IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 10791/22

REPORTABLE: YES / NO

OF INTEREST TO OTHER JUDGES: YES / NO

REVISED

28/02/2023

In the matter between:-

THE DOMINICAN CONGREGATION OF ST CATHERINE OF SIENA OF NEWCASTLE Applicant

VS

THE MINISTER OF PUBLIC WORKS First Respondent

THE EKURHULENI METROPOLITAN MUNICIPALITY Second Respondent

Coram: Kooverjie J

Heard on: 1 February 2023

Delivered: _____ 2023 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to

the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be __H__ on _____ 2023.

SUMMARY: Applicant has proven that the property was acquired by acquisitive prescription in terms of Section 2 of the Prescription Act 18 of 1943. The State Land Disposal Act does not find application.

ORDER

It is ordered:-

1. The applicant is declared to have become owner of the immovable property known as Portion of the Remainder of the Farm V [....] No [....] I.R. measuring 11.0037 ha in extent, as depicted in Annexure 'ST2'.
2. The first respondent is ordered to sign all documents necessary to effect subdivision of the property from the Remainder of the Farm V [....] No. [....]-I.R.; to effect transfer thereof to the applicant, alternatively to notarially tie the claimed property to Erf [....], and to obtain the necessary consents that may be necessary to give effect to this order.
3. In the event the first respondent does not comply with prayer 2, the applicant may approach this court once again for the appropriate relief.
4. The first respondent is liable for the costs of this application as well as the wasted costs incurred at the previous hearing on a party and party basis.

JUDGMENT

KOOVERJIE J

[1] The applicant claims ownership of a portion of a property, titled as *"a portion of the remainder of the farm V [....] nr [....]IR"* (V [....] property) by way of acquisitive

prescription. The first respondent has opposed this application. The first respondent further raised two legal points which is dealt with below.

BACKGROUND

[2] It is firstly necessary to sketch out the background in order to understand the basis and extent to which the applicant claims possession of the " V [....] property". The applicant is a Catholic religious order with its head office in Newcastle, South Africa. It was established in Newcastle in 1896 by six nuns. The applicant's first prioress was one Mother Rose Niland. The purpose of the applicant at the time was and presently is to serve the community, in particular offering education. Over the years it had acquired a number of other properties in its name and from which it operates private schools.[1]

[3] The applicant established the Dominican Catholic School for Girls in 1923. Its first buildings were erected on erf [....], Boksburg Township. The applicant was at the same time utilizing the " V [....] property" for various purposes including sporting facilities and parking areas. The applicant alleged that it has been in undisturbed possession of the property since 1923. By fencing the property, it incorporated the " V [....] property" into the applicant's property. The " V [....] property" had since been used by the applicant together with erf [....]. The applicant is the owner of the property known as "erf [....]". [2]

[4] It was also alleged that before 1960 the applicant had erected a sporting centre on the claimed land known as "Jubilee Centre". The building was erected with the written consent of the second respondent, namely the Ekurhuleni Metropolitan Municipality ("the municipality")[3]. More recently the headmaster, Mr Loring, under the impression that the applicant was also the owner of the " V [....] property", decided to

[1] Annexure ST13 of the founding affidavit
[2] Para 18 of the founding affidavit
[3] Annexures ST7-ST8

conduct a deeds search on the property in order to ensure that this in fact was the case. It was only then that the applicant learnt that it was not the registered owner of V [....].[4]

[5] The applicant submitted that it had expended millions of rands in effecting improvements to the claimed property and had continuously maintained the property for at least 99 years. The property is used daily by staff, learners and parents of learners of the school. Prior to instituting this application, the applicant advised the first respondent that it should consent to having the property transferred in the applicant's name.

POINTS *IN LIMINE*

(a) Authority to institute the action

[6] It is necessary to firstly dispose of the points *in limine* raised by the first respondent. The first respondent challenged the deponent, Sister Stephany Thiel's authority to institute this application. The contention was based on the fact that a resolution authorizing her to do so, was not attached to the founding papers.

[7] Subsequently, upon this point being raised, in its replying affidavit, a resolution authorizing Sister Thiel to institute these proceedings was attached. The first respondent particularly took issue with the resolution being filed at the replying stage, contending that the resolution should have been filed in the founding papers.[5]

[8] The applicant argued that the first respondent's understanding that there should have been a resolution by the board of directors is misplaced. It was explained that the applicant is an association of sisters of the Dominican Congregation of St Catherine of Siene of Newcastle (Catholic order of sisters). The applicant pointed out that Sister Stephany Thiel, as the regional prioress, had the authority to institute these proceedings.

