QUARRIES OF BOTSWANA PTY LTD v GAMALETE DEVELOPMENT TRUST AND OTHERS 2 2010 2 BLR 595 HC

Citation: 2010 2 BLR 595 HC

Court: High Court, Lobatse

Case No: Misca 45 of 2008

Judge: Dingake J

Judgement Date: May 27, 2010

Counsel: rnrnK N Monthe for the applicant.rnL N Liebowitz with him T Ramokhua and D MakatiMpho for the respondents.

Flynote

Land law and conveyancing - Tribal land - What constitutes - Land incorporated in tribal territory not automatically becoming tribal land as such would amount to unlawful expropriation of private land - Tribal Land Act (Cap 32:02), s 7 and Tribal Territories Act (Cap 32:03), s 2

Headnote

The applicant was lessee of a quarry site at which it conducted a mining operation. Access to the quarry was gained by way of a road running across a farm known as 'Forest Hill'. The respondents erected a boom across the entrance to the road, thus denying the applicant's employees and the people with whom it did business access to the road and to the quarry. The closure of the road caused the applicant's business to almost grind to a halt. The applicant alleged that the respondents' conduct was unlawful inasmuch as the farm was tribal land and members of the public, which included its employees and the people with whom it did business, had an unfettered right of access to the land. For that allegation, the applicant relied on s 7 of the Tribal Territories Act (Cap 32:03) as having converted the farm from private to public land, ownership of which vested in the Malete Land Board; and on the definitions of 'land' and 'tribal area' as contained in s 2 of the Tribal Land Act (Cap 32:02). The applicant sought a final interdict against the respondents. The respondents resisted the application, alleging that the farm was owned by the Bamalete tribe, as reflected in the registered title deeds, and that such ownership had not been extinguished by operation of s 7 of the Tribal Territories Act as that would have amounted to an unlawful expropriation of privately owned land.

Held:
(1) The definitions of 'land' and 'tribal area' as contained in s 2 of the Tribal Land Act could not be interpreted as meaning that all land in a tribal territory was public land vesting in a land board because such an interpretation would be absurd. It would have the effect of taking land from private hands without due process or compensation.

(2) The farm Forest Hill belonged to its registered owner, as reflected in the title deeds.

(3) Section 7 of the Tribal Territories Act simply incorporated the farm into the Bamalete tribal territory. It did not, upon being so incorporated, become tribal land.

(4) It followed that the Balete tribe, as represented by the first respondent, was the owner of the farm.

(5) The
first respondent was accordingly entitled to place the boom across the entrance to the road and the applicant was not entitled to its interdict.

Case Information

Cases
referred to:

Admark
(Recruitment) (Pty) Ltd v Botes 1981 (1) SA 860 (W)

Celliers
v Lehfeldt 1921 AD 509

Joosub v
Immigrants' Appeal Board 1919-1920 CPD 109

Kaputuaza
and Another v Executive Committee of the Administration for the Hereros and Others 1984 (4) SA 295 (SWA)

Kgarebe v
National Food Technology Centre [2006] 1 B.L.R. 57, IC

Malan v
Nabygelegen Estates 1946 AD 562

Minister
of Transport for Ontario v Phoenix Assurance Co [1974] 39 DLR (3d) 481

Molatlhwe
and Others v The Diocese of Botswana of the Church of the Province of the Cental Africa and Another [2008] 3 B.L.R. 317

Osman v
Osman 1983 (2) SA 706 (D)

Principal
Immigration Officer v Bhula 1931 AD 323

Seaford
Court Estates v Asher [1949] 2 KB 481; [1949] 2 All ER 155

Setlogelo
v Setlogelo [1914] AD 221

Van
Rensburg v Coetzee 1979 (4) SA 655 (A)

APPLICATION
for a final interdict. The facts are sufficiently stated in the judgment.

K N
Monthe for the applicant.

L N
Liebowitz (with him T Ramokhua and D Makati-Mpho) for the respondents.

