CG CASE NUMBER: 3/92

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

TRANSVAAL CANOE UNION	First Appellant
THE VICTORIA LAKE CLUB	Second Appellant

and

ROBERT GARBETT	First Respondent
ITHUMALENG CC	Second Respondent

CORAM: CORBETT CJ, VIVIER, F H GROSSKOPF JJA,
HOWIE et VAN COLLER AJJA

HEARD ON: 18 MAY 1993

DELIVERED ON: 6 SEPTEMBER 1993

J U D G M E N T

HOWIE AJA

On 1st November 1991, the eve of a canoe race on the Crocodile River organised by and under the auspices of appellants, they made an urgent application in the Transvaal Provincial Division for a declarator to the effect that the participants, as a matter of right, were entitled to portage their canoes on the river banks, including the bank situated on the riparian property belonging to second respondent, a close corporation. Because first respondent (who resides on the property with his wife, the sole member of second respondent) had threatened to erect fencing with a view to preventing such portage, appellants also sought an interdict restraining his doing so. The application was opposed from the outset but on agreed terms which were made the subject of an interim order first respondent undertook not to impede participants. The need for an interdict therefore fell away and the race proceeded as arranged. The main relief sought remained in contention and in due course solemn declarations were filed by

respondents who also made a counter application for an order barring any canoeist from entering or carrying his canoe over any part of the property concerned "which is not covered by the Crocodile River". The Court a quo (Van der Walt J) dismissed the application, allowed the counter application and granted appellants leave to appeal to this Court.

The judgment of the Court below is reported as TRANSVAAL CANOE UNION AND ANOTHER V GARBETT AND ANOTHER 1992 (2) SA 525 (T). The issues and the basic facts are readily apparent from the report and I shall only resort to repetition where necessary for the purposes of this judgment.

In brief, appellants' main argument on appeal is that at common law members of the public have the right to

canoe on a public river even where it flows over privately owned land such as second respondent's property. This right includes the right to use the riverbanks as an incident of their use of the river.

Portage is a necessary incident of canoeing. Accordingly, canoeists are entitled in law to portage anywhere along the riverbanks even if they are privately owned. In the alternative it was submitted that that right ought to be held to arise wherever portage is reasonable in all the prevailing circumstances.

Respondents' contention, on the other hand, is in essence that canoeists have no right to use the riverbanks for any purpose except where a registered servitude or other lawful right of way permits this. Moreover portage is not a necessary incident of the use of the river. Consequently the sole manner in which canoeists may lawfully traverse second respondent's property is by water.

It is appropriate at this stage to set out the facts and legal principles which were common cause on the papers or no longer in dispute on appeal. They may be summarised as follows:

1. The Crocodile River is a public river.

2. Members of the public are entitled as of right to canoe on the river.

(As to these two points see <u>BUTGEREIT AND ANOTHER V TRANSVAAL CANOE UNION AND ANOTHER</u> 1988 (1) SA 759 (A).

3. Second respondent's land ("the property") lies on the western side of the river and extends to the middle of the channel.

4. Appellants organise a number of canoe races on the Crocodile River every year. Up to 350 canoeists compete in some of them. The races start and finish on riparian land, the respective owners of which permit access to the river.

5. As the river passes the property it bends westward. At that point, rocky obstructions in the channel cause a series of rapids.

6. The vast majority of the race contestants are insufficiently competent to negotiate the rapids by canoe. They are therefore obliged to circumvent them on land by way of portage in order to reach the next navigable portion of the river and so continue the race.

7. The eastern bank being on the inside of the bend, most competitors portage on that side because it offers by far the shorter detour. However some canoeists regularly use the western bank and indeed did so during the race on 2 November

1991.

To complete a survey of the relevant facts it is necessary to refer shortly to two aspects that were not free from dispute on the papers.

