

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

Case no: 35735/2018

REPORTABLE
OF INTEREST TO OTHER JUDGES

REVISED

20.08.23

In the matter between:

HASSODY KHATHA

Plaintiff

and

PRIMATHIE PILLAY N.O.

First Defendant

KANDERUBY RAMOOTHY N.O.

Second Defendant

MASTER OF THE HIGH COURT, JOHANNESBURG

Third Defendant

JUDGMENT

MOULTRIE AJ

DELIVERED: *This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date and time for hand-down is deemed to be 10h00 on 21 August 2023.*

Prescription — Acquisitive Prescription — Act 69 of 1969, s 3(1)(a) — Delay in completion of acquisitive prescription — Superior force preventing person against whom prescription is running from interrupting the running of

prescription as contemplated in section 4 — Whether death of such person constitutes superior force prior to appointment of executor.

Prescription — Acquisitive Prescription — Common law — *contra non valentem agere nulla currit praescriptio* — Suspension of running of acquisitive prescription against persons unable to assert their rights – Whether death of person against whom acquisitive prescription running suspends period of prescription prior to appointment of executor.

- [1] This action relates to certain immovable property located in Benoni that has at all relevant times been registered in the name of the plaintiff's mother-in-law, Lutchmia Katha who passed away on 18 August 2014. The first and second defendants (to whom I shall refer as the defendants) are the executrices of Lutchmia Katha's estate. It is common cause that the defendants were appointed as such by virtue of letters of executorship issued by the Master on 2 October 2017.

- [2] The primary relief sought by the plaintiff (pleaded as "claim A" in her amended particulars of claim) is an order declaring that she became the owner of the property by virtue of acquisitive prescription as contemplated in section 1 of the Prescription Act, 68 of 1969. The plaintiff pleads in her amended particulars of claim that "[s]ince June 1986 to date hereof,¹ being a period of over 30 years, the Plaintiff has continuously, openly and as if she was the owner possessed the property of which the deceased was the registered owner".

- [3] The defendants have raised a special plea to the effect that, even assuming that the plaintiff will at the trial establish all the other requirements for acquisitive prescription from 1 June 1986 at the earliest,² the required prescription period was not completed thirty years later at the end of May 2016 or indeed on any

¹ It is not clear to me whether the phrase "to date hereof" in the pleading should be understood as referring to 17 September 2018 (being the date on which the particulars of claim were signed), or 1 October 2018 (being the date on which the combined summons was served) or 18 April 2019 (being the date on which the amended particulars of claim were signed). However, nothing turns on this, as all of these dates were after the date upon which the plaintiff contends the period of acquisitive prescription was completed (i.e. 31 May 2016) and before the date contended for by the defendants (i.e. 1 October 2020) or the date that would apply if prescription was suspended at common law (i.e. 15 July 2019).

² This is the earliest date contemplated in the statement of common cause facts agreed to by the parties in the pre-trial minutes of 12 March 2020 (Caselines 045-5) and 21 January 2021 (Caselines 045-15).

date prior to the date pleaded in the particulars of claim. The special plea is based on the contention that the death of Lutchmia Katha on 18 August 2014 constituted “*superior force*” as contemplated in section 3(1)(a) of the 1969 Prescription Act which “*prevented [her] from interrupting the running of prescription as contemplated in section 4*” and that the earliest presumptive prescription date (i.e. 31 May 2016) occurred before the day on which this “*impediment ... ceased to exist*”. The defendants’ further contention is that the impediment only ceased to exist on the date when they were appointed as executrixes and in a position to serve legal process claiming ownership, being 2 October 2017, and the period of prescription would consequently only have been completed on a date three years thereafter, being 1 October 2020.

- [4] It was agreed between the parties in their pre-trial minutes that the defendants’ special plea to the plaintiff’s claim of acquisitive prescription would be separated for determination on the basis of the common cause facts set out above, and without either party leading any evidence. However, no formal agreement was reached regarding the precise wording of the separation, and (after hearing submissions for both parties) I therefore issued an order by agreement in terms of rule 33(4) at the commencement of the hearing in the terms set out in paragraphs 1 and 2 of the order that I make herein.

- [5] The crisp but surprisingly problematic question before me is whether Lutchmia Katha’s death on 18 August 2014 constituted “*superior force*” as contemplated in section 3(1)(a) of the 1969 Prescription Act. If this is so, then it is not in dispute that the completion of the period of prescription was delayed and would only be completed on a date after the date pleaded in the particulars of claim, with the result that the special plea must succeed.

