IN THE HIGH COURT OF SOUTH AFRICA

KWAZYLY-NATAL DIVISION, PIETERMARITZBURG

Case no: 16587/2015

In the matter between:

SHALENDRAN GOPAUL PADAYACHI **APPLICANT**

versus

CHANDRAKANTHI PILLAY N.O **FIRST RESPONDENT**

DHARAM NAICKER N.O **SECOND RESPONDENT**

JUDGMENT

MADONDO AJP:

Introduction

[1] The applicant, the registered owner of the Remainder of Erf [..]52, Pietermaritzburg, seeks an order declaring him to have acquired by prescription a servitudal right of way over the property, the Remainder of Erf [..]53, Pietermaritzburg, whose registered owner is the late Vengadalam Narrainsamy

Padayachi (the Applicant's grandfather), and in respect of which the first and second respondents are co-executors. Secondly, directing the respondents to sign all documents necessary to have such servitude registered against the title deed of Erf [..]53 in favour of Erf [..]52.

[2] The first and second respondents are opposing the granting of such order on the grounds that the applicant and his predecessor in title, his father, never used the driveway or lane in question as if they were the owners thereof but they did so with the consent of their (respondents') brother, Narrainsamy Nadesan (NN), who was then an executor in the estate late of their father, Vengadalam Narrainsamy Padayachi.

Factual Background

[3] Vengadalam was married in community of property to Lyamah Padayachi; the mother of the respondents and the grandmother of the applicant, who is also now deceased. The first and second respondents are joint executors of the estate late of both Vengadalam and his wife, Lyamah.

[4] Vengadalam acquired various properties in Pietermaritzburg, situated in Church Street and Loop Street respectively. Vengadalam and Lyamah made wills on 19 September 1955 and 17 November 1955 respectively. Vengadalam passed away on 13 January 1966 and Lyamah on 7 March 1969. However, before his death, Vengadalam donated and transferred Erf [..]52 to the applicant's father, Narrainsamy Sholendran Padayachi (NS), which on his death passed onto the applicant through testamentary succession.

[5] Erf [..]52 and Erf[..]53 are adjoining each other. They were originally both owned by Vengadalam, the applicant's grandfather. Erf [..]53 is registered in the name of the applicant's grandfather. It is still so registered as the estate of his late wife, Lyamah, has not been finalised due to certain conditions in their wills (Vengadalam's and Lyamah's). In terms of the will it is required that the devolution of the properties, movable and immovable, shall not take place until all liabilities and debts are liquidated and discharged by the estate and, further, until his unmarried

son Narrainsamy Nadesan Padayachi (NN) and unmarried daughter, Chandrakanthi Pillay, have married and further until the death of his wife, Lyamah.

[6] As a result of the non-fulfilment of the condition as contained in clause 15 of Vengadalam's will of his son NN getting married, the property Erf [..]53, Vengadalam had bequeathed to NN, did not devolve upon the latter. But, NN remained in this property, as it was his parental house, until his death on March 2012.

[7] The same provisions are contained in the will of Lyamah. Though she died on 7 March 1969 the winding up and distribution of her estate have not yet been finalised. Four sons and seven daughters were born of the marriage between Vengadalam and Lyamah. The applicant's father was their second born child, and the second son. NN was their third child and their third son. The first child and son was Narrainsamy Poopenthren Padayachi (NP). The respondents are the only surviving children of Vengadalam and Lyamah. When Vengadalam died on 13 January 1966, NN was appointed the executor in his estate. Once again when his wife, Lyamah died on 7 March 1969, NN was appointed executor in her estate late. When NN died on 30 March 2012 the respondents replaced him as the joint executriks in the estate late of both Vengadalam, their father, and Lyamah, their mother.

[8] In fact, in terms of the will drawn by Vengadalam four persons were appointed joint executors of his estate, namely; his wife, Lyamah; his oldest son, Narrainsamy Poopenthren Padayachi (NP); his middle son, Narrainsamy Sholendran Padayachi (NS), the father of the applicant, and his youngest son, Narrainsamy Nadesan Padayachi (NN). Lyamah in her will she appointed her husband, Vengadalam, NP and NS as the executors in her estate late.

