the facts upon which the legal point depends are common cause, or if they are clear beyond doubt upon the record and there is no ground for thinking that further or other evidence would have been produced had the point been raised at the outset. In presence of these conditions a refusal by a Court of Appeal to give effect to a point of law fatal to one or other of the contentions of the parties would amount to the confirmation by it of a decision clearly wrong.’⁹

[47] The corollary to this is that it would create an intolerable position if a court of appeal is precluded from giving the right decision on accepted facts merely because one of the parties had failed to raise a legal point.¹⁰

Does s 65 apply to Erf 646?

[48] It is also open to a court of appeal to raise questions of law of its own motion for the first time on appeal. It is indeed the court’s duty to do so if the Constitution or a statutory provision or the common law would preclude reliance

⁷ *Ferrari v Ruch* 1994 NR 287 (SC).

⁸ 1910 AD 263 at 272-3.

⁹ See also *Greathead v SA Commercial Catering & Allied Workers Union* 2001 (3) SA 464 (SCA) at para 14-15.

¹⁰ *Paddock Motors (Pty) Ltd v Ingesund* 1976 (3) SA 16 (A) at 23 C-G; See also *Van Rensburg v Van Rensburg en Andere* 1963 (1) SA 505 (A) at 510A.

upon an illegal contract or a principle of common law in conflict with the Constitution. This court has done so and will continue to do so when circumstances require it to do so.¹¹

[49] The facts pertinent to the legal question posed by this court are common cause. Erf 56 was municipal property since 1970 until its subdivision and the creation of Erf 646 in about 2004. Whilst the Local Authorities Act was passed in 1992, a provision to similar effect was contained in s 174A of the Municipal Ordinance, 13 of 1963, the predecessor of Local Authority Act. In terms of that Ordinance, Tsumeb was included in Schedule 5 as from 1968 and would thus at the latest by then have been established as a municipality in terms of s 2 of the Ordinance in 1968. That much is clear from the very terms of the Ordinance itself. A cursory glance at the Ordinance thus answers the first three questions raised by Mr Heathcote in his written argument in October 2018. They appear directly from the statute in question and soon become apparent from cursory legislative research and these issues were rightly not persisted with at the postponed hearing on 12 April 2019. The plaintiffs accepted that Erf 56 was donated to the Municipality in 1970. They accepted that it was municipal property from then until sub-division and transfer to the defendant's predecessor in title. So much for the fourth and fifth questions. As for the sixth, it is a question of contention arising from an interpretation of s 65.

[50] There is thus no inherent unfairness or prejudice in the issue being raised on appeal. The facts are common cause and the plaintiffs would have been aware

¹¹ *TransNamib Ltd v Poolman and others* 1999 NR 399 (SC). *Moolman and another v Jeandre Development CC* 2016 (2) NR 322 (SC); *JS v LC and another* 2016 (4) NR 939 (SC) at para 21; *RH v DE* 2014 (6) SA 436 (SCA) at para 4.

that it could be raised, as was acknowledged by Mr Heathcote in argument on 12 April 2019. The only judgment of this court dealing with the acquisition of a right of way servitude by way of acquisitive prescription expressly refers to s 65 and unambiguously expresses the view that it precludes such acquisition from a local authority.¹²

[51] In *Minister of Agriculture, Water and Forestry v O'Linn*,¹³ one of the questions in that appeal which also concerned the acquisition by servitude of right of way was whether s 65 precluded the applicant in that matter from acquiring a right of way if it were established that the municipality in question was the owner of the 'servient' property.

[52] This court stated with reference to s 65:

'It is not disputed that the statutory provision referred to (s 65) by the appellant precludes the acquisition by prescription of a servitude over municipal property . . .
'¹⁴

[53] Similar sentiments were expressed by the High Court in that matter.¹⁵

[54] As the property in that matter belonged to the State (and not the municipality), the remarks concerning s 65 in both judgments are *obiter*. But they are nonetheless persuasive, given the unequivocal view expressed by both courts to that effect. In that matter, the municipal council also did not oppose the application claiming a right of way, even after an assertion on behalf of the State

¹² *Minister of Agriculture, Water and Forestry v O'Linn* 2008 (2) NR 804 SC at para 7.

¹³ 2008 (2) NR 804 (SC).

¹⁴ Para 7.

¹⁵ *O'Linn v Minister of Agriculture, Water and Forestry and others* 2008 (2) NR 792 (HC) at para 24.

that the property over which a right of way was claimed vested in the municipal council (and a statement made that s 65 precluded acquisition of a servitude of right of way over municipal land).

[55] As I understood Mr Heathcote's contentions, two distinct arguments are raised for the inapplicability of s 65 to the facts of this case. Firstly, the argument that s 65 only applies to immovable property *extra commercium* and what he termed virgin land and secondly because s 65 does not apply to a servitude of right of way because ownership in its ordinary meaning does not inure in the owner of the dominant tenement.

