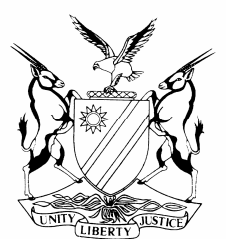


BRIAN O'LINN v MINISTER OF AGRICULTURE & 2 OTHERS

MULLER, J

01 FEBRUARY 2008

SUMMARY

- Application in terms of s 6 of the Prescription Act No 69 of 1969 to declare that the applicant as owner of Erf 2205, Windhoek and successors in title acquired by means of acquisitive prescription a praedial servitude to access a road to that erf and to direct the Registrar of Deeds to transfer such servitude in the Deeds Registry against the title deeds of the applicant's property.
- Only first respondent opposed the application, but did not file an answering affidavit. First respondent decided only to oppose the application on a legal point in terms of Rule 6(5)(d)(iii). First respondent attached two old agreements and a title deed to its notice in terms of Rule 6 (5) (d) (iii) on which it intended to an argue that the third respondent "may be" the owner of the property.
- By not answering the applicant's factual allegations, it accepted same including the applicant's allegation that the State is the owner of the access road.
- Applicant denied that the first respondent is entitled to rely on documents attached to his said notice first respondent conceded it and applied for condonation and leave to produce three affidavits by deponents of the second and third respondents in respect of the agreements and title deeds. Applicant opposed that relief and filed a Rule 30 application to strike such affidavits.

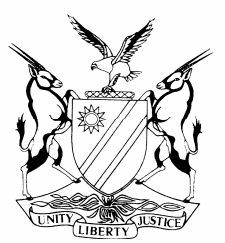
In respect of the point *in limine:*

- At the hearing first respondent took a point *in limine* based on a decision in *Malan v Nabygelegen Estates* 1946 AD 562 that *"in order to create a preservitude title such occupator must be a user adverse to the true owner…"* Reference was also made to several decisions that followed that *dictum*.
- **Held** that *possessio civilis* by detention and the *aminus* to possess is what is required after discussing several decisions, ia *Welgemoed v Coetzer* 1946 TPD 701, *Bisschop v Stafford* 1974 (3) SA 1 (AD); *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd* 1972 (2) SA 464 (W) at 470C; *Albert Falls Power Co (Pty) Ltd v Goge* 1960 (20 SA 46 (N). Saner's *Prescription in South African Law* p2-13; LAWSA 21, para 134, p49 were also discussed.
- **Held** that despite the wording of the Prescription Proclamation, No 13 of 1943 (same as the South African Prescription Act, No 18 of 1943) and the 1969 Act, the common law requirements in respect of acquisitive prescription are still in full force. *(Swanepoel v Crown Mines Ltd* 1954 (4) SA 596 (AD)).
- **Held** that the point *in limine* is rejected as the uncontested allegations of the applicant clearly established *possessio civilis*.

In respect of the first respondent's application for condonation and leave to produce affidavits:

- First respondent took a considered decision not to answer, but to rely on a legal point on documents not properly put before the Court.
- While accepting that the State was the owner, first respondent attempted to offer another speculative possibility that third respondent "may be" the owner.
- Third respondent did not oppose the application or answered the applicant's allegations or applied to put the documents before Court at a later stage.
- Third respondent at a late stage attempted to rely on affidavits by second and third respondents to put documents, which it wanted to argue on, before Court.

- **Held** that condonation and leave are not granted for filing such affidavits.
- **Held** that costs be granted to applicant in respect of his application and his opposition to the first respondent's application.



CASE NO.: [P] A 79/2007

IN THE HIGH COURT OF NAMIBIA

In the matter between:

BRYAN O'LINN **APPLICANT**

and

MINISTER OF AGRICULTURE, WATER & FORESTRY **1ST RESPONDENT**

REGISTRAR OF DEEDS **2ND RESPONDENT**

MUNICIPAL COUNCIL OF THE MUNICIPALITY OF WINDHOEK **3RD RESPONDENT**

CORAM: **MULLER, J.**

Heard on: November 19, 2007

Delivered on: February 01, 2008

JUDGMENT

MULLER, J.: [1] The applicant approached the Court by way of notice of motion for the following relief as set out in his amended notice of motion:

"1. Declaring that the Applicant in his capacity as owner of Erf 2205 Windhoek and his successors in title have by means of acquisitive prescription (in accordance with sections 6 and 19 of Act 68 of 1969) acquired a praedial servitude to access and use the road which begins on the Northern boundary of the said Erf and extends to Nelson Mandela Avenue, as described in annexure "1" to the Applicant's founding affidavit.