[9] In respect of the control and management of the properties, Vengadalam desired that his wife and three sons should jointly control and manage same. In terms of the will NS should account to his mother, Lyamah, in respect of all revenues received from Vengadalam's estate and pay through her from time to time the liabilities due by Vengadalam's estate.

[10] In terms of the will until the devolution of Vengadalam's immovable properties to his sons, as his will provided, all immovable properties owned by Vengadalam should be controlled and managed by his executrix and executors and an administratix and administrators, who would have power to collect rents, interest, debts, principle sums due on any mortgage bond and all revenues due to his estate and should pay from time to time taxes and rates due in respect of his immovable properties, carry out any repairs and liquidate from time to time any indebtedness due by him whether on mortgage bond or otherwise.

[11] Initially, it was Lyamah and her two sons; NP and NS who were charged with the control and management of Vengadalam's properties. However, as NP was a headmaster at a government school he could not devote the whole of his time controlling and managing the affairs of Vengadalam's Estate, he should in terms of the will be relieved of his duty as far as it was possible.

[12] Lyamah, the mother, passed away first on 7 March 1969. NS died on 16 March 1999. It is not disclosed when NP passed away. However, it is not in dispute that when the letters of executorship were issued to NN on 5 December 2005, NN was the only surviving co-executor of Vengadalam's estate. The applicant avers that Vengadalam in his will stated that if NP could not undertake his office due to his commitments as headmaster, then only NS should be responsible for the task. He goes on to state that Vengadalam made no mention of his intention that NN should have anything to do with the control and management of his properties, after his (Vengadalam's) death.

[13] According to the applicant his father, NS, assumed the sole responsibility for the control and management of Vengadalam's property, being assisted by NN. The applicant alleges that the joint estate was *de facto* managed by his father with the assistance of NN. This was the position since the death of Vengadalam in 1966 until the passing away of the applicant's father in 1999. It was only then NN took the sole responsibility of administering the properties for the benefit of Vengadalam's estate. According to the applicant his father was the last surviving executor testamentary.

[14] It is common cause between the parties that during 1960, before death of Vengadalam, the applicant's father built a block of flats on Erf [..]52 which took the entire width of the premises thereof. Access to the back of Erf [..]52 has since then been gained via Erf [..]53. The lane/driveway over Erf [..]53, giving access to the back of Erf [..]52, has since been used by the applicant, his father the tenants and the officials of the Municipality. The lane runs on the border of Erf [..]52 over Erf [..]53 for a distance of approximately 43 metres. According to the applicant, the applicant's father, at his own costs, had compacted and resurfaced the lane/driveway, maintained and upkept it. The Msunduzi Municipality also built a substation at the back of Erf [..]52 which supplies electricity not only to a large area around the block of flats and extending to the other streets.

[15] The applicant avers that he and his predecessor in title (his father, NS) have since 1960 been exercising such right of way openly, peacefully and as of right, as if they were owners thereof. According to the respondents the house at Erf [..]53 was a matrimonial home of their parents and the respondents' parental home, and it was where the respondents and all other siblings were born and bred. In fact, NN resided in this house until he met his death on 30 March 2012.

[16] The applicant and his predecessor in title had according to the respondents, an access to Erf [..]52 across Erf [..]53 with the permission of NN which he granted in his capacity as the executor of the estate. An access via Erf [..]53 to the rear of the back of flats on Erf [..]52 was controlled. The gate was erected to control access to Erf [..]52 across Erf [..]53 and the gate was in fact always locked. The keys to the gate were kept by NN. This was the position since the erection of the block of flats. The respondents are adamant that the access that the applicant and his predecessor in title enjoyed via the driveway/lane was with the consent of NN, it was periodical and that as such it could not establish a real right of servitude in their favour. More so, the applicant's predecessor in title was obliged to pay certain sums of money to NN as a consideration for the use of the driveway to park vehicles at the rear of Erf [..]52.

[17] The respondents go on to aver that the driveway is not the only access to the rear of Erf [..]52. There is also a passage between Erf 2451 and Erf [..]52 which is

used by the municipality and the tenants of the flats on Erf [..]52. In the respondents' submission the granting of a servitudal right of way over Erf [..]53 would seriously detract from the value of the property.

