144/56

144/56

G.P.-S.103675—1954-5—1,000. U.D.J. 219.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(Appellate Provincial Division).
Provinsiale Afdeling).

Appeal in Civil Case.
Appèl in Siviele Saak.

Adriaan Hendrik [illegible] Appellant,

versus

The [illegible] Respondent.

Appellant's Attorney
Prokureur vir Appellant [illegible]

Respondent's Attorney
Prokureur vir Respondent Hand.

Appellant's Advocate [illegible]
Advokaat vir Appellant [illegible]

Respondent's Advocate [illegible]
Advokaat vir Respondent [illegible]

Set down for hearing on
Op die rol geplaas vir verhoor op Monday, 6 Nov. 1956.

(C.P.D.)

6/11/56 (9.45 – 5 pm)

7/11/56 (9.45 – 12.55)

C.A.V.

Appeal dismissed, with costs – but a formal amendment should be made of the Order of the Trial Court by allowing the Appellant to file a new declaration within one month from the date of this judgment.

Centlivres, C.J., Schreiner, Fagan, Beyers, & Hall (aj) } JJ.A

[signature]
Regr. 28/11/56.

Original

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between :

ADRIAAN LODRIK LANGE

&

PIETER ANDRIES LANGE Appellants

&

THE MINISTER OF LANDS Respondent

Coram : Centlivres C.J., Schreiner, Brink, Beyers JJ.A. et Hall A.J.A.

Heard : 6th November 1956. Delivered : 26-11-56

JUDGMENT

CENTLIVRES C.J. :- This appeal turns upon the interpretation to be placed upon a deed of grant and the diagram attached thereto. In 1896 the Government granted in freehold to the Upington Waterworks Company Limited "a piece of land containing "nine morgen two hundred and forty seven square roods..... "being Water Erf No. 26 at Upington and represented and describ- "ed in the diagram hereunto annexed." This diagram, which is dated 1892, depicts Water Erf No. 26 by means of a lettered figure and contains the following legend :-

" The figure marked A B C D d inner bank of Orange River

" a A represents 9 morgen 247 square roods.....
being Water Erf No. 26. "

The entire figure is not rectilinear, only that portion which is marked A b C D is rectilinear. The area of this portion is given as 9 morgen 152 square roods and 76 square feet. The point a is stated as being 12 feet from point A and d is also 12 feet from D. The line A to D is a straight line but the line a to d appears to follow the sinuosities of the right bank of the Orange River which is described in the diagram as the inner bank. Below the line a d appear the words "Orange River". The boundaries are set forth. As far as this appeal is concerned the only relevant boundary is described as follows :-

" Bounded S.E.wd by inner bank of Orange River. "

The appellants, who now own Water Erf No. 26, instituted an action in the Cape Provincial Division for an order declaring that the South-eastern boundary of the erf was the middle of the Orange River. In their declaration they alleged that that river was a non-navigable river and that respondent admitted that the erf was entitled to alluvion. The Provincial Division, on an exception taken to the declaration on the ground that it disclosed no cause of action, allowed the exception and set aside the declaration but granted the appellants leave to

file a new declaration within three weeks of the date of its order.

In the present appeal the Court is not confronted, as has happened in several cases which have come before the Court, with difficulties occasioned by the fact that the description of boundaries given in the grant differ from the description given in the diagram annexed to the grant. For in the present case the grant is completely silent as to the boundaries of the land granted and specifically states that the land granted "is represented and described in the diagram hereunto annexed." In this case, therefore, one has to look at the diagram, and the diagram alone, in order to ascertain the true boundaries of the piece of land.

For the appellants Mr. de Villiers, relying on the case of van Niekerk v The Union Government (1917 A.D. 359), contended that where an ager non limitatus borders on a non-navigable river there is a presumption (which he also described as an incident of ownership) that it extends to the middle of the river : that Water Erf No. 26 is an ager non limitatus because its south-eastern boundary is not an imaginary line between artificial beacons but a natural feature viz: a bank of the Orange River ; that the presumption is not rebutted because the erf according to its description extends only to the bank of

or because no portion of the river
the river bed is shown in its description to be included in the erf and that, as there has been no express exclusion of any portion of the bed of the river, the south-eastern boundary of the erf must be deemed to be the middle line of the river.