[4] Para 29 of the founding affidavit
[5] Para 7-11 of the answering affidavit

[9] In fact the Sister Thiel confirmed that she controls the immovable properties on behalf of the applicant and liases with the Board of Governors and Heads of School in respect of the use of the properties for educational purposes.[6] In her founding papers she also confirmed that she was authorised to act on behalf of the applicant and to institute this application.[7]

[10] If one has regard to the circumstances of this matter, this is not an instance where new matter was set out in the replying affidavit. Sister Thiel, had in fact fully set out the basis upon which she was authorized to institute this application in her founding papers. When her authority was questioned, in the answering papers, the applicant undertook to then submit a written resolution confirming her authority, which, in my view, was not necessary.

[11] I am of the view that based on the allegations in the founding affidavit, the deponent is properly authorized to depose to the affidavit.

(b) <u>Legal status of the applicant</u>

[12] The second point raised was that the applicant is not a legal entity as defined in South African law. It was pointed out that this issue was only raised in argument and not on the papers. It must be pointed out that these facts were not denied in the papers but merely noted by the first respondent in their answering papers. I will, however, deal with this issue for the sake of clarifying the status of the application.

[13] The applicant explained that the “order of sisters” is a voluntary association of persons, and defined as a “universitas”. Such entity is a legal *persona*. The applicant identifies itself as an order of sisters with perpetual existence established as a religious congregation of the Order of Dominicans in 1896.

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[6] Para 7 of the founding affidavit
[7] Para 9 of the founding affidavit

[14] The term "*universitas personarum*" is derived from Roman Dutch law and its characteristics are the following namely that:

> (i) it constitutes an aggregation of individuals which form an entity;
> (ii) it has the capacity of acquiring rights and incurring obligations;
> (iii) it is distinguished from a mere association of individuals by the fact that it is an entity distinct from individuals forming it, its capacity to acquire rights or incur obligations is distinct from its members;
> (iv) it exists as an entity with rights and duties separate from the rights and duties of its individual members and it has perpetual succession;
> (v) the property of a universitas vests in the universitas as a legal person;
> (vi) as it has its origin in Roman Dutch law, it is not necessary for it to be brought into existence by way of a statute or to be registered in terms of a statute to possess the attributes of a legal person.[8]

On the facts before me, the applicant is indisputably a legal person which is entitled to own immovable property.

ANALYSIS

Prescription Act

[15] The applicant's core argument is that it had acquired ownership of the property by way of acquisitive prescription. It alleged that it took occupation of the V [....] property since 1923 and by 1953 it had already been in possession thereof for a period of 30 years. The Prescription Act makes provision for ownership of property, movable or

[8] Joubert: 'The Law of South Africa', 2nd edition, volume 1, page 464, para 618
Webb and Co Ltd v Northern Rifles, Hobson and Sons v Northern Rifles 1908 TS 462 464-465
Dutch Reformed Church, Van Wijks Vlei v Registrar of Deeds 1918 CPD 375
Morrison v Standard Building Society 1932 AD 229 at 238
Exparte Johannesburg Congregation of the Apostolic Church 1968 (3) SA 377

immovable by way of acquisitive prescription. The South African prescription law was formalized for the first time by the 1943 Prescription Act.

[16] The applicant initially relied on the Prescription Act 68 of 1969 which came into effect from 1 December 1970. However, during argument it was submitted that the Prescription Act 18 of 1943 ("the 1943 Act") finds application.

[17] The 1943 Prescription Act came into operation from 19 April 1943. Sections 1 and 2 of the said Act stipulated:

> *"(1) Acquisitive prescription is the acquisition of ownership by possession of another's movable or immovable property or the use of a servitude in respect of immovable property, continuously o rthirty years nec vi, nec clam, nec precario.*
> *(2) As soon as the period of thirty years has lapsed such possessor or user shall ipso jure become the owner of the property or servitude as the case may be."*

[18] Section 1 of the 1969 Prescription Act stipulates:

> *"(1) ACQUISITION OF OWNERSHIP BY PRESCRIPTION*
>
> *Subject to the provisions of chapter 6 a person shall by prescription become the owner of a thing which he has possessed openly and as if he was the owner thereof for an uninterrupted period of 30 years or for a period which, together with any periods for which such thing was so possessed by its predecessors in title, constitutes an uninterrupted period of 30 years."* (my emphasis)

[19] Section 2 of the 1943 Act has the same effect as Section 1 of the 1969 Act. The only difference is that the *nec vi nec clam nec precario* requirement has been replaced with the formulation "openly and as if he was the owner" in the 1969 Act.