[18] The applicant alleges that the gate was installed by his father. He, the applicant, and NN agreed to have the roller gate installed. Both NN and the applicant had keys to the gate. However, the applicant admits requesting NN for the registration of the existence of the servitude over the lane against the title deed of Erf [..]53. He advances reasons for so doing, as that he had a fear of losing his right to use the driveway in the event of NN passing away and the property being sold to a third party who knew nothing of such use.

[19] The applicant avers that the gates were put up as a security measure as the property administrators had experienced the problem of vagrants entering the property through the lane/driveway, urinating and stealing copper wire on the premises. According to the applicant the gates were erected with his approval and assistance. The applicant alleges that since the death of Vengadalam in 1966 until 1999 control of access to the lane/driveway was exercised by his father. On the death of the applicant's father, the management of the property passed on to NN, and at the time, according to the applicant, the servitudal right of way had already accrued.

[20] The applicant denies that his father was obliged to pay certain sums of money to NN for the use of the right of way or parking the vehicles at the rear of Erf [..]52. The "carpark money" referred to in NN's diary entry relates to money collected by his father from the tenants of Erf [..]53, which money NN would take and bank in the estate account. The applicant used to be present at the meetings between his father and NN. The "monthly statements" referred to in the diary entry are the vouchers pertaining to all expenses incurred on behalf of the estate or for the amount of money expended by either the applicant's father or NN. They would produce the vouchers at these meeting and they would be refunded out of moneys collected for the month. Entry regarding a driveway gate for R900, three safety gates at R80, R240 and R120 relates to the expenses for the erection of the gates on the properties.

[21] This response by the applicant has been prompted by the second respondent's version in her answering affidavit that NN administered the immovable properties of the estate of both Vengadalam and Lyamah so meticulously in that he made entries on daily basis in the diary of any event that had taken place. NN in his diary make an entry in August 1993 that "Brother gave car park money half from August 1992 – July 1993 R772 plus monthly instalments."

Issue

[22] The issue raised by the facts of this case is whether the applicant and his predecessor in title have been using the right of way over Erf [..]53 openly, peacefully and as of right, as if they were owners thereof.

[23] Normally, proceedings for the relief sought in this case are brought by way of action. In the present case, the applicant seeks final relief by way of Notice of Motion. Such proceedings are appropriate for the resolution of legal issues based on common-cause facts and are not designed to determine probabilities. A litigant is entitled to seek relief by way of notice. However, if he has reason to believe that facts essential to the success of his claim will probably be disputed he chooses that procedure at his own peril, for the court in the exercise of its discretion might decide neither to refer the matter for trial nor to direct that oral evidence on the disputed facts be placed before it but to dismiss the application. But if, notwithstanding that there are facts in dispute on the papers before it, the court is satisfied on the facts stated by the respondent, together with the admitted facts in the applicant's affidavits, the applicant is entitled to relief (whether in respect of all his claims or one or more of them) it will make an order giving effect to such finding, with an appropriate order as to costs. The court does not exercise discretion in motion proceedings whether or not to grant claims established by the admitted or undisputed facts, except perhaps in very extra ordinary circumstances. The applicant has a right to an order in respect of such claims. See *Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd* 1982 (1) SA 398(A) at 430 G-H-431A.

[24] In *Plascon-Evans Paints Ltd v Van Riebeeck Paints* 1984 (3) SA 623 (A) at 634 H-635 C a rule was laid that where in proceedings on notice of motion disputes

of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, maybe granted if those facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the respondent justify such order. In *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 26 Harms DP said:

> 'It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.'

See also *South Coast Furnishers v Secprop Investments* 2012 (3) SA 431 (KZP) at 433 G-H.

[25] However, if the factual disputes raised in the papers are real, genuine, bona fide and material and they cannot be resolved on papers, the court may adopt a different approach in dealing with the application before it. It may either dismiss the application on this ground alone or refer the matter for the hearing of oral evidence on the disputed facts. Also, a robust approach in motion proceedings can be taken and the matter decided on the probabilities, if clear falsity emerges from the papers. See *South Coast Furnishers'* case at 439 F.

[26] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed.
See *Wightman t/a JW Construction v Headfour (Pty) Ltd & another* 2008 (3) SA 371 (SCA).