In van Niekerk's case the 1380 Griqualand West grant of a farm (which grant replaced an older grant made by the Republic of the Orange Free State) described the farm "De Bad" as being in extent 9,733 morgen and "bounded..... "west by Vaal River as will more fully appear by the hereunto "attached plan framed by the Government Surveyor." That plan showed the bank of the Vaal River as the boundary and
In that Contended
the appellants case ~~was~~ that this was conclusive as showing that the respondent's land extended only to the bank and not to the middle of the river.

Innes C.J. in giving judgment in van Niekerk's case said on p. 376 :-

" The remaining extent of "De Bad" is, in my opinion, not an agar limitatus. Its boundary, given in the grant, is the river, and the line of the diagram follows the curves of the bank. There is no question of an artificial boundary. And the grant was of a piece of land within certain limits ; it was not a grant by measurement. So that if there is any rule of construction which would extend the property to midstream, we are

" free to apply it. There is no rule of the Roman-Dutch law, so far as I know, which would exactly meet the case. But if we turn to the English books we find abundant authority. It is settled law in England that land bounded by a river is presumed to extend ad medium filum fluminis. That presumption may be rebutted ; but it will not be rebutted merely 'on account of a specific or scheduled measurement of the land, a delineation or colouring in a plan, which measurement, delineation or colouring does not, in fact, include any part of the bed of the river' per Lord Shaw, in A.-G. of Southern Nigeria v Holt & Co.(1915 A.C. 612). And unless rebutted, it governs the rights of the parties. The position is, that when once property is shown to be riparian - that is, to run up to the natural boundary of the river - then it lies upon him who contests its extension to midstream to show that it stops at the bank. The mere fact that the plan corfirming the measurement makes it terminate at the bank will not be sufficient. As remarked by Lord Moulton (Maclaren v A.-G., Quebec (1914, A.C., p. 272), 'it is precisely in the cases where the description of the parcel (whether in words or by plan) makes it terminate at the highway or stream, and does not indicate that it goes further, that the rule is needed. If there is any indication of the parcel going further, there is no place for its operation.' This rule of construction would at once dispose of this part of the case. The question is, whether we should adopt it ? "

On page 378 the learned Chief Justice said :-

" The adoption of the English rule will not violate any principle of our law : it will not deprive the public of its rights, for such rights are not affected by any change of dominium in the channel, and it will tend to

" encourage agricultural development. We should lay down, therefore, that a property bounded by a non-navigable stream must be presumed to extend ad medium filum fluminis and that though this presumption may be rebutted, the mere facts that the diagram does not extend beyond the bank, and that the specified measurement is complete without such extension, are not, either singly or together, sufficient to establish a rebuttal. If the Crown desires to exclude the bed of a stream, the proper course is to make that quite clear by the language of the grant. "

The judgment of Solomon J.A. who was the only judge who framed reasons of his own proceeds on much the same lines as the judgment of Innes C.J. excepting that (1) on p. 330 he says that it would be more correct to say that the rule of construction in English law that land granted to the bank of a river extends ad medium filum aquae was borrowed from the Roman law by the English courts and (2) the encouragement of agricultural development does not enter into his reasons.

It is interesting to note that in Sec. 31 bis (2)(b) of Act 9 of 1927 the Legislature has recognised that there may be a presumption that land bounded by the Orange and Vaal rivers extends to the middle of the river and that that presumption is rebuttable by evidence.

It is clear from the judgments delivered in the Van Heerden case that an alveus limitatus is not entitled to alluvion. The respondent's admission (as set forth in the

declaration) that water erf No. 26 is entitled to alluvion cannot, in my view, affect the question whether on the papers before us that erf is or is not an _aver limitatus_.