[20] Although the 1969 Act repealed the 1943 Act, it did not do so with retrospective effect.[9] This meant that all prescription periods running up until 1 December 1970, that is when the new 1969 Act came into operation, would have to comply with the requirements of the old 1943 Act. The remainder of the prescriptive period would then have to comply with the 1969 Act.

[21] Both the 1943 and 1969 Acts made provision for acquisitive prescription and the requirements are the same. In ***Minnaar v Rautenbach 1999 (1) All SA 571 (NC)*** the court acknowledged that the 1943 Act did not change the common law requirements for acquisitive prescription.

[22] Ultimately the onus is on the applicant to prove that its possession complied with the various statutory requirements as set out in the Prescription Act.

[23] The first respondent's contention that the Prescription Act is not applicable to the State is further incorrect.[10] It is accepted prescription does not only run against natural persons, but against public corporations, municipal councils and the State.[11]

[24] The 1943 Act, more specifically Section 13(3), binds the State and stipulates that prescription shall not run against the State unless the property in question is capable of being alienated by the State and of being owned by a private person.

[25] No evidence was placed before me that at the time when the applicant took possession of the property that there was a limitation as envisaged in the said provision. Section 18 and 19 of the 1969 Act have the same effect. It explicitly states that the State is bound and that its provisions shall not affect the provision of any law that prohibits the acquisition of land or any right in land by prescription.

[26] Section 18 stipulates:

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[9] Section 5 of the 1969 Prescription Act
[10] Para 48 of the answering affidavit
[11] Hall CG Maasdorps Institutes of South African Law Volume II – The Law of Property (10ed 1976 80)

"The provisions of this Act shall not affect the provisions of any law prohibiting the acquisition of land or any right in land by prescription."

Section 19 stipulates:

"This Act shall bind the State."

State Land Disposal Act

[27] The first respondent premised its case wholly on the State Land Disposal Act 48 of 1961 (SLDA) and argued that the acquisition of state land through prescription- is prohibited.[12] However, it must be emphasized that the relevant provision, Section 3 only came into operation in 1971 and, in my view, is not applicable.

[28] Section 3 of the SLDA stipulates:

"3. State land not subject to acquisitive prescription – notwithstanding any rule of law to the contrary State Land shall after the expiration of a period of 10 years from the date of commencement of this Act not be capable of being acquired by any person by prescription." (my emphasis)

[29] The first respondent further argued that Section 9 of the SLDA repealed the Prescription Act. Section 9 stipulates:

"9 (1) Subject to the provisions of subsection (2) the law specified in the schedule is hereby repealed to the extent shown in the third column thereof;

(2) Any provision of the law repealed by subsection (1) which immediately prior to the commencement of this Act applies in respect of any prior disposal of

[12] paragraph 14 of the answering affidavit

State land or in respect of any matter arising out of any such disposal shall continue so as to apply as if such law had not been repealed;

(3) Any disposal of State land at the public instance prior to the commencement of this Act which was not effected under or by virtue of any rule of law, shall be deemed to have been lawfully effected."

[30] The "Schedule" referred to Section 9(1) noted the specific legislation repealed. For instance, counsel for the first respondent illustrated that even the Settlers Ordinance Act 45 of 1902 was repealed by the SLDA. Consequently, this applied to the Prescription Acts as well.

[31] It was also argued that Ms de Souza's evidence, where she confirmed that the applicant was in possession of the V [....] property prior to 1962, constituted insufficient evidence.

[32] The first respondent's core argument was that in terms of of Section 3 read with Section 9, any legislation that allowed ownership by way of acquisitive prescription has been repealed and therefore the applicant could not rely on acquisitive prescription in terms of the Prescription Act. This argument has no merit. The SLDA is not applicable in this matter.