[27] The question which I now have to decide is whether the factual disputes raised by the respondents in the papers are real, genuine bona fide and material disputes of fact, justifying the referral of this matter for the hearing of oral evidence on them. The parties in this matter have asked this Court to decide the matter on papers despite factual disputes it may find to exist in the matter.

[28] The respondents have placed facts before this court in support of their allegation that the applicant and his predecessor in title had used the driveway/lane

in question in order to have access to the rear of Erf [..]52 with the consent of NN in his capacity as the executor of the estate late of Vengadalam, that such use was periodical and that, in the premises, it could not have constituted a servitudal right of way over Erf [..]53 in favour of Erf [..]52. Such facts include the correspondence between the applicant's erstwhile attorneys, Govender, Pather and Morgan Attorneys-at-law, and NN attorneys, Masttross Incorporated, dated 10 September 2009 and 16 September 2009 respectively, annexed to the Respondents' Answering Affidavit as "DN7" and "DN8" respectively. These facts also touch upon the entries NN made in his diary in which he recorded all the occurrences of his days as the executor and administrator of the estate in question. It should be borne in mind that the correspondence and the diary referred to above are not per se in dispute save certain items of their contents. At the time of the institution of these proceedings the applicant must have been aware of the contentious nature of these facts and that the disputes of fact were bound to develop at the motion proceedings.

[29] Mr Ender for the applicant has argued that the second respondent, being the deponent to the Answering Affidavit, was not involved in the events and circumstances on which she relies in opposing the application and much of what she says is either hearsay or pure speculation. Strangely, what the second respondent states, finds support in "DN7" and "DN8" in all material respects. In "DN8", for instance, NN states categorically that the driveway/lane in question was given to the applicant and his predecessor in title with his (NN's) consent. NN adds that it was periodical and that as such it clearly could not establish a real servitudal right of way in favour of the applicant. He does not end there, but he goes on to state that numerous gates had been installed on the driveway over the past few decades. He concludes by saying that the applicant's right of access to the driveway was not adverse to his rights. This serves to corroborate the second respondent's version that the applicant used the driveway with the consent of NN and that NN had erected gates in order to control access to the driveway. These allegations cannot be said that they do not constitute real, genuine bona fide and material factual disputes.

[30] Also, it has been the applicant's contention that when NN erected the gates in order to block access to the driveway a servitudal right of way had already accrued to him and his predecessor in title. However, the second respondent in her affidavit

states that since the erection of the block of flats NN was exercising control over an access to Erf [..]52 via Erf [..]53. In my view, these are serious disputes of fact which the second respondent has pertinently and unambiguously addressed in her affidavit, being supported by the correspondence and recordings referred to above. In "DN7" the applicants have given instructions to his attorneys to demand from NN the removal of the control access gates, all building material and any other obstruction on the lane/ driveway in question. This, also serves to corroborate the version of the second respondent that the applicant used the driveway with the consent of NN. In the premises, it cannot be said that the version of the second respondent consists bald and uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, so far-fetched or so clearly untenable that the court could be justified in rejecting it merely on papers. Nor can it be said that the version of the second respondent is fanciful and wholly untenable or so inherently improbable that it is untenable. It was, therefore, improper for the applicant to bring these proceedings on the notice of motion well-knowing or should have known that serious disputes of fact were bound to develop. See *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd. 1949(3) SA 1155(T)* at 1162, 1168.

[31] I now turn to decide whether the applicant has tendered any evidence upon which a reasonable presiding officer acting reasonably, might or could have found for him coupled with the question whether any clear falsity has emerged from his papers. The existence of the falsity, will justify the adoption of a robust approach and deciding the matter on the probabilities. In which event, this court must also satisfy itself as to the inherent credibility of the applicant's factual averments in determining whether he is entitled to the final relief he seeks. See *Plascon Evans'* case 634H – 635C.

