



IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

REPORTABLE

CASE NO. 8605/2005

THE UNIVERSITY OF FORT HARE

APPLICANT

And

WAVELENGTHS 256 (PTY) LTD

RESPONDENT

Coram	:	DLODLO, J
Judgment by	:	DLODLO, J
For the Applicant	:	ADV. M. BLUMBERG
Instructed by	:	SMITH TABATA INC C/o Smith Tabata Buchanan Boyes 8 th Floor, 5 St George's Mall CAPE TOWN (REF. N. Hoffman) TEL. NO. 021 406 9100
For the Respondent	:	ADV. H. DU TOIT ADV. JW VAN DER MERWE
Instructed by	:	VAN DER SPUY & ATTORNEYS 4 th Floor, 14 Long Street CAPE TOWN (REF. CH VAN BREDE) TEL. NO. 021 418 1329
Date(s) of Hearing	:	23, 24 APRIL 2007, 06 AUG. 2007, 12, 19 SEPT. 2007, 19 MAY 2010
Order granted on	:	19 MAY 2010 (With reasons to follow)
Judgment (Reasons) delivered on:		12 AUG. 2010



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JUDGMENT DELIVERED ON THURSDAY, 12 AUGUST 2010

DLODLO, J

- [1] The Applicant seeks the return of a painting belonging to it which came to be in the possession of the Respondent in 2005 (and is now in the possession of its erstwhile attorneys). The Respondent, which was placed in liquidation while these proceedings were underway, no longer opposes the relief sought. The liquidator has stated (in a letter dated 30 July 2009) that he does “not intend to oppose [the] application and will accept the outcome of the case.” The attitude of the liquidator (as it appears from the aforementioned letter) is, however, that the Applicant must nonetheless approach the court for relief (a curious and unhelpful attitude to adopt). In any event the consequence of the Respondent’s supervening liquidation and the

liquidator's decision not to persist with the defence(s) is that the evidence led by the Respondent in relation to prescription on 23 and 24 April 2007 was interrupted before being completed. The consequences of this for the Respondent, which has elected not to complete the evidence, are addressed below. Mr. Blumberg represented the Applicant.

SUMMARY OF COMMON FACTS

[2] The Applicant, the University of Fort Hare, owns a substantial collection of contemporary South African Art. Custody and care of the Applicant's art collection falls within the responsibility of the Applicant's National Heritage and Cultural Studies Centre (NAHECS), the current director of which is Mr. Cornelius Thomas, the deponent to the principal Founding and Replying Affidavits filed on behalf of the Applicant ('Mr. Thomas'). The Respondent is a dealer in art and antiques. In early July 2005, Mr. Thomas was contacted by a representative of Sotheby's Auctioneers in Cape Town, Mr. I Hunter ('Mr. Hunter'). Mr. Hunter was in possession of a painting by the artist Mr. George Pemba ('Pemba'). Mr. Hunter, who, as it turned out, had been handed the painting on consignment by the Respondent's representatives, was researching the provenance of the said painting. He had been prompted to contact Mr. Thomas (of the Applicant) by a label on the reverse side of the painting. The said label:

- (a) bore the words "University of Fort Hare, AJD Meiring Art Gallery";
- (b) indicated that the artist was Pemba, the title of the painting "Unholy Three". And the medium oil.

[3] For convenience the said painting is referred to simply as 'the painting'.

Mr. Hunter had contacted Mr. Thomas out of concern that the painting "came from the Applicant's collection". Sotheby's had been consigned the painting for sale by the Respondent. Mr. Thomas responded to Mr. Hunter on behalf of the Applicant, stating per e-mail that it appeared that the painting "may well belong to" the Applicant. Further investigations confirmed Mr. Thomas' initial inclination that the painting belonged to the Applicant. Accordingly, the Applicant's attorneys addressed a letter to the Respondent's attorneys asserting the Applicant's ownership of the painting and demanding its return.

[4] The Respondent too, asserted ownership of the painting and thus refused to return it to the Applicant. The ensuing impasse regarding ownership of the painting led to the launch of these proceedings. The painting remains in the Respondent's possession (or, more accurately, in the possession of the Respondent's erstwhile attorneys of record). The fundamental dispute between the parties concerns ownership of the painting. That question resolves into certain underlying issues (of fact, in certain instances, and of contention, in others). In order to delineate the underlying disputes, an overview of the case asserted by each party in regard to ownership follows.