2. Directing the Registrar of Deeds to transfer the above servitude, as detailed in Annexure 1 of the Founding Affidavit, in the Deeds Registry and against the Title deed of the Applicant's property.

3. Costs of suit, only in the event of First, Second and/or Third Respondent opposing the application.

4. Further and/or alternative relief."

[2] The application was served on all three respondents, but only the first respondent filed an intention to oppose the application. The first respondent simultaneously filed a notice in terms of Rule 6(5)(d)(iii), giving notice that it intends raising the following questions of law at the hearing of the application:

"1. Is the Municipal Council of the Municipality of Windhoek ("third respondent") the owner of the road which begins on the northern boundary of erf 2205 and extends to Nelson Mandela Avenue, Windhoek ("the property") as detailed in annexure 1 of applicant's founding affidavit, taking into account the following legal instruments:

a) the agreement entered into between the Imperial District Court of Windhoek as the representative of the Treasury of German South-West Africa and the Municipality of Windhoek dated 28 November 1911 annexed hereto as "A1" and "A2".

b) Title deed no 675/1922 annexed hereto as annexure "B".

c) Any other law that may be applicable.

2. Should third respondent be the owner of the property referred to in paragraph 1 hereof, is applicant precluded by virtue of section 65 of the Local Authorities Act, No 23 of 1992 from acquiring a servitude by prscription in respect of the above named property?"

[3] No answering affidavits by any of the three respondents were filed, but after conceding the point taken in the applicant's heads of argument to the effect that the two agreements marked "A1" and "A2" and the title deed no 675/1922, attached to the first respondent's notice in terms of Rule 6 (5)(d)(iii), were not properly placed before Court, two affidavits deposed to by Mrs Johanna Susanna de Kock, the Corporate Legal Advisor of the Municipal Council of the Municipality of Windhoek (third respondent), and one by Mr Beukes, the Registrar of Deeds (2nd respondent), were filed by the first respondent. The applicant filed a notice in terms of Rule 30, indicating that application will be made for the striking out of these affidavits at the hearing as irregular steps or proceedings, having been filed out time and sequence and in conflict with Rules of this Court.

[4] As mentioned before, the applicant amended his notice of motion, but only in respect of the first declaratory order. Proper notice of this amendment was given and served upon all three respondents, but none of the respondents objected thereto or changed their initial stances, as set out above.

[5] At the hearing Mr Nixon Marcus appeared on behalf of the first respondent. He orally argued and amplified first respondent's submissions as set out in its heads of

argument. In those heads of argument he took a point *in limine* requiring the Court to determine whether the applicant has made out case for acquisitive prescription in accordance with sections 6 and 19 of the Prescription Act No 68 of 1969 in his papers. Mr Smuts represented the applicant and also submitted heads of argument, upon which he based his oral submissions.

[6] By agreement between Counsel, Mr Smuts commenced with his arguments and dealt with the point *in limine* during the course of his argument, while Mr Marcus responded and Mr Smuts briefly replied.

[7] I shall deal with the point *in limine* first.

[8] By electing not to answer the allegations made by the applicant in his founding affidavit by way of an answering affidavit, it follows that the facts raised in applicant's founding affidavit were not placed in dispute and should be accepted. This was in fact conceded by Mr Marcus. It is important to note that none of the three respondents upon whom the application was served, elected to answer the applicant's allegations. The second and third respondents did not even oppose the application.

[9] The following allegations by the applicant in his founding affidavit were not placed in issue:

a) the applicant is the registered owner of Erf 2205, situated at Promenaden Road, Windhoek;

b) the applicant bought this erf and the buildings thereon on 24 January 1968;

c) there are two means of access to the Erf 2205 namely, firstly, an entrance from Promenaden Road, which has a high gradient with 74 steps, making it very difficult to use, in particular for elderly and disabled persons and for moving sizeable objects; and secondly, an access road from Nelson Mandela Avenue next to the Klein Windhoek River at the bottom of Erf 2205;

d) the river bank on which the access road is situated, is owned by the State;

e) for a period 49 years the applicant and his predecessor in title used this access road to gain entrance to Erf 2205, the applicant personally using it for a period of 38 years;

f) the access road was used openly, without force and without any objection from any party, as though the applicant and his predecessor were entitled to do so;

g) this access road was also used by the residents, tenants, visitors, guests and colleagues of the applicant;

h) the daily use of the access road by the applicant and his predecessor had been consistent and so obvious that the general public, as well as the owner thereof would have been able to see and take notice of it;

i) daily use of the access road included, *inter alia;*

i. daily use for exit and entrance to the property;

ii. installing of a new gate on the northern boundary where the access road begins;

iii. the strengthening of the river bank on the northern boundary of the property; and

iv. improving and maintaining the access road throughout the period that it was used by the applicant and his predecessor.

