Case No. 417/86

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

LAURA LEE BUTGEREIT ..... First Appellant

CHRISTOPHER JAN ALFRED MARTINUS .... Second Appellant

and

TRANSVAAL CANOE UNION ..... First Respondent

GRAHAM CAMERON MONTEITH ..... Second Respondent

Coram: RABIE ACJ, JOUBERT, VAN HEERDEN, GROSSKOPF et NESTADT JJA.

Heard: 9 November 1987.

Delivered: 30 November 1987

J U D G M E N T

RABIE ACJ:

This is an appeal against the order made by the Transvaal Provincial Division (per Eloff DJP) in the case of Transvaal Canoe Union and Another v. Butgereit and Another 1986(4) SA 207 (T). The order (the full terms of which appear at 214 C-E of the report of the judgment) declares, in effect, that the respondents in the appeal are entitled as of right to canoe on the Crocodile River where it flows between the farm of the first appellant and the farm of one Barnard in the district of Broederstroom, and interdicts the appellants from interfering with the respondents' said right. The property of the first appellant extends ad medium

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a quo the second appellant was represented by the same counsel who appeared for the first appellant. In this Court he appeared in person.

The appellants no longer contend, as they did in the Court a quo, that the first respondent did not have the necessary locus standi to approach the Court for relief. Their arguments in this Court were directed solely to the contention that the respondents are guilty of trespass whenever they canoe on water which flows over the first appellant's half of the bed of the Crocodile River. The arguments may be summed up as follows. Mr Maisels, on behalf of the first appellant, while conceding that the Crocodile River is

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perennial and a "public stream" in terms of the Water Act, No. 54 of 1956, contended that the Court a quo erred in holding that it is a public river in the sense of being res publica, within the meaning of this expression in Roman and Roman-Dutch law. The second appellant likewise conceded that the river is perennial. (He said, in the course of his argument, that "the portion of the river in dispute flows all the year round.") He contended, however, that it is not a flumen (river) as referred to in Roman law texts and in Roman-Dutch law authorities, but a mere rivus, or streamlet, and that it can properly be described as a "private perennial stream".

The appellants contended, also, that when Roman law texts and writers on Roman-Dutch law refer to the rights of the public in respect of public rivers, they refer only to navigable rivers, i.e. navigable for commercial purposes, and not to public rivers which are not navigable in this sense. This point, Mr Maisels said, is fundamental to the whole of the present case. He referred us in this regard to those passages in the works of De Groot, Van Leeuwen, Huber, Voet and Van der Keessel which are quoted at 211-212 of the report of the judgment of the Court a quo. He submitted also that when the old authorities refer to the public's right to sail on or fish in a public river, they refer

to navigation and fishing for commercial purposes. The view that the rights of the public were limited to such rivers as were navigable in the aforesaid sense, counsel contended, would also seem to be borne out by certain texts in the Digest. We were referred in this regard to D. 39.3.19.2 and D. 43.12.2. Both these texts are referred to in the judgment of the Court a quo. (See 210 J-211 B of the report.) Counsel also relied for his aforesaid submission on the following passage in the judgment of Solomon JA in Van Niekerk & Union Government (Minister of Lands) v. Carter 1917 AD 359 at 386-387:

> 'In the Book of Feuds (2,56), amongst the regalia are included 'flumina navigabilia et ex quibus fiunt navigabilia.' And this distinction between navigable and non-

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navigable rivers seems to me to be either expressly or impliedly to be found in the leading authorities on the subject in our law. Thus Grotius (2,1,25), says: 'The United States of Holland and West Friesland are proprietors of the rivers such as the Rhine, the Waal, the Maas, the Ijssel and the Lek, in so far as they flow within the limits of Holland: also of the lakes and other navigable waters, and of beds of all such streams and waters.' Vinnius (2,1,2), says: Etenim flumina omnia navigabilia et ex quibus fiunt navigabilia jampridem a Frederica Imp. inter regalia relata sunt, eorumque proprietas facta Principis vel populi, cujus ditione continentur.'"