THE APPLICANT'S CASE

[5] The Applicant asserts that it acquired the painting in 1969. Whilst the Applicant has not adduced any first hand evidence of the transaction by which the Applicant acquired the property, its records and catalogues

relating to its art collection clearly reflect that a Pemba oil painting entitled "Unholy Three" with dimensions 44x34 cm, was purchased by the Applicant for Forty rand (R40.00) in 1969, and was given a specific catalogue reference number. Moreover, the Applicant relies on the following facts as evidencing its ownership of the painting:

- (a) the label on the reverse side of the painting (the content of which is set out above), which clearly indicates the provenance of the painting to be the Applicant's art gallery, and which includes the catalogue reference number G47 given to the painting in the Applicant's records;
- (b) the existence of a bibliographic card, created by the Applicant's employees on acquisition, in respect of the painting for purposes of cataloguing the painting and its details;
- (c) the existence of a black plaque on the reverse side of the painting, giving the name of the painting and the artist, which is entirely consistent with other plaques on certain older paintings in the Applicant's collection.

[6] The removal of the painting from the Applicant's possession escaped detection by the applicant's employees. The Applicant was alerted to this fact by the call from Mr. Hunter. Prior to the institution of these proceedings, the Respondent presented the following version to the Applicant: The Respondent accepted that the Applicant had, at some stage, acquired and owned the painting. The painting had been sold by the Applicant to one Mr. Tombani Foslara ('Mr. Foslara') (at that stage the Respondents did not attach a date to the alleged purchase by Mr. Foslara). Mr. Forslara sold the painting to one Ms Una Mostert ('Ms

Mostert') in 2003, who had in turn sold the property to the Respondent that same year. The Applicant rejected the assertion that Mr. Foslara legitimately purchased the painting from the Applicant. The Applicant asserts in this regard that it is not in its policy to sell any of its artwork. In any event, had the Applicant (notwithstanding its policy) resolved to sell a piece of art, this decision, like any other to sell an item of the Applicant's property, would have necessitated the passing of a resolution on behalf of the Applicant. No such resolution exists, either in relation to the sale of the painting in particular, or to the sale of any artwork at all. Any 'sale' of the property to Mr. Foslara was, at best for the Respondent and Mr. Foslara, an unauthorized sale (that is, one involving the theft/misappropriation of the painting on the part of the 'seller').

THE RESPONDENT'S CASE

- [7] The Respondent's case on the papers is that the Respondent purchased the property from Ms Mostert in Port Elizabeth during or about October 2003. Ms Mostert had purchased the property from Mr. Foslara in the latter's home in a village outside Fort Hare during October 2003. Mr. Foslara was employed by the Applicant between 1970 and 1972 and had purchased the painting for Fifty rand (R50.00) at (but not from) the Applicant's art gallery. The Applicant was not at any stage the owner of the painting. The presence of the painting at the Applicant's art gallery in 1970 (when Mr. Foslara obtained possession thereof) is explained by the fact that the Applicant used to exhibit and sell works on behalf of various artists, including Pemba. The Respondent is therefore "constrained" to deny that the painting to which reference is made in the applicant's records

is a different painting to that now in the Respondent's possession (although no real basis is provided for this assertion).

[8] Even if Mr. Foslara did not acquire ownership of the painting when obtaining possession of it in 1970, he retained possession thereof more than thirty (30) years thereafter "openly as the owner thereof" and thereby became owner by virtue of acquisitive prescription. In support of its case the Respondent has adduced affidavits by:

- (i) Ms EMM Williams ('Williams'), a director of the Respondent, and the deponent to the chief Answering Affidavit;
- (ii) Mr. Foslara;
- (iii) Ms Mostert;
- (iv) Grant Moster, Ms Mostert's son (who accompanied Ms Mostert on her trip to the Ciskei when she purchased the painting from Mr. Foslara);
- (v) EJ De Jager ('De Jager');
- (vi) DH Meiring ('Meiring');
- (vii) E Duminy.

A brief summary of the salient allegations in each of the affidavits of De Jager, Meiring and Duminy is apposite.

[9] In his affidavit Mr. De Jager proclaims to have been the curator of the Applicant's art collection from 1970 to 1998. He has never seen the painting, which, he concludes, was not part of the Applicant's art collection during his tenure. Frequent audits and stock takes were conducted in respect of the Applicant's works of art (inter alia) during

Mr. De Jager's tenure. Such checks would have resulted in the detection and reporting of any stolen or missing artwork.