[56] As for the contention that s 65 only applies to property *extra commercium*, Mr Heathcote referred to the *Oertel* matter.¹⁶ But that matter concerned extinctive prescription of public debts. The court expressed the view that s 18 of the 1969 Prescription Act bound the State both in respect of acquisitive and extinctive prescription, in so far as ownership or limited real rights could indeed be acquired by reason that under the common law certain State land and rights to it may be inalienable (and not capable of being alienated). But that case concerned whether prescription bound the State and not a municipality. It is by no means authority for the proposition that municipal land originally obtained from the State would be incapable of having prescription run against it. On the contrary, land transferred by the State to local authorities is done so for the purpose of being utilised by a local authority for the purpose of ultimately being subdivided and alienated or used as public spaces. It is thus not incapable of alienation. The common law principle

¹⁶ *Oertel en andere NNO v Direkteur van Plaaslike Bestuur en andere* 1983 (1) SA 354 (A).

referred to in *Oertel* thus does not arise. But it is in any event excluded by the express wording of s 65 of the Local Authorities Act, 1992.

[57] The wording of s 65 is clear. It applies to 'any immovable property of a local authority'. There is no qualification at all as to different categories of immovable property. The use of the term 'any' has the opposite effect. The ordinary grammatical meaning of 'any' is 'no matter which, or what' and 'of any kind or sort whatever'.¹⁷ This is also how the term has been interpreted over the years.¹⁸ 'In its natural and ordinary sense, *any* – unless restricted by the context – is an indefinite term which includes all of the things to which it relates. A qualification applied to *any* of a certain class must necessarily affect each and all of the class'.¹⁹

[58] Not only has the legislature decided not to employ any wording to confine the impact of s 65 to different categories of immovable property (such land which is incapable of being alienated - as referred to *Oertel* - or *extra commercium* as asserted by Mr Heathcote) but the legislature has on the contrary by use of the term 'any' intended that municipal property of whatever kind would not be capable of being acquired by prescription. This is the ordinary grammatical meaning to be accorded to s 65.

[59] I turn to Mr Heathcote's further argument that the wording of s 65 contemplates ownership and that it does not apply to servitudes because they are not 'owned' by the dominant tenement. This argument rests upon wrenching the term 'owner' outside of the context of the section and is artificial and without

¹⁷ The New Shorter Oxford English Dictionary (1993) Vol 1 at p 91.

¹⁸ Per Innes, JA in *Hayne & Co v Kaffrarian Steam Mill Co Ltd* 1914 AD 371.

See also *R v Hugo* 1926 AD 271; *George D C v Minister of Labour* 1954 (3) SA 307 (C).

¹⁹ Per Innes, JA in *Hayne*.

regard to the section construed as a whole. The section rather contemplates the term 'become owner' which is preceded by the words 'by prescription'. The concept addressed in the section is one of acquisition of land or rights in land by prescription. The term becoming an owner is thus used to denote acquisition of ownership of land or the acquisition of rights in it by prescription and to be understood in this context. This is what is plainly intended by the section. The argument is furthermore and in any unsound as a right of way vests in the owner of the dominant land who is entitled to enforce it against the owner of the servient land. That is the nature of the right which is acquired by prescription.²⁰

[60] That is also how this court and the High Court in O'Linn interpreted s 65. Even though the remarks by these courts concerning the ambit and meaning of s 65 can correctly be described as *obiter*, that interpretation is, with respect, sound and to be followed.

[61] Section 65 provides that the prohibition upon acquisition of municipal land or rights in it operates 'notwithstanding the provisions of the Prescription Act.' Section 18 of the Prescription Act itself envisages that laws may prohibit the 'acquisition of land or rights in land by prescription'. It does in these terms:

'The provisions of this Act shall not affect the provision of any law prohibiting the acquisition of land or any right in land by prescription.'

[62] One such right is a servitude of right of way.

²⁰ Badenhorst, Pienaar, Mostert, *Silberberg and Schoeman's: The Law of Property* (5th ed, 2006) at p 322.

[63] As has been made clear by this court in *O'Linn*, s 65 properly construed precludes the acquisition by prescription of a servitude over municipal property. That has been the position in Namibia since 1977. Courts are to give effect to the unambiguous meaning of s 65, despite the hardship which may arise.

[64] The plaintiffs assert that they acquired a servitude of right of way over the erf by prescription which ran from 1973 to 2003. During that time it is common cause that erf vested in the Tsumeb Municipality. Section 65 precluded the plaintiffs from acquiring that right over that property.

