



IN THE HIGH COURT OF SOUTH AFRICA /ES
(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 20744/2008

DATE: 5/9/2010

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED. ✓

3-08-2010
DATE

Bam
SIGNATURE

IN THE MATTER BETWEEN

DE FRIEDLAND EIENDOMME (PTY) LTD

APPLICANT

AND

STEPHANUS JOHANNES MARTHINUS PRETORIUS 1ST RESPONDENT

JANETTE ANNA PRETORIUS

2ND RESPONDENT

JUDGMENT

BAM, AJ

- [1] The applicant, a private company, is since 1991 the owner of immovable property known as the remaining extent of Portion 1046, Capital Park, Registration Division JR, Gauteng, 3,0653 hectares (hereinafter referred to as property "A").

- [2] The respondents, husband and wife, are since 2005 the owners of the erf immediately adjacent to property "A" on the eastern side, known as Portion 12 of the remainder of Portion 1046, 1062m² (hereinafter referred to as property "B").
- [3] To the northern side of the properties is Friedlandburg Street, from which street a person was able to get access to, initially property "A", and currently only to property "B" and other erven east of "B". The entrance to "A" (now obstructed) on the western side of "B", forms a panhandle, almost the size of "B" leading to the remainder of "A". This entrance to "A" is obstructed by paving, grass and plants covering an area of 232m², which area is also now fenced in. The said area will hereinafter be referred to as portion "C".
- [4] The said obstruction on "A" is the *fons et origo* of the problem between the parties. Applicant applies for the removal of the construction obstructing the entrance to its property. Respondents refuse to remove the construction from portion "C" on the basis that they had acquired the property portion "C" in 2005 in terms of the provisions of section 1(c) of the Prescription Act of 1969, Act 68 of 1969. The respondents allege that they and their predecessors possessed and owned portion "C" for more than thirty years, *nec vi, nec clam, nec precario*. This is denied by the applicant. It is common cause that the respondents accordingly bear the *onus* to prove what has been alleged.

[5] It is alleged by the applicant that the factual situation about the obstruction became known to the applicant in 2007, after which legal steps were initiated to remedy the problem. It was to no avail.

[6] Applicant does not say in its papers whether there was any obstruction on "C" on the date of the purchase in 1991. Respondents' averment that "C" had been used since 1972 by one of their predecessors was accordingly not gainsaid by the applicant.

[7] It is, however, of cardinal importance to determine to what purpose "C" was used and what the respondents' predecessor's intention was in that regard. The respondents state as follows in their opposing affidavit:

- "5. Mnr Schoeman het gedurende of ongeveer 1972 die permanente struktuur, wat hoofsaaklik bestaan uit 'n oprit konstruksie wat geplavei is (this is property "C"), opgerig ten einde toegang tot sy motorhuis wat aan die agterkant (met ander woorde weg van die straat) van sy erf (property "B") geleë is. Die oprit konstruksie het dit vir mnr Schoeman moontlik gemaak om gemaklik by sy motorhuis uit te kom.
6. Hy het die traliewerk rondom die struktuur opgerig in die vroeë jare 1980, hoofsaaklik vir sekuriteitsdoeleindes.
7. Mnr Schoeman het gevolglik die gedeelte van die eiendom van die applikant, waaroor hierdie aansoek handel, (property "C") van ten

minste 1972 gebruik asof dit sy eie eiendom is, tot uitsluiting van die regte van enige ander persoon, insluitende die eienaar van die grondstuk wat nou aan die applikant behoort.

8. Sedert die traliewerk opgerig is, was dit net soveel meer opsigtelik duidelik dat mnr Schoeman die eiendom gebruik asof hy die eienaar is van die geheel van die ingespande grond."

[8] In order to substantiate the claim that "C" now belongs to them as the true owners, respondents were obliged to prove that their predecessors, and themselves, had the *possessio civilis*, the intention to possess "A" and not merely the intention (*dominus habendi*) to use the property "C", for some or other reason, which would have established a lesser right than the right of possession with the intention to hold or keep the property for oneself. See in this regard *Wicks & Others v Place*, NO 1967 1 SA 561 (ECD) at 567B-G per EKSTEEN, J:

"The possession required to found a claim of acquisitive prescription, however, is not mere natural possession but the full juristic possession – *civilis possessio* (*Welgemoed v Coetzer*, 1946 TPD 701). This *civilis possessio* has been equated to the requirements of adverse user. (Cf. *Albert Falls Power Co (Pty) Ltd, supra* and *Campbell v Pietermaritzburg City Council*, 1966 (2) SA 674 (N) at p. 680). In *Welgemoed's* case, MURRAY, J., refers to *civilis possessio* as possession 'accompanied by the intention to hold as owner' and as

'the holding or detaining of the corporeal thing with the intention of keeping it for oneself' (p. 712). In that case the claim was also for a certain piece of land the ownership of which the plaintiff claimed to have acquired by prescription. It is clear however that it is not only a corporeal thing which can be acquired by prescription but also incorporeal rights, such as servitudes. A usufruct of property may also be acquired by prescription (*Grotius*, 2.39.11.; *Voet* 7.1.7.) and this, to my mind, can only be said to have occurred where the claimant has exercised the rights of a usufructuary over property continuously *nec vi, nec clam, nec precario* and adversely to the rights of the person entitled to the enjoyment of the property – be he the owner or the holder of some other right less than ownership over the property – for the full period of prescription.

