THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE

Case no: 634/06

In the matter between

LINVESTMENT CC **APPELLANT**

and

BONNIE PATRICIA HAMMERSLEY **FIRST RESPONDENT**
HILTON HAMMERSLEY **SECOND RESPONDENT**

Coram: **HOWIE P, MTHIYANE, HEHER, COMBRINCK JJA and KGOMO AJA**

Heard: **21 NOVEMBER 2007**
Delivered: **28 FEBRUARY 2008**

Summary: **Land – servitudes – right of way – defined and registered – relocation at instance of owner of servient tenement – when allowed.**
Constitutional law – s 173 – development of the common law – when

appropriate.

Neutral citation: This judgment may be referred to as Linvestment CC v Hammersley (634/2006) [2008] ZASCA 1 (28 February 2008).

JUDGMENT

HEHER JA

HEHER JA:

[1] The issue in this appeal, simply stated, is whether the owner of a servient tenement can, of his own volition, change the route of a defined right of way registered against the title deeds of his property.

[2] The appellant is the registered owner of Portion 136 of the Farm Driefontein, registration division FS, Province of KwaZulu-Natal, in extent 25,0912 hectares held under Certificate of Consolidated Title No T66117/2004.

[3] The first respondent is the registered owner of the Remainder of Sub 3 of the Farm Driefontein No 1389, KwaZulu-Natal, in extent 20,9085 hectares held under Deed of Transfer No T19322/1992 and Deed of Transfer No T28469/1998. The second respondent, her husband, apparently resides on this property.

[4] The appellant's property is subject to two registered servitudes in favour of the first respondent's property *viz*

1. An 18,29 metre servitude of right of way represented by the figure e.f.h.g on

a diagram created in Deed of Transfer No 4976/1976;

2. A 15 metre wide road servitude depicted by the figure g.h.G.H.J.m.j on a diagram created in Deed of Transfer No T17863/1983.

The two servitudes are so located as to constitute a continuous strip of land over which the rights can be exercised.

[5] In its declaration in the High Court the appellant, as plaintiff, made the following allegations:

1. The plaintiff had given notice to the first defendant of its intention to amend the course of the servitudes from that shown on the diagrams to [another route over the plaintiff's property].
2. The plaintiff had tendered all costs of amending the registration of the servitudes, including the costs of survey, all consents required, and registration and construction of all roads from any point on the new course of the servitude adjacent to the first defendant's property across the boundary to the place on the first defendant's property to which the first defendant required access.
3. The first defendant had refused to consent to amend the servitudes as proposed.
4. The first defendant's refusal was unreasonable.
5. The present servitudes constituted undue inconvenience to the plaintiff.
6. The substitution of the proposed servitudes for the present servitudes would not excessively inconvenience the defendants.

7. The plaintiff is entitled to a declaration which will permit it to substitute the proposed servitudes for the existing servitudes.

In the premises the appellant claimed an order declaring that it was entitled to substitute the proposed servitude route for the existing route.

[6] The respondents pleaded that they were under no obligation to accept the alternative route and that the declaration sought was not competent in law since the defined route could only be changed by mutual consent.

[7] For the purposes of adjudication by the High Court the parties agreed that the appellant's averments relating to the unreasonableness of the respondents' refusal, the undue inconvenience to the appellant of the existing route and the absence of excessive inconvenience to the first respondent of the proposed route, were not placed in issue.

[8] The parties agreed that the question of whether the declaration was competent in law was to be tried as an issue separated in terms of Rule 33(1) according to a stated case containing the facts set out in paragraphs [2] to [6] of this introduction.

[9] The High Court (Madondo AJ) answered the question in favour of the respondents and ordered the appellant to pay the costs.

[10] With leave of the court *a quo* the appellant appealed to this Court against the whole of the judgment and the order made.