- [10] Mr. Meiring was employed by the Applicant in the chemistry department from 1962 to 1975 and is the son of the late Professor AJD Meiring, the founder of the Applicant's AJD Meiring Art Gallery. Mr. Meiring attended most if not all art exhibitions held at the Applicant's gallery and constantly viewed the Applicant's art collection. Given the high level of security maintained at the Applicant, and the system of checks in place, Mr. Meiring is of the view that *"there is no doubt that a painting could not have been stolen or lost or unlawfully removed from the premises of the Fort Hare University."*
- [11] Mrs. Duminy is the wife of the late Professor PA Duminy, an employee of the Applicant from 1969 to 1978. Ms Duminy and her late husband were involved in handling artworks on behalf of Pemba. The Duminys personally handled Pemba's private sales at the University, that is, the exhibition and sale of Pemba art at the University on behalf of Pemba. Mrs. Duminy constantly encountered duplicate paintings by Pemba of the same subject matter with subtle differences. Mrs. Duminy is of the view that *"a painting could not have been stolen or lost or unlawfully removed from the premises of the Fort Hare University."* Despite her intimate involvement in the sale of Pemba's art at the University (that is, on behalf of Pemba), Mrs. Duminy has never seen the painting and asserts that it was never (*"never ever"*) displayed at Applicant's art gallery. She says that it is

inconceivable that Applicant would have purchased the painting since it was unsigned.

THE ISSUES

[12] On the basis of the above, the issues are whether or not:

- (a) The Applicant owned the painting before or at the time that Mr. Foslara obtained possession of it;
- (b) If so, whether Mr. Foslara acquired title to the painting when obtaining possession thereof (put differently, whether Mr. Foslara obtained possession pursuant to a valid sale concluded with the Applicant);
- (c) If not, whether Mr. Foslara nonetheless possessed the painting for an uninterrupted period of 30 years “*openly and as the owner*”, thereby acquiring ownership by acquisitive prescription.

Each of these issues is addressed below.

THE REFERRAL TO ORAL EVIDENCE: PRESCRIPTION

[13] The parties agreed that the third issue outlined above, viz. whether Mr. Foslara acquired the painting by prescription, could not be resolved on the papers. Accordingly, the following issue was referred for the hearing of oral evidence:

“... whether or not Them bani Foslara possessed the Pemba painting in question openly and as if he were the owner thereof for an uninterrupted period of 30 years or for a time period which, together

with any periods for which it was so possessed by his successors-in-title, constitutes an uninterrupted period of 30 years, as contemplated by the provisions of section 1 of the Prescription Act, No 68 of 1969.”

- [14] Evidence on the question of prescription was led by the Respondent on 23 and 24 April 2007 during which the Respondent called two witnesses, viz.:

Mrs. Kaoleka Foslara, whose testimony was to the effect that she married (the now late) Mr. Foslara (according to customary rites) in 1970. Thereafter she moved into Mr. Foslara’s house (located in a village near Alice in the Eastern Cape). She noticed the painting in the house for the first time in 1971. The painting remained in the house (in the dining room) until it was sold by Mr. Foslara in 2005/2006. Mr. Samuel Foslara, whose testimony was to the effect that he was born on 6 June 1974. He is Mr. Foslara’s nephew. His family home is situated but one house away from that of the Foslaras, and he visited the Foslaras frequently while growing up. He recalls seeing the painting in the Foslaras’ home when he was growing up.

ANALYSIS

- [15] The relevant portion of section 1 of the Prescription Act 68 of 1969 (‘the Act’) provides as follows:

“...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 30 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 30 years.” (emphasis supplied)

The onus of proving prescription is on the party asserting that he has acquired ownership of the thing concerned by prescription. Accordingly, *in casu* the onus is on the Respondent to satisfy the court on a balance of probabilities that the requirements of section 1 of the Act have been satisfied. If indeed prescription was running against the Applicant (a question addressed below), it was obviously interrupted by the service of the notice of motion and founding papers in this application on the Respondent on 2 September 2005, in terms of section 4 of the Act. The Respondent therefore had to prove that for an uninterrupted period of (or in excess of) 30 years prior to 2 September 2005, Mr. Foslara possessed the painting openly and as if the owner thereof. (Mr. Foslara’s tenure as possessor may be added to that of his successors, Ms Moster and thereafter the Respondent itself, to achieve the required period of 30 years.)