In South Africa, the appellants say, there are no navigable rivers in the sense mentioned above, save possibly the Buffalo River. (We were referred in this regard to what was said of the Vaal River in Van Niekerk's case, supra, at 373, and the Orange River in Lange and Another v. Minister of Lands 1957(1) SA 297 (A) at 299 G-H.)

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Since the Crocodile River is not a navigable river, the argument proceeds, members of the public have no rights in respect thereof, save such rights as are given to them by the Water Act. Sec. 164 bis of this Act, the appellants say, governs the public's right to the use of the water in a public river for sporting or recreational purposes. The section, which was inserted in the said Act in 1965, provides as follows in sub-sec. (1) thereof:

> "The State President may by proclamation in the Gazette declare any area defined in the proclamation in question to be a water sport control area if, in his opinion, such area or any portion thereof is or is from time to time or is likely to become submerged, whether naturally or artificially, by water of any kind whatever, and such water is or would be navigable or suitable for the practice of any water sport."

The second appellant also relies on the provisions of sections 75(1), 106(1)(c) and 107 of the Transvaal Nature Conservation Ordinance, No. 12 of 1983. Sec. 75(1) reads as follows:

> "Subject to the provisions of this Ordinance, no person shall catch fish in waters, unless he has obtained the permission of the owner or occupier of the land on which the waters are situated beforehand."

("Waters" is defined in sec. 1 of the Ordinance as meaning inter alia "the waters in rivers.") Sec. 75(2) provides that it is an offence to contravene or to fail to comply with the provisions of sec. 75(1). Sec. 106(1)(c) provides inter alia that a "nature conservator" (i.e. an official appointed in terms of

sec. 4 of the Ordinance, or a member of the South African Police) may at any time stop any float or vessel if he has reason to suspect that there is thereon or therein anything which is being or has been used in committing an offence under the Ordinance. Sec. 107 provides that the owner, occupier or supervisor of land may exercise thereon the powers conferred on a nature conservator by sec. 106. Thus the arguments of the appellants.

The first question which arises is what a flumen (river) was according to Roman law. The answer given in D. 12.1.1. is that a flumen is to be distinguished from a rivus (streamlet, or brook) by its size, or by the opinion of those living in the neighbourhood.

(Flumen a rivo magnitudine discernendum est aut existimatione circumcolentium.) The next question is when a river was considered to be a public river (flumen publicum). Roman law distinguished between private and public rivers. A private river, it is said in D. 43.12.1.4, is in no way different from other private places: nihil enim differt a ceteris locis privatis flumen privatum. A river was public (publicum) if it was perenne, i.e. if it had a perennial flow. In D. 43.12.3 it is said: Publicum flumen esse Caius definit, quod perenne sit : haec sententia Cassii, quam et Celsus probat, videtur esse probabilis, i.e. Cassius defines a public river as one which is perennial: this opinion of Cassius, of which Celsus also approves, seems to be

acceptable. A river was considered to be perennial even if it dried up during certain summers, but was otherwise perennial. (See D. 43.12.1.2: ... si tamen aliqua aestate exaruerit, quod alioquin perenne fluebat, non ideo minus perenne est.) In Van Niekerk's case, supra, at 372, Innes CJ said the following in this regard:

> "The civil law considered all perennial rivers to be public, and the fact that they ceased to flow for a time during exceptional seasons did not render them non-perennial (Digest, 43,12,1,2 and 3)."

A river did not have to be navigable in order to be public. In D. 43.13.1.2 it is said, with regard to an interdict aimed at preventing that anything be done in a public river which may cause it to flow in a manner

different from the previous summer, that the interdict applies to all public rivers, whether they be navigable or not. (Pertinet autem ad flumina publica, sive navigabilia sunt sive non sunt.) In Van Niekerk's case, supra, at 373, Innes CJ made mention of this point when he said:

> "So far as their public character was concerned, the Roman law drew no distinction in principle between navigable and non-navigable rivers, though they were in some respects separately dealt with by the Praetors' Edicts."