[33] Firstly, the Schedule did not repeal the two Prescription Acts. Secondly, the SLDA only commenced on 2 June 1961 with Section 3 coming into effect from only 2 June 1971 (due to the grace period of 10 years expressed in that provision). Hence, by the time the SLDA came into operation, the applicant had been in possession of the V [....] property for at least 38 years.

Interruption of prescription

[34] A further contention raised was that even if the Prescription Act has relevance, prescription was interrupted by the fact that the State had become owner of the property

in 1943. This would entail that by 1943 the applicant was in possession of the property for only 20 years. Hence the applicant involuntarily disposed of the property. Once again, this contention is unsustainable.

[35] The 1943 Act did not specifically regulate interruption of prescription. At the time one had to rely on the common law. By virtue of common law, prescription is interrupted when a specific event occurs that terminates the running of prescription.

[36] There are generally two types in which one's possession of property can be interrupted: the first, natural interruption, that is when the possessor loses possession of the property either by giving up voluntarily or by having it taken from him forcibly, namely by the owner, another person or *vis major*. Our authorities have ruled that mere protest by the owner is not enough, the possessor's possession must be terminated.[13]

[37] The second, civil interruption occurs by the serving of a process (warrant, notice of motion, or interdict) in which the owner's claim to ownership is clearly stated to the possessor. Thus a mere claim for rent or compensation because of unlawful occupation is not sufficient.[14] In this instance there was no act on the part of the State to interrupt prescription. The fact that the property was registered in the name of the State is not sufficient.

[38] In ***De Beer***, the court set out the requirements that must be proved for acquisitive prescription,[15] namely:

> 38.1 that there must be civil possession, that is possession with the intention to possess and control the property;
>
> 38.2 there must also be an intention of acquiring ownership and there must have been physical control of the property;

[13] Willes Principles of South African Law 9th Edition 405-665, 515
[14] Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another 1972 (2) SA 464 (W) (Morkels Transport matter)
[15] De Beer v Van der Merwe 1923 AD 378

38.3 there must be possession of an uninterrupted period of 30 years which together with any period for which the thing was possessed by any predecessor in title constituted an uninterrupted period of 30 years;

38.4 the possession must have been *nec vi*, meaning without force, and *nec clam*, openly for an uninterrupted period of 30 years, and

38.5 the possession must be non-precarious.

[39] The *animo domini* element must be present, meaning that the right must have been exercised adversely and as of right.[16] The intention of the possessor is paramount. The possessor must be in possession with the intention of being owner (*animus domini*) or must be an agent or a person with the *animus domini* in order for ownership to be acquired through prescription.

[40] The contrary position would be an instance where the possessor believes that he is under sufferance (even if he is mistaken) or if he recognizes that he is not and will not be the owner for example by possessing in terms of usufruct then he would not have the necessary *animus* to acquire ownership through prescription.

[41] In this matter there has not been much contestation around the fact that the applicant occupied the property *nec vi* (feasibly), *nec clam* (openly). The point in dispute centered on the *nec precario* requirement.

[42] In ***Malan***[17] the Appellate Division clarified the *nec* precario requirement at page 574 it remarked:

> *"In order to avoid misunderstandings, it should be pointed that the occupation of property "nec vi nec clam nec precario" for the period of 30 years does not necessarily vest in the occupier a prescriptive title to the ownership of that property. In order to create a prescriptive title such occupation must be user*

[16] Neves & Another v Arangies & Another (I 3785/2012) [2017] NAHCMD 57 (03 March 2017)
[17] Malan v Nabygelegen Estates 1946 AD 562

adverse to the true owner and not occupation by virtue of some contract or legal relationship such as a lease or usufruct which recognises the ownership of the other."

[43] The essence of "adverse user" is that the possessor must use or possess the property without recognizing the rights of the owner.

[44] In ***Phezulu Private Estate v Metelerkamp 2014 (5) SA 37 AD*** at paragraph 10 the court defined what *precario/precarium* entails:

"Put differently, a precarium is a legal relationship which exists between parties where one party has the use of the property belonging to the other on sufferance, by leave and licence of the other. Precarium has its origin in the fact of the permission usually being obtained by a party."

[45] The issue for determination is whether the *non precarium* element was present in this matter. If there was some consent by the owner or acknowledgement by the applicant that the State is the owner then the *non precarium* element would not have been met.

