THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1219/2017

In the matter between:

THE COMMUNITY OF GROOTKRAAL **FIRST APPELLANT**

TRUI KIEWIETS **SECOND APPELLANT**

KATRINA MEI **THIRD APPELLANT**

and

JACOBUS DU PLESSIS BOTHA NO **FIRST RESPONDENT**

ESTELLE BOTHA NO **SECOND RESPONDENT**

GERHARD BOTHA NO **THIRD RESPONDENT**

(In their capacities as Trustees for the time being

of the Kobot Business Trust (IT969/2009))

REGISTRAR OF DEEDS,

CAPE TOWN **FOURTH RESPONDENT**

Neutral citation: *Community of Grootkraal v Kobot Business Trust* (1219/2017) [2018] ZASCA 158 (28 November 2018)

Coram: Lewis, Wallis, Swain, Mathopo and Mocumie JJA

Heard: 5 NOVEMBER 2018

Delivered: 28 NOVEMBER 2018

Summary: Public servitude of user for religious, school and related community activities – acquisition – immemorial user (*vetustas*) – principles – evidence – terms of order – ministerial consent in terms of s 6A(1) of the Subdivision of Agricultural Land Act 70 of 1970.

ORDER

On appeal from: Western Cape Division of the High Court (Baartman J sitting as court of first instance):

1 The appeal succeeds with costs, such costs to include those consequent upon the employment of two counsel.

2 Paragraph (a)(ii) of the order of the High Court is set aside and replaced by the following:

(a) It is declared that the First Appellant, the Community of Grootkraal, being all the families and individuals who live and work on farms in the valley which is known as the Grootkraal-Kombuys area, as a portion of the public, has the right, in the form of a public servitude, to use and occupy the property demarcated by the points BCDEFGHJKL and a line drawn parallel to AM and at a distance of 2 metres from the rear corner of the 'Hoof skoolgebou' nearest to the line AB on the survey diagram, Annexure "A1" to the affidavit of Trui Kiewits at page 141 of the record, for the purposes of a Christian church and any related community activities, including the conduct of a school.

(b) Subject to the consent to registration of the Minister of Agriculture in terms of section 6A(1) of the Subdivision of Agricultural Land Act 70 of 1970 first being had and obtained, the Ninth Respondent is directed to register a public servitude in the terms set out in para (a) above over the property described as Remainder of Portion 40 (Portion of Portion 2) of the farm De Kombuys No 28, in the Municipality and District of Oudtshoorn, Province Western Cape, in extent 117,6629 (One Hundred

and Seventeen comma Six Six Two Nine) hectares held by Deed of Transfer T5665/2010.

(c) The Kobot Business Trust (IT 969/2009) as represented herein by its trustees, the First to Third Respondents, is to pay the costs of the counter application, such costs to include those consequent upon the employment of two counsel, where two counsel were employed.

JUDGMENT

Wallis JA (Lewis, Swain, Mathopo and Mocumie JJA concurring)

[1] Some 25 kilometres north of Oudtshoorn, beyond the turnoff to the Cango Caves, and immediately adjacent to the R328, is a nondescript building with a badge on the wall proclaiming it to be the Grootkraal UCC[1] Primary School. Apart from the school building, there is one separate classroom, some outbuildings, a children's outdoor play area and a small, cultivated plot. The whole is surrounded by a wire fence (the property). The school is a public school in terms of Chapter 3 of the South African Schools Act 84 of 1996 (the Schools Act). The property on which it is situated is a small portion of the farm Grootkraal, which extends from the road up into the foothills of the Swartberg. The Kobot Business Trust (the Trust) represented by its trustees, the first to third respondents, owns the farm Grootkraal,[2] having purchased it from the estate of the late J W H van der Veen, who will feature later in the narrative of events.

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[1] UCC is an acronym for United Congregational Church.

[2] The property description of the entire farm is Remainder of Portion 40 (Portion of Portion 2) of the farm De Kombuys number 28 and a 1/6th share in Portion 1 of the farm Groenfontyn in the Municipality and District of Oudtshoorn, Province of the Western Cape.

[2] Although the nature of the dispute requires us to explore the history of missionary activity in the area from the early part of the nineteenth century, its immediate roots lie in an endeavour by the Department of Education, Western Cape (the Department) to close the school by merging it with a school at Voorbedacht. The school and its governing body opposed that decision and obtained an interdict prohibiting the closure or relocation of the school without proper consultation with relevant stakeholders. Five months later the Trust brought proceedings against the Department, the school and the school governing body seeking the eviction of the school from the property.

[3] The second and third appellants, Ms Trui Kiewits and Ms Katrina Tiemie (née Mei), acting for themselves and on behalf of the first appellant, described as the Community of Grootkraal (the Community), intervened in those proceedings, claiming on several grounds that the Community and its members held rights to use the school property and that this precluded the eviction of the school. They lodged a counterclaim seeking an order that a public servitude be registered over Grootkraal that would record and protect those rights. Baartman J heard the Trust's application for eviction and the counterclaim. She postponed her decision on the former, but dismissed the latter. This appeal is with her leave and concerns only the Community's claim to exercise public rights over the property.

The Community's claim

[4] The Community is not a formal body, nor is it capable of exact definition. It is said to consist of those individuals who have historic and family ties with the Grootkraal area, where they and their forebears have

lived and worked for many generations. By way of example, Ms Kiewits and Ms Tiemie are the fifth generation of their families to have lived and worked in the Grootkraal area. Other deponents claimed a similarly lengthy connection with the area and the property, and one deponent said that she was the ninth generation to have lived there. They and their parents and children attended the school and they have longstanding connections with the church that has existed on the property, so they say, for nearly 200 years. The members of this Community are largely drawn from the Coloured sector of the population and are historically disadvantaged. They include farmworkers, artisans, domestic workers at local resorts and people working in various capacities at the Cango Caves. Although people come and go from the area, there is obviously a core of people having close family and working relationships with one another and a connection to both the school and the church on the property. Without further definition of who constitutes the Community I will refer to it as such in what follows. Accepting that there is such a Community there is no challenge to Ms Kiewits and Ms Tiemie's right to represent it.

[5] The Community contended that as a result of missionary activity a church was established on the property in the early part of the nineteenth century. Since then and up until the present day, they and their forebears have, as of right, used the property for church and church related purposes. In 1930 or 1931 this use was extended to the conduct of a school in the church building. Apart from baptisms, weddings and funeral services, various other community activities, such as, bazaars, song festivals, dominoes tournaments, and other celebrations linked to the church and school have taken place there. The Community said all of this

gave rise to a public right, by way of servitude, vested in the Community to continue to use the property for those purposes in perpetuity.

[6] The Community's claim was summarised in the following heartfelt passage from the heads of argument:

'The Appellants' case is: They say that justice demands there will be some way in which the law protects the use and occupation rights of a community such as they – impoverished black farm workers who managed for longer than 200 years, during the course of Apartheid, in harmony with a succession of white land owners, to constitute their community around their use and occupation of a piece of land – against a land owner's desire to evict them.'

Three legal arguments were advanced in the heads of argument in support of this plea. The first was that a public servitude of user for religious, school and related community purposes existed in favour of the Community and that its lawful existence was confirmed by the principles of *vetustas*. The second was that a public servitude in the same terms had been created by prescription in terms of the Prescription Act 68 of 1969. The third was that the trust purchased the property in 2009 from the Estate of the late J W H van der Veen on terms that gave express recognition to the Community's rights, and that the doctrine of notice applied to preclude it from ignoring those rights and evicting the school from the property.

