REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No A332/06

In the matters between:

JOLES EIENDOM (PTY) LIMITED Appellant

and

JOHAN BLOEM KRUGER First Respondent

REGISTRAR OF DEEDS Second Respondent

JUDGMENT: DELIVERED 1 MARCH 2007

GRIESEL J:

Introduction

[1] This appeal concerns a common passage forming the boundary between two adjoining properties, erven 548 and 3765, situated in Dorp Street, Stellenbosch.[1] The appellant (first defendant in the court a quo) owns erf 548,

[1] The position of the passage, together with the relevant points referred to in the judgment, is illustrated on a diagram prepared by the parties, which was annexed to the judgment of the court a quo and is likewise annexed to this judgment for ease of reference. The diagram is based on the Surveyor General's diagram No 8288/60. (Record Vol 7 p 620)

whereas the first respondent (plaintiff in the court a quo) owns the adjoining erf 3765. The second respondent in this appeal (second defendant in the court a quo) is the Registrar of Deeds, who played no active part in these proceedings. (For convenience, I refer to the appellant herein as *'the defendant'* and to the first respondent as *'the plaintiff*'.)

[2] In terms of a servitude registered against the title deeds of the two properties, each party has a reciprocal right of 'common use' of the passage. In this litigation, the plaintiff claimed that the defendant's right of servitude over the plaintiff's half of the passage had lapsed through non-use for more than 30 years. He claimed, furthermore, that he (the plaintiff) had acquired ownership through acquisitive prescription of the defendant's half of the passage (represented by the points NEFM on the annexed diagram), as well as of a further part of the passage, referred to at the trial as 'the extended passage' (represented by the points MFGHJ on the diagram).

[3] The claims were opposed by the defendant, but the court a quo (Woodland AJ) held in favour of the plaintiff with regard to the issue of extinctive prescription in respect of the servitude. The trial judge also found that the plaintiff had acquired ownership of the extended passage through acquisitive prescription. With the leave of the trial court, the defendant appeals against these orders.

Factual background

[4] The plaintiff, Mr Johan Bloem Kruger, conducts a business known as *Wynland Superette en Wynhandelaar* on the premises owned by him at erf 3765, situated at 52–54 Dorp Street in Stellenbosch. The plaintiff's father (*Kruger Snr*) purchased the property during the 1950's. The plaintiff was a small boy at the time. Kruger Snr conducted a café and fish shop on the property. After initially assisting his father in the business, the plaintiff on 16 March 1967 concluded a written agreement with Kruger Snr in terms of which he purchased erf 3765 and the business. The plaintiff took occupation of the property on 1 March 1967, but transfer was only registered in his name on 22 July 1976, the delay being due to High Court litigation between himself and Kruger Snr.

[5] The servitude in question was first created in 1929. In the plaintiff's title deed it is recorded that his property is subject to and entitled to the benefit of, *inter alia*, the following special condition (clause B(1)):

> *'That the passage shewn on the Western boundary on the diagram of Lot D this day transferred to Frederik Karl Viana (No. 6930) shall be for the common use of the said Lot D and of the land hereby conveyed.'*

(Lot D, it appears, is now erf 548 while ‘the land hereby conveyed’ is the property now owned by the plaintiff, namely erf 3765.) In the defendant’s title deed, the special condition, although not identically worded, is to the same effect, namely that ‘the passage … shall be for the common use of the [two properties in question]’.

[6] The common passage is 33 Cape Feet (10,39 metres) long and 3 Cape Feet (0,94 metre) wide. The passage is entered from Dorp Street through a lockable wooden door at point E and is bounded by the buildings on both sides. The centre line of the passage, extending between point E and point F, is the boundary between the two properties. The passage originally provided common access to the respective backyards, where an outbuilding housed the outside lavatories of the two properties and straddled the boundary between the properties.

[7] During 1966, the then owner of erf 548, one Scheiffer, undertook building works on his property, including the construction of a 2,7 metre high wall along his western boundary. This wall runs in a straight line along the boundary from point M to point J. In the process, a small rectangular portion of erf 548, designated by points FGHJ on the diagram, was closed off from erf 548, thus physically becoming part of the backyard of erf 3765. The wall also

had the effect of preventing access to erf 548 from Dorp Street along the passage.