As to the area of land traversed by portaging canoeists, it was alleged in the founding affidavit that for the purposes of the race to be held the following day portage on the eastern bank would cover a strip of bush-covered riverbank next to the waterline some 100 metres long and between 2 and 5 metres wide, which was comfortably below what was referred to, conveniently perhaps, if inappropriately, as the high-water mark. Respondents did not suggest that portage on the eastern side could not be accommodated within an area of that size but alleged that portage on either side of the river regularly occurred above the high-water mark. In fact, respondents averred that on previous occasions competitors portaging on the western side across the property had run through the garden. Appellants'

guarded reply was that if any canoeist had infringed upon the property beyond the extent which the law permitted, this they condemned. It must be accepted as a fact, therefore, that canoeists have on occasion portaged not only on the riverbank. It is, furthermore, a necessary deduction that if the shortest possible portage route envisaged by appellants was of the order of 100 metres on the eastern bank, any portage route over the property - which is on the outside bend of the river - must be appreciably longer.

Finally on the facts, respondents alleged that canoeists portaging across the property in the past had trampled fences and damaged plants, shrubs and trees in the garden, and that portaging necessarily caused damage to vegetation on the riverbanks and to the banks themselves. These allegations were firmly denied. However, in so far as the existence or absence of damage is presently relevant (the question of nuisance, I may say, has never arisen as an issue in this matter) it

must be remembered that both sides sought relief in final form merely on motion and that, in consequence, the case of PLASCON-EVANS PAINTS LTD v VAN RIEBEECK PAINTS (PTY) LTD 1984 (3) SA 620 (A) is applicable as to whose allegations are decisive (see in particular 634 E-I).

It is convenient to deal next with two arguments raised on behalf of respondents. One was that this Court had actually gone as far as deciding in the BUTGEREIT matter, supra, that the right to canoe on the Crocodile River did not include the right to portage. The other argument was that in the absence of a servitude or other right of way the banks of a public river were not for public use in any respect.

In the BUTGEREIT case, having decided (at 770D) that canoeists were entitled to canoe on the stretch of the Crocodile River in issue there, this Court proceeded

at 770E-I to consider the extent to which the subject of portage had been raised in the

papers. After pointing out that one of the riparian owners involved in that litigation had alleged that canoeists portaged over his property, this Court examined the contents of the affidavits and concluded that the allegation as to portage was disputed and that such dispute could not be resolved on the papers. Then followed the passage relied upon by respondents' counsel in the present case (at 770H):

> "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."

In my view it is clearly implicit in that passage, viewed in context, that this Court was merely interpreting the order of the Court a quo. This is manifest from what appears in the immediately following remarks at 770I-J:

> "Eloff DJP, it may be pointed out in this regard, dealt with the case on the basis . . . 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 para (a) of its order was intended to relate only to canoeing, and not to any portage connected with canoeing activities."

Nothing in this Court's judgment indicates, even implicitly, the intention to decide whether a canoeist is or is not entitled to portage as an incident of the right to use a canoe on a public river. The earlier-quoted passage is therefore of no assistance to respondents' case.

As regards respondents' second argument referred to earlier, this, in summary, was as follows. In Roman-Dutch law public rivers, including their banks, became part of the regalia thus vesting in the States of Holland. As a result, public rights in respect of riverbanks fell away. From then on, rights in respect of a riverbank could only be acquired from the State concerned. This was part of the law introduced into South Africa and has remained the legal position until now. Consequently, in the absence of the State's grant

of the ownership in second respondent's land having been subject to a registered servitude which would enable canoeists to portage as they now seek to do, or in the absence of the owner's permission, they have no right to portage over the property.

The short answer to this submission is that, as fully explained in the BUTGEREIT case, supra, at 768A-J, what in Roman-Dutch law became part of the regalia was the ownership of public rivers; the use of such rivers remained public, as it was in Roman law, subject only to such local limitations as were imposed from time to time by various authorities in Holland. That, then, was the legal position that pertained in Holland when Roman-Dutch law was introduced into this country and that is the position which pertained here consequent upon such introduction. It was not suggested that any presently relevant change in the legal situation occurred between then and the present time. It

follows, therefore, that the Roman legal principles

applicable to the public's use of a public river still apply in South Africa today subject, of course, to such legislation and such local laws as might be applicable, (none of which are, however, presently relevant) and subject to what I would, for convenience, call the South African legal context, to which I shall revert later.

Counsel were ad idem (and rightly so - on the strength of much authority) that according to those principles the right to use the river carried with it the right to make some use of the riverbanks even if the banks . were privately owned. Respondents' second submission under discussion must therefore also fail.