- [16] There are two reasons why the court should decide the question of prescription against the Respondent, namely:
- (a) Firstly, Mr. Foslara’s possession of the painting did not meet the requirement of “*openness*” posited by section 1 of the Act.
 - (b) Secondly, the Respondent failed to discharge the onus of proving that it, together with its predecessors (and in particular Mr. Foslara) possessed the painting for the required period of 30 years.

THE REQUIREMENT OF OPENNESS

[17] The requirement of openness which is placed squarely in issue on the papers as evident on paragraph 5.4.3 of the Replying Affidavit existed before the commencement of the Act. It was a component of the requirements posited by the predecessor to the Act, viz. the Prescription Act of 1943 (falling within the '*nec clam*' requirement) and, before that, of those posited under the common law. The facts of the instant case raise this question: What degree of openness is required? See Carey Miller *Land Title in South Africa* p 163 sv "*Openly*"; Joubert (ed) *LAWSA Vol 21* par 132.

In *Smith and Others v Martin's Executor Dative* 1899 16 (SC) 148 (at 151) De Villiers CJ defined it as "*possession...so patent that the owner, with the exercise of reasonable care, would have observed it.*" That test has since been adopted by the Appellate Division and is thus authoritative. See *Bisschop v Stafford* 1974 (3) SA 1 (A) at 8A.

[18] The test does not require actual knowledge on the part of the owner that his thing is in the possession of the would-be acquirer. That is, the test is not subjective. Rather, it is objective: what is required is that the possession is sufficiently open so that it could have come to the owner's attention, with the exercise of reasonable care, that his thing was in the possession of the acquirer. In *Welgemoed v Coetzer and Others* 1946 (TPD) 701, it was put thus (at 720):

"...the exercise is open even without actual knowledge on the part of the true owner, provided it was open for all to see who wanted to see, and would have been known to the true owner but for his carelessness in looking after his property." (emphasis supplied)

- [19] The test as first enunciated in *Smith's* case *supra* and thereafter adopted by the Appellate Division in *Bisschop v Stafford supra*, has been summarized by Carey Miller (Loc. cit) as follows:

"...the requirement is subject to an objective test the practical effect of which is to require the claimant to establish that the nature of his possession was such that a reasonable man would have been aware of it." (emphasis supplied)

The need for openness vis-à-vis the owner himself has been stressed:

"As far as openness is concerned, the possession must be so open and patent that not only the general public, but also the owner, would have been able to see and take notice of the possession and the various acts of user associated therewith." Joubert (ed) *LAWSA Vol 21* para 132.

- [20] The test should be applied with due regard to the rationale behind the requirement of openness (which is in turn informed by the rationale behind the doctrine of prescription itself), which Carey Miller (Loc.cit) describes as twofold: Firstly, openness is required because prescription operates to convert an outward appearance to a legal reality. Accordingly an "*element of publicity*" is required. Secondly, it would be unfair for prescription to run against an owner who does not have an opportunity to interrupt the running of prescription by vindicating the thing (since he does not know, and could not reasonably know, that the thing is in the possession of the acquirer). In this regard, De Wet says the following:

"Bowendien kan die verkryging deur die een 'n verlies vir die ander meebring, en hierdie verlies is slegs geregverdig indien die persoon

die geleentheid gehad het om te wete te kom dat sy goed deur 'n ander besit word en dat hy gevaar loop om sy goed deur verjaring kwyt te raak."

- [21] Turning to the facts at hand, during Mr. Foslara's tenure (for however long that may have been), the painting was kept inside his private dwelling in his village. Mrs Foslara testified that the painting was not visible to those who did not actually step inside the dwelling. Hence it was submitted by Mr. Blumberg that possession in that manner does not satisfy the test for openness, for two reasons:
- Firstly, the Applicant could not by the exercise of reasonable care have established that the painting was in the possession of Mr. Foslara. In this case, as in the case of *Smith v Martin's Executor Dative supra*, "*the owner might have passed ... daily without knowing that [his thing] was in the occupation of anyone else*". Therefore, the applicant had no effective opportunity to vindicate the painting while it was in Mr. Foslara's possession. In those circumstances, it is submitted that prescription did not run against the applicant during Mr. Foslara's tenure as possessor.
- Secondly, the possession exercised by Mr. Foslara's lacked the requisite "*element of publicity*" in that it did not create any impression "*in the world at large*" that Mr. Foslara owned the painting. These submissions cannot be faulted at all. I fully agree with Mr. Blumberg in this regard.

