THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 149/2013
Reportable

In the matter between:

PEZULA PRIVATE ESTATE (PTY) LTD Appellant

and

NEIL METELERKAMP First Respondent
THE REGISTRAR OF DEEDS Second Respondent

Neutral citation: *Pezula Private Estate (Pty) Ltd* v *Metelerkamp* (149/2013) *[2013] ZASCA 188 (29 November 2013)*

Coram:	Brand, Tshiqi, Theron, Petse JJA and Zondi AJA
Heard:	19 November 2013
Delivered	29 November 2013
Summary:	**Prescription - acquisitive prescription - nec precario - failure to prove non precarious user or adverse user - failure to prove benefit in a praedial servitude.**

ORDER

On appeal from: Western Cape High Court, Cape Town (Saldanha J sitting as court of first instance):

1 The appeal is upheld with costs.

2 The order of the high court is set aside and replaced with the following: ‘The application is dismissed with costs.’

JUDGMENT

THERON JA (BRAND, TSHIQI, PETSE JJA and ZONDI AJA concurring):

[1] This is an appeal, with the leave of the court a quo, against an order declaring that the first respondent, Mr Neil Metelerkamp, acquired a servitude of unhindered pedestrian access along a defined route over property owned by the appellant, Pezula Private Estate (Pty) Ltd (Pezula), in favour of his, Metelerkamp’s, property.

[2] Pezula is the registered owner of the remainder of the Farm Noetzie No 394 (the Pezula property) and Mr Metelerkamp is the registered owner of erf 28 of Portion 384 Noetzie and he has been the registered owner of that property since 2 September 1970. Pezula’s predecessor in title in respect of the property was Geo Parkes & Sons (Pty) Ltd (Geo Parkes). Pezula purchased the property from Geo Parkes in 2000.

[3] Mr Metelerkamp inherited erf 28 from his grandfather and built a house on the property during 1973. Mr Metelerkamp’s grandfather, Mr John Rex Metelerkamp, used to be the chairman of the Board of Directors of Geo Parkes. Mr Metelerkamp was employed by Geo Parkes as an accountant for a substantial period.

[4] From about 1920 there had been a car park on the Pezula property, bordering on a Divisional Road, which later became the demarcated area. It was common cause that there was, from 1981 until 2007, a lease agreement between the Divisional Council of Outeniqua, (the Divisional Council) in terms of which the demarcated parking area could be used by the public for parking purposes.

[5] Mr Alan Stephan Accra Henderson (Mr Henderson), Mr Metelerkamp's godfather, was the previous owner of the land described as Portion 91 of the Farm Noetzie No 394 now known as portion 394/91. This portion was sold to Pezula by Mr Henderson on 26 September 2004. During 1940, after Mr Henderson had purchased Portion 394/91, he entered into an agreement with Mr John Metelerkamp, in the latter's capacity as a director of Geo Parkes, in terms of which Mr Henderson was given permission to build a road on the property to gain vehicular access to his property, for which Mr Henderson paid Geo Parkes a token amount. Mr Henderson then built a road, which became known as the strip road, that led from the demarcated parking area to his property and to the beach.

[6] Mr Metelerkamp attached to his founding affidavit a copy of the Noetzie General Plan of 1915. While the general plan shows two access roads to the beach from the Divisional Road, it was common cause that only one road exists, namely the top road leading to the mouth of the river. In times gone by, the local people used to travel along that road with their ox wagons (the road is still known as the Wagon Road) in order to cross the mouth of the river. The other road indicated on the general plan was never built. The public used to make use of a zig zag footpath from the Divisional Road, down to where the steps are now, in order to gain access to the beach. After the strip road was built the public stopped making use of the zig zag footpath and started using the strip road built by Mr Henderson.

[7] In 1980, Mr Metelerkamp and Geo Parkes entered into a lease agreement in

terms of which Mr Metelerkamp rented from Geo Parkes a small portion of the property, on which a single garage was situated. At the time that Mr Metelerkamp entered into the lease agreement with Geo Parkes for the hiring of the garage, the strip road was already in existence. After conclusion of the lease agreement in respect of the garage, Mr Metelerkamp would park his motor vehicle in the garage and walk from there to his property, along the strip road.