Judgement

DINGAKE
J:

This is an application for a final interdict moved by the applicant against the respondents.

The final interdict sought is in the following terms:

'2.1 That remainder of Forest Hill 9-KO is part of Bamalete Tribal Territory in terms of Section 7 of the Tribal Territories Act, Chapter 32:03 of the Laws of Botswana and in consequence, the said remainder of Forest Hill 9-KO is tribal land and therefore public land vested in Malete Land Board to which Applicant, its customers or persons intending to do business from Applicant's quarry site are entitled to traverse without the consent of the 1st Respondent and or alternatively:

2.1.1 1st, 2nd and 3rd Respondents' conduct was unlawful in placing a boom across an entrance to Farm remainder of Forest Hill 9-KO and preventing Applicant the use of a road through such piece of land.

2.1.2 the Applicant enjoys a servitude of right of way over the Southern boundary of the Farm Traquiar 10-KO as well as remainder of Forest Hill 9-KO, alternatively;

2.1.3 Applicant enjoys a way of necessity in order to access a public road namely, A1 Highway from Gaborone to Lobatse and or alternatively;

2.1.4 Applicant as member of the public enjoys a right of way over

DINGAKE J

remainder Forest Hill 9-KO by virtue of acquisitive prescription to the extent that such road has been in existence and use for a period in excess of 30 years and or alternatively in terms of the Prescriptions Act, Chapter 13:01; and or alternatively

2.1.5 The route in dispute is a road in accordance with law.

2.1.6 The Respondents bear the costs of this application jointly and severally, the one paying the others to be absolved.'

This litigation finds its origin in an urgent application moved by the applicant sometime in early 2008 in which the applicant sought and was granted an interim order restraining the respondents from preventing the applicant, its transporters and customers, from using Mmokolodi route. Mmokolodi route is the route that leaves the village of Mmokolodi going eastwards, through various portions of the farm Traquair No 10-KO, before passing through the contiguous piece of land being the remainder of the farm Forest Hill No 9-KO.

The latter farm lies at the centre of this dispute.

Purely for convenience, the remainder of Forest Hill No 9-KO, shall throughout this judgment be referred to simply as 'farm Forest Hill'.

It is imperative to describe the parties involved in the theatre of combat in this matter so as to best appreciate their interests in this litigation.

The

applicant is Quarries of Botswana (Pty) Ltd, a private company duly incorporated in terms of the Company Laws of Botswana. It is a lessee of a quarry site within the Kweneng Tribal Territory, near Mmokolodi Village. On the papers filed of record, it appears that the applicant was granted the lease aforesaid in or about 2003. The applicant holds a licence granted to it by the Director of Mines to mine granite and micro-granite from the Mmokolodi Quarry. The applicant appears to have been incorporated in 1981.

The first respondent is a trust duly registered in accordance with the Deeds Registry Act (Cap 33:02). The trust appears to have been formed and or registered for the purposes of managing land assets of the Ba-Gamalete tribe. It appears to have been formed on or about 5 March 2003. The inaugural trustees of the trust, included the fourth respondent, Kgosi Kgolo ya Ba-Gamalete, Kgosi Mosadi Seboko, as the custodian.

The second respondent is the secretary of the Mmokolodi Environmental Advisory Committee, of Mmokolodi village. The committee appears to have been established by the community of Mmokolodi at a Kgotla meeting sometime in January 2007.

The third respondent is an employee of the first respondent.

The second and third respondents were cited ostensibly because they were instrumental in the blockage of the route that traverses farm Forest Hill. Their conduct appears to have triggered the urgent application referred to earlier.

The fourth respondent is the Kgosi Kgolo ya Ba-Gamalete, who the parties agree is an interested party by virtue of her position as Kgosi Kgolo ya Ba-Gamalete. She was initially not joined as a party but, in due course and following an application to join her, the parties agreed that such joinder was necessary and an order to that effect was issued by this court.