[8] During 1968 the plaintiff, in turn, undertook certain alterations and extensions to the building on his property. As part of the extensions, the outside wall of the new kitchen was constructed in a northerly direction approximately along the eastern boundary of his property. This wall, however, encroached to a very limited extent on erf 548 between points G and H on the attached diagram. The effect of these renovations was to extend the actual passage area bounded on the western side by the plaintiff's new building, by more than 4 metres. (As mentioned earlier, this extended passage is represented by points MFGHJ on the diagram.) At the same time, the passage and extended passage were upgraded by the plaintiff and a cement surface was put down.

[9] Matters were brought to a head during 2001, when the defendant took transfer of erf 548, together with the adjacent erven 546 and 547. The defendant commenced development of an office and shop complex on erf 548 and the adjacent properties, effecting extensive renovations in the process. This included the construction of a door in the wall of the building on erf 548, thereby again providing access from erf 548 to the passage. The door is situated approximately midway along the passage between points N and M.

The plaintiff, however, adopted the attitude that the servitude registered in favour of the defendant's property had been lost by extinctive prescription and, furthermore, that he (the plaintiff) had acquired by prescription that part of erf 548 which is the subject of the servitude in his favour, together with the extended passage. In support of these claims, the plaintiff alleged that, since 1967 and for a period of more than 30 years, he had been in uninterrupted possession and occupation of the passage and the extended passage. He said that such possession had been exercised *nec clam, nec vi, nec precario* and, since 1 December 1970,[2] openly and as if he were the owner.

[10] The defendant took issue with these contentions. It denied that the plaintiff had had sole and uninterrupted possession and occupation of the passage for more than 30 years as if he were the owner. The defendant stated in its plea that the plaintiff used the passage in terms of a registered servitude and, moreover, that he (the plaintiff) had acknowledged the defendant's rights in respect of the servitude registered against erf 548 and those of its pre-decessors in title. The defendant also adduced evidence at the trial to establish that its predecessors in title and their employees and tenants had in fact used the passage during the course of the relevant 30-year-period. Through such use, so it was contended, the running of prescription was interrupted.

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[2] When the Prescription Act 68 of 1969 (*the 1969 Prescription Act*) came into operation.

[11] The issues before us on appeal are therefore – (a) whether or not the servitude had lapsed; and (b) whether or not the plaintiff had acquired ownership of the extended passage though prescription.

Interpretation of the servitude

[12] With regard to the first issue, the trial judge interpreted the servitude in question to be one of passage or footpath (*iter*), finding that the servitude 'was intended to provide a means of pedestrian access to each of the properties from Dorp Street by way of the passage or walkway'.[3] He could find nothing in the language of the servitude 'to suggest that a servitude of any kind other than a foot passage was intended.' He found support for this interpretation in one of the definitions of the noun 'passage' in *The New Shorter Oxford English Dictionary on Historical Principles*, namely '[t]hat by which a person or thing may pass; a road, a park, a route, a channel'.[4] On the evidence, he found that the defendant's predecessors in title had, since 1966, not used the passage as a footpath or as a means of access to the backyard of erf 548, with the result that the servitude had lapsed through non-use for the prescriptive period, i.e. 30 years.[5]

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[3] Para 13.

[4] *Id.*

[5] Para 16.

[13] On appeal, counsel for the defendant submitted that the trial judge adopted an unduly narrow interpretation of the servitude by restricting it to a right of footpath. In my view, there is merit in this criticism. It appears from the judgment that the trial judge focused his enquiry exclusively on the word 'passage' and attached to it *one* particular dictionary meaning. This approach tends to ignore the reality that, like most words and phrases, the word '*passage'* does not have a single 'ordinary' or 'literal' meaning. Where such word appears in a document, therefore, the meaning thereof will necessarily depend on the context in which it is used, its interrelation to the language of the document as a whole and the nature and purpose of the transaction as it appears from such document.[6]

[14] The context in which the word '*passage'* appears in this case is as part of a special condition (servitude) in a title deed where the rights and obligations of the respective owners of two adjoining properties are set out. The word refers to an area lying between the two properties. In that context, it is clear to my mind that the primary meaning of the word 'passage' must be sought in one of the other definitions of the word (from the same dictionary), namely 'a corridor or alley leading to or giving access to an apartment, garden,

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[6] See *Coopers & Lybrand & Others v Bryant* 1995 (3) SA 761 (A) at 767I–768E; *Ridon v Van der Spuy and Partners (Wes-Kaap) Inc* 2002 (2) SA 121 (C) at 136C–D.

etc'.[7] The word *'passage'* must, in other words, be interpreted as synonymous with 'passageway', which is 'a corridor or other narrow passage between buildings or rooms'.[8] This interpretation also corresponds with the Afrikaans translation, *'gang'* or *'steeg'*, which were the terms used by the plaintiff in the course of his evidence in the court a quo with reference to the passage. I accordingly agree with the submission on behalf of the defendant that the word 'passage' is merely descriptive of the land that is to be subject to use by the owners of both properties; in other words, the word does not define the use to which the land is to be put, but rather describes the area that forms the subject matter of the servitude.