[32] The applicant alleges that he and his predecessor in title have since 1966 to date been exercising the servitudal right of way across Erf [..]53 onto Erf [..]52 openly, peacefully and as of right, as if they have been owners thereof. In support of his claim the applicant relies on the Prescription Act 68 of 1969. Section 6 of this Act provides:

> '… a person shall acquire a servitude by prescription if he has openly and as though he were entitled to do so, exercised the rights and powers which a person who has a

> right to such servitude is entitled to exercise, for an uninterrupted period of thirty years or, in the case of a praedial servitude, for a period which, together with any periods for which such rights and powers were so exercised by his predecessor in title, constitutes an uninterrupted period of thirty years.'

[33] This Act came into operation on 1 December 1970. Before this Act came into operation, acquisition by prescription of servitude was governed by the Prescription Act 18 of 1943. Where the prescriptive period began before the new Act came into operation but was completed afterwards, the 1943 Act applies in respect of the former and the 1969 Act in respect of the latter period. The relevant provisions of 1943 Act define acquisitive prescription of a servitude as 'the use of a servitude in respect of immovable property, continuously for thirty years *nec vi, nec claim, nec precario.* In *Pezula Private Estate (Pty) Ltd v Metelerkamp and Another* 2014(5) SA 37 (SCA) para 10 Theron JA took a view that:

> 'Nec precario, the absence of a grant on request, has been subsumed into ss1 and 6 of the current Prescription Act by the requirement that the potential acquirer of the servitude must act as though he or she was entitled to exercise the servitudal right. It follows that either express or tacit consent would mean that the alleged acquirer did not act as if he or she was entitled to exercise the servitudal right.'

[34] *Nec vi* may be understood as 'peaceably', and nec clam as 'openly' – a 'so patent' that the owner, with the exercise of reasonable care, would have observed it. See *Bisschop v Stafford* 1974(3) SA (AD) at 8.

In *Smith and others v Martin's Executor Dative,* 16 S.C, 148 at p. 151 De Villiers CJ said that *nec precario:*

> 'does not mean without permission or with consent in the wide sense…., but 'not by virtue of a precarious consent' or in other words 'not by virtue of a revocable permission' or 'not on sufference.'

[35] The Appeal Court in *Malan v Nabygelegen Estate* 1946 (AD) 562 at573 defined a pre carium as:

> 'something of which the use is granted at the request of the grantee for so long as the grantor is willing to allow him to have it.'

[36] Precarium is the legal relationship which exists between the parties when one party has the use or occupation of property belonging to the other on sufferance, by the leave and licence of the other. Its characteristic is that the permission to use or occupy is revocable at the will of the person granting it. See *Malan* case at 573. In the acquisition of ownership by prescription, *nec precario* postulates the absence of a grant on request. The request and grant need not be express but may be effected tacitly, in such a case it might be well that the requirements for establishing a tacit agreement should be met. See *City of Cape Town v Abelsohn's Estate* 1947 (3) SA 315 (C) at 327-328; *Bisschop v Stafford case* at 8 A-D. Whether the consent is express or tacit has a similar legal consequence that its proof shows that the acquirer did not act as if he or she was entitled to a servitudal right.

[37] In *Malan* case at 574 Watermeyer CJ pointed out:

> '… mere occupation of property *'nec vi nec clam nec precario'* for a period of thirty years does not necessary vest in the occupier a prescriptive title to the ownership of the 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.'

The person exercising the use must do so with the intention to appropriate to himself or herself a servitude, and, therefore, the intention to act adversely to the owners' rights on the part of the alleged acquirer must be established.

[38] One of the requisites of prescriptive prescription is that the user must have taken place without consent because by law there can be no prescription unless there has been adverse user. If there was consent there must be no prescription. See *Malan* case at 566, 571.

[39] In the present case, the onus is on the applicant to show that his possession or user and that of his predecessor in title was *nec vi, nec clam and nec precario*. In *Bisschop* case at 9C-E, the court held that a claimant satisfies *prima facie* these

requirements (for prescription) by proving peaceable and open occupation adversely to and, therefore, to the exclusion of the rights of the true owner for thirty years. In the present case, it is common cause between the parties that the applicant and his predecessor in tittle used the servitudal right of way peacefully and openly. At issue, is whether they did so as of right (*nec precario*), as if they were owners thereof.

[40] The respondents deny that the applicant and his predecessor in title used the driveway / lane as if they were owners thereof and state that NN had since the erection of the block of flats been exercising control over the access to the back of Erf [..]52 via Erf [..]53 and that the applicant and his father had the use of the driveway with the consent of NN.