DINGAKE J

It is common cause that the applicant, its transporters and customers' use Mmokolodi route, inter alia, to ferry the materials from the quarry site through Mmokolodi Village and past the southern boundary of the portions of farm Traquair No 10-KO and farm Forest Hill to join the A1 main road from Gaborone to Lobatse.

It seems plain on the papers filed of record that the first respondent was aggrieved by the conduct of the applicant of traversing through what it considered its 'private' property without its authority.

The discontent arising out of the aforesaid conduct of the applicant had been simmering for a while (if one has regard to the minutes of several meetings held at Mmokolodi village and correspondence between their respective attorneys) before matters came to a head on or about 7 and 8 February 2008.

On 8 February 2008 or thereabout, the respondents blocked or caused to be blocked the route that passes through farm Forest Hill.

The pictures filed of record by the applicant, capturing the stand off reinforce a sense, at least in my mind, of a near chaotic situation which may easily have turned violent.

The obvious

result of the aforesaid blockage was that the applicant's business almost ground to a halt as its customers could not conduct the usual business, including transporting the stones through the normal route that traversed through farm Forest Hill.

It seems plain on the papers that the encounter at the boom gate between the embattled protagonists was not pleasant at all and, eventually, the applicant on or about 15 February 2008, filed an urgent application with this court and eventually obtained an interim interdict referred to earlier.

The interdict essentially maintained the status quo in that it allowed the applicant and its customers and or other persons intending to obtain or do business from the applicant's quarry site to use the Mmokolodi road that traverses through farm Forest Hill.

Now, in determining whether the applicant is entitled to a final interdict, the issue of legal ownership of farm Forest Hill has been thrust to the center, and once established it would go some way towards answering the question whether the applicant has demonstrated a clear right as one of the essential elements in obtaining a final interdict.

The parties have agreed that, in the event the court should determine ownership of farm Forest Hill in favour of the applicant, then it shall not be necessary to determine the balance of the issues and the same will fall away.

It is further agreed between the parties that, in the event the court determines the issue of ownership of farm Forest Hill in favour of the first respondent acting on behalf of the Balete Tribe, then the court shall determine the balance of the issues, in order to determine whether or not the applicant, Quarries of Botswana, is entitled to a final interdict.

The remaining issue(s) pertain to the applicant's claim that it has a public right of way through farm Forest Hill, alternatively, that it enjoys a way of necessity in order to access a public road, namely the A1 highway from Gaborone to Lobatse, and or that it has acquired ownership by prescription. As part of the remaining issues, the court must of necessity

DINGAKE J

answer the question whether or not respondents' conduct was unlawful in placing a boom across an entrance to farm Forest Hill and preventing applicant the use of the route that traverses the farm.

The applicant contends it enjoys a servitude of right of way over the southern boundary of the Farm Traquair 10-KO as well as farm Forest Hill, alternatively, it contends that it enjoys away of necessity in order to access a public road namely, the A1 highway from Gaborone to Lobatse.

The applicant further insists that, as a member of the public, it enjoys a right of way over farm Forest Hill by virtue of acquisitive prescription to the extent that such road has been in existence and use for a period in excess of 30 years and or alternatively in terms of the Prescriptions Act (Cap 13:01).

The applicant further contends that the route in dispute is a road in accordance with law.

The
respondents, on the other hand, deny that the applicant has a public right of way and of necessity through farm Forest Hill and that the contested route is a public road and or that the applicant enjoys a right of way through farm Forest Hill by virtue of acquisitive prescription.

Requirements
for a final interdict

It is
settled law that the following constitute the requirements of a final interdict:

(a) A
clear right

(b) An
injury actually committed or reasonably apprehended; and

(c) The
absence of similar protection by any other remedy. (See Setlogelo v Setlogelo 1914 AD 221; Kaputuaza and Another v Executive Committee of the Administration for the Hereros and Others 1984 (4) SA 295 (SWA) at p 317E.)