[8] Pezula closed the strip road during May 2006 by putting a shade cloth barrier across the steps thereby prohibiting entrance from the parking area onto the strip road as well as by posting a security guard to prevent people from using the strip road. During 2007, Mr Metelerkamp instituted motion proceedings against Pezula and the second respondent, the Registrar of Deeds, in the Western Cape High Court for an order, inter alia, declaring that he had acquired a servitude right of way over Pezula's property. The Registrar of Deeds was cited in the proceedings as a mere formality. The matter was referred for the hearing of oral evidence, after which the high court (Saldanha J) granted the relief sought which is the subject matter of the present appeal.

[9] Section 6 of the Prescription Act 68 of 1969 provides that:

> '... a person shall acquire a servitude by prescription if he has openly and as though he were entitled to do so, exercised the rights and powers which a person who has a right to such servitude is entitled to exercise, for an uninterrupted period of thirty years or, in the case of a praedial servitude, for a period which, together with any periods for which such rights and powers were so exercised by his predecessors in title, constitutes an uninterrupted period of thirty years.'

[10] In terms of the Prescription Act 18 of 1943, the use of the property must have been *nec vi nec clam nec precario* for the period of thirty years. *Nec precario,* the absence of a grant on request, has been subsumed into sections 1 and 6 of the

current Prescription Act by the requirement that the potential acquirer of the servitude must act as though he or she was entitled to exercise the servitudal right. It follows that either express or tacit consent would mean that the alleged acquirer did not act as if he or she was entitled to exercise the servitudal right.[1] The notion of a *precarium* is based upon the application by one party for a concession which is granted by the other party; that other party reserving at all times the right to revoke that concession as against the grantee in terms of the particular conditions to which the grant is subject[2]. Put differently, a *precarium* is a legal relationship which exists between parties when one party has the use of the property belonging to the other on sufferance, by leave and licence of the other. *Precarium* has its origin in the fact of the permission usually being obtained by a prayer.[3]

[11] Mr Metelerkamp's case was that he had acquired a servitude right of way of unhindered pedestrian access over Pezula's property in favour of his property because he had openly used the strip road on Pezula's property as though he was entitled to do so and exercised the rights and powers which a person who had a right to a servitude was entitled to. He alleged that he had been using the strip road since 1973 and that as a property owner, his use had continued uninterrupted for a period of more than 30 years. Mr Metelerkamp in his founding affidavit said the following:

'The general public as well as owners of properties that are situated on the beach have been exercising a right of way over the Respondent's property since I can remember. ... The public as well as the owners of properties along the beach front made use of this road independently from Mr Henderson and/or any agreement Mr Henderson may have had with the owners of farm 394 namely Geo P a r k e s . . '

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[1] *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd & another* 1972 (2) SA 464 (W) at 478A-482A. See also MD Southwood SC *The Compulsory Acquisition of Rights by Expropriation, Ways of Necessity, Prescription, Labour Tenancy and Restitution* (2000) at 125.

[2] John Saner Prescription in South African Law (1996) at 2-10.

[3] Malan v Nabygelegen Estates 1946 AD 562 at 573; Adamson v Boshoff & others 1975 (3) SA 221 (C) at 226H-227G.

[12] The evidence led at the trial, was contrary to the allegations made by Mr Metelerkamp in para 11 above, to the effect that the public made use of the strip road 'independently from Mr Henderson'. The evidence established that Mr Henderson in fact permitted, and even encouraged, the use of the strip road by members of the public including Mr Metelerkamp. Such use of the strip road, including pedestrian access, occurred with the permission, even possibly tacitly, acquired from Mr Henderson. This appears from the following passage of the evidence of Mr George Lovell Parks, a former director of Geo Parkes, who was called as a witness by Mr Metelerkamp:

> 'And as far as the company [was] concerned in respect of the house owners down at the beach with regards to their access down the strip road? — The strip road was Mr Henderson's, it went to his house and we didn't have anything to do with the rest of the residents, no.'

[13] Mr Metelerkamp's evidence was also to the effect that Mr Henderson exercised control over the strip road. Relevant portions of his evidence read:

> 'It is clear that Geo Parks allowed Mr Henderson to build and use that road which is *inter alia* supported by the lease that he obtained from Geo Parks to use the road. — Yes, and I don't think there is any argument about that.
> And as far as that is concerned obviously Mr Henderson would be able to allow people to use his road, not so? — Yes.
> He could give permission if he wanted to? — Well I don't think he ever gave permission for pedestrians to use the road. He gave permission for vehicle use.
> But you don't know as you stand there? — Yes, I do know.
> Well have you spoken to Mr ... (intervenes) — Because Mr Henderson was at Noetzie, he spent quite a bit of time there and yes, certainly I am aware that he gave people use, permission to use vehicular access, but nobody asked him for pedestrian access.