[7] Two of these arguments were not pursued before us. Chapter II of the 1969 Prescription Act deals with the acquisition of servitudes by prescription. Section 9 provides that Chapter II of that Act does not apply to public servitudes. Counsel accepted that this was an insuperable bar to the argument based on prescription. Had it not, the attempt, by way of a development of the common law, to overcome the bar posed by the requirements of s 6 of the Prescription Act, also faced insuperable

obstacles.[3] As for the contention based on notice, there was a dispute of fact that could not be resolved in favour of the Community. In any event, the right for which the appellants were contending was not a personal right granted by any of the Trust's predecessors in title, of which the Trust had notice, which is the basis for the invocation of the doctrine of notice.[4] The appellants' claim must therefore stand or fall by the contention that *vetustas* is the route through which the Community claimed the rights for which they contended.

Vetustas

[8] *Vetustas* is not a subject that frequently engages the attention of our courts.[5] Its origins are to be found in passages in the *Digest*. In *De Beer v Van der Merwe*,[6] Juta JA explained that the doctrine relates to a right that has been exercised against another person and has been in existence for so long – since time immemorial – that no one can tell when, and therefore how, it arose. It is then assumed that the right arose lawfully, subject to the other party being able to rebut that presumption by showing that it had an unlawful origin. He quoted Goudsmit as saying that:[7]

'When any state of things has endured so long in time that its origin dated back to a period to which the memory of man did not extend there was a legal presumption that such origin had been legitimate and the parties were dispensed from furnishing proof that it was so.'

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[3] *Minister of Safety and Security v Sekhoto and Another* [2010] ZASCA 141; 2011 (5) SA 367 (SCA) para 22.
[4] *Meridian Bay Restaurant (Pty) Ltd and Others v Mitchell NO* [2011] ZASCA 30; 2011 (4) SA 1 (SCA) para 14.
[5] J M Otto '*Vetustas*, Onheuglike Tye en die Witpad by Langebaan' 19(1) 2013 *Fundamina* 48 contains a helpful discussion of its origins and reception in South African law. His article commences with this sentence, which I have borrowed and translated.
[6] *De Beer v Van der Merwe* 1923 AD 378 at 383.
[7] J E Goudsmit *The Pandects; A Treatise on the Roman Law* (translated by R de Tracy Gould), §81, p 224.

[9] *Vetustas* may appear similar to prescription, but the two operate in different ways. Prescription depends upon an act adverse to the interests of the owner and lacking legal authority. *Vetustas* presumes a lawful act, but that presumption can be rebutted by proof of unlawfulness. Prescription creates rights arising from conduct by the claimant and their predecessors in title adverse to and infringing upon the rights of the other party. It creates a right and not a rebuttable presumption. By contrast, *vetustas* does not create a right, but dispenses with the need to prove its origin. Once the party relying on it has proved the immemorial existence of the state of affairs that it is desired to maintain, it is presumed that such state of affairs was created in a lawful way. The onus then shifts to the other party to prove that it lacked a lawful origin.

[10] In the light of some of the Trust's submissions, it is necessary to say something about the notion of immemorial usage. The heads of argument contained the following proposition:

'In order to prove an immemorial user it is not sufficient merely to show that no one can remember the exact date or even the exact year when the right was first exercised, or to show that there are no people living who can remember it. It must be proved that those people who might be expected to know of the origin of the right, if it had been within the memory of living man, had themselves no knowledge of its origin and did not hear from the generation preceding them that it had previously existed.'

The emphasis by way of underlining was in the heads of argument and it was said that this was a 'clear exposition of the law'.

[11] There are several difficulties with these contentions. Firstly, the quoted passage was attributed to the judgment in *Berg v Gossyn (2)*.[8] That was incorrect because it comes from the judgment in *Langebaan*

[8] *Berg v Gossyn (2)* 1965 (3) SA 707 (O) at 709C-D.

Ratepayers.[9] Secondly, it is not a statement of law by the judge in that case, but a summary of the argument of the unsuccessful respondent's counsel. Thirdly, the judge concluded that the submission was 'misplaced' and that, as a summary of the reasoning in *Berg v Gossyn (2)*, it was incorrect.[10] Fourthly, it is inconsistent with earlier authority.

[12] In *De Beer v Van der Merwe*, Juta JA described the requirement for proof of *vetustas* as being immemorial user or exercise of the alleged right. In his judgment Kotzé JA dealt with this in slightly more detail saying:[11]

'By *vetustas* is understood a condition of things beyond living memory --- immemorial usage. If it can be shown, or does appear how and when a particular work or construction was originally made, the doctrine of *vetustas* does not apply. … If, therefore, the facts of a given case show that the state of things in question is within living memory, that is to say, if there be *probatio* or *memoria in contrarium*, the doctrine of *vetustas* does not apply.'

In other words the origin of the right being claimed must be beyond proof (*probatio*) or contrary memory or recollection (*memoria in contrarium*).

[13] There is an illuminating discussion of the meaning of immemorial usage by Watermeyer J in *Divisional Council of Fraserburg v Van Wyk*.[12] He pointed out that passages in some judgments to the effect that once it can be shown when the exercise of rights began there could not be an immemorial usage of such rights, were not entirely consistent with the decisions in those cases. If taken to their literal extreme these statements would mean that immemorial usage could never be proved in South

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[9] *Langebaan Ratepayers' and Residents' Association v Dormell Properties 391 (Pty) Ltd* 2013 (1) SA 37 (WCC)(*Langebaan Ratepayers*) para 25.
[10] *Langebaan Ratepayers* para 27.
[11] At 386.
[12] *Divisional Council of Fraserburg v Van Wyk* 1927 CPD 285 at 306

Africa, because one could always establish that there was an earlier date when the usage in question did not exist. Something less must suffice.

[14] Watermeyer J concluded that what is required is proof of the existence, and therefore the exercise, of the right during the memory of the current generation, 'which was not restricted to that which persons themselves remembered but extended to things stated to the existing generation by that which had preceded it'. Differently expressed, there must be proof that the right has existed for a very long time and that there is no certain knowledge or information of a different condition or practice having existed. The witnesses should state that in their own time and that of their forebears the practice existed and nothing was heard or reported to the contrary.[13] In homely language they would say it was ever thus.

[15] In the face of evidence to that effect it is not sufficient for the opponent to identify the date or period when the custom originated. The onus is then to prove that its origin was unlawful. The reason is simple. Every custom or practice must have commenced at some time. If identifying a prior time when it did not exist could defeat it, the point of the presumption would be lost. One can always say of a practice that evolved in the seventeenth century, that it did not exist in the sixteenth century, but that is beside the point. It is not the date upon which it arose that is relevant, but that it has existed since time immemorial and its origins are unknown. There is then a presumption that the right came into existence in some lawful fashion.[14]

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[13] Goudsmit, op cit, 225; L E Krause 'The History and Nature of Acquisitive Prescription and of Limitation of Actions in Roman-Dutch Law' (1923) 40 *SALJ* 26 at 38.
[14] Goudsmit, op cit, 226.

[16] It follows that the Community's claim cannot be defeated simply by proof that the rights it claims to enjoy came into existence at some indeterminate time between 1800 and 1850. The expression 'beyond living memory' is concerned less with the precise date when the right arose, than with the circumstances in which it came into existence. Both when it arose and its origins, that is, agreement, permission, donation or its constitution by some other means, must be beyond living memory. That gives rise to the presumption that its origins were lawful. If it can be shown when and in what circumstances a right was first exercised these questions do not arise, as the issue then will be the nature of the right so created and whether it has thereafter been lawfully terminated.