It is also
trite that the onus is on the applicant to prove that it is entitled to a final interdict. The
standard of proof is a balance of probabilities.

It follows
therefore that it would be incompetent to ask the court to interdict the respondent from stopping the applicant from continuing with conduct that it has no right to perform. (See Celliers v Lehfeldt 1921 AD 509.) In the case of Admark (Recruitment) (Pty) Ltd v Botes 1981 (1) SA 860 (W) the court denied the applicant
the remedy of a final interdict with respect to a restraint of trade on the basis that the restraint of trade was unenforceable in that it was too wide.

Authorities
also seem to suggest that in certain situations, even though the applicant may succeed to prove a legal right, it does not follow that a final interdict will invariably issue. For instance, although the parties to a marriage contract are bound in law to be faithful to each other, with the result that in marriage, fidelity is a recognised right, a court may be hard pressed to interdict a party who has been unfaithful from committing adultery again. (See Van Winsen et al Herbstein & Van Winsen: The Civil Practice of the Supreme Court of South Africa (4th ed Juta and Co Cape Town 1997) p 1067; Osman v Osman 1983 (2) SA 706 (D).)

The
authorities are legion that whether or not the applicant has a clear

DINGAKE J

right is a
matter of substantive law. (See L T C Harms Civil Procedure in the Supreme Court (2nd ed Butterworths Durban) p 500.)

Having
regard to the requisites of a final interdict and the authorities cited above, it is now opportune and proper to investigate the first element that needs to be established in order to obtain a final interdict, namely a clear right. This takes us straight to the issue of the legal ownership of farm Forest Hill.

Legal

ownership of farm Forest Hill

The issue of
legal ownership of farm Forest Hill is hotly contested. Mr Monthe, learned counsel for the applicant, contended that the remainder of farm Forest Hill is part of and within the Bamalete Tribal Territory, it being in the Bamalete Tribal Territory and/or Bamalete tribal area by virtue of the provisions of s 2 of the Tribal
Land Act (Cap 32:02) and s 7 of the Tribal Territories Act (Cap 32:03).

According to
Mr Monthe, the Parliament of the Republic of Botswana, in passing the Tribal Territories Act and including a piece of land being farm Forest Hill as part of the Bamalete Tribal Territory, rendered any title held by the respondents obsolete by operation of law.

Mr Monthe
argues that any interpretation of the law to the effect that Bamalete and their chief are not subject to a statutory instrument would be incorrect and would be intended to defeat the very clear purpose of the Legislature. Mr Monthe, learned counsel for the applicant, in a passionate and eloquent submission to the court indicated that the Bamalete Tribal Territory is no longer exclusively for the benefit
of Bamalete as a tribe but for the citizens of Botswana and that it vests in Malete Land Board.

It was Mr
Monthe's submission that in view of the 1993 amendment to the Tribal Land Act making tribal land accessible to all and for the benefit not only of persons of a particular tribe but for the citizens of Botswana as a whole, it is inconceivable that Kgosi Mosadi Seboko, the fourth respondent, will hold for all citizens
land in Bamalete Tribal Territory parallel to the land board of the area.

It bears
emphasising that, according to Mr Monthe, the piece of legislation that transformed, for lack of better word, farm Forest Hill, from being private land to public land vesting in Malete Land Board, is the Tribal Territories Act, more specifically s 7 thereof.

The above,
in essence, constitute the submission of the applicant regarding the legal ownership of the remainder of farm Forest Hill.

The
respondents, on the other hand and with no less passion and eloquence, contend that farm Forest Hill is owned by Bamalete Tribe by virtue of the title deed earlier referred to, and filed with the deeds registry of the Republic of Botswana.

Mr Liebowitz
SC, learned counsel for the respondents, submitted that the Balete, as represented by the fourth respondent, by virtue of being the legal holder of title in farm Forest Hill, their ownership cannot be extinguished because the title aforesaid clearly and authoritatively denote and record the title of ownership on the farm.