[11] Mr Gorven, who appeared for the appellant, conceded that the established

law is against his client. In *Gardens Estate Ltd v Lewis*[1] this Court said (*per* De Villiers AJA):

'A further question between the parties is: Did the Gardens Estate Syndicate have the right to deviate the pipe-line as it did in 1902? In my opinion it had no such right. A definite servitude having originally been constituted, it could only be altered by mutual consent. In this respect a servitude as constituted differs from a servitude created *simpliciter* (D. 8.1.9.). In the latter case, according to *Voet* 8.3.8, the owner of the dominant tenement has the election where to lay the line, which he must however exercise *civiliter*. If he has once exercised his election, he cannot afterwards change. But the owner of the servient tenement would have the right to do so provided the new route

1 1920 AD 144 at 150.

is as convenient as the old one, (*cf. McCabe v Rubidge*, 1913, A.D. 441). When *Voet*, 1.50, says that the owner of the servient tenement has the right to point out another route to that which has been agreed upon (*vel conventione designatum fuerat*) he speaks of servitudes created *simpliciter*.'

(The reference to *Voet* 1.50 is obscure; the passage referred to is in fact in 8.3.8.)

This dictum has subsequently been referred to without dissent in *Moulder v Thom*[2] and *Smith v Mukheiber*[3].

[12] *Gardens Estate Ltd v Lewis* concerned a servitude of *aquaeductus* constituted and registered in defined and unambiguous terms against the title of the servient tenement. The determination of whether Gardens Estate Ltd (the servient owner) was entitled to relocate the pipeline was the *ratio decidendi* of the judgment. That the servitude was one allowing the leading of water and not a right of way is a distinction without a difference, as Mr Gorven concedes.

[13] The first step in determining the nature and extent of a registered condition is to examine its terms. In the present instance we are concerned with servitudes of rights of way which are precisely defined in relation to the remainder of the servient tenement by reference to surveyors' diagrams and leave no room for uncertainty. Unless there is a valid reason to distinguish or depart from the conclusion in *Gardens Estate Ltd v Lewis*, the appeal must fail.

[14] Mr Gorven submitted that the decision was based upon a misinterpretation. His contention was that Voet, properly construed, did not distinguish between servitudes

2 1974 (1) SA 336 (T) at 339G-H.
3 2001 (3) SA 591 (SCA) at 596I.

constituted in general terms and servitudes specifically constituted (ie in terms not requiring further definition as to location or route). I do not agree. Title 3, sec 8 provides commentary on Justinian's *Digest* 8.3, which deals with rustic praedial servitudes. D 8.3.13.1 relates to general servitudes of *via* over an entire estate. See also D 8.1.9 (*via*), D 8.3.21 (*aquaeductus*) and D 8.3.26 (*via, iter, actus and aquaeductus*). As far as I can ascertain, the Digest does not address the case of servitudes specifically defined. Nor did Voet consider it necessary to do so. That limitation is also inherent in 8.3.8 which is discussed in *Gardens Estate Ltd v Lewis*. The conclusion of this Court relating to the servitude against the title was simply an inference drawn from a contrast with Voet's views. With respect to the learned judges, the inference seems entirely warranted. It is certainly how Gane understood the matter when he added his introductory notes; hence he prefaced 8.3.8 with the words 'In servitudes [of *iter, actus, via* etc] dominant owner has choice of route where not fixed.'[4]

[15] In the event of his failing to persuade us of the correctness of his initial submission, Mr Gorven based an argument on s 25 (1) of the Constitution of the Republic of South Africa.[5] He contended that the effect of refusing to allow the appellant to move the servitude to a more convenient place, was to restrict the free use of the land over which the servitude presently extends; thereby it deprived the

4Counsel did not refer us to other Roman-Dutch authority which espouses a different view. My own limited research suggests that leading writers on servitudes similarly restricted their opinions to servitudes generally constituted. See eg Caepolla, *De Servitutibus*, Tract 11 Cap 1.7; Brunneman, *Comment in Pandectas*, VIII.1.9.

5No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

appellant of a right to property.

[16] But that cannot be so. The appellant acquired and, no doubt, paid for the property in the knowledge (actual or implied) that its right of ownership was limited by the servitude. It is deprived of nothing by the proper interpretation of the servitude. And if it had been a party to the agreement constituting the servitude, it would have suffered no deprivation of its rights but only a limitation to which it had freely consented.

