

When does a right of way prescribe?

In our law, a distinction is made between extinctive prescription and acquisitive prescription.

Examples of acquisitive prescription include when a landowner (or their predecessor in title, where applicable) uses a road across a neighbour's farm for an uninterrupted period of 30 years to access a provincial road. The general requirements are that the right must be exercised openly, without force, and without permission. After the 30-year period, a right of way is then established through acquisitive prescription in favour of the dominant property. This forms a type of servitude which can also be registered against the title deed of the property. However, such registration is not a requirement for validity. A servitude can therefore arise through prescription and is enforceable even if there is no such condition in the title deed.

Extinctive prescription, on the other hand, is relevant where a registered right of way, recorded in the title deed, is not exercised for an uninterrupted period of 30 years.

The case of *Kruger v Joles Properties (Pty) Limited and Another* deals with extinctive prescription for a right of way. The plaintiff and defendant were owners of adjacent properties with houses in Stellenbosch. There is a passageway between the two properties which is registered as a servitude on both their title deeds.

The issue arose from the ambiguous wording of the servitude in the title deeds. The relevant paragraph only stated that the passageway would be for the mutual use of the two properties.

Evidence showed that occupants of the defendant's property did indeed use the passageway from time to time, for instance, to access sewer pipes for maintenance, but did not use it as a passage to the rear section of the property. The plaintiff's argument was that the servitude was intended to provide the defendant with a passage to the rear section of the property. By using the passageway for other purposes, according to the plaintiff, the servitude rights

were not exercised for a period of 30 years.

The High Court rejected the plaintiff's argument. However, the plaintiff appealed to the Supreme Court of Appeal, which accepted his argument.

The Supreme Court of Appeal emphasized an important principle with reference to the Roman-Dutch writer, Voet, namely that a landowner, as a starting point, can exercise their property rights without any restrictions from their neighbours. Any servitudes that impose restrictions on these property rights must therefore be narrowly interpreted where their wording is ambiguous. Furthermore, the court indicated that evidence of surrounding circumstances at the time of concluding the agreement may be considered to determine the common intention of the parties. In this case, however, no such evidence was available, leading the court to conclude that only the aforementioned restrictive interpretation rule is relevant.

Since the right of way to the rear section of the property had not been exercised since 1966, the court decided that the servitude had prescribed in terms of section 71 of the Prescription Act, 68 of 1969.

Apart from illustrating the interesting principles applicable to extinctive prescription, this case also serves as an example of the importance of properly wording the terms and conditions of servitude agreements and other contracts. If the title condition had been properly worded, this court case would never have occurred.