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

JUDGMENT

~~Reportable~~ / Not reportable
Case No: 16888/2024

Before the Hon. Madam Justice Slingers
Hearing: **5 June 2025**
Judgment Delivered: **30 June 2025**

In the matter between:

HENDRIK XAVIER BADENHORST N.O	First Applicant
TAMARA NICOLA GLICK N.O	Second Applicant
ALAN BRYER N.O	Third Applicant
CEDRIC KEITH GLICK N.O	Fourth Applicant
NADINE GLICK N.O	Fifth Applicant

DENISE HEATHER BRYER N.O Sixth Applicant

(in their capacities as trustees for the time being of the Tamric Trust T360/92)

and

ADOWA INFRASTRUCTURE MANAGERS [RF] (PTY) LTD First Respondent

(Registration Number: 2014/124119/07)

GOVERNMENT EMPLOYEES PENSION FUND Second Respondent

REGISTRAR OF DEEDS Third Respondent

CITY OF CAPE TOWN Fourth Respondent

This judgment is handed down electronically by circulation to the parties' legal representatives' email addresses. The date of hand-down is deemed to be 30 June 2025.

JUDGMENT

SLINGERS J

Introduction

[1] In this application the applicants seek an order declaring the Tamric Trust **('the Trust')**[1] to be the owner, by acquisitive prescription, of a portion of land measuring 20m². This portion of land is situated between the cadastral boundary of Erven 1[...]2 and 1[...], Woodstock, Cape Town, to the north of

[1] The Trust is an inter-vivos trust which duly registered in terms of the provisions of the Trust Property Control Act, Act 57 of 1988 with the Master of the Western Cape High Court with number T360/92.

the southern boundary wall as it existed until March 2024 **('the boundary wall').**

[2] The application is brought by the applicants in their capacity as trustees of the Trust and is supported by a founding affidavit deposed to by Cedric Keith Glick **('Glick')**, the fourth applicant.

[3] The application was also supported by an affidavit deposed to by Henry Rosenbaum **('Rosenbaum')**, an adult businessman and an affidavit of Judi Hayes **('Hayes'),** an attorney and conveyancer.

[4] Hayes has been actively involved in this matter on behalf of the Trust and has done extensive research and investigations in the Deeds Office records regarding the properties involved in this application.

[5] The applicants sought no substantial relief against the third and fourth respondents, who did not participate in these proceedings. Only the first respondent filed a notice to oppose and actively opposed the application.

[6] The application is brought in terms of section 1 of the Prescription Act, Act 68 of 1969 read with section 33 of the Deeds Registries Act, Act 47 of 1937.

[7] Section 1 of the Prescription Act 68 provides that:

'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.'

[8] Therefore, to succeed with its claim the applicants must establish that it (or its predecessors in title):

(i) possessed the disputed portion of property;

(ii) for an uninterrupted period of thirty years;

(iii) as if it was the owner thereof;

(iv) freely and openly and as adverse users.

Background

[9] The Trust became the owner of 1[…] R[...] Road, Woodstock, Cape Town situated on Erf 1[...]2 measuring 7954m² **('the property')** on 31 March 1995 pursuant to a written sale agreement concluded between itself and Goodbert Properties (Pty) Ltd **('Goodbert')**. Glick represented the Trust during the conclusion of this sale agreement.

[10] Prior to the Trust's acquisition of the property and during Goodbert's ownership thereof, a company known as Graphco Processing (Pty) Ltd **('Graphco')** concluded a lease agreement with Goodbert in June 1970 in terms whereof Graphco would conduct business from the property. At this time Rosenbaum was the sole shareholder with a controlling interest in Graphco of which he was the sole shareholder and director and person in charge of the business.

[11] In 1995 when the Trust acquired ownership of the property, Graphco concluded a lease agreement with it and continued to conduct business from the property until March 2000. Thus, Graphco has been conducting business from the property from 1970 to 2000.

[12] When Graphco first occupied the property, the boundary wall was already built and remained in place until Graphco vacated the property. Rosenbaum had the boundary wall in his direct view almost daily.

[13] Rosenbaum states further that he is not involved in the business of the Trust or its predecessors.

[14] Adjacent to the south of the property is Erf 1[...] which is registered jointly in the names of the first and second respondents **('the respondents')** who became the owners thereof on 17 March 2022.

[15] When the Trust purchased the property it was separated from Erf 1[...] by the boundary wall which runs in an east- west direction on the southern boundary thereof. This boundary wall remained in the same position until its demolition on 8 March 2024.

[16] Previously the property and Erf 1[...] consisted of a single plot of land. Over the years this single plot was subdivided into smaller erven. The Trust submitted that the boundary wall was likely constructed by or at the behest of Goodbert at a time when it owned the entire property, including Erf 1[...].