[17] The conclusion reached in *Gardens Estate Ltd v Lewis* is also in accordance with existing principle. As the law stands, once the servitutal rights of the parties are unambiguously circumscribed by the terms of their agreement, a court will not order a departure from such terms in order to bring about a lessening of the burden on the servient property: *pacta sunt servanda* - *Van Rensburg en andere v Taute en andere*[6] - except in the case of constitutional violations: *Barkhuizen v Napier*[7].

[18] Selikowitz J summarised the existing state of the law in *De Witt v Knierim*[8]:

'Whilst our law apparently seeks to promote the *bona fide* development by an owner of his agricultural land and to optimise its utilization in the public interest, it also recognises and enforces the principle that once a right has been given to another the grantor cannot either directly or indirectly reappropriate it.'

That, however, is what the appellant seeks to do.

[19] A servitude along a defined route has been said to be analogous to a compulsory

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6 1975 (1) SA 279 (A) at 301H.
7 2007(5) SA 323 (CC) at para 15.
8 1991 (2) SA 371 (C) at 386F.

sale of a particular part of property and can only be altered by mutual consent: *Beukes v Crous en 'n ander*[9], albeit that the analogy is not exact, cf *Reid v Rocher*[10].

[20] The attempt of appellant's counsel to introduce the rule that servitudes must be exercised *civiliter modo*[11] as a means of justifying his client's attempt to remove the right of way to a route more convenient to it, is misconceived. As Van den Heever J pointed out in *Penny v Brentwood Gardens Body Corporate*[12]

'Civility is not in law synonymous with a waiver of one's rights. The old authorities when dealing with this obligation, usually refer to the choice of a route by the owner of the dominant tenement. No one suggested he should rest content with a narrower one than that stipulated because of the convenience of the servient owner, to the best of my knowledge, until Hofmeyr AJP (as he then was) appears to have done so in *Sussman v Stabilis Trust Finansieerders (Edms) Bpk* 1970 (3) SA 58 (O) at 60E-F. With such a proposition, if it were intended, I respectfully disagree. The cases on which he relies do not support such an interpretation of the obligation to exercise one's rights *civiliter modo*.'

[21] Counsel for the appellant also sought to equate a servitude granted in general terms with one over a defined route. But the equation does not balance. A general servitude of right of way burdens a whole tenement (*totus enim fundus servit*). (This has been variously expressed as 'over any part of the land that he likes',[13] ' the whole farm and every clod of it',[14] and 'every inch of the servient

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9 1975 (4) SA 215 (C) at 221G.
10 1946 WLD 294.
11 As to which see *Texas Co (SA) Ltd v Cape Town Municipality* 1926 AD 467 at 474.
12 1983 (1) SA 487 (C) at 491B.
13 *Dig* 8.1.9 (Munro's translation).
14 Gane, *Voet* 8.3.8.

tenement'[15]. See also *Nach Investments (Pty) Ltd v Yaldai Investments (Pty) Ltd*[16]. But that is not true of a servitude in defined terms. Moreover, the dominant owner's right to select the line of a servitude created simpliciter is an essential incident of the grant: *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd*[17]; *Hollman v Estate Latre*[18]. But no such incident attaches to a defined grant. Subject to what is said below, it is both unnecessary and incompatible with a right which is unambiguously limited by the terms of its creation. In the first case the general nature of the servitude remains even though a specific route has been fixed by subsequent agreement[19] and it revives as soon as the servient owner takes away the use of the place over which it was originally delimited[20]; the servient owner must then allot an equally convenient way. That this is so appears from the facts of *Rubidge v McCabe & Sons*[21] where the substitution of an alternative route by agreement for that under an original right of way established in general terms did not, upon the impracticability of the alternative being established, prevent a reversion to the original route. In the second case the right, being fixed by agreement, is immutable save by consent: see *Van Heerden v Coetzee*[22].