- [22] For purposes of acquisitive prescription, Williams' statement that Mr. Foslara possessed the painting "*openly in his home*" is thus an

oxymoron. The conclusion that prescription did not run during Mr. Foslara's tenure as possessor accords with the general proposition advanced by Badenhorst, Pienaar et al (Silberberg & Schoeman *The Law of Property* 4 (ed) 158.) that "*The effect of the very wide meaning giving to the nec clam requirement by our courts, by requiring possession to be patent not only vis-à-vis the general public but also vis-à-vis the owner, is that a thief or a robber, and even a bona fide third party acquiring from him or her, will rarely be in a position to acquire ownership of a stolen (movable) thing by prescription.*"

AN UNINTERRUPTED PERIOD OF 30 YEARS?

- [23] It was incumbent on the Respondent to prove that the painting came into Mr. Foslara's possession prior to 2 September 1975 (i.e. more than 30 years before these proceedings were launched). The only oral evidence to this effect was that of Mrs. Foslara. (Samuel's evidence in this regard does not assist the Respondent. He testified to seeing the property for the first time after commencing primary school, which he did at age 7. Samuel thus saw the painting for the first time during or after 1981, since he was born in 1974.)
- [24] Mrs. Foslara's testimony was that she first noticed the painting in their house in 1971. Unsurprisingly, the Applicant did not lead any direct evidence to contradict this. However, the fact that Mrs. Foslara's testimony was uncontroverted does not mean that it must be accepted. If evidence is unconvincing, the court may reject it

notwithstanding that it went uncontradicted. See *Denisova N.O. v Heyns Helicopters (Pty) Ltd* [2003] 4 All SA 74 (C) at para 33
Meyer v Kirner 1974 (4) SA 90 (N) at 93 G-H
Minister of Justice v Seametso 1963 (3) SA 530 (A) at 534 G-H
Ramakulukusha v Commander, Venda National Force 1989 (2) SA 813 (V) at 838 H-I.

Mrs. Foslara was not a convincing or reliable witness as to the date on which she first noticed the painting in their house. She was unable to recall the dates of important events, revealing her memory to be unreliable. Furthermore, her testimony displayed several significant contradictions and inconsistencies. In short, Mrs. Foslara did not present a coherent and credible version as to when the painting was first possessed by Mr. Foslara. These aspects are analyzed below.

[25] Mrs. Foslara was unable to recollect any of the following:

- (a) When the painting was removed from the house. She testified that this occurred in 2005/2006. The painting was in fact sold in October 2003. If Mrs Foslara is unable to recall when the painting was removed from the house with any certainty at all, she surely cannot remember when it first appeared in the house, given that the first appearance took place 30 years before the removal thereof.
- (b) Whether her marriage before the magistrate took place in 1990 or 1992.
- (c) What age and in what year she finished school.
- (d) Her age when she got married. She conceded that she had no idea how old she was when she got married.

- (e) Her age when she and Mr. Foslara met.
- (f) Mr. Foslara's age when they first met. She said that she had forgotten this.
- (g) The age of her husband when he passed away.
- (h) Whether the painting was present in the house when she moved in.
- (i) The years when her siblings were born.
- (j) The year in which her older sister got married.
- (k) The number of years she spent at school, nor her age when leaving school.
- (l) When her husband stopped working at the University of Fort Hare and thereafter started working in Johannesburg. In this regard she was unable to provide any more particularity than to say that her husband moved to Johannesburg to work at some stage in the 1970's.
- (m) For how many years she was a shepherd after leaving school and before getting married.
- (n) The year in which she finished school.
- (o) Her age when leaving school.
- (p) At times she could not even recall when her husband passed away.
- (q) That she discussed the date when she first saw the painting when making her affidavits with the 'assistance' of Mrs. Williams in July 2006. (Samuel testified that this was discussed, and the content of the affidavits indicates that it was.)

[26] Over and above the obvious unreliability of her memory, the following features of her testimony detract from the cogency of her evidence to the effect that she first saw the painting in 1971:

(a) Mrs. Foslara explained her recollection that she first saw the painting in 1971 based on her recollection that she had married Mr. Foslara the previous year, 1970. Her certainty (in the face of her clearly unreliable memory) that she got married in 1970 was initially based on Samuel's birth shortly after their marriage. At first she said mere "*months*" passed between when she and her husband met and Samuel's birth (in 1974) (although she later, after the tea interval on the first day, changed her testimony, stating that the period which passed was three years.) Later Mrs. Foslara claimed that she remembered 1970 as the year of her marriage because it was the year her sister's child was born. The two explanations proffered are contradictory and thus neither is satisfactory.