[10] Section 6 of the Prescription Act No 68 of 1969 [hereinafter called the 1969 Act] provides as follows:

> ***"Subject to the provisions of this Chapter 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 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."***

Section 19 of the Act provides that the State is bound by the 1969 Act. It common cause that the 1969 Act is applicable to this application.

[11] The applicant bears the *onus* to prove that he acquired a praedial servitude to access to the road by means of acquisitive prescription. *(LAWSA, Vol 21; para 139, p 52; Welgemoed v Coetzer & Others* 1946 TPD 701; *Bisschop v Stafford* 1974 (3) SA

1(AD) at 9D; *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd & Another* 1972 (2) SA 464 (W) at 470C; *Molotlegi v Brummerhoff & Another* 1955 (1) SA 592 (T) at 595B-C). Such *onus* must be proved on a balance of probabilities. *(Minister of Forestry v Michau* 1957 (2) SA 32 (N) 34D-E; *LAWSA, supra,* para 139, p 53).

[12] Although there has been a difference in the wording of the Prescription Act, No 18 of 1943 (the 1943 Act), which is the predecessor of the 1969 Act, it has been recognised by several decisions of South African Courts that the common law provisions for acquisitive prescription had not been overruled. As far as it is not inconsistent with the earlier Acts, the common law remained in full force. Fagan, JA described it in the following words in *Swanepoel v Crown Mines Limited* 1954 (4) SA 596 A at 603H 604B:

> ***"I do not, however, read the Prescription Act as qualifying our law of prescription in the sense of attempting to set out exhaustively, or exhaustively can be done in a code, all rules and principles by which that branch of the law is in future to be applied. It was intended to clarify or settle certain aspects of the law relating to prescription, and enacts no more than is necessary for that purpose. The object of sec. 2 is to state the period required for the acquisition of ownership by prescription, just as sec. 3 fixes the periods for various types of extinctive prescription. The first sub-section of each of these sections says what is meant by the terms "acquisitive prescription" and "extinctive prescription" respectively, and says enough to identify the legal concepts to which these names are applied, but neither sub-section purports to state all that is required to bring either kind of prescription into operation. <u>Common law requirements not affected by</u>***

specific provisions of the Act are therefore not inconsistent with the Act and are not repealed by sec. 15." (My emphasis)

The same position apparently applies in respect of 1969 Act. The several cases referred to in this regard include: *Albert Falls Power Co (Pty) Ltd v Goge* 1960 (2) SA 46 (N) at 47C-D; and *Morkels Transport (Pty) Ltd v Melrose Foods& Another (Pty) Ltd* 1972 (2) SA 464 (W) 467D-F.

[13] Section 2 of the 1943 Act provided:

> ***"(1) Acquisitive prescription is the acquisition of ownership by the possession of another person's movable or immovable property or the use of a servitude in respect of immovable property, continuously for thirty years nec vi, nec clam, nec precario.***
>
> ***(2) As soon as the period of thirty years has elapsed such possessor or user shall ipso jure become the owner of the property or of the servitude as the case may be."***

The 1943 Act was of course never applicable to Namibia or the old South West Africa. The Prescription Proclamation No 13 of 1943, promulgated on 25 May 1943, was applicable to the territory of South West Africa and it was based on the South African Prescription Act, No 18 of 1943. Section 2 of the South West Africa Proclamation was similar to s 2 of the South Africa Act of 1943. The relevant South African decisions were also applicable in respect of the Proclamation. *(Pienaar v Rabie* 1983 (3) SA 126 (A) at 133E-H).