[22] According to existing principle, therefore, the conclusion which this Court reached in *Gardens Estate Ltd v Lewis* would appear to be unassailable. But the judgment is founded on the unstated premise that the law expounded by Voet

15 *Reid v Rocher supra* at 299.
16 1987 (2) SA 820 (A) at 831D and the cases there cited.
17 1918 AD 1 at 16.
18 1970 (3) SA 638 (A) at 645D.
19 The 'covenant' referred to by *Voet* 8.3.8.
20 *Voet* 8.4.12.
21 1913 AD 433.
22 1912 AD 167 at 171, 172.

correctly reflected the common law of South Africa. The refinements brought about to Roman-

Dutch law in the century between the publication of Voet's Commentary and the occupation of the Cape in 1806 are not always readily ascertainable. Whether the relevant authorities were available to the judges in 1920 may be doubted since there exists evidence that that law, in so far as it related to the subject of relocation of servitudes, was, by 1806, no longer consistent with the inference which was properly drawn from *Voet* 8.3.8 in *Gardens Estate Ltd v Lewis*.

[23] In order to appreciate the force of the evidence some reference to history is necessary[23]. After the kingdom of Holland threw off the French yoke early in the 19th century, an attempt was also made to replace French law which had applied there since 1809. A decision was taken to compile a new, indigenous code of law. A commission was appointed under the chairmanship of Prof J M Kemper of Leiden for this purpose. It completed a draft by 1816. The southern (Belgian) part of the country was, however, dissatisfied with the emphasis that it placed on Roman-Dutch law, and preferred instead a system closer to the French Code Civil. The committee published a revised draft in 1820 which also found no favour in the south. Hahlo and Kahn[24] describe this draft as 'a distillation of pure Roman-Dutch law in its final stage of development'.

[24] The Seventh Title of the revised draft is of particular significance in the present context.[25]

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23 See Prof W de Vos, *Regsgeskiedenis*, 223 whose historical survey I have adapted for my purposes.
24 *The South African Legal System and its Background*, 564.
25 I quote from *Ontwerp van het Burgerlijk Wetboek voor het Koningkrijk der Nederlanden aan de Staten-Generaal aangeboden den 22sten November 1820*, 2ed, Leiden, 1864.

"1188. De eigenaar van het dienstbaar erf mag niets doen, waardoor het gebruik der erfdienstbaarheid minder nuttig of minder gemakkelijk zoude gemaakt worden.

Hij mag derhalve de gesteldheid der plaats niet veranderen, noch de uitoefening der dienstbaarheid overleggen of overbrengen op een ander gedeelte van het erf, dan waarop hetzelve oorspronkelijk gelegen heeft.

Wanneer niet te min de oorspronklijke inrigting meer bezwarend voor hom was geworden, of hem verhinderde eenige noodzakelijke of nuttige reparation te doen, mag hij aan dengene, die het regt van erfdienstbaarheid heeft, eene andere even goede en even gemakkelijke plaats tot uitoefening van dezelve aanbieden ten zijnen koste; welk aanbod alsdan niet zal mogen geweigerd worden."[26]

There is nothing in this passage, or, indeed, in the compilers' treatment of the nature of servitudes in Part 1 of the Seventh Title, to suggest an intention to draw a distinction between servitudes generally and specifically created.

If art 1188 was, as it appears to have been, an authoritative statement of the Roman-Dutch private law at the date of the British occupation of the Cape, it contained principles which should have been applied in *Gardens Estate v Lewis*. That it was apparently overlooked certainly justifies a reconsideration of the issue.[27]

[25] In addition, this court has always possessed an inherent power to develop

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26 Which I translate as follows:
'1188. The owner of the servient tenement may not do anything by which the use of the servitude is rendered less useful or convenient.
He may therefore not change the condition of the property, nor transfer the exercise of the servitude to or impose it upon any part of the property other than that on which it was originally laid.
Nevertheless, when the original institution has become more burdensome to him, or hinders him in carrying out any necessary or useful repair, he may offer to those entitled to the right of servitude another equally good and convenient for their exercise, at his cost; an offer so made cannot be refused.'