(b) The *viva voce* evidence given by her contradicted the content of certain previous statements made by her under oath. Those sworn statements were made by her with the assistance of Samuel who testified to the fact that he made sure that Mrs. Foslara understood the content of the affidavits she was signing, and that such content was correct.

(c) The contradictions are as follows:

In an affidavit *jurat* 5 July 2005 she stated on oath that:

(i) She knew her husband since "1965" (while testifying in oral evidence that they only met in 1970). This was an aspect which

Samuel indicated was pertinently discussed and which Mrs. Foslara agreed to.

- (ii) That her customary marriage with Mr. Foslara took place in 1973.
 - (iii) That the painting that was in their house "*from 1970 onwards*".
 - (iv) In a further affidavit *jurat* 5 July 2006, Mrs. Foslara stated on oath that the painting had been in her family "*since early 1970*" (emphasis supplied).
- (d) Her version that she could not remember if the painting was in the house when she moved in, but that she *suddenly* noticed it, and that she recalls that this was in 1971 is not a credible one.
- (e) Mrs. Foslara testified that after leaving school (after standard 5), she spent "*years*" as a shepherd before getting married to Mr. Foslara. She also testified that a few years passed between when she finished standard 5 and marrying Mr. Foslara. That testimony does not fit readily with her getting married in 1970, when she was 13 years old (she was born in October 1967).
- (f) On an analysis of the recorded evidence, some uncertainty as to the date of her marriage emerges. She stated that "*I arrived there in 1971 and found him working for that company*". That is, presumably, a statement that she moved into the house in 1971. That answer, which she gave in cross-examination, was followed by visible and audible gesticulating by Samuel, who was present in the courtroom at the time (one's suspicion is raised, regrettably, by Samuel gesticulating immediately after Mrs. Foslara had

contradicted herself). She then corrected herself later by saying that "*I arrived in 1970*".

- (g) Her testimony that she fell pregnant for the first time in 1975 does not, without further explanation, sit easily with her testimony that she married in 1970.
- (h) There are other examples of Mrs. Foslara contradicting herself. In examination-in-chief she was asked how the painting got into her house. She replied that she did not question that. In cross-examination she was asked whether she discussed the painting with her husband when she saw it for the first time. She responded that her husband ignored her when she asked him where he got it. She repeated that response. Later on in cross-examination she again contradicted herself in stating that "*I did not ask him as to where he got it [the painting] from.*"
- (i) Her recollection that she first noticed the painting in 1971 is made all the less believable by her admission that she did not pay any particular attention to the painting when she saw it. She went further to state that she "*did not think about it at all*".
- (j) Her testimony that she could not remember if the painting was present in the house when she moved in was also contradicted at times. Under cross-examination she said "*When I arrived there, it was there*".
- (k) Of great significance is her testimony that the painting was sold in 2005/2006. It is, however, known that the painting was sold in October 2003 by Mr. Foslara to Ms Mostert. That Mrs. Foslara can remember the year she first saw the painting (over 35 years

ago), but cannot remember the year it was removed from the house (three or four years ago) stretches one's credulity.

(l) Curiously, the Respondent did not put before the court the documents which would have resolved the debate about when the Foslaras' customary marriage took place. (See the questioning by the court at p58:16-20 of the transcript).

(m) In the face of the failure of her memory on numerous scores, and the contradictions in her evidence, Mrs. Foslara was forced to temper her testimony towards the end, to the effect that she had first noticed the painting "*around 1971*".

[27] As regards the affidavit of Mr. Foslara (that which forms part of the Answering papers), it does not add, significantly or at all, to the scanty evidence led by the Respondent in regard to prescription, for the following reasons:

The statement in paragraph 3.6 of that affidavit that he "*bought the painting for R50.00 in 1970*" is contradicted by his written statement on 27 July 2005 where he said that "*Due to my age and the time elapsed since obtaining it I can not record the gentleman's name or the date of purchase.*" (emphasis supplied) (The latter is, inherently, a more credible version than the former. Moreover, the sudden improvement of memory is entirely unexplained.)

Not present at all in the handwritten affidavit made by Mr. Foslara on 28 October 2005 (which was not put before the court by the Respondent and in circumstances where Respondent had, falsely, led the court to believe that the one was a "*typed copy*" of the other).