[14] The first respondent based its objection to the applicant's allegation that it acquired a praedial servitude by means of a acquisitive prescription on a failure to prove the requirement that it was non precarious, in the sense that one of the essential elements of prescriptive acquisition is that the occupation must be a user adverse to the true owner. Mr Marcus based this contention on the decision in *Malan v Nabygelegen Estates* 1946 AD 562, which has often been followed by the South African Courts. In that case Watermeyer CJ said the following on page 573-4:

> ***"It will be seen from these references that*** *"nec precario"* ***does not mean without permission or without consent in the wide sense accepted by the learned Judge, but "not by virtue of a precarious consent" or in other words "not by virtue of a revocable permission" or "not on sufferance."***
>
> ***In order to avoid misunderstanding, it should be pointed out here that mere occupation of property*** *"nec vi nec clam nec precario"* ***for a period of thirty years does not necessarily vest in the occupier a prescriptive title to the ownership of that property. In order to create a prescriptive title such occupation must be a user adverse to the true owner and not occupation by virtue of some contract or legal relationship such as lease or usufruct which recognises the ownership of another."***

This *dictum* has been followed in several cases. It has also been said that the list provided by the Watermeyer CJ, in the *Malan v Nabygelen Estates case* is not an exhaustive one, but merely contains examples of user which would not be adverse. (*Morkel's Transport (Pty) Ltd v Melrose Foods & Another (Pty) Ltd, supra,* at 478H). The author Saner refers to this requirement of user adverse to the owner as part of the common law requirement for acquisitive prescription, despite the fact that it is not mentioned in so many words in either the 1943 or 1969 Acts. *(Saner – Prescription in South African Law,* - 6, paragraph 1.4).

[15] The requirements of *nec vi and nec clam* are not in dispute. The applicant stated in his founding affidavit that he (and his predecessor) used this access road openly and peacefully, namely without force. This is not disputed and must be accepted. As mentioned, the only issue that the first respondent disputes, is the requirement of *nec precario,* in the sense that the access road was not used adverse to the rights of the owner, an argument based on the case of Malan *v Nabygelegen Estates, supra,* and subsequent decisions.

[16] The applicant does not claim ownership by way of acquisitive prescription, but that he acquired a praedial servitude to the access road by way of acquisitive of prescription in terms of 1969 Act. It is common cause that it is an affirmative servitude. Consequently, proof of *quasi possessio* would be enough, as stated by Jansen JA in *Bisschop v Stafford* 1974 (3) SA 1 (AD) at 9G. Saner, (who is also contributor of the latest edition of Joubert's *Law of South Africa,*Vol 21, regarding "Prescription", submitted that although the requisites for the acquisition for a servitude by a acquisitive prescription are differently expressed in each statute, independent of whichever statute is applicable, it will in effect be necessary to prove *quasi possessio* or use adverse to the owner for a period of 30 years. (LAWSA, supra, para 135, p 49). It must be further be proved that user of the servitude had been constituted by *de facto* exercise of the servitude by claiming acquisition, as if of right, for such period. The requirements for the acquisition of a servitude through prescription is governed by the same principles applicable to the acquisition of ownership by the prescription, with the necessary modifications (i.e. possession, no

requirement of *bona fides* etc.) (*Bisschop v Stafford*, supra, p 7A – 9H; LAWSA, supra, para 135 p 49 – 50). After full discussion on the acquisition of a servitude by acquisitive prescription, Jansen, JA came to the conclusion that there is a little difference between the requirements for the acquisition of servitudes and those of acquisition of ownership. The learned Appeal Court Judge also stated that as far as affirmative servitudes are concerned, prove of *quasi possessi*o will be sufficient, at least *prima facie,* to exclude a *precarium* in the circumstances. He said on page 9G of the *Bisschop v Stafford case, supra*:

> ***"(Such a proposition) … would relieve a claimant of the burden of proving a negative which he in many cases could not establish simply because the passage of time has made it impossible."***

[17] The principle has been accepted in several decisions that full *possessio civilis* is required for such acquisition through prescription and not mere detention. For *possessio civilis,* both possession, as well as the *animus* (intention) to possess the property, are necessary. The possessor must have the intention *(animus)* to keep the land as if he was the owner. (*Morkels Transport (Pty) Ltd v Melrose Foods & Another (Pty) Ltd, supra,* at 474B-F).