[46] The first respondent argued that the applicant was well aware that the State had acquired the property in 1943. They had occupied the property knowing well that the State was the owner hence the *nec precario* requirement had not been met. In such an instance then a party would not succeed in acquiring ownership of the property.

[47] I do not agree with this contention. On the evidence before me, there is nothing to suggest that the applicant was aware that the State was the true owner of the property in 1943 or shortly thereafter.

[48] The only evidence at my disposal appeared in the founding papers, where the applicant alleged at paragraph [29]:

> *"In summary the applicant has been in undisturbed possession of the claimed property since 1923 and has used it explicitly for that period of time. The current headmaster, Mr Roger Loring was appointed in 2002. He was responsible for a number of the improvements erected on the claimed property. In order to ensure proper corporate governance Mr Loring requested a deed search to be conducted in order to ensure that the applicant was in possession of all of the appropriate documents relating to its ownership of the property. It was at that stage that it became apprarent that the applicant was not the registered owner of V [....]. …"*

[49] I find it further apt to emphasize that possession of the property further does not have to be in good faith. In ***Morkels Transport***[18] the court found that it is not necessary that the possessor claiming to have acquired ownership by prescription to have been *bona fide* either in assuming or retaining possession. The court therein discussed that the element of *bona fide* was a requirement in Roman law and not in the Roman Dutch system which placed reliance on formalism and not equity.

[50] At paragraph 474E it was stated that:

> *"However, as I have already stated, our law does not require that the possession be bona fide; but that the animus domini co-exist with mala fide possession. The person who holds animus domini need not think he is the owner; it is sufficient if he intends to keep the land or other res as if he was the owner or (as put in 44.3.9 "Gains Trans. Vol. 6 at page 579") "with the intention of keeping it for himself".*

The court at 475 remarked:

[18] Morkels Transport matter

> *"When is it land that is occupied by someone other than the owner and without right or colour of right, there are similarly various states of mind which an occupier may have. He may intend to give up occupation when he no longer needs the land, or sooner, if asked by the owner to do so. He may hope and believe that his occupation will never be defected or disturbed, or that he will have occupied a prescriptive title before that happens. Or he may intend, if necessary falsely, to put forward a claim that he owns the land, hoping on some basis to succeed therein."*

At 476F the court concluded:

> *"The state of mind was not, in my view, animus domini. It was not consistent with the intention on the part of Morkels to keep the disputed ground for themselves, or to hold it (as of right as some authorities put it). In my judgment it was rather the state of mind of a precarious holder or a trespasser who knew that his occupation could be terminated at any time and who intended to give up occupation if called upon to do so."*

[51] On the facts before me, I conclude that the applicant has satisfied all the requirements for acquisitive prescription. It possessed the property "openly and as it were the owner" and did so uninterrupted for a period of 30 years.

[52] There is no adverse evidence placed before me that contests the fact that the applicant had possessed the property as if it was the owner since 1923.

[53] The applicant had invested extensively in constructing and in effecting improvements on the V [....] property. The property has been and still is used daily by the staff, learners and parents of learners of the school.

FUTURE GOVERNMENT DEVELOPMENT

[54] In the answering papers the respondents briefly argued that the V [....] property was earmarked for future government development. This resulted in the applicant occupying the said property illegally. It cannot be gainsaid that both Prescription Acts were applicable to the State. It was only with advent of the SLDA that a limitation on the acquisition of State land was put in place.

[55] Furthermore, I find it necessary to reiterate that the applicant only possessed a portion of the V [....] property, namely 11.0037 hectares from the total of 20.7300 hectares. This fact was not distinguished by the first respondent.

COSTS

[56] In my view, the applicant, as the successful party, is entitled to the costs of this application. Counsel for the applicant further requested that it should also be entitled to the costs in respect of the previous set down of the matter as well. The matter was postponed and at the time costs were reserved. It was pointed out that the matter could not proceed due to the respondent's unpreparedness. These costs were not disputed by the first respondent. The applicant is thus entitled to both the costs of this application as well as the reserved costs.

H KOOVERJIE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

Counsel for the Appellant: Adv L Hollander

Instructed by: Alice Swanepoel Attorneys

c/o P A Rademan Attorneys

Counsel for the Respondents: Adv M Davids

Instructed by: State Attorney

Date heard: 1 February 2023

Date of Judgment: 28 February 2023