As will appear more fully from what is said below, the praetor could take special measures in order to preserve the water in a navigable river. A public river, with the water flowing in it, was considered to be res

publica. According to D. 43.12.3 Paulus said: Flumina publica quae fluunt ripaeque eorum publicae sunt, i.e. public rivers which (always) flow, and their banks, are res publicae. Being res publicae, public rivers and the water therein, together with the river-banks, were the property of the whole community, i.e. the Roman people. According to D. 1.8.1 pr. Gaius said: quae publicae sunt, nullius in bonis esse creduntur, ipsius enim universitatis esse creduntur, i.e. res publicae are things which are considered to be the property of no one, for they are considered to be the property of the community itself. In D. 50.16.5 (Ulpianus) it is said that public things are those which belong to the Roman

people: ... publica sunt, quae populi Romani sunt. Since the water in public rivers belonged to the whole community, the authorities could control the use thereof for the benefit of the public. In D. 43.20.1.41 and 42 it is said that the right to lead water from a canal or other public place could be granted by the princeps. According to D. 43.12.2 one could lead water from a public river unless it was forbidden by the emperor or senate, provided that the water was not in public use (in usu publico). There was, also, the further proviso that one could not do so when the river was navigable, or if another river derived its navigability from it. D. 39.3.10.2 is to the same effect: Si flumen navigabile

sit, non oportere praetorem concedere ductionem ex eo fieri Labeo ait, quae flumen minus navigabile efficiat, idemque est et si per hoc aliud flumen fiat navigabile, i.e. Labeo says that if a river is navigable, the praetor must not allow any leading of water from it which may render the river less navigable, and this is so even if another river should as a result thereof become navigable.

With regard to the public's right to the use of the water in public rivers, it is said in Justinian's Institutiones 2.1.2 : Flumina autem omnia et portus publica sunt : ideoque ius piscandi omnibus commune est in portu fluminibusque, i.e. all rivers and harbours

are public, and for that reason the right to fish in all harbours and rivers is common to all. In 2.1.4 it is said that the right is derived from the jus gentium. Van der Keessel, in his Dictata ad Justiniani Institutiones, says that everyone is permitted per flumen navigare, in flumine piscari, navem ad ripam appellere, in portu morari ..... . Vinnius, in his Commentarius on Justinian's Institutes, is to the same effect. He says ad Inst. 2.1.2 (quoted above) that the use of a river is public by the jus gentium (usus fluminis publicus est jure gentium), and that it is, therefore, permissible for anyone to sail on (navigare) and fish in a public river.

With regard to the ownership and use of public rivers in Holland in Roman-Dutch law times,

Groenewegen says in a comment in his De Legibus Abrogatis on Justinian's Institutiones 2.1.2 (cited above) that according to the latest law (jure novissimo) rivers and harbours were included in the regalia, and that the right to fish was not common to all, but was the sole right of the princeps and of those to whom the princeps had granted the right. As to the ownership of rivers, De Groot states in his Inleidinge tot de Hollandsche Rechtsgeleerdheid (in 2.1.25) that certain rivers, which he mentions, belonged to the "gantsche burgerlicke gemeenschap van Holland ende West-Vrieslandt". The rivers referred to by him were, it would seem, all navigable rivers. According to Voet, Commentarius

41.1.6, public rivers (flumina publica) had at the time when he wrote long been reckoned among the regalia. He cites lib. 2. tit. 56 of the Libri Feudorum, according to which navigable rivers were part of the regalia. It would seem, however, that in the course of time all public rivers, whether navigable or not, became part of the regalia. This was pointed out by Innes CJ in Van Niekerk's case, supra, at 373. The same view was expressed by Kotzé JA in Surveyor-General (Cape) v. Estate De Villiers 1923 AD 588. After stating that navigable rivers were made part of the regalia, the learned Judge went on to say (at 621) that the list of regalia mentioned in the Libri Feudorum 2.56 was not

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complete, and that in time all things, the use of which was common and public by the Roman law, "came to be embraced in the number." Later, the learned Judge said (at 622), when "the authority of the Counts was replaced by that of the States of Holland, all rights in and to the domeynen became vested in the latter."