I shall now endeavour to apply the law as laid down in _van Niekerk's_ case to the present case. It is not clear from the first extract which I have quoted from the judgment of _Innes C.J._ on what ground the learned _Chief Justice_ held that the grant of the piece of land in that case was not a grant by measurement. The grant stated that the extent was 9,733 morgen and referred to the attached plan framed by the Government Surveyor. That plan, which is in the record filed in this Court, was a plan of the farm De Bad and Middelplaats and on that plan was a coloured diagram (marked K No. 130) of De Bad. The diagram showed the inner bank of the Vaal river as one of the boundaries of De Bad. The legend on the plan was as follows : "The coloured diagram K No. 130 "represents the farm De Bad..... in extent 9,733 morgen "bounded as shown on the plan. "

It thus seems to appear from the grant and the plan that the extent of De Bad was ascertained by measurement and was not a mere rough estimate as was the case in some of the early grants made by the Republic of the Orange Free State.

Cf. Webb v Gidey (3 A.C. 908).

Returning to the judgment of the learned Chief Justice in van Niekerk's case it may be that his reason for holding that the grant was not by measurement was because in the grant itself the boundary was given as the river, which was an artificial boundary. In the present case the grant does not not
give the river as the boundary nor does the diagram. Solomon J.A. at p. 390 said that "the land is expressly granted up "to the river and though the estimated area is given, it was "a grant not of a fixed quantity but of land in the lump "according to the boundaries described, one of which was the "Vaal river. "

The grant in van Niekerk's case did not describe the area as an estimated area but what Solomon J.A. probably meant was that on a true construction of the grant the area mentioned therein must be taken to be an estimated area.

It seems to me that in the van Niekerk case great emphasis was laid upon the terms of the grant. There is no doubt that a deed of grant takes precedence over a diagram attached to the grant. See Surveyor-General (Cape) v Estate de Villiers (1923 A.D. 589). In the present case, however, there is nothing in the deed of grant describing the boun-

uries : the deed tells us to look at the diagram in order to ascertain how much of erf No. 26 J. represented and described. When the diagram is examined, it will be found that it represents a piece of land the area of which has prima facie been ascertained by measurement, ~~and it is of some importance to note that this is not a case where the relevant diagram was prepared after the execution of the deed of grant~~. In the absence of any allegation in the declaration that the area granted was not ascertained by measurement it seems to me that on the papers before us we must take it that a measured piece of land was granted.

As I read the judgment of Solomon J.A. at p. 390 of the van Niekerk case he did not intend to depart from the principles of Roman-Dutch law. Immediately above the passage I have quoted from that page the learned Judge refers to Grotius 2,9,25 who is quoted as saying "One thing is certain "that in the case of lands granted by the Courts 'cum definitione mensurae' alluvion beyond such measure belongs to the Courts." Grotius apparently visualised the case of a grant of a measured piece of land with a river boundary : in such a case the boundary did not extend ad medium filum fluminis and therefore the grantor had no right to alluvion. Grotius in his De Jure

Belliac Pacis 2,3,12,1 and 2 points out (Whewell's translation at p. 129) that "we are not to despise the laborious "discussion of the subject by the Romans, in which they have "distinguished limitatum, land bounded by artificial limits, "from other lands ; provided we recollect that land mensura "comprehensum, determined by its measured quantity, is "governed by the same rule as limitate land............. "Imperia are, in a doubtful case, to be supposed to be "arcifinial, bounded by natural limits, because that best "agrees with the nature of the territory ; but private lands "are rather supposed not to be naturally bounded, but either "limitate or determined by measure ; for this is more congruous to the nature of private possession." Grotius goes on to say that though in the case of lands bordering on rivers some measure (mensura aliqua nominata) is mentioned yet if they are sold by the lump and not by measurement they have the right to alluvion.