[17] There is some debate among academics whether *vetustas* may be relevant to proof of the existence of private, as opposed to public, servitudes.[15] It is unnecessary to become embroiled in this debate, as the Community's claim is for a public servitude. Nor is it necessary to determine whether these are properly described as servitudes or whether they should more correctly be classified as a form of public law right.[16] Referring to them as public servitudes is a convenient usage that has been adopted over many years without creating doctrinal problems.[17]

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[15] J C de Wet (1943) 7 *THRHR* 187 at 189 argued that the old authorities, especially Savigny, only permitted the use of *vetustas* to prove the existence of three public servitudes relating to private rights of way and to the right to obtain water from a public source or discharge water over a neighbour's property. Krause, ibid, said that Savigny confined the operation of *vetustas* to public rights. C G van der Merwe *Sakereg* (2d ed, 1989) 548 regards this as the better view and repeats it in 24 *LAWSA* (2nd) para 624. H J Delport and N J J Olivier *Sakereg Vonnisbundel* (2nd ed, 1985) 672 take the opposite view.

[16] *Sakereg* op cit 544; A J van der Walt *The Law of Servitudes* 530.

[17] *Tshwane City v Link Africa and Others* 2015 (6) SA 440 (CC) para 104.

[18] The right being sought by the Community is novel. Prior cases have dealt with public servitudes such as rights of way,[18] the right to discharge water across a neighbouring property, a servitude of outspan,[19] a trekpath,[20] a commonage, or a right of recreation.[21] But there is no closed list of servitudes and it has been said that their number is virtually unlimited, subject to fulfilment of the basic requirements for a servitude's existence.[22] There is no reason why the entitlement of the public, or a defined section of the public, to use someone's property in a particular way or for a particular purpose cannot give rise to a public servitude the existence of which may be established by proof of immemorial user.[23] Professor Van der Walt said of public servitudes that they 'grant use entitlements with regard to specified private land to the general public at large or to a particular section of the public'[24] and that is precisely what the Community is seeking. There is little difference in principle between a servitude of that character and a right of commonage, or right of access to land for recreational purposes.

[19] I conclude that there is no legal bar to the Community's contention that it is entitled to the registration of a public servitude, provided it can establish a right to use, for religious and educational purposes, a small and defined portion of the larger property, that is Grootkraal, by invoking the presumption of lawful creation afforded by the principles of *vetustas*.

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[18] *Langebaan Ratepayers,* op cit, fn 10.
[19] *Du Toit v Aberdeen Divisional Council* 1910 CPD 477.
[20] *Van Heerden v Pretorius* 1914 AD 69; *Nel v Louw* 1955 (1) SA 107 (C).
[21] Such as that in issue in *Bamford v Minister of Community Development and State Auxiliary Services* 1981 (3) SA 1054 (C), although there the public right arose from the terms of a will.
[22] *Tshwane City v Link Africa and Others*, op cit, para 138.
[23] J C Sonnekus and J L Neels *Sakereg Vonnisbundel* (2nd ed, 1994), para 8.1.9, p 712; A J van der Walt *The Law of Servitudes* 530-531. For some reason the author described *vetustas* as 'the most problematic way in which the existence of a public servitude can be established' (p 534) but he did not explain why it was problematic.
[24] Ibid 531.

Whether it can do so depends upon the evidence of immemorial user, which in turn depends on the history of Grootkraal and the circumstances in which the property came to be used for religious purposes.

[20] Grootkraal's history is bound up with the history of missionary activity in this part of South Africa, to which I now turn. The parties dealt with this on a relatively cursory basis, relying principally on memories of what people had been told about the history, with no endeavour being made to consult or refer to readily available and reliable sources of information. In the result some of the assertions made were more the product of legal drafting than historical fact. The relevant developments could have been found, with very little research effort, in the annual Missionary Register published by the Missionary Society, which contained annual reports, usually from the missionaries stationed at the various mission stations.[25] In addition a detailed history of the Congregational Union of South Africa was prepared in 1940 by Geo P Ferguson from church records and records of the LMS.[26]

[21] Much of what follows is drawn from these sources and has been used to complete and correct the picture drawn by the parties in their affidavits. The court may take judicial notice of such material when it is readily available and reliable, however it may come to the court's attention.[27] The emphasis must be on the material's availability and

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[25] The copies of the Missionary Register covering the period until 1855 are available from the Yale University Library in its section of Mission Periodicals Online: Missionary Register (CMS) under the letter M and were digitized from the originals held by the Harvard University Library. See https://guides.library.yale.edu/c.php?g=296315&p=1976907

[26] Geo P Ferguson 'CUSA. The Story of the Churches of the Congregational Union of South Africa' (1940) (hereafter 'Ferguson') a copy of which was kindly made available to the Court by the Cory Library at Rhodes University.

[27] *Consolidated Diamond Mines of South West Africa Ltd v Administrator S W A and Another* 1958 (4) SA 572 (A) 610A. C W H Schmidt and H Rademeyer *Law of Evidence* (looseleaf) paras 6.2.2 and

reliability, recognising that in our technological era information that could in the past have been unearthed only after lengthy investigation, may now be readily available from reliable sources in digitised form. Where necessary, in the interests of procedural fairness, the parties must be apprised of the existence of such material and its relevance to the case in hand to enable them to deal with it either at a factual level, if it is disputed, or in their submissions. In the present case the problems with the evidence and a summary of its impact was put to counsel in the course of argument and not challenged.

The mission and church history

[22] The London Missionary Society (LMS) was founded in 1795[28] as an inter-denominational missionary organisation, with strong Congregational roots. It sent its first missionaries to the Cape in 1799, when four missionaries arrived at Cape Town. Their activities expanded rapidly and by 1816 they had established 13 mission stations in various parts of the Cape Colony and beyond its borders across the Orange River.[29] The Hoogekraal mission station, established on land now falling in the town of George in the Western Cape, was one of the earliest mission stations, established in 1813, which coincides with the arrival of the Rev Charles Pacalt.[30] After his death the mission station was renamed Pacaltsdorp.[31]

6.2.2.3, pp 6-12 to 6-14 (Issue 1); D T Zeffertt and A P Paizes *The South African Law of Evidence* (2 ed, 2009) 873-876; P J Schwikkard and S E van der Merwe *Beginsels van Bewysreg* (3 ed, 2016) para 27.4.3, pp 525-6 and para27.5.7, p 531. The position is the same in the United Kingdom, Colin Tapper *Cross and Tapper on Evidence* (12 ed, 2010) 78-79; Australia, Andrew Ligertwood *Australian Evidence* (3 ed, 1998) paras 6.36 – 6.38, pp 412- 415; and Canada; John Sopinka Sidney N Lederman and Alan W Bryant *The Law of Evidence in Canada* (2 ed, 1999) 1058-1059.

[28] It was originally called the Missionary Society but changed its name to London Missionary Society in 1818.

[29] Ferguson, op cit, 22.

[30] Rev John Philip 'Researches in South Africa' (1828) Vol 1, Chapter XII, pp 237 et seq.

[31] Ferguson, op cit, 101-102.