[65] Mr Heathcote correctly conceded that his argument on the interpretation on the term 'become owner' would not apply to s 65's predecessor (s 174A), given the different formulation of s 174A. (He argued that neither s 65 nor s 174A would apply because their reach was confined to *res extra commercium* which approach is not supported by the authority relied upon but more importantly is emphatically excluded by the wording of both s 65 and s 174A by use of the term 'any'). It would follow that, even upon the interpretation of s 65 contended for by him which has been shown to be unsustainable, prescription would in any event not be capable of running between 1977 to 1992 by reason of the different formulation of s 174A.

Timing of the assertion of the right of way

[66] Mr Heathcote also relied upon the statement by Silungwe, AJ in *Strauss* quoted in para 30.

[67] Mr Heathcote argued that s 65 could only be relied upon as a defence by a local authority which owned the property at the time acquisition by prescription

was claimed, and not by the defendant as a defence in that he became owner of erf 646 in 2012.

[68] The meaning of s 65 is clear – it precludes the acquisition of municipal land or rights in it by acquisitive prescription. It does not merely preclude the assertion of a claim of acquisitive prescription at the time the land is owned by a local authority. It precludes acquisitive prescription running against a local authority. To that extent, the statement by Silungwe, AJ is not to be followed.

Waiver

[69] Mr Heathcote referred to the fact that the Tsumeb Municipality initially opposed the action and then withdrew its opposition. He argued that it would have been aware of the provisions of s 65 and that it waived the right to rely upon that provision enacted for its benefit, relying upon *SA Eagle Insurance Co Ltd v Bavuma*.²¹ The principle confirmed in that case is neatly summarised in these terms:

‘It is a well-established principle of our law that a statutory provision enacted for the special benefit of any individual or body may be waived by that individual or body, provided that no public interests are involved.’²²

[70] That matter concerned the question of whether the failure to comply with s 8(5) (of what was then known as the Workmen’s Compensation Act, 30 of 1941) by lodging particulars of an accident could be waived by the (then) Workmen’s Compensation Commissioner. The court found that the provisions of s 8(5) were

²¹ 1985 (3) SA 42 (A).

²² At p 49G-F

introduced solely for the benefit of the Commissioner and that there were no public interests or public benefit involved.

[71] In this matter, there are plainly public interests and public benefit involved. Section 65 was enacted for the benefit of the public and rate payers in a local authority area to prevent the running of acquisitive prescription of municipal land. The public and rate payers have an interest to ensure that publicly owned land does not succumb to acquisitive prescription where a municipality is negligent or inefficient in maintaining sufficient control over its extensive lands.

[72] The purpose is to prevent private encroachment of property held by a municipality for the public's benefit. The provisions of s 65 are thus not capable of being waived by the Tsumeb Municipality. This is quite apart from the question as to whether the plaintiffs established that there was in any event a waiver on its part which question is no longer necessary for determination.

Article 10 challenge

[73] The plaintiff's constitutional challenge to s 65 became confined to Art 10 of the Constitution which provides:

'Equality and freedom from discrimination

- (1) All persons shall be equal before the law.
- (2) No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.'

[74] As has been made clear this court in *Muller*:²³

²³ At 196B-C.

'Article 10, and more particularly subart (1), was only once before the subject of interpretation. The case to which I refer is *Mwellie v Minister of Works, Transport and Communication and Another* 1995 (9) BCLR 1118 (NmH). The approach of a Court to the article was set out as follows (at 1132E - H):

“. . . article 10(1) . . . is not absolute but . . . it permits reasonable classifications which are rationally connected to a legitimate object and that the content of the right to equal protection takes cognizance of "intelligible differentia" and allows provision therefor”.'

[75] This court in *Muller* proceeded to summarise the test in respect of each sub-article. Relevant for present purposes is what was held with regard to Art 10(1):

'(a) Article 10(1)

The questioned legislation would be unconstitutional if it allows for differentiation between people or categories of people and that differentiation is not based on a rational connection to a legitimate purpose. (See *Mwellie's* case supra at 1132E - H and *Harksen's* case supra (54).'

[76] As to a challenge based upon Art 10(1), the court in *Mwellie v Ministry of Works, Transport and Communication and Another*²⁴ held that in a constitutional challenge based on Art 10, the onus would be on an applicant to establish the constitutional infringement in these terms:

'If therefore, in the present case, the onus is on the plaintiff to prove the unconstitutionality of Section 30(1) on the basis that it infringes the plaintiff's right of equality before the law, it will, on the findings made by me, have to show that the classification provided for in the section is not reasonable, or is not rationally connected to a legitimate object or to show that the time of prescription laid down in the section was not reasonable. Until one or all of these factors are proved it cannot be said that there was an infringement of the plaintiff's right of equality

²⁴ As quoted in para 7, per Strydom, JP as he then was.

before the law. This, in my opinion is because I have found that the constitutional right of equality before the law is not absolute but that its meaning and content permit the Government to make statutes in which reasonable classifications which are rationally connected to a legitimate object, are permissible.²⁵

[77] Mr Heathcote's argument is essentially that it offends against Art 10 that a private person can acquire land or rights in it by prescription against the State but not against local authorities.