Van Leeuwen 2,4,4 as quoted by Solomon J.A. is to the same effect as Grotius. See also Vinnius 2,1,20, Buckland's Manual of Roman Law p. 141 and Lee's Elements of Roman Law p. 128, section 178(b). It is not without interest to note that in van Niekerk's case the old Free State grant, which

was replaced by the 1880 Griqualand West grant, stated the area of De Bad as „groot naar gissing 4675 morgen" and is an example of land conveyed "by the lump and not by measurement." It is also of some significance that Innes C.J. said on p.372 :

" There cannot be two documents of title to the same land. But it is clear that the grant" (of 1880) " must be read in the light of the title for which it was substituted, and that in case of doubt it should be construed as far as possible in conformity with it. "

It is, I think, necessary to deal with the second extract which I have quoted from p. 378 of the judgment of Innes C.J.

The rule adopted by Innes C.J. does not in terms apply

to a case where the boundary is not the river itself but a bank of the river. By using the words "a property bounded by a "non-navigable stream" Innes C.J. must have had in mind the fact that in the case with which he was dealing the deed of grant stated that the property was bounded on the ~~x~~ west by the Vaal River which was a non-navigable river. In the present case the boundary of Water Erf No. 26 is specifically stated to be the inner bank of the Orange River and not the river itself. And I may add that, when Innes C.J. referred to "the diagram", he was obviously referring to the surveyor's figure of the property granted and not to the whole annexure to the deed of grant, which annexure is commonly called a diagram - as it is in fact called in the grant in the present case ~~.~~ What Innes C.J. was emphasising was that importance is to be attached to the stated boundaries and not to the surveyor's figure on the property granted.

I prefer, however, to base my judgment on a wider ground than deciding that the rule adopted by Innes C.J. does not in terms apply to the present case. If that rule is read in vacuo it may lead to difficulties. If it is read in the context of the judgment in which it is enunciated the difficulties disappear. Read in vacuo the rule appears to lay

down that in all cases where a property is bounded by a non-navigable stream it must be presumed to extend ad medium filum fluminis. But I do not think that that is what Innes C.J. intended. On pp. 375 and 376 the learned Chief Justice referred to Roman-Dutch authorities who took the view that land granted "by the lump" up to a river was not an ager limitatus but that land granted by measurement was an ager limitatus. He held, as I have already stated, that the grant of the piece of land in issue was not a grant by measurement and concluding said :-

" The whole matter is rather obscure, but I think it may be said that if a riparian property was not an ager limitatus the law of Holland did not prohibit a right of its owner to alluvion and to the bed of the stream without prejudice, of course, to due user by the public. "

From the above context it seems to me that the learned Chief Justice must have intended that the rule which he adopted should be confined to an ager non limitatus. This also appears to be the view taken by Solomon J.A. at p. 391, where after saying that the English rule should be adopted, he added that the mere fact that the estimated (the italics are my own) area would be exceeded, if the middle of the river

was taken as the boundary, was not sufficient to rebut the presumption. The inference I draw from this is that Solomon J.A. did not intend that the English rule should be applied where the area was not an estimated area but an area ascertained by measurement.

In the present case it seems to me that Water Erf 26 is, prima facie, an ager limitatus. The south-eastern boundary is given as the inner bank of the Orange River, that bank being the curviliner a line a to d on the figure depicted on the diagram. The area comprised by A D d a was 94 square roods 68 square feet, that being the difference between the total area of 9 morgen 247 square roods and the area of 9 morgen 152 square roods and 76 square feet which is given as the area of the figure A B C D. This shows that Water Erf 26 was a measured piece of land and not an ager non limitatus. If I am correct in this it follows that the rule enunciated by Innes C.J. does not apply to this case.

A large number of English authorities were quoted by Mr. de Villiers . I do not consider it necessary to refer to all of them. It will be sufficient if I refer to Attorney-General of Southern Nigeria v John Holt and Company (1915 A.C. 599 at p. 612) where Lord Shaw of Dunfermline said that "the "operation of the rule of adding to the ownership of riparian "lands the property of the soil ad medium filum is not inter-"fered with on account of a specific and scheduled measurement "of land, a delineation or colouring on a plan, which measure-"ment, delineation, or colouring does not, in fact include any

was taken as the boundary, has not much left to rebut the presumption. The inference I draw from this is that Solomon J.A. did not intend that the English rule should be applied where the area was not an estimated area but an area ascertained by measurement.