27 It should however be noted that Kemper's art 1188 is a verbatim translation of art 701 of the Code Napoleon. Presumably his committee was satisfied that it correctly reflected the law of Holland. (Van der Linden's *Ontwerp Burgerlijk Wetboek* 1807-1808 does not deal with the subject of relocation of servitudes.)

the common law. The fullest discussion of which I am aware is to be found in Hahlo and Kahn, *op cit* 582-596 *sub nom* 'The Second Life of the Roman-Dutch Law'.[28] The power is confirmed in s 173 of the Constitution 'taking into account the interests of justice'. Thus, without abandoning our legal heritage, the courts can and should examine how developed legal systems cope with common problems. By appropriate application of the knowledge thus derived, a modification of our existing law may better serve the interests of justice when the existing law is uncertain or does not adequately serve modern demands on it. The present appeal, in my view, is just such a case.

[26] The question of mitigating the burden of servitudes has been addressed in many systems of law, usually in statute or code. Although Kemper's draft was, for reasons which Prof de Vos explains, not adopted as the codified law in Holland, in 1838 a Burgerlijk Wetboek was adopted which contained many elements of the Napoleonic Code, including art 701.[29] In the 19th century, Laurent,[30] discussing art 701 of the French Code, said that that article dealt with mutability of title and commented:

'As the needs of the properties change, and society being concerned that servitudes do not hamper the changes which become necessary, the law must permit interested parties to modify the exercise of the servitude'.[31]

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28 Attention may also be drawn to dicta in *Blower v Van Noorden* 1909 TS 890 at 905, *Pearl Assurance Co v UG* 1934 AD 560 (PC) at 563, *Tjollo Ateljees v Small* 1949 (1) SA 856 (A) at 874-5 and *Cerebos Food Corporation v Diverse Foods SA* 1984 (4) SA 149 (T) at 163D-E.

29 Embodied in art 279 of the Dutch code (the BW) (now art 73); see Diephuis, *Het Nederlandsch Burgerlijk Regt* 2ed (1886), Part 3 (Sakenregt) 585; Opzoomer, *Het Burgerlijk Wetboek* 3ed (1911), Part 3, 760-1.

30 *Principles de Droit Civil Francais*, 2 ed (1876) para 277.

31 Translation supplied.

[27] According to Prof Meijers,[32] (writing in the middle of the 20th century) the right of relocation of a defined servitude is 'recognized by most foreign codes' including Switzerland, Italy and Greece, subject to the duty of the servient owner to prove that the dominant owner's right of enjoyment would not thereby be reduced.[33]

[28] The Belgian Civil Code[34] and the German BGB[35] are to similar effect.

[29] Scots law is discussed *in extenso* by Cusine and Paisley.[36] There is apparently an unresolved dichotomy of authority between that which favours sanctity of contract and that which would allow a right to relocate on the grounds of manifest convenience to the servient owner and absence of detriment to the dominant proprietor. The authors debate the arguments for and against the respective views. Within the same legal environment, an instructive comparative survey[37] traces the progress of the law from the common Roman roots of Scotland and the state of Louisiana until the 21st century, showing how the tide is turning from strict adherence to contractual rights toward a utilitarian power of relocation that is judicially controlled or to legislative intervention having similar effect.

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32 *Ontwerp voor een Nieuw-Burgerlijk Wetboek (Toelichting)* (1955) Book 5, 428. As to his role in the development of a new Dutch code, see De Vos *Regsgeskiedenis supra* at 224-5.

33 See also in this regard, *Asser's Handleiding tot de beoefening van het Nederlands Burgerlijk Rech, (Sakenrecht)* 2nd Part (1996) paras 185, 186, where a distinction is drawn between a servitude of right of way which is expressly defined and one in general terms, and the authors' note:
'In het laaste geval is de eigenaar van het dienende erf al krachtens de titel bevoegd aan te wijzen hoe de wederpartij van zijn recht gebruik kan maken. Dit impliceert dus de bevoegdheid tot verlegging, waartegen de wederpartij alleen kan opkomen, indien hij bewijst, dat door de verlegging zijn belangen op onredelijke wijze worden aangetast. Zie HR 7 mei 1931, NJ 1931, p 1608; HR 22 januari 1982, NJ 1982, 456 m.nt.wmk. Is de weg in de titel echter nauwkeurig bepaald, dan is verlegging alleen mogelijk, wanneer de eigenaar van het dienend erf kan aantonen, dat de werderpartij door de verlegging niet benadeeld word.'