Saner submitted that there is little or no distinction to be made between adverse user or adverse possession and *possessio civilis* as a requirement for acquisitive prescription. He submitted that, although it has been held in some of the dicta to which I have referred, that it must be user adverse to the owner, in reality it would seem that an allegation of *possessio civilis* is what is required and would in fact

suffice. In this regard he referred to the case of *Albert Falls Power Co (Pty) Ltd v Goge*, supra, where Jansen J (concurring with Caney J) said the following at 48E:

> ***"I do not wish to be understood to hold that "possession adverse to the owner" is anything more or less*** *than possession civilis* ***(Cf Welgemoed v Coetzer & Others 1946 TPD 701 at 712). On the assumption that an allegation of*** *possessio civilis nec vi nec clam nec precario,* ***would have been sufficient, the exception must, in my opinion, in any event be upheld."***

[18] From the judgment in *Bisschop v Stafford, supra,* it seems that the Appellate Division of South Africa regarded "adverse user" not to be a separate requirement, but indeed an element of *possessio civilis.* When dealing with the subject of adverse user, Saner suggested in his contribution in LAWSA that the better view would probably be that there is no distinction to be made between adverse use or adverse possession and *possession civilis* for acquisitive prescription. He based his suggestion on several dicta, such as those in the cases of *Albert Falls, supra,* p 48E – F; *Motlegi, supra*, p 594-5 and *Bisschop, supra*, p 8E – F. It was stated as follows in *LAWSA, supra*, para 134, p 49:

> ***"Once a person has actual possession with the intention of becoming the owner of the thing, it would seem to follow that such possession (and user) will be adverse to the owner. Consequently, whilst an allegation to the effect that there must be user adverse to the owner is often made, it would seem that an allegation of*** *possession civilis* ***is all that is required."***

[19] In his work, *"Prescription in South African Law,"* Saner suggested on p 2-13 that the user is still adverse even if he realises during the course of the prescriptive period

that he is not the owner, as long he continues to possess with the intention of becoming the owner. He based this on the decision in *Campbell v Pietermaritzburg City Council* 1966 (2) 674 (N) where it was held that, although the user became aware that the property in fact belonged to somebody else (the Pietermaritzburg City Council in that case), and that he ought to pay rent for it, he was not prohibited to acquire it by prescription. In dealing with the issue of the possessor realising that he is not the true owner during the course of the prescription period, Miller J (as he then was) said the following in the Campbell case on p 681B-E:

> "***In any event, a realisation by plaintiff or his predecessors-in-title that they were in fact not owners of the home paddock but that it belonged to the Corporation, would not of itself operate to negative their "adverse user" of the property. As I understand the authorities, property may be possessed "adversely to the rights of the true owner" if it is held and possessed by one who, knowing that he is not the legal owner, nevertheless holds it as if he were: i.e. without manifesting recognition of the true owner's rights as such (Malan v Nabygelen Estates, 1946 AD, 562 at p. 574: Du Toit and Others v Furstenburg and Others 1957 (1) SA, 501 (O) at p. 505; Payn v Estate Rennie and Another 1960 (4) SA 261 (N) at p. 262). The enquiry is whether plaintiff possessed and used the property as if he were the true owner or whether, by words or conduct, he extended to the true owner recognition of his rights. If he in fact gave no recognition of the owner's rights but used the property as if he were the owner, then it seems to me from a practical point of view to make no difference whether one says that he had*** *possessio civilis* ***or that his possession was adverse to the owner. I agree with Mr Hunt, for the plaintiff, that if the Court is satisfied that there was*** *possessio civilis* ***in the sense in which the phrase was explained in the Welgemoed v Coetzer, supra, it is superfluous to inquire further where there was adverse user and that if, on the hand, the Court is satisfied that possession was*** *nec precario* ***and adverse to owner's rights, it will also have been*** *civilis possessio.*"

The court further pointed out that the plaintiff's position was at all times so open that the Council could have ascertained the true position if its officers had been more vigilant.

[20] The generally accepted basis of the acquisitive prescription is that the owner is penalised for his carelessness, in looking after the property. (Saner, *supra,* p 1-3; *Welgemoed v Coetzer & Another, supra,* at 711; *LAWSA, supra,* para 122, p 42).