In the present case it seems to me that Erf 26 is, prima facie, an ager limitatus. The south-eastern boundary is given as the lower bank of the Orange River, that bank being the curvilinear line a to d on the figure depicted on the diagram. The area comprised by a b c d was 54 square roods 68 square feet, that being the difference between the total area of 9 morgen 247 square roods and the area of 9 morgen 192 square roods and 76 square feet which is given as the area of the figure [illegible] C [illegible]. This shows that Erf 26 was a [illegible] land and not an ager non limitatus. If I am correct in this it follows that the rule enunciated by Innes C.J. does not apply to this case.

A great number of English authorities were quoted by Mr. [illegible]. I do not consider it necessary to refer to all of them. It will be sufficient if I refer to Attorney-General of Southern Nigeria v. John Holt & Co. (Liverpool) Ltd. (1915 A.C. 599 at p. 612) where Lord Shaw of Dunfermline said that "the operation of the rule of adding to the ownership of riparian "lands the property of the soil ad medium filum is not inter-"[illegible] on account of a specific and scheduled measurement "[illegible], a defined [illegible] or colouring [illegible], [illegible] "[illegible], [illegible] or colouring [illegible], [illegible]

"part of the bed of a river." No distinction appears to be drawn in that case between an alveus limitatus and an alveus non limitatus and in this respect English law appears to differ from Roman-Dutch law.

I may add that in the United States of America a view different from that taken in England seems to prevail. In the Annotated American Law Reports Vol. 74 p. 604 note 2 it is stated :-

" When the description runs the boundary line on or along the bank of a river, stream or creek, the courts with few exceptions, mostly distinguishable, have fixed the boundary at the bank, and regarded the force of the general presumption as exhausted by inferring from the use of such word an intention on the part of the grantor to reserve the shore and the land lying in the bed of the river. "

The declaration in the present case also relies on two Proclamations of 1889 and 1895 respectively which enacted that it should be lawful to incorporate as a joint ~~xxx~~ stock company the Waterworks Company originally formed with inter alia the following rights and powers :-

" to own in freehold all land lying between the Water

" Farrow and the Orange River within the limits of the township of Upington. "

I do not think that the above Proclamations are of any assistance to the appellants. There is nothing in those Proclamations which would justify a view that there was an intention to ~~grant~~ the Waterworks Company title of the land mentioned up to the middle of the Orange River.

In my opinion Water Erf No. 26 is, prima facie, an aqua limitatus. It follows that the appeal should be dismissed with costs but a formal amendment should be made of the order granted by the Provincial Division by allowing the appellants to file a new declaration within one month from the date of this judgment.

Brink JA. } concur.
Hall AJA. }

Record

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

A.H.de LANGE and P.A.de LANGE Appellants

and

THE MINISTER OF LANDS Respondent

Coram:Centlivres,C.J.,Schreiner,Brink,Beyers JJ.A. et Hall A.J.A.

Heard: 6th.November, 1956. Delivered: 26-11-1956

J U D G M E N T

SCHREINER J.A. :- In van Niekerk's case, 1917 A.D. 359, INNES C.J. said, at page 378, "We should lay down, "therefore, that a property bounded by a non-navigable "stream must be presumed to extend ad medium filum fluminis; "and that though this presumption may be rebutted, the mere "facts that the diagram does not extend beyond the bank and "that the specified measurement is complete without such ex- "tension, are not, either singly or together, sufficient to "establish a rebuttal. If the Crown desires to exclude the "bed of the stream. the proper course is to make that quite "clear by the language of the grant." The judgment of SOLOMON J.A. seems to me to be to the same effect. At

page/.....

page 391 the learned judge says, "In the absence of any "clear or authoritative rule in the South African Courts "on this subject, I think that we should be well advised to "follow the English rule that the grant of a piece of land "bounded by a river must be construed as conveying the land "up to the middle of the stream unless it is shown that it "was intended to exclude the bed from the grant. Such an "intention may be shown either by the terms of the grant "itself or by marking the boundaries on the ground, or per- "haps in other ways." Both judgments agree that in a certain situation there is a presumption, or as it should rather be called a rule of construction (see pages 376 and 386), to be applied unless other factors make it inapplic- able, that the boundary of the property lies along the middle line of the river, although that is not expressed in the document of title. INNES C.J. considered the rule as stated in the English cases to be consistent with our law, though he did not find that there was in Roman-Dutch law any rule that would exactly fit the case (page 376). SOLOMON J.A. thought that the English law had probably bor- rowed the rule from Roman law (page 388). But both were in agreement that there is such a rule and this view was con- curred in by the other members of the Court. The problem

is to state precisely the situation in which the rule operates ~~applies~~.

It will be observed that both the above quoted statements deal with cases where a property is "bounded by a river." Literally this means, I take it, that one boundary of the property is a river. But a river is possessed of width while the boundary of property has no width. If the boundary is stated to be a river the law must interpret this and fix the true boundary. The expression "bounded by" apparently means the same thing as "is riparian "to" or "abuts on". None of them is self-explanatory. At page 376 INNES C.J., summarising the English law, says, "When once property is shown to be riparian - that is to "run up to the natural boundary of the river - then it "lies upon him who contests its extension to midstream to "show that it stops at the bank." But again the question suggests itself, when does property run up to the natural boundary of a river ?

It seems best to avoid these terms, which might be thought to have technical meanings with consequences flowing from these meanings. The type of case under consideration is that of a property one side of which is described in the relative document of title by

words/.....

words that indicate that the boundary is a river or in other words follows the line or course of a river. In regard to such a property the rule is that prima facie it extends ad medium filum fluminis. But what is ultimately being sought is the intention of the grantor as expressed im the grant and the rule is therefore stated in the form of a rebuttable presumption.

There appear to be two possible approaches to the problem. The first is to ascertain whether the property is an ager limitatus within the meaning of the authorities, and then to decide what is the effect, in the circumstances, of the property being limitatus or not. The second approach is to see whether the document of title makes the river or some line other than the river the boundary; if the river is the boundary this means its middle line. The first approach is indirect, the second direct, but both aim at finding out what was granted. An ager limitatus is said to be such because the area of the land or the beacons mentioned in the grant or both show, when they are related to the ground itself, what boundaries were intended by the grantor. If the boundaries of an ager limitatus do not reach to the middle line of the river the middle line is not the boundary of the property. The area of the land may be

mentioned and yet not show that the property is an ager limitatus, presumably because measurements may be wrong. And drawings may also be wrong so that they too cannot be absolutely relied upon. Nevertheless it may be possible to show that the property, though one of its boundaries follows the line or course of a river, is an ager limitatus, and then there is no presumed extension to the middle line.

But in other cases the second line of approach may be available, when it is unnecessary to consider whether the property is an ager limitatus or not. It may clearly appear from the grant that the boundary was intended to be something other than the middle line. In such a case one may say that the property is an ager limitatus but nothing is gained by doing so. The factum probandum, the expressed intention of the grantor, is sought directly and, being found, concludes the matter.

That is what seems to me to be the position here. I cannot conceive of the words "inner "bank of Orange River" having been used to describe the south-eastern boundary of the erf with any other object than to exclude the riverbed. That being so, effect must be

given/.....

given to the clear language of the grant, which in this case is the legend of the diagram.

What was intended by the admission that the erf is entitled to alluvion is not clear, but it was certainly not intended to constitute an admission by legal intendment that the erf's south-eastern boundary was the river i.e. the middle line of the river and not its inner or north-western bank. For the purposes of the present proceedings it must be disregarded.

For these reasons I agree that the appeal should be dismissed.

D. Schreiner
24.11.56

Beyers J.A. Concurs