Two crucial questions then arise: (1) Do the Roman law principles referred to find sufficient application in South Africa today to entitle members of the public to portage canoes unrestrictedly along the banks of a

public river? (2) What in law constitutes the bank of a

public

river? More particularly, what are the respective riverside and landward limits of the bank?

The starting point in relation to (1) is to be found in Justinian's Institutes 2.1.4. Moyle's translation (5th ed, 1913) is this (citing only the relevant portion):

> "Again the public use of the banks of a river, as of the river itself, is part of the law of nations; consequently every one is entitled to bring his vessel to the bank, and fasten cables to the trees growing there, and use it as a resting-place for the cargo, as freely as he may navigate the river itself."

Digest 1.8.5 is to the same effect and states, in addition, that the banks could be used for drying fishing-nets.

In Institutes 2.1.2 it is stated that the public's right to the use of rivers included the right to fish. It would follow, therefore, that fishing from the bank would seem to be a further instance of use open to the public. And the boaters and swimmers referred to

in the BUTGEREIT case, supra, at 770A-C must have been free to use the banks in order to enter and leave the water.

Commenting on the Roman law concerning the use of riverbanks, Moyle (4th ed, 1903) says that they were subjected by law to a kind of servitude in favour of all members of the public.

Most of the leading Roman-Dutch writers add little, if anything, of note. Some merely state the general principle that riverbanks were for public use. Others go on to repeat some of the examples of use given in the Institutes and the Digest. See Van Leeuwen, Censura Forensis 2.1.8 and Huber, Praelectiones (1766 edition) 2.1.6. As to those who expand somewhat more, Paul Voet, Commentary on the Institutes 2.1.4.1, says that public use of the banks was a servitude imposed by the law of nations because without the use of the banks it would not be possible properly to make use of the river. This concept of a natural servitude is expressed

in very similar terms by Vinnius, Commentary on the Institutes, 2.1.4. He goes on in 2.1.23 to state that a riverbed bounded by private land was only public in so far as its use was necessary to the use of the river. This passage was referred to with approval in VAN NIEKERK AND UNION GOVERNMENT (MINISTER OF LANDS) V CARTER 1917 AD 359 at 372-3. This must mean, I think, that the riverbank, too, is only public in so far as its use is necessary to the use of the river. And to that one must add - necessary within the context of the

limitations expressed or implicit in the Roman and common law authorities to which I have referred.

The above-summarised argument for appellants amounts to this, that the bank of a public river is not merely an area open to public use where necessary at confined, localised places along the riverside but in effect itself a public thoroughfare. Accordingly, canoeists who encounter a non-navigable stretch of water are entitled to proceed on foot, if necessary for an

unlimited distance along the banks of any number of properties, carrying their craft to the next navigable section of the river.

No authority was referred to by appellants' counsel, nor have I found any, which expressly supports that interpretation of the Roman principles.

Accordingly it is necessary to determine whether any implied support is to be derived from the relevant authorities.

It is stated in D 43.12.3 pr that public rivers and their banks were res publicae but this must be construed as referring to the use of the banks, not their ownership. Both I 2.1.4 and D 1.8.5 make it clear that while the public had use -of the riverbanks, ownership vested in the riparian proprietors. See, too, RIVERTON DIAMOND SYNDICATE LTD V UNION GOVERNMENT AND THE MUNICIPALITY OF WINDSORTON 1918-1927 GWLD 207 at 255-256.

Although the public's right to use a river and

17

its banks applied to all public rivers whether navigable or not, it is clear that the emphasis, when it came to the protection of that right, was upon the promotion and

maintenance of unrestricted traffic upon navigable rivers. See D43.12, 43.14 and the BUTGEREIT case, supra, at 767G-H. And it is fair to assume that the bulk of such traffic comprised commercial vessels or craft predominantly used for commercial purposes. Moreover, the examples of riparian use given in I 2.1.4 and D 1.8.5 are entirely consistent with commercial navigation. Mooring, off-loading and drying nets are not activities associated with casual pleasure-boating. The recreational use of small boats such as those referred to in the BUTGEREIT case at 770B-C must naturally have involved using the riverbank for the launching and beaching of such craft but with a single exception nothing in the relevant texts conveys that navigation on a public river ever involved or necessitated the use of the bank as a virtual

thoroughfare for getting a vessel or craft from one point on the bank to another point downstream, whether materially distant or not.