[17] From the outset of its ownership of the property the disputed portion of land was on the Trust's side of the boundary wall and was practically dealt with as if it was part of the Trust's property even though it was registered in the name of the first respondent.

[18] During late September 2023 the respondents caused excavation work to be undertaken. This resulted in the collapse of the majority of the southern boundary wall with the remainder of the wall being demolished in March 2024 by the respondents.

[19] The parties discovered that the cadastral boundary between the Trust's property and the respondents' property, being Erf 1[...] was in fact located between 2.32 and 1.75 m to the south of the southern boundary wall after the excavation work was undertaken. The disputed portion of land was found to be part of the respondents' property.

[20] The applicants aver that the true owners of the disputed portion of land have never laid claim thereto until 2023 when the respondents discovered that it formed part of its Erf. In response, the respondents denied that the applicants

have any personal knowledge on which they could make this averment. This was the extent and nature of the respondents' challenge to this assertion.

Merits

[21] The respondents' challenge to the application centres around the requirement that the Trust (and its predecessors in title) failed to show possession of the disputed portion of the land '<u>as the owner'</u> and with the requisite *animus domini* inherent in this requirement.

[22] The respondents state that:

'His observations of the encroaching wall's existence do not and cannot demonstrate that Goodbert possessed the disputed area openly as if it was the owner thereof.'[2]

and

'Crucially, Rosenbaum (and the Trust) fail to address the mental component of possession required to establish acquisitive prescription. Possession for the purpose of acquiring ownership by prescription entails control with the intention of an owner. *Rosenbaum, as a tenant to Goodbert who only observed the encroaching wall, cannot speak to (and does not speak to) the mental requirement of acquisitive prescription. So, Rosenbaum's evidence does not demonstrate that Goodbert possessed, in the legal sense, the disputed area.'*[3]

[23] The respondents did not challenge nor dispute that the Trust (and Goodbert as its' predecessor in title) was in physical possession of the disputed portion of the property for an uninterrupted period of thirty years being from at least 1970 until 2024, and that this possession was exercised freely and openly.

[24] The possession referenced in section 1 of the Prescription Act, Act 68 of 1969 has been said to constitute civil possession containing both an objective and a

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[2] Paragraph 19 of the answering affidavit, page 163
[3] Paragraph 20 of the answering affidavit, page 163

subjective element consisting of physical possession coupled with *animus domini*.[4]

[25] It is not known exactly when the boundary wall was erected nor is it known whether it was intentionally erected to serve as a boundary between the property and Erf 1[...].

[26] It is known that the boundary wall remained in the same position from at least 1970 to March 2024 when it was demolished. It is further known that the disputed portion of land was part of a parking lot used exclusively by the Trust since its acquisition of the property in 1995 and by its predecessor in title before then.

[27] Furthermore, it is known that the owners of the property (the Trust's predecessor/s in title) limited and controlled access to the disputed portion of the property which was fenced off.

[28] In respect of possessing the property as it if were the owner, Glick states the following:

> *'72. The possession by the Trust and its predecessors over the disputed portion was exercised openly and freely. No agreement ever existed between the registered owners and the Trust. To the best of my knowledge, such an agreement also did not exist between the registered owners and the Trust's predecessors.'*

[29] The first respondent challenges these averments on the basis that Glick had no personal knowledge and presented no direct evidence that:

> *'50.1 Godbert recognised the registered ownership rights over the disputed area;*
>
> *50.2 Godbert possessed the disputed area with* animus domini;

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[4] *Morgenster 1711 (Pty) Ltd v De Kock NO and Others* 2012 (3) SA 59 (WCC)

50.3 Adowa's predecessors in title "challenged" Goodbert's possession;

50.4 Goodbert possessed the disputed area openly and freely;

50.5 Goodbert and Adowa's predecessors in title neve agreed to allow Goodbert to encroach on (what is today) Adowa's property; and

50.6 all owners "simply accepted the encroaching wall as the boundary wall."'

[30] The applicants submitted that when the Trust purchased the property, it possessed and exercised the right as the owner thereof over the full extent of the area withing the boundary walls, including the disputed portion of land for an uninterrupted period of more than 30 years. In responding to this allegation the first respondent states that it cannot comment on how the Trust used the disputed area prior to the respondents' purchase of Erf 1[...]. Nevertheless, the first respondent denies that the Trust has proven that it or Goodbert possessed the disputed portion of property with the requisite *animus domini* for a period of 30 years.

[31] *Animus domini* consists of both a subjective and an objective element. In respect of the subjective element, the respondents argue that there is no direct evidence hereof. Consequently, the applicants failed to show that Goodbert, as the Trust's predecessor, possessed the disputed portion of land as the owner thereof, notwithstanding its undisputed physical possession because it was not shown that Goodbert had the prerequisite subjective intention of an owner.