- [6] Before proceeding, it bears emphasis that I have only been requested to determine whether the death of Lutchmia Katha delayed completion of the period of acquisitive prescription. I have not been requested to determine whether the running of acquisitive prescription was interrupted (judicially or otherwise) before its completion. No such interruption is alleged in the defendant’s special plea, and nothing in this judgment should be interpreted as determinative of that issue, should it arise.

Does the death of the party against whom prescription running constitute “superior force”?

[7] The relevant provisions of the 1969 Prescription Act read as follows:

1 Acquisition of ownership by prescription

Subject to the provisions of this Chapter and of Chapter IV, a person shall by prescription become the owner of a thing which he has possessed openly and as if he were the owner thereof for an uninterrupted period of thirty years or for a period which, together with any periods for which such thing was so possessed by his predecessors in title, constitutes an uninterrupted period of thirty years.

[...]

3 Completion of prescription postponed in certain circumstances

(1) If-

(a) *the person against whom the prescription is running is a minor or is insane, or is a person under curatorship, or is prevented by superior force from interrupting the running of prescription as contemplated in section 4;*

(b) *[...]; and*

(c) *the period of prescription would, but for the provisions of this subsection, be completed before or on, or within three years after, the day on which the relevant impediment referred to in paragraph (1) or (b) has ceased to exist,*

the period of prescription shall not be completed before the expiration of a period of three years after the day referred to in paragraph (c).

[...]

4 Judicial interruption of prescription

(1) *The running of prescription shall, subject to the provisions of subsection (2), be interrupted by the service on the possessor of the thing in question of any process whereby any person claims ownership in that thing.*

[...]

(4) *For the purposes of this section 'process' includes a petition, a*

notice of motion, a rule nisi and any document whereby legal proceedings are commenced.

- [8] The concept of “*superior force*” preventing an owner from judicially interrupting the running of acquisitive prescription by service of process is not defined in the Act, and these words in section 3(1)(a) (as opposed to the same words in section 13(1)(a)) have not been the subject of any judicial consideration that either of the parties or I have been able to locate.
- [9] In those circumstances, it is necessary for me to apply the accepted principles of statutory interpretation, which require simultaneous consideration of text, context and purpose.³ The Constitutional Court has recently summarised the principles as follows:

³ *Shoprite Checkers (Pty) Ltd v Mafate* 2023 (4) SA 537 (SCA) para 21.

- (a) *Words in a statute must be given their ordinary grammatical meaning unless to do so would result in an absurdity.*
- (b) *This general principle is subject to three interrelated riders: a statute must be interpreted purposively; the relevant provision must be properly contextualised; and the statute must be construed consistently with the Constitution, meaning in such a way as to preserve its constitutional validity.*
- (c) *Various propositions flow from this general principle and its riders. Among others, in the case of ambiguity, a meaning that frustrates the apparent purpose of the statute or leads to results which are not businesslike or sensible results should not be preferred where an interpretation which avoids these unfortunate consequences is reasonably possible. The qualification “reasonably possible” is a reminder that Judges must guard against the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used.*
- (d) *If reasonably possible, a statute should be interpreted so as to avoid a lacuna (gap) in the legislative scheme.⁴*

The text of section 3(1)(a)

- [10] The defendants’ contention that the death of the owner constitutes the occurrence of “*superior force*” emphasises the ordinary grammatical meaning of those words and the fact that, at least until such time as an executor is appointed, it is simply not possible for a deceased person to judicially interrupt prescription as envisaged in section 4 of the Act.
- [11] I can find no fault in this submission regarding the ordinary grammatical meaning of the text: while the question of the legal personality of a deceased estate before the appointment of an executor may not yet be finally settled in our law,⁵ there

⁴ *Minister of Police and Others v Fidelity Security Services (Pty) Ltd* [2022] ZACC 16 (CC) para 34.

⁵ In *Commissioner for Inland Revenue v Emary* NO 1961 (2) SA 621 (A) at 624D – G the court expressed doubt as to the legal personality of a deceased estate prior to the appointment of an executor, but ultimately left the question open. See also *Yoonuce v Pillay* 1964 (2) SA 286 (D) at 289C – D which is to the same effect. The Supreme Court of Appeal in both *Mostert NO v Old Mutual Life Assur Co (SA) Ltd* 2001 (4) SA 159 (SCA) para 47 and *Thorpe v Trittenwein* 2007 (2) SA 172 (SCA) para 9, referred to a deceased estate as not being a legal *persona*.

seems to be no question whatsoever that an estate without an appointed executor cannot perform a juristic act and “*at any rate, it seems clear that it cannot sue for the purpose of interrupting prescription*”.⁶

The context of section 3(1)(a)

- [12] On the other hand, the argument advanced on behalf of the plaintiff before me regarding the meaning of the words in section 3(1)(a) emphasised their context.
- [13] The first contextual argument is that the words “*superior force*” should be interpreted *eiusdem generis* with the other ‘impediments’ expressly identified in the section, namely the minority, ‘insanity’ or curatorship of the person against whom prescription is running. Seemingly taking his cue from the *Minnaar* case (which was decided under the 1943 Prescription Act and the common law and is discussed below),⁷ the plaintiff’s counsel argued that whereas the date upon which these impediments might cease are out of the control of such a person, the same does not apply in the case of a deceased estate, in respect of which the heirs are in a position to end the impediment by requesting the appointment of an executor.
- [14] This argument is not sustainable at the level of principle for two reasons. First, quite simply because it is not the heirs against whom prescription would be running, but the estate.⁸ Secondly, while I don’t doubt that it would indeed be possible for an heir to seek the appointment of an executor,⁹ the relevant question is not so much whether the circumstances under which each of the impediments might be put to an end are similar, but rather whether their onset is comparable. This may be demonstrated by contemplating the (by no means fanciful) scenario where the person against whom prescription is running dies

⁶ *Barker NO v Chadwick* 1974 (1) SA 461 (D) at 467D; cf. *Botha v Williams* 2012 JDR 0582 (GSJ) para 12.

⁷ *Minnaar v Rautenbach* [1999] 1 All SA 571 (NC).

⁸ This point was made by the court in *Barker v Chadwick* at 467E.

⁹ Section 14(1) of the Administration of Estates Act, 66 of 1965 only refers to such an appointment being made on the application of the nominated executor, and that section 18 requires the Master to make an appointment *mero motu* in circumstances where the nomination fails (for example through the death of the executor) or where there is no executor nominated in the will. There is however no provision that expressly prevents an heir (intestate or otherwise) from applying for the appointment of an executor.

only a very short time before the notional prescription date (and possibly even once she already decided to take, but has not yet actually taken, steps to interrupt the running of prescription, either judicially or otherwise), and where it would simply be impossible for anyone to seek the appointment of, let alone for the Master to appoint, an executor before the completion of the prescription period.

- [15] I do not think that that there is any relevant difference of principle between the situation that has arisen in this matter and the other impediments expressly identified in section 3(1)(a), all of which are very much out of the control of the person against whom prescription is running. My conclusion in this regard is buttressed by the fact that the Supreme Court of Appeal has interpreted the same words in section 13(1)(a) of the Act as applying to the analogous circumstances of a creditor company in liquidation in respect of which no liquidator has yet been appointed – precisely on the basis of the operation of the *eiusdem generis* rule – despite the fact that it would be possible for those having a potential interest in its assets to seek the appointment of a liquidator.¹⁰
- [16] The plaintiff's second contextual argument seeks to rely on the interpretive presumption that where the Legislature uses the same words in a particular statute it intends for them to bear the same meaning throughout. In particular, her counsel sought to compare section 3(1) with section 13(1), which deals with delays in the completion of extinctive prescription of debts. He relies on the fact that while section 13(1)(a) provides for a delay in the completion of extinctive prescription in circumstances where "*the creditor ... is prevented by superior force including any law or any order of court from [judicially] interrupting the running of prescription*", section 13(1)(h) expressly provides for a delay in the completion of prescription where "*the creditor or the debtor is deceased and an executor of the estate in question has not yet been appointed*". The plaintiff contends that the words "*is prevented by superior force ... from interrupting the running of prescription*" when used in section 13(1)(a) cannot refer to a creditor who has died, because that situation is dealt with in section 13(1)(h) and that where the same words are used in section 3(1)(a) they should be interpreted to

¹⁰ *Knysna Hotel CC v Coetzee NO* 1998 (2) SA 743 (SCA) at 754J.

bear the same limited meaning.¹¹

- [17] While I recognise that this contextual argument has some force, I do not find it ultimately persuasive.
- [18] It is not obvious to me that section 13(1)(a) should be interpreted in such a way as to exclude from its ambit a creditor who is deceased as contemplated in section 13(1)(h). I am not aware of any canon of interpretation that different words in different sections cannot have the same legal consequences.¹² And a finding that they do would not infringe the interpretive principles that a meaning should be given to every word and every section in a statute, and that a court should not lightly construe any provision as having no practical effect.¹³ Thus, assuming that section 13(1)(a) incorporates one of the circumstances described in section 13(1)(h) (i.e. the fact that the creditor is deceased and an executor has not been appointed), that does not mean that both sections will not still have some practical effect: section 13(1)(a) will still have application in the case of creditors who labour under an impediment other than being deceased (such as being a minor), and section 13(1)(h) will still have application in the case of debtors who are deceased. As such, I do not think that too much should be read into the potential overlap between subsections 13(1)(a) and 13(1)(h): especially since section 13 was described by no less an authority than the Appellate Division as an “*inept section [which] is by no means clear and presents obvious problems of interpretation*”.¹⁴
- [19] And even if the death of a creditor is to be excluded from the ambit of “*superior force*” in section 13(1)(a) on the basis that that scenario is addressed in section 13(1)(h), this is also not one of those especially strong cases where the words in question are used in the same section¹⁵ or the same sentence.¹⁶ As the

¹¹ See e.g. *ABP 4x4 Motor Dealers (Pty) Ltd v IGI Insurance Co Ltd* 1999 (3) SA 924 (SCA) para 12.

¹² This seems to be the case in relation to section 13(1)(g) and 13(1)(h), both of which appear (*inter alia*) to regulate the completion of extinctive prescription in circumstances where the debtor is deceased.

¹³ *Panamo Properties (Pty) Ltd and Another v Nel and Others* NNO 2015 (5) SA 63 (SCA) para 27.

¹⁴ *Leipsig v Bankorp Ltd* 1994 (2) SA 128 (A) at 133G.

¹⁵ *Public Carriers Association and Others v Toll Road Concessionaries (Pty) Ltd and Others* 1990 (1) SA 925 (A) at 949F.

Constitutional Court has recognised, the interpretative presumption relied upon is not an immutable rule, and “*room exists for deviation from such a presumption when justified*”, especially where this “*would lead to manifest absurdity or would clearly frustrate the manifest intention of the lawgiver*”.¹⁷ In my view, it would indeed be absurd to suggest that a deceased person in respect of whose estate no executor has yet been appointed is not “*prevented by a superior force*” from judicially interrupting prescription.

- [20] The plaintiff advances no reason of principle why the death of the person against whom prescription is running should be excluded as a circumstance suspending acquisitive prescription but yet be a basis for the suspension of extinctive prescription, and I can’t think of any. In the subsequently published memorandum that Professor JC de Wet submitted to the legislature explaining the draft which he had authored, and which was subsequently promulgated mostly unchanged as the 1969 Prescription Act, he noted that the Roman Dutch writers had always treated suspension as being common to both extinctive and acquisitive prescription and emphasised that in both cases suspension is based on the principle that the person against whom prescription is running is not in a position to protect their rights.¹⁸ He specifically indicated that in seeking to give effect to this in relation to both forms of prescription, his draft of section 3(1)(a) had thus maintained the “*breë opvatting*” of the common law *maxim* to this effect, namely *contra non valentem agere nulla currit praescriptio*. He indicated that this not only reflected the common law position in South Africa but was more “*regverdig*” than the more limited *numerus clausus* adopted by the codified civil systems that he considered.¹⁹

¹⁶ *Minister of the Interior v Machadodorp Investments (Pty) Ltd and Another* 1957 (2) SA 395 (A) at 404D.

¹⁷ *MEC, Dept of Agriculture, Conservation & Environment v HTF Developers (Pty) Ltd* 2008 (2) SA 319 (CC); [2007] ZACC 25 para 33, referring to *S v Dlamini*; *S v Dladla and Others*; *S v Joubert*; *S v Schietekat* 1999 (4) SA 623 (CC); [1999] ZACC 8 para 47.

¹⁸ JJ Gauntlett (ed.) JC de Wet: *Opuscula Miscellanea: Regsgeleerde Lesings en Adviese*. (Butterworth, 1979) para 32, p 91: “*Ons ou skrywers behandel skorsing as iets wat gemeen is aan albei soorte verjaring. Die beginsel wat hulle voorop stel, is dat verjaring nie loop teen iemand wat nie in staat is om te ageer nie - contra non valentem agere, non currit praescriptio – en noem dan verskillende voorbeelde. ... Bowendien is die grondslag van skorsing tog dat die persoon, teen wie verjaring loop, nie in staat is om sy reg te beskerm nie ...*”

¹⁹ *Id.* para 34, p 92: “*Oor die omstandighede, wat die loop van verjaring skors, was die Romeinse reg blykbaar nie so vrygewig nie. Eers in die middeleeue, miskien onder invloed van die Kanonieke reg, het die spreuk "contra non valentem agere non currit praescriptio" gedy. In die Vastelandse Wetboeke is*

- [21] Professor de Wet's observation regarding the common law introduces a further reason to prefer the defendants' contextual argument as to the meaning of "superior force", namely the interpretive presumption that the Legislature should not lightly be inferred to have altered the common law: "[t]he statute must either explicitly say that it is the intention of the Legislature to alter the common law, or the inference from the [legislation] must be such that [the court] can come to no other conclusion than that the legislature did have such an intention".²⁰
- [22] In *Dambuza*, the court observed that acquisitive prescription at common law is "suspended as a general rule ... in all cases where it was not possible to bring an action, owing to a disposition of the law"²¹ and in doing so relied on *Louw*, which had applied the *maxim* and its consideration by Voet²² in concluding that extinctive prescription is suspended upon the death of the debtor.²³ In *Morkel's Transport*, Colman J approved of the statements of academic writers to the effect that under South African common law, acquisitive prescription does not run against "those who are disqualified from asserting their rights" and that "[t]ime does not run against minors or others who are not in a position to assert their rights".²⁴ And it continues to be accepted by our courts that no use, occupation or

aansienlik afgewyk van die breë opvatting in die bogenoemde spreuk beliggaam, en word die skorsingsgronde spesifiek genoem, en daar is 'n sort "numerus clausus" van hulle. In my ontwerp word, wat hierdie punt betref, aangesluit by die breër benadering van die gemene reg. Dit is na my mening geregverdig, ..."

²⁰ *S v Litako and Others* 2015 (3) SA 287 (SCA) para 52, quoting *Casserley v Stubbs* 1916 TPD 310 at 312.

²¹ *Estate Dambuza v Estate Mcikwa* 1946 AD 94 at 98.

²² Johannes Voet *Commentary on the Pandects* (1698) 44.3.11 (Krause's translation, Juta, 1920): "... it is generally admitted that prescription does not run against those who are not able to sue while the law or the will of the testator prevent action from being taken, and for this reason, as far as prescription is concerned, creditors are not prejudiced by the time taken up for the making up of the inventory since they are during such period prevented from disturbing the heir."

²³ *Louw v Louw* 1933 CPD 163 at 168 – 169: "it seems to me that the passage ... from Voet is decisive of the point which I am considering. Under the Administration of Estates Act the estate of a deceased debtor is administered by his executor. Until his appointment there is no one who can be sued and after his appointment he calls for claims against the estate. ... It seems to me that these provisions of the law preclude the idea of bringing actions against the estate at any rate until the executor rejects the creditor's claim. Consequently even if the running of prescription is not completely interrupted by the death of a debtor it is at any rate suspended".

²⁴ *Morkel's Transport (Pty) Ltd v Melrose Foods (Pty) Ltd* 1972 (2) SA 464 (W) at 479A – H, referring to RW Lee *Introduction to Roman-Dutch Law*. 4 ed. (Oxford, 1946) at pp. 148 – 9 and RW Lee and AM Honoré on *Property* (Butterworth, 1954) para 51. See also JE Scholtens "Praescriptio – Jus Possidendi and Rei Vindicatio" 1972 SALJ 383 at 386 – 387, where further instances of references to the maxim in relation to acquisitive prescription are given.

possession can be relied upon for the purpose of the law of acquisitive prescription “*unless the owner has a legal right to prevent it*”.²⁵