The exception is in D 43.12.1.14 where reference is made to the use of a raft and to a footway, presumably a towpath from which the raft was pulled. However that is far more likely to have been an instance of a commercial river use than a recreational one and it is hard to envisage that it has or could have any parallel in South Africa. And even in the towpath example the use that was made of the bank was contemporaneous with such use as was being made of the river. The former use was therefore clearly a necessary incident of the latter.

But for that one exception, therefore, the situations referred to in the Roman law texts involved the use of the riverbank being exercised in respect of only an essentially localised portion of the riverside. Naturally one can envisage that on a busy section of a

major river many vessels might be moored near one another, thus applying public user all at one time to a continuous stretch of the bank of perhaps some substantial length, but this does not warrant the conclusion that the banks, for the entire length of the river, through areas urban and rural, constituted a public way along which portable craft could be carried where the river was not navigable.

The aforegoing, then, was the factual and legal context in which Roman law countenanced, in respect of public riverbanks, public user predominating over private ownership. A small illustration is given in a gloss upon D 1.8.5 contained in the edition of the Corpus Juris Civilis with commentary by Accursius and

others (Lyons, 1627) where the right of a fisherman to spread his nets on a riverbank tree to dry was said to prevail over the riparian owner's right to fell the tree. Riparian rights of ownership were thus subject to limitations which, especially alongside a busy river,

could clearly have been severe.

In Holland the focus on commercial traffic upon navigable rivers was even greater than in Roman times. Most rivers were navigable : VAN NIEKERK'S case, supra, at 373. In addition to that, as stated in BUTGEREIT'S case, supra, at 768B-F, public rivers became part of the regalia as also all things the use of which in Roman law had been for public use. Therefore the banks of public rivers also became the property of the State. Rights forming part of the regalia could, of course, be granted to others but unless that occurred in respect of any particular riverbanks or sections of them, it follows that the banks remained State property. That being so, there would then no longer have been any question of rights of private ownership in the riverbanks competing with public rights such as had been the position in Roman law.

In South Africa, however, riparian property on public rivers came progressively to be conveyed to

private owners: VAN NIEKERK'S case, supra, at 377. It is probably correct to say that nowadays most such riparian land is privately owned. Not only that, but in the VAN NIEKERK matter it was held that in the case of agri non limitati the owner's land extends to the middle of the river. Furthermore, no South African river that is not tidal, and therefore legislatively defined as part of the sea (s 1 of the Sea-Shore Act, 21 of 1935), qualifies as navigable in the sense in which that word was understood in Roman and Roman-Dutch law i.e. capable of navigation by commercial vessels : cf CG van der Merwe, SAKEREG, 2nd ed, 234. In VAN NIEKERKS'S case, supra, at 378, in a passage stressed by the Court a quo and relied upon by respondent's counsel, Innes CJ said:

> "The current of South African decisions and legislation has set in the direction of encouraging and protecting riparian owners. Their rights, are, of course, subject to the rights of the public; but the practical opportunities for public user as regards the majority of streams in this country are small, for the means of access which would not involve a trespass upon private property are limited."

Although the basic right of public riverbank user has endured from Roman times to the present, the context in which that right can be exercised has changed very materially - topographically, climatically and juridically - in the intervening centuries. The circumstances which afforded great importance to public riparian user in those legal systems do not exist in South Africa, and there is consequently appreciably less justification for the law's allowing public user to compete with its erstwhile inhibiting effect against riparian rights of dominium.

Accordingly, the relevant Roman and Roman-Dutch

authors must be read and understood in this changed context.

There being no navigable rivers here in the sense already explained, one must equate our public rivers with the non-navigable public rivers of which they write. The latter rivers were nevertheless

navigable in small craft, and most probably for mainly recreational purposes (D 43.14). Although it might well be supposed that the beds of some of such rivers, more especially perhaps those in Italy, might have contained rocky obstructions, or waterless stretches in summer, one finds no reference by the authorities to activities akin to portage, which word means, as defined in the Shorter Oxford English Dictionary, the "carrying or transportation of boats or goods overland between navigable waters".