[28] In the earlier statement, Mrs. Foslara said that “*I am not conversant with English Languag (sic) but this statement was explained to me by a Xhosa speaking interpreter.*” Mrs. Foslara confirmed in her testimony that her husband could not understand English. There is, however, no evidence or indication that the affidavit was translated and explained to Mr. Foslara before he signed it. This is especially significant since that typed affidavit is not a “*copy*” of the earlier affidavit. As is indicated above, there is a very material difference between the two. Was Mr. Foslara even made aware of this difference? What is more, the very purpose for the fourth set of affidavits (including in particular the affidavits of Samuel and Mrs. Foslara) filed by the Respondent was to respond to the attacks on the affidavit of Mrs. Foslara made by the Applicant in reply. No evidence was led by the Respondent, however, as to how the affidavit came to be signed by Mr. Foslara (i.e. was it read to him? did he understand it?). Samuel, in his testimony, disavowed any knowledge of how Mr. Foslara’s typed affidavit came to be signed, even though, startlingly, this is a matter which he (Samuel) attested to in his own affidavit.

[29] The entire thrust of the version presented, i.e. that Mr. Foslara, a construction worker, purchased the painting from the University for Fifty rand (R50) in 1970 (about R2015 in today’s terms), is, quite simply, not credible. The attempt to add credibility to this version by the statement in paragraph 3.9 that “*I have over the years bought quite a few paintings that I hang in my house*” failed. That statement was not corroborated by Mrs. Foslara, who denied this.

[30] The ‘progression’ (in memory as well as competency in the English language) evidenced by the three statements made by Mr. Foslara, when viewed chronologically, is remarkable beyond credibility. The important allegation by Mr. Foslara in his first statement that he bought the painting “*at the time of a University closure*” (a statement which, if properly particularized and investigated, is potentially dispositive of the dispute regarding the period of possession) is seemingly simply forgotten or jettisoned (by the person responsible for the drafting) in his later statements. One cannot escape the sense that it is the latter given DH Meiring’s evidence, on behalf of the Respondent, that “*During the riots in the mid 70’s to 80’s the university was closed down totally*”.

[31] In light of the foregoing, it is befitting that the testimony of Mrs. Foslara, together with the affidavit of Mr. Foslara, is insufficient to discharge the onus on Respondent to prove that the painting was in the possession of Mr. Foslara from before September 1975. For the reasons given above, the court finds that Tembani Foslara did not possess the painting openly and as if he were the owner thereof for an uninterrupted period of 30 years, or for a time period which together with any periods for which the painting was so possessed by his successors in title, constitutes an uninterrupted period of 30 years, as contemplated by section 1 of the Act. The defence of prescription therefore fails. That leaves the two remaining questions framed above. In that regard, those two disputes are not “*real, genuine or bona fide*” disputes of fact, as would prevent a determination on the papers – see

the test developed in *Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634 I as applied in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA).

Rather, what is advanced by the Respondent in this regard amounts to mere conjecture which is gainsaid by objective evidence, and in relation to which the appropriate attitude is that those allegations and contentions “*are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers.*” These two issues are addressed below.

OWNERSHIP BY APPLICANT WHEN FOSSLARA OBTAINED POSSESSION OF THE PAINTING

[32] It is common cause that the painting was in possession of the Applicant when Mr. Foslara obtained, or shortly prior to Mr. Foslara obtaining possession thereof (since it is asserted by the Respondent that Mr. Foslara purchased the painting at the University). Significantly, the Respondent also admits (or at least does not deny) that the Applicant in 1969 purchased a painting meeting the description of that in its records from Pemba. A presumption of ownership follows from possession. See *Van der Merwe Sakereg* 2de uitgawe 94. It is thus presumed that, immediately prior to Mr. Foslara obtaining possession of the painting, the Applicant was the owner thereof.

[33] In an attempt to rebut that presumption, the Respondent seeks to explain the Applicant’s possession of the painting by suggesting that

the painting was in the Applicant's gallery at the time for purposes of exhibition and sale **on behalf of** Pemba. There is, however, no direct evidence that this was the case. Mrs. Duminy, who personally (together with her husband) handled the sales **on behalf of** Pemba, in fact states that she does not recall selling that painting on behalf of Pemba. Moreover, this explanation does not explain, and is defeated by the content of the Applicant's records (which reflect *inter alia* the purchase by the University of the painting for R40 in 1969 – an entry admitted to be genuine), together with the bibliography card, painting label and plaque referred to above.