[23] The mission at Pacaltsdorp operated as the 'mother' church for further mission stations, referred to as 'outstations', situated inland, in the vicinity of modern day Oudtshoorn. The latter was originally part of the magisterial district of George and was only laid out as a church farm in 1847 on the farm Hartbeesfontein. The first, and principal, outstation was at Dysselsdorp,[32] which Ferguson describes[33] as 'the oldest church of the Little Karroo' covering the area between the Outeniqua Mountains and the whole of the Zwartbergen, an area that included Grootkraal. The earliest reference to the establishment of Dysselsdorp is in 1836,[34] but it acquired its own missionary in 1838, when the Rev John Melvill established an Institution there.[35]

[24] It is apparent from the various reports of the mission work at Dysselsdorp that it was not confined to that place. In 1841, Melvill was 'itinerating among the farms in his neighbourhood'.[36] In 1843 it was said that few people live at the mission station and that they 'reside dispersedly among the farmers'. Some lived at a distance of 30 miles from the station and it embraced a circuit of 200 miles. Many congregants spent two or three days on the road in order to attend public worship.[37] In 1844 it was recorded that the congregation were 'scattered among the different farms, and have to come great distances to Worship', but that

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[32] Originally called Dysel's Kraal and, from 1842, Dysalsdorp. I have used the current spelling throughout the body of the judgment.
[33] Ferguson, op cit, 106.
[34] The date is contained in a list of churches and missions of CUSA in South Africa in The Congregational Year-Book 1901, a digitized version of which taken from the New York Public Library is available at https://babel.hathitrust.org/cgi/pt?id=nyp.33433069128423;view=1up;seq=659
[35] Ferguson, op cit, 109. The Missionary Register for 1840, p 37.
[36] The Missionary Register 1841, p 33.
[37] The Missionary Register 1843, p 38.

some of them conducted 'Social Worship' among their fellow farmworkers in the evenings.[38]

[25] The Register for 1845[39] recorded that although few people lived on the Station most 'come from great distances to attend Public Worship on the Sabbath. The influence of the Missionary extends to at least 1400 or 1500 persons of a variety of races and complexions. They reside among the Dutch farmers either as hired servants, or holding land by a kind of feudal tenure, rendering a certain amount of service for permission to cultivate a part for their own support.'

[26] In 1846, for the first time, the Missionary Register reflected that the mission work at Dysselsdorp had extended to another specific place, with a report that an outstation had been established at Matje's Drift, about 18 miles from Dysselsdorp.[40] In 1847 the Rev Melvill moved to Matje's Drift and was in the process of finishing a small chapel there.[41] In 1850 it was reported that this chapel was complete and another was in the course of erection in the 'new village of Oudshorn, where the population is larger than in any other part of the District.' Both Matje's Drift and Oudtshoorn were supplied with an assistant.[42] The 1851 report reflected that a 'large and substantial chapel' was on the eve of completion in 'Oudtsham'.[43]

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[38] The Missionary Register 1844, pp 40-41.
[39] The Missionary Register 1845, p 39.
[40] The Missionary Register 1846, p 29.
[41] The Missionary Register 1847, p 33.
[42] The Missionary Register 1850, p 25.
[43] The Missionary Register 1851, p 24. The spelling of Oudtshoorn had obviously not become fixed.

[27] Lastly, in this traverse of official reports from the LMS, in 1855 it was recorded that:[44]

'The labours of the Missionary have been distributed among three Congregations collected at Dysalsdorp, Oudtshoorn and Matjes River. At Oudtshoorn, the most important of the three stations, Mr Anderson preaches every alternate Sunday to 350 or 400 people.'

In the same year it was recorded that the Missionary, Mr Anderson, and some of the congregation had purchased a farm at Matje's River, which it was thought would be a good base for further missionary endeavour.

[28] Two significant points emerge from this. The first is that, after Dysselsdorp was established in 1838 as a separate mission from Pacaltsdorp, its missionary efforts were spread over a wide surrounding area in which Grootkraal fell. The second is that Grootkraal itself is not mentioned in any of the reports as a separate mission station, or even as an outstation of either Pacaltsdorp or Dysselsdorp. Accordingly, any regular religious activity on the property must have been on a limited scale. The suggestion, in the affidavits of both the Trust and Ms Kiewits, that the LMS erected a church on the property in the 1820's seems improbable. As already noted the annual Missionary Registers contained reports from all mission stations falling under the aegis of the LMS and it is unlikely that their reports would have failed to mention such a church, when they recorded the erection of small chapels on other outstations. Building a church of any size would have involved the disbursement of funds from the LMS budget. However, the construction of a rudimentary building for the Community to conduct worship cannot be excluded. In the result there do not appear to be any records that would enable the

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[44] The Missionary Register 1855, p 28.

origins of the Grootkraal church, both as a physical entity and as a congregation, to be identified. Similarly there are no means of establishing the nature of any arrangements by which the property came to be used for the purposes of the church.

[29] Between 1848 and 1850 the LMS encouraged churches that it regarded as financially viable and capable of becoming self-supporting to become independent of the LMS. This was not a breakaway movement as there remained links between the LMS and the independent churches, but merely reflected that they had become self-supporting. According to Ferguson,[45] the first three churches took this step in 1855. These were Dysselsdorp, Oudtshoorn and George.[46] It appears therefore that Dysselsdorp and Oudtshoorn were by now regarded as largely separate from one another, although they shared a minister, the Rev B E Anderson. It seems reasonably certain that calling these churches 'Independent' or "Independente' arose around this time. The suggestion in the affidavits that this separation from the LMS occurred in 1838 cannot be correct and that date must refer to something else.

[30] Dysselsdorp and Oudtshoorn formally separated in 1862, when the Rev Anderson divided the parish and took as his responsibility Oudtshoorn and its outstation at Matjes River.[47] This would have included Grootkraal, but there is still no documentary evidence concerning the religious activities on the property. In 1859 a number of independent churches, not restricted to those established as a result of the

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[45] Ferguson, op cit, 32
[46] An 1850 report reflects this as a recently formed 'European Church' separate from Pacaltsdorp, which only became independent in 1877; Ferguson, op cit, 28-29.
[47] Ferguson, op cit, p 109.

activities of the LMS, formed 'The South African Union of Voluntary Churches', and it seems likely that the Independent churches at Oudtshoorn and Dysselsdorp were members of that union.[48] It changed its name in 1861 to the Evangelical Voluntary Union of South Africa.

[31] In 1877 the Congregational Union of South Africa (CUSA) was established with a view to bringing together all Congregational churches in one fold. Initially its membership was confined to the Eastern Cape, but in 1883 both Oudtshoorn and Pacaltsdorp joined, and Dysselsdorp indicated that it wished to join.[49] In 1967 CUSA merged with the Bantu Congregational Church and the LMS in South Africa to form the United Congregational Church of South Africa (UCCSA). The name of the school on the property is plainly derived from this connection.

[32] Reconciling this history, derived from contemporary documentary records of the LMS and from CUSA's own records, with the affidavits of the parties, is not always easy. But that is to be expected when the Community is relying largely on oral tradition and folk memory, while the Trust's understanding is based on hearsay from persons similarly relying largely on memory and tradition. In dealing with their evidence, and trying to complete the picture as far as that is possible, it is convenient to start at a point where there is a clear reference to Grootkraal and work backwards until it is no longer possible to peer into the past.

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[48] There is no reference to them or to Rev Anderson in Ferguson, but detailed membership lists are only given in respect of the Eastern Cape and they would not have fallen into that district.
[49] Ferguson, op cit, pp 50-51.