Apart from the mere absence of such reference, the reason for its absence is no doubt because of the consideration, as valid now as then, that for purposes of

recreational boating portage is not a necessary incident. Generally, one does not need to use the riverbanks other than for entering and leaving the water. Portage is only necessary where other circumstances, in addition to such recreational purpose and use, make it so. In the instant case the organisers

determined upon a course which required most competitors to negotiate the rapids overland in order to complete the race. It was that feature that necessitated portage. Portage may be an incident of competitive canoe racing but it is not required in the mere operation of propelling a canoe on navigable water.

Furthermore portage is not by definition confined to any particular route and its distance is limited only by the locality of the next navigable stretch of river. No doubt canoe race organisers would not readily subject competitors to portages that were too exacting or that involved a disproportionate degree of overland work but it is unquestionably so that if portage were permitted as a matter of public rights canoeists would be entitled to traverse a riparian owner's property for a distance that could conceivably be hundreds of metres or even some kilometres in extent. And if the riverbank were too steep to proceed along, could claim then be laid to the right to use ground

adjoining the bank?

Practically speaking, except where a very short deviation on to the bank is involved around, say, a fallen tree or some other relatively minor obstacle which, if technically a trespass, would justifiably warrant application of the maxim de minimis non curat lex, portage as understood by all concerned in this case is in reality a substitute for canoeing. It occurs not as part and parcel of navigating upon the waters of the river. It occurs where the river is either not navigable at all or not navigable by those canoeists who seek to portage. In that sense it is therefore not a necessary incident of navigation.

By contrast, the examples of public riparian use given in the Roman texts, although, as I have said, they pertained essentially to commercial vessels plying navigable rivers appropriately so called, were clearly incidents necessary to navigation.

In the result the answer to question (1) above

is, in my view, in the negative and appellants' main argument fails.

In his alternative argument, counsel for appellants (who did not appear in the Court a quo or draw appellants' heads of argument) submitted that the right to use riverbanks for portage should be afforded whenever in a given situation such use was shown to be reasonable. (I should stress that none of counsel's contentions was intended to refer to a situation of necessity or emergency.)

Assuming for purposes of that argument that a tenable interpretation of the relevant authorities justifies the conclusion that public user of riverbanks includes not only- necessary incidents of navigation but also such activities as could fairly be said to be reasonably incidental, the following considerations must be borne in mind when deciding whether portage should in this matter be said to be one of them.

Appellants' case for relief must be judged on the facts which are common cause and the facts alleged by respondents which appellants cannot deny. Those facts show that the encroachment upon the property in issue involved a detour well in excess of 100 metres. It necessitated hundreds of canoeists pushing their way along a bush-covered riverbank with accompanying wear and impairment of the ground surface and the vegetation. In the past this activity has caused damage to fencing as well. The incursions have regularly occurred above the bank. On occasions canoeists have even come through the garden.

There is no doubt in my mind that that evidence fell altogether short of establishing that portage of the order and nature revealed in the papers would have been reasonable in all the circumstances, whether viewed as an incident of navigation or at all.

In the result appellants failed to show that their members were entitled as of right to portage along

the riverbank of second respondent's property.

That being so, it is unnecessary to answer question (2) above concerning the legal definition of a riverbank or the question whether the portage route for which appellants sought approval lay within the limits of the bank. I would merely add that the parties omitted to address those questions not only in the papers but in both Courts.

The conclusions reached in this case may conceivably have harsh implications for competitive canoeists whose activities are, after all, not driven by anti-social motives but rather by the wish simply to employ the country's natural amenities in the pursuit of healthy, companionable exercise. Giving full weight to that consideration, I nevertheless agree, with respect, with the approach adopted by the Court a quo at 530G that in striking a fair and workable balance between public user and private dominium in South African circumstances, public rights must encroach as little as

9 possible on the rights of riparian owners. If portage is required it will therefore have to be the subject of negotiation with the riparian owners concerned. It is also feasible that rights of public riparian user could properly be dealt with by legislation, if not nationally then at least locally.

The appeal is dismissed, with costs.

