

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

Case No: 11747/2017

In the matter between:

**MARK EVAN INVESTMENTS CC
(Registration No 1993/031884/23)**

PLAINTIFF

and

LEON EDUARD GROENVELD

FIRST DEFENDANT

KWA-DUKUZA LOCAL MUNICIPALITY

SECOND DEFENDANT

ORDER

The court grants the following order: (as per amended draft order prayed)

1. It is declared that Mark Evan Investments CC, reg. no. 1993/031884/23, is the lawful owner of the immovable property known as Portion 5 of Lot 187 Shaka's Rock (inclusive of the panhandle), situated in the Umhlali Beach Town Board area, in the North Coast Regional Water Services Area, administrative district of KwaZulu-Natal, in extent 1 423m².
2. The first defendant is directed to, within three months of this order, demolish and remove all structures that are encroaching on the plaintiff's property Portion 5 of

Lot 187 Shaka's Rock (including the panhandle) as described in SG Diagrams 33-77/1969, read with SG Diagram 33-78/1969.

3. The first defendant is ordered to pay the costs of the action, such costs to include costs of counsel.

JUDGMENT

ZP Nkosi J

Introduction

[1] The plaintiff is seeking an order declaring that it is the lawful owner of Portion 5 of Lot 187 Shaka's Rock, situated in Umhlali Beach Town Board area ("the property"); and that the first defendant did not become the owner of the property, particularly the panhandle pursuant to acquisitive prescription. The further relief sought is in the form of an order compelling the first defendant to forthwith:

(a) demolish and remove two Wendy houses, the washing line and the sitting bench erected by the first defendant on the panhandle;

(b) remove the building rubble/material and garbage and any other encroachments or items belonging to the first defendant currently on the property, particularly the panhandle and to forthwith vacate same; and

(c) that the first defendant pays costs of the action on a punitive scale.

[2] The first defendant opposes the declaratory relief, and claims in his counter-claim that the property belongs to him pursuant acquisitive prescription. The second defendant has not filed papers to defend the action.

The pleaded case

[3] The plaintiff is the registered owner of immovable property known as Portion 5 of Lot 187 Shaka's Rock, situated in the Umhlali Beach Town Board Area, in the

North Coast Regional Water Services Area, administrative district of KwaZulu-Natal, in extent 1 423m² including a panhandle. The plaintiff holds the title to the property by virtue of Deed of Transfer 2[...], as properly depicted in annexures "A", "B" and "C" to the plaintiff's particulars of claim dated 4 October 2017.

[4] The property is a panhandle consisting of a main portion and a secondary portion. The secondary portion is a panhandle by virtue of which one is able to ingress and egress the main portion of the property from the municipal road known as Ocean Drive.

[5] The panhandle is at the centre of the dispute between the plaintiff and the first defendant. The first defendant is the owner of property known as Portion 4 of Lot 187 Shaka's Rock ("Portion 4"). Portion 4 is situated between the main portion of the property and the Ocean Drive and was acquired by the first defendant on 8 October 1987.

[6] In response to the plaintiff's particulars of claim the first defendant in his plea dated 14 November 2017, alleged that:

(a) the plaintiff has never at any time prior to 1987, exercised any incident of ownership over the panhandle;

(b) the first defendant, and before him the previous owner of Portion 4, Robin Heenan ("Heenan") possessed the panhandle openly as if they were the owner thereof, for an uninterrupted period of more than 30 years;

(c) the first defendant has become the owner of the panhandle by acquisitive prescription in terms of Chapter 1 of the Prescription Act¹ ("the Prescription Act");

¹ Prescription Act 68 of 1969.

(d) access to the right of way was controlled or managed by Heenan or the first defendant continuously since prior to the registration of annexure "A", alternatively September 1987 until the right of way was closed in or about 1993;

(e) the panhandle appeared to form part of the first defendant's property prior to the right of way being closed and has been fenced off and indistinguishable from the first defendant's property since the closure of the right of way;

(f) Heenan or the first defendant has been in effective possession and physical control of the panhandle continuously prior to the registration of annexure "A", alternatively September 1987;

(g) the plaintiff has not exercised physical or visible control over the panhandle, nor maintained, kept or dealt with the panhandle;

(h) the plaintiff has, at all material times, neglected and/or abandoned the panhandle;

(i) Heenan and the first defendant have maintained, repaired erosion damage to landscape and kept the panhandle;

(j) prior to the registration of annexure "A", alternatively September 1987, Heenan physically possessed the panhandle and, inter alia, established a washing trough, a wash line, a small woodshed for gardening tools as well as a cement table and chairs and parking for his visitors on the panhandle, the only entrance to which during Heenan's time, was from the adjacent Lot 6;

(k) the first defendant took over and maintained such possession when he acquired ownership of Portion 4 from Heenan;

(l) the shed, wash trough and wash line had to be discarded because of damage caused by the October 1987 flood event, and the first defendant repaired damage

caused by the flood, installed a retaining wall, maintained, used and continued to possessed the panhandle;

(m) at all material times since the registration of annexure "A", alternatively September 1987, it appeared to the world at large that the panhandle has been a part of the first defendant's property;

(n) the first defendant negotiated with the second defendant, qua owner of the panhandle, with regards to the ultimate closure of the right of way;

(o) the use of the panhandle by the second defendant as a right of way was terminated in 1993;

(p) the panhandle has been incorporated with a portion of the adjacent Lot 6, which was previously used as a right of way in favour of the second defendant, fenced and used exclusively as part of the first defendant's property since 1993; and

(q) the first defendant has erected a washing line and a sitting bench and built two

Wendy houses north-east thereof, upon the old right of way over Lot 6.

[7] The first defendant also filed a claim in reconvention, wherein he alleged that in view of the above-mentioned averments he is entitled to an order declaring that:

(a) he is the owner of the panhandle portion of the property depicted in diagram SG 3378/1969, being that portion to the north-east of figure AGF and the intersection of a line extended from figures EF to the boundary of the property between figures AC; and

(b) he is further entitled to procure registration thereof in his name and in order to do so cause or procure the subdivision or excision of the said panhandle portion from the remainder of the property depicted in the said SG diagram and to consolidate the said panhandle with the property owned by him.

[8] In its replication to the counter-claim, the plaintiff denied the entire basis thereof; and the constitutionality of s 1 of the Prescription Act is impugned as an arbitrary deprivation of property as contemplated in s 25 of the Bill of Rights. The basis of the plaintiffs defence also formed part of its plea to the counter-claim and sought the dismissal of the first defendant's counter-claim.

[9] In the first defendant's replication to the plaintiffs plea to the counter-claim, the first defendant alleges that, through acquisitive prescription, he has acquired ownership of the whole of the property, alternatively that portion of the property over which he can establish continuous adverse possession *nee clam, nee vi, nee preeario* for an uninterrupted period of 30 years. Notwithstanding this averment, it is noted that the first defendant has not amended his counter-claim to seek relief consistent with this allegation of acquisitive prescription against the whole of the property. Such claim against the whole property seems to have been abandoned.

Trial

[10] The first defendant accepted the duty to begin to adduce evidence for the defence because the main issue is whether ownership of the panhandle portion of Portion/Lot 5 has been acquired by him through acquisitive prescription. In his endeavour to prove the counter-claim the first defendant himself testified, followed by Thembinkosi Louis Myeza ("Myeza"), who used to occupy the first defendant's property (Portion 4) together with his aunt Mary Jane Myeza, (the first defendant's domestic worker), and last but not least, Rigby Heenan ("Heenan", the brother of the erstwhile owner of Portion 4). Because of the narrow issue to be resolved, their factual evidence will not be traversed in any detail save where there might be a dispute of fact between the parties. The plaintiff led no evidence because most facts became common cause. I will revert to the common cause facts later.

[11] The following facts emerged from the first defendant's evidence:

(a) he purchased Portion 4 from Robin Lyle Calvert Heenan on 8 December 1987 but personally moved to stay in the property in 1997;

(b) initially the entrance to Portion Lot 4 was next door through Lot 6 to the north eastern side of Lot 4 next-door and was later with developments in Lot 6, moved to where it currently is, south off or along Ocean Drive. It was supposed to be on the right of way on the northern end of Lot 4 (exhibit "C", page 31);

(c) he knew the open property near the domestic worker's quarters was a right of way. There were pathways running next or alongside the outbuilding for the domestic worker. In the inspection in loco it was established that there was not only a right of way but also a panhandle for Portion/Lot 5 along the pathways going down towards the beach (annexure "C", page 29 and exhibits D1-D3);