[33] The first definite reference to Grootkraal is in the Congregational Year Book of 1901,[50] where it appears in a list of Congregational and Mission Churches and Ministers in, inter alia, the then British Colonies.[51] It is shown as an outstation of the Oudtshoorn Congregational Church that had held 300 sittings (presumably meetings and services) that year. Unlike Matjes River and two other churches it was not reflected as a branch church with separate officers, that is, church secretary and deacons. That suggests that it was still a fairly small local church. Three witnesses confirmed that at all relevant times Grootkraal was a congregation attached to the Oudtshoorn Congregational Church, in other words, an outstation. It was reflected as such in a commemorative publication produced on the 150th anniversary of that church.

[34] The Community alleges, and the Trust does not dispute, that the main building at present on the property was built by the members of the community and congregation in the latter part of the nineteenth century. It was constructed originally as a church and in about 1930 adapted for use as a school. Mr Willie Coetzee, the secretary of the church, said that it was built at a time unknown to him, but probably in the last two decades of the nineteenth century. Mr Japie Coetzee, who was for a long period a senior office bearer in the Oudtshoorn Congregational Church, dealt with the history of the church on behalf of the Trust. He noted this allegation without disputing it. Coming from people with deep roots in the Community, going back several generations, this is information that would have been known to their grandparents and construction possibly

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[50] Available in digitised form from the New York Public Library at https://babel.hathitrust.org/cgi/pt?id=nyp.33433069128423;view=1up;seq=657 (accessed 14 November 2018)

[51] Congregational Year Book 1901, p 524.

occurred during the lifetime of their great-grandparents. There is no reason not to accept it.

[35] A church would not have been built until there was a sufficient critical mass of people in the Grootkraal Community wanting a church building of their own in which to conduct worship and other church activities. So there must have been a worshipping community at that place before the church was built. I referred earlier to the possibility that there was a rudimentary church building on the property at a much earlier date, whilst discounting the likelihood of it having been built by the LMS. Mr Botha, the first respondent, said in his affidavit that 'there had at all times been a small Church which had been built during the early-1800's by the London Missionary Society'. He does not indicate the source of this information. Perhaps reflecting how inconclusive the evidence of the parties was in regard to historical matters, Ms Kiewits denied this. She alleged that the church was built 'somewhere during the second half of the nineteenth century' by the Independente Church. It seems probable that she is referring to the more substantial building erected in the late nineteenth century.

[36] If there was no church building until the latter stages of the nineteenth century, then prior to it being built people must have conducted their religious activities in homes and other buildings in the area that were available to them. On special occasions and for special services they would have travelled to Oudtshoorn to join with the congregation there. This is consistent with the historical record. One cannot tell how far back this would have extended, but the church reports cited earlier speak of people travelling extended distances to worship at Dysselsdorp, often taking several days to travel there in wagons. If

mission activity of some sort commenced at Grootkraal in the earlier part of the nineteenth century it is probable that this included people from Grootkraal.

[37] The affidavits on all sides refer to 1838 as a definite commencement date by which there was missionary activity and a church operating at Grootkraal. It is well nigh impossible to reconcile that with the history described above. The establishment of Dysselsdorp as an outstation of Pacaltsdorp Mission only occurred in 1838. The original chapel in Oudtshoorn was built in about 1849, but there was religious activity in Oudtshoorn prior to that date. It is at least possible that the first mission outreach to the new settlement was in 1838 and some very basic building was erected as a place of worship prior to the construction of the chapel. The probability is that 1838 was known because it was the date when Rev Melvill established the Institution at Dysselsdorp, and all the different branches of the church in that wider mission field, including Grootkraal, regard that date as foundational to their existence.

[38] In sum, it is not possible to pierce the veil of history to an earlier date, and the history of the church at Grootkraal up until the last couple of decades of the nineteenth century is obscure. The conclusion must be that at some uncertain date, between 1820 and the building of the church in the late nineteenth century, a Christian community was established at Grootkraal, with connections possibly to Dyssselsdorp, but definitely to Oudtshoorn. It is that Community, as part of the wider Grootkraal community, that has worshipped and conducted other church activities on the property ever since. It built the church and over the years it has associated itself with various churches in Oudtshoorn, itself operating as an outstation of these churches.

[39] The history of ownership of the farm, of which Grootkraal was a part, throws no more light on the matter. It was originally called Kombuis and was Crown land. In 1820 it was let on perpetual quitrent to Pieter van der Westhuizen. He obviously sub-divided and disposed of portion of the property thereafter, because between 1869 and 1880 the remainder of the farm Kombuis, which included Grootkraal, had become fragmented among a number of families, almost all with the surname Schoeman. In 1883 there was some consolidation of these land fragments, but it is impossible to ascertain, from the title deeds we were shown, which portion included Grootkraal, or who owned it. We were not provided with a title deed showing when it came into the possession of the Van der Veen family. One document suggests that the Schoemans and the Van der Veens may have been related, so it was possibly by inheritance, but we cannot tell.

[40] The current representative of the Van der Veen family is Mr Hans van der Veen. He deposed to an affidavit saying that he was the fourth generation of the family to grow up on Grootkraal, preceded by his father, Mr J W H van der Veen and his grandfather, Mr H W J van der Veen. In 1891 one Herman van der Veen was appointed as the caretaker of the Cango Caves.[52] He in turn appointed a Mr John van Wassenaer as a guide according to a history provided to us by the Community. That appointment was made by the Cape Government, as the management of the caves only passed to the Oudtshoorn Municipality in 1921.[53] It is probable that Herman van der Veen, who is identified as the owner of

[52] South African Heritage Agency site at https://www.sahra.org.za/sahris/sites/920680001.
[53] In terms of Ordinance 18 of 1921 (Cape).

Grootkraal, was H W J van der Veen's father, which would make him the first of the four generations of Van der Veens on Grootkraal. When control of the caves passed to the municipality, it appointed H W J van der Veen as caretaker and chief guide and Mr van Wassenaer as his assistant.[54]

[41] The guide, Mr van Wassenaer, is referred to as 'Oupa' in a brief extract from a family history prepared by Mr J W H van der Veen's wife, that is, a member of the third generation of the family. It said that he married "Stiefouma' Nita, who played a leading role in establishing the school in 1930. She subsequently taught there. According to the history, Stiefouma Nita was about the same age as Mr H W J van der Veen's wife, although she was her step-mother. The note records that 'ons pa', an ambiguous expression given that the writer was not born into the Van der Veen family, gave the land on which the school was situated for a church ('vir 'n kerk'). That is revealing as it can only relate to the Grootkraal church that came to be used also as a school.

[42] If, within the Van der Veen family, there were any family recollection of the circumstances in which the church came to use the property, other than that the land was given for a church, one would have expected this to be communicated to Mr Hans van der Veen. However, his affidavits say no more than that when he was growing up on the farm the church (and the school) was always there and used by the

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[54] See Stephen Adrian Craven 'Management Problems at Cango Cave' a Ph D thesis submitted in the University of Cape Town at 29 and 36. The information there is derived from documents in the Cape Archives. Thesis accessed on 16 November 2018 and available at https://open.uct.ac.za/bitstream/item/20037/thesis_sci_1992_craven_stephen_adrian.pdf?sequence=1 Mr van Wassenaer is reflected as having served as chief guide at the caves from 1891 to 1934 and to have been exploring them since 1880.

Community. In the last few years of his life, his father[55] made various unsuccessful attempts to transfer the property for a very nominal amount to the Oudtshoorn Congregational Church, with which Grootkraal had been associated. There is mention in the affidavits of Mr Esterhuizen and Mr Karel Coetzee of a 99 year lease by Mr H W J van der Veen in favour of the Oudtshoorn Congregational Church, but no document was produced. The evidence was that Mr van der Veen did not collect any rental and said that had anything been paid to him he would have donated it back to the church.