> ... [Y]ou never had a discussion with Mr Henderson as to what he allowed and would not allow, not so? — No, I didn't have a personal discussion with him, no.
> I take it that having a [broad] view of what happened there would you agree that it would have been unlikely that Mr Henderson would permit people to use vehicles to go down there and for some reason refuse pedestrian access? — Rephrase that, please?
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> [W]ould you agree that [it] is unlikely that Mr Henderson would allow people to drive down with their cars, but refuse and/or close the road for pedestrians. He would not have done that? — No, he didn't do that.
> Correct, it follows from that, that he permitted people to use that road by foot, not so? — I would say stronger than permitted.
> In other words you say stronger than permitted . . . (intervenes) — I say encouraged.'

[14] The evidence shows conclusively that at all relevant times, at the latest 1940, Mr Henderson, as lessee, was entitled to build the strip road, use it, and control and permit access thereto. Geo Parkes therefore had no right to interfere with the use of the strip road by persons, including Mr Metelerkamp, who were permitted to do so by Mr Henderson, who died in 2008. The finding by the court a quo that Geo Parkes retained control over the strip road is clearly wrong. There was no factual basis for finding that Geo Parkes could have been legally entitled to interfere with the use of the strip road by persons, including Mr Metelerkamp, who had permission from Mr Henderson to do so. Unless there was an indication in the lease that Mr Henderson did not have control over the strip road, we have to accept that the latter, as lessee, had control over and the right to use the leased property (the strip road), within reason. Geo Parkes would have had no right to interfere with Mr Henderson's use of the leased property, the strip road, or anyone else's use of the property if such latter use was with the permission of Henderson, unless the use was in breach of a provision of the lease agreement or was such as to prejudice Geo Parkes' residuary

rights as owner.[4]

[15] The use of the strip road by Mr Metelerkamp, in the circumstances of this matter, could not have been *nec precario.* In other words, the use was not adverse. The legal position in this regard was set out by Colman J in *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd* where the learned judge explained:

'Without myself attempting a full definition (which is not necessary for the purposes of this case), I go so far as to say that no use, occupation or possession is adverse, for the purposes of the law of acquisitive prescription, unless the owner has a legal right to prevent it. The proposition, so stated, covers part (although not the whole) of the ambit of the maxim *contra non valentem agere nulla curritpraescriptio.'*[5]

We know from the evidence that Mr Henderson could give permission in respect of vehicular access to use the strip road. Mr Metelerkamp's grandfather, was given permission by Mr Henderson to drive on the strip road. It must therefore be accepted that he would also have had control over pedestrian use of the strip road. It would be absurd to suggest that he could allow people to drive on the road but that he could not give people permission to walk on the road. For these reasons, prescription could therefore not run in respect of the use of the strip road by Mr Metelerkamp, against Geo Parkes or Pezula.

[16] There is another reason why Mr Metelerkamp must fail in his claim for a praedial servitude over the strip road. It was common cause, at the hearing of this appeal, that the Divisional Road and the strip road were separated by the demarcated parking area. The demarcated area had been leased by Geo Parkes to the Divisional Council for the period 1981 until 2007. In the trial court there was a dispute as to whether the strip road and the Divisional Road ever connected. At the hearing of the appeal, counsel for Mr Metelerkamp, conceded that the two roads did not connect. In the circumstances, the strip road does not provide access to the Divisional Road. It is clear from the evidence that Mr Metelerkamp had a right of

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4 *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd* at 480E-F.

5 *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd* at 479A-B.

access, as a member of the public, to the demarcated area, pursuant to the lease agreement between Geo Parkes and the Divisional Council, from 1981 until 2007. Geo Parkes did not have the right to interfere with the access of any person, including Mr Metelerkamp, to the demarcated area. A servitude right of way ending at the gate to the demarcated area, cannot benefit Mr Metelerkamp's property without a concomitant right of way over the demarcated area to the Divisional Road. Without that connection to the Divisional Road, there is no benefit, which is the essence of a praedial servitude.[6]

[17] For these reasons the following order is made:

1 The appeal is upheld with costs.

2 The order of the high court is set aside and replaced with the following:

'The application is dismissed with costs.'

L V THERON

JUDGE OF APPEA

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6 *Bisschop* v *Stafford* 1974 (3) SA 1 (A) at 11E-H.

APPEARANCES

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