(d) he maintained the grassy open pathways through a maid who stayed on the property together with her husband;

(e) at his instance the right of way was closed, after 1993, by the second defendant because of criminal elements and a lack of safety (exhibit "C", page 35);

(f) it appears, from the inspection in loco that the palisade fence of Lot 6 had been shifted into the path of the right of way/panhandle by some one meter;

(g) he believed that access to Lot 5 would be through Lot 3 (exhibit "C", pages 37-60);

(h) the Wendy houses are not on the panhandle but on the right of way (exhibit "E");

(i) he had never received any complaints or claims against the panhandle from the plaintiff who had been around there on plenty occasions except for a request to put the properties together in order to put up a complex which request was declined by the first defendant;

(j) Mark Evan's father, Leonidas Kazantzias was aware and able to see that the panhandle had been closed off from Ocean Drive as he would come to Portion 4 to have meetings with people interested in the property. He did walk around the property but showed no interest although at one stage he had suggested they purchase the right of way from the second defendant;

(k) the plaintiff did nothing to maintain the panhandle;

(l) Lot 5 was purchased on 21 May 1988 (exhibit "C", page 21); and

(m) the panhandle and right of way were viewed only as a big right of way and not as partly panhandle and partly right of way.

[12] Myeza confirmed the following in his testimony:

(a) that he resided on the first defendant's property from when he was about ten years old, around 1977 to help his aunt Mary Jane Myeza;

(b) that Portion 4 was unfenced and had a footpath running along the panhandle which general holidaymakers and fishermen used to traverse for purposes of going to the beach (exhibit "01"); and

(c) that he cleared vegetation around the area for safety purposes to ensure that no snakes would be close to the dwelling houses (as depicted in exhibit "C29").

[13] The evidence of Heenan was that he used to visit his late younger brother who used to own Portion 4 previously. He confirmed that there were no fences but his late brother used to look after the whole property including the panhandle "as if he is the owner" thereof. He, however conceded that he did not know the boundaries of his brother's property.

Common cause facts

[14] The following facts seem to be common cause:

- (a) the first defendant abandoned his claim for acquisitive prescription against the main portion of the property; he was only claiming acquisitive prescription over the panhandle portion of the property;
- (b) the plaintiff is the registered owner of the property which consist of two portions, a panhandle and the main portion;
- (c) the first defendant is the owner of Portion 4;
- (d) the first defendant acquired his property on 8 October 1987 from Heenan. Heenan took possession of the property on or about 1977 and ownership thereof was transferred to him on 19 October 1982;
- (e) the first defendant did not physically move to his property after he acquired it- he only did so in 1997;
- (f) the perimeter wooden fence, along Ocean Drive, was not erected by the first defendant - it was erected by the second defendant, in and around 1993 at the instance of the first defendant;
- (g) at the time of the acquisition of the property by the first defendant, the perimeter as well as the far northern corner linking the property to Ocean Drive was not fenced. The corner was a demarcated right of way to the beach for pedestrians/ beach-goers, doubling up as a panhandle access to Lot 5 - the plaintiff's property. The plaintiff's right of way or panhandle measured 12-feet while the servitude measured 15-feet;
- (h) there were, at the time, pathways traversing the property, behind and around the maid's quarters; and access to Lot 4 for vehicles was through Lot 6 before developments on that Lot ensued;

(i) Leonidas Kazantzias (the erstwhile director of the plaintiff) purchased Lot 5 with the panhandle in 1988; and he would visit the first defendant to propose and discuss his future plans for the property;

(j) holidaymakers and the general public traversed past and through the first defendant's property to get to the beach before the perimeter wooden fence was erected and access was terminated by the second defendant at the instance of the first defendant;

(k) it cannot be denied that the plaintiff claimed access to the property via the panhandle in 1998 through the application made by the plaintiffs Town Planners, Struwig Mendes and Associates (exhibit "C", pages 37-93). The Scoping report, read with the Diagrams that were attached thereto indicated that there is a panhandle that attaches to the property. In 2014 the first defendant's attorneys indicated that the property situated immediately in front of 53 Ocean Drive can also be accessed via Ocean Drive since the panhandle access is completely fenced off across the road frontage (exhibit "C", pages 106-119);

(l) the property of the first defendant as well as the right of way which included the panhandle was not fenced off up until mid-1990's and people traversed the property for access to the beach; and

(m) the first defendant did not exercise physical control over the claimed property for ten years while staying in Johannesburg. Only grass surrounding the houses was cut by Myeza to prevent snakes invading the premises.