[32] The respondents are correct that no direct evidence was presented in respect of the subjective element of *animus domini* in respect of Goodbert. However, uncontested evidence has been presented that, since at least 1970, the Trust's predecessor in title exercised exclusive control and possession of the disputed portion of the land, that access thereto was limited and controlled by the Trust's predecessor in title and the use thereof was for the benefit of the Trust's predecessor in title.

[33] It is uncontested that the Trust purchased the property from Goodbert at a time when the boundary wall was still erected. It is uncontested that the boundary wall was in the same position it had been since at least 1970. It is uncontested that the disputed portion of land was on Goodbert's side of the boundary wall. It is uncontested that Goodbert's property, which included the disputed portion of land, was sold to the Trust.

[34] It may be inferred from these uncontested facts that the disputed portion of land was dealt with and regarded as part of Goodbert's property allowing it to to deal with as it wished, including selling it to the Trust. The sale of an asset is distinctively an inherent right which resides primarily with the owner who is ordinarily the only entity who has the right to sell and/or dispose of it. It could be inferred that Goodbert considered the disputed portion of land as part of its property with which it could deal with as it wished. Although this is not the only inference which could be drawn from the uncontested facts, it is the more probable inference.[5] Thus, Goodbert used the disputed portion of land as if it was the owner thereof. This possession would fulfil the requirements of *possession civilis.*[6]

[35] The respondents deny that this is the only inference which can be drawn but do not deny that it is a reasonable inference. The applicants need not show that it is the only inference which can be drawn but simply that it is the more plausible inference which could be drawn. This follows from the fact that the applicants need not discharge their onus beyond reasonable doubt but simply on a balance of probabilities.

[36] On the uncontested facts it may be accepted that Goodbert was openly and peaceably performing positive acts on the disputed portion of property and that it was using it adverse to the true owner.[7] Goodbert not only incorporated the disputed portion of land into a parking lot which was fenced off from the respondents but he also sold the property which included the disputed portion

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[5] *Grancy Property Ltd and Another v Gihwala and Others* 2025 (2) SA 76 (SCA)
[6] *Campbell v Pietermaritzburg City Council* 1966 (2) 674 SA (N)
[7] *Bisschop v Stafford* 1974 (3) SA 1 (A)

of property to the Trust. These acts constituted visible acts of appropriation so patent that the owner, with reasonable care could have observed it. Thus, Goodbert and thereafter the Trust possessed the disputed portion of the land openly.[8]

[37] In the circumstances, I am satisfied that the Trust (or its predecessors in title) physically possessed the disputed portion of property for an uninterrupted period of thirty years as if it was the owner thereof in a manner which was free and open as adverse users to the registered owner thereof.

[38] Therefore, I am satisfied that the applicants have made out a case for the relief it seeks as the Trust's together with its predecessor in title fulfilled the requirements of section 1 of the Prescription Act 68 of 1969.

Supplementary affidavits

[39] After filing its replying affidavit, the applicant brought an application in terms of Rule 6(5)(e) for leave to file a supplementary affidavit. This application was not opposed.

[40] In the supplementary supporting affidavit filed, the applicants argued that it matters not whether the Trust's predecessor fulfilled the requirements for acquisitive prescription as it itself had been in possession of the disputed portion of property from 31 March 1995 and had itself been in possession thereof for thirty years. In the supplementary answering affidavit, the respondent avers that the Trust lost possession of the disputed area on 26 June 2024 on which date the respondent constructed a fence excluding the Trust from possession of the disputed area.

[41] Therefore, it had not been in possession of the disputed portion of land for the prescribed period of time.

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[8] *Morgenster 1711 (Pty) Ltd v De Kock NO and Others* 2012 (3) SA 59 (WCC)

[42] Furthermore, the Trust knowingly informed the court that it had regained possession in circumstances where it knew it had not.

[43] In light of the findings made in paragraphs 37 and 38 above, it need not be determined whether the Trust lost possession of the property on 26 June 2024 and whether it itself was in possession of the disputed portion of land for an uninterrupted period of 30 years.

[44] In the circumstances, I make the following order:

(i) the Tamric Trust (T360/92) is declared the owner, by acquisitive prescription, of the portion of land depicted in the land surveyor certificate as the “encroachment area’ annexed to the founding affidavit of Cedric Keith Glick as CKG3’ which is situated between the cadastral boundary of erven 1[...]2 and 1[...], Woodstock, Cape Town, to the north of the southern boundary wall as it existed until March 2024.

(ii) The costs of the application shall be borne by the first respondent and shall be on scale B.

HM SLINGERS

JUDGE OF THE HIGH COURT

Appearances

For the applicant: FA Ferreira

Instructed by: Hayes Attorneys

For respondent: P Farlam SC and E Cohen

Instructed by: ENS Inc.