Murray, J stated in this principle as follows in *Welgemoed v Coetzer & Another, supra,* at 711:

> ***"The basis of prescriptive acquisition in our law is that the true owner is now penalised for his carelessness in looking after his property, and the ownership of the property is acquired by another person who has occupied it and continuously possessed it as his own for the prescriptive period without it having been claimed by anyone else. …The object of the principle, …is not to confer a benefit on the possessor (who may be even mala fide) of another's property, but presumably in the public interest*** *"om den ontachtsamen en slordigen eigenaar voor zyn goed te beter te doen zorgen."*

[21] I have earlier referred to the Appeal Court case of *Pienaar v Rabie*. In that case the South African Appeal Court confirmed a decision of the predecessor of this Court in respect of acquisitive prescription. Although none of the requirements of *nec vi nec clam nec precario* were in issue, the defence raised the argument that if there was no negligence on the part of the true owner, acquisitive prescription was impossible. The Appeal Court rejected that argument and decided that although negligence and carelessness may cause the true owner to loose his property through acquisitive

prescription, there is no rule in our positive law prescribing that lack of proof of such negligence would prohibit acquisitive prescription. (*Pienaar v Rabie, supra,* 138H – 139A).

[22] From the uncontested allegations by the applicant, it is apparent that he not only had physical possession of the property, but in fact had the intention to use it as if it was his own and he did use it in such a manner for more than 30 years. In my view, this clearly establishes *possessio civilis* and I am in agreement with Mr Smuts that the applicant acquired a praedial servitude to this access road by way of acquisitive prescription. The State, as owner, could always have prevented him form using the access road, but did not do so and it was clearly careless in looking after its property.

[23] The point raised *in limine* by the first respondent is consequently rejected and the Court finds that the applicant has complied with the requirements of the Act and the common law.

[24] The remaining issue to be decided is that what the first respondent relied on in its notice in terms of Rule 6 (5)(d)(iii). As a point of law the first respondent submitted that because of certain old agreements and a title deed, the Municipality of Windhoek, and not the State, "may be" the owner of the property on which the access road is situated. It is common cause that should that be the position, section

65 of the Local Authorities Act, No 23 of 1992 precludes anyone, including the applicant, from acquiring a servitude by means of acquisitive prescription.

[25] As mentioned before, it was conceded by Mr Marcus that these agreements and the title deed were not properly put before the Court and that is the obvious reason why an attempt was made to do so by way of affidavits deposed to on behalf of the Municipality of Windhoek and the Registrar of Deeds. In objection to the provision of the documents in order to put them before Court, the applicant brought an application in terms of Rule 30, namely averring that those proceedings were irregular, out of sequence and not in conformity with the Rules of Court and requested that they be struck. The effect would be the same if condonation and leave to file the documents are refused.

[26] The applicant unequivocally avers in his founding affidavit that the State is the owner of the property, namely the access road. First respondent had the opportunity of filing an answering affidavit and to dispute this allegation, but it did not. Consequently, the first respondent accepted that the State is the owner of the property. What the first respondent attempted to indicate is that it would argue that the Municipality of Windhoek "may be" the owner of that property and that no acquisition by way of servitude through acquisitive prescription could occur due to section 65 of the Local Authorities Act, No 23 of 1992. This argument is then based on to 1911 Agreement between the Municipality of Windhoek and the representative of the Treasury of German South West Africa and the title deed. Despite service,

neither the Registrar of Deeds nor the Municipality of Windhoek, disputed the applicant's allegation of ownership by the State. Consequently, both have accepted the allegation of ownership by the applicant and elected not to oppose the application and to dispute it by way of answering affidavits, on any ground, including the existence of these documents. On this basis the application was set down for hearing and the only issue which was raised by the applicant, and later conceded, was that the foundation of that legal argument was not properly put before Court.

[27] Less than the week before the hearing of the application, the first respondent filed a notice of motion in which condonation for its non-compliance with the Rules of Court was sought and further requesting leave to file the affidavits of Ms de Kock and Mr Beukes. As mentioned this application was opposed and led to a Rule 30 application.

[28] The Court has to decide whether this Rule 30 application by the applicant should succeed or whether the condonation and leave sought by the first respondent should be granted. Any decision against the first respondent would effectively bar the production of three affidavits and consequently the documents on which the first respondent relies. Without such affidavits, these documents are not before Court and there would be no substance in the first respondent's proposed legal argument.

[29] When a respondent chooses only to limit his opposition to a preliminary objection on a point of law and decides not to file any opposing affidavits, the court

is faced with two unsatisfactory alternatives, should the objection fail. The first is to hear the application without giving the respondent the opportunity to file opposing affidavits, or secondly, to grant a postponement to enable the respondent to file an opposing affidavit. Both are unsatisfactory and although the second option seems to be the better one, it will inevitably cause a delay and incur additional costs. The courts have held that generally a respondent should file an opposing affidavit on the merits and raise an objection *in limine* on the law. (Erasmus – *Superior Courts Practice*, B 1-44-1-45 and cases referred to therein).