[15] The more crucial term in the servitude, in my view, is the expression 'common use', which was not further described or defined in any way. In my view, this means that the passage may be used by both owners for any lawful purpose – having regard to the nature and situation thereof, namely a narrow passageway between two adjoining commercial buildings in an urban setting – and provided, of course, that the servitude is exercised *civiliter modo*. In addition to the right of footpath (*iter*), other permissible uses of the passage would include urban servitudes, such as *ius stillicidii avertendi* (the right to

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[7] *The Shorter Oxford English Dictionary on Historical Principles* (3ed, 1975 reprint). See also *MSN Encarta Dictionary Online* sv *'passage* – … corridor or pathway: a corridor in an enclosed area or a path enclosed on both sides': http://encarta.msn.com/dictionary /passage.html (accessed on 6 February 2007).

[8] *Concise Oxford English Dictionary* (10ed 2002) *sv 'passageway'*.

pass off one's rainwater onto the ground of another);[9] *ius stillicidii recipiendi* (the right to receive the rainwater coming from another's land);[10] *ius cloacae* (the right to have a drain lying on or coming out on the ground of another);[11] and so on.

Extinctive prescription

[16] Against the foregoing background, I now turn to consider whether the defendant's predecessors in title did in fact use the passage during the relevant period. I bear in mind in this regard that the onus rests on the plaintiff to prove on a balance of probabilities that the servitude had *not* been exercised for the prescriptive period.[12]

[17] The defendant adduced a substantial body of evidence from a variety of witnesses to the effect that its predecessors in title and their employees and tenants had in fact used the passage during the course of the relevant 30-year-period, *inter alia*, for storage of crates, bottles and bicycles; by conducting sewerage from the defendant's property through a pipe to a main sewerage pipe running underground down the centre of the passage; by rainwater

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[9] De Groot 2 34 10–12; Voet 8 2 13.

[10] De Groot 2 34 13–14; Voet *loc cit.*

[11] De Groot 2 34 24; Voet 8 2 14.

[12] Section 7(1) of the 1969 Prescription Act provides:
'A servitude shall be extinguished by prescription if it has not been exercised for an uninterrupted period of thirty years.'
(The common law contains similar provisions. See *Bisschop v Stafford* 1974 (3) SA 1 (A) at 7D–E.)

emanating from erf 548 flowing down a gulley in the passage; and by telephone lines serving the defendant's property emanating from a box installed against the plaintiff's wall in the extended passage. The trial judge dealt with this evidence as follows: [13]

> *'It was not in my judgment sufficient if the passage was used for some other purpose such as the storage of goods. That would not constitute the exercise of the owner's registered servitudal right. I am nevertheless satisfied on the evidence that the section of the passage lying on the plaintiff's land was not used for this purpose.*
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> *… The fact that a sewerage pipe emanating from the first defendant's property might have been connected to the main sewerage pipe running along the passage – which possibly encroached on the plaintiff's land – also does not in my view change matters. Similarly, rain water from erf 548 being conducted down a gully in the passage or a telephone box situated on the wall of the plaintiff's building and telephone wires traversing the passage to the first defendant's property, would be similarly irrelevant. Again, this would not constitute the exercise of the servitudal right contained in the special condition. The facts mentioned may, in the right circumstances, constitute servitudes such as the right to install artificial pipes on the servient tenement – the urban praedial servitude known as* servitus cloacae mittendae. *These, in my view, are not the rights*

[13] Paras 16 & 17.

> *which are encompassed in the registered servitude which burdens the plaintiff's property. It does not of course follow that because the first defendant or its predecessors in title might have had* quasi possessio *in the form of a sewerage pipe traversing the plaintiff's property that the servitudal right inherent in a walk-way was exercised.'* [emphasis added]

[18] It follows from my interpretation of the servitude, as set out above, that I find myself in respectful disagreement with the approach adopted by the learned trial judge in this passage. It follows, furthermore, that he erred, in my view, in disregarding the defendant's evidence of other uses of the passageway as 'irrelevant'.