The school

[43] I have not thus far given any attention to the circumstances in which the school was established. The documentary evidence shows that Mrs van Wassenaer (Stiefouma Nita) was a moving spirit in this and she had the co-operation and blessing of H W J van der Veen's widow (her step-daughter), who had remarried and was then known as Mrs Smuts. Establishing a school as an adjunct to a mission, church or chapel was a feature of much missionary and church activity at this period and there seems to be no reason not to regard the establishment of this school in the church as anything more than that. There is a telling expression in a letter written to Mrs van Wassenaer by the Rev Mullineux, the minister at the time at the Oudtshoorn Congregational Church, in which he expresses gratitude to her and Mr and Mrs Smuts for agreeing that the church may be used as a school. A similar expression is to be found in a letter written by Mr H W J van der Veen to the same church on 10 February 1965. The purpose of the letter was to secure that the church reimburse Mr van der Veen for increased municipal charges arising from the church's use of the

[55] He died in the early part of this century between 2005 and 2009 and was then in his nineties.

property for the purposes of the school. Neither letter suggests that the church itself required any similar permission or consent. There is no reference to the church paying rent for its use of the property. The letters reinforce the conclusion that the operations of the school were seen as an adjunct to the existing activities of the church already on the property.

[44] The fact that the school became a state-aided school and, under the Schools Act, a public school, does not in my opinion alter the relationship between church and school. Such changes are an inevitable consequence of governmental control or oversight in relation to education. They cannot as such alter the circumstances underpinning the school's establishment.

[45] Apart from this, it does not seem to me that the establishment of the school affects the primary issue in this case, which is whether the Community acquired a public right to use the property for the church that they built there and for such further activities related to that use as would be expected to fall within such a grant. The work of a church in a community may vary from time to time depending on the needs of the congregation and the community that it serves. A Sunday School has long been part of that work and its extension to primary schooling on a broader basis is a natural adjunct thereto, frequently encountered in practice. The reports by mission stations in The Missionary Register contain regular references to conventional educational activities taking place as part of the mission work.[56]

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[56] It can hardly be overlooked that many famous schools in South Africa, such as Inanda Seminary and Adams Mission, were established by missionaries associated with the Congregational Church as part of their activities.

[46] The public right for which the Community contends could only have come into existence long before the establishment of the school. In those circumstances it is to the situation at those times that we must look in determining this appeal. The Trust did not argue that the existence of a right to use the property for religious purposes would exclude its use for a school. In the circumstances the focus needs to be upon its use for those religious purposes.

Immemorial Usage

[47] The inevitable conclusion from the history canvassed above is that the circumstances in which the church community at Grootkraal came into being, and obtained the use of the property for the church and church related purposes, are lost in the mists of time. It can safely be concluded that the church existed by the latter stages of the nineteenth century, when the Community erected the church building, but it obviously had its roots at an earlier time and may go back as far as 1838 or even earlier. It was probably always an extension of the mission work at Oudtshoorn, or possibly Dysselsdorp, and eventually it became an outstation of the Oudtshoorn Congregational Church. The Grootkraal church and its congregation have over the years had a connection with a variety of church bodies, starting with the South African Union of Voluntary Churches, and followed by CUSA, the UCCSA, the Independent Church when it broke away from the UCCSA, and now the Grace Church International. Nonetheless, it is plain that the Grootkraal church has always independently walked the path that its adherents have chosen. It has never submerged its existence in any other body or association and throughout it has exercised the right to use the property for the purpose of its church, and by extension, its school and related activities, as of right.

[48] Other than a reference to the land having been given to the church, an expression that is itself ambiguous, there is not the slightest piece of evidence as to the precise circumstances in which it came about that the Grootkraal Community used the property to build a church and conduct church services and related activities there. The fact that successive owners of the property at no stage stepped in to prevent the church from operating, or asserted that it was operating unlawfully, is an indication that this occurred lawfully.

[49] In my view this is sufficient to establish a state of affairs existing from time immemorial. That gives rise to a presumption that the right being exercised for all this time has been exercised lawfully. Did the Trust rebut this presumption by showing that the exercise of the right had an unlawful origin? In my view it did not. In part that was because of its misunderstanding of the law relating to *vetustas*. In part it was because it failed to recognise the difference between the Community and various entities with which it was from time to time associated. That caused it to conflate the Community's claims with the legal relationship between the Trust and the Department, and the earlier relationship between the Oudtshoorn Congregational Church and the Van der Veens.

[50] The failure to understand the principles of *vetustas* can be seen in the Trust's response in the answering affidavit to the claim to a public servitude. It focused almost entirely on the position since 1931. It claimed that the property occupied by the church and school was leased to the Uniting Christian Church, (presumably intending the United Congregational Church) Oudtshoorn, but produced no lease. It went on to claim that from 1931 the church sub-let the property to the Department for the purposes of a school. This was factually wrong because the

question of a lease to the department only arose after the school became a public school, at which stage it became obligatory for the Department to conclude a lease with someone in terms of s14 of the Schools Act. Prior to that the school was a state-aided school operating on private property. Correspondence produced in response to questions posed by the Court before the hearing of the appeal reflected that the Department dealt with the Oudtshoorn Congregational Church over various issues. This was what one would expect, as the Grootkraal church was an outstation of the Oudtshoorn Congregational Church. These letters show that the Department's predecessors regarded the church as the institution they had to deal with in relation to the property, not the landowner.

[51] Mr Botha went on to say that 'after the UCC's rights on the property terminated' the Department entered into lease agreements with Mr van der Veen, presumably referring to the time when a split in the Oudtshoorn Congregational Church led the congregation at Grootkraal to follow the Independente Church in Oudtshoorn. This ignored the fact that the church continued without interruption to operate at Grootkraal.

[52] These statements were not only largely incorrect factually, but ignored the fact that *vetustas* is concerned with a state of affairs that has existed since time immemorial. The primary issue was therefore whether since time immemorial the Community had undertaken, as of right, religious activities on the property and, if so, whether they did so unlawfully or by way of a right that could be shown to be defeasible. There was very little endeavour to address that.

[53] Mr Botha's own affidavit purported to summarise the history, without any reference to historic sources or the sources of his

information. His explanation made it plain that church activities had been conducted on the property since time immemorial and there was no suggestion that these activities were conducted unlawfully. He placed the building of the initial church during the early 1800s by the LMS. He said that in the mid-1800's several churches in the area declared independence from the LMS and formed the Independente Kerk, which 'continued in control of the church buildings erected on the property'. Without any evidence at all he asserted that both the LMS and the Independente Kerk did this in terms of leases with 'the landowners', conveniently overlooking that this was probably at that time Mr van der Westhuizen, or members of the Schoeman family, not the Van der Veens, were the owners of the property. He recited a potted history of the developments from the South African Union of Voluntary Churches to the establishment of the UCCSA in 1967. On the basis of this history he claimed that the Independente Kerk ceased to exist in 1859 and that when CUSA, and subsequently the UCCSA, were formed any rights in relation to these entities passed to them, although by what process he did not say.

[54] Mr Botha's reliance on leases, which he did not produce and of which he could have had no knowledge, resulted in him avoiding the crucial question of who was in fact exercising the right to use the property. There were two alternatives. The one was the Community, the members of which practised the formal side of their religious observance in a building they had constructed on the property in the nineteenth century. They were linked from time to time with other church entities in the district. This provided them with access to ordained ministers and other facilities, but they remained free to follow their own course if they wished to do so, as they have in fact done. It was people drawn from the Community who were attending the church and fulfilling functions in it

irrespective of changes in outward association. For example, Mr Stal said that he had been the evangelist at the Grootkraal congregation for the past ten years, which encompassed times when they were associated with the Independente Church in Oudtshoorn, as well as the present when they are an outstation of the Grace Church International. Other deponents confirmed that they have always been members of the Grootkraal congregation irrespective of its wider associations with the UCCSA, the Independente Kerk or Grace Church International.