C T HOWIE

ACTING JUDGE OF APPEAL

CONCUR:

CORBETT CJ)
VIVIER JA)
F H GROSSKOPF JA)

J U D G M E N T

VAN COLLER, AJA:

I have had the privilege of reading the

judgment prepared in this appeal by my Brother Howie. I agree that the appeal should be dismissed with costs. I have, however, come to that conclusion for somewhat different reasons, which are the following.

The authorities referred to by Howie AJA clearly reveal that in Roman and Roman-Dutch law the public had the right to make use of the riverbanks even if the banks were privately owned. What is less clear, however, is the extent of that right. From the instances given in Justinian's Institutiones 2.1.4, and by Van Leeuwen, Censura Forensis 2.1.8 it appears that it was lawful to moor ships to the banks, to fasten ropes to the trees and even to land cargo on the riverbanks. These instances could certainly not have been an exhaustive list of the use that could have been made of the riverbanks. Howie AJA mentions fishing from the bank as a further instance of use open to the

public. It is true that there seems to be no reference

3

by the authorities to activities akin to portage. One can also not conclude that the right to use a riverbank included the right to use it as a public thoroughfare for the entire length of the river. It appears from the judgment of Rabie ACJ in the case of <u>Butgereit v Transvaal Canoe Union</u> 1988(1) SA 759 (A) that rivers not suitable to accommodate large vessels had been used for a variety of activities other than navigation. It is apposite to refer in this regard to what Rabie ACJ said at 769 I-J and at 770 A-C:

> "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 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 (Eg 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."

It would have been impossible to exercise these activities if the riverbanks could not have been used and it must follow that the public would have been entitled to use the riverbanks in connection with the

sporting and recreational activities practised on the river itself. One is therefore justified in concluding that according to the common law the right to make use of the riverbanks was only restricted to the extent that the use should have been incidental to the use of the river itself. A fisherman would therefore have been entitled to stand cm the riverbanks to fish. It would be absurd to suggest that he would have been obliged to confine his fishing activities to one place along the riverbank. If he, not having met with any success at a particular spot, had decided to walk to another spot further down or higher up the river such use of the riverbank would in my view have been incidental to the use of the river for fishing purposes. Even if the fisherman walked along the riverbank past a rapid which extended for some distance in order to fish the use of the bank may have been incidental to fishing. There appears to be no reason why the common law on this

subject should not still apply today. It would follow, therefore, that a person in a canoe, who comes across an

obstruction like a weir or impassable rapids and who carries the canoe along the bank to get past the obstruction in order to continue paddling would use the riverbank in the same manner as the fisherman would. In my judgment the use of the riverbank in this manner and for this purpose may be regarded as incidental to the use of the river. Although it is difficult to lay down a general principle, it will depend on all the circumstances of each case whether or not the portage can be regarded as incidental to the use of the river. Where rapids make canoeing difficult or impossible over a stretch of several kilometres, portaging along the banks for the entire distance may not be an activity incidental to the use of the river. Such conduct may then not be an incident of, but a substitute for canoeing.

7

In this matter it is unfortunately not possible to determine whether the use which the appellants intended to make of the Crocodile river can be regarded as incidental to the use of the river itself. The appellants failed to make out a proper case with

regard to where precisely they intended to portage. They referred in their founding affidavit to a strip some 100 metres long and between two and five metres wide on the eastern banks of the river. Precisely where this strip begins or ends has not been explained. It also emerged from the opposing affidavits that the canoeists have also made use of the the western bank of the river and will again do so. Apart from the fact that it cannot be determined on the papers where exactly along the riverbanks the portage is envisaged to take place, the relief sought in the Notice of Motion has not been limited to a defined area along the banks of the Crocodile river. It is couched in

terms wide enough to include the whole length of the river and a case for relief of this nature has certainly not been established. There is also the dispute of fact referred to by Howie AJA in his judgment. It seems to me that there is some similarity between the rights pertaining to the use of riverbanks and those derived from servitudes. Such rights must be exercised civiliter modo, that is, in a

reasonable manner and with the least possible damage or inconvenience to the servient tenement and its owner. Having regard to the large number of canoeists who take part in the races and having regard to what happened, according to the allegations contained in the opposing affidavits, it has not been shown that the rights will be exercised in a reasonable manner.

I agree therefore that the appeal should be dismissed with costs.

A P VAN COLLER
ACTING JUDGE OF APPEAL