[19] As a fallback position, counsel for the plaintiff argued that the defendant has in any event not furnished credible evidence that its predecessors in title had used the passage in the ways described above. In this regard, counsel relied on the underlined passage in the above quotation from the judgment in support of a submission that the trial judge must be understood to have rejected the evidence of the defendant's witnesses in its totality. I am unable to agree that this was indeed the intention behind the learned judge's almost dismissive comment. It will be noted that the trial judge qualified his finding by stating that he was 'satisfied on the evidence that the section of the passage lying on the plaintiff's land was not used for this purpose' (i.e. storage of goods) (my emphasis); he did not find that *no* part of the passage was used for

that purpose (or any other purpose) by the defendant. The servitude in favour of the defendant's property is registered in respect of the *whole* passage between points E and F; not just in respect of the half lying on the plaintiff's side of the passage. In my view, it was not necessary for the defendant to show that its predecessors in title specifically used *the section of the passage lying on the plaintiff's land* in order to show that they had exercised the servitude: a praedial servitude being indivisible cannot be partially acquired or lost.[14]

[20] Reverting to the question of credibility, the evidence adduced on behalf of the defendant was subjected to intense scrutiny and criticism by counsel for the plaintiff and we were invited by counsel to reject such evidence. Without having seen or heard the witnesses, I am not in a position to find that the plaintiff and his witnesses should be believed or that the defendant's witnesses should be disbelieved. Having regard to the onus, I am accordingly unable to find on a balance of probabilities that the plaintiff has discharged the onus of proving that the defendant's predecessors in title had not used the passage in *any* of the permissible ways discussed above.[15]

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[14] *Dreyer v Letterstedt's Executors* (1865) 5 Searle 88 at 98.

[15] Cf *R v Dhlumayo & Another* 1948 (2) SA 677 (A) at 700; 706 para 13.

Abandonment

[21] As an alternative basis for his conclusion that the servitude had lapsed, the trial judge found that the construction of the wall by Scheiffer during 1966 amounted to a 'deliberate and express act of abandonment by Scheiffer of his right to use the passage in accordance with the servitude registered against erf 3765'.[16]

[22] The first problem with this alternative approach is that the issue of abandonment was never raised on the pleadings nor was it canvassed at the trial with any of the witnesses. Abandonment of a servitude, like waiver of a right, is not lightly presumed and must be clearly proved by the party relying on such abandonment or waiver. At the trial, the plaintiff did not attempt to discharge this onus. Realising this lacuna in his case, the plaintiff's counsel belatedly – as part of his supplementary written submissions on appeal – brought an application for amendment of his particulars of claim to raise abandonment or waiver of the servitude by the defendant's predecessor in title during 1966. This application was strenuously resisted by the defendant.

[23] Although a court of appeal is in principle empowered – as part of its wide powers in terms of s 22(*b*) of the Supreme Court Act 59 of 1959 – to grant an amendment of the pleadings, this power will be sparingly exercised

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[16] Para 18.

and an amendment will only be allowed in cases where the court is satisfied that the other side will not be prejudiced thereby. In order to satisfy this test, the party seeking an amendment on appeal must ordinarily satisfy the court of appeal that the issues sought to be raised have been thoroughly canvassed in the court below.[17] As mentioned above, this has not happened in the present case. In the circumstances, the objection to the late amendment must be sustained. It follows that the trial judge, in my respectful opinion, erred in finding in favour of the plaintiff on this alternative basis.

[24] Even if the proposed amendment were to be granted, however, the evidence in any event does not establish abandonment or waiver of the servitude on the part of the defendant's predecessors in title. The mere fact that such predecessors in title may have abandoned the right to use the passage as a walkway or footpath, does not justify the conclusion that they thereby simultaneously abandoned all other permissible uses of the passage in terms of the servitude. As pointed out above, a praedial servitude is indivisible and cannot be partially acquired or lost.[18]

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[17] Erasmus *Superior Court Practice* (1994 with loose-leaf updates, Service 26) at A1-59; Herbstein & Van Winsen *The Civil Practice of the Supreme Court of South Africa* (4ed, 1997) 914–5.

[18] See footnote 14 above.

[25] In the circumstances, it follows that there were no grounds for expunging the servitude, with the result that paragraphs 1 and 2 of the order fall to be set aside.