Issue and onus

[15] The main issue is whether the first defendant has acquired ownership of the panhandle portion of the property by acquisitive prescription. If he has, the plaintiffs claim should be dismissed and the first defendant's counter-claim granted.

[16] The onus of proving acquisitive prescription lies on the first defendant. But the plaintiff has an evidential burden, if necessary, of proving its contention that the first defendant acknowledged the plaintiff's ownership. The latter, however, seems to have been jettisoned in the closing arguments.

The applicable legal regime and evaluation

[17] The rationale for prescription, in general, is that after a specified period of time the fault, carelessness or negligence of an owner or creditor in taking care of his/her property or debt should be visited with certain penalties, namely the loss of ownership of the property or extinction or rendering the debt unenforceable after a specified period of time. The justification for acquisitive prescription is that an owner who abandoned or negligently fails to protect his interests for the requisite period should forfeit his/her property to the possessor thereof.² In *Markets Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another*³ the court said that 'it is the idle and slovenly owner, and not one who is alert but incapable of acting, who may lose his property by prescription'.

Prescription Act

[18] Section 1 of the Prescription Act states 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*'. (My emphasis.)

² *Ex parte Puppli* 1975 (3) SA 461 (D); *Smith and Others v Martin's Executor Dative* (1899) 16 SC 148 at 151; *Welgemoed v Coetzer and Others* 1946 TPD 701 at 711; *Van Wyk and Another v Louw and Another* 1958 (2) SA 164 (C) at 170; and *Campbell v Pietermaritzburg City Council* 1966 (2) SA 674 (N) at 682.

³ *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another* 1972 (2) SA 464 (W) at 477H-478A.

In light of the above, for the first defendant to succeed in his defence and counter-claim, the first defendant has to prove that he had:

- (a) possession;
- (b) accessio possessionis;
- (c) possession and use of the subject property;
- (d) *nee vi, nee clam*;
- (e) *nee precario*; and
- (f) adverse use.

I turn to deal with the elements.

(a) *Possession and animus domini*

[19] Possession requires the defendant/claimant to have exercised an element of physical control of the subject property together with a mental attitude upon which the possession was exercised. Thus, it requires the subject property to not only have been physically controlled but controlled with a natural attitude of one who owns the property, or the intention to acquire the property.⁴

[20] The possession required has also been described as civil possession, being possession with an objective and subjective element, namely physical possession coupled with animus domini i.e. intention to acquire.⁵ Whether one is a bona fide or mala fide possessor is irrelevant.

⁴ *Edgington v Fitzmaurice* (1885) 29 Ch D 459 (CA); and *Campbell v Pietermaritzburg City Council* above fn 2.

⁵ *Pienaar v Rabie* 1983 (3) SA 126 (A) at 134A-D.

[21] It is also irrelevant as to whether one has a bona fide but mistaken belief that he/she owns the property. The state of mind may be mala fides as in for example where the possessor knows that the property does not belong to him/her and may give up possession if the true owner asserted his right. However, prescriptive acquisition of the property will only be interrupted where the possessor actually acknowledges, on the true owner's assertion thereof, that the latter has a right to the property.

[22] It is common cause that the first defendant did not physically move to his property after he acquired it in 1987 - he only did so ten years later in 1997. So the element of physical control together with mental attitude upon which possession was exercised (external manifestations) would only have commenced thereafter.

(b) *Accessio possessionis*

[23] This common law principle has found expression in the above-mentioned provisions of s 1 of the Prescription Act, which requires that prescription must be for an uninterrupted period of 30 years. Therefore, a person who requires acquisitive prescription to be applicable may rely on the appropriate possession by his immediate predecessors-in-title in order to prove possession for the relevant time period.⁶ However, absolute continuity of occupation is not required for as long as there is no substantial interruption; each case turns on its own merits.

[24] The first defendant's claim does not rely on the possession of his immediate predecessor (Heenan) to prove possession for the relevant period. The ownership of Lot 5 was, in any event, not acquired by the plaintiff until 1988. He relies on the period from September 1987 (after acquisition of the property) to October 2017 (when the summons was served on him). Between 1987 and 1997 there was no demonstrable use of the panhandle as if he were the owner besides the cutting of grass around the household by his employees to keep snakes and possibly other rodents away from the house. Otherwise, the area was a free for all to walk down to the beach below.