[55] The other possibility, which seemed to be implicit in Mr Botha's affidavit, was that the right to use the property for religious purposes was exercised from time to time by various entities external to the Community. He claimed that they were exercising rights in relation to the property by virtue of independent arrangements with the landowner. The problem with that approach was that it did not explain how the right to use the property was transferred from the LMS to the Independent Church; from there to the South African Union of Voluntary Churches; thence to CUSA; and, eventually to the UCCSA. It also left unresolved the relationship of the Oudtshoorn Congregational Church to the Grootkraal Church and how, after the split in 1995, the Oudtshoorn Congregational Church fell out of the picture and was replaced initially by the Independente Church in Oudtshoorn and thereafter by the Grace Church International. Mr Botha did not address the question of how, if the right to use the church vested in these separate entities, it was passed from one to the next, without any involvement on the part of the landowner. The obvious answer was that it was the Community that were vested with the right and, as they from time to time associated with institutions in the wider church, those institutions came at their invitation

and request to participate in the religious life of the Grootkraal congregation and the Grootkraal Community.

[56] This understanding is entirely in accordance with the Congregational roots underpinning the establishment of the Grootkraal church. We know that until it became an outstation of the Grace Church International it had always been part of an essentially Congregational body, whether that was the LMS, the Dysselsdorp mission, the Independente Church in Oudtshoorn, as the Oudtshoorn Congregational Church was originally known, CUSA or the UCCSA. Mr Botha appeared to think that, like other denominations, control of a local church community rested with the top structures of the organisation and not the local community. That is incorrect in relation to Congregational churches. The article on Congregationalism in the Encyclopaedia Brittanica[57] commences with the following passage:

'**Congregationalism**, Christian movement that arose in England in the late 16th and 17th centuries. … It emphasizes the right and responsibility of each properly organized congregation to determine its own affairs, without having to submit these decisions to the judgment of any higher human authority, and as such it eliminated bishops and presbyteries. *Each individual church is regarded as independent and autonomous. …*

Their emphasis on the rights of the particular congregation and on freedom of conscience arose from their strong convictions concerning the sovereignty of God and the priesthood of all believers. …

Congregationalists were originally called Independents, as they still are in Welsh-speaking communities.' (Emphasis added.)

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[57] Encyclopaedia Brittanica (Online edition). Daniel T Jenkins 'Congregationalism' available at https://www.britannica.com/topic/Congregationalism. Professor Jenkins was the Weyerhauser Professor of Systematic Theology at Princeton Theological Seminary.

[57] When the activities of the Grootkraal Community and its church are understood in the milieu from which they sprang, it must be accepted that their involvement with other bodies in the wider church did not affect their independence. Accordingly the approach adopted by Mr Botha, that the rights of the Grootkraal Community to use the property for their religious activities were taken over by the various bodies he mentions, proceeded from a misunderstanding of the relationship between the Grootkraal church and these bodies.

[58] The consequence of this misconceived approach to the principles of *vetustas* was that the Trust made no attempt to establish that when the Grootkraal Community started exercising the right to use the property for their religious purposes they did so unlawfully. It accordingly failed to discharge the onus cast upon it by the presumption. The Community's claim to be vested with a public right must therefore succeed. I turn to consider the precise content of that right and the definition of the property over which the Community is entitled to exercise that right.

The public right

[59] It is first necessary to formulate the terms of the public right. The Community sought a declaration in the following terms:

> Declaring that the First Appellant, the Grootkraal Community, being all the families and individuals who live and work on farms in the valley which is known as the Grootkraal-Kombuys area, as a portion of the public has the right, in the form of a public servitude to use and occupy the said property … for the purposes of conducting a church, school and any other community activity, with ancillary rights.'

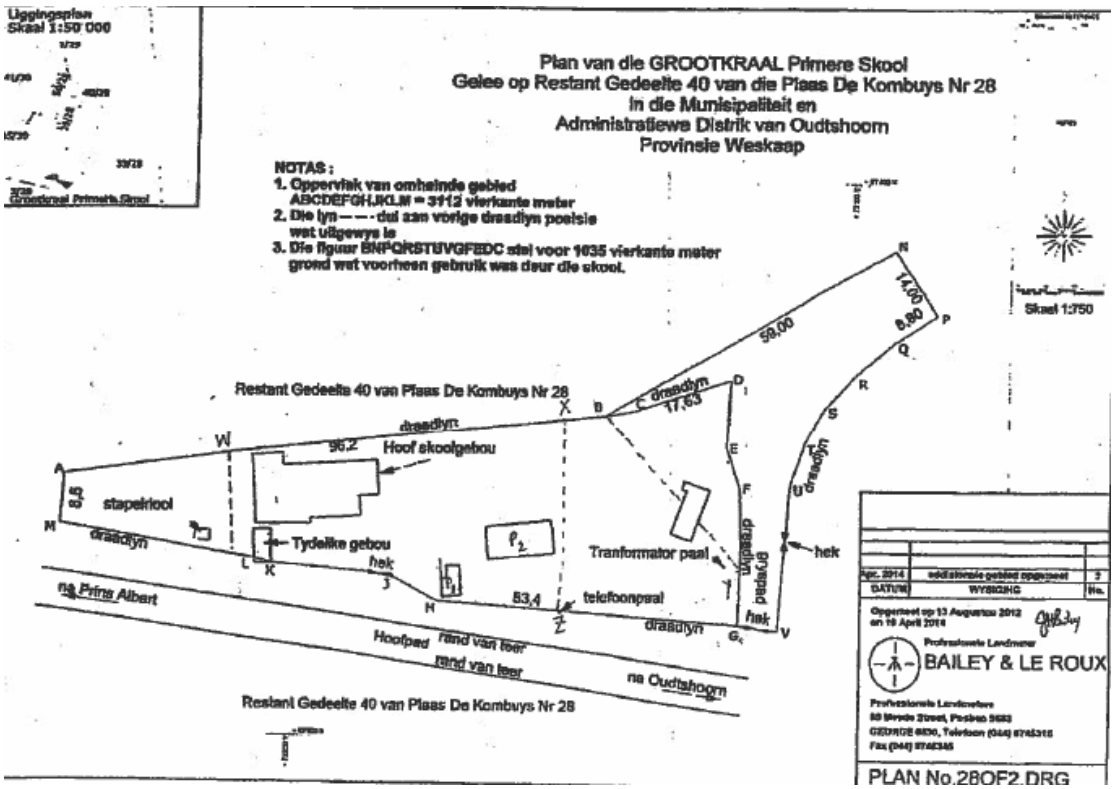
[60] This formulation was not criticised by counsel appearing for the Trust. In the light of my conclusion that the right was created in favour of the Community for religious purposes and that other uses of the property,

including that of the school, were adjuncts thereto, it is too widely formulated. If the Community were to abandon the use of the property for religious purposes, it is difficult to see on what basis they could continue to demand to use it to operate a school. No right to use it for a school, separate from the activities of the church, was established. Nor was a right established to use it for community purposes separate from the church. It would not be within the scope of the right to turn the buildings on the property into a social club for the Community, notwithstanding that the church had ceased to operate there. The existence and continued operation of the church was and is the fulcrum around which the related activities must revolve.