Acquisitive prescription

[26] As for the second issue identified above, it was held, with regard to that part of the passage which is affected by the servitude (NEFM), that the plaintiff exercised his right to use the passage as a servitude-holder and that this was something that the defendant and its predecessors in title had no right to prevent. On the evidence, the trial judge accordingly found that the plaintiff had not proved that he had used that part of the defendant's land as if he were the owner thereof.[19] These findings of the trial judge are, in my view, clearly correct and they were not assailed before us by way of a cross-appeal.

[27] The extended passage (MFGHJ), however, was not affected by the servitude. In this regard, the trial judge held that the plaintiff possessed this area openly and as if he were the owner for the requisite period and that he had accordingly acquired by prescription ownership of that portion of the defendant's land.[20]

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[19] Paras 22 – 23.

[20] Paras 24 – 25.

[28] In order to establish ownership of land through acquisitive prescription, the plaintiff had to prove that had possessed such land 'openly and as if he were the owner thereof for an uninterrupted period of 30 years'.[21] The possession required for the purposes of prescription is *possessio civilis,* being the physical control of the property accompanied by the intention of an owner, the *animus domini*.[22]

[29] As mentioned earlier, the extended passage is not affected by the servitude. It physically became part of the back yard of the plaintiff's property when Scheiffer constructed his wall during 1966, thereby isolating it from the rest of his property. Not only did the extended passage physically and logically become part of the plaintiff's property; he also controlled access to the passage by means of the access door on Dorp Street. He (as well as his tenants) at all times had a key to the access door, which was kept locked *most* of the time. On the evidence as a whole, I am satisfied on a balance of probabilities that the plaintiff had, for the requisite prescriptive period, exercised effective physical control of the extended passage. The fact that some of the defendant's predecessors in title and/or their employees may also occasionally

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[21] Section 1 of the 1969 Prescription Act. I do not regard it necessary for present purposes to consider the provisions of the 1943 Prescription Act separately.

[22] 21 Lawsa (1st Reissue, 2000) *sv Prescription* para 127, 128. See also *Glaston House (Pty) Ltd v Cape Town Municipality* 1973 (4) SA 276 (C) at 281D–F; C G van der Merwe *Sakereg* (2de uitg, 1979) at 275 and authorities referred to in n 447.

have had access to that portion of the passage does not detract from the plaintiff's effective control thereof, nor did it serve to interrupt prescription.

[30] As for the mental element, *animus domini*, the plaintiff's evidence was criticised on behalf of the defendant and it was argued that the plaintiff drew no distinction in his own mind between the portion of the passage that was subject to the servitude and the extended passage, which was not so subject. I do not regard this criticism of the plaintiff's evidence as convincing. It appears from the evidence that the plaintiff regarded the *whole* passage as his property. As has been shown, he was mistaken with regard to the portion which is subject to the servitude and any *animus* he might have had in that regard would have been legally ineffectual – just as in the case of a lessee or a usufructuary. This impediment, however, did not exist with regard to the extended passage. In any event, as pointed out by Miller J in a similar situation in *Campbell v Pietermaritzburg City Council*,[23] 'it is safer, by far, to rely on the external manifestations of his state of mind than on his own clumsy attempts at verbal reconstruction of his state of mind many years ago'.

[31] In the instant case, the evidence shows that the plaintiff made permanent improvements to the extended passage. He also made permanent improvements to his own building during 1968, some of which encroached

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[23] 1966 (2) SA 674 (N) at 679F–G

onto the extended passage. *Prima facie,* this is the conduct of someone who holds the land in question as if he were the owner. There is no evidence to suggest that any of the defendant's predecessors in title took any steps to prevent these actions on the part of the plaintiff; in fact, there was *no* indication anywhere to indicate to the uninformed outsider that the extended passage formed part of erf 548 and not of erf 3765.

[32] I am accordingly satisfied that the trial judge was fully justified in holding that the plaintiff had discharged the onus of establishing that he had acquired ownership of the extended passage by prescription.

Costs

[33] It follows from the above conclusions that the defendant has achieved some success on appeal. It cannot be described as insubstantial. On the other hand, the plaintiff has successfully defended portion of the judgment in his favour. In these circumstances, it would not be fair, in my view, to dub either the plaintiff or the defendant as the loser in the appeal. To order one party to pay the costs of the other would not be appropriate. It would be fairer to order the parties to pay their own costs of the appeal.[24]

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[24] Cf *Independent Newspapers Holdings Ltd & Others v Suliman* [2004] 3 All SA 137 (SCA) para 65.