Mr Liebowitz
SC also firmly contended that Mr Monthe's submission

DINGAKE J

that the
rights of the Balete to the said piece of land has been rendered obsolete cannot be correct and that it has no basis in law in that no transfer of title and ownership as required by law has been effected as required by the Deeds Registry Act to any

entity. He therefore contended that the net effect of Mr Monthe's submission is unacceptable as it suggests that farm Forest Hill has been expropriated by the State and/or government.

According to Mr Liebowitz SC, such a contention would be unmeritorious as any such private to public accession of land rights which fails to meet the fundamental requirements of an agreed or fair and prompt compensation by the State to the title holder would offend the principle of natural justice.

Mr Liebowitz SC contended further that what the Tribal Territories Act and the subsequent amendment did was to incorporate farm Forest Hill into Bamalete Tribal Territory and that by such incorporation ownership of farm Forest Hill was not changed.

I have spent anxious and, on occasion, sleepless nights considering the legal ownership of farm Forest Hill, and tried to come to terms with the implications of Mr Monthe's submissions that farm Forest Hill is tribal and/or public land that vests in the Malete Land Board and that the effect of the passage of the Tribal Territories Act as amended, more particularly s 7 thereof is to divest the Bamalete of ownership of a piece of land with respect to which they hold title in terms of the Deeds Registry Act.

Mr Monthe's contention that farm Forest Hill is tribal land speaks, in essence, to a particular category of land in Botswana's land tenure system. Purely to place the classification of land in its proper perspective, it may be helpful to give a very brief overview of the land tenure system in Botswana. This exercise is helpful as it will illuminate the various classifications of land in Botswana and their historic origins. This would, in turn, help in interpreting whether farm Forest Hill is tribal land or not.

In terms of the existing legal literature or scholarship, it appears incontrovertible that Botswana has a plural land tenure system. As the learned author Clement Ngo'ong'ola states, the bulk of the land which is predominantly held and occupied by indigenous peoples under customary notions of land tenure falls within the category called 'tribal land'. The other categories are 'State land' and 'freehold land'. State land as the name suggests belongs to the State. The learned author makes the point that 'State land' during the colonial period was called 'Crown lands'. He says that 'to some extent' both State and freehold land are governed by 'received law' in contradistinction to tribal land which is largely held under customary law. (See Clement Ng'ong'ola, Land problems in some peri-urban villages in Botswana and problems of conception, description and transformation of 'Tribal' land tenure Vol 36, No 2 Journal of African Law.)

I have found the above academic piece helpful in illuminating my path, but must add that the meaning that I shall finally attach to the various statutory provisions cited before me, more particularly ss 2 and 7 of the Tribal Land and Tribal Territories Acts respectively, is mainly textual. I have read s 2 of the Tribal Land Act, which defines 'land' and 'tribal area'. The definition of 'land' and 'tribal area' is circuitous and may have absurd consequences to the extent that it may give the impression to some

that all land in a tribal territory is tribal land. This is so because such an interpretation would have the effect of extinguishing private rights properly held in terms of other valid statutory instruments such as the Deeds Registry Act.

It is trite law that the courts should avoid interpretations to statutory provisions that have absurd consequences. In my view, a literal interpretation of s 2 of the

Tribal Land Act that defines 'land' and 'tribal area' in a manner that suggest that all land in a tribal territory vests in the land boards and or is public land would lead to absurd consequences and should not be adopted.

Most of our work as judges is consumed by interpreting statutory and/or contractual provisions. With respect to statutory interpretation, the courts have developed a wide array of techniques to assist them interpret statutory provisions. Quite often when the literal interpretation appears to yield absurd results, we attempt as best as we can to find out what the intention of parliament in enacting the said provision(s) was and in so doing the courts are not usurping the function of the legislature. It is the courts that are confronted with real live issues that may not have been contemplated by the legislature in formulating the provisions of statute.