- [34] Significantly, the Applicant's allegations that the affixing of the label and plaque, the creation of the bibliographic card and the recording in the accession books would not have taken place if the painting did not belong to the University (i.e. that this would not have occurred if the University was simply allowing Pemba to sell the painting "through" it) are not disputed – despite the adduction of a fourth set of affidavits by the Respondent (which were filed to respond to "*certain aspects raised by the Applicant in the replying affidavits*", but do not even attempt to respond to Applicant's direct and explicit challenge to the Respondent to explain the records, the plaque, label and catalogue number on the painting itself, and the bibliographic card). Importantly, Mrs. Duminy does not allege that paintings which were sold through the University on behalf of the artist concerned (i.e. in the "*sales and exhibitions [which] were held in the Art Gallery of the FS Malan Archeological Museum*") were labeled

by the University. (One would certainly have expected her to say so if this were the case.)

[35] The Respondent seeks to explain the Applicant's records by advancing (albeit rather faintly) a 'duplicate theory', that is, that the painting reflected in Applicant's records is not the same as that in possession of the Respondent. This explanation too is beyond improbable, as it is irreconcilable with the objective facts, for example:

- (a) the plaque, label and catalogue number on the reverse side of the painting (dealt with above); and
- (b) the uncanny correlation between the details of the painting captured in the Applicant's records and those in Mr. Hunter's e-mail. (And even more significantly, that the measurements reflected in the Applicant's records, accord precisely with the dimensions of the painting in court.)

[36] Moreover, the Respondent cannot seriously suggest that the Applicant had, in around 1970, possession of two duplicate Pemba paintings with the same title, when the Respondent's relevant witnesses claim not to recognize the painting at all (i.e. their testimony is to the effect that they have not seen any painting of this description, let alone two). What puts it beyond doubt that the Respondent's assertions and denials in this regard amount to nothing more than strategic litigation gameplay is the following concession made on behalf of the Respondent at the outset of the matter (and after having made investigations): *"It has obviously never been our*

client's contention that the AGJ Meiring Art Gallery of your client was not at some stage the owner of the artwork."

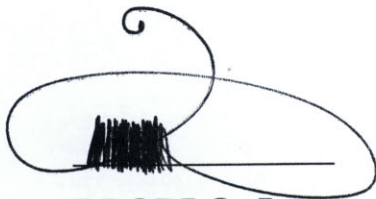
A VALID SALE TO MR. FOSLARA?

[37] Again, it cannot seriously be contended by the Respondent that an authorized representative of the Applicant sold the painting to Mr. Foslara. The statement that the Applicant does not sell, and has a policy not to sell, its own art is not contested, seriously or at all. The Respondent has adduced affidavits by several witnesses capable of testifying to whether or not the Applicant ever sold its own artworks. None has asserted that the Applicant has or ever did. The highwater mark of the Respondent's evidence in this regard is that works not belonging to the Applicant were sold "*through*" it, on behalf of the artist concerned; artists sold "*their*" works (not those of the University) "*through*" the University. Furthermore, the expungement of the details of the painting from the Applicant's records would surely follow an authorized sale of the painting. This has not happened. In any event, such a sale would have required the passing of a resolution by the University council. There is no such resolution. The fact that the Applicant is, unlike the Respondent, a collector of, not a "dealer" in, art (it "*collects artwork and does not sell artwork*") also militates strongly against this argument.

[38] It is on the strength of the above reasons or basis that on the 19th of May 2010 I made the order in this matter. For the sake of completeness I repeat that order hereunder.

ORDER:

- (i) The Applicant is hereby declared to be the owner of the oil painting by GMM Pemba, titled "Unholy Three" and measuring 44cmx34cm, which is the subject of the dispute in the above matter ("the painting").
- (ii) The painting is to be returned forthwith to the possession of the Applicant by the Respondent, alternatively by whosoever has obtained possession thereof, by, from or through the Respondent.
- (iii) Mr. Cornelius Thomas is declared to be a necessary witness for purposes of these proceedings.
- (iv) The costs of this application shall be borne by the Respondent.

A stylized handwritten signature in black ink, featuring a large, sweeping loop that starts from the left, goes up and over, and then comes back down to the right, ending in a small flourish. The signature is written over a horizontal line.**DLODLO, J**