- [23] The unsurprising proposition that this common law principle applies in the case of the death of the party against whom acquisitive prescription is running until the appointment of an executor was assumed in *Barker v Chadwick*. However, since there was a “*statutory executor*” who had the obligation to administer the property at issue in that case with immediate effect after the death of the original owner, acquisitive prescription was not suspended.²⁶
- [24] The plaintiff’s counsel refers in this regard to a portion of the judgment in *Minnaar v Rautenbach*, which was also decided on the basis of the common law. In that case, although an executor had been appointed (and he was well aware that the estate in question had the right to enforce its ownership of the property), he failed to do so on its behalf before he passed away, and no replacement was appointed before the notional prescription period had been completed. Whereas the court accepted the earlier statement in *Barker v Chadwick* that at common law the running of prescription would in principle be suspended in circumstances where the owner had no legal right to prevent the relevant use, occupation or possession, it concluded (purportedly applying *Barker*) that the heirs of a deceased estate in the absence of an executor cannot be said to lack a legal right to prevent acquisitive prescription because of their ability to request the Master to appoint an executor.²⁷
- [25] The judgment in *Minnaar* appears, however, to have overlooked the crucial feature of the *Barker* case, namely that there was a statutory executor who had the responsibility to administer the property of the deceased. Furthermore,

²⁵ *Pezula Private Estate (Pty) Ltd v Metelerkamp* 2014 (5) SA 37 (SCA) para 15. Although *Pezula* was a case involving acquisition of a servitude by prescription under Chapter II of the 1969 Prescription Act, section 8(2) specifically provides that the provisions of section 3 apply *mutatis mutandis* to that situation. See also J Saner Prescription in South African Law, Looseleaf, Issue 33 (Butterworth, 2022) at 2-30.

²⁶ *Barker v Chadwick* at 467F – H and 468C – F. The paucity of authority on the question for decision in the current matter may well be explained by the fact that a similar position applied in Roman and Roman Dutch law. The principle of universal succession meant that the heir would immediately upon death have been able to assert ownership rights in respect of what had previously been the deceased’s property. Universal succession is no longer part of our law: *Magnificent Mile Trading 30 (Pty) Ltd v Celliers NO* 2020 (4) SA 375 (CC) para 31.

²⁷ *Minnaar v Rautenbach* at 576h – 577d.

although it is correct that the court in *Barker* contemplated that heirs might be regarded as “*idle or slovenly*” (read negligent) if they don’t approach the Master for the appointment of an executor, it also specifically held that this was irrelevant because the rights that might be lost as a result of such negligence “*are not the rights of ownership*”.²⁸ As the Appellate Division held in *Pienaar v Rabie*²⁹ (and as the court in *Minnaar* itself noted)³⁰ while the negligence of the owner is one of the recognised justifications for acquisitive prescription, it is not one of the substantive requirements for its operation. Apart from the fact that the court in *Minnaar* did not purport to interpret or apply section 3(1)(a), I am not bound by it, and I decline to follow it.

The purpose of section 3(1)(a)

- [26] The third pillar of interpretation of statutes requires me to consider the purpose of section 3(1)(a).
- [27] Carey Miller persuasively posits that the employment of “*the wide phrase ‘prevented by superior force’*” was an “*important rationalization of the common law*” so as “*to cover the diverse possible circumstances which may produce a de facto condition of disability*” and that it “*is an objective criterion*” requiring consideration of “*whether the circumstances were such as to prevent a reasonable owner from taking steps to interrupt prescription by court action*”.³¹
- [28] While the law of acquisitive prescription more generally has been justified on the basis of a range of moral or philosophical arguments,³² the two main justifications advanced in South African law (punishment and legal certainty)³³ have in common the fact that they focus on the value of the doctrine in the interests of the broader society, rather than on the narrow personal interests of the possessor seeking to rely on it. Thus, the punishment justification emphasises

²⁸ *Barker v Chadwick* at 467E.

²⁹ *Pienaar v Rabie* 1983 (3) SA 126 (A) at 138H.

³⁰ *Minnaar v Rautenbach* at 577d.

³¹ DL Carey Miller *The Acquisition and Protection of Ownership*. (Juta, 1986) at 86 – 87.

³² *Pienaar v Rabie* at 135H.

³³ EJ Marais *Acquisitive Prescription in View of the Property Clause*. (LLD Thesis, Stellenbosch, 2011) para 4.2.3.

that an owner's "*sloth and carelessness*" could "*injure the public by producing in the commonwealth uncertainty as to ownerships, a host of lawsuits which may last forever and the bewilderment which is to be apprehended from such things*".³⁴ The public element of the law of acquisitive prescription also features centrally in the legal certainty justification preferred by Professor de Wet in his memorandum, which refers to the interests of third parties who may be affected by the question of ownership.³⁵ Even in Roman Law, prescription (*usucapion*) was regarded as having been "*introduced for the public weal*".³⁶ More recently, the Constitutional Court has observed (albeit in relation to extinctive prescription) that time limits play a vital role in bringing certainty and stability to social and legal affairs and are supportive of the rule of law.³⁷