[61] The words 'for the purposes of a church, school and any other community activity with ancillary rights' must be amended to reflect this. An appropriate formulation would read 'for the purposes of a Christian church and any related community activities, including the conduct of a school'.

[62] The next issue is the definition of the property over which this right is capable of being exercised. It is helpful at this point to insert a survey diagram of the property claimed by the Community being the area demarcated by points ABNPQRSTUVGHJKLM on the diagram.[58]

[58] A full page version is annexed at the end of this judgment.



[63] Ms Kiewits claimed that at all times the Community had used the entire property so demarcated. This was not borne out by the evidence. The wedge shaped portion between the boundary AM and the rear of the main building was for many years unused. In about 2000, Mr H W J van der Veen suggested to the school principal that it be cleared and used for a vegetable garden. That was done and it has continued to be used for that purpose ever since. It cannot, however, be regarded as falling within the original right and the permission granted by Mr H W J van der Veen cannot be construed as extending the original grant.

[64] The same is true of the area on the plan demarcated by the letters BNPQRSTUVGFEDC, which is referred to in the evidence as the 'gruispad'. Mr Wicomb, a teacher at the school for many years, said that this was not part of the area available for use by the school, although the children would venture there to play when there were gaps in the fence

affording them access. It too cannot be said to be within the terms of the original right or any extension thereof.

[65] A more complex situation arises in relation to the balance of the area. A dotted line marked XZ is shown on the plan. Mr Markus, who hired the entire farm De Kombuys from Mr H W J van der Veen, from 1995 to 2010, placed it there. He said that XZ represented the area excluded from the lease because it was the portion of the property used by the school. Mr Wicomb, who taught at the school from 1973 to 1983, confirmed this. He said that when he was teaching there the only buildings on the property were the old toilets marked P1 and the main school building, which accommodated both school and church. The building P3, depicted as close to the boundary line DEFG, was apparently a farm worker's cottage. The evidence shows that at some indeterminate time this came to be occupied by the school principal and thereafter it has for a number of years been used as an additional classroom.

[66] According to the current school principal, Mr Metembo, when he arrived at the school in 1994, P3 was occupied as his predecessor's residence. As he did not want to use it for that purpose Mr H W J van der Veen suggested that it should be used as an additional classroom, which is the purpose it still fulfils. It, and the surrounding land, has accordingly been in continuous and undisturbed use by the school since around 1983 with the consent of the landowner at the time. This casts some doubt upon the relevance of Mr Markus' description of the portion of land excluded from the farm that was let to him. If his description was correct he provides no explanation for the school's use of P3 as a classroom throughout the period of the lease.

[67] The land around P3 was included in the land that Mr H W J van der Veen tried to sell at a nominal price and transfer to the Oudtshoorn Congregational Church shortly before his death. Its situation in relation to both the church and school and the surrounding farm, from which it is completely separated by a stream, is such that it is safe to infer that it was intended by Mr van der Veen that the existing right to use the property for religious and related school purposes should include this land. It must be borne in mind that when one is dealing with the use of a piece of land since time immemorial it would not have been surveyed at the outset, but would have developed organically. There would have been some flexibility in regard to its precise extent as the needs of the Community altered and this seems to me to be within that margin of flexibility.

[68] The area over which the public right vesting in the Community extends is therefore the area demarcated by the points BCDEFGHJKL and a line parallel to AM. This will need to be surveyed and further defined before the public servitude can be registered. For the purposes of surveying that line it is to be drawn parallel to AM and at a distance of 2 metres from the rear corner of the 'Hoof skoolgebou' nearest to the line AB. It is of course open to the Trust to permit the servitude to be registered over a larger area, for example including the entire area up to AM, where the vegetable garden is situated, but that would be a matter for it to decide in the light of this judgment. Our task is limited to defining the area over which the Community's right has been established.

[69] That brings me to two objections raised in the Trust's heads of argument concerning registration of a servitude. The first was that to do so in respect of the property over the Grootkraal farm would require the

consent of the Minister of Agriculture, as the servitude in question falls outside the categories listed in ss 6A(1)(*a*) and (*b*) of the Subdivision of Agricultural Land Act 70 of 1970. The second was that in terms of s 66(1) of the Deeds Registries Act 47 of 1937 the Registrar's power in relation to public servitudes is discretionary and subject to the Registrar being satisfied of a subjective jurisdictional fact.

[70] The second point can be disposed of easily. While the power of the Registrar to register a public servitude is expressed in the section in discretionary terms, it is a power combined with a duty.[59] The Registrar of Deeds, Cape Town was cited in these proceedings and has never raised an objection to the registration of the servitude claimed by the Community. The point was rightly not pressed in oral argument.

[71] The Registrar likewise did not raise an objection arising from the Subdivision of Agricultural Land Act. As the point was not canvassed in the papers we have no information about the practice in that regard. There is some doubt, given the definition of 'agricultural land' in the Act, whether, notwithstanding its rural nature, this land is still agricultural land, but for present purpose I accept that it is. The answer to the point is that the purpose of s 6A is to enable the Minister of Agriculture to block the creation of new servitudes that might unduly burden agricultural land at a future date. It is not to prevent the registration of public servitudes that have existed since time immemorial. In other words this is not a situation in which the discretion has any tangible effect. For the reasons

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[59] *Schwartz v Schwartz* 1984 (4) SA 467 (A) at 473H-474E.

given in para 70, the minister has a power to consent, combined with a duty to do so. The order directing that a servitude be registered will be made subject to the Minister's consent being obtained.

Result

[72] In the result the following order is made:

1 The appeal succeeds with costs, such costs to include those consequent upon the employment of two counsel.

2 Paragraph (a)(ii) of the order of the High Court is set aside and replaced by the following:

(a) It is declared that the First Appellant, the Community of Grootkraal, being all the families and individuals who live and work on farms in the valley which is known as the Grootkraal-Kombuys area, as a portion of the public, has the right, in the form of a public servitude, to use and occupy the property demarcated by the points BCDEFGHJKL and a line drawn parallel to AM and at a distance of 2 metres from the rear corner of the 'Hoof skoolgebou' nearest to the line AB on the survey diagram, Annexure "A1" to the affidavit of Trui Kiewits at page 141 of the record, for the purposes of a Christian church and any related community activities, including the conduct of a school.

(b) Subject to the consent to registration of the Minister of Agriculture in terms of section 6A(1) of the Subdivision of Agricultural Land Act 70 of 1970 first being had and obtained, the Ninth Respondent is directed to register a public servitude in the terms set out in para (a) above over the property described as Remainder of Portion 40 (Portion of Portion 2) of the farm De Kombuys No 28, in the Municipality and District of Oudtshoorn, Province Western Cape, in extent 117,6629 (One Hundred

and Seventeen comma Six Six Two Nine) hectares held by Deed of Transfer T5665/2010.

(c) The Kobot Business Trust (IT 969/2009) as represented herein by its trustees, the First to Third Respondents, is to pay the costs of the counter application, such costs to include those consequent upon the employment of two counsel, where two counsel were employed.

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M J D WALLIS

JUDGE OF APPEAL

Appearances

For appellant: A M de Vos SC (with her D Brand)
Instructed by: Lawyers for Human Rights, Pretoria;
Webbers Attorneys, Bloemfontein.

For first to third respondents: L Wilkin (with him U K Naidoo)
Instructed by: James King & Badenhorst Attorneys, Oudtshoorn;
Bezuidenhouts Attorneys, Bloemfontein.