⁶ *Buckland v Manga* (2008] 2 All SA 177 (E).

(c) Possession and use of the subject property

[25] The overt acts of the possessor demonstrate his/her assertion of acquisition of ownership. Such overt acts require 'visible occupation, or some acts or acts of appropriation so patent, as to constitute reasonable notice to the owner and others, of the setting up of an adverse claim to the land'.⁷ Acquisitive prescription addresses the true owner's failure to react to such an open act of appropriation.

[26] The first defendant's visible acts of the occupation of the panhandle and right of way which would have been so blatant as to constitute reasonable notice to the owner and others, could only have been manifest after the fencing and/or the building of a retaining wall in/or after 1993, when the second defendant sealed the entrance to it, at the instance of the first defendant. The fencing of the panhandle was done by the second defendant merely to address safety and security concerns raised by the first defendant.

[27] Before then, neither the plaintiff nor the first defendant had used the panhandle or right of way as a driveway or to do other acts of setting up an adverse claim to it. Access was available through the servitude on Lot 6. The panhandle and the right of way was randomly used by the public accessing the beach until it was blocked.

(d) Nee vi, nee clam

[28] The above simply requires the property to be held peacefully and openly. That is, possession must be held in a manner that is open and patent to the general public and also in a manner that the owner would have been able to see and take notice of the possession and the various acts of the user associated therewith.⁸

[29] As stated above, that could only have been manifest post the closure of the entrance into the panhandle/right of way in/or after 1993. Before then, nothing much would have been manifest or so blatant so as to constitute reasonable notice to the plaintiff and others of adverse use.

⁷ *Gifford NO v Owen and Others* 1916 NLR 197 at 209; and *Morgenster 1711 (Pty) Ltd v De Kock NO and others* [2012] 2 All SA 640 (WCC) para 16.

⁸ *Welgemoed v Coetzer* above fn 2 at 720.

(e) *Nee precario and adverse use*

[30] This element requires a property not be held by virtue of a revocable permission, akin to a lease. There must be an absence of a grant on request. Where one is able to prove a tacit agreement, then one may be able to resist acquisitive prescription.

[31] This requirement also finds expression in ss 1 and 6 of the Prescription Act, which requires the potential acquirer to act as though he/she was entitled to exercise possession and use of the right.⁹

Conclusion

[32] From the foregoing it is evident that the first defendant's claim does not satisfy the requirements for acquisition of ownership by prescription. His counter-claim therefore should be dismissed.

[33] The plaintiff should be granted the declaratory orders as well as the eviction relief sought in the amended draft order prayed. It is my considered view that the right of way and the panhandle both form one open physically undelineated property which the first defendant wished to utilise for his own needs. The fact that one or the other item of his sits on the erstwhile right of way or on the panhandle is neither here nor there since that open property does not belong to him by acquisition. The plaintiff owns part of that property and should not be limited or restricted to have access to it by the first respondent's items lying along its way.

Order

[34] , I grant the order in accordance with amended draft order prayed, as annexed to the plaintiff's written heads of argument.

ZP Nkosi J

⁹ See *Pezula Private Estate (Pty) Ltd v Metelerkamp* [2014] All SA 664 (SCA) paras 9-10; and *Morgenster* above fn 7 paras 14 and 16

CASE INFORMATION

DATE OF HEARING : 01 NOVEMBER 2022

DATE JUDGMENT HANDED DOWN : 15 JUNE 2023

COUNSEL FOR THE PLAINTIFF : MR M. MAJOZI

INSTRUCTED BY

(IVAN PAUW & PARTNERS ATTORNEYS

Cnr Rodericks Rd & Sussex Avenue Lynnwood, Pretoria

Ref: P Kruger/pvdh/KM0251

c/o DE WET LEITCH HANDS INC

Section 3, Salmon Bay House Sandra Road

Ballito

Ref: JDW/sm/IVA4/0002

Service email: Semantha@dlh.co.za

COUNSEL FOR THE FIRST DEFENDANT : GLEN GODDARD SC

INSTRUCTED BY

(NORMAN BRAUTESETH & ASSOCIATS

t/a NBA LAW

4 Caefron Avenue Westville

3630

Ref: NLB/NG 0029

Email: glenglen@goddardlaw.co.za