[30] The acceptance of further affidavits in the discretion of the Judge, which discretion must of course be exercised judiciously. The approach of a court in this regard has been formulated by Ogilvie Thompson JA (as he then was) in *James Brown & Hamer (Pty) Ltd v Simmons N. O.* 1963 (3) SA 656 (AD), an approach, which have frequently been followed by other Judges. On 660D-F Ogilvie Thompson JA stated this approach in the following words:

> ***"It is in the interests of the administration of justice that the well-known and well established general rules regarding the number of sets and the proper sequence of affidavits in motion proceedings should ordinarily be observed. That is not to say that those general rules must always be rigidly applied: some flexibility, controlled by the presiding Judge exercising his discretion in relation to the facts of the case before him, must necessarily also be permitted. Where, as in the present case, an affidavit is tendered in motion proceedings both late and out of its ordinary sequence, the party tendering it is seeking, not a right, but an indulgence from the Court: he must both advance his explanation of why the affidavit is out of time and satisfy the Court that, although the affidavit is late, it should, having regard to all the circumstances of the case nevertheless be received."***

[31] I am not satisfied and have no intention of condoning the non-compliance of the Rules by the first respondent to allow the production of the said affidavits. The first respondent clearly elected not to answer and to deny any factual allegation by the applicant, including that of the ownership of the access road. The attempt by the first respondent to put the allegation of ownership of the property, that it decided not to deny, in doubt by relying on the 1911 Agreements and the title deed is clearly untenable. The first respondent's decision not to answer on the merits, was a considered one and its acceptance of the applicant allegations substantiates it. The first respondent continued to rely only on this legal point and attempted to rectify its conduct by seeking condonation and placing affidavits by Ms de Kock and Mr Beukses before Court.

If these was any substance in arguments based on these agreements, I would have expected the third respondent to dispute the issue of ownership, which it did not. Even if the third respondent discovered later that it was the owner on the strength of the 1911 Agreements and title deed, I would have expected an application by the third respondent to put such new facts, of which it was not aware earlier, before the Court. The third respondent did not do so, but the first respondent attempted to produce affidavits deposed to by an employee of the third respondent in aid of its argument that, despite admitting ownership by the State, the Municipality of Windhoek "may be" the owner. This amounts to speculation and of clutching at straws. The procedure followed by the first respondent cannot be condoned. Consequently, first respondent's application for condonation is denied, as well as leave to submit these further affidavits.

[32] In the light of this decision, the first respondent's submissions set out in its notice in terms of Rule 6 (5)(d)(iii), are not supported by evidence and the arguments in that regard and -cannot be upheld. The applicant gave notice of intention to oppose the first respondent's notice of motion, but instead of deposing to an answering affidavit, decided to apply an order in terms of Rule 30, with supporting affidavits. As mentioned, the effect of the Court's decision is the same and in respect of the applicant being successful with his opposition against allowing the three affidavits, he is entitled to such costs. A cost order in respect of the applicant's opposition to the notice of motion, therefore, includes all such costs, namely including those in respect of the Rule 30 application.

[33] In the result, the applicant succeeds in his application and the following orders are made:

1. Declaring that the Applicant, in his capacity as owner of Erf 2205 Windhoek, and his successors in title have by means of acquisitive prescription (in accordance with sections 6 and 19 of Act 68 of 1968) acquired a praedial servitude to access and use the road which begins on the Northern boundary of the said Erf and extends to Nelson Mandela Avenue, as described in annexure "1" to the Applicant's founding affidavit.

2. Directing the Registrar of Deeds to transfer the above servitude, as detailed in Annexure 1 to the Founding Affidavit, in the Deeds Registry and against the Title deed of the Applicant's property.

3. Ordering the first respondent to pay the costs of this application, as well as the applicant's costs of opposition to first respondent's notice of motion.

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MULLER, J

ON BEHALF OF THE APPLICANT:	**MR D. F. SMUTS, SC**
INSTRUCTED BY:	**KOEP & PARTNERS**
ON BEHALF OF THE 1ST RESPONDENT:	**MR N.MARCUS**
INSTRUCTED BY:	**GOVERNMENT ATTORNEYS**