Where the true and perfect intention of the legislature has received imperfect expression, the court must not hesitate to make the logically defective letter of the enacted law logical (Minister of Transport for Ontario v Phoenix Assurance Co [1974] 39 DLR (3d) 481).

The attempt to find out the true intention of the legislature is often called the purposive approach. The purposive approach enjoins the court to give an interpretation that will render the legislation effective, instead of being ineffective or unjust.

It is trite that to depart from the literal interpretation on the basis that to follow it may lead to absurdity requires that the absurdity must be glaring.

Alongside the well known canons of interpretation such as the literal rule and purposive approach, there are also presumptions that help the courts in interpreting statutes. One such presumption appears particularly relevant to this case. It is the presumption that the legislature does not intend that which is harsh, unjust and unreasonable.

The above presumption is applied to the interpretation of statutes on the basis that every legal system strives to achieve standards of reasonableness, justice and fairness and that the law making organ of the system must thus be presumed to enact with this aim in mind. (See Joosub v Immigrants' Appeal Board 1919-1920 CPD 109 at p 111.)

In the case of Principal Immigration Officer v Bhula 1931 AD 323 it was held that:

'Where however two meanings may be given to a section, and one meaning leads to harshness and injustice, whilst the other does not, the court will hold that the legislature rather intended the milder meaning than the harsher meaning.'

All the above authorities reinforce the position I subscribe to that a judge, because of the special nature of his role, cannot change the fabric from

DINGAKE J

which the law is woven, but he/she has the right to iron out the creases (See Seaford Court Estates Ltd v Asher [1949] 2 KB 481 at p 499; Kgarebe v National Food Technology Centre [2006] 1 B.L.R. 57, IC and Molatlhwe and Others v The Diocese of Botswana of the Church of the Province of the Central Africa and Another [2008] 3 B.L.R. 317.

Applying the

above canons of interpretation and the presumption referred to earlier, I am clear in my mind that it would be absurd to interpret s 2 of the Tribal Land Act that defines 'land' and 'tribal area' and the corresponding section of the Bogosi Act (Cap 41:01), to which reference is made by the Tribal Land Act, to mean that all land in a Tribal Territory is public land vesting in the land boards, in this particular case the Malete land board, because such an interpretation would be harsh, unjust and/or unreasonable. Such an interpretation would take, by the backdoor, property that is in private hands without due process and without any form of compensation whatsoever.

As indicated earlier, every legal system strives to achieve standards of reasonableness, justice and fairness and I would be the last to assign an interpretation to any statutory provision that would be unjust, unreasonable and have harsh consequences. If Parliament had intended to extinguish the rights of the first respondent to farm Forest Hill it would have specifically said so and not left it to guesswork.

In my considered view, farm Forest Hill belongs to its owner as reflected in the title deed. Any person and or entity claiming ownership must show that the said farm was duly transferred by a deed of transfer registered at the Deeds Office; alternatively, that the said farm was duly acquired in terms of the Acquisition of Property Act (Cap 32:10).

The Deeds Registry Act provides that ownership of land may be conveyed from one person to another by means of a deed of transfer executed or attested by the registrar. This court has not been furnished with evidence suggesting that title in farm Forest Hill ever passed to any entity as required by the Deeds Registry Act or any other law. It follows therefore that Mr Monthe's argument that the first respondent's title to farm Forest Hill has been extinguished by operation of law is without merit and cannot be sustained.

Mr Monthe's submissions, if accepted, would render people or entities who have title to land which is registered in terms of the Deeds Registry Act, extremely vulnerable, so long as such title is within a tribal territory as defined by the Tribal Territories Act.