With regard to the question of the use of public rivers, as distinct from the ownership thereof, Bort, in his Tractaet van de Domeynen van Hollandt, V. 2, states that although the ownership (eygendom) of "Stroomen, Revieren, en de andere publycque wateren, mitsgaders van der selver Oever" vested in the "Graven", the use (gebruyck) thereof remained common (gemeen),

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as it had been in Roman law (ut de jure Romano), save in so far as limitations had been placed on the public's rights by those in power. In the case of navigation, he says, tolls were imposed, while fishing was restricted to fishing with a rod. (See also De Groot, Inleidinge 2.1.26 and 2.1.28, and Voet 41.1.6). Vinnius, ad Inst. 2.1.2, states that navigable rivers became part of the regalia, but that this did not mean that the use of a river did not continue to remain public (tamen non obstat quominus usus fluminis adhuc publicus manserit). He refers, however, to limitations that were placed on the public's right of fishing. Finally, on this point, reference may be made to Heineccius, Elementa Juris Civilis,

2.1 (para. 325), who says that in his day (hodie) those in power (imperantes) claimed for themselves rights which were public according to Roman law and that they were wont to put a limit on the use thereof (usui modum praescribere soleant).

In view of the aforegoing it may be said, I think, that the position in Holland was that the public had the right to make use of the water in public rivers, as had been the case in Roman law, save to the extent that such right was restricted by measures taken by those in authority.

Turning now to the facts of the present case and the various submissions made by the appellants

in regard thereto, the second appellant's first contention is, as I said above, that the Crocodile river is not a river (flumen). His submission is that there is no evidence to show that it is of sufficient size to be ranked as a river rather than as a mere rivus, or streamlet. The argument cannot be sustained. It is true that there is no precise evidence as to the volume of water present in the river from time to time, but a statement made by the second appellant in his affidavit shows that the river cannot possibly be considered to be nothing more than a streamlet. The statement is that "Canoeists, literally in their hundreds, make use of the said river at times". This may be a somewhat exaggerated statement,

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but it shows, in my view, that the Crocodile River cannot be so small as not to be classified as a river (flumen). Both appellants concede that the river is perennial, but they contend that it can nevertheless not be regarded as a public river in respect of which the public has rights of the kind referred to in Roman and Roman-Dutch law. The contention is that it is not a navigable river, and that the references in Roman and Roman-Dutch law to the rights of the public to the use of the water in a public river are references to navigable rivers only. In support of this submission Mr Maisels referred us to the passage in the judgment of Solomon J in Van Niekerk's case, supra, at 386-387, which I quoted above when summarising the appellants' contentions in this

Court. The passage does not support counsel's submission. The statements contained therein as to what the Libri Feudorum, De Groot and Vinnius said, relate to the ownership of navigable rivers, and not to the right to the use of the water in such rivers or in public rivers in general. As to the use of the water in public rivers, I pointed out above that Vinnius states in express terms that the fact that navigable rivers were included in the regalia did not mean that the public did not continue to have rights in respect of the use of public waters - although it did result in the imposition of certain limitations on rights previously enjoyed. Bort, too, as I pointed out above, states that while the ownership

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of streams, rivers and other public waters became vested in the Counts, the use (gebruyck) thereof was left "gemeen", as it had been in Roman law (ut de jure Romano) - although certain limitations were placed on such rights by those in power.

In support of his aforesaid submission Mr Maisels also relied on D. 39.3.19.2 and D. 43.12.2. The passages are cited at 211 A-B of the report of the judgment of the Court a quo. These texts do not support counsel's submission. They indicate, as I said above, that special measures could be taken to preserve the water in a navigable river. They refer, in other words,

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to limitations which could, in the interest of shipping, be imposed on the use of water in navigable rivers. They do not indicate in any way that the public's right to make use of the water in public rivers was limited to the water in navigable rivers.

The public could use a public river for the purpose of commercial navigation because of its public nature - and, of course, because it was large enough to accommodate large vessels. If a public river was not large enough to be used for such navigation, it could, I have no doubt, by reason of its public nature have been used by the public for such activities as such river rendered

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possible. There can be little doubt, I think, that such rivers would have been used for sporting and recreational purposes. Fishing, one knows, was not confined to fishing for commercial purposes. The Emperor Augustus, Suetonius (Aug. 83) tells us, fished with a hook animi laxandi causa, and many others must have done the same. Horace (C. 3.7.28 and C. 3.12.6) tells of young men who swam in the Tiber, and there is no reason to believe that such activities would have been confined to navigable rivers. Pliny (Ep. 8.8) tells of swimming in the Clitumnus, a small river in Umbria, and of pleasure-boating on that river. Propertius (C. 1.11), too, tells of pleasure-boating. Latin, one may add, has several

words for different varieties, or sizes, of small boat, which would seem to indicate that boating was not confined to commercial activities. With reference to one kind of such boats, viz. a linter, it is interesting to note, having regard to the present case, that several literary references indicate that it was made by hollowing out the trunk of a tree.