- [29] Whatever the best rationale may be, however, it is important for current purposes to observe that acquisitive prescription has, in the case law at least, not been sought to be justified on the basis that the possessor personally 'deserves' the benefit of ownership. In *Welgemoed v Coetzer*, the court emphasised that "*the object of the principle ... is not to confer a benefit on the possessor (who may even be mala fide) of another's property, but presumably in the public interest*".³⁸
- [30] The only potential exception that I have come across in this regard is the suggestion by Marais that acquisitive prescription may in part be justified by Locke's labour theory on the basis that the possessor has invested labour and effort in land that would otherwise lie abandoned.³⁹ While I do not propose to evaluate the correctness of that proposition, it seems to me that it operates at a high level to justify acquisitive prescription in general, and that it would be unhelpful to consider the specific possessor's labour interest in the property for

³⁴ Johannes Voet Commentary on the Pandects (1698) 41.3.1 (Gane's translation, vol. 6, Butterworth, 1957 at 258 - 259) See also Maasdorp, AFS Institutes of South African Law, 2 ed. vol. 2 (Juta, 1907) p 82.

³⁵ JC de Wet Memorandum para 5, p 78.

³⁶ Digest 41.3.1: Gaius, Provincial Edict, book 21 (A Watson Digest of Justinian, vol. 4, University of Pennsylvania, 1985 at 31)

³⁷ *RAF v Mdeyide* 2011 (2) SA 26 (CC); [2010] ZACC 18 para 8.

³⁸ *Welgemoed v Coetzer* 1946 TPD 701 at 711. See also the discussion of the writing of Schorer by Marais in his LLD Thesis at 151.

³⁹ Marais LLD Thesis at 250.

the purposes of determining whether the death of the owner constitutes superior force that gives rise to a delay in the completion of the prescription period. Even if there had been anything in the agreed factual matrix of the current case to suggest that Lutchmia Katha abandoned the property (there wasn't),⁴⁰ an approach requiring an investigation into the possessor's labour interest in the property in every acquisitive prescription case would undermine what continues to be identified by many authors as one of (if not the "*most acceptable*") rationales of acquisitive prescription, namely legal certainty.⁴¹

- [31] It would in my view be especially inappropriate to limit the scope of the *contra non valentem* rule in view of the constitutional protection of property rights against arbitrary deprivation.⁴² In the absence of safeguards such as those contained in section 3(1)(a), the rigid application of a set period after which an owner is deprived of their property could well expose the concept of acquisitive prescription to challenge on the grounds of arbitrariness.⁴³ This calls for the invocation of the principle that a court should prefer statutory interpretations that are least invasive of fundamental rights if it is reasonably possible to do so.⁴⁴ If section 3(1)(a) is interpreted to exclude the death of a person from the scope of "*superior force*", that may result in the arbitrary transfer of property rights from the owner (being the estate), to the possessor.

Conclusion on the proper interpretation of section 3(1)(a)

- [32] In conclusion, I find that the text and purpose of section 3(1)(a) both clearly favour the defendant's interpretation. While some aspects of context do provide

⁴⁰ Notably, the plaintiff does advance an alternative claim of unjustified enrichment in her Claim B.

⁴¹ CG Van der Merwe "*Original Acquisition of Ownership*" in Zimmerman and Visser (eds) Southern Cross: Civil Law and Common Law in South Africa. (Juta, 1996) at 717.

⁴² Constitution, s 25(1); *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service*; *First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC).

⁴³ cf. *Pye (Oxford) Ltd v United Kingdom* 2006 43 EJRR 3 (IV), discussed in Marais LLD Thesis and Van der Walt & Marais "*The Constitutionality of Acquisitive Prescription: A Section 25 Analysis*" 2012 TSAR 714 at 724.

⁴⁴ *Tshwane City v Link Africa* 2015 (6) SA 440 (CC) para 153 (applying and extending *S v Letako* para 52). Section 39(2) of the Constitution specifically provides that "*when interpreting any legislation ... every court ... must promote the spirit, purport and objects of the Bill of Rights*". At common law, the Legislature will not be presumed to have intended "*obvious injustice ... unless the intention had been manifested in express words*": *Principal Immigration Officer v Bhula* 1931 AD 323 at 334 and 336 – 337; *Road Accident Fund v Smith* NO 1999 (1) SA 92 (SCA) at 103E.

support for the plaintiff's contention, I am not satisfied that they are sufficient to overcome the application of interpretive guidelines (including those of context) that point in the opposite direction.