The *animus domini* that is required for the *possessio civilis* need not therefore necessarily be the intention to hold a corporeal thing as owner, but it can also be an intention to hold an incorporeal right as holder of that right. If, therefore, a claimant were to hold property with the intention of holding same merely as a usufructuary, and he were to do so continuously for 30 years *nec vi, nec clam, nec precario* and without manifesting recognition of any other person's rights to enjoy the fruits of that property, he would acquire a usufruct over that property by prescription, but he will not have acquired ownership unless he intended to hold as owner."

[9] Ownership has been defined as follows:

"Ownership is potentially the most extensive private right which a person can have with regard to a corporeal thing. Of all the real rights ownership potentially confers the most complete or comprehensive control over a thing. This becomes apparent when one contrasts ownership with limited real rights such a mortgage, pledge, servitude and lease which confer only certain clearly defined powers on the holder of the real right. It is impossible to draw up a complete catalogue of all the powers conferred by ownership. In principle, ownership entitles the owner to deal with his thing as he pleases within the limits allowed by law."

See *LAWSA* Vol 27 1st edition par 104.

Van der Merwe *Sakereg* p.460 para (vi) states that servitudes are not a *numerus clausus*.

[10] I am in respectful agreement with the learned EKSTEEN, J (as he then was) in *Wicks, supra*.

Accordingly the respondents' version as contained in their opposing affidavit has to be scrutinised in order to determine what respondents' and their predecessors' intention with the possession of "C" was.

[11] When the respondents' reasons for the use and possession of property "C" are considered, several other reasons comes to mind for the initial use of property "C" by the then owner of property "B":

- it could have been used as a temporary dumping site for garden refuse, etc; this is a common sight in the city of Pretoria;
- it could have been possessed for "cosmetic" reasons to improve the view of property "B" from Friedlandburg Street;
- it could have been more convenient for the owner of premises "B" to have access to his garage;
- on one of the photographs is depicted that portion "C" is demarked for parking. It is not explained on the papers what the reason is for the parking and for whom parking is provided for.

[12] I agree with Mr Van Twisk, appearing for the applicant, that the words used by the respondents to substantiate their allegation of the acquisition of portion "C" through prescription, are vague and do not refer to the specific intention of the respondents and their predecessors to have had *possessio civilis*, the intention to possess property "C" to keep it.

[13] The respondents were nonspecific pertaining to their endeavour to substantiate their allegation. In this regard, to my mind, there is no reference to the intention of the respondents and their predecessors to have had the intention to possess portion "C" with the intention to keep it. Mr Schoeman, the erstwhile possessor

of portion "C", could have had in mind some other reason to use portion "C". See in this regard *Wicks, supra.* and *Welgemoed v Coetzer & Others* 1946 TPD 701.

[14] I have already alluded to the contents of the respondents' opposing affidavit. In this regard I want to record that I could find no evidence indicating what Mr Schoeman's intention was during 1972, and what exactly the "encroachment" consisted of, how it developed and to what purpose.

[15] I cannot on the facts before me find what exactly Mr Schoeman's intention was and what exactly he did in manifesting it. It would amount to speculation and conjecture. The mere fact that the encroachment on portion "C" developed into a partly paved area, a parking place and some horticulture improvements, does not constitute sufficient evidence that the respondents have, on the probabilities, proved their case.

[16] It was conceded by Mr Krüger that the owner of the property with the *possessio civilis* has an automatic right of way (via) to gain access to or leave his property.

[17] The applicant's and/or its predecessors' negligence, in not looking after the property properly, to avoid abuse thereof, in view of my finding above, seems to be irrelevant. See *Pienaar v Rabie* 1983 3 SA 126 (AA) at 136.

[18] On the facts before me it appears that since 1972 the "encroachment" escalated through the years. This situation covers the thirty years space of time provided for in the Act. There is however no indication whether the intention of the first predecessor of the respondents did not change or was not amended after lapse of time. Respondents' case lacks proof of what the respondents' predecessor's intention with property "C", at all relevant times, was.

[19] The application of the applicant succeeds. The applicant is, and was, at all relevant times the owner of property "A", which right includes the applicant's right to gain access to or leave the property as it wishes. Applicant never lost possession of portion "C".

I therefore make the following order:

1. The respondents are ordered to remove all permanent and/or semi permanent structures erected on or encroaching on the property of the applicant known as the remaining extent of Portion 1466, Capital Park, Registration Division JR, Gauteng ("the property") within thirty days from date of this order.
2.
 - 2.1 That the applicant be authorised, in the event of non-compliance by the respondents with 1 above, to engage the services of a civil contractor to remove any permanent and/or semi permanent structures erected on or encroaching on the property.
 - 2.2 That the respondents are ordered to pay the costs occasioned thereby.

3. That the applicant is granted free and unrestricted access to the property from date of this order.
4. That the respondents pay the costs of this application.



A J BAM

ACTING JUDGE OF THE NORTH GAUTENG HIGH COURT

20744-2008

HEARD ON:
FOR THE APPLICANT: ADV M VAN TWISK
INSTRUCTED BY:
FOR THE RESPONDENTS: ADV T P KRÜGER
INSTRUCTED BY: