



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

REPORTABLE

Case no.: 20399/2023

In the matter between:

GRAEME ANDREW GERARD TAKIS

Applicant

And

DAVID ARTHUR TAYLOR

First Respondent

STEPHEN ALFRED TAYLOR

Second Respondent

LISA O' HARE

Third Respondent

LAC INVESTMENTS (PTY) LTD

t/a HARCOURTS SOUTHERN CAPE

Fourth Respondent

Coram: Pangarker J

Judgment delivered electronically: 25 March 2025

JUDGMENT

PANGARKER J

Introduction

1. The cottage on the hill, also known as the house on the hill, the river cottage and the shepherd's cottage (*the cottage*), is a 62 square metre cottage straddling erven 222 and 223 in the picturesque town of Malgas on the banks of the Breede River in the Overberg Region. It takes centre stage in this dispute between neighbours, wherein the owners of Erf 222 Malgas claim ownership of the cottage to the extent of 62 square metres and the surroundings on the basis of acquisitive prescription.

The parties, the urgent interdict and the counter-application

2. The parties in this matter are David Arthur Taylor (*Mr Taylor*), the first respondent in the urgent application for an interdict. The second and third respondents are his nephew and niece Stephen Alfred Taylor and Lisa O' Hare, and the fourth respondent is LAC Investments (Pty) Ltd t/a Harcourts Southern Cape which plays no role in the matter and against which no relief is sought. The applicant in the interdict application is Graeme Andrew Gerard Takis (*Mr Takis*), the owner of erf 223 Malgas.

3. In November 2023, Mr Takis launched an urgent application for an interdict against the respondents seeking, in Part A, orders that they be interdicted from advertising for sale the cottage, pending the outcome of an action to be instituted by him in respect of the ownership of the cottage, as well as orders interdicting registration of the cottage into the name of any third party, and *inter alia*, interdicting the sale of erf

222 pending the outcome of the action. In Part B, Mr Takis sought orders that the first, second and third respondents (*the respondents*) be ordered to remove their possessions from erf 223 including boats, boat trailers, motor vehicles and other equipment. The interdict application is referred to as *the main application*.

4. On 30 November 2023, Thulare J granted an order by agreement which encapsulated an undertaking that the respondents shall not market, sell or advertise the cottage nor register or cause to be registered, the cottage into the name of any third party. Furthermore, Part B of the urgent application was postponed to be heard simultaneously with the counter-application to be delivered by the first to third respondents seeking a declaration that they be declared the owners of the cottage by virtue of acquisitive prescription. Thulare J also granted an order that in terms of Rule 6(5)(g), the respondents' counter-application was referred to oral evidence on the acquisitive prescription question, and further orders that the parties were allowed to discover.

5. In December 2023, the first to third respondents delivered a counter-application seeking the following orders:

1. *Declaring the Respondent to have become, by way of acquisitive prescription in terms of the provisions of Act 68 of 1969, the owner of full rights and title in a cottage situated on both erven 222 Malgas and 223 Malgas, registration division Swellendam Road, in the province of the Western Cape ("the Cottage") together with the land whereupon it is situated to the extent of 62 square metres, and surroundings, during 2016.*
2. *Directing the Applicant to co-operate in, and take all steps necessary, to effect an amendment to the SG diagrams and all subsequent records regarding Ef 222 and 223 Malgas in order to include 62 square metres, whereon the Cottage is situated and surroundings, as being part of erf 222 Malgas.*

3. *The applicant shall pay the costs of the counter application.*

4. *Further and alternative relief*

6. The parties indeed discovered and called witnesses in support of their respective cases. The papers comprise the founding and confirmatory affidavits in the main application and the founding affidavit in the counter-application, and the parties have attached annexures in support of their versions and the relief sought. A portion of the documentary evidence comprised notes regarding the history of the cottage and surrounding erven. While not all the compilers of these histories testified, there was no objection to the content of the documents nor what the documents purported to be: an account of the history of the cottage.

The Louw and Taylor families

7. The table below sets out a brief history of the two families¹, and must be read with the detailed chronology which follows:

<i>Personae</i>	<i>Description</i>
Alexander Louw (Alex)	Father of Guy Louw, Johan Louw and Louis Louw
	Became owner of erven 222, 223, 224 and 225 Malgas – 1972
Eric Louw	Became owner of erf 222 – 1979
	Sold erf 222 to Frank Taylor – mid 1980s
Johan Louw	Inherited erf 223 from father Alex – 2016
	Sold erf 223 to Mr Takis – 2023
Guy Louw	Purchased erf 225 from Alex – 1981
	Appointed Executor of Alex's estate – 2015

¹ Alex Louw is often referred to by his name and surname herein mainly because his children bear the Louw surname and also feature in the history of the cottage and erf 223

Frank Taylor	Brother of David Taylor (first respondent)
	Purchased erf 222 from Eric Louw
	Father of Stephen Taylor and Lisa O' Hare (second and third respondents)
David Taylor	Inherited erf 222 along with Lisa and Stephen in terms of Frank Taylor's Last Will
	Occupant of the cottage since 1987

Chronological account of the history of the cottage and its occupation

8. The evidence in this matter, gleaned from the affidavits, the documents and oral testimony indicate that there are several persons who feature in its history which is intertwined with the occupation of erven 222 and 223 respectively. The chronology of events include common and/or undisputed facts as I set out below and must be read with the table above:

8.1 In the 1960s, erven 222 to 225 Malgas were owned by Mr HJ Dames. He built a prefabricated cottage which had no services and was occupied by an employee, Piet, who worked on the properties.

8.2 In 1971, Alex Louw met Mr Dames, who wished to sell his properties and move to Somerset West due to health reasons. At the time, Alex was the owner of a vacant erf in the vicinity of erf 212 Malgas, further down the Breede River and he was interested in purchasing Mr Dames' properties. In February 1972, Alex Louw became the registered owner of erven 222 to 225 Malgas. The employee, Piet, remained in the cottage on the hill until his death a few years later, whereafter another employee, Hendrik, occupied the cottage for a few years. Thereafter it stood vacant.

8.3 From 1972 to the late 1970s, Alex Louw's employees occupied the cottage, which saw no repairs nor maintenance work being done to it.

8.4 At the time when Alex took transfer of the four properties and vacant land on erven 222 to 225, there were very few houses in the area. **The cottage on the hill straddles erven 222 and 223, both of which properties belonged to Alex Louw at the time.**²

8.5 In the mid-1970s, Alex Louw sold **erf 222** to his brother, Eric Louw, who built a house on the property. Erf 222 was registered in Eric's name in 1979³.

8.6 Guy Louw purchased erf 225 from his father, Alex, in 1981 and remains the owner thereof at the time of the hearing of this matter.

8.7 Frank Taylor purchased **erf 222** from Eric Louw in the mid-1980s and transfer was registered in his name in 1986⁴.

8.8 During this period, the cottage on the hill remained unoccupied. The first respondent, Mr Taylor, spent most of his time from 1987, on his brother's property, erf 222.

8.9 In 1987, Louis Louw persuaded Frank Taylor to put up 50% of the costs to install a bathroom inside the cottage. Alex was not willing to contribute any funds (his 50% contribution) and the work to the cottage was never completed⁵.

² My emphasis

³ Exh A, p29

⁴ Exh A, p291

⁵ Exh B2, p149

8.10 Also in 1987, Mr Taylor approached Alex Louw with a request to fix up the cottage and use it. Alex agreed that he could continue with fixing up and using the cottage provided that he (Alex) was not expected to contribute financially to any improvements. Alex had no objection to Mr Taylor fixing up the portion of the cottage which fell on his property, Erf 223.

8.11 Mr Taylor commenced with improvements, excavations and installations to the cottage from 1987.

8.12 In 1994, Mr Taylor commenced living permanently on Frank's property, erf 222.⁶

8.13 On 17 September 2007, Frank Taylor passed away. In terms of his Last Will and Testament executed on 20 July 2007, he bequeathed one third share and interest each in erf 222, to the first, second and third respondents respectively.⁷ On 27 March 2008, Executors were appointed to the estate of the late Frank Taylor.

8.14 On 9 March 2009, Alex Louw executed his Last Will and Testament. In terms of the Will, **erf 223 was bequeathed to Johan** and erf 224 to Guy⁸.

8.15 Pursuant to the administration of Frank Taylor's estate, erf 222 was transferred into the names of the first, second and third respondents' respectively, who became the registered owners of the property and the house thereon in equal shares on 10 January 2012⁹.

⁶ My emphasis

⁷ Exh B3, p159-165

⁸ Louis Louw did not inherit any of the erven in Malgas belonging to Alex at the time of Alex's death

⁹ Exh B3, p151-153; Exh A, p28-29

8.16 **Alex Louw passed away in Constantia on 25 May 2015.**¹⁰

8.17 **On 26 August 2015, the Master of the High Court issued Letters of Executorship appointing Guy Louw as the Executor of Alex's deceased estate**¹¹.

8.18 In 2016, Johan Louw became the registered owner of **Erf 223**, having inherited the property in terms of his father's Will.¹²

8.19 In December 2022, the applicant, Mr Takis, concluded two *"offers to purchase vacant land"* in respect of erf 223¹³ from Johan Louw and the contracts involved an estate agent.

8.20 On 19 December 2022, Mr Houterman, land surveyor at Bekker and Houterman Land Surveyors, issued an invoice in relation to pegging and the determination of dimensions of erf 223¹⁴.

8.21 **Mr Takis subsequently purchased erf 223 on 31 January 2023 and the property was registered in his name on 23 March 2023**¹⁵. Erf 223 is 7331 square metres in extent.

8.22 In May 2023, the land surveyor conducted an encroachment assessment in respect of the cottage, which is depicted on annexure GT6 to the founding affidavit in the interdict application. **In summary, the cottage is 62 square metres, with 45 square metres thereof situated on Mr Takis' property (erf 223) and 17 square**

¹⁰ Exhibit B2, p110

¹¹ Exh B2, p116

¹² Exh A, p32

¹³ Exh B2, p117-148

¹⁴ Exh B1, p77

¹⁵ Exh A, p31

metres of the cottage situated on erf 222, owned by the first to third respondents.

Further evidence in the counter-application

David Taylor

9. David Taylor testified that prior to 1994 he lived in Somerset West. He cited the cottage, which he referred to as the river house, as his permanent address and had transferred his Telkom line from the Somerset West residence to the cottage. Even though he was away at weekends, involved in his boat reconstruction business, he had no other residence but the cottage on the hill where he spent eighty percent of his time.

10. Mr Taylor confirmed the history of the cottage and the sequence of events as explained by Guy Louw¹⁶. He also confirmed that he and his late brother Frank had approached Alex Louw with a request to fix up the cottage, which was dilapidated at the time, and that Alex was happy for the brothers to go ahead provided that he did not spend money on the renovation and improvement of the cottage. This conversation occurred over a cup of tea in 1987. He was referred to various photographs in Exhibit A and explained that the cottage was considered to be a project and that it needed to be fixed up. He was aware from the outset that the boundary between erven 222 and of 223 ran through the cottage and that therefore, the cottage was not entirely theirs (the Taylors')¹⁷.

11. Mr Taylor regards himself as being the owner of the cottage because he had the go-ahead and the blessings of Alex Louw and commenced his efforts to improve the cottage in 1987. He was responsible for various improvements and renovations

¹⁶ Exh A, p38-39

¹⁷The first respondent and his brother's (Frank Taylor)

thereto, including excavating around the cottage to create drainage due to water ingress in winter; casting an exterior rear wall as support because the structure had no foundation; extending the original "stoep"; painting the cottage with a white wash in order to retain the character; purchasing and installing second-hand door and window frames¹⁸; replacing the roof and interior walls in the 1980s and strengthening the retaining wall to prevent the ground from collapsing¹⁹

12. Mr Taylor exercised his possession of the entire cottage openly and with the knowledge of Alex Louw, who would often drop by to share a secret smoke. Mr Taylor and his wife brought their possessions into the cottage which initially did not have a lock but once they locked it, they had the only access to the cottage and could come and go as freely as they wished. He estimated that the lock was put on around 1990.

13. As for the arrangement between him, Frank and Alex Louw, Mr Taylor described it as a *gentlemen's' agreement*. There was no lease nor other agreement concluded. According to Mr Taylor, he and Frank were allowed to use the cottage as if it was theirs, and this is what he has done for more than 30 years. He testified that the cottage belongs to him and his family, and was used by them as a coffee shop, accommodation for his son and he has imprinted his name in the kitchen floor.

14. As for erf 223, which was advertised for sale, Mr Taylor relies on the Pam Golding advert which advertised the erf as a vacant erf of 7331 square metres and he understands this to mean that the cottage was not advertised as part of the erf. Prior to January 2023, a mutual friend introduced Mr Takis to erf 223. Mr Taylor paid no heed but testified that the documentary evidence shows that Mr Takis purchased erf 223 in January 2023 and became the registered owner thereof in March 2023. Aside

¹⁸ Mr Taylor also attended to the following further improvements and installations in/at the cottage: he installed a septic tank, renovated the bathroom, plumbing; laid a concrete floor in the kitchen; installed roof beams, a bamboo ceiling and a kitchen sink; supplied electricity from the main distribution board at erf 222 to the cottage and lead a water supply to the cottage from the property, and removed an encroaching tree in the bathroom.

¹⁹ The cottage had no foundation

from possibly greeting his new neighbour when he came to view erf 223, Mr Taylor paid no further attention to him and what was happening in respect of erf 223.

15. In cross-examination, Mr Taylor testified that his nephew and niece (the second and third respondents) did not occupy the cottage property in 1986 but lived with their father and their mother in Somerset West. They have not been in occupation of the cottage for many years and live their own lives. He was questioned as to whether all three respondents claim the cottage by virtue of acquisitive prescription and his response, in summary, was that there was an agreement between his nephew and niece that the cottage is his home and that he represents all three respondents. He treats erf 222 as an entity which lays claim to ownership of the cottage.

16. The third respondent sent an e-mail on 14 June 2023 to Mr Takis' legal representative, Mr Ismail, which reads as follows:

"Good afternoon

Thank you for your email.

Please note that this matter is solely between Dave Taylor and your clients who have purchased the neighbouring property to him, namely ERF 223 Lemoentuin, Malgas. Dave Taylor is a co-owner and the full-time resident for many years of the property, ERF 222, Lemoentuin, Malgas.

Kindly address all further communication in this regard to Mr Dave Taylor. Many

Many thanks

Lisa O' Hare"

17. Notwithstanding the third respondent's statement in her email, Mr Taylor was adamant that she also used the cottage years ago²⁰ and that he represents all three

²⁰ Mr Taylor's testimony was that his niece Lisa used the cottage for fun and entertainment

respondents and erf 222. He requested an order declaring the cottage to be incorporated into erf 222 and that they be declared the owners thereof. In further cross-examination, Mr Taylor conceded that his niece and nephew do not live in the cottage and that Lisa had never lived there. To the extent that Mr Taylor referred to his wife Debbie Taylor (to whom he is married in community of property) also defending her right to ownership of the cottage, he eventually admitted that she has not lived in the cottage for 30 years and is not cited in the counter-application.

18. Mr Taylor testified that the period from 1987 when he commenced utilising and repairing the cottage, which is more than 30 years, is when he lays claim to the cottage. He confirmed that he knew in 1987 that the cottage straddled two properties, but he was not entirely certain where the demarcation or boundary line was. Mr Taylor testified that the cottage has been in existence for six decades. The exact meterage, and where exactly on the two erven the cottage was situated was not known at the time he started occupying the cottage and it was not a consideration for him, his brother and Alex Louw. He had no knowledge of Alex's employees who occupied the cottage in the 1960s and 1970s.

19. It is apparent from Mr Taylor's testimony that erf 222 is smaller in dimension than erf 223 in that it measures 6595 square metres. The properties are adjacent to each other and the boundaries were not pegged, to the best of his knowledge.

20. Mr Taylor was questioned about the arrangement which he reached with Alex Louw regarding the cottage and he conceded that this was an arrangement which allowed him to renovate and occupy the cottage as long as Alex Louw was not expected to contribute to the renovations.²¹ Furthermore, he also agreed with the applicant's counsel that Johan Louw's note explaining the history also did not indicate that the cottage was transferred to him and Frank but that they were allowed to *fix up* the cottage.²²

²¹ Affidavit counter-application, par 10

²² Exh B2, p149-150

21. Similarly, he agreed that Guy Louw's statement also confirmed that Alex Louw had no objection to him using and renovating the part of the cottage situated on erf 223. At the time, the ownership of the cottage was shared, and he clarified his understanding by explaining that the part of the cottage which falls on erf 223, was given to them (the Taylors) to treat as their own and that neither Alex Louw nor the Taylors were the owners of the cottage in its entirety.

22. Mr Taylor equates Alex Louw giving him permission and the opportunity to renovate the portion of the cottage on erf 223 with Alex expressing disinterest in the cottage and/or that he did not want the cottage. Furthermore, by giving him this opportunity to renovate that portion of the cottage which fell on erf 223, it therefore meant that Alex Louw gave him the cottage. He confirms in cross examination that there was no usufruct registered in relation to the cottage over erf 223 nor was the portion of the land on erf 223 on which the cottage is situated, subdivided, and later consolidated with erf 222.

23. With reference to Alex Louw's Will, Mr Taylor agreed that the inheritance to Johan Louw, being erf 223, was not qualified nor subject to a condition which referred to an agreement between such testator and Mr Taylor in respect of the cottage. Furthermore, in relation to his brother's Will, Mr Taylor admits that it did not indicate that his brother had an interest in the cottage and that the cottage should be bequeathed to the respondents. In fact, he admits that despite a contractual arrangement between him, his brother and Alex Louw, Frank Taylor's Will excluded a reference to the cottage.

24. More than that, there was also no deed of donation concluded whereby Alex Louw donated the cottage to the Taylors. Mr Taylor further admits that he did not conclude an agreement with Johan Louw, who became the owner of erf 223 in 2016, that he could occupy the cottage but remarked that Johan simply accepted his occupation and never objected to it. Regarding Mr Takis, Mr Taylor denies discussing the cottage with him in April 2023 upon meeting him. His version is that they only

discussed Mr Takis' use of the Taylor's slipway²³. He furthermore admitted that he and his wife were at loggerheads regarding Mr Takis' claim to the cottage. Whatsapp messages of 24 April 2023 between him and Mr Takis indicate that a discussion of the cottage was due to occur at a later stage²⁴.

25. Mr Taylor was questioned about a threat he had expressed to disconnect the water and electricity supply to the cottage: he denied making the threat but said that the disconnection of electricity and water supply would only occur once they had agreed on the cottage. On the accusation that he threatened to break down the portion of the cottage which encroached on erf 222, he seemed to have blamed his wife for such remarks²⁵. It was suggested during cross examination that Mr Taylor only replaced windows when Mr Takis became the owner of 223, however, he denied this and denied Mr Takis' view that the cottage was dilapidated. He explained the repairs which he did to the cottage which were attended to as and when his finances allowed for it. He confirmed the 11 May 2024 conversation with Mr Takis occurred and explained that he would demolish the part of the cottage which encroached upon erf 222.

26. Mr Takis testified with reference to the Pam Golding estate agent, Mr McPherson, that he denies that there was a conversation about the cottage and his version was that he enquired whether the status quo about the cottage would be maintained. Mr Taylor testified that his concern was that he was left "*out of the loop*" in respect of the purchase of erf 223.

27. The first attempt to carry out improvements to the cottage was after Frank Taylor bought erf 222. The second attempt was when Mr Taylor approached Alex Louw with a view to improve the cottage and use it. The spirit of the agreement is what he relied upon, and he described that Alex Louw consented to his use of the cottage and that he could use it and treat it as his own. He could not recall the exact wording of the

²³ Exh B1, p384

²⁴ Exh B1, p51-53

²⁵ Exh C

agreement with Alex but on his understanding, he could go ahead with the renovations and no objections were raised provided that Alex did not put money into the project.

28. Mr Taylor understood the arrangement to be on a short-term basis. He was given the use of the property and not questioned, and he occupied and used it for himself and his family. His understanding was that he would occupy the property until challenged and he certainly did not envisage hanging onto the cottage for 30 years in a cloak and dagger fashion hoping that nobody would object and then say that the cottage was his.

29. Mr Taylor was questioned about what Alex Louw would have thought but his response was that he could not know. It was put to him that Alex Louw would never think that he was the owner of the property. He explained that in 2015 he would have occupied the property for 28 years²⁶. He confirms that between May and August 2015, the estate of Alex Louw was not represented as no Executor had as yet been appointed. It was put to Mr Taylor that the 30-year period of prescription as against Alex Louw would have concluded on 25 August 2018 but that erf 223 was transferred to Johan Louw prior to that date, in 2016. Mr Taylor admits he did not stop the transfer of erf 223 nor lodge a claim against Alex Louw's estate that he was the owner.

30. Regarding the interaction with Mrs Takis and the conversation transcribed as Exhibit C, Mr Taylor testified that Mr Takis said that he must remove the boats from his property, which he indicated he was busy doing. He also testified that Mrs Takis said that he should tear down the cottage.

31. Mr Taylor confirmed that the full dimensions of the properties were only known in May 2023 when the land surveyor's diagram became available. He denies asking Mr Takis about his intentions regarding the cottage. In re-examination, Mr Taylor confirmed that the owner of erf 223 does not have access to the cottage and that it is

²⁶ Occupation commencing in 1987

used exclusively by him and his family, and that the other respondents gave him free reign to the cottage²⁷. He pays rates, taxes, insurance and utilities and indicated that during the years, the owners of erf 223, accepted his possession of the entire cottage and there was no timeframe nor limit ever discussed by when he would access his rights in relation to the owners of erf 223.

32. Mr Taylor conceded that the condition of the cottage was not the best in 2023 when Mr Takis purchased erf 223. He further testified that neither Guy nor Johan Louw ever objected to his occupation over the years.

Michael Parsons

33. Michael Parsons, the owner of erf 220 since 2006, was called as a witness and has known the Taylor family for 30 years as his father owned the erf in the 1970s. He is the author of the note in Exhibit A²⁸ wherein he sets out that Mr Taylor maintained and repaired the shepherd's cottage, and that the latter possesses it. He always thought that the cottage was situated on erf 222. In cross examination Mr Parsons confirmed that there were no fences nor boundary lines between the properties therefore he thought that the cottage was situated on erf 222. Mr Parson had no direct knowledge of the cottage being situated on two erven.

34. Furthermore, he was unaware of arrangements between Alex Louw and Mr Taylor regarding the use and occupation of the cottage. As for Mr Taylor's nephew and niece, Mr Parson testified that they lived in the cottage 20 years ago. His view was that had Mr Taylor not maintained the cottage over the years, it would have washed away. This was the case for the respondents' counter-application.

²⁷ B1, p10

²⁸ Page 41

Graeme Takis

35. Mr Takis confirmed the content of his affidavit and application. He is of the view that Lisa O' Hare is not a claimant to the cottage. The first time he viewed erf 223, he was not informed of the boundary lines and hence, required the boundaries on erf 223 to be pegged. The cadastral boundary was determined by the land surveyor in December 2022²⁹. At the time of purchasing erf 223, Mr Takis was made aware of the boundary lines and the markers thereto³⁰. Mr Takis was adamant that he did not purchase vacant land but that the 7331 square metres he purchased included the 45 square metres of the entire cottage.

36. As for his interaction with Mr Taylor, Mr Takis testified that they spoke on 17 April 2023 when he informed Mr Taylor that he intends making the cottage liveable. Mr Taylor's response was that he would have the water and electricity supply cut as it originated from erf 222. On 30 April 2023, Mr Taylor informed him that he would break down the part of the property encroaching onto erf 222 to which Mr Takis responded that he should await the land surveyor's assessment. In May 2023, the exact meterage of erf 223 was determined³¹.

37. In cross examination, Mr Takis conceded that he could be mistaken about Lisa O' Hare's email when it was put to him that her email referred to the matter and not that she was not interested in the cottage. Mr Takis also accepts that Mr Taylor occupies the cottage and stores goods on the property. His request was that he wants Mr Taylor to move out so that he could own the entire cottage. The first time he went out to the property he saw boats and a boat trailer. In respect of the contention that he purchased vacant land, Mr Takis stressed that the offer to purchase was subject to identification of the boundaries being pegged. At the time of signing the offer to

²⁹ Exhibit B1, p77.

³⁰ Exhibit B2, p45

³¹ Ain application, p52; Exhibit B1, p76

purchase he did not know that the cottage encroached upon his erf. He also testified that he did not know when the Taylors took occupation of the cottage.

38. Mr Taylor had informed him that he was given permission to use the cottage, and, in this regard, the witness cannot refute Mr Taylor's version that Frank Taylor bought erf 222 in 1996, nor can he refute the chronology and history set out above. Mr Takis has no idea of the renovations to the cottage and testified that Johan Louw informed him of the agreement between his late father and Mr Taylor regarding repairs to the cottage.

39. In re-examination, he explained that after the first offer to purchase concluded with Johan Louw, he called the land surveyor out to peg the boundary lines between the two properties and referred to clause 19.3 of the second offer to purchase. The second agreement was the final agreement without the Eskom servitude which was referred to in the first agreement. He knew at the time of purchasing erf 223, that the cottage straddled both erven.

Amanda Takis

40. Mrs Takis' testimony is only relevant to the extent that she was involved in a squabble with Mrs Taylor at the property and told the latter to take down a portion of the cottage which encroached on erf 222. This occurred before the land surveyor's assessment was known. In cross examination she admitted that she had no idea when the Taylors had commenced their occupation of the cottage.

Legal principles applicable to acquisitive prescription

41. The real right of ownership may be acquired through prescription which is a mode of acquisition of ownership obtained through a person's uninterrupted

possession of the property for a specified period³². Carey Miller and Pope in ***Land Title in South Africa***³³ describe acquisitive prescription as follows:

“the process of recognition of a title based upon the de facto exercise of the right of ownership for a period and in a manner which the law regards as sufficient.”

42. The process of acquisitive prescription would have the effect that the previous owner's ownership would terminate and it (ownership) would vest in the prescriptive possessor.³⁴ Prior to the current Prescription Act 68 of 1969 (*the Act*), its predecessor was the Prescription Act 18 of 1943, which provided a statutory basis for prescription.

43. Section 2(1) of the 1943 Act allowed a person who possessed property ***nec vi, nec clam, nec precario***, to automatically become the owner thereof if he possessed the property for an uninterrupted period of 30 years. The rationale behind acquisitive prescription is that the careless or negligent owner loses his ownership of the property after a specified period of time and in so doing, forfeits his property to the acquisitive possessor³⁵.

44. Section (1) of the current 1969 Act states that:

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 30 years or for a period which, together with any

³² Wille's Principles of South African Law, 9th Edition, F Du Bois (ed), p510

³³ DL Carey Miller and A Pope, p156; see also Pienaar v Rabie 1983 (3) SA 126 (A) at 137

³⁴ Wille's Principles, p510

³⁵ See Van Wyk and Another v Louw and Another 1958 (2) SA 164 (C) 170

periods for which such thing was so possessed by his predecessors in title, constitutes an uninterrupted period of 30 years.

(my emphasis)

45. It is evident from section (1), that the requirements for a claim based on acquisitive prescription are:

45.1 civil possession of movable or immovable property;

45.2 the possession must be exercised openly;

45.3 as if he were the owner thereof;

45.4 for an uninterrupted period of 30 years, or for a period which, together with any period for which the thing was possessed by any predecessors in title, constituted an uninterrupted period of 30 years.

46. In *Ex parte Puppli*³⁶ it was held that section 2 of the 1943 Act did not allow for the situation where a person purports to acquire ownership by means of acquisitive prescription in a property which is already vested in him. Simply stated, the possessor cannot lay claim by acquisitive prescription to property of which he is already the owner. It follows that in a claim for ownership by acquisitive prescription, the onus is on the person claiming acquisitive prescription, to prove all its elements.

47. Furthermore, according to *Bisschop v Stafford*³⁷ there is no requirement that just title or *bona fides* are requirements for a claim based on acquisitive prescription. The 1943 Act contained the requirements that the possession and use of the property should be *nec vi, nec clam, nec precario*, which directly translated, means “*neither by force, nor secretly, nor with permission*”³⁸. The *nec vi* requirement refers to the

³⁶ 1975 (3) SA 461 (D) 463 E-F

³⁷ 1974 (3) SA 1 (A) at 7

³⁸ <https://www.oxfordreference.com>

possessor who must retain possession without force or peaceably. *Nec clam* refers to the requirement that the possession is open, or visible and so ensuring that the possessor demonstrates the intention to acquire ownership of the property³⁹. In ***Malan v Nabygelegen Estates***⁴⁰, the Appellate Division had an opportunity to consider the proper meaning of *nec precario* and concluded that the words mean “*not by virtue of a precarious consent*” or “*not by virtue of a revocable permission*” or “*not on sufferance*”⁴¹.

48. As correctly submitted by counsel for the applicant, there are differences between the 1943 Act and the 1969 Act. Having considered both Acts, I summarise the differences as follows:

48.1 The 1969 Act has done away with the *nec vi* requirement.

48.2 The *nec clam* requirement was retained in that the possession must be exercised “*openly*”, which one may interpret as meaning that it should not be secretly.

48.3 The *nec precario* requirement in the 1943 Act was replaced with the requirement that the possession is held “*as if he were the owner thereof*”.

48.4 The uninterrupted period of 30 years is retained, and a further calculation of accumulated periods of possession by successors in title also constitute the 30 years.

49. The question may be posed: what type of possession is required in a claim for

³⁹ Property Law in Namibia, SK Amoo, p128

⁴⁰ 1946 AD 562 at 573

⁴¹ At 573-574

acquisitive prescription? A succinct answer was provided by Corbett J in **Glaston House (Pty) Ltd v Cape Town Municipality**⁴², as follows:

"Before considering these defences, I propose to examine the basis of plaintiff's claim. At common law acquisitive prescription confers ownership of property upon a person who has possessed it continuously for a period of 30 years nec vi nec clam nec precario. The possession required is full juristic possession (possessio civilis), i.e. the holding or detaining of the property in question with the intention of keeping it for oneself. (See Welgemoed v Coetzer and Others, 1946 T.P.D. 701 at pp 712-3). Both the physical act of detention and the mental state must concur. The limited possessio naturalis of, for example a lessee is not sufficient because he lacks the intention of acquiring and keeping the property for himself (Welgemoed's case, supra). It has not been suggested that successive Prescription Acts (Act 18 of 1943 and Act 68 of 1969) have in any way altered the position; nor do I think that they have."

(my emphasis)

50. Thus, possession referred to in section 1 of the Act is *possessio civilis* or civil possession, which comprises both the physical act of control over the property and the mental element⁴³, which I address against the backdrop of the facts in this matter. Before commencing the assessment, it is important to note that in terms of the counter-application, the acquisitive prescription claim is sought in relation to the entire cottage which straddles both erven. The respondents are the owners of erf 222 and cannot by virtue of acquisitive prescription and the *dicta* in **Ex parte Puppli**, claim ownership of the 17 square metres of the cottage, which is situated on erf 222, which the respondents own.

⁴² 1973 (4) CPD 276 at 281 C-F; Morkels Transport v Melrose Foods and Another 1972 (2) WLD 464 at 467 E-H

⁴³ Kruger v Joles Eiendom (Pty) Ltd and Another 2009 (3) SA 5 at 13A-B; Amlers Precedents of Pleadings, 7th Edition, LTC Harms, p329

51. In my view, the claim and relief in the form of a declaratory order, lies only in respect of the 45 square metres of the cottage which encroaches upon Mr Takis' land, erf 223. As Mr Taylor is a co-owner of erf 222, his occupation and possession of the 17 square metres is not an issue in this matter as co-ownership of the property vests in him and the other respondents. While Mr Takis requested an order that Mr Taylor vacates the cottage so that he becomes the owner of the entire cottage, no such relief is sought in the main application and such issue is not before me.

The physical element of *possessio civilis: corpus*

52. The evidence presented, which remains unrefuted is that Mr Taylor has been in physical possession of the entire cottage since 1987 when he and his brother approached Alex Louw to request to repair and use the cottage. On his version, he spent eighty percent of the time at the cottage with the rest of the time spent in Somerset West attending to boat repair business. This version is largely supported by Guy Louw's account of the cottage's history⁴⁴, Mr Parson's letter and to an extent, the account by Johan Louw, although the latter does not present dates in his account of the history of the cottage. Ultimately, Mr Taylor's testimony and version is corroborated by these witnesses who have first-hand knowledge of some of the events, and the history related to the use, repair, and occupation of the cottage.

53. I do not view it problematic for the first respondents' case that he spent eighty percent of the time at the cottage from 1987 until at least 1994 when he moved permanently onto his brother's premises at erf 222. Certainly, from 1994, the eighty percent occupation increased to one hundred percent of the 45 square metres plus the rest of the cottage. On this score, there is no suggestion in this case, either by virtue of evidence presented or submissions, that Mr Taylor has only partially occupied the cottage.

⁴⁴ Exhibit A, p38-39

54. The evidence indicates that Mr Taylor used (and continues to do so) the cottage as a residence, as his wife's yoga studio, as a coffee shop several years ago and as a relaxation area for his children and his niece. Furthermore, he effected numerous repairs and renovations to the cottage, and in so doing, he has over the years of occupation since 1987, improved the structure and the interior of the cottage. Additionally, the evidence also indicates that he stores personal possessions as well as boats and equipment on the land on which the cottage is situated. The latter aspect also forms the subject matter and motivation for Part B of Mr Takis' application.

55. At least from 1990, locks were placed on the door of the cottage, and this continues to this day. In doing so, Mr Taylor exercised physical control over the entire cottage to which he and his family have had exclusive access over the years. For the period 1987 to 1990, we know that there were no locks on the cottage but the evidence is that he was still able to exercise and exert physical control over the entire cottage notwithstanding such absence. There is no evidence suggesting that when he was in Somerset West to attend to his boat business, that anyone other than his late brother Frank had access to the cottage. Accordingly, I find that Mr Taylor's exercise of physical control over the 45 square metre portion was not diminished due to an absence of locks on the door for the abovementioned three years⁴⁵.

56. A further aspect, which I consider also does no damage to the requirement of physical control over the property is that the evidence indicates that Alex Louw would drop by at the cottage for secret smoke breaks and tea in the early years from 1987. At the time, he was the owner of erf 223. The evidence is that this was an occasional visit, but either way, the fact that the true owner of the disputed portion of the cottage visited does not detract from nor diminish that Mr Taylor, and to an extent, his late brother, were in physical control of the entire cottage at the time.

57. This physical control continued to 2023, when Mr Takis arrived on the scene as the new neighbour and owner of erf 223. Neither Mr Takis nor his wife have access

⁴⁵ ZF See Stoffberg NO v City of Cape Town [2019] ZASCA 70 at par [14]

and there is no evidence presented by the applicant to refute the picture presented of Mr Taylor's outward manifestation of physical control over the entire cottage. It is also uncontested that Mr Taylor shares the cottage with his wife and children, although it is unclear whether the children still occupy the cottage with him.

58. Be that as it may, exclusive occupation of the property in question is not necessary to fulfil the requirement of physical possession, as was held in **Baker NO v Chadwick and Others**⁴⁶. In other words, the fact that Mr Taylor shares the disputed portion of the cottage with his wife and/or children for several years in no way detracts from his physical control thereof. Ultimately, the shared occupation is irrelevant to the outcome of the counter-application. In view of the above, I am satisfied that by virtue of his physical occupation of the part of the cottage which encroaches upon erf 223, Mr Taylor has proved the physical element (*corpus*) of possession over the disputed portion of the cottage. I will address the *animus domini* element later in the judgment.

Possession must be exercised openly

59. The requirement in section 1 of the Act is that possession must be exercised "openly". Jansen JA in **Bisschop v Stafford**⁴⁷ cites the definition of "openly" as described in **Smith and Others v Martin's Executor Dative**⁴⁸ as being:

*"so patent that the owner, with the exercise of reasonable care, would have observed it"*⁴⁹.

Carey Miller and Pope explain the rationale behind the objective test of the reasonable man who would have been aware of the possessor's possession, as follows: firstly,

⁴⁶ 1974 (1) SA 461 (D) at 456G

⁴⁷ Supra at 8A

⁴⁸ 16 S.C. 148 at p151

⁴⁹ Smith and Others, supra, p151

the exercise of rights must be out in the open/in the public and must be outwardly manifested; and secondly, an owner should not be expected to take steps to recover possession from someone who holds his property secretly when security of ownership should allow the owner to leave his property⁵⁰.

60. The requirement of possession being open fulfils the *nec clam* requirement in the 1943 Act. This requirement overlaps with the intention element of possession and the section 1 requirement that the possessor must possess the property “as if he were the owner thereof”. In considering this issue, questions arise as to whether the requirement of openness relates to possession being open *vis-à-vis* the owner or the public or both. In ***Morkel’s Transport v Melrose Foods and Another***⁵¹, Colman J held the view that for possession to be considered open, it must have been exercised in a manner so that “all who looked could see”⁵², while the authors CG Van der Merwe with A Pope in ***Wille’s Principles of South African Law***⁵³, citing some authorities, are of the view that possession need not necessarily be open in relation to the owner.

61. Having regard to the above discussion, I am of the view that the description in ***Morkel’s Transport***, regarding the openness of possession in that it should be exercised in a manner that “all who looked could see”, lends credence to my view that openness in relation to the owner, would depend on the facts of the matter and the circumstances surrounding the physical control element of possession. In my view, “all who looked could see” would, by implication, include the owner as well as the public who are able to view the possessor’s occupation and use of the property. I am therefore inclined to consider that whether possession was open *vis-à-vis* Alex Louw is a factor relevant to the overall determination of the counter-application. There is no debate that the openness of possession must be exercised *vis-à-vis* the public.

⁵⁰ *Morkel’s Transport v Melrose Foods (Pty) Ltd and Another* 1972 (2) WLD 464 at 468

⁵¹ 1972 (2) WLD 464

⁵² At 468F-G

⁵³ See 9th Edition, 2007, at 517

62. As regards openness of possession, the Act requires that the openness extends over the full suggested 30-year period claimed by the possessor⁵⁴. A further important factor, in my view, is that the requirement of openness in relation to the owner and the public, must finally be considered alongside the next requirement which is that the possessor possessed the property *“as if he were the owner”*. I certainly share the applicant's counsel's understanding that these requirements are interlinked and cannot be divorced from each other.

63. In relation to Johan Louw and Mr Takis, the evidence indicates that Mr Taylor indeed exercised physical control over the entire cottage openly. Johan Louw's note on the history indicates that he knew of the occupation and use of the property, and this is corroborated by the e-mail correspondence between Guy Louw and Mr Takis' legal representative wherein reference is made to Guy Louw being requested to provide an account of the cottage's history⁵⁵.

64. Furthermore, Mr and Mrs Takis cannot dispute that Mr Taylor, and his family lived and used the cottage and that he renovated it, commencing in 1987. Thus, insofar as the erstwhile and current owners of erf 223 are concerned, I am satisfied that the first respondent has shown that they were aware of his physical occupation of and control over the entire cottage, albeit that Mr Takis had no knowledge of the history and circumstances of Mr Taylor's occupation.

65. As regards the public, it is also undisputed that Guy Louw and Mr Parsons were clearly aware of Mr Taylor's occupation throughout the years. While no other witness was called, nor any confirmatory affidavits presented in the counter application, Mr Taylor testified about his interaction with the estate agent who was involved in the sale of erf 223 to Mr Takis. He knew the agent and would often meet him locally. Furthermore, the evidence is that the estate agent often cycled around the erven, and that Mr Taylor had assisted him at some stage when he had an accident on or near

⁵⁴ Section 1 of the 1969 Act

⁵⁵ Exhibit B, p67

the property. That being the case, the probabilities are strong that the estate agent knew of Mr Taylor's occupation of the cottage through the years. My view is also strengthened by Mr Taylor's account that he felt left in the dark about the purchase of erf 223 and had conveyed this to the estate agent when he enquired whether the *status quo* of the cottage would be retained considering that there was a new owner of erf 223.

66. Similarly, Mr Taylor recounted his employment history and activities on erf 222, explaining that he also repaired boats and would often visit clients in the area to attend to their needs. In addition, boats and equipment were/are stored presumably for intended repairs on erf 222 and part of erf 223. This leads me to believe that in a small town like Malgas, it would not be improbable that the owners of these boats and the neighbours on the various erven on the Breede River adjacent to erf 222, would know that he was occupying and using the cottage for many years

67. These facts, considered objectively, lead me to conclude that not only the boat repairing clients and neighbours must have been aware of Mr Taylor's possession but also the reasonable man, who upon passing the cottage on erven 222 and 223, would see or be able to see, Mr Taylor's occupation and control of the cottage. Accordingly, my finding is that these facts satisfy the requirement that the first respondent's possession, to the extent that it is found to be *possessio civilis*, in relation to the public, Guy and Johan Louw and Mr Takis, was patent to the extent that anyone would be and/or would have been, aware of it. Accordingly, in respect of this category of people, I am satisfied that Mr Taylor has met the threshold in showing that his control, occupation and possession of the disputed portion of the cottage was open.

68. In relation to Alex Louw, there is sufficient evidence to indicate that he must have been aware of the physical occupation and use of the cottage from 1987 until he died in May 2015. Whether the possession was open in relation to Alex Louw, is addressed when considering the "*as if he were the owner*" requirement and *animus domini*, the mental element of possession.

Animus domini and the requirement that possession must be “as if he were the owner”.

69. The mental element of possession (*animus domini*) which is necessary to complete *possessio civilis* must be understood within the context of the requirement in section 1 that the claimant in an acquisitive prescription matter is required to show and prove that he possessed the property as if he were the owner⁵⁶.

70. Colman J, in ***Morkels’ Transport***, referring to decisions of the Transvaal Provincial Division such as ***Welgemoed v Coetzer and Others***⁵⁷ and ***Molotlegi v Brummelhof and Another***⁵⁸, says the following about *animus domini*:

*“It is not enough, it was held, that there should have been physical possession; the claimant must, in addition have had, throughout the relevant period, the animus domini”*⁵⁹.

71. It is apparent from the discussion of authorities and authoritative work on Jurisprudence in ***Morkel’s Transport***⁶⁰, that the possessor must hold the property to the exclusion of all others⁶¹. In other words, he must have a will to hold it for himself which must coincide with the physical element of *corpus* and he must not recognise anyone more entitled to the property than himself.

72. To add, the decisions of ***Welgemoed***⁶² and ***Campbell v Pietermaritzburg City Council***⁶³ confirm that even if the possessor is aware that he is not the owner of the

⁵⁶ *Welgemoed v Coetzer* 1946 TPD 701 at 712-713

⁵⁷ *Supra*

⁵⁸ 1955 (1) SA 592 (T)

⁵⁹ *Supra*, at 474 C-D

⁶⁰ Colman J cites Voet, Sohm, Salmond and Savigny in his discussion about the mental element of possession

⁶¹ *Morkel’s Transport*, *supra* – see discussion at 474 – 475

⁶² *Supra*

⁶³ 1966 (2) SA 674N at 680

property but occupies it with the intention of retaining it for himself and does not display any outward consideration of the owner's rights, then he has fulfilled the *animus domini* requirement of *possessio civilis*. It must therefore follow from the above discussion and assessment of the various authorities and writers on the issue of *animus domini*, that the mental and physical elements must co-exist or manifest simultaneously, otherwise the holding of the thing or occupation of property does not amount to *possessio civilis*. The possessor or holder must intend to hold the thing to the exclusion of the owner and all others.

73. *Animus domini* and the legislative requirement of “as if he were the owner” are then two sides of the same coin, both necessary and crucial considerations for a successful reliance on acquisitive prescription. In ***Ploughmann NO v Pauw and Another***⁶⁴, a judgment of this Division, the Court followed the *dicta* in ***Bisschop v Stafford***⁶⁵ and ***Campbell***⁶⁶ that the possessor should possess the property in question “as if he were the owner”.

74. There is also no requirement in the Act, nor any authority that I have found, for a view that the possessor must show that he had the intention (during the period of his possession) *to possess to become the owner*⁶⁷. If this were the case – in other words, the possessor holds the property having an intention that he would (one day) become the owner – then he cannot also possess *as owner* or *as if he were the owner*: the two situations are mutually exclusive. In this regard, I share the views held by the academic writer FE Marx in ***Verkrygende Verjaring in die Suid-Afrikaanse Reg***⁶⁸ that the *animus domini* requirement is not fulfilled where the possessor has the intention of becoming the owner.

⁶⁴ 2006 (6) SA 334 (C) par 36

⁶⁵ *Supra*, at 9B

⁶⁶ *Supra*, at 680C-D

⁶⁷ My emphasis

⁶⁸ (1994) 237

75. How does one then determine whether a person possessed the property “as if he were the owner”? Miller J in **Campbell**⁶⁹ provides the answer to the question at page 679 of the judgment:

“It is safer, by far, to rely on the external manifestations of the possessor’s state of mind than on his own clumsy attempts at verbal reconstruction of his state of mind many years ago.”

76. Having regard to the above, I agree with the applicant’s counsel, and accept that Mr Taylor’s mental attitude over the period of occupation must be determined by having regard to his physical and outward manifestations to answer the question as to whether he possessed as if he were the owner. The applicant has submitted that in relation to Alex Louw, the owner of erf 223 at the time when Mr Taylor commenced occupation of the cottage in 1987, the respondents’ possession must be open and as if they were the owners.

77. Counsel for the respondents has submitted that the requirement of possession as owner can manifest in a situation where the possessor has used the land on the basis of a mistake as to the boundary of the land and in such a case, the fact that the land was not identified as a separate unit but was simply treated by the claimant on the assumption that it was part of his land, would be conclusive of the requirement of possession as if he were the owner. The respondents’ further submission is that Mr Taylor and his brother treated the cottage as a single entity, and by virtue of Mr Taylor’s conduct in occupying the entire cottage, therefore the disputed portion on erf 223 was incorporated into erf 222. This conduct, it is argued, constitutes use adverse to the true owner⁷⁰. It is submitted that at least a *prima facie* proof of possession is established, and that any observer would have formed the impression that the cottage was part of the respondents’ property.

⁶⁹ Supra

⁷⁰ The respondents rely upon Pienaar v Rabie 1983 (3) SA 126 (A)

78. The counter argument is that through his conduct, Mr Taylor has not established that possession of the cottage was open in relation to Alex Louw and given that consent by the owner was provided to use and therefore occupy the cottage, it cannot be said that the possession was *nec precario*. In relation to the other respondents, the applicant's counsel has also argued that there are three claimants in the counter-application and all three would have to prove that they physically possessed the property as if they were owners, aside from having to prove the mental element of *possessio civilis*. The applicant's counsel submitted that in the absence of providing such evidence, the counter-application should fail.

79. Dealing with the submission that possession is established *prima facie*, the starting point is to recognise that the facts relied on in this matter to claim acquisitive prescription are not those of a claimant who occupied the property under the mistaken belief regarding a boundary between the two erven. The facts, as testified to by Mr Taylor, are that he knew at the outset in 1987 that the boundary between erven 222 and 223 ran through the cottage and that therefore the cottage was not entirely theirs (his and his brother's).

80. This illuminating fact arose early in his examination in chief, hence he is not a person who was unaware of a boundary dividing the two erven⁷¹; on the contrary, he knew in the very early days, notwithstanding an absence of pegging the land, that part of the cottage straddled Alex Louw's erf 223. The chronology also indicates that in 1987, Frank Taylor was already the owner of erf 222, so it makes sense that they would approach the owner of the rest of the cottage (Alex Louw) to seek permission to renovate and as Mr Taylor testified, "*fix up*" the cottage.

81. In view of these facts, the reliance on an incorporation of the 45 square metres into erf 222 and use of the whole cottage constituting possession is not the end of the matter. Certainly, as I mentioned above, onlookers and the public would have

⁷¹ I appreciate that the respondents did not know exactly where the boundary was situated or the extent of the encroachments on each property

considered the outward manifestations of Mr Taylor's control of the disputed portion and the rest of the cottage as his possession of the entire cottage, but that alone does not address the other material issues in the respondents' claim for ownership by acquisitive prescription.

82. The respondents' argument ignores that Mr Taylor had on more than one occasion during his testimony, confirmed that at the time that the request was made to Alex Louw to do the renovations and fix up the cottage, he and his brother knew that the cottage straddled two erven and that the boundary line passed through it. This fact is nowhere more clearly depicted than on annexure GT18⁷² to the interdict application, which shows a line or demarcation represented as running through the cottage. While I agree that any passersby and the public would have been of the view that through his use and occupation of the entire cottage, including having boats, trailers and equipment on erf 223, therefore his possession was open and he possessed as if he were the owner, this fact does not render the respondents owners of the 45 square metres of the cottage⁷³.

83. The second request to Alex Louw to fix up the cottage and improve it, personally made by the Taylor brothers, was granted and agreed to but on condition that Alex Louw was not to be requested to contribute financially to repairs and renovations to the cottage. An important point to note is that at this stage, the brothers knew that Alex Louw was the owner of erf 223. The request in those circumstances was only in relation to the disputed portion of the cottage which lies on erf 223⁷⁴. Having regard to those facts, I find that I must agree with the applicant's view that in this regard, an agreement or arrangement was struck with Alex Louw that the brothers could commence improvements, renovations and use the part of the cottage situated on erf 223.

⁷² Main application, p80

⁷³ Therefore, owners of the entire cottage

⁷⁴ The exact meterage was unknown

84. The fact that according to Mr Taylor, Alex Louw dropped by for smoke breaks, cups of tea and a friendly chat, reinforces my view that the latter was or must have been fully aware of Mr Taylor's occupation and control over the cottage and areas surrounding it which included a part of erf 223. It is also correctly submitted that when the first request was made to Alex Louw (through Louis Louw) to grant permission for improvements to the cottage's bathroom, and such permission was refused, no improvements or renovations were undertaken.

85. On the second request, permission was granted, and as we know, the renovations and improvements commenced in 1987. By granting permission and giving the go-ahead to commence improvements and renovations, Alex Louw did so as owner of the disputed portion of the cottage, and in my view, he thus manifested his rights as owner thereof. I emphasise that this is not a case of the cottage, being unoccupied for a lengthy period, where Mr Taylor and his brother simply moved in and occupied it, absent the knowledge and permission of the owner of erf 223. On the contrary, the situation was one where, for purposes of the renovation project, the Taylor brothers required the consent and permission of Alex Louw as owner of erf 223, who granted such permission.

86. Furthermore, Mr Taylor's evidence was that the agreement between himself, his brother and Alex Louw was endorsed by his brother and that they were given free reign to use the cottage and do with it as they wished. He regarded himself as being the owner of the cottage because he had the go ahead and the blessings of Alex Louw and commenced his efforts to improve its interior and exterior. Nobody argues that these improvements were in fact done, and that he paid rates and taxes for the cottage and directed the water and electricity supply to the cottage from erf 222.

87. However, the above facts and Mr Taylor's admissions during cross examination lead me to find that the *gentlemen's agreement* concluded between Alex Louw and the Taylor brothers was some form of contract/agreement or right of use to what was in reality, Alex Louw's portion of the cottage, as it fell on his land. In those

circumstances, can it then be said that Mr Taylor had the necessary *animus domini* to possess the portion of the cottage falling on erf 223 as if he were the owner?

88. One of the difficulties in this matter is that if he had such intention to possess as if he were the owner, it is unclear from the evidence when exactly this intention manifested itself with/in Mr Taylor. I say this because when Mr Taylor was questioned about the request to Alex Louw in 1987, he confirmed in cross examination that he understood it to be an agreement on a short-term basis, in other words, that he would continue to do renovations and occupy in terms of the agreement until he was challenged or replaced.

89. He furthermore tellingly also stated that he did not envisage hanging onto the cottage for 30 years in a cloak and dagger fashion hoping that nobody would object so that he could say that the cottage was his. For all intents and purposes, Mr Taylor was granted consent and permission to improve and use the portion of the cottage situated on erf 223, which he did. In my view, his evidence that this was a short-term agreement until someone, presumably the owner of erf 223, challenges him, and that he did not intend to hang onto the cottage for 30 years, negates any idea that he harboured an intention to possess as if he were the owner.

90. I must emphasise that the portion of land on erf 223 upon which part of the cottage is situated was never subdivided from that erf and consolidated with erf 222. At all times, the cottage was and remains situated over the two erven, with the larger portion being on erf 223. Ownership in respect of the portion of the cottage and land on erf 223 was not granted to Mr Taylor and his family in Alex Louw's Last Will but the entire erf 223 was bequeathed to Johan Louw, which included the 45 square metres discussed in this judgment. Furthermore, the portion in question was also not donated to Mr Taylor and the other respondents.

91. Considering the above discussion and findings, the facts do not support a view that Alex Louw was negligent or lackadaisical in respect of his property. In respect of Alex Louw, my view is that it cannot be said that Mr Taylor's possession of the 45 square metres was as if he were the owner thereof. I say so because consent or permission was granted to renovate and use and as the years went by, with the new owner Johan Louw, the evidence indicates that the latter simply accepted that there existed an agreement between his late father and Mr Taylor that he may renovate and improve the cottage⁷⁵. Johan Louw lives in Johannesburg and only visits Malgas once a year, had no idea of the purpose for which Mr Taylor improved the cottage and seemed to have accepted that the agreement between his late father and Mr Taylor was to continue.

92. In my view, subsequent to an agreement allowing Mr Taylor to use and renovate the cottage, Alex Louw would never have known that Mr Taylor's intention at the time was to possess the 45 square metres as if he were the owner. Mr Taylor's testimony that he and his brother knew that the cottage was not entirely theirs further entrenches my view that on these facts, Mr Taylor did not have the necessary *animus domini* and did not possess as if he were the owner, to the exclusion of all others. Thus, I agree with the applicant's submission that while his possession was open vis-à-vis the public, neighbours, the estate agent, boat repairing clients and others, it was not open vis-à-vis Alex Louw. Furthermore, Mr Taylor's act of imprinting his name in the cottage's kitchen floor takes his case no further because it is evident from the authorities referred to above, possessing openly entails an outward manifestation, clear for all to see, and marking his name in the kitchen, is not an act which was evident for all to see.

93. I have the same difficulty as the applicant in determining, when if at all, Mr Taylor formed the intention to possess as if he were the owner because on his version, he understood and clearly believed that at any stage, his use of the cottage (in other words, the portion of the cottage on erf 223) could be challenged. He would only think this if he believed that he was not possessing as owner because the owner was Alex

⁷⁵ Exhibit B2, p149

Louw, and later, Johan Louw followed by Mr Takis. Mr Taylor's possession, if any, was not adverse to the owner's rights. The evidence considered holistically, gives the impression that Mr Taylor acted within the consideration of Alex Louw's rights as owner, which is the antithesis of a possessor who acts as if he were the owner.

94. To add, Mr Taylor's conduct was more in line with use in terms of a verbal agreement or a form of *precarium*, because the knowledge was always there that the owner's permission could be revoked. In that regard, therefore, my view is that *animus domini* was not present and the possession was not *nec precarium*, rather it was by virtue of a "revocable permission" as referred to in ***Malan v Nabygelen Estates***⁷⁶. At best and as recognised in the aforementioned judgment, the claimant's occupation was through a contract or legal relationship with Alex Louw, which as Rogers J explained in ***Morgenster 1711 (Pty) Ltd v De Kock NO and Others***⁷⁷ is excluded from the definition and understanding of what is meant by 'adverse possession'.

95. Can it be said that the acts of use by Mr Taylor constituted reasonable notice to the owner that he possessed as if he were the owner? I am of the view that the answer must be "No". I say this because everything Mr Taylor did in relation to the cottage - renovations, improvements, extending the stoep, moving into the cottage, bringing boats and trailers onto the land – was done with the permission, allowance and consent of the owner of erf 223. At the risk of repetition, Mr Taylor was allowed to renovate, use and occupy, but all the while he knew that such use of the disputed portion of the cottage could be revoked at any time. The evidence indicates that he had in fact expected it. Mr Taylor, not unexpectedly, became comfortable with the "project" of the cottage and was largely undisturbed. Considering all these facts, I remain unconvinced that Mr Taylor occupied with the intention as if he were the owner.

96. In consequence of these findings, Mr Taylor's possession does not constitute *possessio civilis* for purposes of acquisitive prescription, certainly not in respect of Alex

⁷⁶ Supra

⁷⁷ 2012 (3) SA 59 (WCC) par 15

Louw, because the mental element of possessing as owner, is not fulfilled. In respect of Johan Louw, it must be emphasised that the agreement between Alex Louw and Mr Taylor was known, and his view is clearly that the disputed portion of the cottage was allowed to be used and renovated by Mr Taylor, for an unknown purpose. Given the limited information regarding Johan Louw's interaction, if any, with Mr Taylor, it cannot be said that the latter established that his possession in relation to Johan Louw, was as if he were the owner.

97. Furthermore, Mr Taylor was aware of Alex Louw's death and certainly in respect of the latter, Alex Louw did not fall within the category of owners who failed to protect their interests against someone in possession of their property. I say this because he ensured in his Will that the entire erf 223 was bequeathed to his son, Johan. Further in relation to Johan Louw, Mr Taylor did not submit a claim to the cottage against the estate of Alex Louw on the basis that the latter had, in terms of an agreement, given the cottage to him. The applicant's counsel argues that the reason for Mr Taylor's failure to do so may be attributed to the fact that such action would not support a claim for acquisitive prescription as the cottage would have been one that he owned. In my view, the submission has merit.

98. In respect of later external manifestations which would give an indication as to his intention, the following must be stated: Mr Taylor's denial that he spoke to Mr Takis regarding the cottage was wholly unsatisfactory. His evidence was certainly contradictory because the WhatsApp messages between the two indicate that a conversation was had regarding the cottage, despite his protestations to the contrary. It is apparent from the evidence that he informed Mr Takis that he intended to terminate the electricity and water supply to the cottage, and he confirmed this later in a telephone conversation with Mr Takis. The evidence furthermore indicates that he was concerned with what would happen to the cottage because he raised this with the estate agent and felt that he had been left out of the picture in respect of the purchase of 223.

99. Mr Taylor felt it necessary to make enquiries with the estate agent because he wished to know whether the *status quo* in relation to the cottage would remain. That *status quo*, in my view, relates to the agreement that he had struck with Alex Louw, that he could use the portion falling on erf 223 (and hence, the entire cottage). I am of the view that there would have been no need to threaten a termination of the electricity and water supply if he possessed the cottage as if he were the owner. Furthermore, there would also have been no need to query the estate agent as to what would happen to the cottage in lieu of the new owner of erf 223 if Mr Taylor possessed as if he were the owner.

100. While these actions falls outside the suggested 30-year period, their consideration is nonetheless relevant as it cements my view that Mr Taylor knew that his occupation and use of the disputed portion of the cottage was susceptible to being revoked and/or challenged. Thus, these actions and expressions regarding the *status quo* are considered against Mr Taylor's awareness as far back as 1987 that the boundary between the two erven ran through the cottage. These actions point to a man who knew that in purchasing erf 223, Mr Takis had certain rights in respect of a portion of the cottage which is situated on erf 223.

101. Having considered the outward manifestations of Mr Taylor in relation to the public and the owners of erf 223, and as in ***Morkel's Transport***⁷⁸, the actions of Mr Taylor do not present as that of an owner but rather as that of a precarious holder who knew that his occupation of the disputed portion could be terminated or challenged at any time. In conclusion on this aspect, I find in light of the above discussion, that the first, alternatively all the respondents, have not proved *possessio civilis* and an intention as owner, and thus the counter application must fail.

102. On the issue related to the three respondents, I have already set out the evidence which Mr Taylor presented indicating that all three respondents claimed the entire cottage through acquisitive prescription. The problem for the respondents is that

⁷⁸ Supra, at 476F-G

the second and third respondents cannot and have not come out of the starting blocks when I consider the requirements of section 1 and *possessio civilis*. Physical control or *corpus* is an element of *possessio civilis* and the evidence is that neither the second nor third respondent has been in physical occupation of the disputed portion of the cottage for many years. At some stage in his testimony, Mr Taylor stated that they have not occupied for more than 20 years. In light of these facts, the second and third respondents cannot succeed in a claim based on acquisitive prescription as they would never be able to prove possession of the cottage. Mr Taylor also does not possess as agent for his nephew and niece⁷⁹. The counter application, therefore, in respect of all three respondents will be dismissed.

Possession for an uninterrupted period of 30 years

103. In view of the above findings that in relation to Alex Louw, the first respondent has not proved *possessio civilis*, the question of whether he possessed for an uninterrupted period of 30 years, is academic. However, for completeness' sake I address this requirement below.