In my respectful view, Parliament in its wisdom passed the Deeds Registry Act in order to ensure that the process of acquiring rights in land is clear, orderly and offers landowners the greatest possible protection and security. Even if it were to be assumed that the parliament of Botswana has no regard for private property, it is doubtful, in the face of the constitutional provision entrenching the right to property that Parliament would have the constitutional competence to do so. Section 8(1) of the Constitution of Botswana provides that there should be 'prompt payment' of 'adequate compensation' whenever 'property of any description' or 'the interest in or right over property of any description' has been compulsorily taken possession of or acquired.

DINGAKE J

In my considered view, s 7 of the Tribal Territories Act simply incorporated farm Forest Hill into the Bamalete Tribal Territory. It cannot be credibly said that because the remainder of farm Forest Hill is part of the tribal territory of Balete then ipso facto or ipso jure it becomes part of tribal land to be governed by the Tribal Land Act. I must repeat that, if Parliament had intended such a far-reaching consequence to extinguish or take away pre-existing rights, it would have said so in very clear terms. The view I take is that no parliament can be presumed to act in a high-handed fashion that extinguishes rights, willy nilly, without complying with the principle of natural justice or without recourse to the

principle of international law.

It follows
in my view, therefore, that Balete Tribe as represented by Gamalete Development Trust (first respondent) and Kgosi Mosadi Seboko of the Balete Tribe (the fourth respondent) are the registered and/or legal owner of the farm Forest Hill.

Having
determined that farm Forest Hill belongs to the Balete Tribe pursuant to the deed of transfer no 387/1925, I now turn to consider the next question being whether or not the applicant enjoys servitude rights of way over farm Forest Hill and other questions incidental thereto.

It is trite
that a servitude is a limited real right or ius in re aliena which entitles its holder either to the use and enjoyment of another person's property or to insist that such other person shall refrain from exercising certain entitlements flowing from his or her rights of ownership over and in respect of his or her property which he or she would have if the servitude did not exists. (See Badenhorst, et al Silberberg
and Schoeman: The Law of Property, (5th ed Butterworths Durban 2006) at p 321.) What that means in simple terms is that a servitude simply confers a real right to the property of another.

The
applicant maintains that the disputed route has been in use by the public of which the applicant is a member or class for over 30 years and so members of the public, including the applicant, have acquired a right of use of the route in the event the
land thereto was private.

The
applicant relies, inter alia, on the affidavit of the headman of Mmokolodi Village Mr Molomo Rasetlhogwane, in support of his contention that the disputed route has been used by the public for a long period of time.

Alternatively,
the applicant contends that it has been using the said route undisturbed for a period of not less than 30 years.

Further, the
applicant relies on s 3(1) of the Prescriptions Act.

Section 3(1)
of the Prescriptions Act deals with acquisitive prescription. It provides as follows:

'3(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 30 years nec vi, nec clam, nec precario.'

The
applicant contends further that it is entitled by way of necessity to traverse the disputed piece of land.

DINGAKE J

On the
papers it seems probable, and I so find, that the disputed route has been used by members of the public for time immemorial. However, there is no basis and or evidence to suggest that the applicant is a member of the public, having regard to the special nature of the applicant's operations. Even if it were to be assumed that the applicant is a member of the public, the evidence filed of record suggests that the applicant came to the scene less than 30 years ago. The applicant was incorporated in 1981, and assuming that it started operations then, this period

falls short of 30 years. On the evidence, I am satisfied that the public right of way extended predominantly to the people living around Mmokolodi village and their visitors, especially with reference to pedestrian, animal driven traffic, and not the applicant and or its customers.

In this case, it appears that no servitude rights of way over the remainder of Forest Hill 9-KO have been registered on the title deed of the said property and there is no endorsement on farm Forest Hill title deed entitling the applicant to traverse the said property.

It is the position in law that the granting of servitude by an owner over his land by another is a serious matter and must be strictly interpreted by the courts. (See Lowe et al, Elliott - The South African Notary (6th ed Juta & Co Ltd Cape Town 1987) at p 70.)

I turn now to consider the applicant's argument and or averments in relation to acquisitive prescription.

It is trite law that acquisitive prescription, as another way of acquiring ownership, is a continuous process, which means that the applicant must have possessed and or used farm Forest Hill for an uninterrupted period of 30 years, nec vi (without force), nec clam (openly), nec precario (non-precariously).

In the case of Malan v Nabygelegen Estates 1946 AD 562 at p 574 the court after holding that nec precario must be given the meaning of 'not on sufferance' stated that:

'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 30 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 recognizes the ownership of another.'

I have already held that the applicant has not used farm Forest Hill for a continuous period of 30 years.

Further, in this case it is clear that at all times material hereto, the applicant recognised the first respondent as the owner of farm Forest Hill.

It follows therefore that the applicant cannot succeed on acquisitive prescription. In the premises, there is no basis to conclude that the applicant has exercised the alleged right of way for the past 30 years nec vi, nec clam, nec precario.

I am somewhat startled that the applicant must insist that it is entitled to traverse private property of another whilst there is evidence that it can use

DINGAKE J

other routes to access public roads. It seems to me that the Environmental Impact Assessment Study and/or Report of 2004, upon which the applicant premised the grant of its quarry licence identified four potential routes.

In my
respectful view, it does not lie in the mouth of the applicant to complain that
the alternative route is cumbersome.

I agree
entirely with the position of the first respondent that the extent to which
such routes are rendered less cumbersome to the applicant in its commercial operations should be
an inherent part of the applicant's commercial and financial commitments and or
obligations.

In my view,
it would be harsh and unjust to burden the first respondent with problems that
are peculiarly for the applicant to resolve, in order simply to advance its
commercial interests. Sheer expediency can never take precedence over vested
rights. If the applicant has to traverse farm Forest Hill it can only do so
with the first respondent's consent, failing which it simply has to seek alternative routes.
Its choices are stark: it has to adapt or die.

The
applicant not only does not have the public right of way, for the reasons
already stated, but can also not claim a way of necessity. The applicant's
claim of way of necessity can only succeed if it can show, by credible and
cogent evidence,
that it has no direct or reasonably sufficient access to a public road and is
therefore compelled to use the route traversing farm Forest Hill. On the
evidence, there appears to be access to a public road as earlier indicated. In
my view, a way of necessity may not be claimed to shorten the distance over
which the public road should be reached without crossing the land in
contention.

Further and/or
alternatively, the applicant is not contending that it is an owner of land
adjoining the respondents' property. It is trite that a way of necessity is a
right of way granted in favour of a property over an adjoining one constituting
the only means to access a public road. (See Van Rensburg v Coetzee 1979
(4) SA 655 (A).)

On the
whole, the applicant has not furnished sufficient evidence that supports its
view that it does not have reasonable or sufficient access to the A1 highway
route.

On the evidence
and having regard to my conclusions aforesaid, the first respondent was
entitled to place a boom or a barrier to stop the applicant and its customers
to traverse its private property.

Having come
to the conclusion that farm Forest Hill is private property and that the
applicant has no public right of way through farm Forest Hill or any way of
necessity, it follows therefore that the applicant has failed to satisfy the
first element of a final interdict being a clear right.

There is
also no evidence of any injury, let alone one which cannot be remedied by
damages. On the papers, the only prejudice that the applicant can conceivably suffer
relates to inconvenience, namely that it is convenient to join the A1 highway
from Gaborone to Lobatse through traversing farm Forest Hill. This is not the
kind of prejudice that can warrant a final interdict against an owner of
property. The applicant has no right to traverse farm Forest Hill. It can
therefore not ask the court to interdict the respondents to stop it from
conduct which it has no right to engage in.

DINGAKE J

It seems to

me that the applicant has failed to satisfy the requirements of a final interdict, on a balance of probabilities.

Having come to the conclusion that the applicant has failed to meet the requirements of a final interdict, it is not necessary to traverse other grounds raised by the applicant.

In the result, the application is dismissed with costs.

Application dismissed.