In view of all the aforegoing I am of the opinion that the appellants' contentions, discussed above, are unsound, and that the respondents are, according to the common law, entitled to canoe on the stretch of the Crocodile River which is in issue in this case.

It remains, however, to consider a few further points. The first relates to the question whether canoeists sometimes resort to the practice of portage, i.e. carrying their canoes over the first appellant's property, when engaged on their canoeing activities. The respondents say that canoeists invariably enter the water on a farm belonging to one of the canoeists, and that they leave the water at a point beyond the first appellant's property. According to their averments it is at no stage necessary for them to portage over the first appellant's property. The second appellant denies these statements and says that canoeists often find it necessary to portage over the first appellant's

property, especially when their canoes are damaged.

In a replying affidavit made on behalf of the respondents it is said that, if any portage does take place as alleged by the second appellant, it would be at a point where there is "a servitude in favour of the public". The existence of this servitude, it is said, appears from the first appellant's title deed and the diagram attached thereto. In the title deed mention is made of a servitude of right of way in favour of the general public along the eastern boundary of the first appellant's property, but one cannot determine therefrom, nor from the diagram attached thereto, whether the portage of which the second appellant complains takes place over the area to which the servitude relates or

not. In the result there is a dispute of fact which cannot be resolved on the papers. Paragraph (a) of the order of the Court a quo refers to the right of the respondents "to canoe on the Crocodile River". This would not include the right to carry canoes over the first appellant's property for the purpose of such canoeing. Eloff DJP, it may be pointed out in this regard, dealt with the case on the basis (see at 208 G-H of the report) that there was no allegation that canoeists ever disembarked on the first appellant's property. There was indeed such an allegation, but the Court's view of the matter makes it clear that paragraph (a) of its order was intended to relate only to canoeing, and not to any portage connected with canoeing activities.

It remains to discuss two further arguments that were advanced by the appellants. The first relates to sec. 164 bis (1) of the Water Act. The section, which I quoted above, provides that the State President may by proclamation in the Gazette declare any area defined in the proclamation to be a water sport control area. The appellants contend, as stated above, that this section governs and circumscribes the public's right to the use of water in rivers for sporting and recreational activities. The contention is unsound. The fact that the section empowers the State President to declare a water sport control area does not mean that Parliament has put an end to the public's common law rights in

respect of the use of the water in public rivers in South Africa.

The second argument, which was advanced by the second appellant, relates to sec. 75(1), read with sections 106(1) and 107, of the aforesaid Transvaal Nature Conservation Ordinance. Sec. 75(1), as indicated above, provides that no one may "catch fish in waters, unless he has obtained the permission of the owner or occupier of the land on which the waters are situated beforehand", and the argument is that the said Ordinance "presumes that the owner or occupier of land over which water flows controls the activities that occur in or on such water." (The quotation is from the second appellant's

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heads of argument.) The argument in unsound. The Ordinance is concerned with nature conservation. Chapter VI thereof (sections 67-85) deals with the catching, preservation, sale, etc., of fish. Sec. 75(1) authorises the owner or occupier of land to control, or prohibit, fishing in water situate on such land, but it in no way empowers him to prevent members of the public from canoeing on the water of a public river when their activities are in no way related to the catching of fish. The provisions of sections 106(1)(c) and 107 take the matter no further.

The appeal is dismissed with costs,

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including the costs of two counsel. The costs are payable by the appellants jointly and severally, the one paying the other to be absolved.

P J RABIE

ACTING CHIEF JUSTICE.

JOUBERT JA

VAN HEERDEN JA

GROSSKOPF JA Concur.

NESTADT JA