[34] As for the costs of the trial we are, in the light of the variation of the order of the trial court, obliged to consider this aspect afresh. The plaintiff originally approached the court with a claim comprising three separate but interlinked components. He was successful, after this appeal, in respect of one of them, which did not constitute the main aspect of his claim. In fact, I venture to suggest that, had ownership of the extended passage been the sole issue between the parties, it is improbable that the plaintiff would have embarked on this litigation. In these circumstances, I am of the view that it would be fair to adopt the same approach with regard to the trial costs as was done in respect of the costs of appeal, namely to order the parties to pay their own costs.

Conclusion

[35] In conclusion, it remains for me to deal briefly with a matter that was raised with counsel during argument before us. One of the defences pleaded by the defendant was that the plaintiff had acknowledged the rights of the defendant (and its predecessors in title) in respect of the servitude;[25] furthermore, that the plaintiff accepted transfer of his property 'publicly and unequivocally, subject to and in recognition of first defendant's part of the passage and first defendant's servitude to which this matter relates'.[26] This

[25] Plea para 4.2.3, Record Vol 1 p 24.

[26] Plea para 5.2 Record Vol 1 p 24.

defence – although mentioned in passing in the judgment[27] – was not pertinently dealt with by the court a quo, nor was it raised in the defendant's notice of appeal or its heads of argument as a substantive ground of appeal. When asked by the court, during argument before us, whether she still relied on that defence, counsel for the defendant replied in the affirmative. In response, counsel for the plaintiff objected to this line of argument, submitting that a point not taken in the notice of appeal cannot ordinarily be taken on appeal. In the event, we reserved the right of counsel for the plaintiff to submit supplementary written argument to deal with the issue after judgment had been reserved. Supplementary written submissions by counsel for the plaintiff, together with a brief reply on behalf of the defendant, have now been filed, for which we are indebted to counsel.

[36] It is clear from the authorities to which we have been referred that a court of appeal may, in certain circumstances, consider a point not taken in the notice of appeal – especially where it concerns a point of law. The proper approach in this regard was succinctly summarised by Innes JA almost a century ago in *Cole v Government of the Union of SA*:[28]

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[27] Para 12.

[28] 1910 AD 263 at 272, quoted with approval in *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) at 23D–F. See also Erasmus *Superior Court Practice* (1994 with loose-leaf updates, Service 26) at B1–358 and cases referred to in footnotes 3 and 4.

> *'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.'*

[37] Although the issue now under consideration was raised in the defendant's plea in the terms quoted above,[29] and although the issue was also canvassed with the plaintiff during cross-examination,[30] the fact is that the issue has, to this day, not been properly raised in the notice of appeal (as amended) filed on behalf of the defendant, nor was it fully argued before us. It appears from various authorities, furthermore, that the issue is by no means free from difficulty. Despite common law authority to the effect that mere acknowledgment by a plaintiff of a defendant's title has the effect of interrupting acquisitive prescription,[31] this view has been the subject of cogent criticism, *inter alia* by the 'father' of the 1969 Prescription Act, Prof J C de

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[29] See para [35] above.

[30] Record Vol 2 p 139.

[31] See eg Voet 44 3 9; *Paarl Municipality v Colonial Government* (1906) 23 SC 505 at 527–8; *Pratt v Lourens* 1954 (4) SA 281 (N) at 282E; *Lawsa op cit* para 134.

Wet,[32] as well as by Prof C G Van der Merwe,[33] both of whom require that there should, in addition, be acquiescence (*berusting*) in the situation. In the circumstances, I am loath to base my judgment on this defence raised by the defendant and I prefer to leave the issue open.

Order

[38] For the reasons stated above, I would issue the following order :

1. The appeal succeeds in part, to the extent that paragraphs 1, 2 and 5 of the order of the court a quo are set aside.

2. Each of the parties is ordered to pay his/its own costs of the trial as well as of the appeal.

B M GRIESEL
Judge

[32] Gauntlett (Ed), *Opuscula Miscellanea* (Butterworths 1979) at 93 para 36.

[33] *Op cit* at 281. See also Henckert *Die* Animus Domini-*vereiste by Verjaring* 1986 *Responsa Meridiana* 138–143.

TRAVERSO DJP: I agree. It is so ordered.

J H M TRAVERSO
Deputy Judge President

NDITA J: I agree.

T C NDITA
Judge