- [33] The words "*superior force*" in section 3(1)(a) of the 1969 Prescription Act must therefore be interpreted to include the death of the owner of the property in question. I conclude that the death of Lutchmia Katha in August 2014 constituted an impediment that only ceased to exist when the defendants were appointed as executrixes on 2 October 2017, with the consequence that the period of acquisitive prescription which commenced to run in June 1986 would only be completed on 1 October 2020.⁴⁵

The common law

- [34] Before closing, I note that it has consistently been held that the 1969 Act only "*constitutes a partial codification of our law of prescription*" and that the common law rules continue to apply "*where the Act is silent about matters to which they relate and they are not inconsistent with the Act's provisions*".⁴⁶ In his LAWSA volume on acquisitive prescription, Saner specifically asserts that the common law continues to apply in "*circumstances falling outside the ambit of 'superior force'*" as contemplated in section 3(1)(a).⁴⁷
- [35] To the extent that the conclusion that I have reached above may be incorrect, and that the death of the party against whom acquisitive prescription is running cannot be regarded as "*superior force*" which delays its completion, with the result that section 3(1)(a) of the Prescription Act is "*silent*" in this regard, the common law I have referred to above would thus apply.

- [36] Assuming this to be the case, the running of acquisitive prescription was

⁴⁵ If the logic of *Shoprite Checkers v Mafate* paras 29 to 37 (in which the court found that the creditor had suffered a permanent disability, and that the appointment of a curator *ad litem* did not cause that impediment to cease to exist) is applied to section 3(1), it may be arguable that the period of acquisitive prescription will never be completed, but it is not necessary for me to decide this issue.

⁴⁶ *Lombo v ANC* 2002 (5) SA 668 (SCA) para 22; *Marais v Commercial Union Insurance Co of SA Ltd* 1977 (2) SA 269 (T) at 270I – 273E; *Erasmus v Protea Assuransiematskappy Bpk* 1982 (2) SA 64 (N) at 69D; and *Oertel NNO v Director of Local Govt* 1981 (4) SA 491 (T) at 499D – G (although this judgment was overturned on appeal, there was no disagreement on this point: see *Oertel NNO v Direkteur van Plaaslike Bestuur* 1983 (1) SA 354 (A) at 370H to 375A).

⁴⁷ Saner "*Prescription*" in *The Law of South Africa*, 3 ed. vol. 33 (LexisNexis, 2020) para 231.

suspended on the date of Lutchmia Katha's death on 18 August 2014, at which point there remained, at best for the plaintiff (i.e. assuming that prescription began to run on 1 June 1986 and not on a later date in that month), 21 months and 13 days to run until 31 May 2016. At common law, the running of acquisitive prescription then recommenced upon the appointment of the defendants as executors on 2 October 2017, and would only have been completed 21 months and 13 days later, on 15 July 2019 at the earliest.

Conclusion, costs and order

[37] In summary, irrespective of whether section 3(1)(a) of the Prescription Act or the common law of acquisitive prescription applies, the defendants are correct in contending in their special plea that the period of acquisitive prescription had not been completed by 18 April 2019 (being the latest date capable of being signified by the plaintiff's pleadings). The special plea must consequently succeed.

[38] The defendants have been successful in relation to the issue raised for my determination. The usual principle is that successful parties should be awarded their costs, and I see no reason to depart from that approach in this matter.

[39] I make the following order:

1. The first and second defendants' special plea to the plaintiff's main claim of acquisitive prescription is separated from, and is to be determined prior to, all other issues in the action.
2. The remaining issues in the action (including, if necessary, whether the plaintiff has possessed the property "openly" and "as if the plaintiff was the owner thereof"), shall be stayed until the first and second defendants' aforesaid special plea has been disposed of.
3. The first and second defendant's special plea to the plaintiff's main claim of acquisitive prescription is upheld.
4. Claim A, as pleaded in the plaintiff's particulars of claim (as amended), is dismissed with costs.

RJ Moultrie AJ
Acting Judge of the High Court
Gauteng Division, Johannesburg

APPEARANCES

For the Plaintiff: M Karolia instructed by DP Attorneys Inc.

For the Defendants: S Morgan instructed by SP Attorneys Inc.