34 Para 701 based on the equivalent provision in the Code Napoleon.

35 Para 1023; see *Münchener Kommentar*, 1325'Recht auf Verlegung' from which it is clear that sanctity of contract yields to equitable considerations.

36 *Servitudes and Rights of Way*, (1998) sub nom 'Diversion of the route of the Servitude' at paras 12.23-12.75.

37 'A New Way:Servitude Relocation in Scotland and Louisiana' by John A Lovett *9 Edin LR* 352 (2004-5).

[30] Even from this brief, and necessarily superficial, survey it is apparent that

widespread civilised practice favours a flexible approach to the relocation of servitudes. If that flexibility is soundly based I think we would be wrong to adhere blindly to an inference drawn from the views of Voet expressed at the end of the 17th century, albeit affirmed as late as 1920 by this court.

[31] I am persuaded that the interests of justice do indeed require a change in our established law on the subject. The rigid enforcement of a servitude when the sanctity of the contract or the strict terms of the grant benefit neither party but, on the contrary, operate prejudicially on one of them, seems to me indefensible. Servitudes are by their nature often the creation of preceding generations devised in another time to serve ends which must now be satisfied in a different environment. Imagine a right of way over a farm portion registered fifty years ago. Since then new public roads have been created providing new access to the dominant tenement, the nature of the environment has changed, the contracting parties have long gone. Why should a present owner, on no rational ground, be entitled to rely on his *summum ius* derived from the alleged sanctity of a contract or a grant or prescriptive acquisition to which he was not privy[38].

Properly regulated flexibility will not set an unhealthy precedent or encourage abuse.

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38 Brunneman, *Comment. in Pandectas*, VIII.1.9, (freely translated by me) says
'And the place in which the servitude was first located should not be changed because all change is odious and once a choice is made a way ought not to be varied. But if the servient owner asks that the servitude be constituted in another manner, he should be heard; Maevius says that the dominant owner obtains from the determination through a less burdensome use only what was provided in a more oppressive way, because he has no interest beyond that, and malice must be opposed where something of equal value can be done. And this opinion is approved. For it is unfair to deny to another what does not hurt you and is indeed to the advantage of the other. Malice must not be tolerated.'
This principle applies equally to a servitude initially constituted in specific terms which, for valid reason, the servient owner seeks to relocate.

Nor will it cheapen the value of registered title or prejudice third parties.

[32] But even if the dominant and servient tenements still remain in the ownership of the original contracting parties, the opportunity for relocation should not be excluded if

the circumstances prevailing at the time of the original agreement have changed and the dominant owner no longer possesses any acceptable reason to subject the servient property to the strict terms of the grant. It seems to me that, in such a case, the respective interests of the parties can fairly be regulated by reliance on the concepts of convenience and prejudice which I have introduced into the order.

[33] In line with the extensive international trend of legal development in this respect, I therefore propose that, in circumstances falling within the problem posed by the stated case, the law be developed to ensure that injustice does not result.

[34] The appellant will, in consequence, have been successful in the appeal. This success may, however, prove illusory if evidence should show that it cannot satisfy the terms of the law as declared. The respondents were satisfied to fight the matter on the basis of the stated case. Their opposition has proved empty, but for reasons which they could not have foreseen. I think it would be fair if the parties are ordered to pay their own costs in both courts.

[35] I would make the following order:

1. The order of the court *a quo* is set aside and replaced by the following-

‘It is declared that if the owner of a servient tenement offers a relocation of an existing defined servitude of right of way the dominant owner is obliged to accept

such relocation provided that:

(a) the servient owner is or will be materially inconvenienced in the use of his property by the maintenance of the *status quo ante*;

(b) the relocation occurs on the servient tenement;

(c) the relocation will not prejudice the owner of the dominant tenement;

(d) the servient owner pays the costs attendant upon such relocation including those costs involved in amending the registration of the title deeds of the servient tenement (and, if applicable, the dominant tenement).'

2. The parties are ordered to pay their own costs in both courts.

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J A HEHER
JUDGE OF APPEAL

HOWIE P **)Concur**
MTHIYANE JA **)**
COMBRINCK JA **)**
KGOMO AJA **)**