[78] As was held in *Mwellie*, a party challenging a provision bears the onus of establishing that a differentiation is not reasonable in the sense of not being rationally connected to a legitimate statutory object.

[79] Section 65 is universal in its application and does itself not differentiate between persons or classes of persons in respect of whom it applies in preventing the acquisition of municipal land or rights in it by prescription. That is, in essence, the end of the enquiry.

[80] The fact that the State does not enjoy the benefit of similar protection does not mean that s 65 would be in conflict with Art 10 by preventing the acquisition by prescription in respect of municipal land or rights in it. The legislature may not as yet have provided for similar protection to the State²⁶ because much of the land and public spaces in urban areas vest in local authorities. Although this may give rise to anomalies as is demonstrated by the facts in the *O'Linn* case, the protection of municipal property and rights in it by s 65 is however rationally connected to a

²⁵ At p 1132.

²⁶ As it did in South Africa in s 3 of the State Land Disposal Act, 48 of 1961.

legitimate purpose of preserving municipally owned land in the public interest which a local authority would be at pains to protect against acquisitive prescription.

[81] The plaintiffs have not established that the differentiation contemplated by s 65 infringes Art 10. The constitutional challenge to s 65 is without merit and must fail.

Conclusion and costs

[82] Given the fact that s 65 precludes the acquisition of rights over municipal property by way of acquisitive prescription, the High Court could not have granted relief to that effect. It follows that the appeal is to be upheld and the plaintiff's action should have been dismissed.

[83] Turning to the question of costs, Mr Barnard argued that costs should follow the result and that the defendant should receive a costs order in his favour if the appeal were to succeed on this ground.

[84] Mr Akweenda rightly conceded that the unsuccessful party should not be required to pay the Attorney-General's costs.

[85] Mr Heathcote argued that if s 65 were to find application, the defendant should not be entitled to costs because he had not raised the issue, relying upon the approach of this court in *TransNamib Ltd v Poolman and others*.²⁷ This court in that matter raised a statutory provision, not raised in the proceedings, which precluded the granting of relief. The court considered that it was not a question of

²⁷ 1999 NR 399 (SC).

an appeal 'succeeding' in the usual way as the point was not raised in the grounds of appeal and directed that no order be made as to the costs of appeal. There is much to recommend itself in that approach even though the import of the general rule is that costs should follow the result and has in another been followed in an instance where a court on appeal *mero motu* raises a new point which determined the outcome of the appeal.²⁸

[86] The liability to pay costs is however ultimately a question to be determined by the exercise of judicial discretion based on the circumstances of each case.²⁹ It is for this court to determine in the exercise of its discretion whether the general rule that costs follow the event be applied in this case. I am of the view that the order concerning the costs of appeal should follow the order given in the *Poolman* matter where no order was made in respect of the costs of appeal. As that was a labour matter, no cost orders were made in the courts below. In *Greathead v SA Catering & Allied Worker's Union*,³⁰ the court raised a point of law on appeal for the first time and made no order as to the costs of appeal but ordered that the costs in the court below be paid by the respondent.³¹ In my view, a similar order is warranted in this matter.

[87] I may add that, had this order not been made, the appellant would have been deprived of his costs in relation to the preparation of an appeal record because of the wholly unsatisfactory nature of the record. Relevant items were missing such as the judgment of the High Court on absolution as well as the report

²⁸ *Western Johannesburg Rent Board and another v Ursula Mansions (Pty) Ltd* 1948 (3) SA 353 (SA) at 301C-D.

²⁹ *Ferrari v Ruch* 1994 NR 287 (SC) at 301C-D.

³⁰ 2001 (3) SA 464 (SCA).

³¹ At 471F following *Argus Printing and Publishing Co v Die Perskorporasie van SA Bpk; Argus Printing and Publishing Co v Rapport Uitgewers (Edms) Bpk* 1975 (4) SA 814 (A) at 823-4.

on the inspection *in loco*. These omissions were compounded by the inclusion of several items, including the transcription of oral argument, which do not form part of an appeal record, thereby unduly and unnecessarily burdening the record. The several warnings by this court concerning the unsatisfactory state of appeal records would appear to go unheeded by legal practitioners and would, but for the cost order given, have been implemented in this appeal.

Order

[88] The following order is made:

- (a) The appeal is upheld with no order as to the costs of appeal.
- (b) The order of the High Court is set aside and replaced by the following order:

‘The action is dismissed with costs including the costs of one instructing and one instructed counsel.’

SMUTS JA

MAINGA JA

ANGULA AJA

APPEARANCES

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