104. Section 3(1)(a) of the Act states as follows come on

“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;
or

[S 3(1)(a) subs by s 22 of Act 132 of 1993.]

⁷⁹ See Carey Miller and Pope, Land title in South Africa, discussion at p167

- (b) *the person in favour of whom the prescription is running is outside the Republic, or is married to the person against whom the prescription is running, or is a member of the governing body of a juristic person against whom the prescription is running; and*

[S 3(1)(b) subs by s 10 of Act 139 of 1992.]

- (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 (a) 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)."

(my emphasis)

105. In terms of the counter application, prescription commenced in 1987 and ran against Alex Louw as owner of erf 223. There is no evidence presented by Mr Taylor as to the exact date when the prescriptive period commenced running in 1987, but I shall agree with his counsel and use 31 December 1987 as the suggested date. It is common cause that on 24 May 2015, Alex Louw passed away.

106. In the recent reported judgment of *Katha v Pillay*⁸⁰, the Court confirmed the view that the death of the owner is regarded as a superior force and thus an impediment which interrupts the running of prescription, which only ceases on the appointment of an Executor to the deceased owner's estate:

"[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

⁸⁰ 2024 (1) SA 159 GJ

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."

(footnote omitted)

107. Having regard to the facts of this matter, ordinarily the period of prescription which the first respondent relies upon, commencing in 1987, would have been completed on 31 December 2017, which would be 30 years later. In terms of section 3(1)(c) of the Act, the period of prescription would, but for the provisions of the subsection, be completed before, on or within three years after the day on which the relevant impediment referred to in sub-section (1)(a) would cease to exist.

108. Guy Louw was appointed as Executor of his father's estate on 26 August 2015⁸¹. Given that prescription would ordinarily have been completed on 31 December 2017, regard must be had to section 3(1)(c). The impediment referred to was the appointment of the Executor to Alex Louw's estate, on 26 August 2015, therefore the running of acquisitive prescription as contemplated in section 3(1)(a) read with sub-section (1)(c) was completed on 27 August 2018.

109. A further event occurred prior to the end of the potential period referred to as the extended prescriptive period as per section 3(1)(c), and that is that in 2016, erf 223 in its entirety was inherited by and transferred into the name of Johan Louw. In terms of paragraph 1 of the counter-application, the respondents seek to have become owners by way of acquisitive prescription of the cottage situated on the two erven together with the land whereupon it is situated to the extent of 62 square metres, during 2016. I must point out that prior to the conclusion of the prescriptive period, as

⁸¹ Record, p116

extended in terms of section 3(1)(c), and having regard to the fact that Johan Louw became the new owner in 2016, I thus conclude that the respondents, and/or the first respondent, did not possess the cottage for an uninterrupted period of 30 years.

110. In relation to Alex Louw, I agree with the applicant's counsel that there was no negligence on his part in relation to his estate. He saw to executing a Will in 2009 dealing with erf 223 and in 2016, when the property was registered in the name of Johan Louw, there existed no agreement between the latter and the first respondent with regard to the portion of the cottage on erf 223. As indicated, for all intents and purposes in relation to the new owner (Johan Louw) prescription began to run against him as owner in 2016. In 2023, he sold the property to Mr Takis, and it must be that in relation to Johan Louw, there is most certainly not a 30-year period of prescription which was concluded against him.

111. Furthermore, the period of 30 years in respect of Alex Louw was not concluded in that the prescription against him was suspended two years prior to the conclusion of the prescriptive period⁸². The running of prescription seized when his son Johan became owner in 2016 and then a new claim to acquisitive description arose, which was also not concluded. In light thereof, the respondents and/or first respondent, have/has not proved possession for an uninterrupted period of 30 years. Accordingly, this requirement in section 1 has also not been fulfilled, albeit that in view of my earlier findings regarding possession, the question of the 30-year prescriptive period is moot.

112. It is not necessary for purposes of this judgment to deal with whether the absence of the second respondent from the country constitutes an impediment which results in the completion of prescription being postponed. It has been argued that only when the second respondent returns to South Africa, then the joint claim as an entity can be concluded on the respondents' version of acquisitive prescription. The issue is academic in light of my earlier findings, and I make no definite pronouncement on it⁸³.

⁸² See discussion in earlier paragraphs under the prescription heading

⁸³ See section 13(1) of the Act

Part B of the main application

113. An undertaking is contained in the Thulare J order regarding the marketing and advertising of the cottage, as referred to in Part A, which is not before me. The evidence presented at the hearing was such that in relation to Part B, Mr Taylor would remove his belongings and equipment from erf 223 and had in fact commenced doing so. There is thus no need to go into any great detail regarding Part B of the application. The indication at the outset of the hearing was that the parties were agreed that the outcome of the counter-application would dispose of the issues in Part B of the main application. The entire application was brought as one of urgency and the photographs attached to the application depict boats, planks, rubble, boat trailers and equipment on the property near and behind the cottage, which would be part of erf 223.

114. In response, Mr Taylor denied that the property was stored on erf 223 and bases this view on the understanding that the cottage had become part of erf 222. Furthermore, his version was that the items on or in the cottage have been stored there for more than 40 years and there is no interference with the applicant's contractors. Aside from being informed that Mr Taylor undertook to remove the items, there is no other evidence regarding this issue. Given that I shall dismiss the acquisitive prescription claim, there is no reason why an order in terms of Part B, with a variation, should not be granted. The argument that the cottage became part of erf 222 with use as a single entity was rejected and thus an appropriate order will be granted.

Costs and remaining issues

115. Insofar as costs of Part B is concerned, costs shall follow the result. In respect of paragraph 4 of the Thulare J order related to the costs of Part A, the respondents did not provide an undertaking (as requested) not to sell their property inclusive of the cottage, hence the applicant approached the Court on an urgent basis on 30

November 2023 and was successful in preventing the sale and transfer of the cottage. In the circumstances, the respondents shall be ordered to pay such costs. Costs shall follow the result in respect of the counter-application.

115. The matter was not straightforward and costs of counsel on scale B is thus warranted. Lastly, it is unclear in light of the findings in the counter-application, whether the applicant shall still pursue an action regarding ownership of the cottage, as he refers to in Part A. This aspect was not addressed, and to rather err on the side of caution, I shall postpone any outstanding issue in Part A, *sine die*.

Order

116. In the result the following orders are granted:

- a. The counter – application is dismissed. The respondents are ordered to pay the costs, jointly and severally, the one paying, the other to be absolved (scale B).
- b. Part B of the main application is granted as follows:
 - b1. The first respondent is ordered to remove and/or cause to be removed all his possessions including but not limited to motor vehicles, boats, boat trailers, rubble, planks and equipment (“the movables”) situated and stowed on the applicant’s property at Erf 223, Malgas within 10 (ten) days of the granting of this order.
 - b2. In the event that the first respondent fails to remove or cause to be removed the movables situated and stowed on the applicant’s

property at Erf 223, Malgas within 10 (ten) days of the granting of this order, the applicant is authorized to move the movables onto Erf 222 Malgas, being the respondents' property.

- b3. Following the removal of the movables from the applicant's property, the first respondent is interdicted and restrained from storing and/or placing any of their possessions and/or property onto the applicant's property at Erf 223 Malgas.
- b4. The first respondent is ordered remove his water pump and pipes situated on Erf 223 Malgas, failing which, the applicant is authorized to disconnect and remove the water pump and pipes.
- b 5. The first respondent is restrained and interdicted from interfering with and preventing any person, employee of the applicant, contractor or the like instructed by the applicant from accessing and/or remaining on Erf 223, Malgas.
- b6. The first respondent is restrained and interdicted from preventing the applicant's employees, contractors or the like from carrying out their work/services on Erf 223, Malgas.
- b7. The first respondent is restrained and interdicted from carrying out any work and/or renovations to the portion of the cottage which is situated on erf 223 (45 square metres) and are interdicted from damaging or destroying or causing any harm to that portion of the cottage, pending the outcome of the action to be instituted by the applicant.

causing any harm to that portion of the cottage, pending the outcome of the action to be instituted by the applicant.

- c. The first respondent is ordered to pay the costs of Part B of the main application (scale B).
- d. The respondents are ordered to pay the costs of Part A of the main application, jointly and severally, the one paying, the other to be absolved (scale B).
- e. The remainder of Part A (in the event of any outstanding issues) is postponed *sine die*.


M PANGARKER
JUDGE OF THE HIGH COURT

Appearances:

For Applicant: **Adv M Karolia**

Instructed by: **ZI Attorneys**
Fourways
Johannesburg
Per: Z Ismail

For First to Third Respondents:

Adv J Potgieter

Instructed by:

de Vries de Wet & Kroukam Inc.

Worcester

Per: B de Wet

No appearances for Fourth Respondent