[41] According to the second respondent NN managed to control an access onto Erf [..]52 via Erf [..]53 by erecting gates on the driveway so to be able to block an access thereto. The gates were always locked and the keys to the gates were kept by NN. This according to NN in "DN8", started happening some decades ago. The second respondent states that NN had administered the immovable properties of the estate of Vengadalam and Lyamah meticulously and kept a diary in which he made entries on daily basis of any event that had taken place with regard to an estate. She avers that the applicant's father who was the owner of the flats on Erf [..]52 was obliged to pay certain sums of money to NN as a consideration for the permission to use the drive way to park the vehicles at the rear of Erf [..]52. In the second respondent's version this is also evident from the entries her late brother, NN had made in August 1993.

> 'Brother gave a park money half from August 1992 – July 1993 R772 plus monthly instalments.'

[42] The other recording is to the effect that 'Adam told several people not to urinate … lock gate please', Adam an employee of NN, installed the gates including the pedestrian gate plus antitheft and a bracket razor coil. The recording of August 2008 reads, 'Driveway closed. No one to use.' These are important recordings necessary for the determination of an issue between the parties. According to the second respondent it is apparent from the above that her brother, NN, had at all

times objected to the free use of the driveway by the applicant and his father and recorded this in his diary.

[43] In his Founding Affidavit the application makes no mention of his father as having a sole responsibility to control and administer the affairs of the estate late of Vengadalam, since the death of his father Vengadalam, on 13 January 1966. However, he mentions for the first time in his Replying Affidavit that his father had since the death of Vengadalam in 1966 until his passing away in 1999 been managing the affairs of Vengedalam's joint estate. NN was virtually under the control and supervision of the applicant's father assisting with the collection of rentals and some other related administrative activities. It was only after the death of the applicant's father NN stepped into his shoes as the *de facto* manager of the Vengadalam's estate. According to the applicant, his father, NS, was the last surviving executor testamentary. This could not be true since it is not in dispute that NN was one of the four co-executors of Vengadalam's estate appointed by the latter in his last will, "SP5". Further, the applicant's claim must stand or fall on his founding affidavit.

[44] It is highly improbable and far-fetched that NN who had been duly appointed co-executor of the joint estate of Vengadalam and endowed with same power as his co-executors would virtually become subservient to the applicant's father, taking instructions from and reporting to him in the carrying out of certain administrative tasks. It does not appear from the applicant`s Founding Affidavit as to under what circumstances his father assumed a sole responsibility to control and manage the estate of Vengadalam. In the same breath, the applicant says that Vengadalam had made no mention of his intention that NN should have anything to do with the control and management of his properties, following his (Vengadalam's) death. According to the applicant if NN were to be involved, he must have been under the authority and supervision of his father, NS, as the person appointed in terms of the will to exercise control and management of those properties. Whereas in his founding affidavit the applicant states this as a fact and the true position that NN was only subservient to NS. This demonstrates the lack of tangible evidence as to his father's sole responsibility to control and manage the estate properties of Vengadalam, on the

part of the applicant. His claim in this regard appears to be purely based upon conjecture.

[45] The applicant alleges in his Replying Affidavit that Vengadalam in his last will and testament had stated that if NP could not undertake his office due to his commitments as headmaster then only NS, his father, should be responsible for the task, given to both of them in the will. Needless, to say that the applicant`s version in this regard is not only false but also misleading, for Vengadalam did not say this in his affidavit at all. What Vengadalam had said in his will was that if his son, NP, as a head master at a government school 'may not be able to devote the whole of his time to control and manage the affairs of his Estate he shall be relieved of his duty as far as possible….' The probabilities are that it was at that stage NN assumed the responsibility of a co-executor controlling and managing the immovable properties of the joint estate.

[46] On the applicant's version that his father assumed the sole responsibility to control and manage the affairs of the joint estate and that NN was there only to take instructions from and reporting to his father in the performance of certain administrative tasks, it would mean that no one would prevent his father, NS, from using the driveway across Erf 24653 onto Erf [..]52. By law there can be no prescription unless there has been an adverse user. If there was no one to prevent the using of the driveway/lane by the applicants father, for the period from 1969 to 1999 when he passed away, there could be no right acquired by prescription. See also *Malan's* case at 571. Moreso, according to *nulli res sua servit* principle an owner cannot have a servitude over his or her own land. See Erlox Properties (Pty) Ltd v Registrar of Deeds 1992(1) SA 879 (A) at 887 F – J.

[47] The applicant computes the uninterrupted period of thirty (30) years as from 1969 and it is for that reason he avers that it is the Prescription Act 68 of 1969 which finds application in this matter (paragraph 13.2 of the applicant`s Founding Affidavit). This seriously contradicts what he says in paragraph 13 of his Founding Affidavit that he and his father used the lane openly as if they were owners thereof for an uninterrupted period of over 30 years, in fact since 1960. In order to demonstrate that this has not been an oversight or due to a mistake on his part in paragraph 15.1

of his Founding Affidavit the applicant alleges that he has accordingly complied with the provisions of the Prescription Act 68 of 1969.

[48] The second respondent avers that she has personal knowledge of the fact that NN exercised control over access to Erf [..]52 via the driveway since the time of the erection of the block of flats on Erf [..]52 in 1960. The applicant's predecessor in title was according to the second respondent obliged to pay certain sums of money to NN as a consideration to use the driveway to park vehicles at the rear of Erf [..]52.

[49] According to the applicant his father erected the block of flats during 1960. However, he says the prescription period started running from 1 December 1970, the day on which the current Prescription Act came into operation. He does not proffer any explanation as to what the position was in the period between 1960 and 30 November 1970 with regard to an access to Erf [..]52. Regard should also be had to the fact that in the period between 1960 and 13 January 1966 the registered owner of the property in question was still alive.

[50] Mr Roberts for the respondents has argued that when NN installed an access control gate during 2008, the running of the prescription was thereby interrupted. I do not find any substance in this argument since from 1970 to 2008 is 38 years. By that time the servitudal right of way could have already accrued to the applicant. On the alternative, the respondents aver that the prescription period was interrupted in August 1993 when the applicant's father paid certain sums of money to NN as a consideration for the use of the right of way or parking the vehicles at the rear of the property.

[51] According to the applicant the "Car Park Money" referred to in NN's diary entry relates to rental his father was the collecting from the tenants of Erf [..]53, which NN would receive from him and deposit it into the estate's bank account. The respondents have not been challenged when they say Erf [..]53 was their parental home and that NN occupied that property until he died on 30 March 2012. It is not in dispute that the applicant and his father used the driveway in order to park the vehicles at the back of Erf [..]52. The description NN gave to the money he had received from the applicant's father is more consistent with the version that the

applicant's father paid this money for the use of the driveway. The second respondent's version in this regard is more probable and plausible as compared to that of the applicant. The probabilities, therefor, are that the applicant's father had paid money for that purpose and in which event such action on the part of the applicant's father had an effect of interrupting the prescription period in respect of the use of the driveway, if it was at the time running.

[52] An access via Erf [..]53 to the rear of the black of flats on Erf [..]52 was according to the respondents controlled. Gates were erected to block access across Erf [..]53 to Erf [..]52. In order to ensure such control NN locked the gates and kept the keys in his possession. The version of the applicant is that the gates were put up as a security measure as the property administrators had experienced the problem of vagrants entering the property through the driveway/lane, urinating and stealing copper wire on the property premises. The erection of gates and the locking thereof had according to the applicant happened with his approval and assistance. However, there are conflicting versions by the applicant as to when the gates were first erected and by whom.

[53] In his Founding Affidavit the applicant says that his uncle, NN, put a gate for security reasons at the entrance of Erf [..]53, 533 Church Street, during 2010, and provided him (the applicant) with a remote control and pedestrian key (para 10.4). This is suggestive of the fact that the controlled access gate was first installed in 2010. Whereas in his Replying Affidavit the applicant says that from 1964 to 1999 his father was controlling access to the lane (para 27.2). He then adds that his father installed the driveway gate long before his death in 1999 (para37.1). The conflicting assertions by the applicant, leave a question in the applicant's version as to who first installed the access gate, when and who exercised control over the access to Erf [..]53, since 1960.

[54] In his Founding Affidavit the applicant does not disclose that on 10 September 2009 through his attorneys he caused a letter ("DN7") to be addressed to NN demanding that the latter should remove the gate, the building material and any obstruction on the driveway. In "DN7" dated 10 September 2009 the applicant states that NN had installed a gate and dumped building material on the lane and that he

(NN) was thereby obstructing his (applicant's) use of his servitude. The applicant then demanded that NN should remove the gates, building material and any of the obstruction within 48 hours, failing which the applicant would file an urgent application to the High Court for an order compelling NN to do so. However, NN refused to remove the gate and the building material from the driveway with no legal consequence. That NN should remove a gate is an implied assertion by the applicant that it was NN who had installed it, without the concurrence of the applicant and his predecessor in title. It can, therefore, reasonably be inferred from the applicant`s non-disclosure of "DN7" that the applicant was concealing the fact that NN had independently installed the gate and that he had been exercising control over an access to the driveway for decades.

[55] Once again, the applicant has failed in his Founding Affidavit to disclose NN's reply ("DN8") dated 16 September 2009 to 'DN7" in which he (NN) through his attorneys avers that the applicant acquired access to Erf [..]52 via Erf [..]53 with his consent. Further, that such access was periodical and that as such it could not establish a real right in favour of the applicant. NN added that the applicant's right of access to the driveway was not adverse to his (NN's) rights. Apart from demonstrating that the applicant knew that genuine disputes of fact would arise in this matter, such non-disclosure by the applicant shows that the applicant has no legitimate claim to the servitudal right of way in question.

[56] With regard to "DN7" the applicant denies that he instructed his attorneys that NN installed a gate against his wishes. The gate was installed by consent between the applicant and NN. According to the applicant Mr Morgan, his attorney, misconstrued his instructions to him. The applicant states that his instructions to Morgan were not that NN should remove the gate but the building material rubble, obstructing the lane. NN had caused the building rubble to be placed on the lane and that he thereby obstructed the traffic. However, the applicant does not proffer any explanation as to how it came about that Mr Morgan, his attorney, misconstrued his instructions to him.

[57] The applicant denies obtaining from NN permission to use the right of way but he admits requesting NN for the registration of the existence of the servitude over

the lane against the title deeds of the estate property. Such request for the registration of the existence of the servitude is, in my view, indicative of the fact that the applicant was using the driveway with the consent of NN.

[58] The applicant states that the roller gate was installed by consent between him and NN in 2007 and that he, NN, supplied him with his own set of remote control device. The applicant goes onto state that when the gate motor ceased working in 2009 he appealed to NN to have it repaired since the applicant's son who was an invalid could not enter on Erf [..]52 via the lane. In the condition in which the applicant's son was, he could not alight from the vehicle and open and close the gate manually, as the remote was no longer working. However, NN did not accede to the applicant's request and he simply allowed the matter to lie unattended to. It stands to reason that had the applicant and his predecessor been exercising control over the driveway and had installed the control gates for that purpose, there could be no reason for the applicant to approach NN when the gate motor ceased to operate and when he wanted to have the building material rubble removed from the driveway. He would have attended to all this by himself.

Conclusion

[59] The nature and extent of the evidence which has been adduced in this case, seems to be more consistent with the conclusion that the user, by the applicant and his predecessor in title was not and has not been adverse to NN, as the representative of the true owner of the property in question. As a consequence, such user could not have established a real right of servitude in favour of the applicant and his predecessor in title. It would not be that all the people that used the driveway namely; the applicant and his predecessor in title, the tenants of the block of flats and the Msunduzi Municipality had each free and independent use of the driveway without the consent or involvement of either Vengadalam or NN. In the premises, I am not satisfied that the applicant has discharged the onus resting on him to prove that he is entitled to succeed on his claim.

Order

[60] In the result, the application is dismissed with costs and such costs to include costs consequent upon the employment of senior counsel.

Date reserved: 1 December 2016
Date delivered: 16 March 2017

For Applicant: Adv Ender
Instructed by: Carlos Miranda Attorneys
Ref: Mr Miranda

For Respondent: Adv Roberts SC
Instructed by: Messrs. Sangham Incorporated
Ref: RC/ZK/P1277